

May 2024

Tribunal Procedure Committee

Consultation on possible amendments to the power to set-aside a decision in:

- Rule 43 of the Tribunal Procedure (Upper Tribunal) Rules 2008
- Rule 54 of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010
- Rule 37 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008
- Rule 35 of the Tribunal Procedure (First-tier Tribunal) (War Pensions and Armed Forces Compensation Chamber) Rules 2008
- Rule 45 of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008
- Rule 38 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009
- Rule 41 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009
- Rule 51 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013
- Rule 32 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014

Introduction

1. The Tribunal Procedure Committee (“TPC”) is the body that makes rules to govern practice and procedure in the First-tier Tribunal and in the Upper Tribunal. It is an independent Non-Departmental Public Body, sponsored by the Ministry of Justice. Information on the TPC can be found at:
www.gov.uk/government/organisations/tribunal-procedure-committee
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. The TPC has considered whether to bring forward amendments to the Tribunal Procedure Rules governing all chambers of the First-tier Tribunal and Upper Tribunal. These amendments would relate to each chambers' power to set aside one of its own final decisions. The current rules in the First-tier Tribunal and Upper Tribunal allow final decisions to set aside so long as certain conditions are met.

MA v Secretary of State for Work and Pensions [2020] UKUT 172 (AAC)

7. The decision to consult on a potential change has arisen from the case *MA v Secretary of State for Work and Pensions*, in which Upper Tribunal Judge Wikeley in *MA* decided that in the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 ("the SEC Rules"):

"...rule 37 requires an application by one of the parties..."
8. Rule 37 of the SEC Rules currently provides as follows;

37 - Setting aside a decision which disposes of proceedings

 - (1) The Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision, or the relevant part of it, if—*
 - (a) the Tribunal considers that it is in the interests of justice to do so; and*
 - (b) one or more of the conditions in paragraph (2) are satisfied.*
 - (2) The conditions are—*
 - (a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party's representative;*
 - (b) a document relating to the proceedings was not sent to the Tribunal at an appropriate time;*
 - (c) a party, or a party's representative, was not present at a hearing related to the proceedings; or*
 - (d) there has been some other procedural irregularity in the proceedings.*
 - (3) A party applying for a decision, or part of a decision, to be set aside under paragraph (1) must make a written application to the Tribunal so that it is received no*

later than 1 month after the date on which the Tribunal sent notice of the decision to the party.

9. Rule 37 of the SEC rules is very similarly drafted to the provisions relating to setting aside final decisions in the other chambers of the First-tier Tribunal and Upper Tribunal where there is no specific rule about particular proceedings. The *MA* decision therefore has potential implications across the tribunal structure and raises the questions of (i) whether the Social Entitlement Chamber should be able to set aside decisions of its own initiative and (ii) whether other tribunals are affected by this decision. This consultation deals with whether amendments should be made to the various rules in light of these two questions. This consultation does not propose amending rules other than those referred to in the bullet points at the top of this document.

The First-tier Tribunal and Upper Tribunal

10. The First-tier Tribunal and Upper Tribunal were created by section 7 of the Tribunals, Courts and Enforcement Act 2007 (“the TCEA”) and deal with many original and appellate jurisdictions conferred upon them by enactments. Paragraph 15¹ of Schedule 5 to the TCEA, permits Tribunal Procedure Rules as follows:

(1) Rules may make provision for the correction of accidental errors in a decision or record of a decision.

(2) Rules may make provision for the setting aside of a decision in proceedings before the First-tier Tribunal or Upper Tribunal –

(a) where a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party to the proceedings or a party’s representative,

(b) where a document relating to the proceedings was not sent to the First-tier Tribunal or Upper Tribunal at an appropriate time,

(c) where a party to the proceedings, or a party’s representative, was not present at a hearing related to the proceedings, or

(d) where there has been any other procedural irregularity in the proceedings.

(3) Sub-paragraphs (1) and (2) shall not be taken to prejudice, or to be prejudiced by, any power to correct errors or set aside decisions that is exercisable apart from rules made by virtue of those sub-paragraphs.

¹ Authorised by section 22 TCEA.

11. Currently, the power to set aside a final decision contained in each chambers' procedure rules, as derived from paragraph 15(2), is not expressly limited by each tribunal's power to do so of its own initiative

The *MA* case

12. *MA* was a case that was initially brought as an appeal by MA to the First-tier Tribunal (Social Entitlement Chamber) ("FtT SEC") against a decision of the Secretary of State for Work and Pensions. That appeal was against a decision made on a claim for Personal Independence Payment ("PIP"). One constitution of the FtT SEC in November 2018 gave a decision partially in favour of MA.
13. MA's advisers sought written reasons for that decision. A District Tribunal Judge, having considered that request acted, purportedly under rule 37(2)(b) of the SEC Rules,² to set aside the decision that had been made partially in MA's favour. This was because MA's advisers had sent a detailed written submission and further evidence to the FtT SEC in advance of the hearing of the appeal. Despite being sent by MA's advisers to the Tribunal, the FtT SEC panel who gave the decision partly in MA's favour in part did not see a copy of those submissions. It is unclear why the Tribunal did not see them.
14. There was a fresh hearing before a different constitution of the FtT SEC which eventually dismissed MA's appeal to the FtT SEC in its entirety. MA appealed to the Upper Tribunal (Administrative Appeals Chamber), where Judge Wikeley decided that the power to set aside under rule 37 of the SEC Rules could not be exercised absent an application by one of the parties – neither MA nor the Secretary of State made such an application.

