

September 2024

Tribunal Procedure Committee

Consultation on possible amendments to the Tribunal Procedure (First-tier Tribunal) (Health Education and Social Care Chamber) Rules 2008 regarding proposed changes to whether Special Educational Needs appeals can be dealt with on the papers without the consent of both parties

Introduction

1. The Tribunal Procedure Committee (TPC) is the body responsible for making Tribunal Procedure Rules for the First-tier Tribunal and the Upper Tribunal, each of which is divided into Chambers. The First-tier Tribunal is the first instance tribunal for most jurisdictions, while the Upper Tribunal is primarily responsible for appeals from the First-tier Tribunal. The Upper Tribunal also hears some judicial review applications that are transferred in from the High Court. The TPC has recently assumed statutory responsibility for making rules of procedure for the Employment Tribunals. The First-tier Tribunal, including the Health Education and Social Care Chamber (HESC), replaced a number of tribunals in 2008. Special Educational Needs appeals (SEND) are decided within the HESC Chamber.
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. Further information on the TPC can be found at our website [here](#).
3. Section 22(4) of the TCEA requires that the TPC’s rule-making powers 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 the proceedings before the tribunal are handled quickly and efficiently.
4. 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.

Summary Proposal

6. This consultation seeks views on a proposal to amend the procedure rules governing the First-tier Tribunal (Health Education and Social Care Chamber) (“the Tribunal”) for special educational need and disability appeals.
7. The proposal is to amend Rule 23 of the Tribunal Procedure (First-tier Tribunal) (Health Education and Social Care Chamber) Rules 2008 (“the 2008 HESC Rules”).
8. The proposed amendment is limited to appeals against decisions to refuse to carry out an assessment of needs (“Refusal Appeals”). The proposals are to remove the application of Rule 23(1)(a) of the 2008 HESC Rules for these Refusal Appeals. This would leave the issue of whether a decision should be made on the papers or at a hearing, in Refusal Appeals, entirely to judicial discretion or, alternatively to remove the requirement for the respondent in Refusal Appeals to consent to a decision being made without a hearing.
9. A link to the relevant Rules is [here](#).¹

Background to the Proposal

10. The TPC received a request from the Ministry of Justice, Administrative Justice Policy Team, with the support of the Chamber President of HESC and the Deputy Chamber President responsible for SEND appeals.
11. The TPC understands that the proposals are intended to ensure that proceedings before the Tribunal are handled quickly and efficiently while ensuring that the system remains accessible and fair. See section 22(4) of the TCEA.
12. The number of SEND appeals in the Tribunal has increased significantly: there were just over 3,000 appeals registered in the year 2014-2015 compared with 18,000 appeals registered in the year 2023-2024². Waiting times for appeals continue to increase and appeals registered in March 2024 are currently being listed for hearing in February 2025.
13. Only 14.5% of all appeals determined by the Tribunal are decided on the papers. It is estimated that such cases take roughly half the time from receipt to disposal, compared to those listed for a hearing. Therefore, enabling a greater number of appeals to be decided on the papers, where appropriate, would allow the Tribunal to resolve cases more quickly and efficiently.

¹ Health, Education and Social Care Chamber tribunal rules - GOV.UK (www.gov.uk)

² [Tribunal Statistics Quarterly: January to March 2024 - GOV.UK \(www.gov.uk\)](#)

14. The aim is to ensure that the children and young people involved in these appeals are provided with a decision as soon as possible, given that the provision of such services as they may require can be critical to their developmental and educational needs.

Current Rule

15. Rule 23 of the 2008 HESC Rules establishes the circumstances under which decisions can be made by the Tribunal without a hearing. Specifically, Rule 23(1)(a) requires both the appellant and the respondent to consent to the case being decided without a hearing before that may happen.

16. Rule 23 of the 2008 HESC Rules states:

23.—

(1) Subject to paragraphs (2) and (3), the Tribunal must hold a hearing before making a decision which disposes of proceedings unless—

- (a) each party has consented to the matter being decided without a hearing; and
- (b) the Tribunal considers that it is able to decide the matter without the hearing.

