

Tribunal Rules

Part 1 of the Tribunals, Courts and Enforcement Act 2007

Response to consultation on proposed amendments to the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (SI 2008/2699)

(1 June 2011 – 29 August 2011)

Response from the Tribunal Procedure Committee

February 2012

This document is the post-consultation report for the consultation that led to **rule 3(3) of the Tribunal Procedure (Amendment) Rules 2012 (SI 2012/500(L.1))**

Contents

Introduction	3
The consultation process	4
Responses and the Committee's reply	5
Conclusion	15
Keeping the Rules under review	16
Annex A - List of respondents	17
Annex B - Membership of the Tribunal Procedure Committee	18
Annex C - Rule 35	19

Introduction

The Tribunal Procedure Committee is established under section 22 of, and Schedule 5 to, the Tribunals, Courts and Enforcement Act 2007, with the function of making Tribunal Procedure Rules for the First-tier Tribunal and the Upper Tribunal. A list of the members of the Committee is at Annex A.

Under section 22(4) of the Act, power to make Tribunal Procedure Rules is to be exercised with a view to securing:

- (a) that, in proceedings before the First-tier Tribunal and Upper Tribunal, justice is done,
- (b) that the tribunal system is accessible and fair,
- (c) that proceedings before the First-tier Tribunal or Upper Tribunal are handled quickly and efficiently,
- (d) that the rules are both simple and simply expressed, and
- (e) that the rules where appropriate confer on members of the First-tier Tribunal, or Upper Tribunal, responsibility for ensuring that proceedings before the tribunal are handled quickly and efficiently.

In pursuing these aims the Committee seeks, among other things:

- to make the rules as simple and streamlined as possible;
- to avoid unnecessarily technical language;
- to enable tribunals to continue to operate tried and tested procedures which have been shown to work well; and
- to adopt common rules across tribunals wherever possible.

The Committee has taken the approach of creating a single set of rules for each chamber of the First-tier Tribunal so that they generally apply to all jurisdictions within the chamber. However, proceedings in mental health cases are necessarily different in many respects from those in other cases dealt with in the Health, Education and Social Care Chamber and so Part 4 of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 contains provisions exclusively governing the basic procedure in mental health cases. Part 4 includes rule 35, which currently requires there to be a hearing in all cases.

The proposals that were the subject of this consultation were that rule 35 should be amended so as to remove in two circumstances the requirement that the First-tier Tribunal always hold hearings of mental health cases. First, it was proposed that there need not be a hearing of a reference in respect of a patient subject to a community treatment order (CTO) if the patient consented to the reference being determined without a hearing. Secondly, it was proposed that there need not be a hearing when the First-tier Tribunal was considering whether to strike out a case for lack of jurisdiction.

The consultation process

The Committee carried out a 12 week consultation exercise from 1 June 2011 to 23 August 2011.

In the consultation the Committee asked for views on both of the proposals and also the drafting of the suggested amendments to rule 35.

27 responses were received from legal practitioners, public bodies, charities and tribunal judiciary. A full list of respondents can be found at Annex B.

Having considered the responses to the consultation, the Committee made some changes to the proposed draft. These changes were discussed with the

senior judiciary of the First-tier Tribunal and were then approved by the Committee on 17 January 2012, subject to drafting amendments made before the Tribunal Procedure (Amendment) Rules 2012 were signed. The amendments are made by rule 3(3) of those Rules.

The current rule 35, the draft consulted upon and the new rule are all set out in Annex C.

Responses and the Committee's reply

Question 1

Do you agree that the Tribunal ought to be able to determine a reference in respect of a community patient without a hearing, provided the patient has given valid consent?

Responses

All 27 respondents answered this question. 6 were in favour of the proposal and 21 were against it.

Some of those in favour nonetheless stressed the need for appropriate safeguards. They emphasised the need for patients to be able to change their minds and elect to have a hearing and also for the tribunal to be satisfied that there had been valid consent and, for that purpose, to be able to determine whether the patient had the capacity to consent. The Department of Health suggested that the proposal should not apply to young people under the age of 18 years.

