



TRIBUNALS
JUDICIARY

**First-tier Tribunal
Asylum Support**
Second Floor
Import Building
2 Clove Crescent
London
E14 2BE

Members of the AST User
Group

By Email Only

Our Ref: SHS/FM
Date: 6 April 2020

Dear All,

Re: AST Covid – 19 Response

In advance of the User Group meeting on 7 April 2020, I would like to bring you up to date with changes in FTT-AS procedures for managing appeals during the Covid-10 pandemic. I am sorry that this letter is sent to you later than I had hoped but unfortunately, my request for a temporary change to Rule 27 of the Tribunal Procedure (First – tier Tribunal) (Social Entitlement Chamber) Rules 2008 (the Rules) is still awaited. Until the rule change is approved, you are asked to note the following;

a) The Practice Direction made by the Senior President of Tribunals, the *Pilot Practice Direction: Contingency arrangements in the First-tier Tribunal and the Upper Tribunal* on 19 March 2020 (the Practice Direction). <https://www.judiciary.uk/publications/pilot-practice-direction-contingency-arrangements-in-the-first-tier-tribunal-and-the-upper-tribunal/> provides that during the pandemic, it may be necessary for tribunals to adjust their ways of working to limit the spread of the coronavirus. Most Chambers have produced jurisdiction specific Covid-19 guidance, as has the FTT-AS. I enclose a copy for your reference. The Guidance has been published and is therefore in the public domain It has been approved by the Acting Chamber President.

b) I also enclose a note prepared by Judge Carter concerning the practicalities of the FTT-AS appeals process. This explains the new time limits to which the FTT-AS and the parties are expected to adhere. You should consult both jurisdiction specific documents when advising your clients, as these contain all the information you will require.

c) Please note that the Practice Direction, the FTT-AS Guidance and Judge Carter's note are subject to change as the situation changes. As and when this becomes necessary, you will be informed.

d) We recognise that there may be some uncertainty about the new process and procedure and we will aim to address these at Tuesday's meeting. In the meantime, Judge Carter has passed to me ASAP's email of 30 March 2020, containing nine questions. Additionally, Judge Verity Smith has been sent a further two points for clarification. I shall aim to deal with these

here to save time at the user Group meeting. For ease of reference I will include ASAP's questions followed by our response below.

Q1: We note that para 5 of the new PD sets out a provisional decision-making procedure to be used when a successful outcome for the appellant is highly likely. We note that this procedure is not being followed, could you confirm? We know that the strict time-lines of the AST would pose challenges to following this part of the PD.

A: Paragraph 5 of the Senior President's Practice Direction has not been carried forward into the FTT-AS guidance because it adds little to the process. The FTT-AS takes the view that it is clearer and quicker for the appellant to have their appeal "allowed" with a final decision and written Reasons. The FTT-AS's revised process still provides for a final determination on or about 2 weeks from the lodging of an appeal.

Q2: Under the directions notices that we have seen, we note that the appellant has five days to object to a decision on the papers and, as in Appeal no 41973, 'explain why it is considered that a hearing is necessary'. Under Tribunal rules 27 and 28, we note that appellants have an automatic right to an oral hearing, with no requirement to justify why they wish to have one. The credibility of the appellant is central to many hearings, especially complex destitution cases, and it's difficult to see how this can be dealt with appropriately without an appellant being able to give oral evidence. We note that of the 14 paper hearings listed between 7th and 9th, 10 are 'not destitute' decisions.

A: The FTT-AS is seeking an amendment to Rule 27 which will effectively dispense with the need for consent to dispose of proceedings without a hearing where the matter is urgent and it is not reasonably practicable for there to be a hearing, including video or audio hearings and it is in the interests of justice to do so. In the meantime, the Practice Direction and the Guidance address the changes necessary in the light of the Covid-19 pandemic.

The experience of the salaried judges to date is that the majority of appeals are capable of being decided on the papers, particularly if supported by detailed judicial case-management. There is no evidence of outcomes to date to suggest that the process is detrimental to appellants. Where a party or their representative objects to an appeal proceeding without a hearing they must follow the procedure set out in paragraph 6 of the Guidance and provide written reasons for their objection. Where a party can demonstrate that an oral hearing is necessary in the interests of justice or where, on further review, a judge considers on their own initiative that such a hearing is necessary, one will be directed. The FTT-AS decision is final.

Q3: The PD/Tribunal rules state that parties need to consent to the matters being disposed of on the papers. We are concerned that appellants will not receive the paperwork from the AST notifying them of their right to request an oral hearing due to the closure of face-to-face services around the country and the inevitable delay this will cause to

communications. Given these problems, we do not think that silence from appellants should be taken to be meaningful consent to a paper hearing.

A: Please consult the FTT-AS Guidance. The parties consent is not required. The Guidance has been published and is therefore in the public domain. There is no “right to request an oral hearing”. The presumption is that a matter will be decided without a hearing unless reason is shown why a hearing is necessary.

Q4: The recent Direction Notices that we have seen don't specify that a phone hearing is a possibility and that appellants will not need to leave their home to participate, potentially leaving appellants under the impression that they would need to travel to a hearing. Appellants will also need the reassurance that they will be called by the Tribunal when the hearing is about to start, rather than having to call in themselves; otherwise they may not have the credit on their phones to participate in this way. Please can these details be added to the information sent out to appellants?

A: The new Directions Notice includes the following footnote, “Save in exceptional circumstances, and only with the consent of the judge, all oral hearings will be conducted remotely by telephone, skype or video link, when and where suitable facilities are available.” It does not suggest that require an appellant to travel at Import Building or any other place of hearing. If and when a telephone or video hearing is directed, a new Notice of Hearing will include the instruction that appellants will be contacted by the Tribunal at the time of their hearing.

