



CONSULTATION PAPER ON ACCESS TO DECISIONS AND REPORTING IN UTAAC

Introduction

1. This is a consultation paper about the reporting and publishing of decisions in the Upper Tribunal Administrative Appeals Chamber ('the Chamber' or 'UTAAC') and users' access to those UTAAC decisions. Responses are requested by 1 August 2021 (see paragraph 15 below for further details).
2. The reformed tribunal system, instituted by the Tribunals, Courts and Enforcement Act 2007, has been in place for just over a decade. With that in mind, the Chamber considers it is now timely to review the arrangements for publishing and reporting its decisions. The Chamber has therefore launched this consultation exercise to gather the views of its users, and particularly as to how they currently access UTAAC case law. Those users of the Chamber's case law who refer to it for social security, tax credits and other benefit decisions (including war pensions appeals) are invited to answer the questions set out in Section A at the end of this short paper. Those users who operate in any of the non-social security jurisdictions are asked to answer the questions in Section B below.

A summary of the work of the Upper Tribunal (AAC)

3. The Chamber exercises a largely error of law jurisdiction in deciding appeals from a range of First-tier Tribunals. The great majority of these cases are appeals from the First-tier Tribunal (Social Entitlement Chamber) relating to social security benefits; many of these decisions are of no wider interest beyond the parties to the particular case (e.g. where the error of law is inadequacy of reasoning on the facts of a particular case). These appeals constituted the core jurisdiction of the former Social Security Commissioners (together with appeals from the War Pensions and Armed Forces Compensation Chamber). Other appeals from the first instance Health, Education and Social Care Chamber and General Regulatory Chamber were transferred to UTAAC by the Tribunals, Courts and Enforcement Act 2007. These include mental health, special educational needs and freedom of information second tier appeals. The Chamber also exercises a judicial review jurisdiction.
4. The Chamber's Judges decide most appeals following the exchange of written submissions and 'on the papers'. A small minority of social security appeals are decided following an oral hearing. Hearings are more common in the non-social security jurisdictions. Occasionally the Chamber will sit as a three-judge panel with the Chamber President or other senior judicial member of the Upper Tribunal presiding. Such panels are convened to hear cases involving a question of law of special difficulty or an important point of principle or practice.

The reporting of Upper Tribunal (AAC) decisions

5. The Chamber's practice in reporting its decisions has evolved over many years but remains firmly rooted in the historical processes developed under the former National Insurance (and then Social Security) Commissioners. The current practice is explained in more detail in the *Introductory Note* to the annual *Administrative Appeals Chamber Reports*. Most of the Chamber's decisions are never published. They are not posted on any public-facing website and so are not searchable. It has not been considered helpful for thousands of fact sensitive decisions to be published, placing onerous obligations on advocates, advisers and litigants in person to search for decisions of potential relevance to their own. Unpublished decisions are available from the Chamber on request.
6. The Chamber's *published* decisions are those decisions given an NCN reference and stored electronically on the Chamber's public-facing website. Over one thousand decisions by the Chamber's judiciary have been posted on this searchable website since 2016. The general criterion used by judges for publishing their decisions in this way is whether the decision is thought to be of potential interest to persons other than the parties, either because it determines a point of law or as an illustration of a point of practice or procedure. The posting of decisions on the website is at the discretion of the Judge who decides the case in question.
7. A minority of *published* decisions are considered for reporting in the *Administrative Appeals Chamber Reports*. The Editorial Board, comprising a committee of the Chamber's judges presided over by the Chamber President, meets quarterly for this purpose. Thus, *reported* decisions comprise the UTAAC's decisions that are published in the official series of law reports – the *Administrative Appeals Chamber Reports* (the AACR). Decisions are reported in the AACR if they (a) contribute to the coherent development or operation of the law; or (b) give practical guidance to decision-makers or appeal tribunals. Decisions of three-judge panels are invariably reported. Decisions by a single Judge are only reported if they command the broad assent of the majority of the salaried Judges of the Chamber who regularly determine appeals in the jurisdiction in question. It follows from the account above that reported decisions represent only a small minority of all those decisions that appear on the Chamber's website. In a typical year about 30-40 decisions will be reported in the AACR whereas about 200-250 will be published on the website.
8. In summary, therefore, only a minority of the Chamber's decisions are published on its website and an even smaller number are formally reported in the *Administrative Appeals Chamber Reports*. It follows that a *published* decision is not the same as a *reported* decision. Thus, unpublished decisions are identified simply by their UT file reference (e.g. CUC/27/2021), while published decisions are indicated instead by an NCN (e.g. *AB v SSWP* (UC) [2021] UKUT 210 (AAC)), and a reported decision is additionally denoted by its reported number (e.g. [2021] AACR 23, which follows its NCN).
9. In this context it should be noted that the Chamber's practice differs in important respects from that adopted in the Upper Tribunal Immigration and Asylum Chamber (UTIAC). Just to take one example, all UTIAC decisions are posted on its public website whereas, as described above, only a selection of UTAAC decisions are published in this way. The Lands and the Tax & Chancery Chambers of the Upper Tribunal both publish all their decisions on line, although both deal with much lower volumes of cases.

