

# **The Tribunals (Scotland) Act 2014: Consultation on 2 sets of Draft Regulations which make provision for:**

- 1) a time limit within which to seek permission to appeal a decision of the Scottish Tribunals and Rules of Procedure for the Upper Tribunal; and**
- 2) Offences in the Scottish Tribunals.**

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## **PART 1: CONSULTATION ON DRAFT REGULATIONS PRESCRIBING A TIME LIMIT FOR SEEKING PERMISSION TO APPEAL AND UPPER TRIBUNAL RULES OF PROCEDURE**

1. Part 1 of this consultation paper seeks your views on draft regulations that prescribe a time limit within which permission to appeal a decision of the Scottish Tribunals must be sought. They also contain proposed rules of procedure for the Upper Tribunal for Scotland.

### **Background**

2. The Tribunals (Scotland) Act 2014 (the “2014 Act”) creates a new, simplified statutory framework for tribunals in Scotland, bringing existing tribunal jurisdictions together and providing an organised structure for new jurisdictions. The 2014 Act creates two new tribunals, the First-tier Tribunal for Scotland and the Upper Tribunal for Scotland, known collectively as the “Scottish Tribunals”.
3. Section 55(1) of the 2014 Act gives the Scottish Ministers the power to specify, in regulations, a time limit within which the permission required by section 46(3) of the 2014 Act (i.e. to appeal a decision of the First-tier Tribunal for Scotland) or section 48(3) of the 2014 Act (i.e. to appeal a decision of the Upper Tribunal for Scotland), must be sought.
4. Sections 68 to 73 of the 2014 Act makes provision for the making of rules to regulate the practice and procedures of both the First-tier and Upper Tribunals. Schedule 9, paragraph 4(2) of the 2014 Act, allows rules to be made by the Scottish Ministers by regulations, until such time as responsibility for rule making passes to the Court of Session on the basis of drafts prepared by the Scottish Civil Justice Council (as per Schedule 9, paragraph 13 of the 2014 Act).

### **Time limits for seeking permission to appeal**

5. The draft regulations attached at **Annex A** contain provisions which specify a 30 day time limit for seeking permission to appeal a decision of either the First-tier Tribunal or Upper Tribunal for Scotland. This timescale is intended to strike an appropriate balance between access to justice (giving parties adequate time to consider the merits or otherwise of appealing and to prepare etc) and certainty for parties. The draft regulations also include the ability to extend this time limit with good reason. This flexibility is intended to ensure fairness.

## Draft rules

6. Tribunals will transfer-in to the First-tier Tribunal with their existing rules of procedure suitably modified so as to operate within the new structure. The Upper Tribunal for Scotland require rules of procedure to be able to function and therefore new rules have been drafted. The proposed Upper Tribunal rules can be found in the Schedule of the draft regulations attached at **Annex A**.
7. The draft rules seek to strike an appropriate balance between conferring on the Upper Tribunal broad powers to regulate its own procedure and providing a reasonable level of prescription in key areas. We would welcome your views on their proposed terms. In particular, we highlight the following:
  - Rules 3- 6 set out the process for appealing. In essence, an appellant must lodge with the Upper Tribunal a notice of appeal which sets out details of the decision being challenged; whether permission to appeal has been granted by the First-tier Tribunal (if not, the Upper Tribunal would need to consider whether to grant permission ) and the alleged error of law in the decision. The Upper Tribunal would copy this information to each respondent and any interested party. The respondent could then make representations to the Upper Tribunal on the notice of appeal (copied to the appellant and any interested party). The appellant would then be able to make representations to the Upper Tribunal on the respondent's representations. Is this process sufficiently clear; does it afford parties adequate notice as regards the scope of the appeal and time to comment?
  - Rule 11 (Dismissal of a party's case) – This is an unusual and potentially severe power. Is it appropriate in a tribunal context where lay representatives may be being used?
  - Rule 13 (expenses) – makes provision for the recovery of wasted expenses.
  - Rule 34 (Judicial review) – Petitions for judicial review of a category specified in an act of sederunt may be remitted to the Upper Tribunal in certain circumstances. Our understanding is that no such act of sederunt is proposed to be made in early course and so this rule may not require to be included in the draft regulations but it would nonetheless be helpful to receive feedback on its proposed terms.

## **Questions on draft regulations prescribing a time limit for seeking permission to appeal and Upper Tribunal rules of procedure**

Q1: Is the proposed time limit of 30 days appropriate for a party to submit an application for permission to appeal a decision of the First-tier Tribunal or Upper Tribunal?

Q2: Do you have any comments on the draft rules of procedure?

Q3: In particular, are there any additional rules of procedure that you would wish to see prescribed?

Q4: In particular, do you consider that any of the proposed rules of procedure are not relevant to the Upper Tribunal?

**Do you have any other comments on the draft regulations?**

## **PART 2: DRAFT REGULATIONS CREATING OFFENCES IN RELATION TO PROCEEDINGS BEFORE THE SCOTTISH TRIBUNALS**

1. Your views are sought on draft regulations that create generic offences in relation to proceedings within the Scottish Tribunals created by the Tribunals (Scotland) Act 2014 (the “2014 Act”).

