

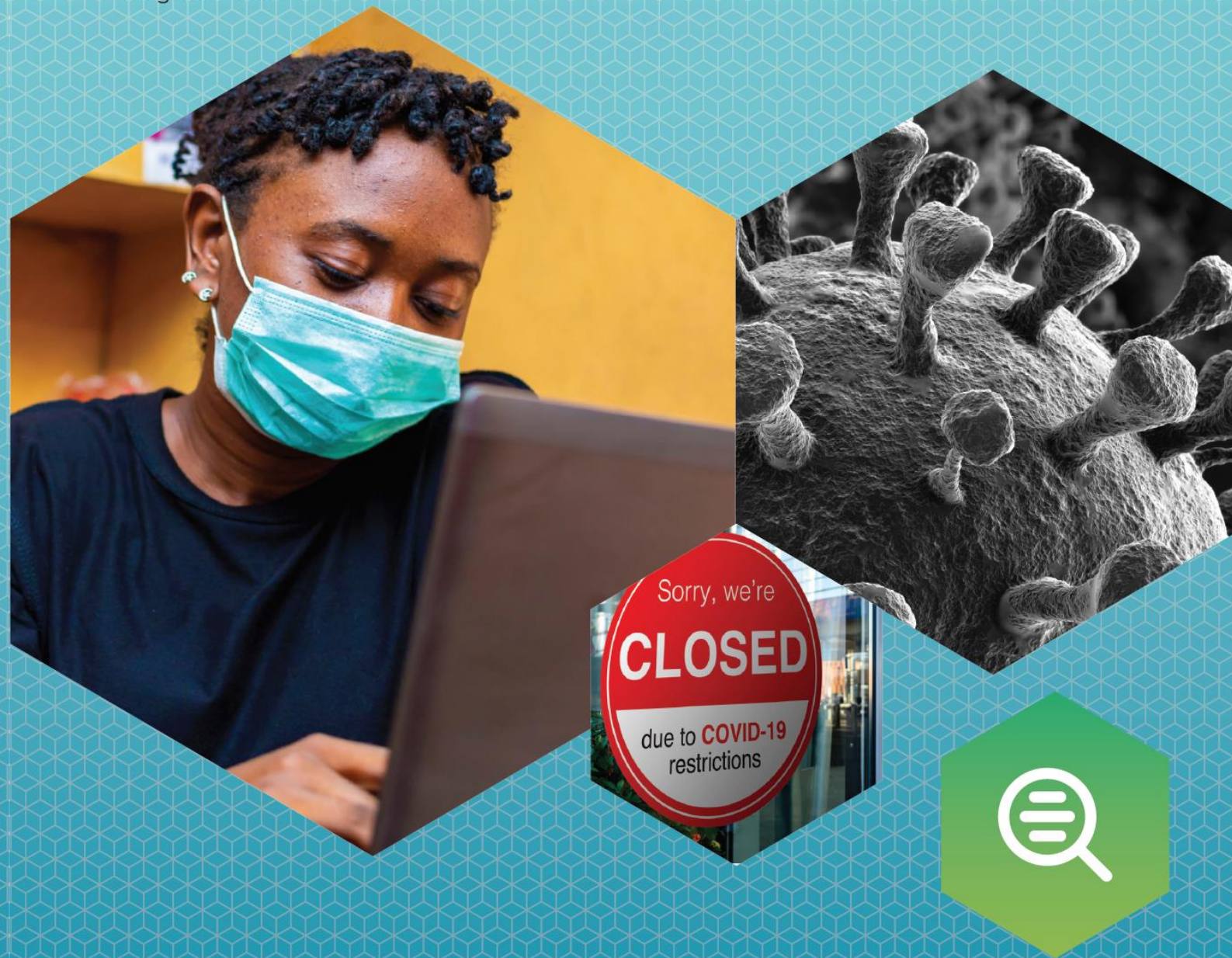


Public
Law
Project

PLP RESEARCH PAPER

Online Immigration Appeals: A Case Study of the First-tier Tribunal

Jo Hynes, Joe Tomlinson, Emma Marshall, Jack Maxwell,
Maria Wardale & Cecilia Correale
August 2020



Public Law Project (PLP) is an independent national legal charity. Our mission is to improve public decision making and facilitate access to justice. We work through a combination of research and policy work, training and conferences, and providing second-tier support and legal casework including public interest litigation.

Our strategic objectives are to:

- Uphold the Rule of Law
- Ensure fair systems
- Improve access to justice

www.publiclawproject.org.uk

Executive Summary

This report explores the recent shift towards adopting digital ways of working in the First-tier Tribunal (Immigration and Asylum Chamber) (FtTIAC).

The bulk of our research examines the transition to using the online procedure to manage appeals in this Tribunal. This new system involves the introduction of a digital platform to lodge and track appeals, as well as an adapted appeal process that aims to provide more active case management and encourage earlier engagement from parties.

Our research into this online procedure has two parts: first, an exploration of its use in the pilot phase in 2019, and second, its unplanned expansion as a response to the COVID-19 pandemic from March 2020 to June 2020.

We also explore wider developments in the Tribunal's transition to an online court during the pandemic, and the adoption of remote hearings in particular. In the FtTIAC, substantive hearing lists were vacated from March 2020 to June 2020. Instead, only Case Management Review Hearings and immigration bail hearings were heard. These were conducted almost exclusively via telephone, with some later hearings heard via the video conferencing platform, Cloud Video Platform (CVP). Our research explores the impact of these developments and how they have interacted with the online procedure.

Research methodology

Our methodology draws on both quantitative and qualitative data produced through interviews, observations, and Freedom of Information Act (FOIA) requests. Our data was collected between 20 April and 24 June 2020, which broadly corresponds with the first peak of the pandemic in the UK.

We conducted semi-structured interviews with 43 lawyers, appellants, representative bodies, and appellant support organisations. These interviews focused on interviewees' experiences of the online procedure during the pandemic and, where relevant, their experiences of the online procedure pilot. We also conducted observations of 13 immigration bail hearings, in order to observe how remote hearings were proceeding in the Tribunal during the pandemic. Quantitative data was sourced through a combination of publicly accessible data published by Her Majesty's Courts and Tribunals

Service (HMCTS), two FOIA requests, and correspondence from HMCTS that was shared with us.

Summary of key findings

- The online procedure offers significant benefits in principle. Interviewees saw the shift away from paper working and towards a digital system that facilitates earlier engagement of parties to be beneficial. Specifically, the role of Tribunal Case Workers (TCWs) and the respondent review stage were perceived to have clear benefits.
- There were substantial concerns with how the online procedure was implemented during the pilot and how it was expanded during the pandemic. It was clear that many of the issues experienced with the online procedure during the pandemic, both in terms of its implementation and its fundamental structure, had their antecedents in issues that were not addressed during the pilot phase.
- A number of key concerns need to be tackled for the online procedure to fulfil the potential that many interviewees saw in it. These concerns related primarily to the legal aid funding arrangements, the nature of the Appeal Skeleton Argument (ASA), and poor Home Office engagement with the respondent review process. As a frontloaded process, sufficient resourcing of the early stages in the online procedure was perceived to be vital in addressing these concerns.
- Conducting Case Management Review Hearings via remote link was generally seen as desirable if an appellant was represented. Interviewees saw advantages to remote hearings in the context of Case Management Review Hearings but had concerns about their use in substantive hearings.

Recommendations

- 1) The results of any evaluation of the online procedure, pertaining to its use either in the pilot phase or during its recent expanded use under presidential Guidance Notes Nos. 1 and 2, should be made publicly available.
- 2) Frontloading of work in the online procedure needs to be matched by a frontloading of resources. This applies to both the respondent, in terms of Home Office review capacity, and the appellant, in terms of legal aid funding. Without this, the value of the online procedure is undermined.

- 3) We support the Lord Chancellor's move to make a temporary transitional amendment to the 2018 Standard Civil Contract. This will mean that by September 2020 all immigration and asylum appeals lodged using the online procedure under a legal aid contract will be remunerated on an hourly rates basis pending a full consultation.¹ We suggest that this consultation should commence as soon as possible. It should include in its terms of reference an evaluation of the impact on the legal profession and access to justice of any proposals for a legal aid funding framework for the online procedure.
- 4) The capacity of the current TCW teams and Home Office review teams should be reviewed by HMCTS and the Home Office respectively. The ratio of the number of staff dedicated to the review process in these teams to the number of appeals lodged should be maintained, as a minimum, at pilot phase levels.
- 5) A coherent, systematic approach across all hearing centres is important in order to maintain both procedural fairness and support for the online procedure. The value of a streamlined approach should be communicated by the Chamber President to Resident Judges and facilitated by the provision of model directions and examples wherever possible.
- 6) We support the publication by HMCTS of a Vulnerability Action Plan² and in particular the collection of protected characteristics data on service users. We suggest this good practice can be built upon by urgently conducting research into the impact of the online procedure on especially vulnerable appellants.
- 7) HMCTS and the FtTIAC Chamber President should provide more publically available information on the powers exercised by TCWs, their level of supervision, and the training they receive. The TCW Code of Conduct referenced as a possible future publication in the Senior President of Tribunals' Annual Report 2020³ would be a welcome step. As a new role with potentially substantial case management powers, the accountability of TCWs is integral to the success of the online procedure.
- 8) A guidance note about good practice for remote hearings (both telephone and video links) in the FtTIAC should be produced by the Tribunal. The judiciary, user groups, and interested stakeholders could make valuable contributions to this. This note should particularly focus on the technical, financial, and linguistic constraints experienced

by appellants in the FtTIAC, both represented and unrepresented, with regard to their ability to engage with digital processes.⁴

Acknowledgements

We would like to express our sincere gratitude to all of our research participants for being so generous with their time and for making this piece of research possible.

The report benefited greatly from the invaluable feedback provided by Professor Ingrid Eagly, Dr Helena Wray, and Sonia Lenegan.

This research was in part funded by the Economic and Social Research Council, through their funding of Jo Hynes' placement at Public Law Project.

Abbreviations

ASA	Appeal Skeleton Argument
CCD	Core Casework Database
CMR /CMRH	Case Management Review/ Case Management Review Hearing
CVP	Cloud Video Platform
EEA	European Economic Area
FOIA	Freedom of Information Act
FtTIAC	First-tier Tribunal (Immigration & Asylum Chamber)
HMCTS	Her Majesty's Courts and Tribunals Service
HOPO	Home Office Presenting Officer
HR	Human Rights
TCO	Tribunal Case Officer. As referred to in the Pilot Directions.
TCW	Tribunal Case Worker. The same role as TCO. HMCTS literature and most interviewees refer to TCWs and so we adopt TCW in this report.

Contents

Executive Summary	3
Introduction	10
Methodology	12
Part One – Online procedure: pilot phase	16
Part Two – Online procedure: expansion during the COVID-19 pandemic	30
Part Three – Remote hearings in the FtTIAC	51
Conclusions and recommendations	54
Appendices	56
References	68

Introduction

The First-tier Tribunal (Immigration and Asylum Chamber) (FtTIAC) is established by the Tribunals, Courts and Enforcement Act 2007.⁵ It is one of seven chambers of the First-tier Tribunal. The FtTIAC hears appeals from Home Office decisions and applications for immigration bail from people in immigration detention.

The legal context of the FtTIAC

The Home Office makes millions of decisions every year about whether people can enter the UK.⁶ Just over three quarters of the applications made are for visitor visas, and the remainder are people seeking permission to enter and remain for reasons relating to work, study and family. The UK also offers asylum or protection to those who qualify, with 20,703 people granted protection status in 2019.⁷ Those who wish to continue their stay in the UK may apply for an extension of a temporary visa, or for settlement. These asylum and protection applications constitute a relatively small proportion of all immigration decisions.⁸

If a person receives an unfavourable decision from the Home Office on an application, they might have a right to appeal it in the FtTIAC. The FtTIAC is a creature of statute: it only has authority to hear and decide an appeal if legislation says so.⁹ The categories of case with a right of appeal attached were significantly reduced by the Immigration Act 2014. Some of these rights of appeal can only be exercised if the person is outside the UK. At present, the FtTIAC can hear appeals from the following classes of decision:

- Refusals of human rights or protection claims or revocations of protection status¹⁰
- Deportations or refusals of residence documents under the Immigration (European Economic Area) Regulations 2016¹¹
- Revocations of British citizenship¹²
- Deportations, refusals or revocations of status, and certain other decisions under the EU Settlement Scheme¹³

On an appeal, an independent tribunal judge considers whether the original decision was correct on the merits.¹⁴ The judge takes a fresh look at the facts and can hear evidence and summon people to answer questions or produce

documents.¹⁵ If the judge decides that the Home Office got the original decision wrong, they can substitute a fresh decision in its place.

The FtTIAC also has the power, on application, to grant immigration bail to people in immigration detention.¹⁶ A person on immigration bail is released from detention subject to certain conditions. The proportion of people leaving immigration detention to be removed has significantly declined over recent years, from 64% in 2010 to 37% in 2019. At the same time, the proportion of people leaving detention through release on immigration bail has increased, from 34% in 2010 to 61% in 2019.¹⁷

The HMCTS reform programme

Courts and tribunals in England and Wales are undergoing a period of rapid change, guided by the vision outlined in the 2016 policy paper 'Transforming Our Justice System.'¹⁸ Her Majesty's Courts and Tribunals Service (HMCTS) consequently launched a £1 billion reform programme with the aim of modernising the justice system, reflecting global trends towards digital justice. The reform programme is currently expected to be completed by December 2023. In the FtTIAC, the reforms build on recommendations made by the charity, JUSTICE, which published a report in 2018, suggesting that the HMCTS Reform Programme is an opportunity to make improvements to the system.¹⁹

COVID-19 developments

Like many other jurisdictions, the FtTIAC has been forced to change how it works as a result of the COVID-19 pandemic. Alongside expanding the use of remote hearings, the Tribunal has expedited its rollout of the online procedure, ostensibly to allow the Tribunal to continue functioning during the exceptional circumstances created by the pandemic. Specifically, the pilot outlined in the previous section has been expanded in two Presidential Guidance Notes.²⁰ This has allowed the FtTIAC to accelerate reform in the FtTIAC 'so that 90% of all IAC appeals can be submitted and concluded online.'²¹

Methodology

Prior to beginning our research, we had planned to examine the online procedure pilot in the FtTIAC. This developed into exploring both the online procedure pilot and its expanded use during the pandemic. We also explored wider developments in the Tribunal's transition to an online court during the pandemic, most notably its adoption of remote hearings.

Scope of the research

Our methodology draws on both quantitative and qualitative data produced through interviews, observations, and Freedom of Information Act (FOIA) requests. Our data was collected between 20 April and 24 June 2020, which broadly corresponds with the first peak of the pandemic in the UK.

This research represents the first evaluation of the online procedure in the FtTIAC. It constitutes a significant advancement in our understanding of the practical workings of the online procedure, both in its pilot phase and in its expanded format during the pandemic. More broadly, it makes a substantial contribution to the developing literature on online courts.²² In particular, it highlights the challenges of parachuting in a digital process to an already established network of systems.

Despite this, the nature of conducting research during a pandemic presented a number of obstacles. Firstly, the data involves only limited engagement with appellants, particularly unrepresented appellants. This was due to the practical limitations of conducting research during a time when researchers were working from home and when appellant support organisations were under acute strains. We are also aware that our data relates largely to the implementation of the online procedure during a pandemic and are clear that our findings cannot necessarily be extrapolated beyond the unexpected experiment that this situation created. Nevertheless, we consider our findings to be a valuable indication of potential opportunities and challenges of the online procedure beyond a pandemic context.

We refer to the reformed, fully digital, 'end-to-end' appeal process journey in the FtTIAC, navigated through the Core Case Database (CCD) via MyHMCTS, as the "online procedure." We make it clear when we are referring to this online procedure in the context of the pilot or in its expanded form during the

pandemic. Our focus here is on the period from an appellant with a right of appeal appealing an initial immigration or asylum decision up until the First-tier Tribunal issuing a decision on their appeal.

Qualitative methods

As outlined in table 1, we adopted a mixed-methods approach combining semi-structured interviews with observations.

Table 1: A breakdown of qualitative research conducted.

Method	Details	Further Details	Total
Semi-structured interviews	Interviews with lawyers who were involved in the pilot about their experiences of the pilot and the online procedure during the pandemic.	Solicitors (8)	8
	Interviews with appellants about their experiences of the pilot.	Appellants (2)	2
	Interviews with lawyers about their experiences of the online procedure during the pandemic.	Barristers (14) Solicitors (10) Immigration caseworkers (2)	26
	Interviews with representative bodies about their experiences of the online procedure during the pandemic.	Representative bodies (3)	3
	Interviews with appellant support organisations about their experiences of the online procedure during the pandemic.	Legal practitioner (2) Support coordinator (2)	4
		TOTAL	43
Observations	Immigration bail hearings at Taylor House.		8
	Immigration bail hearings at Hatton Cross.		5
		TOTAL	13

Semi-structured interviews

Interviews were conducted with a mixture of lawyers and non-lawyers. In total, we conducted 43 interviews with individuals from across England and Wales. We secured these interviews through social media call-outs, emailing representatives whose firms had been involved in the pilot, and contacting individuals who we already knew worked in this area. There was also a significant 'snowballing' effect, as interviewees often suggested further potential interviewees.

