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Mr Justice Lane, President of the Upper Tribunal (Immigration and Asylum Chamber)

By email only

2 April 2020

Dear Judge,

Re: Presidential Guidance Note No 1 2020: Arrangements during the COVID-19 pandemic issued on 23 March 2020

We write further to the Upper Tribunal Immigration and Asylum Chamber '*Presidential Guidance Note No 1 2020: Arrangements during the COVID-19 pandemic issued on 23 March 2020*' ("the Guidance"), issued following the approval by the Lord Chancellor on 19 March 2020 of the Practice Direction made by the Senior President of Tribunals *'Pilot Practice Direction: Contingency arrangements in the First-tier Tribunal and the Upper Tribunal'* ("the Practice Direction").

We understand that the Bar Council has already written to you to raise concerns about the proposed approach in the Guidance Note and we write to reiterate those concerns, which reflect those raised by many ILPA members, and set out further detail below.

We appreciate that the current situation was unforeseen and that the Upper Tribunal (IAC), like all members of the judiciary, have worked hard to find the right way forward. We also acknowledge that establishing new forms of adjudication, and ensuring access to justice across the board is a difficult task. We hope the concerns raised by our membership in this letter will be received, as intended, as a constructive and useful starting point for further discussion.

We consider that any changes to practice or procedure should be kept to a minimum and limited to the duration of the pandemic. While the present circumstances are unprecedented, any changes touching on an appellant's right to fairly access the court should be limited to preventing the effect of Covid-19. It should not be influenced by any broader programme for change.

Decisions on the papers

As noted in the Guidance, paragraph 4 of the Practice Direction provides that decisions should "*usually*" be made on the papers where the procedure rules allow, but the Practice Direction is of course directed to "*all appeals and applications in the First-tier Tribunal and the Upper Tribunal*" (at paragraph 3). It is not specifically directed to the Upper Tribunal (IAC), or the types of cases that routinely fall to be decided by the Tribunal. The Practice Direction, for understandable reasons, does not account for the highest standards of fairness applicable in protection appeals, and although the importance of the issues to the parties is recognised at paragraph 16 it is downgraded to a neutral factor and the consequences of getting decisions wrong is missing (see below).

Our primary concern as regards the Guidance Note relates to the proposed move away from holding oral hearings in appeals to the UT in favour of decision-making on the papers where there is no oral evidence or fact-finding required. In the first instance, it appears to us that where it is not appropriate or possible to adjourn an appeal until such time as oral hearings in person can be resumed, the preferred alternative would be for a telephone or video link remote hearing at which oral submissions can be made by both parties. Given that remote hearings are available to the Tribunal, the justification for adopting a presumption that cases which do not involve evidence or fact-finding can be fairly resolved in the papers is unclear to us.

Rule 2(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the Rules") states that dealing with a case fairly and justly includes "c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings". Should, following consultation with the parties, it be deemed not to be possible or desirable for a given hearing to be postponed until this emergency is over, the default position should be that an oral hearing still takes place, even if that means that it needs to be remote. **If the UTIAC's position is that it is not practicable for remote hearings to take place in the majority of cases, we ask that an explanation and reasons are given**. It is our understanding from the guidance issued in respect of other civil hearings, that the pandemic necessitates remote hearings wherever possible. This will require facilitating oral (remote) hearings. It is unclear to us why the Upper Tribunal's guidance on hearings in cases which do not require oral evidence or fact-finding diverges from this general principle.

We are also concerned about the provision in the Guidance permitting a decision to proceed without a hearing to be made by the UT without the parties' consent (para 9). When read with paragraph 6, which states that there is, during this time of crisis, a "particularly significant" duty on the parties to cooperate with the Tribunal, the extent to which the parties' views will be taken into account and weighted is unclear. In this regard, we note that the Rules provide that the UT **may** make a decision without a hearing but **must** have regard to the views of the parties. Given that Rules weights this provision in favour of the wishes of the parties, the default position should be that the parties' wishes for a hearing (or otherwise) are followed absent exceptional circumstances. As indicated above, it may in many cases be possible for that hearing to be conducted by telephone or video link where no evidence is required.

Preliminary decision as to whether or not a hearing should take place

Paragraph 5 of the Practice Direction states as follows in relation to triage: "To deal more efficiently with cases **in which a successful outcome for the applicant or appellant is highly likely**, Chamber Presidents may decide to follow the following scheme to 'triage' appeals and applications for some or all of their jurisdictions where paper determinations are possible with the parties' consent" (our emphasis). We wish to highlight the use of a "highly likely" successful outcome for the appellant is completely absent from the triage process described in the Guidance. We seek an explanation as to why the Guidance does not adopt the triage system set out in the PD which, in our view, would promote efficiency in the disposal of appeals with strong merits.

The Guidance states the following:

> "*11. The judge will consider whether, in all the circumstances known to the judge, his or her provisional view is that it would be appropriate for UTIAC to decide the following questions without a hearing: (a) whether the making of the First-tier Tribunal's decision involved the making of an error on a point of law; and, if so (b) whether the First-tier Tribunal's decision should be set aside.*"

When considered along with the assertion that the parties are under a "particularly significant" duty to cooperate with the UTIAC, this "provisional view" has the appearance of a decision of the UTIAC. In our view, this step is non-compliant with the Rules which state that the UT "must" have regard to the parties' views **before** making a decision.

