

EXPLANATORY MEMORANDUM TO
THE TRIBUNAL PROCEDURE (FIRST-TIER TRIBUNAL) (IMMIGRATION AND
ASYLUM CHAMBER) RULES 2014

2014 No. 2604 (L. 31)

1. This explanatory memorandum has been prepared by the Ministry of Justice (MoJ) and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (“the Rules”) replace the current rules of procedure dating from 2005 and harmonises them as far as is feasible with tribunal procedure rules which apply in other chambers.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 Schedule 5, paragraph 17, to the Tribunals, Courts and Enforcement Act 2007 (“the 2007 Act”) confers a power that rules may refer to provision made or to be made by directions. The IAC Rules propose a future pilot of one of the fast track time limits (see Fast Track Rule 8(3)) by use of a practice direction.

4. Legislative Context

4.1 Part 1 of the 2007 Act created a two-tier tribunal system into which existing tribunals can be transferred, or new appeal rights directed. Section 3 of the 2007 Act establishes the First-tier Tribunal and the Upper Tribunal, which together make up this two-tier system. Both Tribunals are divided into Chambers which deal with different areas of jurisdiction e.g. health, immigration and asylum, tax, and education.

4.2 The 2007 Act provides for Tribunal Procedure Rules to be made by the Tribunal Procedure Committee (“TPC”) and deals with the process of making, and the content of, those rules.

4.3 The Tribunal Procedure (Amendment No.3) Rules 2014 (SI 2014/2128) made by the TPC on 7th August 2014 contain amendments to the Tribunal Procedure (Upper Tribunal) Rules 2008 that apply in the Immigration and Asylum Chamber of the Upper Tribunal, reflecting the harmonisation of the First-tier Tribunal Rules. They will come into force on the same day as this instrument.

5. Territorial Extent and Application

5.1 This instrument applies to all of the UK.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

• **What is being done and why**

7.1 When the Immigration and Asylum Chamber (“IAC”) of the First-tier Tribunal was established on 15 February 2010, the existing rules of procedure – The Asylum and

Immigration (Procedure) Rules 2005 and the Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005 – continued to have effect and only amendments considered essential were made. The Fast Track Procedure Rules apply to certain cases where a person is detained under the Immigration Acts. The Rules apply an accelerated process for the determination of such cases.

- 7.2 The TPC has brought the separate Fast Track Rules within the same statutory instrument as the principal rules by adding them as a Schedule to the rest of the IAC Rules. As jurisdictions have been transferred into the First-tier and Upper Tribunals, the TPC has consulted on and made rules for each new Chamber. This has resulted in core rules of general application that work well across the different Chambers; and that was the starting point for the IAC Rules.
- 7.3 The 2007 Act confers responsibility on the TPC for rules that ensure justice is done; the tribunal system is accessible and fair; proceedings are handled quickly and efficiently; and are both simple and simply expressed. The TPC considered there were a number of areas within the 2005 rules that did not meet these objectives; accordingly in addition to harmonising the rules a number of substantive changes have been made.

The Fast Track Rules Schedule

- 7.4 The TPC had originally considered there was no need for separate rules relating to the detained Fast Track cases (“DFT”). The DFT Rules provide for similar processes as the principal rules but with significantly shorter time limits, and the TPC was aware of concerns that these were too accelerated to give someone with a meritorious appeal sufficient time to prepare their case and present it to the Tribunal. Instead the TPC felt that where time limits did need to be shortened the Tribunal’s extensive case management powers would be sufficient. This view was supported by the majority of respondents to the TPC’s consultation (see paragraph 8.2) and by members of the judiciary who reported cases regularly being ill-prepared or unready; resulting in cases taking longer due to adjournments or removal from the fast track.
- 7.5 However, the TPC recognises that speedy adjudication is desirable where a person is detained; not least for the individual concerned who should not be deprived of freedom for longer than is necessary. Following detailed consideration and engagement with Her Majesty’s Courts and Tribunals Service (HMCTS) and the Home Office, the TPC decided that the DFT process should be catered for in the principal Rules. The language and structure of the Schedule has been harmonised with the rules in place in other Chambers, and several of the DFT time limits have been adjusted where the TPC considers there is a practical need to do so for justice. These are: the listing of an appeal, applications for permission to appeal to the Upper Tribunal, and relisting of a case after adjournment. As mentioned above (paragraph 3.1), powers have been conferred to pilot a 6 day time limit for the hearing of DFT cases instead of the 3 day time limit contained in Fast Track rule 8(1). The TPC consider that giving the appellant a slightly longer period to prepare for the hearing will reduce the number of DFT cases that have to be adjourned on the day of the hearing or transferred out of the fast track.