### **Background**

2. Section 67 of the 2014 Act allows the Scottish Ministers, by regulations, to create certain types of offences in relation to proceedings in both the First-tier and Upper Tribunal.
3. The regulations may also specify circumstances in which a person cannot be compelled to give evidence or produce something. Section 67(2) of the 2014 Act sets out the maximum penalties regulations may apply to any offences created.

### **Current provisions in existing tribunals**

4. The proposed offences are in part modelled on existing statutory provision that applies to the devolved tribunals. However, a number of the devolved tribunals that will transfer into the new structure do not currently have related offences. This includes the two new housing jurisdictions created by the Housing (Scotland) Act 2014 (i.e. for Private Rented Sector and enforcement of Letting Agents Code of Practice), the Homeowner Housing Panel (hohp), the Scottish Charity Appeals Panel (SCAP), Education Appeal Committees, the NHS National Appeal Panel and Valuation Appeal Committees.
5. For the new Private Rented Sector jurisdiction there is already a precedent of offences as these cases will transfer from the Sheriff Court. The Sheriff Court can already issue fines up to a maximum of level 5 on the standard scale when tried summarily or up to the statutory maximum for offences triable either way. They can also impose an unlimited prison sentence for offences triable on indictment.
6. The other tribunals (Mental Health Tribunal for Scotland (MHTS), Private Rented Housing Panel, Lands Tribunal for Scotland, Additional Support Needs Tribunal for Scotland, NHS Tribunal, Parking and Bus Lane Adjudicators and Police Appeals Tribunals) already have offences prescribed in their legislation. However, the detail of offences and the level of fine or imprisonment varies amongst the tribunals. For example, a number of the tribunals have offences for failure to attend or give evidence or for altering and concealing documents. However, only a few tribunals make it an offence to give a false statement and MHTS is the only tribunal where on prosecution in the criminal courts a person may be liable to a fine or prison sentence.

## Provisions in the Sheriff Court

7. The Sheriff Court where many of the appeals from the tribunals are currently heard has established scales for offences and penalties. On summary conviction there is a maximum of level 5 on the standard scale and/or 12 months imprisonment. On summary conviction or indictment they can impose the statutory maximum and/or 12 months imprisonment. Currently level 5 on the standard scale is £5000.

## Draft regulations

8. The draft regulations attached in **Annex B** set out the proposed scales and penalties for fines and offences across the Scottish Tribunals. The policy aim is to standardise levels so they are the same irrespective of the subject matter of the case in hand.
9. In broad terms, an offence may be committed if a person makes a false statement in an application in a case, fails to attend or give evidence in proceedings, alters, conceals or destroys something that is required to be produced in proceedings. The draft regulations propose that, a reasonable excuse for acting in the way charged will be a defence.
10. The draft regulations also propose that a person need not give evidence or produce something which they would be entitled to refuse to give or produce in proceedings in a court in Scotland.
11. The draft regulations set out that the maximum penalty for offences tried summarily is imprisonment not exceeding 12 months or a fine not exceeding level 5 on the standard scale or both. On conviction on indictment, the maximum penalty is imprisonment not exceeding 2 years or a fine not exceeding level 5 on the standard scale or both.
12. It would be for the Court to decide the appropriate sentence in any particular case within these parameters.

## **Questions on Draft Regulations creating offences in relation to proceedings before the Scottish Tribunals**

Q1: Do you have any comments on the draft regulations creating offences in relation to proceedings before the Scottish Tribunals ?

Q2: Are there any additional offences in relation to proceedings that you would like to see added?

Q3: Would you like to see any of the proposed offences omitted?

Q4: Do you have any views on the penalties proposed for committing these offences?

**Do you have any other comments on the draft regulations?:**



## DRAFT REGULATIONS FOR TIME LIMITS AND RULES OF PROCEDURE

## SCOTTISH STATUTORY INSTRUMENTS

2016 No.

## TRIBUNALS AND INQUIRIES

The Upper Tribunal for Scotland (Time Limits and Rules of Procedure)  
Regulations 2016*Made* - - - -*Laid before the Scottish Parliament**Coming into force* - - *1st September 2016*

The Scottish Ministers make the following Regulations in exercise of the powers conferred by section 55(1) of, and paragraph 4(2) of Schedule 9 to, the Tribunals (Scotland) Act 2014<sup>(1)</sup> and all other powers enabling them to do so.

In terms of paragraph 4(3) of Schedule 9 to the Tribunals (Scotland) Act 2014, Scottish Ministers have consulted the President of the Scottish Tribunals and such other persons as they considered appropriate.

**Citation, commencement and interpretation**

1.—(1) These Regulations may be cited as the Upper Tribunal for Scotland (Time Limits and Rules of Procedure) Regulations 2016 and the Rules contained in the Schedule may be cited as the Upper Tribunal for Scotland Rules of Procedure 2016.

(2) These Regulations and Rules come into force on 1st September 2016.

(3) In regulations 3 and 4—

“the Act” means the Tribunals (Scotland) Act 2014; and

“the appellant” means a party applying for permission to appeal.

**Application of Rules in Schedule**

2. The Rules in the Schedule to these Regulations apply to all proceedings before the Upper Tribunal for Scotland.

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<sup>(1)</sup> 2014 asp 10.

