EXPLANATORY MEMORANDUM TO

THE TRIBUNAL PROCEDURE (AMENDMENT NO. 2) RULES 2023

2023 No. 1280

1. Introduction

1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of His Majesty.

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 This instrument ("the Amendment Rules") make amendments to the Tribunal Procedure (First-tier Tribunal) (War Pensions and Armed Forces Compensation Chamber) Rules 2008 (S.I. 2008/2684) ("WPAFCC Rules") to clarify the period within which a party in receipt of a copy of an application for directions may make representations to the Tribunal, and to correct a missed consequential amendment to rule 21 (notice of appeal), following amendments made to this rule by the Tribunal Procedure (Amendment) Rules 2023 (S.I. 2023/327) ("2023 Amendment Rules"), to allow appeals to this chamber to be lodged directly with the Tribunal.

2.2 The Amendment Rules also make amendments to the Tribunal Procedure (Upper Tribunal) Rules 2008 (S.I. 2008/2698) ("Upper Tribunal Rules") to omit rule 22A (special procedure for providing notice of a refusal of permission to appeal in an asylum case) to restore the requirement under rule 22 of those rules for the Upper Tribunal to serve a copy of its decision to refuse permission to appeal in an asylum case on the appellant. The Amendment Rules also makes consequential amendments to rules 22(1) (decision in relation to permission to appeal) and 40(2) (decisions) of the Upper Tribunal Rules to omit references to rule 22A in those rules.

2.3 The Amendment Rules makes changes to the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (S.I. 2013/1169) ("Property Chamber Rules") to provide that the Tribunal's power to make an order in respect of costs where a person has acted unreasonably in bringing, defending or conducting proceedings does not apply to proceedings brought under Part 1 of the Landlord and Tenant Act 1954 (security of tenure for residential tenants), Part 4 of the Rent Act 1977 (registration of rents under regulated tenancies) and paragraph 6(2) and 20(2) of Schedule 10 to the Local Government and Housing Act 1989 (security of tenure on ending of long residential tenancies). These exemptions are in addition to Part 5 (rents under restricted contracts) and Part 1 of the Housing Act 1988 (assured tenancies, shorthold and non- shorthold) where this restriction already applies.

2.4 The Amendment Rules makes changes the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (S.I. 2014/2604) ("Immigration and Asylum Chamber Rules") to clarify the time limits that apply to an appeal against a decision of the Home Office in relation to the EU Settlement Scheme that is also subject to an administrative review, where a decision on administrative review has been made, or the application for an administrative review has been withdrawn prior to a decision on administrative review having been determined.

2.5 The Amendment Rules also make amendments to the rule 4(4)(b) of the 2023 Amendment Rules, which amended rule 22(2) (lapse of cases) of the WPAFCC Rules to replace "decision maker" with "Tribunal", to correct a minor drafting error.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 The Ministry of Justice has taken action to correct a drafting error as identified by the Joint Committee on Statutory Instruments (Thirty-Seventh Report of Session 2022-23) in respect to rule 4(2) and rule 4(4)(b) of the Tribunal Procedure (Amendment) Rules 2023 (S.I. 2023/327). A copy of the report can be found here:[1]

3.2 The Ministry of Justice in accordance with paragraph 4.7.6 of the Statutory Instrument Practice Guidance (5th edition) confirms that the Amendment Rules will be issued under the free issue procedure.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is the United Kingdom.

4.2 The territorial application of this instrument is the United Kingdom.

5. European Convention on Human Rights

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

6. Legislative Context

6.1 Part 1 of the Tribunals, Courts and Enforcement Act 2007 ("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 ("FtT") and the Upper Tribunal ("UT"), 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 and education. In addition to statutory appeals, the UT also deals with certain kinds of judicial reviews.

6.2 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.

7. Policy background

What is being done and why?