(2) This rule does not apply to a decision under Part 5.

(3) The Tribunal may dispose of proceedings without a hearing under rule 8 (striking out a party's case).

17. "Hearing" (defined in rule 1(3)) means an oral hearing and includes a hearing conducted in whole or in part by video link, telephone or other means of instantaneous two-way electronic communication.

18. In practice, both parties are asked to specify on the initial forms submitted to the Tribunal whether they consent for a decision to be made on the papers. If either party does not consent, then the case will be listed for a hearing. If both parties consent to a decision being made on the papers, then the Tribunal must also determine that it is able to do justice fairly without a hearing.

Proposals In Detail

19. The proposals seek to increase the number of appeals that can be determined without a hearing by a review of the papers once all the evidence is gathered. The proposals are that any amendment should be limited to SEND appeals against a local authority's refusal to secure an Education, Health and Care (EHC) needs assessment ("Refusal Appeals").

20. The request from the Ministry of Justice Administrative Justice Policy Team ("MOJ"), with the support of the Chamber President of HESC and the Deputy Chamber President responsible for SEND, considers that Refusal Appeals can often be determined on written submissions alone, due to the following:

- a. the decision made by the local authority is binary in nature (either to grant or refuse an EHC needs assessment), and
- b. local authorities often appear incorrectly to apply the relevant statutory test for determining whether an assessment should be granted (according to a report by the Administrative Justice Council in 2023³), based on the SEND statutory code of practice which might lead local authorities to apply an incorrect, and more stringent, test than is required under the Children and Families Act 2014.

Option 1: Leave entirely to judicial discretion

21. Proposal 1 is to remove the application of Rule 23(1)(a) of the 2008 HESC Rules for Refusal Appeals. This would leave the matter of whether a decision should be made on the papers or at a hearing, in such cases, entirely to judicial discretion.

Option 2: Remove local authority consent

22. Proposal 2 is to remove the requirement for the respondent in Refusal Appeals to consent to a decision being made without a hearing (contained in Rule 23(1)(a) of the 2008 HESC Rules). This means that the appellant's consent for the decision to be made on the papers, alongside the Tribunal's agreement, would determine whether an appeal could proceed without a hearing.

Considerations

23. The TPC appreciates that altering the right to a hearing may raise concerns about access to justice and the right to a fair hearing.

24. It is anticipated that any rule change that facilitates an increase in the number of decisions made on the papers is likely to lead to a reduction in overall waiting times in HESC. On average, cases decided at a hearing take 33.75 weeks from receipt to disposal, whereas those decided on the papers take 14.89 weeks. Delays in SEND Appeals are likely to directly impact on the developmental and educational needs of children and young people. The TPC's preliminary view is that it is in the interests of justice to reduce the waiting time and increase the efficiency of the HESC Tribunal.

25. Additionally, whilst there would be an immediate increase in the operational workload of the HESC Tribunal, such as updating guidance and forms, this would be temporary and offset by the expected reduction in the number of appeals requiring a hearing.

26. The ability to list Refusal Appeals as a decision to be made on the papers throughout the year (rather than predominantly during term-time when Appellants, Schools and the Local Authorities are available for hearings) will increase and spread capacity across the HESC Tribunal which will contribute to the efficient use of judicial and administrative resources.

³ Administrative Justice Council Special Educational Needs and Disability: Improving Local Authority Decision Making, July 2023, Report of the Administrative Justice Council's Working Group on Special Educational Needs and Disability [SEND-Improving-Local-Authority-Decision-Making.pdf \(judiciary.uk\)](#)