### **Time limits for permission to appeal - application to decision making forum**

3.—(1) For the purposes of the permissions mentioned in section 46(3)(a) of the Act (application for permission to appeal made to the First-tier Tribunal) or section 48(3)(a) of the Act (application for permission to appeal made to the Upper Tribunal), the following time limit applies.

(2) Subject to paragraph (3), an application for permission to appeal must be received by the First-tier Tribunal for Scotland or the Upper Tribunal for Scotland, as appropriate, within the period of 30 days from the relevant date.

(3) The First-tier Tribunal for Scotland or the Upper Tribunal for Scotland, as appropriate, may on cause shown extend the period beyond 30 days if it considers such an extension to be in the interest of justice.

(4) Subject to paragraph (5), the relevant date is the later of—

- (a) the date on which the decision appealed against was sent to the appellant;
- (b) the date on which the statement of reasons for the decision was sent to the appellant.

(5) But where a decision is given orally at a hearing, the relevant date is either—

- (a) the date on which written reasons were sent to the parties, if (i) written reasons were requested at the hearing (or were requested in writing within 14 days of the hearing); or (ii) the First-tier Tribunal or the Upper Tribunal undertook at the hearing to provide reasons; or
- (b) the date of the oral decision, if (i) written reasons were not requested at the hearing (or were not requested in writing within 14 days of the hearing); and (ii) the First-tier Tribunal or the Upper Tribunal did not undertake at the hearing to provide reasons.

### **Time limits for permission to appeal – application to appellate forum**

4.—(1) For the purposes of the permission mentioned in section 46(3)(b) of the Act (application for permission to appeal made to the Upper Tribunal following refusal by the First-tier Tribunal) or section 48(3)(b) of the Act (application for permission to appeal made to the Court of Session following refusal by the Upper Tribunal), the following time limit applies.

(2) An application for permission to appeal must be received by the Upper Tribunal for Scotland or the Court of Session, as appropriate, within the period of 30 days from the relevant date.

(3) The relevant date is the date on which notice of the First-tier Tribunal for Scotland's refusal of permission to appeal, or the Upper Tribunal's refusal of permission to appeal, as appropriate, was sent to the appellant.

(4) The Upper Tribunal for Scotland or the Court of Session, as appropriate, may on cause shown extend the period beyond 30 days if it considers such an extension to be in the interests of justice.

A member of the Scottish Government

St Andrew's House,  
Edinburgh

2016

SCHEDULE  
The Upper Tribunal for Scotland Rules of Procedure 2016

Regulation 2

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## PART 1

### Interpretation

#### **Interpretation**

1. In these Rules—

“the 2014 Act” means the Tribunals (Scotland) Act 2014;

“Appeal Appendix” means all the documents and authorities to be relied on for the purpose of the appeal along with an inventory;

“appellant” means—

(a) a person who makes an appeal to the Upper Tribunal; or

(b) in any case, a person substituted as an appellant under rule 12(1) (addition, substitution and removal of parties).

“Convention rights” has the meaning given to it in section 1 of the Human Rights Act 1998<sup>(2)</sup>;

“proceedings” includes, unless indicated otherwise, a part of the proceedings;

“document” means anything in which information is recorded in any form;

“excluded decision” means a decision referred to in section 51 of the 2014 Act;

“First-tier Tribunal” means the First-tier Tribunal for Scotland;

“hearing” means an oral hearing and includes a hearing conducted in whole or in part by video link, telephone or other means of instantaneous two-way electronic communication;

“interested party” means a person other than the appellant or respondent on whom the First-tier Tribunal has ordered the proceedings before it to be served;

“judicial review” has the meaning in section 60 of the 2014 Act;

“party” means a person who is (or was at the time that the Upper Tribunal disposed of the proceedings) an appellant or respondent in proceedings before the Upper Tribunal;

“practice direction “ means a practice direction issued in terms of section 74 of the 2014 Act;

“President” means the President of the Scottish Tribunals;

“representative” means a legal or lay representative of a party appointed under rule 14(1);

“respondent” means—

(a) in an appeal against a decision of the First-tier Tribunal, that tribunal and any person other than the appellant who—

(i) was a party before the First-tier Tribunal;

(ii) otherwise has a right of appeal against the decision of the First-tier Tribunal and has given notice to the Upper Tribunal that they wish to be a party to the appeal;

(b) in proceedings transferred or referred to the Upper Tribunal from the First-tier Tribunal, a person who was a respondent in the proceedings in the First-tier Tribunal;

(c) in any case, a person substituted or added as a respondent under rule 12 (addition, substitution and removal of parties);

“Upper Tribunal” means the Upper Tribunal for Scotland; and

“witness statement” means a written statement of a witness ordered by either the First-tier Tribunal or the Upper Tribunal to stand for the evidence-in-chief of the witness.

## PART 2

### The Upper Tribunal and the Rules

#### **Purpose of the Upper Tribunal**

2. The Upper Tribunal decides appeals from the First-tier Tribunal and judicial review cases transferred to it by the Court of Session.

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<sup>(2)</sup> 1998 c.42.

## PART 3

### Procedure for Cases in the Upper Tribunal

#### Notice of appeal against a decision of the First-tier Tribunal

**3.—**(1) A person may lodge with the Upper Tribunal a notice of appeal against a decision of the First-tier Tribunal.

(2) A notice of appeal must —

- (a) identify the decision of the First-tier Tribunal to which it relates; and
- (b) identify the alleged error or errors of law in the decision.