Those opposed to this proposal were primarily concerned about how the tribunal could ensure that the patient had given informed consent and had the capacity to do so. Some suggested that independent evidence would be required and there were concerns about patients' access to good quality advice. A number referred to research that suggested that as many as a third of patients subject to CTOs were not capable of consenting to treatment, which might suggest that a substantial proportion would not be able to give consent to a reference being determined without a hearing. Concerns were also expressed about the way that the question would be put to patients and that patients might too readily consent to there being no hearing simply because it was easier or because they did not understand the likely consequences. In particular, it was said that patients fear being detained if they attend a hearing in a hospital. It was observed by one respondent that it was unlikely that the tribunal would discharge a patient whom it had not seen.

There were also concerns that the level of scrutiny given by the tribunal to references would be affected. The whole point of references, it was said, was to protect those patients who lacked the capacity or initiative to make applications to the tribunal. It was particularly important that there be a thorough consideration of a case when it had not been considered by the tribunal during the last three years. It was said that oral hearings allowed the evidence to be tested thoroughly. Questioning by the tribunal, it was argued, often elicited a different picture of a case from that conveyed by written reports, revealing gaps and inconsistencies in the reports. The suggestion in the consultation document that the tribunal often had nothing to ask other witnesses when the patient did not attend was challenged. Mention was also made of reports sometimes being out of date or otherwise inadequate and the need to look at a patient's records.

Decisions on the papers, it was claimed, would be no more than a review and the proposal would make it more likely that CTOs would be continued. Respondents queried the assertion in the consultation document that patients might be content to stay on CTOs. One respondent pointed out that a patient's

legal status could change many times within a short period, and they might recently have had a previous CTO revoked. Another said that while patients' wishes were relevant, they should not be the determining factor in tribunal decisions.

It was also suggested that the desired aim of avoiding adjournments could be achieved under the current Rules. Finally, some of the respondents suggested that more work should be done to explore holding hearings outside hospitals, which might improve the patient attendance rate.

The Committee's reply

We accept many of the points made by respondents but we do not agree that the proposal should be abandoned.

It was always intended that it would be necessary that the tribunal be satisfied that a patient had given valid consent to the tribunal determining a reference without a hearing. We accept that this would require the tribunal to be satisfied that the patient had the capacity to give such consent. We have changed the proposed amendment to emphasise this. However, we do not agree with those respondents who said that it would be necessary that evidence of capacity should come from a wholly independent source. What we consider is necessary is that the tribunal should form its independent judgement as to the patient's capacity, taking account of all the evidence available to it from whatever source.

In our view it should generally be possible for the tribunal to be satisfied as to capacity without a hearing. It is envisaged that the responsible clinician will provide an opinion as to a patient's capacity to consent to a decision being taken without a hearing. We anticipate that the relevant practice direction issued by the Senior President of Tribunals will be amended so that such an opinion will be required to be provided automatically whenever there is a reference and the patient is subject to a CTO. However, the tribunal will

consider that opinion in the light of the other evidence before it. It will be looking for evidence that the patient can retain information and understand issues of similar complexity, including understanding the consequences of choices. If, having considered all the reports, the tribunal is not satisfied that the patient has the capacity to give the relevant consent, the tribunal will continue to be required by the Rules to hold a hearing.

We accept that it is important that consent be informed and freely given. Members of the Committee have been involved in discussions about the appropriate form of words to be used on the relevant form. This should make clear to an unrepresented patient the choice he or she is being offered and the consequences of making the choice.

Consideration of the wording of the question being put to a patient has led us to make a further change to the proposed amendment. What the patient will be invited to answer under the new rule is the question whether or not he or she wishes to attend or be represented at a hearing, rather than the more complicated question whether he or she consents to the reference being decided without a hearing.

The consequence that there may not be a hearing at all if the patient does not wish to be present or represented at one will still need to be spelled out in the information given to the patient. So too will the possibility of the patient or representative writing a letter or supplying other documents for consideration by the tribunal after having had an opportunity to see the usual reports. Patients should also be warned that, if they wish to be discharged from the CTO, it would be in their interest to attend a hearing. They should be told that the tribunal has no power to detain them.

We have also decided that a representative should be able to state that a patient does not wish to attend or be represented at a hearing, even where the patient themselves lacks the capacity validly to decide whether or not to waive the right to a hearing. We do not expect that representatives will very often suggest that a hearing is unnecessary. However, in principle, it should be

possible for a representative to take the view that a hearing is not in the patient's best interests because, perhaps, the patient is very anxious about the hearing and there are no realistic prospects of him or her being discharged from the CTO.

