July 2023
Tribunal Procedure Committee

Consultation on possible changes to the First-tier Tribunal (Immigration and Asylum Chamber) Rules and the Upper Tribunal Rules

Introduction

1. The Tribunal Procedure Committee (the "TPC") is the body that makes Rules that govern practice and procedure in the First-tier Tribunal and in the Upper Tribunal. Both are independent tribunals. The First-tier Tribunal is the first instance tribunal for most jurisdictions, while the Upper Tribunal is primarily responsible for appeals. Further information on Tribunals can be found on the HMCTS website at: https://www.gov.uk/government/organisations/hm-courts-and-tribunals- service/about#our-tribunals

2. The TPC is established under section 22 of, and Schedule 5 to, the Tribunals, Courts and Enforcement Act 2007 ("the TCEA"), with the function of making Tribunal Procedure Rules for the First-tier Tribunal and the Upper Tribunal.

3. Under section 22(4) of the TCEA, power to make Tribunal Procedure Rules is to be exercised with a view to securing that:
   a) in proceedings before the First–tier Tribunal and Upper Tribunal, justice is done;
   b) the tribunal system is accessible and fair;
   c) proceedings before the First–tier Tribunal or Upper Tribunal are handled quickly and efficiently;
   d) the rules are both simple and simply expressed; and
   e) the rules where appropriate confer on members of the First–tier Tribunal, or Upper Tribunal, responsibility for ensuring that proceedings before the tribunal are handled quickly and efficiently.

4. In pursuing these aims the TPC seeks, among other things, to:
   a) make the rules as simple and streamlined as possible;
   b) avoid unnecessarily technical language;
   c) enable tribunals to continue to operate tried and tested procedures which have been shown to work well; and
   d) adopt common rules across tribunals wherever possible.

5. The TPC also has due regard to the public sector equality duty contained in section 149 of the Equality Act 2010 when making rules.

6. Further information on the TPC can be found at our website: https://www.gov.uk/government/organisations/tribunal-procedure-committee

The First-tier Tribunal and the Upper Tribunal

7. The First-tier Tribunal ("F-t Tribunal") is divided into chambers which group together jurisdictions dealing with like subjects or requiring similar skills.

8. The First-tier Tribunal (Immigration and Asylum Chamber) (the "F-t Tribunal IAC") is responsible for deciding appeals against some decisions made by the Home Office relating to permission to stay in the UK, deportation from the UK and entry clearance to the UK. It also deals with applications for immigration bail from people being held by the Home Office on immigration matters. Further information on the F-t Tribunal IAC can be found at: https://www.gov.uk/courts-tribunals/first-tier-tribunal-immigration-and-asylum

9. Likewise, the Upper Tribunal is divided into separate Chambers. The UT mainly, but not exclusively, decides appeals from the F-t Tribunal.

10. The Upper Tribunal (Immigration and Asylum Chamber) (the "Upper Tribunal (IAC)") deals with appeals against decisions made by the F-t Tribunal IAC and with judicial reviews of certain decisions made by the Home Office relating to immigration, asylum and human rights claims. Further information on the Upper Tribunal (IAC) can be found at: https://www.gov.uk/courts-tribunals/upper-tribunal-immigration-and-asylum-chamber

Immigration Tribunal Rules

11. The procedural Rules that apply in the F-t Tribunal IAC are the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 ("the First-tier Tribunal IAC Rules"); those which apply in the Upper Tribunal (IAC) are the Tribunal Procedure (Upper Tribunal) Rules 2008 (the "Upper Tribunal Rules").

12. The current F-t Tribunal IAC Rules and Upper Tribunal Rules can be found at:

    https://www.gov.uk/government/publications/immigration-and-asylum-chamber-tribunal-procedure-rules

    https://www.gov.uk/government/publications/upper-tribunal-procedure-rules

This consultation

13. This consultation deals with proposed rules changes in two areas: Citizens' Rights Appeals and Rule 22A of the Upper Tribunal Rules.