(3) The appellant must provide with the notice of appeal a copy of—

- (a) any written record of the decision being challenged;
- (b) any separate written statement of reasons for that decision; and
- (c) the notice of permission to appeal or alternatively notice of refusal of permission to appeal from the First-tier Tribunal.

(4) When the Upper Tribunal receives a notice of appeal it must send a copy of the notice and any accompanying documents to each respondent and interested party (if any).

(5) If the appellant lodges the notice of appeal with the Upper Tribunal later than the time required by regulation 4(2) of the Upper Tribunal for Scotland (Time Limits and Rules of Procedure) Regulations 2016—

- (a) the notice of appeal must include a request for an extension of time under regulation 4(4) of those Regulations and show cause why the notice of appeal was not provided in time and argue why it is in the interests of justice that the time be extended; and
- (b) unless the Upper Tribunal extends time for lodging a notice of appeal the Upper Tribunal may not admit the notice of appeal.

(6) The Upper Tribunal may, where the First-tier Tribunal has refused permission to appeal—

- (a) refuse permission to appeal;
- (b) give permission to appeal; or
- (c) give permission to appeal on limited grounds or subject to conditions;
- (d) and must send a notice of its decision to each party and any interested party including reasons for any refusal of permission or limitations or conditions on any grant of permission.

(7) Where the Upper Tribunal, without a hearing,

- (a) refuses permission to appeal; or
- (b) gives permission to appeal on limited grounds or subject to conditions,

the appellant may make a written application (within 14 days of receipt of notice of the decision) to the Upper Tribunal for the decision to be reconsidered at a hearing.

(8) An application under paragraph (7) must be heard by different members of the Upper Tribunal from those who refused permission without a hearing.

#### Response to the notice of appeal

**4.—**(1) Subject to any direction given by the Upper Tribunal, a respondent may provide a written response to a notice of appeal.

(2) Any response provided under paragraph (1) must be sent or delivered to the Upper Tribunal so that it is received no later than 30 days after the date on which the Upper Tribunal sent a copy of the notice of appeal to the respondent.

(3) The response must state—

- (a) the name and address of the respondent;
- (b) the name and address of the representative (if any) of the respondent;

- (c) an address where documents for the respondent may be sent or delivered;
- (d) whether the respondent opposes the appeal;
- (e) the grounds on which the respondent relies, including (in the case of an appeal against the decision of the First-tier Tribunal) any grounds on which the respondent was unsuccessful in the proceedings which are the subject of the appeal, but intends to rely in the appeal;
- (f) whether the respondent consents to the case being heard without a hearing; and
- (g) whether the respondent intends to make a cross appeal.

(4) If the respondent provides the response to the Upper Tribunal later than the time required by paragraph (2) or by an extension of time allowed under rule 8(3)(a) (power to extend time), the response must include a request for an extension of time and the reason why the response was not provided in time.

(5) When the Upper Tribunal receives the response it must send a copy of the response and any accompanying documents to the appellant and any interested party.

### **Appellant's reply**

5.—(1) Subject to any order given by the Upper Tribunal, the appellant may provide a written reply to any response provided under rule 4 (response to the notice of appeal).

(2) Any reply provided under paragraph (1) must be sent or delivered to the Upper Tribunal so that it is received within 30 days after the date on which the Upper Tribunal sent a copy of the response to the appellant.

(3) If the appellant provides the reply to the Upper Tribunal later than the time required by paragraph (2) or by an extension of time allowed under rule 8(3)(a) (power to extend time), the reply must include a request for an extension of time and the reason why the reply was not provided in time.

(4) When the Upper Tribunal receives the reply it must send a copy of the reply and any accompanying documents to each respondent and interested party (if any).

### **Cases transferred or referred to the Upper Tribunal**

6.—(1) Paragraphs (2) and (3) apply to a case transferred or referred to the Upper Tribunal from the First-tier Tribunal.

(2) In a case to which this paragraph applies—

- (a) the Upper Tribunal must give orders as to the procedure to be followed in the consideration and disposal of the proceedings;
- (b) the preceding rules in this Part will only apply to the proceedings to the extent provided for by such orders.

(3) If a case or matter to which this paragraph applies is to be determined without notice to or the involvement of a respondent—

- (a) any provision in these Rules requiring a document to be provided by or to a respondent; and
- (b) any other provision in these Rules permitting a respondent to participate in the proceedings,

does not apply to that case or matter.

### **Reviews**

7.—(1) The Upper Tribunal may at its own instance or on the application of a party review a decision (except an excluded decision) made by it in any matter before it if it considers it necessary in the interests of justice.

(2) The Upper Tribunal's decision whether or not to carry out a review cannot itself give rise to a review or appeal.

(3) After the review of a decision, the Upper Tribunal may:

- (a) take no action;
- (b) set the decision aside;

- (c) correct a minor or accidental error contained in the decision; or
  - (d) take such other action it thinks fit.
- (4) A decision is not reviewable under paragraph (1) more than once.

## PART 4

### General Powers and Provisions

#### Case management and power to give directions

**8.**—(1) Subject to the provisions of the 2014 Act and these Rules, the Upper Tribunal may regulate its own procedure.

(2) The Upper Tribunal may give an order in relation to the conduct of proceedings before it at any time, including an order amending, suspending or setting aside an earlier order.