Precedent and the Upper Tribunal (AAC)

10. The system of precedent for decisions by the former Commissioners and by UTAAC judges can be summarised as follows. All decisions of the Chamber on questions of legal principle are binding on the First-tier Tribunal and on relevant decision-makers acting on behalf of Government departments, local authorities, HMRC and other official bodies in relevant geographical jurisdictions. As such, the principles laid down must be applied in other cases arising in the same geographical jurisdiction (which, depending on the subject matter, may be the UK as a whole, or Great Britain, or one or more of England, Wales, Scotland and Northern Ireland). Social security, for example, is a GB-wide jurisdiction whereas mental health has different jurisdictions for each of the four constituent parts of the UK. In other geographical jurisdictions the Chamber's decisions are persuasive but not binding.
11. In principle, all Judges of the Chamber speak with equal authority. In the event of a conflict between the decision of a three-judge panel and a single Judge, a First-tier Tribunal should follow the panel's decision. Within the Chamber itself, a single Judge should follow the decision of a panel (unless there are compelling reasons to the contrary) and should normally (although is not bound to) follow the decision of another single Judge: see *Dorset Healthcare NHS Foundation Trust v MH* [2009] UKUT 4 (AAC).
12. The precedential status of reported decisions may be a little uncertain. The Tribunal of Commissioners was clear in reported decision *R(I) 12/75* that tribunals and other decision-makers should *prima facie* give more weight to a reported decision than an unreported decision. This is because, as seen above, decisions are only reported if they command the general assent of the majority of the Chamber's salaried judiciary. However, this is only a presumption and not a binding rule. Likewise, a single Judge sitting in UTAAC is more likely to follow a reported decision over an unreported decision but is not bound to do so.

Conclusion and invitation to comment

13. The Chamber considers it is now timely to review the arrangements for reporting its decisions. The reformed tribunal system has been in place for just over a decade. The Chamber's own new website has been operational for five years and has bedded down. The system of reporting and publishing reported decisions in bound volumes was devised at a time when there was no other reliable means of disseminating the Commissioners' jurisprudence. Today users seem to turn to the UTAAC website rather than the AACR and also have access to other sources (e.g. the Bailii and Rightsnet websites as well as printed and online guides by agencies such as CPAG). With that in mind, the Chamber has launched this consultation exercise to gather the views of users.
14. Those users of the Chamber's case law who refer to it for social security, tax credits and other benefit decisions (including war pensions appeals) are invited to answer the questions set out in Section A. Those users who operate in any of the non-social security jurisdictions are asked to answer the questions in Section B.
15. All users are asked to return their responses by 1 August 2021 to the bespoke email address utaac.reporting@justice.gov.uk or by post to the Senior Registrar, UTAAC, 5th Floor, 7 Rolls Building, Fetter Lane, London EC4A 1NL.

Section A (for those working in the field of social security)

1. How do you access the UTAAC's case law? (please tick or **highlight in bold** all that apply)

- (a) The Chamber's own decisions website
- (b) The *Administrative Appeals Chamber Reports*
- (c) Bailii
- (d) Sweet & Maxwell's *Social Security Legislation* (annual volumes)
- (e) Rightsnet
- (f) Westlaw/Lawtel/LexisNexis
- (g) CPAG website or publications
- (h) Other (please specify)

2. How do you usually access the UTAAC's case law? (please tick or **highlight in bold** one only)

- (a) The Chamber's own decisions website
- (b) The *Administrative Appeals Chamber Reports*
- (c) Bailii
- (d) Sweet & Maxwell's *Social Security Legislation* (annual volumes)
- (e) Rightsnet
- (f) Westlaw/Lawtel/LexisNexis
- (g) CPAG website or publications
- (h) Other (please specify)

3. If you refer to the Chamber's own decisions website, how could it be improved?

4. If you refer to the *Administrative Appeals Chamber Reports* (AACR), do you do so

- (i) online? Yes / No
- (ii) in the bound volumes? Yes / No

5. Do you find the system of reporting decisions in the AACR helpful and why/why not?

6. Any other comments.

7. Finally, please circle or **highlight in bold** whichever term best describes your role

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| Claimant | Welfare rights adviser/rep | Solicitor | Academic/legal researcher |
| Barrister | Public authority | | Tribunal judge or member |

