

**WELCOME TO ONE PUMP COURT
OUR SEMINAR ON
RUNNING IMMIGRATION CASES DURING THE COVID-19
PANDEMIC
WILL BE STARTING SHORTLY**

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BAIL & IMMIGRATION DETENTION

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BASIC PRINCIPLES

- Statutory power to grant bail:
 - *Immigration Act 2016* Schedule 10 at paragraph 1:
 - The Secretary of State **may** grant a person bail if...[a person is detained under the Immigration Acts].
- Detention is impliedly limited by common law, in particular:
 - *R (Hardial Singh) v Governor of Durham Prisons* [1984] 1 WLR 704
 - 1 - The Secretary of State must intend to deport the person and can only use the power to detain for that purpose;
 - 2 - The deportee may only be detained for a period that is reasonable in all the circumstances;
 - 3 - If, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within that reasonable period, he should not seek to exercise the power of detention;
 - 4 - The Secretary of State should act with reasonable diligence and expedition to effect removal.
- HS 2 in light of the COVID-19 pandemic:
 - What period of detention is reasonable in all the circumstances?
 - Circumstances that pertain ordinarily **AND** in light of COVID-19 pandemic.
 - **Must** be a cumulative assessment:
 - Ordinary Monthly Progress Reports (MPRs); and,
 - Exceptional COVID-19 detention review.



COVID-19 DETENTION CHALLENGE

- *Detention Action & Anor, R (On the Application Of) v Secretary of State for the Home Department [2020] EWHC 732 (Admin) (25 March 2020)*
 - Key points:
 - §19: *The Claimants contend that because the Secretary of State has decided as a general rule not to initiate detention for persons who would be removed to countries who, because of COVID-19 are not presently accepting removals, it must follow that detention of any person in an immigration detention centre pending removal to such a country is already unlawful. We do not agree.*
 - §25: *We accept that the position of those in immigration detention is not without risk of serious harm... We accept that those in detention, in what was described as a congregate setting, are exposed to particular risks arising from that setting.*
 - §29: Guidance issued by SSHD. *Detainees must be assessed individually.*



COVID-19 BAIL ISSUES

- Who is still in detention after *Detention Action* challenge?
 - Foreign National Offenders (FNOs)
 - Why?
 - Issues with addresses – SSHD vs NPS vs police
 - Risk of harm and / or absconding
 - Risk assessments (lack of and / or dis-jointed approach)
- What is the Home Office approach to bail applications now?
 - Extraordinary exchange of letters following marked increase in (successful) applications for bail during COVID-19:
 - Letter from James Stevens, Director of Appeals, Litigation and Administrative Reviews, UKVI dated 29.4.20 to Michael Clements, President of the First-tier Tribunal, Immigration and Asylum Chamber
 - Letter of response from President Clements dated 1.5.20



COVID-19 BAIL – PRACTICAL TIPS

- Current removal situation:
 - Almost all clients are non-removable now, in the short-term and potentially medium-term and / or long-term.
- Conduct of bail hearing:
 - Additional time to brief counsel
 - Contact with and participation of client
 - Conditions and management of bail
- Policies, guidance and resources:
 - [Guidance on Immigration Bail for Judges of the First-tier Tribunal \(Immigration and Asylum Chamber\) implemented 15.1.18](#)
 - [Adults at risk in immigration detention](#) version 5.0 published 6.3.19
 - [Enforcement and Instructions Guidance Chapter 55](#)
 - Helen Bamber Foundation and Freedom from Torture report, [The Courts, Tribunals and the Covid-19 Public Health Crisis](#) May 2020, v1 (recommendations on safeguarding vulnerable people in the context of remote international protection and human trafficking/modern slavery legal casework)