Citizens' Rights Appeals

14. The issue of Citizens' Rights was one of the matters covered in the UK-EU Withdrawal Agreement. In broad terms, they are the post-Brexit residence rights of EU citizens living in the UK, who took up residence before the end of the transition period (11.00PM on 31st December 2020).

15. In accordance with the Withdrawal Agreement, the UK established the EU Settlement Scheme (EUSS). This required EU citizens (excluding Irish citizens) and family members of EU citizens who were not British or EU citizens themselves to apply if they wished to retain residence rights.

16. Applicants may be granted 'settled status', which is broadly equivalent to indefinite leave to remain or 'pre-settled status' which is permission to stay in the UK for five years. Those with pre-settled status who complete five years residence may then make a second application for settled status.

17. The deadline for most initial applications was 30th June 2021, although it is possible to make a late application. Applications from those who secured pre-settled status for settled status are ongoing.

18. If an application is refused, the applicant may appeal that decision to the F-t Tribunal IAC. They may also, however, apply to the EUSS scheme for an administrative review. In practice, applicants were encouraged to seek administrative review before making an appeal.

19. To facilitate these appeals, the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ("the 2020 Regulations") made by the Secretary of State amended the IAC Rules to insert Rule 19(3A) to (3E):

> **Notice of appeal**
> 19.—
> (1) An appellant must start proceedings by providing a notice of appeal to the Tribunal.
>
> (2) If the person is in the United Kingdom, the notice of appeal must be received not later than 14 days after they are sent the notice of the decision against which the appeal is brought.
>
> (3) If the person is outside the United Kingdom, the notice of appeal must be received—
>
> (a) not later than 28 days after their departure from the United Kingdom if the person—
>
> (i) was in the United Kingdom when the decision against which they are appealing was made, and

(ii) may not appeal while they are in the United Kingdom by reason of a provision of the 2002 Act; or

(b) in any other case, not later than 28 days after they receive the notice of the decision.

(3A) But paragraphs (2) and (3) do not apply in relation to the bringing of an appeal against a citizens' rights immigration decision.

"A citizens' rights immigration decision" is a decision which can be appealed against under the 2020 Regulations.

(3B) The notice of appeal in relation to an appeal against a citizens' rights immigration decision must be received—

(a) if the person is in the United Kingdom, not later than 14 days after the appellant is sent the notice of the decision;

(b) if the person is outside the United Kingdom, not later than 28 days after the appellant receives the notice of the decision. But this paragraph is subject to paragraph (3D).

(3C) Paragraph (3D) applies where—

(a) a person ("P") applies for an administrative review of a citizens' rights immigration decision ("the original decision") under the relevant rules, and

(b) P had not, before P receives notice of the decision on administrative review, started proceedings in relation to the original decision.

(3D) Where this paragraph applies, the notice of appeal against the original decision must be received—

(a) if P is in the United Kingdom, not later than 14 days after P is sent the notice of the decision on administrative review;

(b) if P is outside the United Kingdom, not later than 28 days after P receives the notice of the decision on administrative review.

(3E) In this rule, "the relevant rules" means—

(a) Appendix AR (EU) and Appendix AR (administrative review) to the immigration rules, or

(b) the Citizens' Rights (Frontier Workers)(EU Exit) Regulations 2020 (see regulations 21 to 23 of those Regulations).

20. Subject to the points raised below, the effect of these rules is that the deadline to appeal is either a) 14 days from the date the appellant is sent the notice of the original decision on the application (28 if the appellant is outside the UK) or 14 days from the date the appellant is sent notice of the decision on administrative review (28 if the appellant is outside the UK).

21. Since these rules were made by the Secretary of State on a consequential basis in the 2020 Regulations, they were not made by the TPC and did not go through the normal consultation process.

22. A degree of ambiguity has arisen concerning how the rules operate in practice. The ambiguity concerns the interaction between the ability of a failed EUSS applicant to apply for administrative review, on the one hand, and any right of appeal they may enjoy, on the other.