After conducting ten interviews, we established four sets of questions (for barristers, solicitors, support organisations, and appellants) followed by a series of thematic prompts. The interviews were largely guided by the interviewees, following a 'conversation with a purpose' interview style.²³ As all researchers were working from home during this period, interviews were conducted via a video conferencing platform and recorded to generate transcripts.

Observations

At the time of the research, the FtTIAC was hearing almost exclusively immigration bail hearings and Case Management Review Hearings. We observed 13 immigration bail hearings in order to observe how remote hearings were proceeding in the Tribunal during the pandemic. We considered that findings in this context may be indicative of the way a broader adoption of remote hearings in the Tribunal may develop.

Access was established through emailing the bail team at the relevant hearing centre, who provided bail listings and joining details for us to be able to join the hearings. All 13 hearings were conducted via telephone and we informed parties on the call that we were present in a purely observational capacity.

Quantitative methods

We also sourced a range of quantitative data to contextualise our qualitative findings and establish how appeals were progressing through the online procedure. Our quantitative sources were:

- official statistics published by HMCTS, including the Tribunal Statistics Quarterly for January to March 2020;²⁴
- weekly management information published by HMCTS, which does not have the level of accuracy that the official statistics are able to

provide, but which we use here as an indication of how tribunals are currently operating;²⁵ and

- data gained through other means, including FOIA requests and correspondence from HMCTS shared with us.

Two requests were made under the FOIA. The first was to establish how many asylum appeals were being lodged via the online procedure and their outcomes. The second was to establish what proportion of all FtTIAC appeals were being lodged through the online procedure and their outcomes. In both, the Ministry of Justice provided the requested data.

Approach

We explore primarily the transition to using the online procedure in the FtTIAC. This has two parts: firstly, an exploration of its use in the pilot phase in 2019, and secondly, its expansion as a response to the COVID-19 pandemic from March 2020 to June 2020. In the final section, we explore wider developments in the Tribunal's transition to an online court during the pandemic, involving the shift to conducting bail hearings and Case Management Review Hearings via telephone.

Part One – Online procedure: pilot phase

HMCTS have said that the reform programme will ensure that all cases can be started online and some cases will be resolved entirely online, creating a system which is 'digital by default.'²⁶

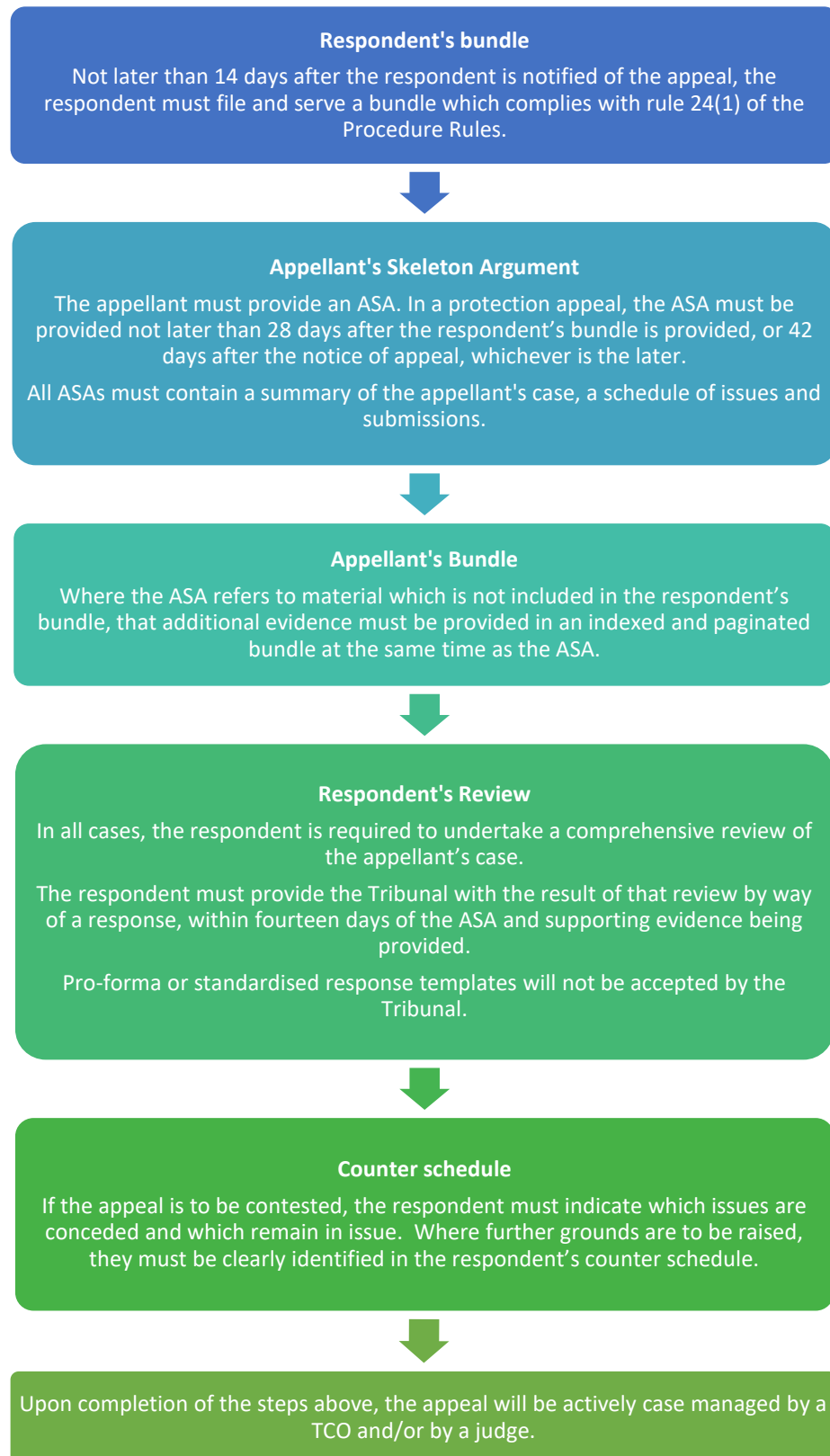
Pilot process

In the FtTIAC, the reform programme has produced a reformed system for lodging and managing appeals online. This involves a three-step reformed process before the hearing goes to a physical hearing, providing what HMCTS refer to as a reformed, fully digital, 'end-to-end' appeal process journey.²⁷ The process is as follows:

- 1) Online application. Applications are submitted using an online platform with a simplified appeal form (25 fields reduced from 128 fields).
- 2) Digital bundle. Tribunal Caseworkers (TCWs) manage the progression of the bundle, requesting missing information and listing the appeal when they consider it is ready. A shared digital bundle is created as part of the process.
- 3) Review of the skeleton argument. The legal representative has 28 days from bundle submission to file an Appeal Skeleton Argument (ASA). The Home Office then has 14 days to review the appeal, giving them the opportunity to withdraw or concede parts of it at this stage.
- 4) Hearing. The appeal is then heard as per the traditional process in the FtTIAC, with the addition of screens, recording equipment, and digital bundles on devices.

From January 2019, HMCTS began piloting the use of this online procedure in Taylor House, London, and Manchester Piccadilly. This pilot was limited to a subset of appeals, specifically protection or revocation of protection appeals from six law firms that were invited to take part. Figure 1 summarises the directions that were originally issued to participants of the online procedure pilot ("the Pilot Directions").²⁸

Figure 1 Summary of Pilot Directions, as issued by the Resident Judges at Taylor House and Manchester Piccadilly, from January 2019.



HMCTS hoped that the active case management and early engagement of parties built into the pilot would reduce the number of cases requiring a hearing, as well as making hearings shorter and more focussed.²⁹

In September 2019, this pilot was expanded to Bradford and Newport, with a view to further expanding the service to North Shields, Hatton Cross and Birmingham by the end of 2019.³⁰ HMCTS then planned an iterative rollout of the online procedure throughout 2020. This involved its expansion to include all legal firms being able to submit asylum appeals through the online procedure, and later in the year to include a wider variety of appeal types (human rights and European Economic Area appeals), plus appeals from detained appellants and unrepresented appellants.

Pilot evaluation

Some information on the evaluation of the pilot has been made publicly available by HMCTS. Sources of information that are available include: updates published on the reform programme, which contain information about the development of the digital appeals process,³¹ as well as events;³² monthly newsletters that provide progress updates;³³ and articles on the Inside HMCTS blog.³⁴ However, what is not published is any detailed analysis of user perceptions of the programme or its effectiveness in meeting a set of objectives or specified criteria.

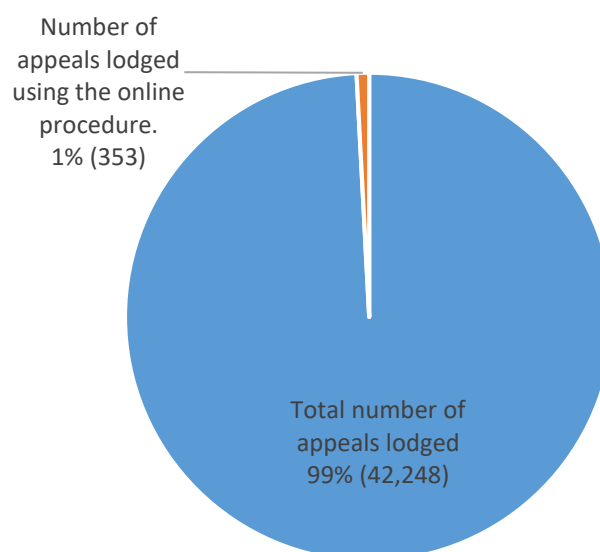
In a letter to Duncan Lewis solicitors dated 3 June 2020, HMCTS state that there has 'not yet been a formal evaluation of the project,'³⁵ but that evaluation has been ongoing as the project develops. The letter notes that 'a cross jurisdictional evaluation approach and methodology is currently being considered by the HMCTS Customer Directorate.' Consultation activities with users include 'research visits to immigration lawyers, practitioners, and representative bodies; the running of co-design and/or problem solve workshops; and attendance at Tribunal User Groups, the Law Society's Immigration Law Committee and the bi-annual IAC stakeholder meetings.'³⁶ The letter reports that user feedback is captured through a range of activities and attendance at events and meetings. From these sources, the project team capture thematic findings on user experience in a digital platform, which is not in a format that it is possible to share, but demonstrates 'anecdotally' that 'users report the process is improved and the technology easy to use.'³⁷

The publication of official evaluation results from the pilot and the incremental introduction of the online procedure is essential in delivering a transparent service. Publishing any evaluation results would assist HMCTS in meeting their stated aim to deliver an 'efficient and transparent IAC service that is simple, fair and accessible for everyone using it.'³⁸

The scale of the pilot

As figure 2 demonstrates, relatively few appeals were lodged under the pilot, compared to the total number of appeals lodged in the FtTIAC at the time it was running. This reflects the fact only a small number of appeals were eligible to take part in the pilot and highlights its relatively small scale.

Figure 2 The proportion of appeals lodged in the FtTIAC through the online procedure during the pilot.³⁹



Empirical evidence

Benefits of modernisation

The underlying principles of the online procedure were seen by the vast majority of interviewees as extremely positive. Interviewees saw the shift away from paper working to be very desirable and an inevitability in the digital age.

'[I]f those [concerns] can be resolved then I think it probably is the right way forward, to do things online because the world is online, you know, and we have to move and change and adapt.' [Interview #3]

'I think the concept is good, and I think that it could work well. ... I like the idea of working paperless as much as possible, and being able to upload bundles is something that saves a huge amount on postage.' [Interview #4]

Tribunal Case Workers

Tribunal Case Workers (TCWs) were given an enhanced role as part of the online procedure. According to HMCTS literature, they 'proactively manage cases through [the online procedure] process, narrowing issues and deciding when it is ready for listing.'⁴⁰

TCWs were spoken of very highly and many interviewees praised their responsiveness and the fact that they were not '*just in a call centre*' but knew the case they were referring to. A number of interviewees also highlighted the helpful role they played in actively case managing the appeal, particularly with regards to contacting the respondent for missing documents. Interviewees felt that TCWs elicited a better response from the Home Office and therefore served as a helpful mediator between parties. Furthermore, because an appeal would not be listed by a TCW until it was ready, several interviewees felt they could plan better as they were not going to be '*taken by surprise*' by an appeal hearing listed with short notice.

'[T]here's a dedicated email addresses for Tribunal case workers and they've been very very responsive.... So if we've got things that we need to get from the Home Office and vice versa, there's a much better channel of communication and so that's really good.' [Interview #1]

'It took two or three times over email to explain to the TCW why we needed this, but the TCW engaged with it well and asked sensible questions and eventually agreed, and gave us what was quite a reasonably long extension in order to get the report because the expert couldn't do report for 3 or 4 months. ... [T]he process was much more transparent in a way. You felt like you were communicating with a real person rather than just getting something back a week later ... and they haven't really engaged with it. So I mean probably we would have gotten there in the end [with the standard procedure], but it was a much quicker process.' [Interview #6]

'[I]f you get a respondent's bundle and you're missing something, it's not just you having to contact the presenting officers going, "Where is this? We need this", we now also have a TCO who's saying to them, we can't proceed with this appeal until you produce this evidence.' [Interview #8]

Flexibility

Many interviewees found the flexibility of the online procedure extremely helpful, and particularly valued the easier process of applying for extensions or adjournments. Interviewees suggested there was an improved sense of parties working towards the shared goal of getting the appeal ready for hearing.

'[B]ecause hearings don't get listed until they're ready, there's no longer [the] need to try and get adjournments if you need to get expert evidence, ... because you can just communicate that with the tribunal from the beginning. We've generally found getting expert reports, take around four to six weeks to get funding and to get the reports, and we often don't have time to do that within the Tribunal time frame, but the Tribunal have been very flexible about allowing additional time to get expert reports and evidence.' [Interview #1]

'[I]f from the initial stage, if you indicate that you need more time, then generally you will get that time because the case can't proceed until you're ready. So in terms of expert reports or for whatever reason you need more time than the 28 days that they give you, we're finding there's a lot more flexibility. Often getting an adjournment from a judge was quite difficult ..., whereas with the TCO it seems like it's a much smoother process, because the purpose of the appeal ... is to have all of that evidence in place for the respondent to review, but also before the hearing date. ... [W]e have more time to prepare cases, certainly, which has been beneficial. That's probably the best thing.' [Interview #8]

Home Office 'withdrawal to grant' rate

One of the most popular elements of the online procedure was the increased rate at which the Home Office withdrew unsustainable decisions to contest an appeal, in order to grant the immigration status in question ('withdrawal to grant'). When this happened, interviewees felt that it significantly improved the appellant experience and saved significant resources for both the appellant and respondent.

'[W]e've had a much higher percentage of appeals that have been withdrawn than we have seen in the normal system. ... So cases, I think, that normally would have gone all the way through the court system, waited for judge to make a decision, had a positive outcome, we get in a positive outcome much sooner. Which is really good and I think it just shows the level of engagement on both sides because we're preparing very detailed bundles, extra evidence, skeleton arguments that are really, really addressing all of the points and the caseworker is actually looking at that and being quite pragmatic and sensible, and realise there's a case that, you know, they're quite likely to lose. ... I've been in immigration for seven years now at [law firm] and I don't know if I've ever had appeals where the Home Office have considered the bundle before the hearing and withdrawn.' [Interview #1]

'[I]t feels like a fairer process as well, because it feels as though the Tribunals are really putting the appellant and respondent on equal footing, which didn't always feel to be the case before with the paper process. And you can be very straightforward with the client about timescales and things as well. There isn't like months and months where you have to wait for an appeal hearing ..., which isn't very good for our work life balance, but also for the client's mental health.' [Interview #5]

Even if the respondent review stage did not lead to a 'withdrawal to grant', the engagement from the Home Office, combined with the Appeal Skeleton Argument (ASA) was seen by some as helpful in focussing issues before the hearing.

'I don't think they would have conceded this [appeal] on the day. So if it had been under the old system and the presenting officer had got all our stuff the day before ... they wouldn't have looked at it ... they would have just come along and stuck to their refusal letter. So I think the fact that there is this period of time where they have to look at it, it's really good. ...[E]ven if they hadn't conceded it, we should have been able to narrow down the issues on the basis that they are required then to tell us what issues remain in dispute.'