Q5: If either party requests a phone hearing, will this automatically be granted?

A: A party may request an oral hearing. It will not be granted unless the good reasons are provided for the request and a judge decides that the matter cannot be decided fairly without a hearing. If a hearing is granted, the FTT-AS will decide the form of the hearing i.e. a video or audio hearing. The judge’s decision is final.

Q6: Is there any provision for video-link hearings in the process as it currently stands? Can an appellant currently request that a hearing takes place in this way?

A: Video-link hearings in their previously known format are unlikely to be available due to a lack of available court facilities. Arrangements for Skype hearings are currently being explored. If such a hearing is necessary, a judge will issue directions and the FTT-AS’s staff will make suitable arrangements. Any appellant requesting such a hearing must confirm why a telephone hearing would be insufficient and that they have access to suitable equipment.

Q7: Please can you provide us with a time-table of the new system (both for paper and phone appeals), running through what should happen at each stage for all parties and key deadlines for submission of representations etc., including what happens if a paper

hearing is changed to a phone hearing during the process. The key information that we need to know is, at what point you see ASAP participating in the process. Our urgent questions, to allow us to prepare for next week are:

A: Please see Judge Carter's attached note the contents of which are self-explanatory.

Q7(a): In paper hearings, can ASAP continue to submit representations up until the start of the hearing, as we have been doing in the past week?

A: The judge listed to determine the appeal on the papers will decide the matter remotely. They will therefore require the papers to be sent to them in advance (ideally by email or Home Office portal). To ensure that the judge receives all documentation in time, it is necessary for representations to be received no later than 4pm on the day before the date of determination. In exceptional circumstances, where an explanation is provided for the delay, the judge may decide to use their Rule 5 discretion to extend the time limit for delivery of submissions or other documents.

Q7(b): To follow on from query above, we have noted the 'evidence return' dates on the listings, all of which give a deadline 1 week ahead of the hearing itself. Is this to include all evidence and written representations?

A: Yes, subject to the answer above.

Q7(c): When will ASAP receive the bundles through? We will need these in advance of any deadline for representations.

A: The FTT-AS's advance list of hearings and paper cases is a public document and will be made available to ASAP and UKVI as soon as appeals are scheduled. The onus is on representatives to notify the FTT-AS at the earliest opportunity that they are instructed. On receipt of confirmation of instructions, the FTT-AS will take the necessary action to provide copies of the documents received to date to the nominated representative. As now, the FTT-AS will always be flexible about the receipt of later evidence and submissions. Please see Judge Carter's note for further information.

Q8: We've noted the addition of 'NRP of S' on the listings and 'bar'. Are we correct in understanding these codes to mean:

i) NRP of S means the appellant's case has NRP of S?

ii) Bar means the HO case has NRP of S?

We are concerned that appellants are, now more than ever, going to find it difficult to access advice and support to help them submit full and complete ASF1s and Notices of Appeal, including through Migrant Help, and we know this may result in 'threadbare' appeal forms. However, it's clearly important that clients are still able to access justice despite factors that are outside of their control. It's also important to note that problems

with inadequate ASF1s have existed for some time and yet a high proportion of s95 not destitute appeals have been allowed. Between Jan – Feb 2020, 79% of s95 not destitute appeals, where ASAP represented, were allowed.

- A:
- i) Where the appellant's case has no realistic prospect of success (NRP of S), this may result in the case being struck out pursuant to Rule 8(3)(c).
 - ii) Where the Home Office case has no reasonable prospect of success, this may result in barring pursuant to Rule 7(a).

In either case, the appellant or respondent are given an opportunity to make representations in relation to the proposed strike out / bar. This is highlighted in clear judicial case-management directions.

The FTT-AS recognises concerns about appellants access to advice at this difficult time, but this is a matter for ASAP and other representative agencies to organise. The FTT-AS has responded by extending the time limit between directions being issued and the determination of appeals. See Judge Carter's note.

Despite all the difficulties that appellants face, a high proportion of Section 95 not destitute appeals are nevertheless successful. This demonstrates that they are well served by their representatives and receive a fair hearing.

Q9: Does the AST have a plan to communicate the new system to the key referring agencies and to appellants themselves?

A: You are our stakeholder agencies with whom we work closely. A copy of the Guidance and note are attached. The Guidance has also been published and is in the public domain. The FTT-AS has a longstanding reputation for upholding the rights of appellants to a fair hearing. We will continue to ensure that the interests of justice are served. We expect you also to fulfill your obligations.

Q10: Can we be notified of all outcomes to appeals?

A: You are only entitled to be informed of outcomes where you are on record as acting for the appellant.

Q11: What is the method for informing the appellant of the result of the appeal. Are they (or the rep in section 5 of the form) telephoned on the day? If the AST can't get through on the phone, then what happens?

A: The FTT-AS will notify the appellant and their representative (if any) and UKVI by email on the day the appeal is determined. It is not possible for us to contact appellants and/or their representatives by telephone. Where an email address is provided, the decision notice and written Reasons will be sent by email. If not, they will be sent by first class post.

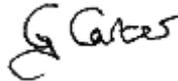
In a telephone or Skype hearing, the decision will also be announced orally at the end of the hearing in the majority of cases.

In discontinuance cases, we understand that the Home Office policy during the coronavirus pandemic is to await the FTT-AS decision before taking any further action. This means that an appellant already in Home Office accommodation will not be asked to vacate their home until a final decision has been communicated to the parties.

Yours sincerely,



Sehba Haroon Storey
Principal Judge
FTT - Asylum Support



Gill Carter
Deputy Principal Judge
FTT – Asylum Support