27. Whichever option is adopted, it is not expected to impact on the success rate of appeals (see paragraphs 28 and 30 for further comments on success rates). Rather, the rule amendments are proposed to ease the current pressures faced by the HESC Tribunal and bring down waiting times for cases to be heard, facilitating quicker access to justice for the children and young people involved in the SEND appeal.
28. Whichever option is adopted, the HESC Tribunal would still determine whether a hearing was needed. This means the HESC Tribunal can assess the circumstances of each case and whether either party would be disadvantaged by the lack of a hearing. In cases where a decision on the papers is considered appropriate, the written submissions are considered by a fully constituted panel, with the same constituted panel as those used during hearings. The panels considering the written evidence can adjourn cases for a hearing if they believe there is missing evidence or that they require certain witnesses to give live evidence.
29. As to any access to justice concerns, it might also be considered relevant that parties can still apply for a hearing if they feel that the case requires one, and a decision on whether a hearing is held remains a judicial decision.
30. Currently, appellants ask for decisions to be made on the papers (in their original appeal form) in approximately 90% of Refusal Appeals. Local authorities consent to a decision being made on the papers in approximately 20% of those appeals; this equates to 14.5% of all appeals heard by the Tribunal being determined on the papers only. It is noted that by withholding consent, the local authority is able to delay any final outcome which might involve the use of their resources to comply with the statutory deadline to complete the EHC needs assessment. It is further noted that the Appellant succeeds in 96.3% of Refusal Appeals⁴ on at least one ground.
31. The TPC's preliminary observation is that, in the interests of justice, it is appropriate that the local Authority ought not to be in a position to delay the case by insisting on a hearing where the applicant wishes the case to be decided on the papers to ensure a swifter outcome.
32. The ancillary effect of an earlier consideration of the Refusal Appeal might also impact on the number of such appeals being conceded by the local authority at a late stage⁵.
33. Any access to justice concerns may be addressed under either proposal, as both parties would be able to apply for the decision to be reviewed and set aside, under Rule 45 of the 2008 HESC Rules, if the tribunal determined it was in the interests of justice to do so

⁴ Page 9 Administrative Justice Council Special Educational Needs and Disability: Improving Local Authority Decision Making, July 2023, Report of the Administrative Justice Council's Working Group on Special Educational Needs and Disability [SEND-Improving-Local-Authority-Decision-Making.pdf \(judiciary.uk\)](#) and [Tribunal Statistics Quarterly: July to September 2022 - GOV.UK \(www.gov.uk\)](#)

⁵ Page 10, Administrative Justice Council Special Educational Needs and Disability: Improving Local Authority Decision Making, July 2023, Report of the Administrative Justice Council's Working Group on Special Educational Needs and Disability [SEND-Improving-Local-Authority-Decision-Making.pdf \(judiciary.uk\)](#)

and one of the other conditions was met, including “(c) a party, or a party's representative, was not present at a hearing related to the proceedings”.

34. The TPC invites responses as to the suitability of either of the proposed changes.

Public Sector Equality

35. In proposing these changes, the TPC has considered its duty to eliminate conduct prohibited by the Equality Act 2010, advance equality and to foster good relations and believes that if making the proposed rules, the TPC would be acting in accordance with section 149 of the Equality Act 2010.

The Consultation Questions

Question 1: Do you agree with either of the proposed changes to Rule 23? Please give reasons for your answer.

Question 2: Do you consider that one of the two proposals is more desirable than the other? If so, please explain your reasons

Question 3: Do you consider Proposal 1, to leave a decision on whether a refusal to assess case should be made on the papers or at a hearing entirely to judicial discretion, is appropriate?

Question 4: Do you consider Proposal 2, to remove the requirement for the respondent in Refusal Appeals to consent to a decision being made without a hearing (Rule 23(1)(a) meaning that the appellant's consent for the decision to be made on the papers, alongside the Tribunal's agreement, would determine whether an appeal could proceed without a hearing, to be appropriate?

How to Respond

Contact Details

Please reply using the response questionnaire template.

Please send your response by **05 December 2024** by email to:

Email: tpcsecretariat@justice.gov.uk

Post: Tribunal Procedure Committee
Access to Justice Directorate
Policy, Communications and Analysis Group
Ministry of Justice
Post Point: Area 5.20
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SW1H 9AJ

Extra copies of this consultation document can be obtained using the above contact details or online at: <https://www.gov.uk/government/organisations/tribunal-procedure-committee/about>