UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

PRESIDENTIAL GUIDANCE NOTE No 1 2020:
ARRANGEMENTS DURING THE COVID-19 PANDEMIC

A. INTRODUCTION

1. On 19 March 2020, the Lord Chancellor approved the Practice Direction made by the Senior President of Tribunals: *Pilot Practice Direction: Contingency arrangements in the First-tier Tribunal and the Upper Tribunal*. The Practice Direction states that, during the Covid-19 pandemic, it may be necessary for tribunals to adjust their ways of working to limit the spread of the virus and to work appropriately. The Practice Direction is to be in force for 6 months from 19 March 2020, although it may be reviewed within that period should it become inappropriate or unnecessary and may be revoked at any time. The Practice Direction can be found here: https://www.judiciary.uk/publications/pilot-practice-direction-contingency-arrangements-in-the-first-tier-tribunal-and-the-upper-tribunal/.

2. This Guidance is issued pursuant to the Practice Direction. It will last as long as the Practice Direction is in force.

3. On 19 and 20 March 2020, the UTIAC informed parties of the postponement of hearings of cases that had been the subject of hearing notices, beginning on 23 March. This Guidance explains what will happen with regard to those cases and to the other cases which are before the UTIAC or which may come before it during the pandemic.

B. THE OVERRIDING OBJECTIVE

4. Both the Practice Direction and this Guidance are intended to enable the UTIAC to give effect to the overriding objective during the Covid-19 pandemic. For our purposes, the overriding objective is defined in rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the UT Rules"). The overriding objective is "to enable the Upper Tribunal to deal with cases fairly and justly".

5. Rule 2(2) explains that dealing with a case fairly and justly includes: dealing with it in ways that are proportionate to the importance of the case, the complexity of the issues, etc; avoiding unnecessary formality and seeking flexibility in the proceedings; ensuring, so far as practicable, that the parties are able to participate fully in the proceedings; using any special expertise of the Upper Tribunal effectively; and avoiding delay, so far as compatible with proper consideration of the issues.

6. Rule 2(4) puts a duty on the parties to help the Upper Tribunal to further the overriding objective; and to cooperate with the Upper Tribunal generally. This duty is particularly significant at this time.

C. DECISIONS WITHOUT A HEARING

7. Paragraph 4 of the Practice Direction reads as follows:

> "**Decisions on the papers without a hearing**
>
> 4. Where a Chamber's procedure rules allow decisions to be made without a hearing, decisions should usually be made in this way, provided this is in accordance with the overriding objective, the parties' ECHR rights and the Chamber's procedure rules about notice and consent."

8. Rule 34 provides:

> "34. –(1) Subject to paragraphs (2) and (3), the Upper Tribunal may make any decision without a hearing.
> (2) The Upper Tribunal must have regard to any view expressed by a party when deciding whether to hold a hearing to consider any matter, and the form of any such hearing.
> (3) In immigration judicial review proceedings, the Upper Tribunal must hold a hearing before making a decision which disposes of proceedings.
> (4) [Enables the UTIAC to do various things without a hearing in immigration judicial review proceedings, including deciding paper applications under rule 30]".

D. MAKING CERTAIN APPEAL DECISIONS WITHOUT A HEARING

9. Rule 34 gives the UTIAC power to make decisions in appeals without a hearing. Provided it has regard to any view of a party or parties, the UTIAC may do so without the parties' consent. Paragraph 4 of the Practice Direction provides that, during the pandemic, decisions should usually be made in this way.

10. In view of this, a UTIAC judge will examine, on the papers, any case where permission has been granted to appeal against a decision of the First-tier Tribunal, and where a hearing has not yet taken place in UTIAC. This will happen, irrespective of whether an adjournment of the hearing has been sought.

11. The judge will consider whether, in all the circumstances known to the judge, his or her provisional view is that it would be appropriate for UTIAC to decide the following questions without a hearing:

    (a) whether the making of the First-tier Tribunal's decision involved the making of an error on a point of law; and, if so

    (b) whether the First-tier Tribunal's decision should be set aside[1].

12. Where the judge reaches that provisional view, he or she will give directions to the parties, including a direction to the party who has been given permission to appeal to make further submissions on the error of law and set aside issues; a direction for the other party to file and serve any submissions in response; and (where there is such a response), directions to the appellant to file and serve a reply.

13. The process just described will include a direction to enable the parties, within a stated time, to express their respective views, if any, on whether there should be a hearing to decide the questions in paragraph 11(a) and (b) above, giving reasons for any such views. The judge will have regard to any such views, pursuant to rule 34(2).

14. In formulating the process, the UTIAC is drawing on its expertise since 2010 in making error of law decisions and decisions on whether, in the light of finding an error of law, the First-tier Tribunal's decision should be set aside. It is unusual for the questions in paragraph 11(a) and (b) above to require oral evidence and/or findings of fact by UTIAC; but, if that is the position, the judge may decide a hearing is necessary. The presence of particularly complex or novel/important issues of law may also be such as to necessitate a hearing.