Use of Rule 24

Our view is that it would make sense to find out, before any "provisional view" or further steps are taken, whether the Respondent accepts that there was an error of law, and if so in what regard. There is already provision for this in Rule 24 of the Rules, and we believe that this existing process should instead be utilised rather than introducing new processes. This adds an extra step to the process envisaged in the Guidance, however it would significantly speed up the consideration of at least some cases – indeed it would remove the need for judicial consideration in some of them – and it would ensure that those cases were dealt with in a way most similar to with the procedure before the pandemic.

Once the Rule 24 process has been completed and there remains a dispute about whether or not there is an error of law, the parties should then be asked whether they believe that a remote hearing is suitable, or whether they seek the hearing to be adjourned and listed in person once the UTIAC is again operating normally. As set out above, we believe that remote hearing **will** be practicable in many cases where oral evidence is not required, and an oral hearing (whether in person or remote) is ordinarily required in order to allow the parties to participate fully in the proceedings as required under Rule 2.2.

Further, we note that paragraph 14 of the Guidance refers to the Tribunal's *"expertise since 2010 in making error of law decisions and decisions on whether, in the light of finding an error of law, the First-tier Tribunal's decision should be set aside".* The expertise referenced is, of course, in the context of oral hearings having taken place. The UT does not have significant experience or expertise in deciding error of law issues without an oral hearing. We also note that it cannot properly be said (as the Guidance does at paragraph 16) that it is not relevant that cases raise important issues since every case raises important issues. The logical conclusion of this proposition would be an argument in favour of never having oral hearings, even in the absence of a global pandemic. We are concerned that such a position creates a serious risk of injustice which in the context of asylum and human rights appeals is unacceptable.

In respect of paragraph 15 of the Guidance which states that, in respect of unrepresented appellants, a person with limited English may find it easier to make submissions in writing than orally, we note that this does not reflect our experience of working with appellants. Nor, in our view, should the

UTIAC be encouraging those who are not legally qualified to make legal submissions in this manner (that is, through the assistance of a relative, friend or other third party).

Concern regarding the quality of decisions made on the papers

We refer you to the report "Immigration Judicial Reviews: An Empirical Study" by Professor Robert Thomas and Dr Joe Tomlinson, published last year (emphasis added):

> "*The overall success rate for applicants at oral renewal hearings is higher than at the paper permission stage. The proportion of oral renewals granted permission is around 20%. This compares with around 10% of paper permission claims granted permission. This may be explained by following factors. First, it is in the nature of the jurisdiction that the content of cases and the grounds of challenge can evolve and change. For instance, many applicants change their representative. Proceeding to an oral renewal will typically involve instructing counsel. In oral renewal hearings, the grounds of challenge may be modified and changed. Second,* ***oral argument by counsel may be of greater weight in persuading the Judge that a claim previously refused permission on the papers is in fact arguable***."[1]

Although it relates to judicial review applications, the comments about the value of oral argument are important and echoed by our members. The importance of oral argument in the UK's legal system cannot be overstated. Not only does it permit an advocate to crystallise the keys aspects of her case, but, crucially it permits advocates to engage with and answer the questions of the judge. As such, absent the benefits of oral argument, a paper decision may be inferior to one in which oral argument is heard. The risks for procedural fairness and access to justice are obvious. Our concerns are both anecdotal and evidence-based by reliance on such academic research as that referenced above. We are concerned that the Tribunal has failed properly to consult on the risks of removing oral advocacy. We ask that any research or information relied upon by the Tribunal to the effect that there is no or minimal risk to justice be provided to us.

Difficulty in remedying a poor decision on the papers

Of further and possibly greater concern in respect of the guidance on paper hearings, is the difficulty in remedying a poor decision on the papers. Whereas with a judicial review application where permission is refused on the papers it is possible to renew the application to an oral hearing, there are no such safeguards proposed here. This means that where the Upper Tribunal's decision needs to be challenged, including because it was reached in an unfair manner, an application will need to be made for permission to the Court of Appeal, and the second appeals test will need to be met. It is entirely foreseeable that appeals would be made on the grounds that the UT refused to allow an oral hearing under this guidance. Not only is this test inappropriate in the absence of an oral hearing in the Upper Tribunal (it being premised on the assumption that full ventilation of the appeal below, which in the normal course of events would include an oral hearing) but given that it is well established that procedural unfairness may constitute another compelling reason to hear the appeal by the Court of Appeal, there are likely to be more onward permission applications granted. This is not a sensible use of the UTIAC or the Court of Appeal's resources.

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[1] https://www.nuffieldfoundation.org/project/immigration-judicial-reviews, pages 40 to 41

Next steps

For the reasons above, we believe that the Guidance should be withdrawn. We understand and appreciate the desire to get guidance in place quickly, however it is important that this is not done at the expense of justice. Any changes to the existing procedures should be kept to an absolute minimum of what is required in order to respond to this emergency situation. We would welcome the opportunity to liaise with the Tribunal about the terms of the Guidance and its proper application, and formally invite the Tribunal to do so. We therefore ask that a remote meeting of the UTIAC User Group is convened as soon as possible.

Yours sincerely,

Sonia Lenegan
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