[Interview #2]

A number of interviewees were also pleased with the general level of Home Office engagement, suggesting it improved throughout the pilot. This improved engagement primarily involved the timely upload of the respondent's bundle, which one interviewee noted would not have happened under the standard procedure.

Substantive hearings

A number of interviewees had been involved in appeals that had gone to hearing under the online procedure pilot. This hearing process involves the standard appeal hearing process, with the addition of screens, recording equipment and digital bundles on devices. This reformed hearing process was generally well-received by the interviewees who had experienced them.

One interviewee suggested that this reformed hearing process did not fundamentally alter their experience of advocating in the hearing, and felt that their client's experience was improved by having access to an electronic bundle on an individual screen.

'So for us, we just said it really is the same, just a few extra screens. The advocacy part of it really is just no different. The process of it is same and the structure of the hearing is the same. ... I would say it's probably easier to refer to evidence. ... It was quite handy for the client to actually have that [electronic bundle] in front of them rather than me having to pass them my bundle you know, so that side was a little more slick and probably beneficial.'

[Interview #8]

However, an appellant we interviewed said they did not have access to an electronic bundle via a screen provided by the Tribunal like everyone else did, but would have liked one as this would put all participants '*at the same level.*'

General concerns with the implementation of the online procedure

Alongside these benefits of the online procedure in its pilot phase, many interviewees highlighted multiple challenges. Many of these concerns were framed as '*teething issues*' or issues that needing to be '*iron[ed] out*' before interviewees would be happy to use the online procedure. These were challenges that interviewees felt could be addressed reasonably quickly, given the right resources.

Legal aid

Many interviewees were anxious about the legal aid funding arrangements in place during the pilot. Multiple interviewees were concerned that the online procedure created additional work for representatives, but this was not paid work in fixed-fee cases.

'[G]enerally these appeals take longer to prepare and yet you're not getting paid more money for them. Unless they're hourly rates cases, but if they're fixed fee cases and they're not going to become escape fee cases, which very few of them do. So you're doing more work for the same money which is, you know, a bit of a worry. ... The thing is, as a bare minimum on every single case it's an extra 4 hours work and sometimes it will be lots, lots more than that. So effectively, that sort of work you're doing for free, so that's the concern.' [Interview #4]

'[A]t the end of the day, if I'm going to be spending 4-6 hours extra on this, and not being paid more, it's just not financially viable. ... [W]hat I'm afraid will happen is a lot of firms will start just doing standard skeleton arguments where they're not really engaging. Because if you're not getting paid for it and you're doing all this hard work, I think it's going to be back to the olden days but we're just doing it on CCD.' [Interview #7]

A number of interviewees specifically suggested that the timeframe and the extra review stages built into the online procedure generated some of this additional work for representatives.

'[O]bviously you've prepared a case in response to a refusal letter and then in effect, in a few of ours, we've got a second refusal letter where you have to go back to the client in order to take further evidence, or collect further evidence in order to rebut those additional refusal points. And obviously that would not happen during the course of a normal appeal, so this is additional work that we're having to do within the same fixed fee.' [Interview #8]

'[T]he difficulty is that if I have prepared everything 3 months beforehand, by the time I've been through the whole system I need to advise them [client] again about how the hearing will proceed. Which means, again, spending more time with clients which previously I didn't have to do because I would normally see them 3 weeks prior [the hearing] ... I think with the CCD

system, the majority of them [cases] will be going over [the fixed fee] because of the prep you have to do in readiness for the hearing.’ [Interview #7]

One interviewee noted that this time lag between submitting an appeal via the online procedure and the appeal being decided was affecting the commercial viability of taking on these cases.

‘[W]e can’t final bill a case, or stage bill a case, until we get a decision from the Tribunal, so that slowed things down. ... I think in December last year, I had to stop putting appeals into the CCD because we had so many in there which weren’t getting heard so it was a cash flow issue.’ [Interview #8]

Several interviewees were also concerned that the funding arrangements led to counsel in fixed-fee cases being left without remuneration for drafting an ASA.

‘The current situation we’re in, Counsel can’t get paid for what they’re doing. I mean, that’s not fair and not sustainable for anybody. So that needs to be addressed by the LAA if this is going to be rolled out. And we sort of had assurances from the Tribunal, you know they’re going to help us speak to the LAA.’ [Interview #1].

A number of solicitors were concerned that their appeals would be of poorer quality without this early engagement from counsel, as well as leading to possibly difficult negotiations between solicitors and barristers.

‘And I’m very anxious about the fact that we cannot get a barrister involved until after the reconsideration. Or, you know, we can get a barrister involved on a pro bono basis which is just not sustainable for the barristers. ... I feel that barristers are being put in really difficult positions and being asked, “Ooh, could you just have a look or, you know, do you mind just giving a view?”, and that’s really hard for both the solicitor and the barrister.’ [Interview #3]

‘[S]ome of us are thinking, maybe that means we should do the [ASA] ourselves, which I think is fine to an extent but often I think we don’t really have time to do justice to it. We are not so experienced as barristers in writing [ASAs] so in the best interest of the client, it would be better still to engage counsel, no matter if we think we can make a reasonable go at it.’ [Interview #6]

Home Office engagement

Whilst some interviewees experienced improved engagement from the Home Office during the pilot, others expressed frustration at what they perceived to be poor Home Office participation with the online procedure. Most notably,

this involved limited engagement from the Home Office with the respondent review process.

'[Respondent reviews] seem a bit formulaic and don't always seem to engage with the issues as well as I would have liked. Interestingly, I think the ones in [one hearing centre in the pilot] I've seen the reviews for seem to have engaged a bit more with the actual issues. ...[B]ut what concerns me is ... you've got these two people in [central review team] doing not many appeals and they're still being a bit cut and paste-y and a bit superficial to be honest.' [Interview #4]

'The decision, the response that we got back [from the Home Office] really didn't engage with the points that we had raised, so it was disappointing in that sense.' [Interview #7]

Prescriptive nature of the online procedure

A number of interviewees felt that the online procedure at times could be overly prescriptive and that this limited their ability to present the best possible case.

For the most part, interviewees said that there was sufficiently responsive communication with TCWs for requests for extensions, but one interviewee noted that they had been required to submit their ASA prior to receiving an expert report. It was then very unclear whether they were able to amend and re-upload their ASA.

Other interviewees found the ASA to have unnecessarily '*stringent requirements*' and in particular found the page limit difficult to comply with whilst still submitting a comprehensive ASA.

Delays

A small number of interviewees also expressed frustration at delays ('*the slow speed of things*') in the online procedure during the pilot.

'I think if you wanted an appeal to take place in 4 weeks' time then you wouldn't choose to use the pilot system, you would just choose the paper system to get your hearing sooner.' [Interview #6]

One interviewee expressed frustration at the delays in getting hearing rooms ready for hearings.

'[I]t appeared that they didn't have the hearing room ready, or the technology in place, so they asked us to start lodging the appeals and getting them prepared ... but I don't think we had any hearings until March.

So there's sort of two months where we had a number of appeals ready but nothing happening, which was a bit frustrating.' [Interview #4]

Another interviewee noted that these delays made it impossible to advise clients of a hearing date. Furthermore, the same interviewee explained that clients would want to add additional information to their appeal as the hearing date got closer.

'I'm concerned that it's taking 3-4 months for the case to get listed, probably longer. And that means that I'm going to have clients who want to give me lots of documents. And again that's time consuming because I have to review all the documents again. Before because it was 4-6 weeks, we were ready. But now, because things are taking a lot longer, clients are getting frustrated and they then want to add information, which is relevant a lot of the time. So I think again that's more work on or side as well which we are not going to be remunerated for.' [Interview #7]

Both appellants we interviewed whose appeals had been through the pilot spoke of the frustration of the delays they experienced. For one appellant, it took six months between the initial refusal and the appeal hearing, which the appellant said has significant negative impact on their depression, anxiety, and overall health.

Structural concerns with the online procedure

Beyond these *'teething'* issues, more structural concerns also presented themselves during interviews.

Appellants in person

The 'frontloaded' nature of the online procedure led many interviewees to question its suitability for unrepresented appellants, or even those with less diligent representation.

'[T]he work is very front loaded, so if representatives do that work it's great, but I think I would be worried about what happens if it gets rolled out further, in particular to unrepresented appellants. I'd be concerned about how they would be able to handle the system.' [Interview #1]

One interviewee expressed frustration that the online procedure platform, CCD, did not send email notifications to inform them that directions had been served. They suggested that this put the onus on the representative or appellant in person to keep checking for notifications on the system, which was *'hidden away on quite a small tab'*. They were unsure how an unrepresented appellant would manage this unintuitive process.

Interviewees highlighted language barriers, poor digital literacy and lack of access to technology in a secure environment as key obstacles to appellants in person being able to engage fully with the online procedure in its pilot form. In particular, one interviewee suggested some appellants in person may be able to '*muddle through*', but would not be able to get the '*full benefit*' of the online procedure. The role of the TCW in possibly addressing these barriers was also highlighted as a concern.

'It's [CCD] relatively straight forward for a lawyer to use, for someone who's used to working on a computer... but there are plenty of people for whom it would be completely baffling and then they would resort ... to asking friends, disclosing things to people that they wouldn't otherwise want to disclose things to, or they just won't be able to use it at all. [I]f you're not computer literate and you can't read English, there's just no way you'd be able to do it.' [Interview #6]

'I think that if it's going to be rolled out to unrepresented appellants there's going to need to be a huge level of support. And then leading on from that, my concern would then be, does that support come from the Tribunal ...? Do you have a caseworker effectively helping the appellant to prepare their case and then how does the Tribunal maintain their independence, if they're effectively, almost acting as a quasi-legal representative?' [Interview #1]

'I think they could be really lulled into a false sense of a facilitator becoming an advocate, or an advisor. And the thing is, the Tribunal person [TCW] could say until they're blue in the face, "I can't give you advice, I can't give you advice", but if you have a person who hasn't got any other source of advice then they will just follow what they [TCW] think.' [Interview #2]

'[W]here do you draw the line? If you have an appellant who wants to submit lots and lots of documents and then you have this facilitator [TCW], do they just say, "Ok, this is how you upload everything"? They might get tempted to say, "Well actually I don't think you're going to need that". Because it would be easy to be drawn into that person giving advice about what to do. ... [W]e've seen it [in other immigration contexts] where people [who] were only supposed to just assist with uploading, end up becoming sort of pseudo advisors and making things worse.' [Interview #4]

A represented appellant whose appeal had been part of the pilot phase was concerned about how someone who did not have the legal support they had would be able to navigate the process.

'[S]ome of these people cannot speak English, maybe they don't know how to use the Internet. What will be their fate?' [Interview #19]

Complex appeals

Some interviewees suggested that the online procedure would be unsuitable for more complex appeal types.

For one interviewee, all fresh asylum appeals came under this category, because the appellant would invariably be *'still working through the process of talking about their experiences'* and would not be able to give *'neat little packages of information deposited into this online pilot.'* Another interviewee was concerned about meeting ASA requirements in complex cases.

One interviewee suggested that cases where the appellant was detained would be very difficult to conduct in the online procedure. Detained cases were exempt in the pilot and remain exempt from complying with the online procedure, as per the Presidential Guidance Note No 2 2020. Nevertheless, the interviewee felt that this may present issues at a later stage of the reform rollout.

'It's difficult enough communicating with client, I don't know how people in detention are going to cope with it. You can see that being a real sort of hurdle to overcome and I'm not quite sure whether the HMCTS are thinking about it... I assume they've got a plan about how to make sure that you know, detained clients are able to access the system and upload documents and so on, but I can't see that being straightforward.' [Interview #4]

Concerns about resourcing beyond pilot phase

Many interviewees expressed concern about how the online procedure would be supported to the same degree as they had experienced during the pilot phase. They felt that many of the benefits they had received, in particular the responsiveness of TCWs and the Home Office, may be compromised with a wider rollout of the procedure.

'What the big concern is, is if everyone's got to suddenly use it ... will it cope with that many people? ... At the moment you know, TCWs are fantastic – they're responding quickly, but then there are not many firms and not many appeals. If you're suddenly dealing with a whole range of firms and thousands of appeals a month, they're not going to be able to cope in the same way. Certainly in the Leeds Review Team the two senior Presenting Officers ... at the moment, they can cope with reviews of appeals. But if there are suddenly 100 times more than there are now, they're going to need more. ... The quality of the [Home Office] review undoubtedly is going to go down because they're not going to have enough time to do it so if they're relatively poor already, I hate to think what they'll be like when they've got so many more to deal with.' [Interview #4]

'[I]n theory, it's not a bad thing but I think in practice ... my fear is that there won't be enough Tribunal or barrister time to make it operate well.'
[Interview #6]

'So I am worried that once it gets rolled out, we're not going to get quick responses from the Tribunal like we do now. The Home Office might not even comply with directions or if they do it'll just be tick boxes – yes we reviewed it but we are maintaining our decision.' [Interview #7]

A number of interviewees also highlighted how the pilot only accepted a limited number of appeal types and where the appellant was over 18, living in the pilot area, had legal representation, was not detained, and the appeal was not linked. Some interviewees expressed concern about how it would work in a wider context.

Two interviewees were particularly concerned about how technical issues would be addressed when more appeals were channelled through the online procedure and their direct contact with technical support staff potentially ceased. One interviewee was already having issues with getting a response from technical support during the pilot and was concerned about what this would mean for an expanded online procedure.

'At the moment I'm ok because I've got the email address for the [name] Tribunal and they're more than happy for us to email because it's the pilot, but I'm sure when this is no longer the pilot, just like they have done in the past, they've said, "Please don't email us anything". ... But if we have a technical issue and we can't comply with directions, and the technical team are not getting back to me in 24 hours or at least 48 hours, then what's going to happen further down the road? ... He [technical support] still hasn't gotten back to me. That was two weeks ago or something.' [Interview #7]

Part Two – Online procedure: expansion during the COVID-19 pandemic

The Pilot Practice Direction issued by Sir Ernest Ryder on 19 March 2020 gave Chamber Presidents considerable discretion to ‘adjust their ways of working’ to respond to the COVID-19 pandemic.⁴¹

Expanded pilot process

President of the FtTIAC, Judge Michael Clements, first addressed the challenges presented by the pandemic through Presidential Guidance Note No 1 which was issued on 23 March 2020.⁴² This note indicated that, ‘[w]ith the exception of HR [Human Rights]/ EEA [European Economic Area] appeals, all appeals to the First-tier Tribunal must be commenced using the online procedure unless it is not possible to do so.’ HR appeals are just under half of the total applications made to the Tribunal, and EEA appeals are just over a quarter.⁴³

In response to the Presidential Guidance Note No 1, Resident Judges began issuing directions, stating that parties must comply with the Pilot Directions.⁴⁴ All hearings that were scheduled were vacated, and appeals began to proceed instead through the online procedure and Case Management Review Hearings. In effect, appeals began to follow the processes outlined in figure 1, although the ‘start date’ from which days are counted differed between hearing centres.

Presidential Guidance Note No 2 was then issued on 11 June 2020 and came into effect on 22 June 2020, revoking Presidential Guidance Note No 1.⁴⁵ It indicated that all appeals must be started through the online procedure, with a more limited number of exceptions than the earlier note. Specifically, at paragraph 3, it noted the following exceptions:

‘Where an appeal is brought in any of the following circumstances, it shall be deemed not to be reasonably practicable to commence that appeal by using MyHMCTS:

- a) under The Immigration (Citizens’ Rights Appeals)(EU Exit Regulations 2020);
- b) if the appellant is outside the United Kingdom;

- c) if the appellant is in detention;
- d) any appeal brought by a person without representation by a qualified person within the meaning of s.84 of the Immigration and Asylum Act 1999; or
- e) if the appellant's appeal is linked to another appeal. (This applies where the appeal of one or more appellants is brought at the same time in circumstances in which those appeals raise common issues).'