15. The judge can also be expected to have regard to whether a party is unrepresented, in deciding whether a hearing is necessary to decide the questions in paragraph 11(a) and (b). It is important to appreciate that the fact

[1] Section 12(1) and (2)(a) of the Tribunals, Courts and Enforcement Act 2007.

a party is unrepresented will not necessarily lead the judge to conclude a hearing is necessary. On the contrary, a person with no or limited English language ability may find it easier to make their submissions in writing, with the assistance of a relative, friend or other third party, rather than to address the UTIAC orally, through an interpreter, on what are legal issues. Here, as elsewhere, the judge will have regard to all relevant circumstances.

16. In deciding whether it is necessary to hold a hearing, the judge can be expected to have regard to paragraph 4 of the Practice Direction and rule 2 of the UT Rules. The fact that the outcome of the appeal is of importance to a party (or another person) will not, without more, constitute a reason to convene a hearing to decide the relevant questions. Almost all appeals in the immigration jurisdiction are important to the individuals affected; and to the Secretary of State, in the discharge of her statutory responsibilities. In particular, human rights and protection appeals necessarily involve the prospect of an individual being removed from the United Kingdom.

17. It is important to emphasise the limited scope of the process described in this Part of the Guidance. It is confined to whether the First-tier Tribunal's decision should stand. If the decision reached is that the First-tier Tribunal's decision should be set aside, the UTIAC will then need to determine whether to remit the case to the First-tier Tribunal or re-make the decision. [2] In reaching its determination on that issue, the UTIAC will require the parties' submissions, if it does not already have them. If the outcome is that the appeal should be re-made in the UTIAC, then, again, the parties can expect further directions. In the event that oral evidence needs to be given and findings of fact made, in order to re-make, the UTIAC is more likely to proceed by way of a hearing; but where some or all of this evidence is uncontroversial, UT rule 15(1)(e), permitting evidence to be given by witness statement, may be of assistance.

E. REMOTE HEARINGS

18. Paragraph 6 of the Practice Direction applies where a tribunal decides in a particular case that a hearing is necessary. Paragraph 6 reads as follows:

> "**Remote hearings**
>
> 6. Where it is reasonably practicable and in accordance with the overriding objective to hear the case remotely (that is in any way that is not face-to-face, but which

[2] Section 12(2)(b)(i) and (ii).

complies with the definition of 'hearing' in the relevant Chamber's procedure rules), it should be heard remotely."

19. If a hearing is necessary, the "default" option during the pandemic is, therefore, that the hearing should be conducted remotely. Rule 1 of the UT Rules defines a "hearing" as "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". There is, accordingly, no question that a remote hearing is a hearing for the purposes of the UT Rules, including rule 34 (see above) and rule 40(1A), which states that, in immigration judicial review proceedings, a decision which disposes of proceedings shall be given at a hearing.

Form of remote hearing

20. A remote hearing may involve a live audio link or a live video link. A live audio link will usually be by telephone (probably *BT conference call*; but might be *BTMeetMe)*. A live video link might involve a video link from a courtroom that has fixed "kit" for the purpose to a barristers' chambers/presenting officers' premises; although three-way video links are likely to be impracticable. For three-way (or more) video links, *Skype for Business* may be available.

21. Whichever form of remote hearing is used, the principle of open justice must continue to be respected. Unless the circumstances are exceptional or there is a reason why, in any event, regardless of whether the hearing is a remote hearing, it should be held in private, pursuant to a direction under rule 37(2), the remote hearing will be in public. In order to achieve this, the UTIAC will, wherever practicable, make the audio or video link through a courtroom at Field House, or other centre where the UTIAC sits, so that any member of the public who wishes to do so can attend to hear or see/hear the proceedings. That is, of course, subject to the courtroom being open for the purpose. Where no relevant courtroom is open, owing to the pandemic, the UTIAC can be expected to proceed in accordance with such procedures as may be enacted by Parliament for the purpose[3]; or – exceptionally – by making a direction under rule 37(2) for the hearing to be private in the interests of securing the proper administration of justice.

22. Where a judge (or UTIAC Lawyer exercising delegated judicial functions) considers that a remote hearing is necessary and feasible, the UTIAC will

[3] See Coronavirus Bill, Schedule 24 (Public participation in proceedings conducted by video or audio), paragraph 2, inserting new s 29ZA to 29ZD in Tribunals, Courts and Enforcement Act 2007.

inform the parties of that fact and of the intended means of delivering the remote hearing. This will either be in the notice of hearing or in a separate communication. Each of the parties will be directed to respond by email, copied to the other party/parties, giving the details required in the direction in order to participate in the remote hearing by the intended means. Any objection to the intended means of delivering the remote hearing, or to the use of any form of remote hearing, must give reasons. These will be considered by a judge or UTIAC Lawyer under delegated judicial functions. The parties will be informed of the UTIAC's decision.