23. The TPC understands that the Home Office's working understanding of the current rules is that, if an applicant has applied for administrative review, once the 14 or 28 day period prescribed by Rule 19(3B) has elapsed, the right of appeal enjoyed by the applicant only crystalises upon the determination of the administrative review. The deadline for appealing the original decision contained in Rule 19(3B) will have passed. Until, however, a decision is made on the administrative review, the new deadline found in Rule 19(3D) does not yet apply.

24. If this construction is correct, this is not a theoretical problem, since there is currently a considerable delay in dealing with EUSS administrative reviews, which are taking 12-18 months to complete. There is therefore a significant cohort of applicants who wish to pursue an appeal, notwithstanding the fact that their administrative review process has not concluded. While such prospective appellants could apply to appeal out of time, that would not be a satisfactory solution in practice, on this view.

25. The Home Office has therefore asked the TPC to consider amending Rule 19(3D) as follows [suggested amendments in italics]:

> (3D) Where this paragraph applies, the notice of appeal against the original decision must be received—
>
> > (a) if P is in the United Kingdom, not later than 14 days after P is sent the notice of the decision on administrative review *or the notice accepting withdrawal*;
> > (b) if P is outside the United Kingdom, not later than 28 days after P receives the notice of the decision on administrative review *or the notice accepting withdrawal*.

26. The Home Office considers that this would allow an applicant who was unhappy with the delay in resolving their administrative review to withdraw their application for administrative review. Once that withdrawal had been accepted, they would be able to appeal to the First-tier IAC. In effect, they would be in the same position as if their application had been refused.

27. The request for a rule change appears to be based on the assumption that, once the paragraph (3B) time limits have expired, the underlying right of appeal conferred by the Withdrawal Agreement and the 2020 Regulations is not exercisable until a decision has been taken on the applicant's administrative review. The TPC is not aware that the Home Office's construction of Rule 19(3A) to (3E) has been the subject of any detailed determination at the Upper Tribunal level or higher.

28. While the TPC can see the superficial force in this constriction, it queries whether it is a correct construction of the rules as presently drafted. The TPC notes that, if an administrative review decision has not been sent to a prospective appellant, any notice of appeal submitted before that date will, by definition, be "not later than 14 days after P is sent the notice of the decision." It could be said to be a considerable period *before* the expiration of that 14-day period. The fact that the 14-day period has not yet started does not, on this view, prevent a prior date from being regarded as *before* the expiration of that 14 day period.

29. The TPC notes that, ordinarily, the engagement of a time limit prescribed in such terms would be dependent upon the specified 'trigger event' taking place, thereby lending force to the Home Office's construction. The present scenario would appear to be different. The right of appeal is triggered by, and attaches to, the underlying EUSS decision, not the administrative review. The unsuccessful applicant in such circumstances continues to enjoy a substantive right of appeal against the underlying EUSS decision. Nothing in the current rules expressly states that the time limit for bringing an appeal does not start until a decision on an appellant's administrative review has been taken. Clear wording would be required to deprive a prospective appellant of the substantive rights they otherwise enjoy by virtue of the Withdrawal Agreement or under the 2020 Regulations.

30. The TPC notes that if its alternative construction of paragraphs (3D) and (3E) is correct, it would mean that the rules provide set time limits for appellants who have not applied for administrative review, and potentially much longer time limits (particularly given current EUSS administrative review processing times) for those who have applied for administrative review. Moreover, while the Secretary of State's policy intention appears to have been to encourage unsuccessful applicants to pursue administrative review in lieu of appeals, the effect of the rule changes already made to Rule 19 may well have been to provide for a parallel right of appeal in such circumstances.

31. Whatever the correct construction of the rules, it is clear to the TPC that that the ambiguity that has arisen through the amendments made by the 2020 Regulations calls into question whether the rules are "both simple and simply expressed". If the Home Office's construction is correct, appellants should not be restricted from seeking an appeal because they have previously sought administrative review. There should be clarity on the relationship between an application for administrative review and the exercise of a right of appeal under the 2020 Regulations.