Considerations

15. While the *MA* decision only relates to the SEC Rules, the set-aside rules set out at the head of this consultation are similarly drafted for each chamber. The TPC is aware that the understanding of practitioners and judges outside of the FtT SEC of the power to set aside is that each tribunal may do so of its own initiative. The correctness of the *MA* decision on rule 37 of the SEC rules has also been doubted by a different constitution of the Upper Tribunal in *KH (dec'd) by AMH v Secretary of State for Work and Pensions* [2021] UKUT 189 (AAC).

² Setting aside in the interests of justice where a document relating to the proceedings was not sent to the Tribunal

16. It is not the role of the TPC to decide whether or not *MA* was correctly decided. The TPC is however required by section 22(4) TCEA to consider whether Tribunal Procedure Rules confer on the tribunals the necessary responsibility for ensuring that proceedings before the Tribunal are handled quickly and efficiently. Paragraph 6 of Schedule 5 to the TCEA also allows the TPC to make rules about the circumstances in which the First-tier Tribunal, or the Upper Tribunal, may exercise powers of its own initiative. The TPC considers that in order to ensure that the tribunals' rules are simple and simply expressed, consideration should be given to adopting clarificatory rules for the future of the sort discussed in this consultation.
17. The TPC also takes into account whether tribunals can continue to operate tried and tested procedures, which have been shown to work well. The TPC is aware that each chamber of the First-tier Tribunal and Upper Tribunal has, for some time, exercised the power to set aside of its own initiative where it is thought necessary in the interests of justice.
18. To that extent, the TPC is considering whether it may be desirable to amend each chamber's procedure rules, so as to clarify that, in so far as the rules do not already allow tribunals to set aside decisions of their own initiative, tribunals will have that power in the future, always on the assumption that it is in the interests of justice that they do so. The TPC believes that, where a Tribunal is aware that there has been procedural irregularity in proceedings it is often desirable that the Tribunal be able to act without the requirement for an application.
19. Often the procedural irregularity will be identified initially by the Tribunal. It may be artificial, and inconsistent with the overriding objective in many circumstances, for the Tribunal to write to the parties explaining the problem and inviting them to make a formal application, rather than acting of its own motion. An example of where this occurs is where a document relating to the proceedings had been sent to the tribunal, but not passed onto the judge or panel taking the decision until after a decision disposing of the proceedings had been sent to the parties. In those circumstances, the TPC considers that the tribunal should be able to use any power to set aside the decision on the grounds of procedural irregularity of its own initiative, provided it is consistent with the overriding objective of the tribunal to do so.
20. Requiring that a party makes a formal application delays proceedings and puts the parties, as well as the Tribunal, to additional work. There is also a risk, particularly in cases involving litigants in person, that a party may not understand the significance of a Tribunal's communication about an irregularity or, for other reasons, fails to make an application – leaving a procedurally flawed decision to stand.

21. In some Chambers such as the FtT SEC, represented parties, often the Secretary of State, will intervene and make, or support, formal applications to set aside because of his or her duty to cooperate with the tribunal and to assist the tribunal to further the overriding objective. There are however other chambers where the parties are involved in litigation of a different nature. The TPC's view is that it would be undesirable for the rules to assume that one party would act against its own interests, or that there should be different rules for different chambers.
22. The Tribunals will still be obliged to follow the remaining procedure rules, including only to set aside decisions where it is in the interests of justice. As with all powers under the rules of each tribunal, a tribunal's reliance on a power to set aside its own decisions must be exercised in a manner that gives effect to the overriding objective. That will often require the Tribunal to seek the parties' views before considering whether to exercise a power to set aside a decision. There is case law in each chamber reflecting this position and the TPC does not believe that it is appropriate or desirable to try to specify in rules what are "the interests of justice".
23. Before considering whether to amend the rules however, the TPC wishes to ensure that any clarificatory change to the rules explicitly stating for the future that the various chambers can act of their own initiative:
 - is likely to ensure justice is done and that proceedings are, accessible, fair and ensures cases are handled quickly and efficiently;
 - will not have an adverse impact on any other areas of tribunal practice or procedure; and,
 - will not otherwise have an adverse impact on proceedings before the First-tier Tribunal and Upper Tribunal.
24. All of the First-tier Tribunal Chambers rules are drafted almost identically.³ There is a threshold in paragraph (1) of the respective rules requiring a set aside to be in the interests of justice (subparagraph (1) (a)) and that conditions in paragraph (2) are met (subparagraph (1) (b)). Paragraph (3) in each set of rules sets a time limit (which is not the same in each chamber) for a party to make an application. Both sets of the Upper Tribunal rules are similarly drafted.

