

Tribunal Procedure Committee

Consultation on changes to The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 arising from the Immigration Act 2016

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. It is an independent Non-Departmental Public Body, sponsored by the Ministry of Justice.
2. The TPC’s remit includes the rules for the First-tier Tribunal (Immigration and Asylum Chamber) (the ‘IAC’) and the Upper Tribunal (Immigration and Asylum Chamber). These Chambers deal with appeals against government decisions in immigration, asylum and nationality matters.
3. The Immigration Act 2016 (“the 2016 Act”) received Royal Assent on 12th May 2016. It makes significant changes to the substantive law relating to immigration and asylum, including provisions relating to access to services, facilities, licences and work by reference to immigration status; makes provision for the Director of Labour Market Enforcement; introduces language requirements for public sector workers; amends fees for passports and civil registration; and deals with assorted connected matters.
4. Much of this is beyond the scope of the TPC’s work, which is only in respect to the tribunals’ procedure rules. The 2016 Act, however, includes a number of changes relating to bail, which the TPC considers may make amendments to the rules relating to bail applications desirable. This consultation sets out these potential changes and seeks the view of stakeholders on them.
5. Below you will find further information on the following:
 - (a) the First-tier Tribunal and the Upper Tribunal,
 - (b) the consultation questions,
 - (c) how to respond and by when.
6. The current First-tier Tribunal 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> Further information on the IAC can be found at: <https://www.gov.uk/courts-tribunals/first-tier-tribunal-immigration-and-asylum> Information on the TPC can be found at: <https://www.gov.uk/government/organisations/tribunal-procedure-committee>

The First-tier Tribunal and the Upper Tribunal

7. The Tribunals, Courts and Enforcement Act 2007 (the “TCE Act”) provides for the First-tier Tribunal and the Upper Tribunal. Both are independent tribunals, and the First-tier Tribunal is the first instance tribunal for most jurisdictions.
8. The First-tier Tribunal is divided into separate chambers which group together jurisdictions dealing with like subjects or requiring similar skills.
9. The First-tier Tribunal Chambers are:
 - (a) Social Entitlement Chamber,
 - (b) Health, Education and Social Care Chamber,
 - (c) War Pensions and Armed Forces Compensation Chamber,
 - (d) General Regulatory Chamber,
 - (e) Immigration and Asylum Chamber,
 - (f) Tax Chamber, and
 - (g) Property Chamber

10. The 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.
11. The Upper Tribunal (Immigration and Asylum Chamber) deals with appeals against decisions made by the First-tier Tribunal (IAC) and with judicial reviews of certain decisions made by the Home Office relating to immigration, asylum and human rights claims.

The TPC's approach to drafting rules

12. The TPC makes rules with a view to securing the objectives set out by the TCE Act. These are 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.

Consultation

13. As noted above, the TPC is interested to receive your views on changes arising from the 2016 Act, in particular in relation to the proposals laid out below.
14. When responding, please keep in mind that the tribunal rules ("the Rules") should be simple and easy to follow. They should not impose unnecessary requirements or unnecessarily repeat requirements that are contained elsewhere. The TPC must secure the objectives set out in section 22(4) of the TCE Act and aims to do so in a consistent manner across all jurisdictions. Where your views are based upon experience of the Rules in practice, the TPC would be assisted by reference to relevant evidence.

Confidentiality and data protection

15. In general, the TPC regards consultation responses as public documents. They may be published by the TPC and referred to in its Reply to the Consultation.
16. If you would prefer your response to be kept confidential, you should be aware that information you provide, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes. These are primarily the Freedom of Information Act 2000 and the Data Protection Act 1998.
17. In view of this, it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information, we will take full account of your explanation but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the TPC.

Changes to nomenclature

18. The existing systems of bail recognizances and, in Scotland, bail bonds, will be replaced with a UK wide system of financial conditions. The TPC therefore intends to harmonise the language used in the Rules with the 2016 Act.
19. In particular:
- References to 'recognizances' in Rules 37, 38, 41, 42, 43 will be replaced with 'financial conditions'.
 - Rule 44, which deals with changes to the existing Rules required by the different system currently operating in Scotland, will be removed.
20. The TPC welcomes views on these points and any other changes to the Rules' nomenclature that may be desirable to achieve consistency with the 2016 Act.