INTERIM RELIEF – COVID-19 CASES AND PRACTICAL TIPS

- **Interim relief:**
 - Test:
 - There is a **serious issue to be tried** (*American Cyanamid Co v Ethicon Ltd* [1975] 2 WLR 316).
 - The **balance of convenience supports the granting the relief** (*Leeds Unique Education Ltd v SSHD* [2010] EWHC 1030 (Admin)).
- Applications for interim relief brought during the COVID-19 pandemic:
 - *TM(DRC) v SSHD*, CO/1599/2020
 - *WP (Poland) v SSHD* [2020] 4 WLUK 150
 - *Arian Khan v SSHD*, CO/1366/2020
 - *Zalys* [2020] 4 WLUK 86
 - *E v SSHD* [2020] 4 WLUK
 - *Bello v SSHD* [2020] EWHC 950 (Admin)
- Issues to consider in making an application for inter relief:
 - Has an application for bail been made to the First-tier Tribunal? If not, why not?
 - Disclosure?
 - What is the urgency?
 - Which Defendant?



THE FIRST TIER TRIBUNAL

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OVERVIEW

1. Useful Documents & Resources
2. Procedural Changes
3. Notices/Bulk Directions & Issues arising
4. Latest letters from the FTT President
5. Tips
6. Future developments & funding

Useful Documents

- A. 19 March 2020 - [Pilot Practice Direction: Contingency Arrangements in the FTT and the UT](#) (Senior President of Tribunals), in force for 6 months
- B. 23 March 2020 - [PRESIDENTIAL PRACTICE STATEMENT NOTE 1 2020: ARRANGEMENTS DURING THE COVID 19 PANDEMIC](#) (President Clements)
- C. Bulk Directions/Pilot Directions
- D. Legal Aid Amendment - [the Civil Legal Aid \(Remuneration\) \(Amendment\) \(Coronavirus\) Regulations 2020](#)

Useful resources

- ILPA Website: Resources > Coronavirus Resources
- HMCTS Daily Operational Summary - supposed to be updated weekly but not updated since 24/04/20

Guidance

English | [Cymraeg](#)

HMCTS daily operational summary on courts and tribunals during coronavirus (COVID-19) outbreak

This page provides a daily summary of the HM Courts and Tribunals Service operational position during the coronavirus pandemic. We will aim to update this page by 9am daily.

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Related content

- [Courts and tribunals tracker list during coronavirus outbreak](#)
- [Coronavirus \(COVID-19\): courts and tribunals planning and preparation](#)
- [Online court and tribunal services for professional users and the public](#)
- [Changes to court and tribunal hearings during the coronavirus outbreak](#)
- [HMCTS priorities during coronavirus outbreak](#)



Procedural Changes to TPR 2014

- 9 April 2020, Amendments to the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 amended by Rule 10 of [The Tribunal Procedure \(Coronavirus\) \(Amendment\) Rules 2020](#)
- will expire on the same day as s55(b) of the Coronavirus Act 2020. s.89 of the Act = 2 year duration; s.90 = relevant national authority has the power to extend the duration.
- **Decisions without a hearing**
- Existing r.25 stays
- new r.4A allows for decisions without a hearing without parties' consent if three cumulative conditions are met: (urgent/not reasonably practicable to have a hearing inc. remote hearing/interests of justice)
- amendment to “reduce the risk of infection between Tribunal users, HMCTS staff and Judiciary by allowing more decisions to be made on the papers.” (§7.6 of the [Explanatory Memorandum to the Amendment Rules](#))



- **Private hearings**

- new r27(2A) to allow for hearings in private where “*the Tribunal directs that the proceedings are to be conducted wholly or partly as video proceedings or audio proceedings; (b) it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; (c.) a media representative is not able to access the proceedings remotely while they are taking place; and (d) such a direction is necessary to secure the proper administration of justice.*”
- Recognises that remote cases can be heard in private if they cannot be broadcast and accessed by the public (§7.8 of the [Explanatory Memorandum to the Amendment Rules](#))



Notices and Bulk Directions

NOTICES

- *Bulk Notices and the Online Pilot Directions have been sent out by Principal Resident Judges.
- *Only apply if being sent in a specific case.
- *How do they interact together?
- *All listed hearings are vacated
- *Witness Statement, ASAs and bundle followed by CMR
- *At CMR, R will be directed to respond. If in default, “assumption” that does “not take issue”.
- *FTJ will consider, having given parties an opportunity to make representations, whether appeal can be determined without a hearing (r.25(1)(g) TPR)
- *Where not appropriate to not have a hearing, consideration will be given to a remote hearing
- *applications can be made at any time (para 2) - but being properly considered?
- *Bundle - 50 page limit (some notices)



Pilot Directions

- to be read with the Notice in each case
- pilot directions for digital appeals introduced in January 2019 at Taylor House and Manchester.
- consider requirements for an ASA (§3.4-3.7), page limit, matters to be covered.