(3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Upper Tribunal may—

- (a) extend or shorten the time for complying with any rule, practice direction or order;
- (b) conjoin or take concurrently two or more sets of proceedings or parts of proceedings raising common issues;
- (c) specify one or more cases as a lead case or lead cases where—
  - (i) two or more cases are before the Upper Tribunal;
  - (ii) in each such case the proceedings have not been finally determined; and
  - (iii) the cases give rise to common or related issues of fact or law,
- (d) and sist the other cases until the common or related issues have been determined;
- (e) permit or require a party to amend a document;
- (f) permit or require a party or another person to provide documents, information, evidence or submissions to the Upper Tribunal or a party;
- (g) deal with an issue in the proceedings as a preliminary issue;
- (h) hold a hearing to consider any matter, including a case management issue;
- (i) decide the form of any hearing;
- (j) adjourn or postpone a hearing;
- (k) require a party to produce and/or lodge documents including but not confined to a note on argument and the Appeal Appendix;
- (l) sist proceedings;
- (m) transfer proceedings to another court or tribunal if that other court or tribunal has jurisdiction in relation to the proceedings and—
  - (i) because of a change of circumstances since the proceedings were started, the Upper Tribunal no longer has jurisdiction in relation to the proceedings; or
  - (ii) the Upper Tribunal considers that the other court or tribunal is a more appropriate forum for the determination of the case;
- (n) suspend the effect of its own decision pending an appeal of that decision;
- (o) in an appeal against the decision of the First-tier Tribunal, suspend the effect of that decision pending the determination of any permission to appeal or any appeal;
- (p) require the First-tier Tribunal to provide reasons for the decision, or other information or documents in relation to the decision or any proceedings before the First-tier Tribunal.



### **Procedure for applying for and giving orders**

**9.**—(1) The Upper Tribunal may give an order on the application of one or more of the parties or on its own initiative.

(2) An application for an order may be made—

- (a) by sending or delivering a written application to the Upper Tribunal; or
- (b) orally during the course of a hearing.

(3) An application for an order must include the reason for making that application.

(4) Before making an order, the Upper Tribunal must afford parties an opportunity to make representations to it concerning whether the order should be imposed and the terms of the order.

### **Failure to comply with rules etc.**

**10.**—(1) An irregularity resulting from a failure to comply with any requirement in these Rules, a practice direction or an order, does not of itself render void the proceedings or any step taken in the proceedings.

(2) If a party has failed to comply with a requirement in these Rules, a practice direction or an order, the Upper Tribunal may take such action as it considers just, which may include—

- (a) waiving the requirement;
- (b) requiring the failure to be remedied; or
- (c) exercising its power under rule 11 (dismissal of a party's case).

### **Dismissal of a party's case**

**11.**—(1) The proceedings, or the appropriate part of them, will be dismissed if the appellant has failed to comply with an order that stated that failure by the appellant to comply with the order would lead to the dismissal of the proceedings or part of them.

(2) The Upper Tribunal must dismiss the whole or a part of the proceedings if the Upper Tribunal—

- (a) does not have jurisdiction in relation to the proceedings or that part of them; and
- (b) does not exercise its power under rule 8(3)(1)(i) (transfer to another court or tribunal) in relation to the proceedings or that part of them.

(3) The Upper Tribunal may dismiss the whole or a part of the proceedings if—

- (a) the appellant has failed to comply with an order which stated that failure by the appellant to comply with the order could lead to the dismissal of the proceedings or part of them; or
- (b) the appellant has failed to co-operate with the Upper Tribunal to such an extent that the Upper Tribunal cannot deal with the proceedings fairly.

(4) The Upper Tribunal may not dismiss the whole or a part of the proceedings under paragraph (2) or (3)(b) without first giving the appellant an opportunity to make representations in relation to the proposed dismissal.

### **Addition, substitution and removal of parties**

**12.**—(1) The Upper Tribunal may give an order adding, substituting or removing a party as an appellant or a respondent including where—

- (a) the wrong person has been named as a party; or
- (b) the addition, substitution or removal has become necessary because of a change in circumstances since the start of proceedings.

(2) If the Upper Tribunal gives an order under paragraph (1) it may give such consequential orders as it considers appropriate.

(3) A person who is not a party may make a written application to the Upper Tribunal to be added or substituted as a party under this rule.

(4) If the Upper Tribunal refuses an application under paragraph (3) it must consider whether to permit the person who made the application to provide submissions or evidence to the Upper Tribunal.

## **Orders for expenses**

**13.**—(1) The Upper Tribunal may make an order for expenses in proceedings on appeal from the First-tier Tribunal if the First-tier Tribunal had the power to make an order for expenses, and only on the basis on which that the First-tier Tribunal had the power to award expenses.

(2) In the case of a judicial review transferred to the Upper Tribunal by the Court of Session, the Upper Tribunal may make an order for expenses on the same basis as the Court of Session may make an order for expenses in a judicial review case before it.

(3) Notwithstanding paragraphs (1) and (2) and without prejudice to these paragraphs, the Upper Tribunal may make an order for expenses against a party if an appeal is amended by that party such that the other party incurs extra expense, with the recoverable expenses being the extra expenses incurred.