Notice that the Secretary of State may vary bail conditions

21. Schedule 10, paragraph 6 of the 2016 Act allows the Tribunal to grant bail on the basis that it may later be varied by the Secretary of State:

“(1) Subject to this paragraph and to paragraphs 7 and 8, where a person is on immigration bail—

- (a) any of the conditions to which it is subject may be amended or removed, or*
- (b) one or more new conditions of the kind mentioned in paragraph 2(1) or (4) may be imposed on the person.*

(2) The power in sub-paragraph (1) is exercisable by the person who granted the immigration bail, subject to sub-paragraphs (3) and (4).

(3) The Secretary of State may exercise the power in sub-paragraph (1) in relation to a person to whom immigration bail was granted by the First-tier Tribunal if the Tribunal so directs.

(4) If the First-tier Tribunal gives a direction under sub-paragraph (3), the Tribunal may not exercise the power in sub-paragraph (1) in relation to the person.

(5) The First-tier Tribunal may not exercise the power in sub-paragraph (1)(a) so as to amend an electronic monitoring condition.

(6) If the Secretary of State or the First-tier Tribunal exercises, or refuses to exercise, the power in sub-paragraph (1), the Secretary of State or the Tribunal must give notice to the person who is on immigration bail.

(7) Where the First-tier Tribunal is required under sub-paragraph (6) to give notice to a person, it must also give notice to the Secretary of State.”

22. The TPC's understanding of how this is expected to work in practice is that the Tribunal will make an initial decision on bail, but may direct that the Secretary of State may exercise the power to vary the conditions. This will permit greater administrative flexibility in managing those on bail, without requiring applicants to return to the Tribunal to deal with issues such as changes of address.
23. Nonetheless, a decision to give a direction under paragraph 6(3) that the Secretary of State may exercise bail powers will have implications for the parties. In particular, once that direction is given, the Tribunal will no longer have the power to vary the bail conditions.

24. Furthermore, such a direction will affect the rights of third-parties, specifically those who agree to provide a financial condition in relation to bail (see paragraph 5 of Schedule 10). Where no direction is made, decisions in relation to such conditions (such as whether it should be paid where an applicant has failed to comply with the bail conditions) will be for the Tribunal. Where a direction is made, they will be for the Secretary of State.
25. The TPC is therefore considering whether there should be provision in the Rules to govern the procedure used when making the decision as to whether to make a direction under paragraph 6(3). In particular rules could ensure that both parties and third parties are properly informed of the implications of such a direction and will have the opportunity to make representations.
26. The TPC welcomes stakeholders' views on whether there should be such provisions and, if so, what they should be.

Grants of bail where a person is subject to removal directions

27. Where there are directions to remove a detained person within 14 days, he or she cannot be released on bail without the consent of the Secretary of State. This is currently provided for by Schedule 2, paragraph 22 of the Immigration Act 1971 (inserted by the Immigration Act 2014). Paragraph 22(4):

“A person must not be released on bail in accordance with this paragraph without the consent of the Secretary of State if—

- (a) directions for the removal of the person from the United Kingdom are for the time being in force, and*
- (b) the directions require the person to be removed from the United Kingdom within the period of 14 days starting with the date of the decision on whether the person should be released on bail.”*

28. These provisions are reflected in Rule 41(5) and (6):

“(5) Paragraph (6) applies where the Tribunal determines that directions for the removal of the bail party from the United Kingdom are for the time being in force and the directions require the bail party to be removed from the United Kingdom within 14 days of the date of the decision to release the bail party on bail or under paragraph (4).

(6) The notice provided under paragraph (1) must state—

- (a) the determination of the Tribunal under paragraph (5);*
- (b) whether the Secretary of State has consented to the release of the bail party;*
- (c) where the Secretary of State has not consented to that release, that the bail party must therefore not be released on bail.”*

29. In practice this means that where there are relevant removal directions, the Tribunal will make a decision as to whether it should grant bail. The Secretary of State then decides whether to consent to release. There is therefore a distinction drawn in the Rules between bail being granted, and release on bail. The Tribunal makes a decision on whether bail should be granted, while the Secretary of State decides whether that grant should lead to a release.

30. The existing provisions in the Immigration Act 1971, will be replaced by those in the 2016 Act, Schedule 10, paragraph 3(4). This provides that.

“A person must not be granted immigration bail by the First-tier Tribunal without the consent of the Secretary of State if—

- (a) directions for the removal of the person from the United Kingdom are for the time being in force, and*

(b) the directions require the person to be removed from the United Kingdom within the period of 14 days beginning with the date of the decision on whether the person should be granted immigration bail.”

