EXPLANATORY MEMORANDUM TO

THE TRIBUNAL PROCEDURE (AMENDMENT) RULES 2025

2025 No. 561 (L. 3)

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.

2. Declaration

2.1 Lord Ponsonby of Shulbrede, Parliamentary Under-Secretary of State at the Ministry of Justice confirms that this Explanatory Memorandum meets the required standard.

2.2 Jenny Pickrell, Deputy Director for the Tribunals, Fees and Illegal Migration Directorate at the Ministry of Justice confirms that this Explanatory Memorandum meets the required standard.

3. Contact

3.1 Vijay Parkash at the Ministry of Justice (email: Vijay.Parkash@justice.gov.uk) can be contacted with any queries regarding the instrument.

Part One: Explanation, and context, of the Instrument

4. Overview of the Instrument

What does the legislation do?

4.1 This instrument makes amendments to the rules of procedure that apply to the First-tier Tribunal and to the Upper Tribunal ("the Tribunal Procedure Rules"), to expressly provide that the tribunal has the power to set aside a decision on its own initiative.

4.2 This instrument also amends rule 35(5) of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008[1] so that the limitation of consecutive paper reviews applies only to hospital-based patients, thereby restoring the right for community patients whose case has been referred to the Tribunal, to choose not to have a hearing of their reference, as was the case prior to December 2024.

Where does the legislation extend to, and apply?

4.3 The territorial extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales, Scotland and Northern Ireland.

4.4 The territorial application of the amendments made by this instrument (that is, where the instrument produces a practical effect) is the same as the application of the instruments to which the amendments relate.

[1] https://www.legislation.gov.uk/uksi/2008/2699/contents.

5. Policy Context

What is being done and why?

Amendments to the power to set-aside a decision

5.1 There are nine sets of Tribunal Procedure Rules. Presently, each set of Tribunal Procedure Rules includes a rule, drafted in substantially similar terms, giving the First-tier Tribunal and the Upper Tribunal ("the Tribunal") the power to set aside its own decision where there has been a procedural irregularity ("the set aside rule").

5.2 The set aside rule does not expressly specify whether the Tribunal has the discretion to exercise this power on its own initiative. It does however specify that a party may make an application for a decision of the Tribunal to be set aside, with different application time limits applying in different chambers. As a consequence, there appears to be an inconsistency in how the Tribunal has exercised the power to set aside under the set aside rule.

5.3 The case of *MA v Secretary of State for Work and Pensions [2020] UKUT 172 (AAC)*[2] brought into judicial focus whether the power to set aside a decision under rule 37 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 is only exercisable where an application has been made. The Upper Tribunal held that the power cannot be exercised by the First-tier Tribunal in the absence of an application. A subsequent Upper Tribunal decision (*KH (deceased) v Secretary of State for Work and Pensions [2021] UKUT 189 (AAC)*)[3] doubted the correctness of *MA* but followed it.

5.4 The Tribunal Procedure Committee ("the TPC") received a request from the Judicial Office with the support of the Senior President of Tribunals and the Chamber Presidents for an amendment to the set aside rule to expressly provide that the power to set aside can be exercised by the Tribunal of its own motion. The TPC launched a public consultation seeking views on whether it was desirable for the set aside rule to be amended in this manner ("the Consultation").

5.5 The Consultation ran from 15 May to 07 August 2024 and is available here[4].

The TPC's reply to the Consultation was published on 06 December 2024 and is available here[5].

5.6 Following the outcome of the Consultation, the TPC agreed to make the amendments as proposed in the consultation, with the addition of the requirement for notice to be given where a decision has been set-aside under this rule (see paragraphs 7.8 and 7.9). This instrument amends the power to set-aside a decision in the following instruments:

- Rule 37 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008[6];
- Rule 35 of the Tribunal Procedure (First-tier Tribunal) (War Pensions and Armed Forces Compensation Chamber) Rules 2008[7];
- Rule 43 of the Tribunal Procedure (Upper Tribunal) Rules 2008[8];

[2] https://assets.publishing.service.gov.uk/media/5f1ff836e90e074561b159fb/CPIP_2140_2019.pdf.
[3] https://assets.publishing.service.gov.uk/media/6128f9278fa8f53dccf1aa72/CI_0365_2020-00.pdf.
[4] https://assets.publishing.service.gov.uk/media/6642326c993111924d9d3369/tpr-set-aside-consultation.pdf.
[5] https://www.gov.uk/government/consultations/possible-amendments-to-the-power-to-set-aside-a-decision/outcome/possible-amendments-to-the-power-to-set-aside-a-decision-consultation-response.
[6] https://www.legislation.gov.uk/uksi/2008/2685/contents.
[7] https://www.legislation.gov.uk/uksi/2008/2686/contents.
[8] https://www.legislation.gov.uk/uksi/2008/2698/contents.