It is important that patients should not be positively discouraged from attending a hearing. On the other hand, we consider it equally important that undue pressure should not be placed on patients to attend hearings, which they may find stressful and which they may really not want to attend.

Whether or not a patient expresses a valid wish not to attend a hearing, the tribunal would still be able to direct a hearing. Moreover, whether or not there is a hearing cannot affect the duty of a tribunal properly to determine a reference. A tribunal must determine whether the degree of compulsion provided by a CTO remains necessary. If reports are out of date or otherwise inadequate, the tribunal will be able to direct a hearing notwithstanding the patient not requiring one. But it will also be open to the tribunal to ask questions of, say, the responsible clinician, perhaps by way of a telephone conference (which would amount to a hearing) or by secure email, without having a full hearing with everyone else present. If, upon reading the papers, the tribunal considers that it is likely that a patient should be discharged but it first wishes to see the patient, it will be able to say so. Equally, there are some cases where the tribunal will not need to consider the patient's records and others where it might wish to do so.

In our view, while there are some cases where a hearing will be necessary even if the patient does not wish to attend, there will be cases where the tribunal can quite properly decide on the papers that a CTO remains justified. This will particularly be so where there has been a reference under section 68(7) of the Mental Health Act 1983, following the revocation of a CTO, and a new CTO has been made while the reference is pending. In those cases, unless there are grounds for considering the revocation to have been unnecessary or improper, the evidence of the recent breach of the previous

CTO may well clearly justify the continuation of the new CTO in the circumstances of the case. It is in such cases that a patient may be particularly reluctant to attend a hearing. We understand from the Chief Medical Member (Mental Health) of the First-tier Tribunal that there is some evidence that it is detrimental to patients' mental health to be pressurised into attending hearings in these cases. In other references, there may be reports showing recent non-compliance with, say, medication requirements, which might equally justify the continuation of a CTO. Where documentary evidence is sufficient to satisfy a tribunal that there exist grounds for continuing a CTO, there is no reason in principle why a decision to that effect should not be made on the papers if the patient consents to that procedure.

We accept the point that this change is not necessary to reduce the number of adjournments when patients fail to appear, because that might be done through a more rigorous application of the existing provision. However, it is still a waste of valuable resources to hold a hearing when a reference can properly be determined without one. Although we cannot exclude the possibility that a witness might say at a hearing the complete opposite of what is said in reports, it is disproportionate to insist on there being hearings in all cases where patients have waived the right to be present or represented at a hearing.

Most importantly, if a patient who has the capacity to do so expresses an informed wish not to attend a hearing, that wish should be respected and the question whether there should then be a hearing in his or her absence should depend on the circumstances of the case.

We acknowledge that arranging hearings outside hospitals might make them more inviting for patients. However we understand that attempts to do this have not met with great success in practice. Moreover, there are clear disadvantages in terms of the time spent travelling to, and waiting for, hearings by staff based in the hospitals who could be more usefully employed. In any event, while we hope that this issue will be explored further, we do not consider that holding hearings outside hospital would make this proposed rule change unnecessary.

Question 2

Do you agree that the Tribunal ought to be able to strike out a case for lack of jurisdiction without a hearing?

Responses

Of the 18 respondents who answered this question, 14 were in favour and 4 against.

Many of those in favour did not give a reason, presumably agreeing with what was said in the consultation document. One simply said the proposal seemed “perfectly sensible”, while another said they “welcomed any reform which leads to a decrease in the number of unnecessary hearings and increases efficiencies, as long as it does not unduly affect clients’ rights and Tribunal experience”. Another respondent said they were in favour “only if the case is so strong that the outcome is unlikely to be swayed by verbal presentations”, which is the way we would expect the tribunal to approach the exercise of the power not to hold a hearing. One respondent referred to the need for informed consent by the patient. However, the proposal does not suggest that consent of the patient is required at all (although valid consent to there being no hearing might justify not having a hearing in circumstances where otherwise there would need to be one).

Of those against the proposal, one simply said that there was no evidence that a change was needed, and one gave no reasons at all. The third said that, until a hearing is convened, it is not possible to be sure that justice has been correctly administered. The fourth said they thought the change unnecessary as they could not envisage a basis on which the tribunal would knowingly conduct a hearing where it lacked jurisdiction to do so. It was also suggested that where the patient requests a change that is seemingly outside the

tribunal's remit, it may be that a panel may still usefully give extra-statutory recommendations.