Issues Arising from Directions

- Time limits - impossible to comply? Instructions difficult in lockdown - how can a case be fully prepared before a CMR?
- Funding issues - ASAs at risk in publicly funded cases. Issues for self-funding appellants too?
- Suitability for remote hearings? (vulnerabilities, VOTs, logistical issues, lack of support, childcare)
- ASAs being rejected by FTT (TCWs?) for being non-compliant” including for containing “extensive quotations from case law” and country guidance
- HO responses consisting of one line (maintaining refusal) - compliant? Costs application?
- Anecdotal eg. Response to application for extension/specific directions - *“please see the letter from President who has recently written to stakeholders about the arrangements for conducting hearings in the current circumstances. We attach a copy of the letter herewith.”*
- Duncan Lewis letter - President has agreed to list 6 cases together as lead cases for a preliminary hearing before a Presidential panel to provide general guidance on issues to do with bulk directions.



Recent Letters from the President

Letter from President Clements 17 April 2020

- Written following a meeting between ILPA, HO, HMCTS, MOJ, senior FTT judges
- encouraged all practitioners to register for CCD (“core case data”) platform - it will be a “*straightforward way of making evidence available in digital or electronic form, of communicating with the FTT and each other reliably and without delay and of deciding appeals and achieving prompt promulgation of decisions*”
- legal aid issues - “*not an issue which the Tribunal can or should be directly concerned*” - referred to a decision being awaited from government



Letter from President Clements 21 April 2020

- *“all appeals will commence using the CCD (“core case data”) platform with effect from 4 May 2020, or such later date if the legal aid issues of using CCD have not been resolved. In respect of appeals lodged between 23 March and 4 May, or such later date depending on the resolution of the legal aid issues, these appeals will be initially scanned by the Tribunal and then proceed as legacy cases”*
- Some cases cannot proceed in CCD - out of country cases and appeals under the Rules brought following Brexit will not be “within scope”.
- Appeals that were adjourned as a result of lockdown will be returned to and will be conducted by *“remote means in all but exceptional circumstances”*.
- When a case is commenced, “active dialogue” between FTT and parties to establish what is needed to complete the case. Paper decision? Remote hearing using CVP? Or face to face hearing?
- some appeals will need a face to face hearing and the most careful case management will be required on a case by case basis to make the necessary effective arrangements.
- Intention to issue a further Practice Statement by the end of this week, to replace the Practice Statement made at the outset of the current crisis (No 1 of 2020) - **still awaited...**



What's happening on the ground?

- No substantive hearings
- Remote bail hearings/some CMRs
- Not aware of any substantive hearings being listed
- ASAs being prepared



TIPS

- THINK about whether your case is suitable for a remote hearing/practicable? Will your client be in a position to participate in a remote hearing? NB the [Equality and Human Rights Commission's Report](#) (22.03.20) on video and telephone hearings and barriers to justice for disabled defendants in criminal courts.
- BE PROACTIVE when applying for directions - extension of time/adjournment/bundle size/early CMRs.
- ASA - need for a formal ASA or just pointing out why decision is wrong?
- Consider funding issues in house.



Future Developments?

