Public Law Project

Tribunal Procedures Committee

By email to: tpcsecretariat@justice.gov.uk

16 August 2021

Dear Madam or Sir

Re: TPC Consultation on possible changes to rule 22 of the Upper Tribunal Rules 2008

I write on behalf of the Public Law Project (PLP) in response to your consultation on possible changes to rule 22 of the Upper Tribunal Rules 2008.

Public Law Project

PLP is a national legal charity founded in 1990 with the aim of improving access to public law remedies for the disadvantaged. Since its inception PLP has played an active role in the development of the law, and has helped other lawyers and advice agencies to use public law principles and redress mechanisms to help many of the most vulnerable in society. Our work has resulted not only in the direct enforcement of individual rights but also in wider improvements in access to justice.

PLP's vision is a world in which state decision-making is fair and lawful and each person has the power to hold public bodies to account.

PLP's response to the consultation

PLP is primarily concerned with the use, value and effects of judicial review. While we have some organisational experience and expertise in the appellate functions of Tribunals, this is primarily in the context of the Immigration and Asylum Chamber, the Social Entitlement Chamber, and the First-tier Tribunal (Asylum Support). We therefore do not have organisational experience or expertise to comment in detail on the proposed reforms.

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Our primary reason for responding is because of the identified connection with the Government's proposal to abolish '*Cart* judicial reviews' which would remove the ability of the Administrative Court to retain oversight of the Upper Tribunal where it refuses permission to appeal from the First-tier Tribunal. As the consultation paper rightly identifies, the Government's response to its recent consultation on this proposal (following the recommendations of the Independent Review of Administrative Law) was awaited at the time the consultation was published. However, the consultation response has now been published,[1] as well as the Judicial Review and Courts Bill,[2] which had its first reading on 21 July 2021. Clause 2 of the Bill seeks to implement the proposed abolition of the *Cart* jurisdiction in most cases.

In PLP's view, the proposal to amend rule 22 needs to be reconsidered in light of the proposed restriction of the *Cart* jurisdiction. Clearly, removing the right to an oral renewal of an application for permission to appeal would be a more significant step if the right to apply for judicial review of the refusal of permission is also removed or in some way limited. It is of concern that this consultation is proceeding at a time when it is unclear whether and to what extent the *Cart* jurisdiction will remain.

PLP is opposed to the Government's proposal to abolish *Cart* judicial review. The reasons for our opposition to the proposal are in summary:

(1) The availability of judicial review of a decision of the Upper Tribunal is a vital safeguard for important cases and ensures that errors of law are not perpetuated and that the Upper Tribunal is not insulated from external scrutiny. There are critical differences between the High Court and the Upper Tribunal which mean that, although they are intended to be of equivalent status, it remains appropriate for the High Court to be able to review the unappealable decisions of the Upper Tribunal in limited circumstances.

(2) Contrary to the suggestions in the Government consultation paper, there was nothing new or unusual about the decision that the Upper Tribunal should be amenable to judicial review. Its predecessor Tribunals had been so amenable and the Supreme Court was right to hold that Parliament had not ousted judicial review in enacting the Tribunals, Courts and Enforcement Act 2007.

(3) The recommendation of the IRAL panel to abolish *Cart* judicial review proceeded on the basis of a fundamental error of fact as to the number of Cart judicial reviews which are successful (0.22%). This error was carried over into the Consultation Paper. In its Consultation Response, the Government accepts that the IRAL panel made a significant error. Its own analysis indicates that 5.69% of all *Cart* judicial reviews are granted permission to proceed – and in most cases this leads to the quashing of the Upper Tribunal's refusal of permission, and a subsequent grant of permission to appeal.[3]

A link to our consultation response which expands on these reasons is available here: https://publiclawproject.org.uk/content/uploads/2021/04/210429-PLP-JR-consultation-response.pdf

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1 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1004881/jr-reform-government-response.pdf

2 https://publications.parliament.uk/pa/bills/cbill/58-02/0152/210152.pdf

3 See Annex E of the Consultation Response. The IRAL report, Consultation Response and Explanatory Notes to the Bill use a definition of "success" which involves consideration of whether the subsequent appeal to the Upper Tribunal also succeeded. This led the Government to conclude that 3.4% of judicial reviews are unsuccessful. However in PLP's view this is an overly narrow conception of success in judicial review: a judicial review should be regarded as successful where the challenged decision (the refusal of permission to appeal) is withdrawn or quashed.

Question 1: Do you consider that there should be a power conferred on a UT Judge deciding PTA (or an application to admit a late application for PTA) on the papers to certify the application (or part of it) as being "totally without merit", with the consequence that the applicant would not be allowed to renew the application (or that part of it) at an oral hearing? If so, why; and if not, why not?

No. PLP is not persuaded that the case has been made for making this change at this time.

In addition to the points about *Cart* judicial review highlighted above, we make the following brief points as to the reasons given in the TPC's consultation for the proposal to amend rule 22.

As to coherence: for the reasons we have explained in our submissions to the JR consultation and our submission in response to the consultation on appeals from the Upper Tribunal[4] (to which the Government's Response is still awaited), there is an important distinction between the High Court and the Upper Tribunal. The judges of the High Court are part of the ordinary court system. There is a greater risk of ossification of the law in the Tribunal system if it is more insulated from the ordinary court system. The refusal of permission to appeal to the Upper Tribunal prevents, subject to the availability of *Cart* judicial review, appeals from ever reaching the ordinary court system. There is therefore a good reason for the distinction between the way that applications for permission to appeal are treated in the Tribunal system as compared to the High Court.

As to consistency with judicial review processes. There is again an important distinction. If permission to apply for judicial review is incorrectly refused by the Upper Tribunal (or, indeed, the Administrative Court), the applicant is able to seek permission to appeal to the Court of Appeal. For the reasons we have explained in our submission to the consultation on appeals from the Upper Tribunal,[5] this is a vitally important mechanism to prevent the Tribunal system from becoming overly parochial and insulated from external scrutiny. There is therefore a good justification for the distinction between PTA and judicial review.

As to equality of treatment, we would agree there is no apparent reason for the different treatment of social security appellants, who may be thought more likely to require an oral hearing to ensure fairness given their vulnerability and the significance of what is at stake for them. This does not however in itself justify taking away the important right to seek an oral hearing. It would also be open to the TPC to level up by giving social security appellants the right to oral renewal.

As to efficiency, the consultation document presents no evidence to support the case for reform. There is no data provided about the number of cases in which an oral renewal is sought, or the number or type of cases in which permission is granted on oral renewal. Nor is any information given about how much judicial time is spent considering applications on oral renewal. Without this data it is impossible to assess whether the additional time and resources involved are warranted by the importance of what is at stake and the interests of fairness.

For these reasons, PLP is not persuaded that the case has been made for removing the right of oral renewal. We are concerned that, coupled with the proposals to restrict the availability of *Cart* judicial review, there is a real risk of injustice and an increased risk of the development of a 'local law' within the Tribunal system.

In the circumstances, question 2 does not arise, and we have no further comments (question 3).

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[4] https://publiclawproject.org.uk/latest/plp-responds-to-government-consultation-on-reforms-to-process-for-appealing-from-the-upper-tribunal/

[5] https://publiclawproject.org.uk/latest/plp-responds-to-government-consultation-on-reforms-to-process-for-appealing-from-the-upper-tribunal/

Kind regards

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