

Mr. Michael Clements
President FtTIAC
(via email)

Copied to:

Amanda Pinto QC
Chair of the Bar
(via email)

27 March 2020

Dear Judge Clements

RE: CONCERNS OVER CORONAVIRUS PRACTICE AND PROCEDURE

We wholeheartedly support the continuing efforts to ensure that the tribunal continues to provide access to justice. We appreciate that drafting new procedure rules and practice directions with such urgency and in unprecedented circumstances has not been an easy task. We thank all those involved.

However, upon review of the existing directions and notices, we are concerned that the current proposals are unworkable. We address here only the concerns that relate to counsel.

No funding for counsel for the preparation of skeleton arguments

We note from the ‘FIRST-TIER TRIBUNAL (IMMIGRATION AND ASYLUM) CHAMBER HEARINGS – NOTICE’, issued by Resident Judge J F W Phillips (Newport) on 25 March, Resident Judge Martin (Manchester) (undated), and we understand from Resident Judges Zucker (Bradford) and Appleyard (Birmingham), that skeleton arguments will be directed to be provided within 15 working days of that notice, which reflects the procedure as set out in the Reform Digital Pilot scheme (‘the Pilot’).

We are deeply concerned that the tribunal is now requiring a skeleton argument in all cases in advance of the appeal. We trust you are familiar with the concerns raised by ILPA and individual chambers in relation to the Pilot.

One significant concern we have with the new directions is that, as with the Pilot, if the Home Office withdraw the decision, or an appeal is successful without a hearing, there is no provision in publicly funded cases for counsel to be paid for the skeleton argument, the drafting of which inevitably requires full preparation of the appeal. Also, the more effective counsel is in drafting the skeleton argument, the more likely it becomes that counsel will not be paid for that work. Given how precarious practice already is at the junior end of the bar, this is simply not economically viable.

Unless and until the Legal Aid Agency changes the way it funds FtT appeals to allow for remuneration for skeleton arguments, we urge the tribunal not to adopt this procedure. ILPA’s letter to yourself as FtT President of 24 March 2020 confirms that this was recognised by the LAA themselves at a meeting on 11 March 2020, at which time changes to the funding regime were said to be under way.

Some chambers have already felt compelled not to take instructions under such circumstances and it is likely that most barristers will be unable or unwilling to accept publicly funded cases if required to comply with this direction.

An alternative way forward would be for the tribunal to undertake the triage system without involvement of the parties at the first stage. If the tribunal is of the view it could make a decision without a hearing, that could be disclosed at a CMR and the parties invited to express their views. The tribunal could then make the preliminary decision if it deems it appropriate. We welcome the existing provision for either party to request a hearing thereafter.

Lack of clarity as to the applicable Practice Directions

Again, we appreciate the difficulty in devising a remote system at such short notice. However, it is not clear whether Judge Phillips' and Judge Martin's Notices will apply to all hearing centres. We understand that there has been released yesterday a 'Presidential Practice Statement Note'. Whilst there remains inconsistency around different tribunals responding to the directions, this remains an area of uncertainty. We would very much welcome a definitive Practice Direction from you which applies to all hearing centres. This will also of course mean that wherever an Appellant is located, they will be treated equally.

Hearings which require live evidence

We understand that the tribunal intends to carefully case manage appeals to enable hearings to proceed justly. However, we are very concerned as to how any hearings which require live evidence can be conducted remotely. The current assumption appears to be that all hearings can be conducted remotely, whereas in reality very few that require live evidence to be taken can fairly be done this way.

There is no practical or suitable place from which witnesses can give evidence during this time. Evidence could not be taken at a hearing centre, chambers or solicitors' premises. Each would require numerous people to travel and to come into contact with others both throughout their journeys and on arrival. A witness's ability to join remotely from home would be dependent on the person having the technology and understanding to do so, and raises the possibility of contamination of the evidence and breaches of confidentiality: many asylum seekers have to live in multi-occupancy (indeed crowded) accommodation. Particular concerns will arise where children or vulnerable witnesses are involved, such as victims of trafficking where there could be undue influence, and where interpreters are required. These of course are non-exhaustive examples.

Our view is there should be an assumption that live evidence cannot be taken remotely from a non-controlled environment, in line with the tribunal's view in out of country appeals.

We would also welcome guidance specific to bail hearings to be issued in light of their particular character and urgency.

Access to the Public

We understand that these procedures will have an impact on public access to the tribunal and we welcome the HMCTS initiative allowing some centres to re-open for “essential face-to-face hearings.” We note that the Upper Tribunal has specifically addressed this concern in paragraph 21 of its PRESIDENTIAL GUIDANCE NOTE No 1 2020: ARRANGEMENTS DURING THE COVID-19 PANDEMIC, where it is stated ‘Whichever form of remote hearing is used, the principle of open justice must continue to be respected’. We request that similar guidance is put in place via Presidential Guidance in the FtT, with clarity as to how such “essential” cases will be defined and identified.

We understand there is no easy solution to this. We very much wish for the Tribunal to continue to operate during this period, and want to co-operate to find the best solution possible in these unprecedented times.

We would be grateful if any reply could be sent to sonia.lenegan@ilpa.org.uk.

Yours sincerely

36 Public and Human Rights, The 36 Group
Broadway House Immigration Team
Doughty Street Chambers Immigration Team
Garden Court Chambers Immigration Team
Garden Court North Chambers Immigration Team
Goldsmith Chambers Immigration Team
Justitia Chambers
Kenworthy’s Chambers
Lamb Building Immigration Practice Group
Matrix Chambers Immigration Team
No. 5 Immigration Group
No. 8 Immigration Team
One Pump Court Immigration Team
Trinity Chambers