Amendments to the WPAFCC Rules and the 2023 Amendment Rules

7.1 The War Pensions and Armed Forces Compensation Chamber of the First-tier Tribunal ("WPAFCC") is responsible for handling appeals by current and former servicemen or women in England and Wales against decisions by Veterans UK in relation to pensions, compensation, allowances etc. Prior to the 6 April 2023, appeals against decisions taken by Veterans UK were made to them and then sent to the

[1] Thirty-Seventh Report of Session 2022-23 (parliament.uk)
https://committees.parliament.uk/publications/40016/documents/195342/default/

WPAFCC. The concern from stakeholders was that this gave the appearance that the WPAFCC is not wholly independent and therefore contrary to the principles of natural justice.

7.2 Following a public consultation[2] by the TPC the 2023 Amendment Rules, that came into force on 6 April 2023, made changes to the WPAFCC Rules to allow appeals against decisions by Veterans UK to be lodged directly with the WPAFCC. Other minor and consequential amendments were made by the 2023 Amendment Rules to the WPAFCC Rules, including an amendment to rule 6 to require a party making an application for a direction to send a copy of the application to the other parties, and to notify them of the time within which they may make representations to the WPAFCC.

7.3 The Amendment Rules amends rule 6(3A) (as inserted by the 2023 Amendment Rules) of the WPAFCC Rules, to clarify the period within which a party in receipt of a copy of an application for directions may make representations to the WPAFCC and corrects a missed consequential amendment to rule 21(2) of the WPAFCC Rules.

7.4 In addition, the Amendment Rules corrects a drafting error contained in rule 4(4)(b) of the 2023 Amendment Rules, which amended rule 22(2) of the WPAFCC Rules. Rule 22(2) of the WPAFCC Rules contains two references to decision maker and rule 6 of the Amendment Rules amends rule 4(4)(b) of the 2023 Amendment Rules to specify that only the second reference to "decision maker" is to be replaced with "Tribunal".

Amendments to the Upper Tribunal Rules

7.5 Rule 22A of the Upper Tribunal Rules (as inserted by rule 10 of the Tribunal Procedure (Amendment No. 3) Rules 2014 (S.I. 2014/218)) requires the UT in an asylum case to serve its refusal of permission to appeal on the Secretary of State where the appellant is not the Secretary of State.

7.6 This practice predates the coming into force of the 2007 Act and 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.

7.7 The TPC received a request from the UT asking the TPC to consider removing rule 22A. The TPC in its consultation proposing the removal of rule 22A remarked that its provisional view was that this rule no longer serves a useful purpose, and its only original proponent (the Home Office) no longer seeks its retention and provides full support for removal. The TPC noted that the policy justifications which were said to support it no longer apply as 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.

7.8 At the same time, the TPC noted that operating this system creates a burden on both the UT and the Home Office. In particular, the administrative work on the part of the

[2] TPC consultation: Possible amendments to the (War Pensions & Armed Forces Compensation) Rules 2008 to accommodate the introduction of Direct lodgement https://www.gov.uk/government/consultations/possible-amendments-to-the-tribunal-procedure-first-tier-tribunal-war-pensions-and-armed-forces-compensation-chamber-rules-2008-to-accommodate-the Consultation period: 30 June to 22 September 2022 https://www.gov.uk/government/consultations/possible-amendments-to-the-tribunal-procedure-first-tier-tribunal-war-pensions-and-armed-forces-compensation-chamber-rules-2008-to-accommodate-the

UT checking whether the Home Office has received the notice and that it has been sent to the appellant is significant.

7.9 The Amendment Rules remove rule 22A from the Upper Tribunal Rules and as a consequence the UT will by virtue of rule 22 of the Upper Tribunal Rules be required to serve notice of a refusal of permission to appeal in an asylum case on the appellant, rather than the Secretary of State, as is the position in all other cases.

Amendments to Property Chamber Rules

7.10 In July 2022 the TPC reviewed the Tribunal's power under rule 13 of the Property Chamber Rules to award costs. At the time rule 13(1)(b) adopted an "opt in" approach to unreasonable costs orders, where the Tribunal's power to make an award in respect of costs where a person had acted unreasonably in bringing, defending, or conducting proceedings, applied only in proceedings as expressly provided for by rule 13(1)(b). The TPC recognised that this construction of rule 13 was cumbersome, as it required rule 13 to be amended each time the Tribunal acquired a new jurisdiction where the power to make unreasonable costs orders is to apply.