(4) In the case of orders for expenses under paragraphs (1), (2) and (3), a party is entitled to apply to the Auditor of the Court of Session for taxation of the expenses.

## **Representatives and supporter**

**14.**—(1) A party may appoint a representative (whether a legal representative or not) to represent that party in the proceedings whose details must be communicated to the Upper Tribunal prior to any hearing.

(2) Anything permitted or required to be done by a party under these Rules, a practice direction or an order may be done by the representative of that party, except signing an affidavit or precognition.

(3) At a hearing a party may be accompanied by another person to act as a supporter who, subject to the permission of the Upper Tribunal, may not represent the party in the proceedings.

(4) Paragraph (2) does not apply to a supporter.

## **Calculating time**

**15.**—(1) An act required by these Rules, a practice direction or an order to be done on or by a particular day must be done by 5 pm on that day.

(2) If the time specified by these Rules, a practice direction or an order for doing any act ends on a day other than a working day, the act is done in time if it is done on the next working day.

(3) In this rule “working day” means any day except a Saturday or Sunday, Christmas Day, Good Friday or a bank holiday in Scotland under section 1 of the Banking and Financial Dealings Act 1971.

## **Sending and delivery of documents**

**16.**—(1) Any document to be provided to the Upper Tribunal under these Rules, a practice direction or an order must be—

(a) sent by pre-paid post or by document exchange, or delivered by hand, to the address of the Upper Tribunal; or

(b) sent or delivered by such other method as the Upper Tribunal may permit or direct.

(2) Subject to paragraph (3), if a party or an interested party provides a fax number, email address or other details for the electronic transmission of documents to them, that party or interested party must accept delivery of documents by that method.

(3) If a party or an interested party informs the Upper Tribunal and all other parties and interested parties that a particular form of communication, other than pre-paid post or delivery by hand, should not be used to provide documents to that party or interested party, that form of communication must not be so used.

(4) If the Upper Tribunal or a party or an interested party sends a document to a party or interested party or the Upper Tribunal by email or any other electronic means of communication, the recipient may request that the sender provide a hard copy of the document to the recipient. The recipient must make such a request as soon as reasonably practicable after receiving the document electronically.

(5) The Upper Tribunal and each party and interested party may assume that the address provided by a party or interested party or its representative is and remains the address to which documents should be sent or delivered until receiving written notification to the contrary.

## **Disclosure of documents and information**

17. The Upper Tribunal may at any stage of the proceedings, on its own initiative or on application by one or more of the parties or any interested party, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice or in order to protect the Convention rights of any person.

## **Evidence and submissions**

18.—(1) Without restriction on the general powers in rule 8(1) and (2) (case management powers), the Upper Tribunal may give orders as to—

- (a) subject to paragraph (4), issues on which parties may lead fresh evidence or make submissions;
- (b) the nature of any such evidence;
- (c) whether the parties are permitted or required to provide expert evidence, and if so whether the parties must jointly appoint a single expert to provide such evidence;
- (d) any limit on the number of witnesses whose evidence a party may put forward, whether in relation to a particular issue or generally;
- (e) the manner in which any evidence or submissions are to be provided, which may include an order for them to be given—
  - (i) orally at a hearing; or
  - (ii) by written submissions or witness statement; and
- (f) the time at which any evidence or submissions are to be provided.

(2) The Upper Tribunal may exclude evidence that would otherwise be admissible where—

- (a) the evidence was not, without reasonable excuse, provided within the time allowed by an order or a practice direction;
- (b) the evidence was otherwise, without reasonable excuse, provided in a manner that did not comply with an order or a practice direction; or
- (c) it would otherwise be unfair to admit the evidence.

(3) The Upper Tribunal may consent to a witness giving, or require any witness to give, evidence on oath, and may administer an oath for that purpose.

(4) Fresh evidence may only be led in an appeal if the Upper Tribunal is satisfied—

- (a) that the evidence—
  - (i) could not have been obtained with reasonable diligence at the First-tier Tribunal stage;
  - (ii) is relevant and will probably have an important influence on the hearing; and
  - (iii) is apparently credible; or
- (b) that the interests of justice justify the evidence being led.

## **Citation of witnesses and orders to answer questions or produce documents**

19.—(1) On the application of a party or on its own initiative, the Upper Tribunal may—

- (a) by citation require any person to attend as a witness at a hearing at the time and place specified in the citation; or
- (b) order any person to answer any questions or produce any documents in that person's possession or control which relate to any issue in the proceedings.

(2) A citation under paragraph (1)(a) must—

- (a) give the person required to attend 14 days' notice of the hearing or such other period as the Upper Tribunal may order;
- (b) where the person is not a party, state (if appropriate) how expenses of attendance necessarily incurred may be recovered;

- (c) state that the person on whom the requirement is imposed may apply to the Upper tribunal to vary or set aside the citation or order, if the person did not have an opportunity to object to it before it was made or issued; and
- (d) state the consequences of failure to comply with the citation or order.

(3) A person making an application referred to in paragraph (2)(c) must do so as soon as reasonably practicable after receiving notice of the citation or order.

### **Withdrawal**

**20.**—(1) A party may give notice to the Upper Tribunal of the withdrawal of the case made by it in the Upper Tribunal proceedings, or any part of that case—

- (a) by sending or delivering to the Upper Tribunal a notice of withdrawal; or
- (b) orally at a hearing.