Time limits

- 7.6 The TPC’s preference and general approach, to ensure clarity and certainty, is for time limits to run from when documents are sent or received by the Tribunal, rather than from the time they are received or deemed to be received by parties. Furthermore, the TPC considers there is an important balance to be struck between cases being resolved quickly and ensuring that parties are able to participate effectively in the process.

Accordingly, some time limits have been altered in the Rules; including the time to lodge a notice of appeal, for filing of the respondent's response, and to apply for permission to appeal to the Upper Tribunal. As a consequence of the general approach, however, most revisions represent only modest, extensions.

Response to appeal; including time limit

7.7 The Rules impose a requirement, as regards appeals from entry clearance decisions, for a response from the Home Office respondent to include a statement of whether or not the appeal is opposed, and if so, the grounds. This is the norm in other Chambers, and allows the appellant and Tribunal to see the grounds of opposition at an early stage; assisting the proceedings to be dealt with quickly and efficiently. The TPC considered that in other cases a response would be unnecessary as the respondent's original refusal letter already set out the grounds in detail. However, the rules oblige the respondent to provide a statement where it intends to contest the appeal on additional or changed grounds.

7.8 The time for filing the respondent's response and related documentation has been adjusted to reflect the position in other Chambers and will be due within 28 days of the notice of appeal being sent to the respondent. Currently a response is required as soon as possible but not later than the day before the hearing. The TPC considered this too late in the process, consequently under the IAC Rules both the appellant and Tribunal will have the benefit of receiving the response at a much earlier stage. The rule for entry clearance cases will initially be for a response to be sent within 28 days of receipt of the notice of appeal. This is in recognition of the time currently taken for appeals to reach Home Office overseas Posts. The Home Office is taking steps to improve performance in this area, after which the rule will be amended to reflect the position for in-country cases and other Chambers.

Withdrawal of the appeal

7.9 The 2005 Rules required an appeal to be treated as withdrawn where the Home Office withdraws the decision under appeal. However, the TPC thought there may be cases where automatic withdrawal might be inappropriate or in conflict with case law. The requirement also differs from the rules in other Chambers, including the rule in immigration and nationality cases in the Upper Tribunal. Accordingly, the IAC Rules remove the automatic withdrawal provision. Instead, rule 17(2) provides that the Tribunal shall, *save for good reason*, treat an appeal as withdrawn. The TPC has been informed by the Home Office that its policy is only to withdraw the underlying decision where the intention is to grant leave to enter or remain. Therefore it is expected that where the underlying decision is withdrawn the Tribunal will also treat the appeal as withdrawn unless there is good justification not to do so.

Service of asylum decisions

7.10 The 2005 Rules currently require the Tribunal to send certain asylum decisions initially only to the Home Office, and for the Home Office to serve the decision notice on the appellant. The new Rules will require all asylum decisions to be served on both parties by the Tribunal and addresses a concern that service on the appellant by the Home Office was detrimental to the Tribunal's independence and created an appearance of unfairness. The TPC has decided that the practice should cease entirely in the First-tier Tribunal, and that instead all asylum decisions and determinations should be provided directly to both parties by the Tribunal. This aligns with the position with immigration and nationality appeals in the Tribunal, for appeals in all other First-tier Tribunal Chambers, and in the civil courts.