- Virtual appeal hearings in the next few weeks? HO ‘security issues’ resolved? Kinly- Cloud Video Platform (being used in the criminal courts).
- “Minded to grant” decisions - being sent to HO “wherever it is appropriate” to do that. HO gets a judicial indication whilst maintaining the opportunity for representations if a hearing is still required (‘Help for Users’ 15/04/20)
- Difference of approach in different hearing centres?
 - Proposal to have socially distanced hearings - Bradford. “Only 5 people required in a court room”. Open justice?
 - Telephone CMRs - North Shields/Bradford



Funding

- [The Civil Legal Aid \(Remuneration\) \(Amendment\) \(Coronavirus\) Regulations 2020](#), with effect from 8 June 2020
- Controversial amendments
- [ILPA's Statement](#), (18 May 2020)
- [Letter from Members of the Immigration Bar](#) (21 May 2020)
- [Bar Council Statement](#) "*these measures ought not to be implemented*" (18 May 2020)
- [1PC Statement](#) (21 May 2020)
- Firms need to decide what to do re legal aid - will you do this sort of work?
- **Will you decide to do an ASA in-house and only involve a barrister if there is a hearing?**
- **Will you split the fees available?**



THE UPPER TIER TRIBUNAL

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Key Documents

- **PILOT PRACTICE DIRECTION: CONTINGENCY ARRANGEMENTS IN THE FIRST-TIER TRIBUNAL AND THE UPPER TRIBUNAL**, Senior President of Tribunals (19/03/2020)
- **PRESIDENTIAL GUIDANCE NOTE No 1 2020: ARRANGEMENTS DURING THE COVID-19 PANDEMIC**, President of UT (AIC) (23 March 2020)

SENIOR PRESIDENT'S PRACTICE DIRECTION

- 6 months validity - §1
- *Where a Chamber's procedure rules allow decisions to be made without a hearing, decisions should usually be made in this way, provided this is in accordance with the overriding objective, the parties' ECHR rights and the Chamber's procedure rules about notice and consent - §4*
- Allows tribunals to triage cases, provisional decision provided and consent requested. Hearing will take place if both parties do not consent. Appears this only applies to tribunals that do not have the power to decide on the papers with parties' consent - §5



SENIOR PRESIDENT'S PRACTICE DIRECTION

- Remote hearings - *Where it is reasonably practicable and in accordance with the overriding objective - §6*
- *Insofar as compatible with the efficient administration of justice, the tribunals will take into account the impact of the Covid-19 pandemic when considering applications for the extension of time for compliance with directions and the postponement of hearings. - §12*



UT's PRESIDENTIAL GUIDANCE NOTE

- 6 months validity - §1
- Rule 34 of [Upper Tribunal Procedural Rules](#) allows for a decision to be made without a hearing having heard the views of the parties on the issue: i.e. consent is not required
- *during the pandemic, decisions should usually be made in this way - §9*
- All cases where PTA has been granted will be examined and judge will consider whether appropriate to make a decision on (a) error of law and (b) set-aside - §11
- Will give Directions allowing parties to make submissions on error of law and set-aside— §12



UT's PRESIDENTIAL GUIDANCE NOTE

- Directions will enable the parties to express their views re whether the decision should be made without a hearing - §13
- Where evidence is required or where there is *The presence of particularly complex or novel/important issues of law* a hearing may be required - §14
- May still be a decision without hearing for unrepresented appellant as *a person with no or limited English language ability may find it easier to make their submissions in writing, with the assistance of a relative, friend or other third party, rather than to address the UTIAC orally, through an interpreter, on what are legal issues* - §15



UT's PRESIDENTIAL GUIDANCE NOTE

- *The fact that the outcome of the appeal is of importance to a party (or another person) will not, without more, constitute a reason to convene a hearing to decide the relevant questions - §16*
- §17 addresses post error of law procedure
- *If a hearing is necessary, the “default” option during the pandemic is, therefore, that the hearing should be conducted remotely - §19*
- *A remote hearing may involve a live audio link or a live video link - §20*
- Documents must still be filed by post - *if practicable* - §23



UT's PRESIDENTIAL GUIDANCE NOTE

- *Where case law is relied upon, the bundle should contain a list of the cases concerned, with citations, rather than the text of the judgments; provided the cases are publicly accessible online - §24*
- *Attachments to an email must not, in total, exceed 15 MB, otherwise the email will not be delivered. - §25*
- *Where oral evidence is required and remote hearing not appropriate a face-to–face hearing will take place - §30*