(2) Unless satisfied that a party has already been notified, the Upper Tribunal must notify each party of its receipt of a withdrawal under this rule.

### **Chairing member**

**21.** Where a matter is to be decided by two or more members of the Upper Tribunal, the President must determine the chairing member.

### **Venue for hearings**

**22.** The Upper Tribunal is to be convened at such time and place in Scotland as the President may determine.

### **Enforcement of decisions**

**23.** An order for the payment of a sum payable in pursuance of a decision of the Upper Tribunal, or a copy of such an order certified by the Upper Tribunal, may be enforced as if it were an extract registered decree arbitral bearing a warrant for execution issued by the Court of Session.

## **PART 5**

### **Hearings**

#### **Decision with or without a hearing**

**24.** The Upper Tribunal may make any decision without a hearing.

#### **Entitlement to attend a hearing**

**25.** Subject to rule 27(4) (exclusion of a person from a hearing), each party and interested party is entitled to participate at a hearing together with any representatives and supporters permitted by rule 14.

#### **Notice of hearings**

**26.**—(1) The Upper Tribunal must give each party an interested party entitled to attend a hearing reasonable notice of the time and place of the hearing (including any adjourned or postponed hearing) and any change to the time and place of the hearing.

(2) The period of notice under paragraph (1) must be at least 14 days except that the Upper Tribunal may give shorter notice—

- (a) with the parties and interested parties' consent; or
- (b) in urgent or exceptional circumstances.

### **Public and private hearings**

- 27.—(1) Subject to the following paragraphs, all hearings must be held in public.
- (2) The Upper Tribunal may give an order that a hearing, or part of it, is to be held in private if the Upper Tribunal considers that restricting access to the hearing is justified—
- (a) in the interests of public order;
  - (b) in order to protect a person’s right to respect for their private and family life;
  - (c) in order to maintain the confidentiality of sensitive information;
  - (d) in order to avoid serious harm to the public interest; or
  - (e) because to hold it in public would prejudice the interests of justice.
- (3) Where a hearing, or part of it, is to be held in private, the Upper Tribunal may determine who is entitled to attend the hearing or part of it.
- (4) The Upper Tribunal may give an order excluding from any hearing, or part of it—
- (a) any person whose conduct the Upper Tribunal considers is disrupting or is likely to disrupt the hearing;
  - (b) any person whose presence the Upper Tribunal considers is likely to prevent another person from giving evidence or making submissions freely; or
  - (c) any person where the purpose of the hearing would be defeated by the attendance of that person.
- (5) The Upper Tribunal may give a direction excluding a witness from a hearing until that witness gives evidence.
- (6) When publishing a decision notice referred to in rule 29(4) resulting from a hearing which was held wholly or partly in private, the Upper Tribunal must, so far as practicable, ensure that the report does not disclose information which was referred to in a part of the hearing that was held in private.

### **Hearings in a party’s absence**

- 28.—(1) If a party fails to attend a hearing, the Upper Tribunal may proceed with the hearing if the Upper Tribunal—
- (a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and
  - (b) considers that it is in the interests of justice to proceed with the hearing.

## **PART 6**

### **Decisions**

#### **Notice of decisions and reasons**

- 29.—(1) Subject to the remainder of this rule, the Upper Tribunal may give a decision orally at a hearing.
- (2) The Upper Tribunal must provide to each party and interested party as soon as reasonably practicable after making a decision (other than a decision under Part 7) which finally disposes of all issues in the proceedings or of a preliminary issue dealt with following an order under rule 8(3)(f)—
- (a) a decision notice stating the Upper Tribunal’s decision; and
  - (b) notification of any rights of appeal against the decision and the time and manner in which such rights of appeal may be exercised.
- (3) If the Upper Tribunal does not provide written reasons for a decision, a party and an interested party may request written reasons within 14 days of the decision.
- (4) The Upper Tribunal may publish any of its decisions if it considers it in the public interest so to do, with the manner of publication also at the discretion of the Upper Tribunal.

## PART 7

### Appealing Decisions of the Upper Tribunal

#### Interpretation

**30.** In this Part, “appeal” means the exercise of a right of appeal under section 48(1) of the 2014 Act.

#### Application for permission to appeal a decision of the Upper Tribunal

**31.**—(1) A party seeking permission to appeal must make a written application to the Upper Tribunal for permission to appeal.

(2) An application under paragraph (1) must—

- (a) identify the decision of the Upper Tribunal to which it relates;
- (b) identify the alleged error or errors of law in the decision; and
- (c) state in terms of section 50(4) of the 2014 Act what important point of principle or practice would be raised by a second appeal or that there is some other compelling reason which shows that the appeal should be allowed to proceed.

#### Upper Tribunal’s consideration of application for permission to appeal

**32.**—(1) The Upper Tribunal must consider whether to give permission to appeal in relation to the decision or that part of it.

(2) The Upper Tribunal must provide a record of its decision to the parties and any interested party as soon as practicable.

(3) If the Upper Tribunal refuses permission to appeal it must provide with the record of its decision—

- (a) A statement of its reasons for such a refusal; and
- (b) notification of the right to make an application to the Court of Session for permission to appeal and the time within which, and the method by which, such application must be made

(4) The Upper Tribunal may give permission to appeal on limited grounds, but must comply with paragraph (3) in relation to any grounds on which it has refused permission.

