

# How to request an oral hearing.

December 2020

Factsheet 4a

## In this Factsheet:

- Changes to AST Procedure during Covid-19
- When can the AST decide to dispense with an oral hearing?
- When is the decision to dispense with an oral hearing made
- Is a paper appeal appropriate?
- Reasons for objecting to a paper appeal
- When should you apply for an oral hearing?
- AST's information to appellants

This Factsheet gives guidance on the conditions imposed on the Asylum Support Tribunal (AST) in relation to oral hearings during the Covid-19 period. **It should be read in conjunction with Factsheet 4 – Filling in the Notice of Appeal during the Covid-19 period and ASAP's Briefing note – Asylum Support Tribunal Procedures during the Covid-19 pandemic**

### Our telephone advice line:

If you still have questions or need further information and advice *after* reading this factsheet, please contact our advice line on 020 3716 0283. It is open Mondays, Wednesdays and Fridays from 2pm to 4pm. Please note this is a 'second-tier' advice line. This means that we can give advice to other advice workers but not to individual clients.

### Changes to AST procedure during Covid-19

The most significant change to procedure is that the AST now determines a large number of appeals without holding a hearing<sup>1</sup>.

Prior to March 2020, most appeals had an oral hearing. To request a hearing, the appellant or their representative only needed to indicate their preference in Section 4 of the [Notice of Appeal form](#).

This is no longer the case. To successfully request a hearing, you may need to explain why an appeal determined on the papers is not appropriate for your client. In order to do so, you need to understand the criteria that the AST will use when considering your objection to a paper appeal.

---

<sup>1</sup> A hearing is defined at Tribunal Procedure Rules 2008 Rule 1 as meaning an oral hearing and includes a hearing conducted in whole or in part by video link, telephone or other means of instantaneous two-way electronic communication. Tribunal Procedure (First-Tier Tribunal) (Social Entitlement Chamber) Rules 2008 SI no 2685 (amended 2013)

The information contained in this Factsheet is intended for guidance only. While every effort is made to ensure it is correct a time of publication, it should not be used as a substitute for legal advice. For client specific advice please contact ASAP.

### When can the AST decide to dispense with an oral hearing?

On 19/03/20 the President of Tribunals published a Pilot Practice Direction<sup>2</sup> in response to the pandemic which stated that paper determinations should become the norm, *if* tribunal rules allowed for this.<sup>3</sup>

There are two tribunal rules that allow the AST to dispense with an oral hearing; rule 8 and rule 27<sup>4</sup>. The powers under these rules have been supplemented by a temporary amendment to the rules; rule 5A<sup>5</sup>. Any decision made under these rules to hold a paper appeal must also be in accordance with the overriding objective<sup>6</sup> and the parties ECHR rights. Therefore, any decision to dispense with an oral hearing **must also be in the interests of justice**.

#### Rule 8 – strike out

Under rule 8 the AST can strike out an appeal, which means that they can bring an appeal to an end without a hearing. They can do so in several circumstances, but is usually limited to:

- Where the AST does not have jurisdiction to hear the appeal
- Where the AST believes that the appeal has no reasonable prospect of success.

Before striking out the case, the appellant must be invited to make written representations on the proposed strike out. In essence, they will be required to argue the merits of their case in writing. If the judge then decides not to strike out the appeal, they will then determine whether the case should be decided on the papers or to hold an oral hearing. Since March 2020 there has been an increase in the number of cases listed as a possible strike out due to the case having no reasonable prospect of success, in particular for s4 appeals. You can help avoid your client's s4 appeal being listed as a possible strike out by explicitly outlining eligibility under the reg 3(2) criteria in your grounds of appeal (see Factsheets 2 and 12 for more information on s4). You should also outline why any decision made on the papers would not be in the interests of justice.

#### Rule 27

Under rule 27 of the Tribunal Rules the AST can dispense with an oral hearing if the appellant either consents to a paper determination or does not object to one. Even if your client consents to a paper determination, the AST must consider that it is in

<sup>2</sup> <https://www.judiciary.uk/wp-content/uploads/2020/03/General-Pilot-Practice-Direction-Final-For-Publication-CORRECTED-23032020-1.pdf>

<sup>3</sup> The Pilot Practice Direction was renewed on the 14/09/2020 and will remain in force until 18/03/2021: <https://www.judiciary.uk/wp-content/uploads/2020/09/15-Sept-20-SPT-Amended-General-Pilot-Practice-Direction.pdf>

<sup>4</sup> Rule 8 and Rule 27 Tribunal Procedure Rules 2008

<sup>5</sup> Tribunal Procedure (Coronavirus) (Amendment) 2020 SI no 416

<sup>6</sup> The overriding objective of the Tribunal Rules is to enable the Tribunal to deal with cases fairly and justly. See Rule 2 Tribunal Procedure Rules 2008

the interests of justice to decide the matter without a hearing.