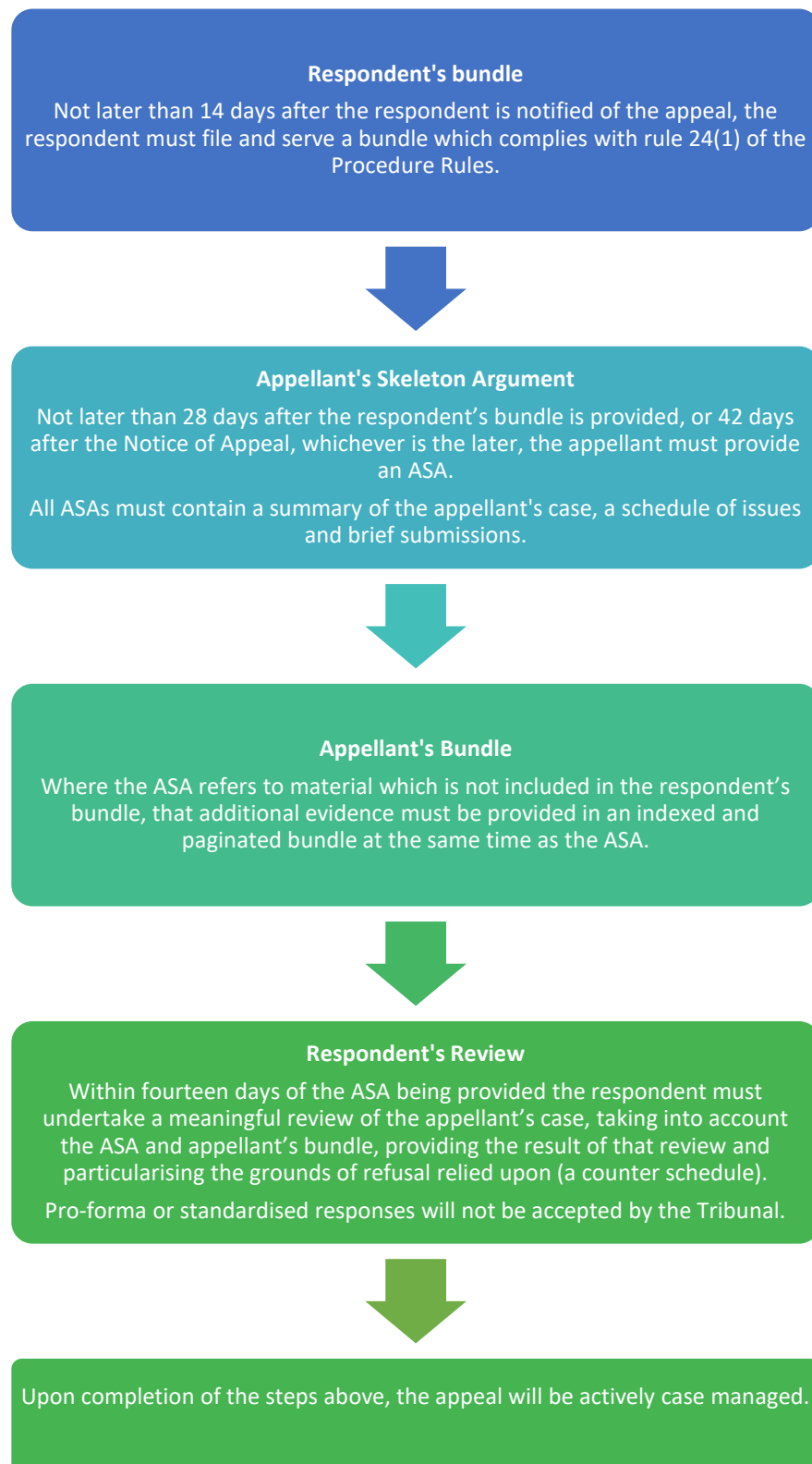
Attached to this later note were three annexes that outlined the process for appeals progressing through the online procedure, appeals not progressing through the online procedure, and appeals with unrepresented appellants. The first annex, for appeals progressing through the online procedure, is summarised in figure 3. There are minor differences between the Pilot Directions (summarised in figure 1) and the directions issued under Presidential Guidance Note No 2, but as figure 3 below highlights, the timeframes and stages remained the same.

The user guide issued alongside Presidential Guidance Note No 2 also indicates how the Tribunal is approaching the listing of hearings until December 2020.⁴⁶ This information is summarised in table 2.

Table 2 Summary of FtTIAC plans to list hearings June to December 2020. Summarised from the original in the FtTIAC User Guide, p. 6.

Timescale	Action
June 2020	The Tribunal will continue to focus on remotely conducted Case Management Review Hearings. An increasing number of these will be held via Cloud Video Platform (CVP).
July to September 2020	Ensure that all judges can be trained in the use of CVP. Begin to conduct substantive hearings. Some face to face hearings will begin. Hearings involving several participants will likely take place on a hybrid basis with some participants attending in person and others attending remotely using CVP.
October to December 2020	Period of consolidation as judiciary, staff, and Tribunal users increase their familiarity with the use of remote hearing technology.

Figure 3 Summary of model directions in annex 1 of Presidential Guidance Note No 2.

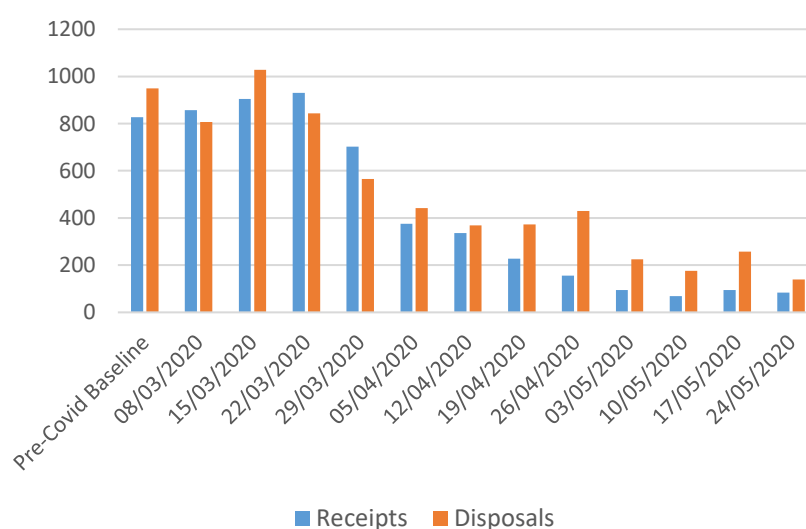


Impact of COVID-19 on the FtTIAC

Weekly management information published by HMCTS gives some indication of the volume of cases progressing through the Tribunal during the pandemic. However, this weekly management information is subject to a number of caveats. First, the notes that accompany the data indicate that '[t]he data does not include some cases which are currently collected through a different platform, which is currently being piloted.' This suggests that some cases proceeding through the Tribunal are not recorded in the management information, which may include those lodged via the online procedure. However, it is not clear how many cases are not included, or whether these correspond directly with the figures obtained by Duncan Lewis, which indicate that 369 appeals were received via the online procedure up to 23 March, and a total of 461 up to 1 June. Second, the figures from the case management system differ from the official statistics that are published quarterly, and government guidance on the use of management information data is clear that it should not be relied upon. It does, however, give an indication of the effects of Covid-19 on the functioning of the Tribunal.

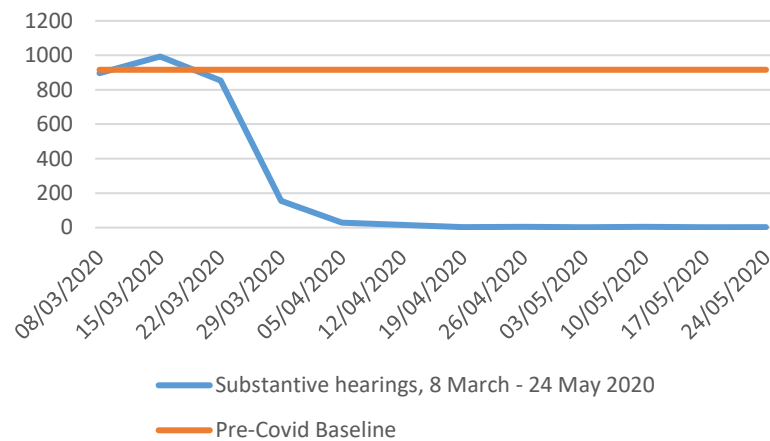
The weekly management information indicates a sharp drop in the number of cases received and disposed of by the Tribunal in the early months of the pandemic. The receipt of cases dropped from a 'Pre-Covid Baseline' of 827 receipts per week to 84 by the week ending 24 May 2020. The disposal of cases (the number of cases that have been determined) similarly dropped from a 'Pre-Covid Baseline' of 950 disposals per week to 139 in the week ending 24 May 2020 (see figure 4).

Figure 4 Workload in the FtTIAC per week, 8 March - 24 May⁴⁷



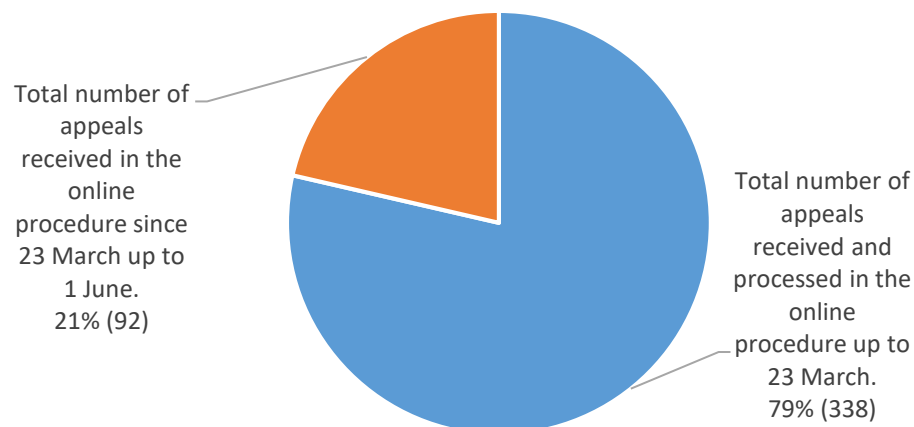
The number of substantive hearings for the same period has also fallen dramatically, as lists were vacated and converted to Case Management Review Hearings. The number of substantive hearings fell from a 'Pre-Covid Baseline' of 916 hearings per week to 3 hearings in the week ending 24 May 2020 (see figure 5).

Figure 5 Hearings (substantive) in the FtTIAC per week, 8 March - 24 May 2020⁴⁸



Finally, figure 6 shows the rapid expansion of the use of the online procedure after Presidential Guidance Note No 1 was issued on 23 March 2020. Of all the appeals lodged via the online procedure since the pilot began in January 2019, 79% were lodged between January 2019 and 23 March 2020, and 21% were lodged in the 10 weeks after 23 March. On average, during the pilot phase (January 2019 to 23 March 2020), 5 appeals were lodged via the online procedure per week. This increased to 9 appeals lodged via the online procedure per week in the period from 23 March to 1 June 2020.

Figure 6 Appeals received in the online procedure in the pilot compared to in the first 10 weeks of its expanded use during the pandemic.⁴⁹



Empirical evidence

Benefits of the online procedure

Generally, interviewees could see clear benefits with lodging and tracking appeals online.

'I mean as a system, it makes sense to do it online.' [Interview #4]

'Having an online way of doing it, is good in some ways for uploading evidence and getting the decision at the end and then seeing if they appealed. I think that all works better because you don't have to ring the Tribunal to chase for decision or to check if the other side has appealed. It's quite good way of being able to access everything. So having that stuff digital is good.' [Interview #22]

Early engagement of parties

Although many interviewees had issues with the ASAs, a small number felt that they were helpful in focussing the issues at an early stage and found them a useful stage in the process.

'I quite like them! This is a bit controversial to say, but it feels like it does sort of focus attention ... and it does sort of straight jacket you a bit, but also is quite good in terms of getting all that stuff in the First-tier Tribunal judge's mind early on in terms of what the issues are going to be.' [Interview #14]

'I think actually an ASA does focus the mind. Because if you are supposed to simply say, "This is the decision, these are the issues that you need to look at, Mr or Mrs or MX tribunal and this is what I say about them", in a condensed format, then it does really help to focus you.' [Interview #38]

One interviewee noted that this narrowing of issues and the early engagement of parties that the online procedure created could reduce the number of adjournments.

'It's positive in that there is a consolidated bundle and cases are, I think, timetabled to proceed only when the parties are ready. So, in that respect, I think there are fewer instances of cases being adjourned on the day and because of the party not being ready. The other aspect as well is that through the various pleadings and written submissions that go on, it does tend to narrow the issues. So there are fewer instances of the parties being surprised on the day.' [Interview #20]

Home Office 'withdrawal to grant' rate

In the pilot phase of this online procedure, HMCTS indicated that the Home Office withdrew unsustainable decisions to contest an appeal, in order to grant the immigration status in question ('withdrawal to grant') in around 23% of cases that they reviewed.⁵⁰ However taking the total number of withdrawals to grant up to 1 June means this rate drops slightly, to 18%.⁵¹

The filtering out of stronger cases and the avoidance of a lengthy appeal process was noted by multiple interviewees as something that initially struck them as potential benefit of the online procedure.

'HMCTS had essentially what was a good idea which came out of the JUSTICE Working Group, which was to build in this early review stage to try and filter out the strong cases. And one of the main reasons for that was actually from the Home Office, because what the Home Office were saying [was] the high overturn rate on appeal is because the Tribunal has evidence that we didn't have and so had we had this expert report, had we had the evidence that the Tribunal had, we would have granted [the disputed immigration status].' [Interview #26]

'I personally welcome this whole thing, you know in the new standard practice directions for the respondent to review matters actively, that's a positive thing because that really hasn't been happening enough and that's why we're in this, such a mess.' [Interview #28]

'[I] like having a requirement for the respondent to consider in the light of initial submissions whether or not the decision was sustainable to try and stop cases from running senselessly through to contested hearings at great distress to the client and great cost for the public purse.' [Interview #38]

'My general position is that I can see real merit in an advocate skeleton arguments [ASAs], and proceedings being front loaded so that the Secretary of State does at an early stage have an opportunity to properly consider its position. All this makes perfect sense.' [Interview #39]

Tribunal Case Workers

The enhanced role of the Tribunal Caseworker (TCW) was also viewed by a number of interviewees as being a helpful element to the online procedure.

'[T]hat's [the introduction of TCWs] an improvement because there is a direct line of communication to the caseworkers there, which never was before. We never had telephone number. We didn't have direct email.' [Interview #32]

General concerns with the implementation of the online procedure

For the most part, interviewees often saw significant benefits to the online procedure, particularly in relation to the early engagement of parties and the respondent review stage. It is clear that the majority of the interviewees felt that, as one interviewee phrased it '*this system had the potential to be positive.*' However, almost all those we interviewed expressed significant concerns both with how the online procedure had been implemented and with elements of its underlying structure.

We explore, first, the general concerns with the implementation of the online procedure since the pilot phase, and second, the concerns that specifically relate to its implementation in a pandemic context. Finally, we turn to the structural issues with the online procedure that interviewees highlighted.

Legal aid

The Civil Legal Aid (Remuneration) (Amendment) (Coronavirus) Regulations 2020 (SI 2020 No. 515) ("new Regulations") came into force on 8th June 2020 and introduced two new standard fees.⁵² These were payable for asylum and immigration (non-asylum) cases which were appealing to the FtTIAC and used the online procedure. Consequently, they dictated the legal aid fees lawyers could expect when undertaking legally aided FtTIAC appeals using the online procedure.⁵³

Concerns about the impact of the new legal aid fee structure were expressed in the majority of the interviews we conducted.⁵⁴ These concerns took a variety of forms.

Firstly, some interviewees expressed concern about the lack of consultation before the new Regulations were introduced and the speed at which the new Regulations had come into force.

'[C]onsultation has been non-existent.' [Interview #21]

'But when ILPA and various other bodies made the MOJ and HMCTS and the Home Office aware that there was a funding problem, there was going to be a consultation, we were at the early stages of that. And then the pandemic seems to have precipitated this mass or general application of the pilot to all cases and then obviously we got the new fee Regs which had been rushed through Parliament.' [Interview #26]

There was also a repeated view that the new Regulations undermined the commercial viability of immigration legal aid providers and make '*surviving on legal aid... near impossible.*' Our interviews were conducted before the new

Regulations came into force, but practitioners were already concerned about the planned legal aid changes.

'I mean, we're not [a large firm], but we've got three or four different departments in the law centre, so it's trying to then explain this madness to the CEO and the director who don't do immigration. And they're like what? ... From a business perspective grappling with what this could mean, what the main remuneration rates could mean. Because if we're doing the work for if it would be paid, paid to counsel for less than minimum wage, if we do the work that's us being paid less than minimum wage. It doesn't solve doing it. I mean we do our own advocacy in house, we do our own skellies [skeleton arguments] from time to time, so it's not something we can't do, but obviously it's still work we're barely getting paid for.' [Interview #9]

Similarly, some barristers experienced this from a different perspective:

'I did speak to another firm who told me that they're doing it in-house. ... What that firm said was the directions basically include a lot more work. The money that was available on the fixed fee regime was not enough. They are unable basically to kind of forgo some of that income because the actual work they have to do to instruct a barrister and pay a barrister as well, so what they've been doing in effect is complying in the sense that they've been putting together something like a skeleton argument, but they know pretty well it's not really adequate, doesn't say very much because they can't afford to do to do it properly. And as a result that firm at any rate, who send me normally quite a lot of the FT tribunal work haven't sent me any.' [Interview #11]

Many interviewees felt that they were being asked to undertake significant extra work at minimal or no pay. The Ministry of Justice has said that cases under the online procedure require between 4 and 12 hours of additional work.⁵⁵ Yet simply drafting an ASA, one interviewee indicated could take '*[u]p to 10 hours, 7-10 hours. But with the other work around it, sometimes more.*' Another interviewee suggested:

'[Y]ou're looking at anything between three and five hours work for a good skeleton argument. Plus getting all these bundles together, they want all these bundles and you know ... we're only a small legal aid firm and we've to purchase all these like expensive fancy bundle makers that all the city firms use. You know we've had to pay for them as well and it's really, really expensive. So in total, just the preparation itself, I mean this is not even sitting down with the client, this is after all that. I would say to do a good job, you're looking at five or six hours work. That's a pretty standard job and that's nowhere near escape.' [Interview #16]

As a result, there were anxieties about the potential impacts of the undermining of the commercial viability of legal aid providers. A number of

interviewees felt that new Regulations may incentivise poorer quality representation.