## PART 8

### Judicial Review

#### Judicial review

**33.**—(1) Where a petition for judicial review is remitted from the Court of Session to the Upper Tribunal, the Upper Tribunal—

- (a) must notify each party and any interested party in writing that the proceedings have been transferred to the Upper Tribunal; and
- (b) must give orders as to the future conduct of the proceedings.

(2) The orders given under paragraph (1)(b) must:—

- (a) if the Court of Session did not order the required intimation, service and advertisement of the petition, state the Upper Tribunal’s requirements in relation to these matters;
- (b) state what procedure the Upper Tribunal is to apply in relation to determination of the permission required under section 27B of the Court of Session Act 1988 in cases where: (i) the conditions mentioned in section 57(2) of the 2014 Act are met and the application has been transferred to the Upper Tribunal; and (ii) the Lord Ordinary has ordered the transfer of the application instead of determining permission in terms of Rule 58.7 of the Rules of the Court of Session 1994;

- (c) state that the Upper Tribunal shall send to the applicant and each respondent, and may send to any other interested party written notice of its decision in relation to the permission and the reasons for any refusal of permission or limitations or conditions on permission;
- (d) state that if, without an oral hearing, permission is refused, or permission is granted to proceed subject to conditions or on particular grounds, the applicant may request an oral hearing within 7 days beginning on the day on which the decision was made and that request shall be considered by different members of the Tribunal to those who refused permission and any oral hearing granted must be heard by different members of the Tribunal to those who refused permission but no appeal shall lie from the refusal of a request for an oral hearing; and
- (e) state that if the permission required under section 27B of the Court of Session Act 1988 is refused by the Upper Tribunal, the Upper Tribunal shall dismiss the application and at the request of any respondent to the petition, or on its own instance, may recall or otherwise deal with any order made or other step taken by the Court of Session in relation to the application including any award of expenses made by the Court of Session.

## PART 9

### Legal Aid

#### **Legal aid**

**34.** If a party is granted legal aid by the Scottish Legal Aid Board in respect of a case before the Upper Tribunal that party must as soon as practicable send a copy of the legal aid certificate to the Upper Tribunal.

## **EXPLANATORY NOTE**

*(This note is not part of the Regulations)*

These Regulations make the Upper Tribunal for Scotland Rules of Procedure 2016 regulating the practice and procedure to be followed in proceedings at the Upper Tribunal for Scotland. The Regulations also set time limits for applications for permission to appeal to the Upper Tribunal.



## DRAFT REGULATIONS FOR OFFENCES IN PROCEEDINGS

## SCOTTISH STATUTORY INSTRUMENTS

2016 No.

## TRIBUNALS AND INQUIRIES

## The Scottish Tribunals (Offences) Regulations 2016

*Made* - - - - - 2016

*Coming into force* - - - - - 1st September 2016

The Scottish Ministers make the following Regulations in exercise of the powers conferred by section 67(1) of the Tribunals (Scotland) Act 2014<sup>(3)</sup> and all other powers enabling them to do so.

In accordance with section 67(3) of that Act the Scottish Ministers have obtained the approval of the Lord President of the Court of Session in relation to these Regulations.

In accordance with section 79(2)(d) of that Act a draft of these Regulations has been laid before and approved by resolution of the Scottish Parliament.

**Citation and commencement**

1. These Regulations may be cited as the Scottish Tribunals (Offences) Regulations 2016 and come into force on 1st September 2016.

**Offences in relation to proceedings before the Scottish Tribunals**

2.—(1) In any proceedings before the First-tier Tribunal for Scotland or the Upper Tribunal for Scotland it is an offence for any person to—

- (a) make a false statement in an application in a case;
- (b) alter, conceal or destroy, or fail to produce, something that is required to be produced in accordance with Scottish Tribunal Rules; or
- (c) fail to attend, or give evidence, when required to do so in accordance with Scottish Tribunal Rules.

(2) It is a defence for a person charged with an offence under paragraph (1) to prove that the person had a reasonable excuse for acting in the way charged.

(3) A person who is guilty of an offence under paragraph (1) is liable:

- (a) on summary conviction to imprisonment for a term not exceeding 12 months or a fine not exceeding level 5 on the standard scale (or both),

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<sup>(3)</sup> 2014 asp. 10.

(b) on conviction on indictment to imprisonment for a term not exceeding 2 years or a fine not exceeding level 5 on the standard scale (or both).

**Circumstances in which a person need not give evidence or produce something to the Scottish Tribunals**

**3.** In any proceedings before the First-tier Tribunal for Scotland or the Upper Tribunal for Scotland a person need not give evidence or produce something which the person would be entitled to refuse to give or produce in proceedings in a court in Scotland.

St Andrew's House,  
Edinburgh  
2016

A member of the Scottish Government

## **EXPLANATORY NOTE**

*(This note is not part of the Regulations)*

These Regulations provide for offences before the Scottish Tribunals.

Regulation 2 provides for offences in relation to proceedings before the Scottish Tribunals, grounds of defence and the associated maximum penalties.

Regulation 3 provides for the circumstances in which a person need not give evidence or produce something to the Scottish Tribunals. The circumstances include when evidence or material is privileged.



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