STANDARD DIRECTIONS FOR ERROR OF LAW / SET ASIDE

- No indication of Tribunal's view
- Party who was granted PTA has 14 days to file further submissions on error of law and set-aside
- Other party then has 7 days to respond
- First party then has 7 days to reply
- Parties can submit their views on whether an oral hearing is needed within 21 days of directions (i.e. the day the respondent is meant to respond to further subs)
- If no Rule 24 the appellant will not know other side's position until the day (if filed in time) s/he has to submit whether oral hearing is necessary



EXAMPLE RESPONSE TO WHETHER ORAL HEARING IS REQUIRED

The Appellant's position is that a hearing is not necessary if:

- i. The Respondent concedes the First-tier Tribunal made an error of law and the determination should be set aside; and
- ii. The Tribunal agrees with those concessions; or
- iii. The Tribunal is minded to find there is an error of law and set-aside the determination.

The Appellant cannot agree that a hearing is not necessary otherwise, as:

- i. The Tribunal has given no indication of its view or concerns;
- ii. The Respondent has not submitted a Rule 24 Response and has not responded to efforts by the Appellant to communicate and come to an agreement. The Appellant is not therefore aware of the Respondent's position;
- iii. The Appellant does not know the Respondent's response to these submissions;
- iv. The Appellant has been unable to attempt agreement with the Respondent which would be possible if there were a hearing;
- v. There is no substitute for oral advocacy. In [Smith v Parole Board](#) [2005] UKHL 1, Lord Bingham cited a US decision of Brennan J in *Goldberg v Kelly* 397 US 254, 269 (1970):

Moreover, written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decisionmaker appears to regard as important. Particularly where credibility and veracity are at issue, [...] written submissions are a wholly unsatisfactory basis for decision. [...]

- i. If the Tribunal finds the FtTJ did not make an error of law or declines to set aside her decision, the Appellant's only route of appeal is to the Court of Appeal, where she will have to satisfy the second-appeals test. By contrast, if this appeal is allowed, the Respondent will have a chance to reargue her case *de novo*;
- ii. The outcome of this appeal has far greater consequences to the Appellant than to the Respondent. It is submitted the Tribunal cannot risk finding the FtTJ did not err in law in assessing whether the Appellant is a refugee without a hearing.



WHAT'S ACTUALLY HAPPENING?

- Directions vary but appear to always contain the timings as above
- Very few examples of SSHD responding to further submissions or expressing view on whether oral hearing is necessary
- No known decisions yet
- No known remote statutory appeals in UT yet (HO has confirmed it will be in a position to do so shortly having resolved 'security issues').
- Potential litigation
- Field House getting ready for face-to-face hearings



JUDICIAL REVIEW IN THE UT

- Cannot 'dispose of proceedings' without a hearing – [Procedure Rules](#) 34(3) (subject the exceptions listed in rule 40(1B))
- [UTIAC notice: Judicial Review applications](#) (29 April 2020)
- Applications and docs will be accepted by email
- Urgent to utiac.londonjr@justice.gov.uk (must not exceed 15 MB)
- Non-urgent to UTIACJudicialReviewApplications@justice.gov.uk (must not exceed 25 MB)
- Fees payable after lodging
- Have been a number of remote OPHs
- Substantive hearings in May and 4-5 a week in June



ADMINISTRATIVE COURT OFFICE GUIDANCE – COVID-19 MEASURES

Urgent applications

- Can only be filed by email to administrativecourtoffice.immediates@hmcts.x.gsi.gov.uk
- Docs restricted to ones 'necessary' for Court to make a decision and must not exceed 20mb
- Exact requirements for format of bundles - §5a-h

Non-urgent

- Must be filed by email to administrativecourtoffice.generaloffice@hmcts.x.gsi.gov.uk
- Is no file size maximum but Court cannot accept files over 24mb (multiple can be filed)
- Same exact bundle and format requirements as above
- Most if not all hearings will be conducted by Skype or phone, and where possible will be conducted as public hearings

- OPHs and substantive have been heard remotely



THANK YOU FOR
ATTENDING!