'[It] incentivises bad representation because it makes it profitable to do as least work as possible. I think in the long run, obviously the impact on the client is massive, but it also means that appeals aren't getting finished because cases that should have won that weren't properly represented and can be won. And we see a lot of them.' [Interview #22]

Others we interviewed suggested firms may start 'cherry-picking' less complex cases to avoid being in the 'at risk zone' where the fixed fee has been exceeded but the threshold for the 'escape' claim fee has not been met.⁵⁶ In reference to complex trafficking cases, one representative told us: *'firms aren't going to want to take on cases where they're not going to get paid that much for doing all this work.'*

The perceived issues with the Regulations have led some barristers to refuse to draft the ASA in appeals that are legally aided. All the barristers we spoke to had a policy in their chambers to not accept instructions under the online procedure to prepare an ASA, except in exceptional circumstances or in cases that were adequately remunerated.⁵⁷

'[A] number of chambers of decided to adopt a chambers wide policy that says, unless there are exceptional circumstances, we won't accept instructions in this reformed procedure. And I that would certainly be my approach if I ever got asked to act on legal aid basis.' [Interview #10]

'[M]y view is that we're striking. ... [I]t's completely impossible for you to do essentially a full day's work for 60 quid.' [Interview #18]

This refusal to draft ASAs has left both barristers and solicitors in a difficult position, according to many of the interviewees. Although many interviewees noted that it was, as one barrister suggested, *'a pretty united front so far'*, a number of interviewees were concerned that the new Regulations would *'drive a wedge'* between solicitors and barristers by undermining their distinct roles.

'But ultimately, that's the way the system works in this country, that we have division of roles and ... the Tribunal can't just white wash that by creating new systems and expecting solicitors to pick up the work. Because my solicitor doesn't have any more time on their clock than they did before.' [Interview #28]

'[I]t means you end up having some quite difficult conversations about remuneration for cases, and I don't think those are alleviated by the remuneration changes by way of regulations at all. And it's kind of pitting you against each other in terms of who is best or best placed or most

suitable to do the work. And I just don't think that's appropriate.' [Interview #38]

'[Y]ou don't want to have to take work away from barristers, you know, but we're kind of fighting to survive here at the same time. But we want to keep very, very good relations with the barristers chambers as we have in the past.' [Interview #16]

'[T]he Ministry of Justice's position seems to be wanting to pit solicitors and barristers against each other because they think that it will be the most cost effective way forward if we are at each other's throats which is a bit depressing.' [Interview #39]

A number of interviewees felt that appeals would suffer as a result of this lack of early engagement from counsel.

'You said the solicitor would do it, but let's face it, in legal aid there are a lot of non-qualified caseworkers who do this work. So I mean obviously they will need to have their immigration and asylum accreditation, but you can't tell me that a paralegal is going to do the same job as a barrister. So then it's an access to justice [issue].' [Interview #21]

Lack of engagement from the Home Office at the respondent review stage

Many of the interviewees described the online procedure as a '*frontloaded*' process, predicated on significant involvement from all parties at an early stage.

In a majority of the interviews with individuals involved in casework, interviewees said that the Home Office had either not complied with their obligation outlined in the directions to review the appellant's case and provide a response, or that their response had not meaningfully engaged with the ASA provided.⁵⁸

'[T]he Home Office have not done anything at all, so not responded to us, not engaged. We still don't really know what their case is. The [other case] they have responded to it by basically just copying, pasting our list of issues and saying we disagree with all of these. You know I think the Tribunal is overly optimistic about the idea that they would really be able to narrow issues.' [Interview #18]

'The thing that the judge said in the telephone CMR was ... he directed to the Home Office for them to please make the effort to do something beyond just saying whether or not they would uphold the decision. ... So the judge specifically asked that you know offer some engagement. Because that's always our problem.' [Interview #30]

'[T]hey sent back ... what they call their standard template response, which doesn't deal with any of the issues. [It is] one side long, there was no reference to any inquiries they've made, no reference to the directions that were made.' [Interview #35]

'But in both cases I've done, I think, at least a 20 page skeleton argument and got back, I think, five lines in each case about why they were maintaining their decision. So extremely cursory and quite frustrating as well, because had I known that that was going to be the nature of their review, I'm not sure I'd have invested so much time at the earlier stage dealing with all the issues in the case.' [Interview #41]

In particular, one interviewee was exasperated that when the Home Office did not comply with the directions set, they were simply given extra time to do so. This contravened the directions being issued at the time which stated that 'if no response is received within the said time limit it will be assumed that the Respondent does not take issue with the submissions contained in the ASA.'⁵⁹

'[T]he directions from the Tribunal in [regional hearing centre] basically say that if the Home Office don't reply then they're taken to accept what is said in the skeleton argument. ... [B]ut none of the Judges have said, "Ok, we will just allow your appeal" So the Judge has basically said, "Right, the Home Office needs to reply within 14 days and then we will list for a substantive hearing." So really, the CMR has not fulfilled the function that it's set out to do which is to narrow the issues because the Home Office rep who has been involved in the CMR hasn't been sufficiently au fait with the case so they can say what they agree and disagree with.' [Interview #43]

A number of interviewees expressed frustration that the team responsible for undertaking the review of appellants' cases were not then the Home Office representatives at the hearing.⁶⁰ This points to a wider systemic issue of the role of Home Office Presenting Officers (HOPOs) in FtTIAC hearings. However, in this particular context, several interviewees were exasperated that if the Home Office had failed to complete a review, the HOPO present at the Case Management Review Hearing or substantive hearing would not have the discretion to concede any points during the hearing.

'I mean there has been narrowing down of points at the hearing, but I don't think it happens effectively because if they don't do the review then often the HOPO is not prepared to make concessions at the hearing and that's the difficulty.' [Interview #40]

Practical difficulties

Interviewees also noted smaller practical difficulties which nevertheless affected their ability to engage with the online procedure effectively. For

example, one interviewee had difficulties finding the relevant TCW's email address.

'I've heard that the Tribunal Case Workers are the people that are responding to emails and so if you email them directly then you'll get a response. But I have no personal experience of that. ... I think you've just got to know them [TCWs' email addresses]. So it wasn't on the direction, so for a litigant in person it seems like that would be an impossible thing to know.'
[Interview #14]

Another interviewee noted that there was no indication of a timeframe beyond the appellant and respondent making their submissions in the directions being issued by the Tribunal. The directions make it clear that the appeal will be actively case-managed and a CMR scheduled but offers no timeline for this process.

'There's no fixed point in time where the judge would be considering the case after the submissions that have been made, so we don't really know what's going on.' [Interview #30]

The same interviewee, a solicitor, also explained to us how they were normally able to easily call the relevant hearing centre, with whom they have good contacts, to quickly iron out any issues with a case. However, with cases lodged via the online procedure they told us they were unable to do this due to the centralised nature of how appeals were processed.

'Because my understanding is that they [a centralised unit] sort of deal with it and then they pass it to the relevant jurisdiction and then they have a handle on it. And with [hearing centre] I can just pick up the phone and speak to a clerk and then we can sort of figure it out ... I've got a few cases where I've launched appeals. And I just don't know what's going on with them and they [hearing centre] can't tell me what's going on with them either.' [Interview #30].

Geographical variation in processes

Multiple interviewees highlighted various ways in which the online procedure was being differently implemented across hearing centres, generating an '*inconsistent approach*.' Most significantly, this involved hearing centres issuing different directions.

'[I]t's just simply not clear, because what they've done is ... each hearing centre has come up with basically its own practice directions, it seems, or a set of directions for each hearing centre and if they had made that clear, for instance, then we would all know... And so, not knowing whether it [individual directions] ... applies to all different hearing centres or it was just individually discrete directions, that caused a bit of an issue, I think. I mean

ideally what they would have done is what we did, which is to consolidate and put it all into ... one easy document.' [Interview #29]

A key area in which directions differed was in their vision of the ASA. The same interviewee elaborated:

'[One hearing centre] ... said it [ASA] doesn't need to be drafted by counsel, which contradicted everything we knew and then ... different directions said that it should be clear, it should be concise, it should include case law.' [Interview #29]

A number of interviewees noted that each hearing centre was also responding differently to non-compliance with the directions.

'We got standard directions [from one hearing centre] and there's a note saying, we know you haven't complied with these directions and you may be liable for wasted costs. ... [Another hearing centre] on the other hand are agreeing that we don't need to serve a skeleton. So that's good. Different centres, different processes.' [Interview #12]

Another interviewee told us that hearing centres were calculating the date from which the timeframes were calculated from differently. One hearing centre calculated from the date of receiving directions, whilst another calculated from the date that the vacated substantive hearing was scheduled. As they worked across these centres, the interviewee found this unnecessarily confusing.

'[Hearing centre A's approach] seemed like a far more sensible approach. So I said to [hearing centre B], look at what [A's] doing, maybe you want to do something similar, but they just ignored us.' [Interview #14]

Concerns with the implementation of the online procedure in the pandemic context

A number of interviewees praised the '*drive to try and make it work*' shown by the Tribunal and court staff in their shift to rapidly adopting the online procedure during the COVID-19 pandemic.

However, many interviewees expressed significant concern that implementing the online procedure in the pandemic context created specific challenges. We separate these from the more general concerns outlined above, to draw a distinction between challenges that may continue to present an issue beyond the pandemic, and concerns that are largely confined to the pandemic context.

Lack of consultation on expanded use of online procedure

First, the lack of consultation on expanding the online procedure pilot as a response to the pandemic was viewed by many interviewees as an issue. Without this consultation, interviewees felt they were not given an opportunity to air their views on the implementation of a whole new process in the FtTIAC during a pandemic.

'Like why now? Why this level of change? Why no consultation? ... It's just been done at a time when everyone has enormous stress anyway, the whole appeal system has been paused, so a lot of people have had next to no work. People are very worried about meeting their overheads. People are working from home, which can be very tricky, looking after their kids, potentially unwell or got people around who are unwell. It is the worst time to do a massive change and I think the profession is just at its wits' end.' [Interview #38]

A number of interviewees felt that familiarizing themselves with the new procedure took a significant amount of work, at a time when they were juggling many other tasks. Some interviewees also expressed confusion as to how all the elements of the online procedure addressed the challenges the pandemic presented.

'[Y]ou can digitize the process without needing the ASA to be provided and without needing to front load the work. ... This is why it's absolute nonsense to claim that this is a response to the pandemic, because it isn't. Things can be done electronically without overhauling the whole process or speeding up a process that had not completed yet.' [Interview #21]

Practical difficulties

Many interviewees were having difficulties taking statements and gathering evidence remotely, particularly within the tight deadlines set by the directions. Some interviewees felt that the challenges this created were compounded by what they described as a lack of understanding from the Tribunal and long delays in getting replies from the Tribunal.

'[T]here's no real understanding of statement taking or what that involves. I've had to stop. I've recently stopped trying to take a statement from one young person on safety grounds. It was too distressing for him and the risk of self-harm.' [Interview #9]

'Our position is that it is not appropriate and not possible to draft statements from witnesses over the phone or remotely. There are far too many issues. Issues about privacy, confidentiality, safety, technology, reliability, expense and various other things. It's really not ideal and most judges, many judges,

are not accepting that. ... It's a failure to engage in the nature of what we do.'
[Interview #32]

'It's the gathering of the evidence and assembling it in the first place, that's where the challenges have been most acutely felt. ... [We] contacted the Tribunal and said ... we need more time [to gather evidence]....[B]ut actually it proved to be completely useless because we didn't get anything back from the FT, which meant we were forced to comply with the directions. We didn't want to find ourselves in breach of them, even if we couldn't fully comply, just to say, 'This is where we are, this is the evidence we're still waiting for'.' [Interview #10]

One interviewee was concerned about the consequences of an appeal being refused, after the bundle and the ASA had been submitted without the vital evidence they were unable to produce due to pandemic restrictions.

'And then to do a fresh claim you need to obtain all this evidence again. Then the Home Office can take up the objection, "Why didn't you produce this evidence before?".' [Interview #13]

Two interviewees in particular had issues with communications from the Tribunal being posted to their offices, despite them explicitly asking for them to be emailed as the offices were closed. One interviewee also noted that, should their office reopen and they become able to take statements and speak to appellants face to face, the poor provision of legal aid providers in their area would put them at risk of spreading COVID-19.

'[B]ecause we've got this lack of legal aid lawyers, people travel miles to see me ... So I might have someone come and see me from Wiltshire, someone coming to see me from South Wales, and I've got someone coming soon from Plymouth. So I'm worried ... about me being vector in all of this.'
[Interview #9]

Structural concerns with the online procedure

Beyond the more practical concerns interviewees shared, there was also significant concern about fundamental aspects of the online procedure.

Appellants in person

Firstly, a number of interviewees were concerned about how an online procedure for lodging and case-managing FtTIAC appeals would accommodate the needs of unrepresented appellants. HMCTS have made it clear that a separate channel is in development for appellants in person⁶¹ and Presidential Guidance Note No 2 2020 specifically exempts unrepresented appellants from having to use the online procedure at present. Interviewees were nevertheless concerned that the particular vulnerabilities of

unrepresented appellants often made them unsuitable candidates for any online procedure.

One interviewee also had experience of the separate channel for appellants in person and had specific concerns about this. Their concerns involved the risk of digital exclusion and the role of the TCW when there is no representative to mediate between the appellant and the TCW.

'[T]he design relies on the use of an email address to access the system. ... And we know that the use of email addresses in that system has caused some difficulty for people who are being supported by charity organisations where the advisor or the worker will put in an email address and then the person whose application it is doesn't actually have a record of the email address and does not have access to it. These tend to be quite vulnerable people who won't be necessarily familiar with these kinds of systems or who struggle with kind of being included in these kinds of systems. ... [We raised concerns] about the reliance on Tribunal Case Workers to build a case on behalf of appellants, and that's something that we have been worried about throughout and about the need for those Tribunal Case Workers to be independent.' [Interview #27]

Appeal Skeleton Argument

The majority of interviewees expressed significant concern about the Appeal Skeleton Argument (ASA). These concerns are structural challenges, due to the nature of the ASA as a cornerstone of the online procedure.

Firstly, many interviewees felt that the communications from the Tribunal and from individual Resident Judges lacked clarity in how the nature and purpose of the ASA was explained. Interviewees were left unsure whether the ASA needed to be a comprehensive skeleton argument drafted by counsel, as implied by the name, or a more cursory document confirming information and making limited submissions. Many interviewees felt that if it was the former, the legal aid issues already outlined would present an issue, but if it was the latter, it would undermine the purpose of the online procedure in getting parties to engage at an earlier stage.

'[M]y understanding ... is the appeal skeleton argument was supposed to be a comprehensive document and it always troubled me that it was called an appeal skeleton argument because effectively it was an odd stage of the proceedings to have a skeleton argument as we would know it as counsel. I always understood that this would be a comprehensive document because the... way they were selling it was to try and get the Home Office to concede cases and they were sort of trumpeting in the pilot how many concessions there had been.' [Interview #33]

'The word "skeleton argument" is completely loaded in this profession We've been using skeleton arguments for years and we all know what it is. So then when they come out and say something like "Appeal Skeleton Argument", then instinctively we're just going to go to what we know.'

[Interview #29]

One interviewee had ASAs rejected on multiple occasions.

'[T]he procedure rules for skeletons are not badly drafted, they are appalling. I have skeletons being thrown back at me, rejected and returned to me by the Tribunal saying they are in breach of the procedure rules because there is excessive quoting, citing of case law. I've had them rejected, thrown back at me because they're too long. ... What is the skeleton argument if you're not citing case law? Now that has not happened once or twice. This has happened half a dozen times for me. ... There's also been inconsistency, because sometimes it [the ASA] gets through, sometimes it doesn't.'

[Interview #32]

A number of interviewees were also frustrated by what they perceived as a '*u-turn*' on the part of the Tribunal. They highlighted that recent suggestions from the Tribunal that the ASA only needs to be brief document with no engagement from counsel risks undermining the value of meaningful, early engagement of all parties, which was the primary aim of the online procedure.