Documents

23. Documents which a party intends to rely on at a remote hearing must, if practicable, still be filed by sending by post to the UTIAC, in advance of the hearing, and served by post on the other party. In all cases of remote hearings, however, the documents must in any event be filed and served electronically, in advance of the hearing.

24. Because of this requirement for electronic filing and service, it is important that the documentation to be relied upon at a remote hearing is confined what is essential. Where case law is relied upon, the bundle should contain a list of the cases concerned, with citations, rather than the text of the judgments; provided the cases are publicly accessible online. Where other documents are publicly accessible online, only the parts relied on should be included in the bundle, together with a reference to the online site at which the full document can be found.

25. The reason for requiring only what is essential is that large electronic files can be slow to transmit and unwieldy to use. Attachments to an email must not, in total, exceed 15 MB, otherwise the email will not be delivered. For this reason, several separate emails may be necessary, in order to deliver the complete bundle electronically.

26. If practicable, electronic bundles should be indexed and paginated. They must be prepared in .pdf, .doc, .docx or other format readily capable of being opened and read on computers using Microsoft Windows operating systems.

The remote hearing itself

27. Unlike face to face hearings, remote hearings in the UTIAC listed for a particular day will be listed at different times, rather than all at 10am. The UTIAC staff

member assigned to facilitate the remote hearing will establish contact with the parties approximately 10 minutes before the scheduled time of the remote hearing. The parties must, accordingly, make themselves ready and available in advance. If the judge is to conduct the remote hearing from a courtroom, the judge will enter at the appointed time and conduct the hearing. If the judge is participating remotely, he or she will be invited to join by the staff member, once the parties are logged in.

28. Wherever practicable, the UTIAC will record the proceedings electronically. If in a courtroom with DARTS facilities, that will be used and/or a recording facility on the telephone system or *Skype* etc. The parties shall not make an audio and/or visual recording of the proceedings without the judge's express permission.

Oral evidence

29. In an appeal to the UTIAC, it may be necessary to hear oral evidence to make findings of fact; in particular, in order to re-make the decision under section 12(2)(b)(ii) of the TCEA 2007: see paragraph 17 above. If so, a remote hearing may still be appropriate, depending upon the nature and extent of the evidence and of the findings that may need to be made on it.

30. If it is decided that, in a case where a hearing is necessary in order to make a particular decision, there is a particular reason why a remote hearing would not be appropriate, the parties will be so informed. In such a situation, arrangements will be made for the case to proceed by means of a face to face hearing in court, with appropriate precautions to prevent the transmission of Covid-19. Where no such precautions are practicable, the case will be adjourned; but the position will be reviewed from time to time, as may be necessary.

Other

31. It is quite possible that the above requirements will be modified or supplemented, in the light of experience. Here, as elsewhere, the parties are reminded of their obligation under rule 2(4) to cooperate with the UTIAC (see paragraph 6 above). In each case, the parties will, in any event, be given directions that explain what is needed in advance of the remote hearing.

F. INTERPRETERS

32. *The Big Word*, which supplies interpreters for hearings in UTIAC, has confirmed it has interpreters available, who are able to provide interpretation services via conference calls to connect with the UTIAC. In the event that an interpreter is needed for a remote hearing, the parties can, therefore, expect the UTIAC to make appropriate arrangements.

G. JUDICIAL REVIEW

33. Beginning on 23 March 2020, applications to the UTIAC for judicial review that require urgent or immediate consideration (using or including form T 483 or T 484), must be filed by email to utiac.londonjr@justice.gov.uk. This applies where the applicant is represented; or where the applicant is unrepresented and not in immigration detention or at a removal centre. Details can be found here: https://www.gov.uk/government/publications/apply-for-urgent-consideration-in-a-judicial-review-form-t483. This applies to the whole of England and Wales. There is no change to the existing arrangements for urgent/immediate applications, where the applicant is unrepresented and in immigration detention or at a removal centre. There is also no change to the previous arrangements, whereby applications made after 4pm on working days and at any time on a non-working day (weekends and bank holidays) must be made using the out of hours court service.

34. If an application for urgent or immediate consideration has been refused by UTIAC without a hearing, the applicant can ask for the matter to be reconsidered at a hearing. During the pandemic, this hearing will take place by telephone with a judge.

35. Applications to UTIAC for judicial review, which do not require urgent or immediate consideration may continue to be filed by post (or by hand, if circumstances permit and the relevant office is open).

36. UT rule 40(1A) provides that, in immigration judicial review proceedings, a decision that disposes of proceedings shall be given by the UTIAC at a hearing (subject the exceptions listed in rule 40(1B)). As explained in paragraph 19 above, this requirement may be satisfied by the use of a remote hearing. If, in a particular case, a remote hearing is not appropriate, paragraph 30 above applies.

H. FINAL MATTERS

37. It needs to be appreciated that unfolding events during the pandemic may affect the extent to which UTIAC can operate by reference to this Guidance. In any event, the need to adopt new ways of working may well lead to challenges on the ground, which will need to be approached sympathetically by parties and the UTIAC alike.

Mr Justice Lane
President
23 March 2020