Powers not covered by this Consultation

25. Nothing in this Consultation is intended to suggest new rules which might affect the Upper Tribunal's powers under section 25 of the Tribunals, Courts and Enforcement Act 2007. Furthermore, the potential new rule envisaged by this Consultation is intended only to apply to a decision to set aside and not to the existing power to review a decision.

³ The relevant rules are listed at the start of this consultation document.

Question 1: Do you agree with the proposed changes to clarify that, if and in so far as the rules do not already allow tribunals to set aside decisions of their own initiative, the First-tier Tribunal and Upper Tribunal may exercise a power to set aside a decision on their own initiative in the future? Please give reasons for your answer.

26. The TPC is consulting on whether to amend the relevant rules by inserting “, *either on its own initiative or on the application of a party,*” (or similar) after “*The Tribunal may...*” in each of the respective rules. Rule 37(1) of the SEC rules, would therefore read:

(1) *The Tribunal may, either on its own initiative or on the application of a party, set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision, or the relevant part of it, if—*

(a) *the Tribunal considers that it is in the interests of justice to do so; and*

(b) *one or more of the conditions in paragraph (2) are satisfied.*

27. The various chambers’ rules each has provision for a time limit within which a party may request a set aside.⁴ If the TPC is to amend the rules as above, it believes that it is desirable to retain the potential for the Tribunal to act on its own initiative at any time, without limit. This would allow each chamber to consider whether to correct a procedural irregularity without an artificial time limit on doing so. Each Tribunal would, as it can now, be able to take account of any passage of time since a decision had been made when considering whether that decision should be set aside by the Tribunal of its own initiative (and always in the context of the obligation to have regard to the overriding objective).

Question 2: Do you see any difficulties with making the proposed changes for the future and/or any adverse impact on other areas of tribunal practice or procedure? If so, how do you consider that such difficulties or adverse impact might be mitigated or resolved? Do you believe that any transitional provisions are required?

28. The TPC is also consulting on whether, as set out above, any adverse impact on other areas of tribunal practice or procedure might follow by stating that such a power exists. For example, this may raise an issue where decisions outside the FtT SEC have already been taken on the basis that the power exists. If there were any difficulties, would transitional provisions help with them?

29. Another potential concern might be that decisions made many years prior to the rule change could be set aside on the Tribunal’s own initiative. In practice, it seems most unlikely to the TPC that this presents a genuine concern, not least because of the importance of the application of the overriding objective. However, the TPC wishes to understand whether there may be any reasons to think that its view on this is mistaken.

⁴ Subject to each chambers’ power to extend or shorten time.

Question 3: Do you believe that where a tribunal exercises the power to set aside of its own initiative, it should be required to give the parties notification of that exercise in writing?

30. If the TPC amends the rules to make explicit each chambers' power to set aside on its own initiative, it wishes to consult to see whether an alteration should be made to the various sets of procedure rules so that where a decision to set aside is taken of a tribunal's own initiative, the parties must be notified of that decision. Currently, the First-tier Tribunal and Upper Tribunal procedure rules do not make provision for a notice in these circumstances.
31. However, for the future, although it is perhaps inconceivable that a tribunal could set aside a final decision while also concluding that it was not necessary to inform the parties, nevertheless it may be considered sensible to make appropriate provision in the rules. It may be thought that there is an obligation to act appropriately under the overriding objective in each set of rules in any event, but the extent to which this would oblige notice of a decision of this type to be given to the parties is unclear.

Public Sector Equality

32. 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

Questions

Question 1: Do you agree with the proposed changes to clarify that, if and in so far as the rules do not already allow tribunals to set aside decisions of their own initiative, the First-tier Tribunal and Upper Tribunal may exercise a power to set aside a decision on their own initiative in the future? Please give reasons for your answer.

Question 2: Do you see any difficulties with making the proposed changes for the future and/or any adverse impact on other areas of tribunal practice or procedure? If so, how do you consider that such difficulties or adverse impact might be mitigated or resolved? Do you believe that any transitional provisions are required?

Question 3: Do you believe that where a tribunal exercises the power to set aside of its own initiative, it should be required to give the parties notification of that exercise in writing?

Question 4: Do you have any other comments?

How to Respond

Please reply using the response questionnaire template.

Please send your response by 7 August 2024 to one of the following:

Email: tpcsecretariat@justice.gov.uk

Post: Tribunal Procedure Committee
Civil, Tribunals, and Administration of Justice Directorate
Policy, Communications and Analysis Group
Ministry of Justice
Post Point: Area 5.20
102 Petty France
London
SW1H 9AJ

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>