- Rule 45 of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008[9];
- Rule 38 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009[10];
- Rule 41 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009[11];
- Rule 54 of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010[12];
- Rule 51 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013[13]; and
- Rule 32 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014[14].

Amendments to the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) 2008 Rules ("the HESC Rules")

5.7 The Tribunal Procedure (Amendment No. 2) Rules 2024 ("2024 Amendment No. 2 Rules") amended rule 35 of the HESC Rules to allow the Tribunal to determine references without a hearing, following the outcome of two consultations.

5.8 The first consultation on amendments to rule 35 of the HESC Rules was published on 18 July 2023 and can be found here[15].

The second consultation (and response to the 18 of July 2023 consultation) on amendments to rule 35 was published on 19 December 2023 and can be found here[16].

The TPC's response to the second consultation was published on 01 August 2024 and can be found here[17].

5.9 The TPC determined that it was appropriate for rule 35(3) of the HESC Rules to be amended to allow the Tribunal to determine references made under section 68, 71(2) or 75(1) of the Mental Health Act 1983 ("the MHA"), without a hearing where the patient is 18 or over, has capacity and has stated in writing (or the patient's representative has stated in writing) that they do not (or the patient does not) wish to attend or be represented at a hearing of their reference. The amendment also inserted a new paragraph (5) to rule 35 to provide that the exception in paragraph (3) (as amended by the 2024 Amendment No. 2 Rules) does not apply to those patients whose detention under the MHA has not previously been considered by the Tribunal or if the Tribunal last considered their case without a hearing.

5.10 Following commencement of the 2024 Amendment No. 2 Rules on 26 December 2024, Judge Sutherland Williams, Chamber President of the Health, Education and Social Care ("the HESC Chamber") and Judge Johnston, Deputy Chamber President

[9] https://www.legislation.gov.uk/uksi/2008/2699/contents.
[10] https://www.legislation.gov.uk/uksi/2009/273/contents.
[11] https://www.legislation.gov.uk/uksi/2009/1976/contents.
[12] https://www.legislation.gov.uk/uksi/2010/2600/contents.
[13] https://www.legislation.gov.uk/uksi/2013/1169/contents.
[14] https://www.legislation.gov.uk/uksi/2014/2604/contents.
[15] https://assets.publishing.service.gov.uk/media/64b12c04995900000d002aa8/tpc-mental-health-consultation.pdf
[16] https://assets.publishing.service.gov.uk/media/658025cd83ba38000de1b6e2/mht-consultation-hybrid-response-consultation.pdf
[17] https://assets.publishing.service.gov.uk/media/66aa3e46fc8e12ac3edb0888/mht-rule-25-consultation-response.pdf

of the HESC Chamber (responsible for the mental health jurisdiction) made representations to the TPC asserting that the amendment to rule 35 had altered the Tribunal's approach to cases involving community patients, by limiting the number of consecutive paper reviews for such patients, where previously there was no such limitation. The judges drew the TPC's attention to its two previous consultations (see para 5.8) and observed that those consultations did not propose any change or limits to the right of community patients to choose to have a paper review. The judges requested the TPC to restore the right of community patients to choose to have their reference heard on the papers without limitation, as was the case prior to the amendments made by the 2024 Amendment No. 2 Rules.

5.11 At their meeting on 06 February 2025, the TPC re-examined the previous consultation documents, the final reply document published in August 2024, and past TPC meetings minutes dealing with this issue. The TPC also heard representations from Judge Johnston (supported by Judge Keates) who provided anecdotal evidence that the change to the right of community patients to choose to have a paper hearing of their reference would increase the workload of the Tribunal and negatively impact community patients in exercising their right to request a hearing on the papers.

5.12 The TPC concluded that the previous consultations were concerned with extending the right of hospital-based patients to choose to have a reference of their case dealt with on the papers. Rule 35(5) was inserted in order to address concerns raised by consultees in respect of the risk of inappropriate detentions and the potential for unlimited paper reviews for such patients. In contrast, community patients have been able to elect for their reference to be dealt with on the papers since 2012[18], and prior to the 2024 Amendment No. 2 Rules, this was without the limitations imposed by rule 35(5). The TPC noted that it had not received a request for a change to this right, nor was it aware of any challenges or complaints against consecutive paper reviews being undertaken for community patients. Further, the TPC had not consulted on a rule change that affected community patients. In those circumstances, the TPC determined that rule 35(5) which limits consecutive paper reviews should be amended at the earliest opportunity so as to apply to hospital-based patients only. This amendment would restore the right of community patients to choose not to have a hearing of their reference, in all circumstances, as was the case prior to amendments made by the 2024 Amendment No. 2 Rules.

6. Legislative and Legal Context

How has the law changed?

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 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, and education. In addition to statutory appeals, the Upper Tribunal also deals with certain kinds of judicial reviews.