32. To achieve this clarity, the TPC proposes to amend "not later than 14 days" to "*within* 14 [or 28] days". By using "*within* 14 days", a notice of appeal received outside that period, whether before or after it will not be valid, either because it will be premature, or late.

33. In the rule change proposed by the Home Office, time begins when the appellant receives the EUSS notice accepting the withdrawal. The TPC has been told by the Home Office that they believe this is the simplest approach, in particular because the notice accepting the withdrawal will advise potential appellants of their right to appeal. This

also mirrors the current process in which appellants receive a notice of the outcome of the administrative review.

34. The TPC is of the preliminary view that an appellant's right of appeal should not be dependent upon the Home Office issuing a "notice accepting withdrawal" of the administrative review. A prospective appellant enjoys a right of appeal pursuant to the Withdrawal Agreement and under the 2020 Regulations. The TPC does not consider that such a right of appeal should be dependent upon a further administrative decision being taken by the Home Office, especially when the context for this requested rule change is the backlog of administrative review applications and existing delays. The TPC also notes that the Immigration Rules presently treat an application for administrative review as withdrawn as soon as the request to withdraw it is received: see paragraph 34X(3) of the Immigration Rules. Since an appellant will not know when the request for their administrative review will be received by the Home Office, the TPC considers that all that should be provided in order to trigger the Rule 19(3D)(a) window for submitting a notice of appeal on the basis of the withdrawal is evidence that a request withdrawing an application for administrative review has been sent to the Home Office. This would, in practice, mean that the deadline to appeal was shorter, but it would mean that an appellant could make their appeal immediately, rather than waiting for notice of withdrawal from EUSS.

35. The TPC therefore is considering whether to amend paragraph (3D) in the following terms [amendments in bold]:

> (3D) Where this paragraph applies, the notice of appeal against the original decision must be received—
>
> > (a) if P is in the United Kingdom, **within** 14 days of P ***sending a notice of withdrawal of administrative review to the Secretary of State or*** being sent the notice of the decision on administrative review;
> > (b) if P is outside the United Kingdom, **within** 28 days of P ***sending a notice of withdrawal of administrative review to the Secretary of State or*** being sent the notice of the decision on administrative review;

36. The TPC welcome stakeholders' views on the rule generally. The TPC is particularly interested in views on when the time-limit for bringing an appeal, following a withdrawal, should begin to run.

<u>Question 1: Do you agree that Rule 19 should be amended? If not, why not?</u>

<u>Question 2: Do you agree with the TPC's proposed formulation at paragraph 35, above? If not, why not?</u>

<u>Question 3: Do you have any further comments?</u>

Rule 22A Upper Tribunal Rules

37. Since the Immigration and Asylum (Procedure) Rules 2000, provision has been made for judicial decisions in asylum appeals to be served only, or initially, upon the Secretary of State. The Secretary of State is then responsible for serving the decision on the appellant.

38. This practice arose because of concerns that an unsuccessful appellant might abscond, rather than face removal. Serving the decision on the Secretary of State allowed the Home Office, in a small number of cases, to deliver the decision in person to the appellant, who could then be taken into custody immediately.

39. Such provisions were held by the Court of Appeal to be lawful but 'unpalatable' in *Bubaker v Lord Chancellor* [2002] EWCA Civ 1107 and *NB (Guinea) v SSHD* [2008] EWCA Civ 1229.

40. Upon the coming into force of the TCEA, the Tribunal Procedure Committee was created and was responsible for creating procedural rules for the F-t Tribunal and the Upper Tribunal.

41. Immigration matters were brought within the unified tribunal system in 2010. At that stage, as an interim measure, the Asylum and Immigration Tribunal (Procedure) Rules 2005 were ordered to have effect as Procedure Rules for the First-tier Tribunal IAC and the Upper Tribunal Rules were lightly amended so that they were suitable for dealing with Immigration Appeals. As a result, rule 23 of the AIT Rules 2005 continued in force, requiring the First-tier Tribunal IAC to serve substantive asylum decisions upon the respondent. Equivalent provision was made in the Upper Tribunal Rules in rule 40A.