Costs (in Scotland, expenses)

7.11 The Rules introduce new costs powers that replicate the approach in other Chambers. The Tribunal will be able to award costs as a sanction for unreasonable behaviour by either party or their representatives. Before making an order for costs, the Tribunal must give that person an opportunity to make representations. The current provision to award a successful appellant a sum up to the amount of any Tribunal fee they have paid is being retained in the Rules.

Amendments relating to bail applications

7.12 Two amendments relating to bail are made, consistent with provisions in the Immigration Act 2014 (“2014 Act”). The 2014 Act will restrict the ability of immigration detainees to make repeat applications for bail within 28 days of the last bail hearing and will prevent release on bail, unless the Home Secretary consents, where removal is scheduled to take place within 14 days. When considering bail applications, the Rules ensure the Tribunal is informed as to the applicant’s circumstances and when removal directions have been set.

Consolidation

7.13 The new IAC Rules will be available on the Justice website when the instrument comes into force. They will be found at: <http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/rules.htm>. Any further amendments made from time to time to those Rules will be reflected in an informally consolidated version of the Rules also maintained on that website.

8. Consultation outcome

8.1 The TPC ran a 12-week public consultation exercise on the IAC Rules during the spring of 2013; it closed on 2 July 2013. Stakeholders identified by MoJ, HMCTS, and the Home Office were contacted in writing and informed of the consultation. In accordance with paragraph 28(1)(a) of Schedule 5 to the 2007 Act, the TPC also consulted with the First-tier Tribunal Chamber President and Liaison Judge, HMCTS, and both policy and legal officials at the Home Office. Twelve responses were received including from the Home Office, and several key stakeholders such as the Immigration Law Practitioners’ Association, the Bar Council, Council for Immigration Judges, and Bail for Immigration Detainees.

8.2 All respondents supported harmonisation of language and structure to bring the IAC Rules in line with other Chambers in the First-tier Tribunal, and ensure consistency in practice; thereby assisting appellants, judiciary, and legal representatives. The majority of respondents also supported the TPC’s proposals for more substantive change. In relation to the proposed new costs power to sanction unreasonable behaviour, respondents agreed in principle but concerns were raised about the potential for injustice and added complexity in what had been a costs-free Tribunal. In particular some respondents felt there should be a procedure to challenge any costs orders made. Accordingly, the TPC have ensured the rules give an opportunity to make representations before a costs order is made.

8.3 The issues raised by respondents and the conclusions reached are set out in more detail in both the TPC’s consultation document which can be found at: <http://www.justice.gov.uk/about/tribunal-procedure-committee/ts-committee-closed-consultations> and in the forthcoming Response to the consultation that will be published

shortly on the Committee's website: (<http://www.justice.gov.uk/about/tribunal-procedure-committee>).

9. Guidance

- 9.1 HMCTS produces guidance for all tribunal jurisdictions that are routinely issued to appellants at key stages of the appeals process. The guidance is updated to reflect changes to procedure and is available at: <http://www.justice.gov.uk/tribunals>.

10. Impact

- 10.1 The impact on business, charities, voluntary bodies and the public sector is nil.

- 10.2 An Impact Assessment (IA) has not been prepared for these instruments. A Regulatory IA was prepared for the 2007 Act and can be found at:

<http://www.justice.gov.uk/publications/tribunalscourtsandenforcementact.htm>

The Regulatory IA confirmed that the legislation would create a new flexible overarching statutory framework for tribunals, bringing them together in one organisation. No additional costs were identified from the setting up of the First-tier Tribunal and Upper Tribunal within the first 3-years, and no further costs have been identified since to change this assumption.

11. Regulating small business

- 11.1 The legislation does not impact upon small businesses.

12. Monitoring & review

- 12.1 The TPC and MoJ will keep the IAC Rules continually under review. In particular the TPC has agreed to monitor the impact of the adjusted time limits; notably in the DFT.

13. Contact

- 13.1 Julie McCallen, TPC Secretary, (julie.mcallen@justice.gsi.gov.uk or 020 3334 4066) can answer any queries about this instrument.