### Rule 5A

On 10/4/20 the AST Tribunal Rules were amended inserting a new rule, 5A which provides that the AST may make a decision without holding a hearing even if an appellant objects but only when all the following conditions are met:-

- (a) the matter is urgent; and
- (b) it is not reasonably practicable for there to be a hearing (including a hearing where the proceedings would be conducted wholly or partly as video proceedings or audio proceedings); and
- (c) it is in the interests of justice to do so.

If your client objects or does not consent to a paper determination, in order to make a decision on the papers a judge must be satisfied that **all three** of the above conditions are met. It is not sufficient for the matter to simply be urgent, it must also not be reasonably practicable to hold a hearing, and a determination on the papers must be in the interests of justice.

### When is the decision to dispense with an oral hearing made?

The decision whether to make a paper determination or to hold an oral hearing is made by a Judge, and should be considered at three stages:

1. From the Notice of Appeal and any attached documents, a judge will make an initial decision on whether to list your client's appeal for an oral hearing or a paper determination. If you have explicitly addressed why a paper appeal is not in the interests of justice on the Notice of Appeal you are more likely to succeed in having an oral hearing listed at this stage.
2. In the Directions Notice, a judge should invite your client to state if they object to a paper determination. In responding to the Directions Notice you should again address why a paper determination is not appropriate. You should also address if all the conditions in r5A have been met.
3. Before making a decision on the appeal the judge should again address if a paper determination is in the interests of justice. If your client has objected or not consented to a paper determination, the judge will also have to consider whether all the conditions in r5A are satisfied.

### When is an appeal determined on the papers appropriate?

ASAP's position is that it is nearly always in your client's best interests to be able to participate in an oral hearing. Although the format of an appeal hearing at the AST has changed since April 2020, with appellants taking part over the phone, ASAP's position on this point has not changed. It will generally be preferable and beneficial for your client to be able participate in a hearing where they have the opportunity to give oral evidence.

Oral hearings provide an opportunity for an appellant and/or their representative to explain and clarify aspects of the appellant's case. This will be in response to questions put to them by their representative, the HO's representative and the judge. The judge then makes findings of fact based on the evidence presented. Oral hearings allow the evidence to be tested.

In a paper appeal, the judge makes their decision based on the written evidence submitted in advance of the appeal. It will rarely ever be appropriate to request a paper determination on the Notice of Appeal. At this stage, you will not have access to the HO bundle or their written submissions, without which it is difficult to assess if you have sufficient documentary evidence to win the appeal. Requesting a paper determination on the Notice of Appeal may be detrimental to your client, as this will be taken as consent to a paper determination.

Once consent has been given, a judge will not have to ensure that all 3 of the conditions in r5A are met in order to proceed with a paper determination. Ticking the paper determination box on the Notice of Appeal will make it harder to request an oral hearing later in the appeal process.

### Reasons for objecting to an appeal determined on the papers.

Any decision made under rule 8, rule 27 or rule 5A to dispense with a hearing must give effect to the overriding objective outlined in rule 2 of the Tribunal rules.

Rule 2 states that:

*2.—(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.*

*(2) Dealing with a case fairly and justly includes—*

*(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;*

*(b) avoiding unnecessary formality and seeking flexibility in the proceedings;*

*(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;*

*(d) using any special expertise of the Tribunal effectively; and*

*(e) avoiding delay, so far as compatible with proper consideration of the issues*

You can object to a decision to dispense with a hearing if would not be in the interests of justice to proceed with the appeal on the papers. This is relevant for decisions made under any of the tribunal rules.

Here are some examples of relevant reasons for objecting to a paper appeal on the grounds that it is **not in the interests of justice**. The following examples must be treated as guidelines only and adapted to reflect an appellant's individual circumstances.