6.2 Section 22 of, and Schedule 5 to, the 2007 Act establishes the TPC and provides the TPC with the function for making Tribunal Procedure Rules. By virtue of the Judicial, Review and Courts Act 2022 ("the JRCA"), the TPC's rule-making responsibility now

[18] https://www.legislation.gov.uk/uksi/2012/500/rule/3/made

extends to the Employment Tribunals (and the Employment Appeal Tribunal once the relevant provisions of the JRCA are in force).

6.3 This instrument makes the amendments to the various sets of Tribunal Procedure Rules as provided in paragraphs 5.1 to 5.12, and for the reasons set out in those paragraphs. In accordance with paragraph 28(3) of Schedule 5 to the 2007 Act, the Lord Chancellor has allowed the amendments to the Tribunal Procedure Rules made by this instrument.

Why was this approach taken to change the law?

6.4 This is the only possible approach to make the necessary changes.

7. Consultations

Summary of consultation outcomes

Consultation on possible amendments to the power to set aside decisions in Tribunal Procedure Rules ("the Consultation")

7.1 Following the request from the Judicial Office on possible amendments to the power to set-aside a decision in the Tribunal Procedure Rules, the TPC launched the Consultation seeking views on whether it was desirable for the set aside rule to be amended to expressly allow the Tribunal to set aside decisions of its own initiative. The Consultation ran from 15 May to 07 August 2024 and is available here[19].

The reply to the Consultation was published on 06 December 2024 and is available here[20].

7.2 Stakeholder views were sought on the following 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?

[19] https://assets.publishing.service.gov.uk/media/6642326c993111924d9d3369/tpr-set-aside-consultation.pdf
[20] https://www.gov.uk/government/consultations/possible-amendments-to-the-power-to-set-aside-a-decision/outcome/possible-amendments-to-the-power-to-set-aside-a-decision-consultation-response

7.3 There were four respondents who replied to the Consultation.

Question one

7.4 Three respondents answered this question. They were unanimously in favour of making the amendment proposed in the consultation. In broad terms the consultees who responded agreed that it would be practically useful for tribunals to have the power, and that it was often the tribunals who identified the need for a decision to be set aside.

7.5 Some respondents expressed concern in answer to this question about tribunals exercising this power without notifying parties in advance that they proposed to do so. The TPC address those concerns in their response to the other questions as more than one respondent raised the issue but in answer to a separate question. Having considered the three received responses, the TPC determined to proceed to amend the relevant rules in accordance with the proposal as consulted.

Question two

7.6 All respondents answered this question. Two respondents doubted that there were any circumstances where, in practice, any amendment to the rules would cause any fresh decisions to be made on old cases. One respondent expressed concern that the amendment could result in the tribunal seeing it as their role to set aside decisions more actively. Another respondent suggested that the amendment to the rules could be mitigated by setting out in the Explanatory Memorandum that the amendment was not intended to introduce a new power that did not exist previously. No respondent considered that transitional provisions were required.

7.7 In light of the comments the TPC determined that it was not necessary to include any transitional provisions when introducing the amendments and remained of the view that it was not for the TPC but for a court or tribunal to determine the meaning and effect of any new rule.

Question three

7.8 This question was aimed at inviting comments on whether after a decision was made by a Tribunal to set aside a decision, it should be required to give notice of the decision to set aside. Only one respondent addressed the question in that way and was strongly of the view that parties should be given notice of a decision to set aside made by a tribunal of its own initiative.

7.9 The TPC agreed that it cannot currently envisage any circumstances where it would be in the interests of justice to withhold notification of a decision to set aside.

Question four

7.10 The only reply to this question was a respondent stating that its response was limited to the Social Entitlement Chamber of the First-tier Tribunal and the Administrative Appeals Chamber of the Upper Tribunal.

Amendment to Rule 35(3) of the HESC Rules

7.11 The TPC did not conduct a public consultation in respect to the amendment to narrow the application of rule 35(5) of the HESC Rules to hospital-based patients only (see paragraphs 5.7 to 5.12 for further details). Given the circumstances and the nature of the changes proposed and in accordance with paragraph 28(1)(a) of Schedule 5 to the 2007 Act, the TPC consulted such persons as it considered appropriate. For these changes, this included consultation with the President and the Deputy President of the

HESC Chamber and the Office of the Senior President of Tribunals, who agreed with the changes made by this instrument.

8. Applicable Guidance

8.1 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 here[21].

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

9.1 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.

Impact on businesses, charities and voluntary bodies

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

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

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

10.1 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, His Majesty's Courts and Tribunals Service and users.

10.2 This instrument does not include a statutory review clause. The legislation does not apply to activities that are undertaken by small businesses.

Part Three: Statements and Matters of Particular Interest to Parliament

11. Matters of special interest to Parliament

11.1 None.

12. European Convention on Human Rights

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

13. The Relevant European Union Acts

13.1 This instrument is not made under the European Union (Withdrawal) Act 2018, the European Union (Future Relationship) Act 2020 or the Retained EU Law (Revocation and Reform) Act 2023 ("relevant European Union Acts").

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