'I suppose it's difficult now because the Tribunal performed this miraculous u-turn and said, "No, no, no. You've all misunderstood what this document was, it doesn't need to be that." And in practice statement number 2 and the model directions certainly in Annex 1, which is the one for digital online appeals, there's that emphasis on brevity and conciseness. But there's an inherent tension there, because if the whole idea is to get the Home Office to concede cases, and these cases have been actively case managed and issues are going to be conceded, if it's supposed to be just a very brief skeleton argument, that's not going to achieve that ultimate aim. So there's an inherent tension there between the sort of stated aim to try and reduce the number of appeals, get things conceded, narrow issues, and then, 'no, no, no, the skeleton argument needs to be very brief'.' [Interview #33]

'It's infuriating and obviously you don't assume when you get a set of directions that says you must comply, that actually it doesn't mean that and it's probably alright. Because, I don't know, because that's not the way directions work!' [Interview #9]

'Some of them [judges] seem to be starting to roll back on the ASA now. They say "No, actually, it's not a skeleton argument at all". But then the concerns that arise out of that movement is that... this is supposed to be a document that tells the Home Office the decision you have made is unlawful and you should withdraw it now. So I am extremely concerned if the judiciary are now rowing back on that and saying well, actually it doesn't need to be a

very detailed document at all. For me that flags up immediate access to justice issues.’ [Interview #21]

This lack of clarity about the purpose of the ASA and concerns that the appeal may be heard on the papers with no opportunities for further representations, led some interviewees feeling pressured to submit extensive ASAs.

‘[S]ay a solicitor did a brief schedule of issues or skeleton argument at the time before the CMR. ... [E]ffectively, once you've submitted your bundle and your ASA, that's your evidence closed.’ [Interview #33]

A number of interviewees felt that the early submission of the ASA and the opportunity for the Home Office to respond to it, gave the Home Office an advantage over the appellant.

‘I think it hinders the appellant, the way that the skeleton is submitted at that point, because you are showing your entire hand to the Home Office.’ [Interview #32]

‘I think one of the problems of the ASA process is that it tends to put the Home Office on the front foot because it requires you to engage specifically with each individual point of the refusal letter ... [By] identifying all these individual points and why you disagree with them [it] gives authority to the kinds of reasons that we see in reasons for refusal letters, which are often really just in there without any real thought.’ [Interview #41]

‘In essence it's been giving the Secretary of State a second bite at getting the decision right. And I think when the judiciary is saying the SSHD is going to review the case and is going to take a rational view, that's just not how the Presenting Officers Unit works. They will get the decision and if the skeleton argument is good [and] raises good issues that render the decision unsustainable, they will try and perfect the decision, which I think makes it makes it more difficult in some regards for the appellants and it's really not in the spirit.’ [Interview #20]

The staggered timeframe associated with the online procedure and the submission of the ASA led multiple interviewees to suggest that it risked duplicating work.

‘If you are making work discrete, so if you're saying skeleton arguments and then you're saying a CMR and then you're saying hearing, that's three different discrete [tasks], that you will have to pay for counsel, solicitors or whatever, and there's no guarantee that just because you could do the skeleton argument, you're going to do the hearing or you going to do the CMR. ... Now you're separating the work, so there's much more work and money going in.’ [Interview #29]

'There's a huge delay between the final submission of all evidence and it being listed for hearing. That is a fundamental problem for a protection claim because protection claims are fluid. And the evidence can change up to the date before the hearing if not on the day of the hearing. ... So it actually therefore increases the work we have to do because ... there needs to be an updated witness statement. ... [B]ecause we are submitting these so far in advance they get lost in this huge PDF file of 500 pages. And it doesn't have the same impact on the judge. It's just another document.' [Interview #32]

'Also, if this is working the way it supposed to, which it absolutely won't, but if it did and the Home Office was going to properly engage with the stuff you say, it might then produce further written documents to respond to.... And then you're effectively doing 2 skeleton arguments.' [Interview #18]

Role of Tribunal Caseworkers

Interviewees were generally supportive of the role of TCWs, but a small number were concerned about a lack of information on how much discretion they had and the training and supervision they received.

'There have to be enough TCWs. How much power will they have? Will they take too much power for themselves? How well trained have they been? Who knows? Who has explained this? I'm sure other practitioners are thinking the same. And where is the consultation? Has anyone heard about these TCWs previously? How are they being recruited? ... [W]hen they make decisions they need to come to some kind of conclusion, they need to do some kind of balancing exercise. Have they done that? A Judge would – they have a duty to be impartial. Are these TCWs really going to be impartial? How well trained are they?' [Interview #28]

Scalability of the pilot phase

Some interviewees expressed concern about the ability of HMCTS and the Home Office to support the expansion of the pilot to the majority of FtTIAC appeals. These concerns lay partly in the nature of scaling up the pilot during a pandemic, but also partly in the considerable task scaling up the pilot involves at any time.

'[T]he Home Office do not appear to be resourced to carry out this work or certainly not to carry it out in the way that the Tribunal thinks that it should be carried out, which is a full and detailed consideration and response.' [Interview #21]

'But of course, that's [pilot] a very different situation from applying that generally across all the tribunals and all the cases in the UK and other firms in the UK. I just couldn't see how that could be replicated on a general scale. It seems to be kind of specific to the very specific circumstances of the pilot, which were very few cases and very few kind of hand-picked firms. ... I just

don't think the Home Office has the resources to put that amount of scrutiny back into the system when it is dealing with thousands as opposed to 80 or 100 which it was before.' [Interview #26]

'I suppose the whole point of the front loading is to capture those cases that the Home Office should be reconsidering, and to make sure that they do that. And that only works if it's resourced properly like in terms of time, but also remuneration ... I suppose my only hope is that when we're out of a pandemic they [the gains of front loading] can be rebuilt back into the system, so that the status quo isn't the emergency procedure that we've got now... but that quality and that resource can be built in.' [Interview #37]

'It's much more labour intensive, not for us, but both for the Tribunal and for the Home Office. For the Home Office essentially you now have to duplicate the number of caseworkers because it's OK if you're doing a pilot and there's only, say, two appeals a week going in, if you've got one case worker ... with responsibility for the reviews. But if you transfer the entire system into this, you're going to have to build a whole new department. Otherwise it's not going to respond within two weeks. It's going to slow down.' [Interview #32]

Part Three – Remote hearings in the FtTIAC

Remote hearings in the FtTIAC have been conducted via telephone link and, more recently, via video link using Cloud Video Platform (CVP).

For the vast majority of the time we were conducting research, no substantive hearings were listed in the FtTIAC. Instead, only immigration bail hearings and Case Management Review Hearings were conducted and were primarily held via telephone link. Towards the end of our research, as per Presidential Guidance Note No 2 2020, some substantive hearings were being listed for face to face and remote hearings, but the vast majority of our interviewees did not have experience of these remote substantive hearings.

Nevertheless, the wider shift to digital ways of working in the FtTIAC, particularly the adjournment of hearings and their relisting as remote Case Management Review Hearings, was an area of significant debate in our interviews.

Empirical evidence

Immigration bail hearings

Bail hearings were prioritised in the FtTIAC throughout the time we conducted this research. They were held almost exclusively via telephone with the appellant generally not present for the hearing and all parties in separate locations. Generally, no-one was in a Tribunal hearing room, although the set-up varied across hearing centres.⁶²

The interviewees that we spoke to had mixed experiences of conducting bail hearings via telephone. Some felt that it was an acceptable medium given the high bail grant rate at the time, meaning they felt their chances of success were high regardless of the mode of hearing, whilst others felt audio-only hearings were *'just not the way to do it.'* Our observations too demonstrated a mixed picture of relatively smoothly running telephone bail hearings and those that experienced more difficulty. Overall, our research relating to bail hearings in this period primarily points to a lack of meaningful Home Office engagement with the bail process. This is instructive in the context of the implementation of an online procedure predicated on the active participation of all parties at an early stage.

One interviewee highlighted issues they had had with the Home Office not serving bail summaries before the bail hearing, leaving representatives at a disadvantage during the hearing.

'Even without the pandemic the Home Office serve the bail summary on the day, but now they don't submit it at all ... and we only receive it afterwards. So it doesn't give me an indication as to where the Home Office stands and why they are using bail.' [Interview #15]

In seven of the bail hearings we observed, the judge had made a provisional decision to grant bail ('minded to grant'), which was served on the Secretary of State prior to the hearing. This was a new process, established in light of the pandemic in order to avoid unnecessary hearings.⁶³ Despite this, in all of these hearings the Home Office maintained their position to contest a grant of bail. The HOPO then relied solely on the bail summary and the evidence contained in the bundle, both of which the judge would have already used in reaching their provisional decision. The hearings consequently proceeded without any additional relevant submissions from the Home Office.

On a number of occasions, we observed HOPOs making submissions which relied on case law pertaining to the legality of detention, despite this being irrelevant to the judgement in bail hearings. Ultimately, in six of the seven hearings where a provisional decision to grant bail had been made, bail was granted. In the only case that was not granted bail, the application was withdrawn by the appellant. This points to a lack of engagement by the Home Office with the minded to grant process.

Case Management Review Hearings

Case Management Review Hearings are short, administrative hearings held prior to a substantive appeal hearing in order to address practical issues. During our research they were being conducted remotely, almost exclusively by telephone, with all parties in separate locations and generally no-one in a Tribunal hearing room.⁶⁴

There was an almost unanimous agreement from interviewees that conducting Case Management Review Hearings via telephone was sensible if the appellant was represented.⁶⁵ Indeed, a number of interviewees pointed to the Tribunal's past use of telephone links to conduct Case Management Review Hearings. Many interviewees also expressed a desire to see remote Case Management Review Hearings continued beyond the pandemic, as they were viewed as primarily administrative hearings that could be efficiently conducted remotely. Many suggested audio-only links were sufficient, but one interviewee, who had experienced a two-hour long Case Management Review Hearing, advocated for them to be conducted via video conferencing.

'I mean, they [Case Management Review Hearings] could probably be done by telephone, even in the best of times if someone's represented. Because it's just admin. Effectively it's case management and most tribunals where you've got represented appellants will do those remotely, because what's the point in coming into court for 10 minutes?' [Interview #9]

'So I think a CMRH is perfect for a remote hearing, to be quite frank. It's a waste of time and money to travel to the Tribunal, sit around all day like a wally waiting for your slot. So that's great and I think that that could be a really effective use of our time and resources.' [Interview #38]

Some interviewees experienced difficulties with being called for a Case Management Review Hearing at a different time to that scheduled, but nevertheless saw telephone Case Management Review Hearings are ultimately desirable, albeit after these preliminary issues had been addressed.

'It's a bit amateur hour with the phone, you know we got called really late. Which didn't happen when they ... used to routinely do telephone CMRs.' [Interview #18]

'The telephone CMRs are not an issue. The only thing yesterday was my hearing was supposed to be at 12, my CMR. Then I got a call at 10:30 saying, "Can you just do it now?". That's not ideal because you plan your days and you're in the middle of work.' [Interview #29]

A number of interviewees said that the Case Management Review Hearings they had been involved in during the pandemic were taking much longer than usual and even adopted lines of questioning normally reserved for the substantive hearing. Interviewees felt that this was because judges were *'trying to dispose of appeals as...quickly as possible.'*

'[T]he CMRs are not like the usual CMRs. Usually you walk into court, you could be 10, 20, 30 minutes tops. CMRs at the moment are lasting about an hour. I have to prepare the case like I am preparing for the hearing. I have to go through everything, I have to make arguments, make submissions for these CMRs. ... But then in quite a few of them, we are having to make arguments [on] why parts of the account should be taken as credible. And this is the type of thing you'd expect to do in the substantive hearing.' [Interview #25]

Conclusions and recommendations

Many of the challenges surrounding the use of the online procedure during the pandemic mirrored concerns regarding its use during the pilot phase.

We cannot extrapolate our findings from data collected during the pandemic beyond this specific time period. We accept that they were, and continue to be, exceptional circumstances during which many were working hard to allow the Tribunal to continue to function. However, it is clear that many of the issues experienced with the online procedure during the pandemic, in terms of both its implementation and its design, had their antecedents in issues that were not addressed following the pilot phase.

This suggests there are a number of key concerns that need to be tackled for the online procedure to fulfil the potential that many see in it.

- 1) The results of any evaluation of the online procedure, pertaining to its use either in the pilot phase or during its recent expanded use under presidential Guidance Notes Nos. 1 and 2, should be made publicly available.
- 2) Frontloading of work in the online procedure needs to be matched by a frontloading of resources. This applies to both the respondent, in terms of Home Office review capacity, and the appellant, in terms of legal aid funding. Without this, the value of the online procedure is undermined.
- 3) We support the Lord Chancellor's move to make a temporary transitional amendment to the 2018 Standard Civil Contract. This will mean that by September 2020 all immigration and asylum appeals lodged using the online procedure under a legal aid contract will be remunerated on an hourly rates basis pending a full consultation.⁶⁶ We suggest that this consultation should commence as soon as possible. It should include in its terms of reference an evaluation of the impact on the legal profession and access to justice of any proposals for a legal aid funding framework for the online procedure.
- 4) The capacity of the current TCW teams and Home Office review teams should be reviewed by HMCTS and the Home Office respectively. The ratio of the number of staff dedicated to the review

process in these teams to the number of appeals lodged should be maintained, as a minimum, at pilot phase levels.

- 5) A coherent, systematic approach across all hearing centres is important in order to maintain both procedural fairness and support for the online procedure. The value of a streamlined approach should be communicated by the Chamber President to Resident Judges and facilitated by the provision of model directions and examples wherever possible.
- 6) We support the publication by HMCTS of a Vulnerability Action Plan⁶⁷ and in particular the collection of protected characteristics data on service users. We suggest this good practice can be built upon by urgently conducting research into the impact of the online procedure on especially vulnerable appellants.
- 7) HMCTS and the FtTIAC Chamber President should provide more publically available information on the powers exercised by TCWs, their level of supervision and the training they receive. The TCW 'Code of Conduct' referenced as a possible future publication in the Senior President of Tribunals' Annual Report 2020⁶⁸ would be a welcome step. As a new role with potentially substantial case management powers, the accountability of TCWs is integral to the success of the online procedure.
- 8) A guidance note about good practice for remote hearings (both telephone and video links) in the FtTIAC should be produced by the Tribunal. The judiciary, user groups, and interested stakeholders could make valuable contributions to this. This note should particularly focus on the technical, financial, and linguistic constraints experienced by appellants in the FtTIAC, both represented and unrepresented, with regard to their ability to engage with digital processes.⁶⁹

Appendices

Appendix A: Pilot Directions



ONLINE APPEALS PILOT IN TAYLOR HOUSE AND MANCHESTER

PILOT DIRECTIONS

1. Introduction

- 1.1 These directions are issued to the representatives who have kindly agreed to take part in the Reform Online Pilot at Taylor House and Manchester Piccadilly beginning in January 2019.
- 1.2 The Pilot marks an important step in the reform of the Tribunal pursuant to various recommendations made in the JUSTICE report entitled *Immigration and Asylum Appeals – a Fresh Look*. The online system has been designed with judicial oversight and is now in its ‘Private Beta’ (testing and evaluation) phase, during which it will be used by the Tribunal and by the representatives who have agreed to participate in this Pilot. The respondent will not have access to the online system during the Pilot, although the final iteration of the online system will be used by all parties and the Tribunal.
- 1.3 The Private Beta phase will play a key role in perfecting the online appeals process and it is imperative that users of the system keep a record of any observations they might have about it, since there will be regional meetings at which all participants will be invited to provide their feedback. Those meetings will be held at the end of the Pilot, however, and raising concerns about the operation of the system

during the Pilot is unlikely to be considered to be a good reason for failing to comply with the directions which follow.

- 1.4 Alongside the development of the online system, the Tribunal has developed a new process for appeals. It is anticipated that this process – which will be facilitated through the online portal – will ultimately yield considerable benefits for appellants and respondents alike, and in turn for the Tribunal and for the public purse. The intention is that those cases which are bound to succeed on appeal will be identified more quickly than at present, and that the focus of those cases which are ultimately to be contested by the respondent will be narrowed considerably. It is pursuant to those goals, and in furtherance of the overriding objective, therefore, that the Tribunal issues these directions, which apply only to cases within the Pilot.
- 1.5 The parties are expected to comply with the timetable set out below in all Pilot cases. Each appeal will be supervised by a Tribunal Case Officer (“TCO”), however, and there is liberty to apply to a TCO or, on review, a judge, in order to seek variation of a stipulated deadline.
- 1.6 The directions set out below are issued by the Resident Judges at Taylor House and Manchester Piccadilly under the Case Management powers conferred by rule 4 of the Tribunal Procedure Rules (FtT)(IAC) 2014. These are not Practice Directions issued by the Senior President of Tribunals or the President of the IAC under s23 of the Tribunals, Courts and Enforcement Act 2007.