The Committee's reply

We acknowledge that lack of jurisdiction is an issue that seldom arises but we consider that it is desirable to bring this part of the First-tier Tribunal into line with the rest of it in this regard, given that we are in any event proposing to amend rule 35.

It seems to us that the objections overlook the points that on one hand the question whether or not there is jurisdiction itself requires a judicial decision and a hearing may be necessary for that purpose but on the other hand jurisdiction is a matter of law often eminently suitable for disposal on paper. Also, the mere fact that a patient seeks a remedy that the tribunal has no statutory power to give would not necessarily mean that the tribunal had no jurisdiction to hear the application or reference at all and so would not by itself justify the case being struck out.

We are satisfied that the tribunal should have the power to strike out a case without a hearing. There would still be the power to have a hearing in an appropriate case.

Question 3

Do you have any other comments on the draft Rule 35?

Responses

Some 15 respondents answered this question, most merely restating or reinforcing their responses to Question 1.

However, one respondent suggested that the rule change was unnecessary because a fast-track short-form procedure for paper hearings could be established in a practice direction issued by the Chamber President or the Senior President of Tribunals. Another suggested that the proposed paragraph (3) should be amended to make it clearer that the tribunal had to be satisfied that that the patient was a community patient and that valid consent to the reference being decided without a hearing “has been reasonably established”, suggesting that “‘reasonably established’ could be by way of independent corroboration from an IMCA or social worker”. The Department of Health suggested that it should be made plain in paragraph (3) that any reference would be “considered” even if there were no hearing and suggested adding “consider, and whenever appropriate,” after “may”. The Department also suggested that it should be made clear that consent had to be “valid” and that an appropriate definition should be included in rule 1(3). Finally, as already noted, the Department suggested that the paragraph be amended to exclude those aged under 18.

There was also a query as to whether similar changes would be made to the Mental Health Review Tribunal for Wales Rules 2008 (SI 2008/2705).

The Committee’s reply

We do not consider that it would be appropriate for a practice direction to qualify the unamended rule. The Rules should prescribe the circumstances in which there need not be a hearing.

We accept the suggestion that the proposed paragraph (3) should make it clear that, before proceeding without a hearing, the tribunal must consider whether the patient had the capacity to decide not to attend a hearing, with the consequences that flow from that. However, we do not consider that we should suggest in the Rules how that might be established and, in particular, we do not consider that it should be suggested that independent evidence is required. As

we have said above, what we consider essential is not that the evidence is independent but that it is given independent consideration.

We also do not consider that paragraph (3) should be amended so as expressly to provide that a case must be properly considered before any decision is made on the papers. Not only do we consider that to be unnecessary but also we consider that it would introduce an inconsistency between different sets of rules that might raise doubts as to the duty to consider cases fully in other parts of the First-tier Tribunal where decisions are already made without hearings but after full consideration of the papers.

As mentioned above, we accept that the provision should be drafted so as to exclude those aged under 18 years from its scope and we have further amended the proposal so that the patient is asked whether he or she wishes to be present or represented at a hearing and so that a representative may provide an answer on behalf of a patient who lacks the capacity validly to do so.

The Committee is not responsible for the Rules for the Mental Health Review Tribunal for Wales. The Lord Chancellor retains that responsibility. Those Rules do not contain an equivalent to rule 35 of the First-tier Tribunal's Rules, expressly prohibiting the disposal of proceedings without a hearing. We understand that the question whether those Rules should be amended in the light of the amendments to rule 35 has been raised with the President of the Welsh Tribunal by the Ministry of Justice and that the President is considering whether, in any event, there should be a change of practice.

Conclusion

We are mindful of the concerns raised by respondents, particularly as to the importance of the patient's capacity to make decisions and the need for the tribunal to be able properly to determine a reference. We have adopted some suggestions made by respondents and we have further modified our original proposal. However, we take the view that, where the patient has decided that he or she does not wish to be present or represented at a hearing, the question whether a hearing is necessary for the proper determination of a reference should be determined on a case-by-case basis. A patient will continue always to have a right to a hearing of a reference if he or she wants to be present or represented at one. Indeed, if he or she has second thoughts after a reference has been determined on the papers, the structure of the Mental Health Act 1983 is such that he or she will always have a right to make a new application to the tribunal. The question whether a hearing is necessary before a case is struck out should also be decided on a case-by-case basis.