42. In 2013 the TPC consulted on reformed procedural rules for the First-tier Tribunal IAC and amendments to the Upper Tribunal Rules. Amongst other matters consulted upon was the possible deletion of these 'advance service' provision from the Rules. The Home Office strongly opposed the deletion of these rules in its response, citing the absconding and safeguarding considerations which had prevailed in *NB (Guinea) v SSHD*. All other respondents favoured simultaneous service on appellant and respondent alike.

43. Details of that consultation and the TPC's response can be found on the TPC's website:

    https://www.gov.uk/government/consultations/immigration-and-asylum-chamber-rules-2013-consultation

44. The TPC accepted that the existing rules created an inequality of arms but considered that this could be justified if there was shown to be a powerful public policy rationale. It did not accept that there was a sufficiently powerful justification for the existence of rules relating to the service of substantive decisions, since those affected would always have a right to a further appeal (whether to the Upper Tribunal or the Court of Appeal). The TPC considered that it was only where the decision of the Tribunal brought the appeal to an end that there was a sufficiently cogent justification. That only applied

in relation to the refusal of permission to appeal by the Upper Tribunal, a decision from which there is no further statutory right of appeal.

45. The rules relating to advance service of substantive decisions were consequently removed from the First-tier Tribunal IAC Rules and Upper Tribunal Rules. Rule 22A of the Upper Tribunal Rules which deals with notice of refusals of permission to appeal in asylum cases was inserted (by the Tribunal Procedure (Amendment No. 3) Rules 2014) as follows:

> **Special procedure for providing notice of a refusal of permission to appeal in an asylum case**
> **22A.**—(1) This rule applies to a decision in an asylum case to refuse permission to appeal or to refuse to admit a late application for permission to appeal, where—
> (a) the appellant is not the Secretary of State; and
> (b) at the time the application is made the appellant is in the United Kingdom.
>
> (2) The Upper Tribunal must provide written notice of the refusal and of the reasons for the refusal ("the notice") to the Secretary of State as soon as reasonably practicable.
>
> (3) The Secretary of State must—
> (a) send the notice to the appellant not later than 30 days after the Upper Tribunal provided it to the Secretary of State; and
> (b) as soon as practicable after doing so, inform the Upper Tribunal of the date on which, and the means by which, it was sent.
>
> (4) If the Secretary of State does not give the Upper Tribunal the information required by paragraph (3)(b) within 31 days after the notice was provided to the Secretary of State, the Upper Tribunal must send the notice to the appellant as soon as reasonably practicable.

46. The TPC has recently been approached by the Upper Tribunal and asked to consider removing Rule 22A. The TPC has also sought the views of the Home Office.

47. The TPC understands that it is now extremely rare for the Home Office to serve any decision personally on an appellant. The practice has fallen away because other safeguarding measures are in place. The Home Office is therefore in full support of the Upper Tribunal's request to remove Rule 22A.

48. The TPC is provisionally of the view that Rule 22A ought to be removed from the Upper Tribunal Rules. It now serves no useful purpose and its only original proponent (the Home Office) no longer seeks its retention. The policy justifications which were said to support it no longer apply and there is nothing to set against the concerns expressed about such rules in the original consultation process.

49. At the same time, operating this system creates significant work for both the Upper Tribunal and the Home Office. In particular, the administrative work on the part of the Upper Tribunal checking whether they have received notice that the decision has been sent to the appellant and, if not, sending it themselves, is significant.

Question 4: Do you agree with the deletion of Rule 22A from the Upper Tribunal Rules? If not, why not?

Question 5: Do you have any other comments?

How to Respond

Contact Details
Please reply using the response questionnaire template.

Please send your response by **29 August 2023** by email to:

Email: tpcsecretariat@justice.gov.uk

Extra copies of this consultation document can be obtained using the above contact details or online at: http://www.justice.gov.uk/about/moj/advisory-groups/Tribunal-procedure-committee/ts-committee-open-consultations