2. Provision of Documents

- 2.1 By Rule 12(1)(e) of the Procedure Rules, the Tribunal may identify any means by which a document must be provided to the Tribunal or another person.
- 2.2 For the purposes of the Pilot, an appellant’s representative is required to provide documents to the Tribunal by uploading those documents in legible form to the online portal. Because the respondent will not have access to the system during the Pilot, copies of any such documents must then be served upon the respondent

by conventional means of service, in compliance with rule 12(1)(a)-(d). When the respondent is required to act following service of any such documents, time starts to run from the date of service, not the date on which the document(s) are uploaded.

2.3 Because the respondent will not have access to the online portal during the Pilot, the respondent is required to file and serve documents by conventional means, in accordance with Rule 12(1)(a)-(d).

2.4 Any reference below to a document being ‘provided’ is to be construed with reference to the above.

3. Procedure

3.1 The process which will be followed within the Pilot is set out in the following paragraphs. A timetable appears at the foot of the document for ease of reference.

3.2 Grounds of appeal will not be required when a notice of appeal is provided to the Tribunal online. The appellant provides notification of his appeal online, without further particulars being required at that stage. Insofar as rule 19 requires further particulars to be provided, it will be disapplied (pursuant to the general power conferred by rule 4(1)) for the purposes of this Pilot.

3.3 The respondent will be notified by a TCO that an appeal has been commenced.

3.4 *Respondent's Bundle.* Not later than 14 days after the respondent is notified of the appeal, the respondent must file and serve a bundle which complies with rule 24(1) of the Procedure Rules. The respondent must also include within that bundle, any evidence which was submitted by the appellant in support of the application which led to the decision under appeal.

3.5 *Appellant's Skeleton Argument.* After the respondent has filed and served his bundle of documents, the appellant must provide an Appeal Skeleton Argument (“ASA”). In a protection appeal, the ASA must be provided not later than 28 days after the respondent’s bundle is provided, or 42 days after the notice of appeal, whichever

is the later. The intention is that an appellant in a protection claim will always have at least six weeks from lodging their appeal.

3.6 Any advocate who prepares a skeleton argument should have regard to what was said by Jackson LJ (with whom Lewison and Treacy LJJ agreed) at [52]-[57] of Inplayer v Thorogood [2014] EWCA Civ 1511. The Practice Directions to CPR Part 52 do not apply directly to appeals to the FtT(IAC), however, and ASAs in this Chamber must comply with the following.

3.7 The purpose of an ASA is to set out as concisely as practicable the arguments upon which an appellant intends to rely. An ASA must contain three sections: a summary of the appellant's case; a schedule of issues; and the appellant's submissions on those issues. A template is available on the portal.

3.8 An ASA must:

- be concise;
- be set out in numbered paragraphs;
- not include extensive quotations from documents or authorities;
- engage expressly with the decision under challenge;
- be cross-referenced to any relevant document in the appellant's bundle [AB/x] or the respondent's bundle [RB/x]
- not exceed 10 pages and should certainly be no longer than 20 pages of A4.
- be in no less than 12-point type with line spacing of not less than 1.5.

3.8.1 *Summary of the Appellant's Case.* All ASAs must contain a concise summary of the appellant's case. The purpose of this summary is to distill the facts upon which the appellant relies and which, in the appellant's submission, justify the relief sought. This summary should not advance any argument, nor should it contain reference to the law.

3.8.2 *Schedule of Issues.* In all cases, the ASA must contain a schedule of issues, the resolution of which are said by the appellant to be determinative of the appeal in his favour.

- 3.8.3 The issues must be identified concisely in a sequence of numbered points, for example as follows:

The appellant appeals against the respondent's decision to refuse her human rights claim for entry clearance as the spouse of a settled person. Having regard to the requirements of Appendix FM of the Immigration Rules and the reasons given by the respondent for refusing the application, it is submitted that the issues which arise are as follows, and that resolution of these issues in the appellant's favour should result in a decision to allow the appeal on Article 8 ECHR grounds:

1. *Are the appellant and the sponsor validly married?*
2. *Is their marriage genuine and subsisting?*
3. *Does the sponsor earn in excess of the Minimum Income Requirement?*
4. *If not, are there compelling circumstances which render the appellant's exclusion unlawful under section 6 HRA 1998?*

- 3.8.4 *Submissions.* Having set out a summary of the appellant's factual case and the schedule of issues, the ASA must set out the appellant's submissions on the issues. Those submissions must comply with the guidance above and representatives must note, in particular, that it is imperative that the ASA engages expressly with each of the grounds upon which the appellant's application was refused.

- 3.8.5 In an appeal against the refusal of a protection claim, for example, the ASA must engage with questions of credibility, sufficiency of protection and internal relocation where such issues have been raised by the respondent. In an appeal against the refusal of a human rights claim, for example, the ASA should identify the articles of the ECHR relied upon, the manner in which any qualified articles are engaged and the reasons why any decision taken under the Immigration Rules is said to be wrong. It is not possible to provide a more prescriptive template but the submissions must, in summary, provide a reasoned response to each of the grounds of refusal.

- 3.9 *Appellant's Bundle.* Where the ASA refers to material which is not included in the respondent's bundle, that additional evidence must be provided in an indexed and paginated bundle at the same time as the ASA. There is no need to duplicate material which is already to be found within the respondent's bundle and bundles which contain substantial duplication are likely to be rejected by a TCO.
- 3.10 *Respondent's Review.* In all cases, the respondent is required to undertake a comprehensive review of the appellant's case, taking into account the ASA and any bundle of documents supplied by the appellant. The respondent must also particularise any additional grounds of refusal. The respondent must provide the Tribunal with the result of that review by way of a response, within fourteen days of the ASA and supporting evidence being provided.
- 3.11 Pro-forma or standardised response templates will not be accepted by the Tribunal. The Review must engage expressly with the submissions made and the evidence provided to the Tribunal. The respondent will also note that appeals will not be considered for listing unless and until this important stage has been fully and properly completed.
- 3.12 *Counter schedule.* The respondent must, at the same time as the review, respond to the appellant's schedule of issues. If the appeal is to be contested, the respondent must indicate which issues are conceded and which remain in issue. Where further grounds are to be raised, they must be clearly identified in the respondent's counter schedule. A counter schedule in response to the example above may be as follows:
1. *The validity of the marriage is conceded in light of the further letter from the Registrar at p45 of the appellant's bundle.*
 2. *The genuineness and subsistence of the marriage is conceded in light of the additional evidence at pp23-79 of the appellant's bundle.*
 3. *The ground of refusal in relation to the Minimum Income Requirement is maintained as the appellant has still not produced the evidence required by Appendix FM-SE.*

4. The respondent maintains that there are no compelling circumstances which warrant a grant of entry clearance outside the Immigration Rules.
5. In addition, and for the reasons given at [3]-[4] of the Review, the respondent submits that the appellant falls for refusal on Suitability grounds due to his conviction.

3.13 ASAs and responses which do not comply with this Practice Direction will not be accepted by the Tribunal and a compliant replacement will be required.

3.14 Upon completion of the steps above, the appeal will be actively case managed by a TCO and/or by a judge.

3.15 For the avoidance of doubt, any timescale or requirement set out above may be varied by a TCO or a judge but the parties must, in the absence of any such variation, assume that the procedure set out above will be followed.

4. Timetable

4.1 Subject to directions given by a judge or a TCO, the parties will be expected to adhere to the following timetable:

Period within which step is to be taken	Action
Day 1	Notice of appeal provided to Tribunal
Not later than 14 days after respondent notified of appeal by Tribunal	Respondent's bundle ("RB") must be provided
28 days after provision of RB or 42 days after notice of appeal, whichever is later.	Appellant must provide: (i) Appeal Skeleton Argument (ii) Bundle of evidence in support
14 days after provision of appellant's ASA, schedule of issues and evidence	Respondent must provide: (i) Response to appellant's case (ii) Particulars of any disagreement with appellant's schedule of issues

Appendix B: Example bulk Case Management Review notice, issued by Resident Judges alongside the Pilot Directions



FIRST-TIER TRIBUNAL (IMMIGRATION AND ASYLUM) CHAMBER HEARINGS

NOTICE

In view of the rapidly changing circumstances created by the Covid-19 pandemic, the President of the First-tier Tribunal (IAC) has directed that all appeals will proceed by way of a Case Management Hearing (CMR) via telephone or Skype which will take place on a date to be notified in a time slot to be allocated. **All current scheduled hearings are vacated.**

1. Within 5 working days of the date of the original substantive dated you must provide direct contact number(s) and email address(es) for the Tribunal to contact you and any members of your organisation having any business with the Tribunal. If members of your organisation have access to Skype for Business, you must inform the Tribunal and provide all necessary information to the Tribunal to enable communication by that medium.
2. You must comply with the following directions.
3. All parties must be available 5 minutes before the allocated time
4. The parties may make an application to the Tribunal at any time. Such application must only be by email Manchesteriac@justice.gov.uk
5. Any witness statements and other evidence upon which the Appellant intends to rely must be sent electronically to the Tribunal and to the Respondent together with an Appeal Skeleton Argument ('ASA') within 15 working days of the original Substantive Hearing Dated to Manchesteriac@justice.gov.uk
6. Within 10 working days of the provision of the ASA the Respondent must serve a response to the ASA by email to the Tribunal and to the Appellant's representatives and if no response is received within the said time limit it will be assumed that the Respondent does not take issue with the submissions contained in the ASA.

7. The ASA and the response together with all the evidence provided will be considered by a Judge who will consider, having given the parties an opportunity to make written representations (rule 25(2)), whether the appeal can be justly determined without a hearing (rule 25(1)(g)).
8. In cases concerning international protection or the revocation of international protection the Appellant, if represented, must set out at the commencement of the ASA a summary of the Appellant's case together with a schedule of issues as if the Pilot on-line Digital Pilot Directions applied (a copy of which is attached) and the Respondent must respond accordingly subject to the time limits set out in this Notice being applicable.
9. Where it is not considered appropriate for the matter to proceed without a hearing, consideration will be given to the hearing of this appeal by remote means. To that end each party must provide at the CMR or before
 - (a) the means by which they, the appellant(s) and any witnesses, will engage with the Tribunal (the Tribunal expects all representatives to have access to Skype or Skype for Business);
 - (b) the location of the Appellant;
 - (c) the location of each witness, if any;
 - (d) language of interpreter(s) if not already provided;
 - (e) the number of pages in the bundle of documents to be relied upon;
 - (f) no bundle may exceed 50 pages without the consent of the Tribunal;
 - (g) any documents provided to the Tribunal must be in .pdf format and reduced to the minimum number of documents required, for the avoidance of doubt generic bundles will not be accepted.

Appendix C: Presidential Guidance Note No 1



TRIBUNALS
JUDICIARY

FIRST TIER TRIBUNAL IMMIGRATION AND ASYLUM CHAMBER MR MICHAEL CLEMENTS, PRESIDENT

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

In accordance with the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014

And the PILOT PRACTICE DIRECTION: CONTINGENCY ARRANGEMENTS IN THE FIRST-TIER TRIBUNAL AND UPPER TRIBUNAL issued by the Senior President of Tribunals on 19th March 2020

The following Practice Statement is made today by the President of the First-tier Tribunal (Immigration and Asylum Chamber) with the consent of the Senior President of Tribunals. It shall take effect immediately and continue in force for so long as the Practice Direction referred to above is still in force unless it is revoked or amended on an earlier date.

- (1) With the exception of HR/EEA appeals, all appeals to the First-tier Tribunal must be commenced using the online procedure unless it is not possible to do so.
- (2) If an appellant contends that it is not possible to commence an appeal by using the online procedure, the appellant may commence an appeal without using the online procedure but must at the same time state why it is not possible to do so.
- (3) The Tribunal shall consider any reasons provided in support of appeals commenced in accordance with paragraph [2] above and may give such directions as it thinks fit, having regard to the overriding objective, including directing that the appeal must continue using the online procedure, be stayed, be determined by a means to be directed having regard to those reasons or be determined without a hearing.

Michael Clements
President

Date 23 March 2020

Appendix D: Presidential Guidance Note No 2



TRIBUNALS
JUDICIARY

FIRST TIER TRIBUNAL IMMIGRATION AND ASYLUM CHAMBER JUDGE MICHAEL CLEMENTS, PRESIDENT PRESIDENTIAL PRACTICE STATEMENT No 2 of 2020: ARRANGEMENTS DURING THE COVID-19 PANDEMIC

In accordance with the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (“the Rules”)

And the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and Upper Tribunal issued by the Senior President of Tribunals on 19th March 2020

The following Practice Statement is made today by the President of the First-tier Tribunal (Immigration and Asylum Chamber) with the consent of the Senior President of Tribunals. It shall take effect on Monday 22 June 2020 and continue in force for so long as the Practice Direction referred to above is still in force unless it is revoked or amended on an earlier date. Presidential Practice Statement Note No.1 of 2020 is hereby revoked.

- (1) All appeals to the First-tier Tribunal must be started using the reform online procedure* (accessed through MyHMCTS**) unless it is not reasonably practicable to do so.
- (2) If an appellant seeks to argue that it is not reasonably practicable to start an appeal by using MyHMCTS, the appellant must at the same time, save where paragraph (3) applies, state why it is not reasonably practicable to do so. If the Tribunal agrees, the appellant may proceed without using MyHMCTS. Where paragraph 3(e) applies the appellant must provide to the Tribunal together with the Notice of Appeal, the reference number or numbers of any linked appeals.
- (3) Where an appeal is brought in any of the following circumstances, it shall be deemed not to be reasonably practicable to commence that appeal by using MyHMCTS:
 - (a) under The Immigration (Citizens’ Rights Appeals)(EU Exit Regulations 2020);
 - (b) if the appellant is outside the United Kingdom;
 - (c) if the appellant is in detention;
 - (d) any appeal brought by a person without representation by a qualified person within the meaning of s.84 of the Immigration and Asylum Act 1999; or
 - (e) if the appellant’s appeal is linked to another appeal. (This applies where the appeal of one or more appellants is brought at the same time in circumstances in which those appeals raise common issues);
- (4) The Tribunal will consider the reasons provided in support of appeals started in accordance with paragraph [2] above and will give such directions as it thinks fit in accordance with the Rules.

- (5) Where an appeal is brought online using “MyHMCTS” the Directions which appear at Annex 1 will ordinarily apply. Where an appeal is brought, or case managed online, not using “MyHMCTS” the Directions which appear at Annex 2 will ordinarily apply. Where paragraph 3(d) applies the Directions which appear at Annex 3 will ordinarily apply.
- (6) Where an appellant has representation by a qualified person within the meaning of s.84 of the Immigration and Asylum Act 1999 the Tribunal will accept as an Appeal Skeleton Argument (“ASA”) a document that answers the following question: “Why does the appellant say that the decision of the respondent is wrong?” In answering this question, the appellant should set out concisely the reasoning in the respondent’s decision letter to which objection is taken. Anything that is relevant should be identified and the answer to the question should be given with sufficient particularity to enable the respondent to conduct an effective review of the decision under appeal.
- (7) Where an appellant does not have representation by a qualified person within the meaning of s.84 of the Immigration and Asylum Act 1999 the Tribunal will accept in place of an ASA an Appellant’s Explanation of Case (“AEC”) that answers the following question: “Why does the appellant say that the decision of the respondent is wrong?”
- (8) Parties are reminded of their obligations pursuant to rule 2(4) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. To that end parties are required to engage constructively with the Tribunal. The Tribunal will respond to any applications properly made on a case by case basis.
- (9) Any appeal accepted by the Tribunal and started before 22 June 2020 will be considered by a Tribunal Caseworker or Judge who will decide on a case by case basis what further directions, if any, are to be made in respect of that appeal and whether having regard to the overriding objective the appeal should be listed for a Case Management Review Hearing before a Judge.
***Note: Increased functionality of MyHMCTS has been brought forward to facilitate an increased number of appeals being brought by that method to enable remote engagement. However, some aspects of the system have not yet been completed, which explains why not all appeal types can be brought in this way. Further there will be occasions when parties may still need to communicate with the Tribunal from time to time by email or other online means as directed.**
**** If you have not already done so you will need to register by following this link:**
<https://www.gov.uk/guidance/hmcts-online-services-for-legal-professionals>

Michael Clements

President FtTIAC

Date: 11 June 2020

References

¹ The new Regulations were successfully challenged and a consent order agreed between all parties on 11 August 2020. This followed the lodging of a claim for judicial review in *MT and others* against the Ministry of Justice (LAA) and the Lord Chancellor, and a judicial review in *CRA and others* against the Lord Chancellor. The Defendants conceded that the new Regulations were unlawful on the basis that the requirement to consult and duty of inquiry was inadequate. See: Garden Court North, *Successful challenge of Civil Legal Aid (Remuneration) (Amendment) (Coronavirus) Regulations 2020* (11 August 2020). Available at: <https://gcnchambers.co.uk/successful-challenge-of-civil-legal-aid-remuneration-amendment-coronavirus-regulations-2020/> [Accessed 11/08/20]

² HMCTS, *Vulnerability Action Plan* (30 July 2020). Available at: <https://www.gov.uk/government/publications/hmcts-vulnerability-action-plan> [Accessed 12/08/20]

³ Senior President of Tribunals (2020) *Senior President of Tribunals' Annual Report 2020*. Available at: https://www.judiciary.uk/wp-content/uploads/2020/07/6.6755_The-Senior-President-of-Tribunals-Annual-Report-2020_WEB-CS-amend-1.pdf [Accessed 20/08/20]

⁴ Comprehensive and thoughtful examples of good practice guidance have already been produced by the Judicial College Equal Treatment Bench Book Committee (<https://www.judiciary.uk/wp-content/uploads/2020/03/Good-Practice-for-Remote-Hearings-May-2020-1.pdf>) and the Family Court (<https://www.judiciary.uk/wp-content/uploads/2020/04/The-Remote-Access-Family-Court-Version-4-Final-16.04.20.pdf>). The Helen Bamber Foundation has also produced a series of recommendations for safeguarding vulnerable people in the context of remote international protection and human trafficking/modern slavery legal casework (<http://www.helenbamber.org/wp-content/uploads/2020/05/Tribunals-courts-and-COVID-recommendations-Final.pdf>). These three documents would provide a helpful starting point for a FtTIAC good practice guidance note. [Accessed 09/07/20]

⁵ Tribunals, Courts and Enforcement Act 2007 s 3(1).