- The appellant has no or limited English. At an oral hearing a court interrupter is provided, without which the appellant will not be able to fully understand or participate in proceeding
- They have no or limited ability to submit written arguments again meaning they will not be able to fully participate in a paper appeal.
- They have no representative (see Factsheet 4 Section 5)
- The appellant has a particular vulnerability that would hinder their ability to put forward their case fully and accurately in writing.
- The appellant has had or is likely to face practical difficulties in gathering the evidence requested (e.g. evidence of bank accounts held abroad).
- Their credibility is in question. E.g. the HO has indicated that it does not believe aspects of the applicant's case or there is contradictory evidence, such as between the information in the visa application and the ASF1, or between the ASF1 and an Experian check.
- The issues in the case are not clear cut i.e. it is not obvious which issues the judge may consider significant.
- The appellant is unable to provide sufficient documentary evidence. E.g. the steps they have taken to try to obtain a letter of support from a friend or relative and they need to explain this in person.
- The appellant has vulnerabilities which may affect their entitlement to support and/or their ability to engage with proceedings, which cannot be adequately expressed on the papers.
- The case is legally and/or factually complex for another reason(s). E.g. the appellant has had a previous appeal dismissed by the AST.

If your client does not consent or objects to a paper appeal then the AST can only make a determination on the papers if **all** the conditions in rule 5A are met. As well as a paper appeal being in the *interests of justice*, rule 5A requires that it is *urgent* and that it is *not reasonably practicable* for there to be a hearing. It is sufficient for one of these conditions not to be met for your client's request for a hearing to be successful. But it is useful to address all three. Reasons why your clients appeal might not be considered urgent could include that your client is being accommodated under s4 support and this support will continue pending a decision on their appeal on the decision to discontinue support. If your client has access to a mobile phone then it is reasonable practicable for them to be dialled into an oral telephone hearing at a date and time set by the AST

### When should you apply for an oral hearing?

There is no formal application process for requesting an oral hearing. You will need to take the following steps depending on at which stage you are assisting your client. If you have followed steps 1 and 2 successfully then step 3 will not be necessary.

#### **Step 1**

Tick 'yes' to an oral hearing in Section 4 of the Notice of Appeal. Then tick 'yes' to the appellant attending the hearing.

**Step 2**

In Section 6 of the Notice of Appeal, list the reasons why an appeal determined on the papers is not appropriate for your client, with reference to the grounds above. Once the appeal has been listed you will be sent the Directions Notice notifying you (and your client) which form the appeal will take<sup>7</sup>.

**Step 3**

E.g. 1 – if on receipt of the Directions Notice the AST has decided to dispense with an oral hearing, you will need to object to this decision in writing. If the judge has given reasons for refusing to grant an oral hearing, you must address these. In these circumstances we strongly advise you contact us for advice.

E.g. 2 – if you are assisting with an appeal after it has been listed i.e. at the directions stage and/or a request for an oral hearing has not yet been made, then you will need to make a separate application using the grounds above.

In both cases, the application should be sent to the AST at the earliest opportunity by email<sup>8</sup>, headed with the appellant's name and five digit appeal reference number. Mark the application for the urgent attention of the Duty Judge.

If you are unsure about how or when to request an oral hearing please call our advice line.

**AST's information to appellants**

ASAP will update this Factsheet when there are changes to procedure and guidance. However, you **must** also check the AST's own guidance on remote appeals before lodging an appeal. The user guide is on the AST website:

<https://www.gov.uk/appeal-first-tier-asylum-support-tribunal/apply-to-the-tribunal>

There are further guidance notes available on the Judiciary website. Follow the link and scroll down to Social Entitlement Chamber:

<https://www.judiciary.uk/coronavirus-covid-19-advice-and-guidance/#differentchambers>

You will find links to the two guidance documents below:

1. [Social Entitlement Chamber \(First-Tier Tribunal\): Asylum Support: Arrangements During the COVID-19 Pandemic](#)
2. [Social Entitlement Chamber \(First-Tier Tribunal\): Asylum Support: Help for Users](#)

<sup>7</sup> In order to receive correspondence from the AST you must include your contact details in Section 5 of the Notice of Appeal. For more information refer to Factsheet 4.

<sup>8</sup> [asylumsupporttribunals@justice.gov.uk](mailto:asylumsupporttribunals@justice.gov.uk)