7.11 The TPC concluded that it was appropriate for rule 13 to be restructured to allow for a 'default costs' rule. This would be consistent with the overall policy for costs provisions in Tribunals and would make the Property Chamber Rules consistent with most other chambers. The TPC noted that in making this change it would also be necessary to expressly exempt proceedings in rent cases from the 'default costs' provisions. This was in order to preserve the long- standing position that the Tribunal does not make unreasonable costs orders in appeals and applications in rent cases.

7.12 Amendments to rule 13 were made by rule 4(3) of the Tribunal Procedure (Amendment No.2) Rules 2022 (S.I. 2022/312) which came into force on 1st November 2022. The amended rule 13 provides the Tribunal with the power to award unreasonable costs orders in proceedings except for proceedings brought under Part 5 of the Rent Act 1977 and Part 1 of the Housing Act 1988. As drafted rule 13 inadvertently removes the exception which applied to fair rent proceedings brought under Part 4 of the Rent Act 1977 and market rent proceedings brought under Schedule 10 to the Local Government and Housing Act 1989 (as well as analogous proceedings under Part 1 of the Landlord and Tenant Act 1954). To remedy this and reinstate the previous position the Amendment Rules amend rule 13(1ZA) to expressly exempt proceedings under Part 1 of the Landlord and Tenant Act 1954, Part 4 of the Rent Act 1977 and paragraph 6(2) and 10(2) of Schedule 10 to the Local Government and Housing Act 1989 from the Tribunal's power to make unreasonable costs orders.

Amendments to the Immigration and Asylum Chamber Rules

7.13 The European Union (EU) Withdrawal Agreement made provision for certain EU citizens and their family members to continue to enjoy rights to reside in the United Kingdom (UK) following the conclusion of the "implementation period" following the United Kingdom's withdrawal from the European Union, which ended on 31 December 2020. In accordance with the Withdrawal Agreement, the UK established the EU Settlement Scheme ("the 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 the retain residences rights.

7.14 If an application is refused, the applicant may appeal that decision to the Immigration and Asylum Chamber of the FtT ("FtT (IAC)"). An applicant may also under the EUSS, apply for administrative review and in practice, applicants were encouraged to seek an administrative review before making an appeal.

7.15 To facilitate appeals, the Secretary of State made the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ("2020 Regulations") which made amendments to the Immigration and Asylum Chamber Rules to insert rule 19(3A) to (3E). The effect of these rules is that the deadline to appeal is either (a) 14 days from the date the applicant is sent the notice of the original decision on the application (28 days if the applicant is outside the UK) or (b) 14 days from the date the applicant is sent notice of the decision on administrative review (28 days if the applicant is outside the UK).

7.16 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.

7.17 The TPC understands that the Home Office's working understanding of the current rules is that, if an applicant has applied for administrative review having not brought a parallel appeal under rule 19(3B) of the Immigration and Asylum Chamber Rules within the initial 14 or 28 day period, the applicant's right of appeal cannot be exercised until the decision by the Home Office on administrative review has concluded. In practice, that construction of the rules has led to a significant delay in applicants securing judicial redress due to a Home Office backlog in determining administrative review applications, which are taking between 12 to 18 months on average.

7.18 To address this issue the Home Office has asked the TPC to consider amending rule 19 to enable an EUSS applicant who is outside the initial 14 or 28 day appeal period to withdraw their administrative review, and thus to appeal against the original EUSS decision.

7.19 A public consultation was undertaken and the TPC queried whether the premise of the Home Office's understanding of the operation of rule 19(3D) was correct. Following the TPC's consideration of the response to the public consultation, the TPC determined that it was clear that amendments made by the 2020 Regulations gave rise to ambiguity and it was necessary to address this issue. Consequently the Amendment Rules amend rule 19(3D) of the Immigration and Asylum Chamber Rules to clarify that the deadline to bring an appeal against an EUSS decision, that is also subject to an administrative review, is either (a) 14 days from the day that the decision on administrative review is sent to the applicant (28 days if the applicant is outside the UK), or (b) 14 days from the day that the applicant sends a notice of withdrawal of administrative review to the Home Office, where the applicant has not been sent a decision on administrative review by the Home Office (28 days if the applicant is outside the UK).