⁶ See: Home Office, *National Statistics: Summary of latest statistics* (27 February 2020). Available at: www.gov.uk/government/publications/immigration-statistics-year-ending-december-2019/summary-of-latest-statistics [Accessed 16/07/20]

⁷ Ibid.

⁸ Ibid.

⁹ Since the enactment of the Immigration Act 2014, only a small proportion of Home Office decisions attract a right of appeal to the FtTIAC.

¹⁰ Nationality, Immigration and Asylum Act 2002 s 82.

¹¹ Immigration (European Economic Area) Regulations 2016 regs 36-39.

¹² British Nationality Act 1981 s 40A.

¹³ Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020.

¹⁴ In some areas, legislation limits the grounds on which an appeal may be brought. See, e.g., Nationality, Immigration and Asylum Act 2002 s 84.

¹⁵ See generally First-tier Tribunal (Immigration and Asylum Chamber) Rules.

¹⁶ Immigration Act 2016 sch 10.

- ¹⁷ The Migration Observatory (2020) *Immigration Detention in the UK*. Available at: <https://migrationobservatory.ox.ac.uk/resources/briefings/immigration-detention-in-the-uk/> [Accessed 19/08/20]
- ¹⁸ Ministry of Justice (2016) *Transforming our Justice System*. Ministry of Justice. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/553261/joint-vision-statement.pdf [Accessed 09/07/20]
- ¹⁹ JUSTICE (2018) *Immigration and Asylum Appeals – a Fresh Look*. Available at: <https://justice.org.uk/wp-content/uploads/2018/06/JUSTICE-Immigration-and-Asylum-Appeals-Report.pdf> [Accessed: 17/07/20]
- ²⁰ Presidential Practice Statement Note No 1 2020: Arrangements During The Covid-19 Pandemic. Available: https://www.judiciary.uk/wp-content/uploads/2020/03/2020_03_23_FtTIAC-PRESIDENTIAL-PRACTICE-STATEMENT-NOTE-No-1-2020-.pdf [Accessed: 08/07/20]. Reproduced at appendix C; Presidential Practice Statement No 2 of 2020: Arrangements During The Covid-19 Pandemic. Available at: <https://www.judiciary.uk/publications/immigration-and-asylum-tribunal-chamber-presidential-practice-statement-note-covid-19-pandemic/> [Accessed: 08/07/20]. Reproduced at appendix D.
- ²¹ HMCTS, *COVID-19: Overview of HMCTS response* (1 July 2020). Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/896779/HMCTS368_recovery_-_COVID-19-Overview_of_HMCTS_response_A4L_v3.pdf [Accessed: 08/07/20]
- ²² In particular see: Tomlinson, J. (2019) *Justice in the Digital State*. Bristol: Policy Press; Rowden, E. (2013). Virtual courts and putting 'Summary' back into 'Summary Justice': Merely brief, or unjust? *Architecture and Justice: Judicial Meanings in the Public Realm* (pp. 101–113). Ashgate.
- ²³ Burgess, R. (1984) *In the Field: An Introduction to Field Research*. London: Routledge, p 102.
- ²⁴ Tribunal Statistics Quarterly. Available at: https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-january-to-march-2020?utm_source=daf65c2-8f8d-4f8f-81a6-677b8fb4ed70&utm_medium=email&utm_campaign=govuk-notifications&utm_content=daily [Accessed: 16/07/20].
- ²⁵ HMCTS weekly management information. Available at: https://www.gov.uk/government/statistical-data-sets/hmcts-weekly-management-information-during-coronavirus-march-to-may-2020?utm_medium=email&utm_source= [Accessed: 16/07/20].
- ²⁶ Ministry of Justice (2016) *Transforming our Justice System*. Ministry of Justice. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/553261/joint-vision-statement.pdf [Accessed 09/07/20]
- ²⁷ For full details of the process, see: HMCTS Reform Event, 13 November 2019: Immigration & Asylum Appeals. Available at: https://www.gov.uk/guidance/hmcts-reform-event-13-november-2019-immigration-asylum-appeals?utm_medium=email&utm_source= [Accessed 09/07/20]
- ²⁸ Online Appeals Pilot in Taylor House and Manchester: Pilot Directions. Reproduced at appendix A.
- ²⁹ HMCTS, *HMCTS reform update – Tribunals* (11 July 2019). Available at: <https://www.gov.uk/guidance/hmcts-reform-update-tribunals#immigration-and-asylum> [Accessed: 16/07/20].

- ³⁰ HMCTS Reform Event, 13 November 2019: Immigration & Asylum Appeals. Available at: https://www.gov.uk/guidance/hmcts-reform-event-13-november-2019-immigration-asylum-appeals?utm_medium=email&utm_source [Accessed 09/07/20]
- ³¹ HMCTS reform update. Available at: <https://www.gov.uk/guidance/hmcts-reform-programme-reform-update> [Accessed: 17/07/20].
- ³² HMCTS tribunals events. Available at: <https://www.gov.uk/guidance/hmcts-reform-events-programme#previous-tribunals-events> [Accessed 17/07/20].
- ³³ HMCTS monthly bulletin. Available at: <https://www.gov.uk/guidance/hmcts-reform-programme-monthly-bulletin> [Accessed: 17/07/20].
- ³⁴ Inside HMCTS blog. Available at: <https://insidehmcts.blog.gov.uk> [Accessed: 17/07/20].
- ³⁵ Letter from Daniel Flury, Deputy Director of Tribunals, HMCTS to Duncan Lewis (3rd June 2020).
- ³⁶ Ibid.
- ³⁷ Ibid.
- ³⁸ HMCTS, *HMCTS reform update – Tribunals* (11 July 2019). Available at: <https://www.gov.uk/guidance/hmcts-reform-update-tribunals#immigration-and-asylum> [Accessed: 16/07/20].
- ³⁹ Data from an FOIA response (FOI 200526007), 22 June 2020. Due to the reporting periods of the data (01/04/2019 - 31/03/2020), the data set does not include the first 3 months of the pilot and *does* include 8 days where Presidential Guidance Note No 1 was in effect and the online procedure was in its expanded form. We consider that this is unlikely to skew the data to a significant degree.
- ⁴⁰ HMCTS Reform Event, 13 November 2019: Immigration & Asylum Appeals. Available at: https://www.gov.uk/guidance/hmcts-reform-event-13-november-2019-immigration-asylum-appeals?utm_medium=email&utm_source [Accessed 09/07/20]
- ⁴¹ Pilot Practice Direction: Contingency Arrangements In The First-Tier Tribunal and The Upper Tribunal. Available at: <https://www.judiciary.uk/wp-content/uploads/2020/03/General-Pilot-Practice-Direction-Final-For-Publication-CORRECTED-23032020.pdf> [Accessed: 08/07/20]
- ⁴² Presidential Practice Statement Note No 1 2020: Arrangements During The Covid-19 Pandemic. Available: https://www.judiciary.uk/wp-content/uploads/2020/03/2020_03_23_FtTIAC-PRESIDENTIAL-PRACTICE-STATEMENT-NOTE-No-1-2020-.pdf [Accessed: 08/07/20]. Reproduced at appendix C.
- ⁴³ Although the figures fluctuate over time. According to published government statistics, '[i]n January to March 2020, Human Rights (HR) receipts proportionally represented 43% of all FTTIAC receipts (down from 54% a year ago)'. In the same period, EEA receipts were 27% of the overall number of appeal applications lodged in the FtTIAC, an increase of 13% from the previous year. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/891348/Tribunal_and_GRC_statistics_Q4_201920_accessible.pdf, p6 [Accessed: 16/07/20]
- ⁴⁴ A copy of the 'Bulk Case Management Review Notice' being issued in accordance with Presidential Guidance Note No 1 2020, can be found here: <https://www.freemovement.org.uk/wp-content/uploads/2020/03/Bulk-CMR-Notice-JP.pdf> [Accessed: 02/07/20]. Reproduced at appendix B.

⁴⁵ Presidential Practice Statement No 2 of 2020: Arrangements During The Covid-19 Pandemic. Available at: <https://www.judiciary.uk/publications/immigration-and-asylum-tribunal-chamber-presidential-practice-statement-note-covid-19-pandemic/> [Accessed: 08/07/20]. Reproduced at appendix D.

⁴⁶ First-tier Tribunal (Immigration and Asylum Chamber) User Guide. Available at: <https://www.judiciary.uk/wp-content/uploads/2020/06/FtTIAC-User-Guide-June-2020-Final-12.6.20.pdf> [Accessed 09/07/20]

⁴⁷ Data taken from HMCTS weekly management information during coronavirus - March to May 2020. Available at: https://www.gov.uk/government/statistical-data-sets/hmcts-weekly-management-information-during-coronavirus-march-to-may-2020?utm_medium=email&utm_source [Accessed: 17/07/20]

⁴⁸ Ibid.

⁴⁹ Data from letter from Daniel Flury, Deputy Director of Tribunals, HMCTS to Duncan Lewis (3rd June 2020). N.B 369 appeals were received up to 23 March, but 31 dropped out of the digital process and continued as 'business as usual'.

⁵⁰ HMCTS Reform Event, 13 November 2019: Immigration & Asylum Appeals. Available at: https://www.gov.uk/guidance/hmcts-reform-event-13-november-2019-immigration-asylum-appeals?utm_medium=email&utm_source [Accessed 09/07/20]

⁵¹ 'Total number of appeals that have been withdrawn to grant by the respondent is 33. This is out of 181 appeals that have been reviewed (18%).' Letter from Daniel Flury, Deputy Director of Tribunals, HMCTS to Duncan Lewis (3rd June 2020).

⁵² The Civil Legal Aid (Remuneration) (Amendment) (Coronavirus) Regulations 2020. Available at: <http://www.legislation.gov.uk/uksi/2020/515/introduction/made> [Accessed 02/07/20]

⁵³ Since conducting this research, the new Regulations have since been successfully challenged and a consent order agreed between all parties on 11 August 2020. The Defendants conceded that the new Regulations were unlawful on the basis that the requirement to consult and duty of inquiry was inadequate. Consequently, the Lord Chancellor has agreed to make a temporary transitional amendment to the 2018 Standard Civil Contract meaning that all immigration and asylum appeals lodged using CCD will now be remunerated on an hourly rates basis.

⁵⁴ Of the 33 interviews we conducted regarding the online procedure since the pilot phase, in 24 of these the interviewee expressed concern about the new Regulations.

⁵⁵ ILPA's statement on the new immigration and asylum legal aid fixed fee (18 May 2020). Available at: <https://ilpa.org.uk/ilpa-statement-re-new-legal-aid-immigration-and-asylum-fixed-fee/> [Accessed 02/07/20]

⁵⁶ 'Escape' fees are paid when work exceeds three times the fixed fee rate. For a detailed breakdown of the new Regulation's fee structure, see: ILPA's statement on the new immigration and asylum legal aid fixed fee (18 May 2020). Available at: <https://ilpa.org.uk/ilpa-statement-re-new-legal-aid-immigration-and-asylum-fixed-fee/> [Accessed 02/07/20]

⁵⁷ A full list of the barristers' chambers which adopted this position can be accessed here: <https://www.freemovement.org.uk/legal-aid-changes-for-online-immigration-appeals-will-do-irreparable-harm/> [Accessed 02/07/20]

⁵⁸ Of the 28 interviews we conducted with individuals involved in casework regarding the online procedure since the pilot phase (26 lawyers and 2 legal practitioners), 17 highlighted this issue.

⁵⁹ A copy of the 'Bulk CMR Notice' being issued at the time in accordance with Presidential Guidance Note No 1 2020, can be found here: <https://www.freemovement.org.uk/wp-content/uploads/2020/03/Bulk-CMR-Notice-JP.pdf> [Accessed: 02/07/20]. Reproduced at appendix B. The reference to the Respondent conceding the points raised in the appellant's ASA has since been removed in the latest directions being issued in accordance with Presidential Guidance Note No 2 2020. However, it does direct that '[p]ro-forma or standardised responses will not be accepted by the Tribunal. The Review must engage with the submissions made and the evidence provided to the Tribunal.'

⁶⁰ This is the reconsideration team within the Home Office Presenting Officers Unit.

⁶¹ HMCTS Reform Event, 13 November 2019: Immigration & Asylum Appeals. Available at: <https://www.gov.uk/guidance/hmcts-reform-event-13-november-2019-immigration-asylum-appeals> [Accessed: 03/07/20]. The rollout of the appellants in person channel has since been suspended due to the pandemic.

⁶² After our research ended in June 2020, bail hearings began to be conducted via the Cloud Video Platform.

⁶³ The FtTIAC Help for Users guide outlines this process. Available at: https://www.judiciary.uk/wp-content/uploads/2020/04/14-Apr-20-Immigration-and-Asylum-Chamber-First-Tier-Tribunal-Help-for-Users.pdf?utm_medium=email&utm_source [Accessed: 06/07/20]

⁶⁴ After our research ended in June 2020, Case Management Review Hearings began to be conducted via the Cloud Video Platform.

⁶⁵ This is in contrast to interviewees' views on conducting substantive hearings remotely, where a majority suggested that this would be inappropriate in this Tribunal. Interviewees' views on remote substantive hearings were largely speculative or based on past experiences as our data collection concluded prior to substantive hearings resuming. As a result, we have not included this data in this report.

⁶⁶ The new Regulations were successfully challenged and a consent order agreed between all parties on 11 August 2020. This followed the lodging of a claim for judicial review in *MT and others* against the Ministry of Justice (LAA) and the Lord Chancellor, and a judicial review in *CRA and others* against the Lord Chancellor. The Defendants conceded that the new Regulations were unlawful on the basis that the requirement to consult and duty of inquiry was inadequate. See: Garden Court North, *Successful challenge of Civil Legal Aid (Remuneration) (Amendment) (Coronavirus) Regulations 2020* (11 August 2020). Available at: <https://gcnchambers.co.uk/successful-challenge-of-civil-legal-aid-remuneration-amendment-coronavirus-regulations-2020/> [Accessed 11/08/20]

⁶⁷ HMCTS, *Vulnerability Action Plan* (30 July 2020). Available at: <https://www.gov.uk/government/publications/hmcts-vulnerability-action-plan> [Accessed 12/08/20]

⁶⁸ Senior President of Tribunals (2020) *Senior President of Tribunals' Annual Report 2020*. Available at: https://www.judiciary.uk/wp-content/uploads/2020/07/6.6755_The-Senior-President-of-Tribunals-Annual-Report-2020_WEB-CS-amend-1.pdf [Accessed 20/08/20]

⁶⁹ Comprehensive and thoughtful examples of good practice guidance have already been produced by the Judicial College Equal Treatment Bench Book Committee (<https://www.judiciary.uk/wp-content/uploads/2020/03/Good-Practice-for-Remote-Hearings-May-2020-1.pdf>) and the Family Court (<https://www.judiciary.uk/wp-content/uploads/2020/04/The-Remote-Access-Family-Court-Version-4-Final-16.04.20.pdf>). The Helen Bamber Foundation has also produced a series of recommendations for safeguarding vulnerable people in the context of remote international protection and human trafficking/modern slavery legal casework (<http://www.helenbamber.org/wp->

[content/uploads/2020/05/Tribunals-courts-and-COVID-recommendations-Final.pdf](#)). These three documents would provide a helpful starting point for a FtTIAC good practice guidance note. [Accessed 09/07/20]



Public
Law
Project