31. The TPC’s understanding is that this change in wording was not intended to produce any substantive change in the law or in the way the tribunals and the Secretary of State approach these cases. However the TPC is aware of concerns that the new provisions represents greater interference with judicial decision making.
32. In so far as the legislative change might give rise to questions of substantive law, these are not matters for the TPC — which is responsible only for the Rules.
33. The TPC has considered whether a change to Rule 41 might be appropriate to reflect the changed legislation. The TPC has reached the preliminary view that a change is not desirable because the effect will be the same however the rule is drafted. We are not aware of any problems caused by the current Rule and the TPC believes that the Rules can operate in the same manner under the new legislation.
34. However the TPC welcomes any comment on the Rules, in light of the new legislation.

References to the Tribunal

35. Under the 2016 Act, Schedule 10, paragraph 11, the Secretary of State must, subject to certain exceptions, make a reference to the First-tier Tribunal where a person has been subject to immigration detention for more than four months (and periodically re-referred thereafter). The Tribunal will then consider whether the detained individual should be granted bail.

“(1) Subject as follows, the Secretary of State must arrange a reference to the First-tier Tribunal for the Tribunal to decide whether to grant bail to a person if—

- (a) the person is being detained under a provision mentioned in paragraph 1(1)(a) or (c), and*
- (b) the period of four months beginning with the relevant date has elapsed.*

(2) In sub-paragraph (1)(b) “the relevant date” means—

- (a) the date on which the person’s detention began, or*
- (b) if a relevant event has occurred in relation to the person since that date, the last date on which such an event has occurred in relation to the person.*

(3) The following are relevant events in relation to a person for the purposes of sub-paragraph (2)(b)—

- (a) consideration by the First-tier Tribunal of whether to grant immigration bail to the person;*
- (b) withdrawal by the person of an application for immigration bail treated as made by the person as the result of a reference under this paragraph;*
- (c) withdrawal by the person of a notice given under sub-paragraph (6)(b).*

(4) The reference in sub-paragraph (3)(a) to consideration of whether to grant immigration bail to a person—

- (a) includes such consideration regardless of whether there is a hearing or the First-tier Tribunal makes a determination in the case in question;*
- (b) includes the dismissal of an application by virtue of provision made under paragraph 12(2).*

(5) The reference in sub-paragraph (3)(a) to consideration of whether to grant immigration bail to a person does not include such consideration in a case where—

*(a) the person has made an application for bail, other than one treated as made by the person as the result of a reference under this paragraph, and
(b) the First-tier Tribunal is prevented from granting bail to the person by paragraph 3(4) (requirement for Secretary of State's consent to bail).*

*(6) The duty in sub-paragraph (1) to arrange a reference does not apply if—
(a) section 3(2) of the Special Immigration Appeals Commission Act 1997 (persons detained in interests of national security etc) applies to the person, or
(b) the person has given to the Secretary of State, and has not withdrawn, written notice that the person does not wish the person's case to be referred to the First-tier Tribunal under this paragraph.*

(7) A reference to the First-tier Tribunal under this paragraph in relation to a person is to be treated for all purposes as an application by that person for the grant of bail under paragraph 1(3)."

36. The existing Rules make no detailed provision for such references, because they have not previously been a feature of the system.
37. The TPC welcomes views on whether there is a need for any change to the Rules because once they are received at the Tribunal they are to be dealt with as if they were bail applications; for which the Rules already provide. In particular, the TPC intends to consider whether the Rules should include a requirement that the Secretary of State provide information to the Tribunal when the Secretary of State arranges a relevant reference and, if so, what information should be required.

Other Changes

38. Although the TPC has highlighted the above areas as potentially calling for changes to the Rules, we also welcome responses on any other changes made desirable by the 2016 Act.
39. The TPC also intends to conduct a more wide ranging review of the rules for the First-tier Tribunal (Immigration and Asylum Chamber) (the 'IAC') and the Upper Tribunal (Immigration and Asylum Chamber) to examine how the rules are operating in practice and whether they would benefit from changes. This will be announced in due course.

How to respond

40. We would welcome responses on the questionnaire provided. Please submit your response by **23 March 2017** to:

The Secretary, Tribunal Procedure Committee
Post point 3.37, 102 Petty France, London SW1H 9AJ
Email: tpcsecretariat@justice.gsi.gov.uk