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 Informally consolidated versions of these rules will be updated onto the Justice website when the instruments come into force. They will be found here: [3]

10. Consultation outcome

Consultation on possible changes to the Immigration and Asylum Chamber Rules and the Upper Tribunal Rules

10.1 Possible amendments to the Immigration and Asylum Chamber Rules to provide clarity around when an appeal can be brought to the FtT where a person has an outstanding administrative review of an EU Settlement Scheme (EUSS) decision and changes to rule 22A of the Upper Tribunal Rules was the subject of a public consultation by the TPC. The consultation ran over the period 18 July 2023 to 29 August 2023. A copy of the consultation can be found here: [4]

10.2 The sole respondent to the consultation, ILPA, agreed with the proposal to remove rule 22A but disagreed with the need to amend rule 19. ILPA considered the TPC's alternative construction of rule 19 to be the better legal view but disagreed with the drafting amendment proposed by the TPC. Doing so in the manner proposed by the TPC would be a "regressive" change, for it would materially restrict the ability enjoyed by putative EUSS appellants to submit notices of appeal as enjoyed at present. ILPA also considered that the proposed change would render notices of appeal received before the Secretary of State's decision on, or the appellant's withdrawal of, the administrative review invalid. ILPA agreed with the TPC's concern that an appellant should not have to wait until the Home Office had accepted a notice of withdrawal of an administrative review before being able to submit a notice of appeal.

10.3 The TPC considered that having identified a potential ambiguity, it would be inappropriate to leave the matter unresolved. The TPC's view was that prospective appellants challenging an EUSS refusal decision should not be in a procedurally more advantageous situation than other appellants simply on account of having applied for administrative review. The TPC agreed with the underlying premise of ILPA's suggested alternative drafting, that is to clarify in the rules that there are only two options when appealing against an EUSS decision. However, the TPC were not persuaded that ILPA's proposed drafting would satisfactorily achieve this goal nor did it address the potential ambiguity identified in rule 19. The issues raised by the respondent and the TPC's response to the consultation can be found here: [5]

10.4 In accordance with paragraph 28(1)(a) of Schedule 5 to the 2007 Act, the TPC has consulted such persons as it considers appropriate which includes individually with all relevant government departments and stakeholders. This includes the Tribunal Chamber Presidents, senior judiciary, the Home Office and His Majesty's Courts and Tribunals Service.

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[3] https://www.gov.uk/search/all?organisations%5B%5D=tribunal-procedure-committee

[4] https://assets.publishing.service.gov.uk/media/64b125e6995900000d002a9e/tpc-iac-consultation-paper-july-2023.pdf

[5] https://assets.publishing.service.gov.uk/media/652fdd0892895c000ddcb9b7/euss-consultation-response.pdf

11. Guidance

11.1 His Majesty's Courts and Tribunals Service produces guidance for each Tribunal jurisdiction which is issued to parties at key stages of the appeals process and is available on the website at: [6]

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 There is no, or no significant, impact on the public sector.

12.3 An Impact Assessment has not been prepared for this instrument as its impact is expected to be minimal and well below the threshold of £5 million per annum at which an assessment must be prepared.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 The approach to monitoring of this legislation in respect to the impact of any changes to the Tribunal Procedure Rules is monitored by the TPC by way of feedback from the Tribunal and users.

15. Contact

15.1 Vijay Parkash at the Ministry of Justice Telephone: 0203 334 4471 or email: Vijay.Parkash@justice.gov.uk can be contacted with any queries regarding the instrument.

15.2 Cathryn Hannah, Deputy Director for Tribunals, Legal Support, Dispute Resolution and Fees Policy, at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.

15.3 Parliamentary Under-Secretary of State Lord Christopher Bellamy KC MP, at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.

[6] https://www.gov.uk/government/organisations/hm-courts-and-tribunals-service/about