Hearings are essential for the proper determination of some cases but other cases can properly be determined without a hearing.

Keeping the Rules under review

The Committee wishes to thank all those who contributed to this consultation process. It will monitor the operation of the amended rule 35, as it monitors the operation of all Tribunal Procedure Rules and will make amendments as and when it appears necessary or desirable.

Any suggestions for amendments should be sent to the Tribunal Procedure Committee Secretariat at:

TPC Secretariat

Post Point 4.38, 4th Floor

102 Petty France

London

SW1H 9AJ

Email: tpcsecretariat@justice.gsi.gov.uk

Copies of this report and the Rules can be obtained from that address or on the website:

www.tribunals.gov.uk/Tribunals/Rules/tribunalprocedurecommittee.htm

Membership of the Tribunal Procedure Committee

Mr. Justice Paul Walker	Chairman - Appointed by the Senior President Tribunals
Bronwyn McKenna	Member of and nominated by AJTC - Appointed by the Lord Chancellor
Michael J Reed	Free Representation Unit - Appointed by the Lord Chancellor
Philip Brook Smith QC	Barrister - Appointed by the Lord Chancellor
Simon Cox	Barrister - Appointed by the Lord Chancellor
Douglas May QC	Upper Tribunal Judge - Appointed by the Lord President of the Court of Session
Mr Simon Ennals	First Tier Tribunal Judge - Appointed by the Lord Chief Justice of England & Wales
Mr Mark Rowland	Upper Tribunal Judge - Appointed by the Lord Chief Justice of England & Wales
Lesley Clare	First Tier Tribunal Member - Appointed by the Lord Chief Justice of England & Wales

List of respondents

Administrative Justice & Tribunals Council
Judge Joanne Briggs, Member of FTT Mental Health
Care Quality Commission
Camden & Islington NHS Trust
Dr Jonathan Cripps, Member of FTT Mental Health
Department of Health
East London NHS Foundation Trust
Peter Grahame, Member of FTT Mental Health
Judge Haydn Gott, Member of FTT Mental Health
David Hill
Christine Hughes, Member of FTT Mental Health
Judge Sarah Johnston, Member of FTT Mental Health
James Kinsella, Member of FTT Mental Health
Law Society
Legal Services Commission
Michael Libby, Member of FTT Mental Health
Jane Marston, Member of FTT Mental Health
Mental Health Foundation
Mental Health Lawyers Association
MIND
Dr Linda Montague, Member of FTT Mental Health
The Revd His Honour Peter Morrell, Member of FTT Mental Health
Dr Christine Murray, Member of FTT Mental Health
Juliet Rowcroft, Member of FTT Mental Health
The Revd Ian Williams , Member of FTT Mental Health
Peter Scanlon, Member of FTT Mental Health
Scott-Moncrieff & Associates LLP

Rule 35

Current rule

No disposal of proceedings without a hearing

35.—(1) The Tribunal must not dispose of proceedings without a hearing.

(2) This rule does not apply to a decision under Part 5.

Rule as proposed in the consultation paper

35.—(1) Subject to the following paragraphs, the Tribunal must hold a hearing before making a decision which disposes of proceedings.

(2) This rule does not apply to a decision under Part 5.

(3) The Tribunal may make a decision on a reference under section 68 of the Mental Health Act 1983 (duty of managers of hospitals to refer cases to tribunal) without a hearing if the patient is a community patient and has consented to the reference being decided without a hearing.

(4) The Tribunal may dispose of proceedings without a hearing under rule 8(3) (striking out a party's case).

Rule as amended

Restrictions on disposal of proceedings without a hearing

35.—(1) Subject to the following paragraphs, the Tribunal must hold a hearing before making a decision which disposes of proceedings.

(2) This rule does not apply to a decision under Part 5.

(3) The Tribunal may make a decision on a reference under section 68 of the Mental Health Act 1983 (duty of managers of hospitals to refer cases to tribunal) without a hearing if the patient is a community patient aged 18 or over and either—

- (a) the patient has stated in writing that the patient does not wish to attend or be represented at a hearing of the reference and the Tribunal is satisfied that the patient has the capacity to decide whether or not to make that decision; or
- (b) the patient's representative has stated in writing that the patient does not wish to attend or be represented at a hearing of the reference.

(4) The Tribunal may dispose of proceedings without a hearing under rule 8(3) (striking out a party's case).