

# DELEGATED POWERS AND LAW REFORM COMMITTEE

## 1st Meeting, 2023 (Session 6) Tuesday, 10 January 2023

### Instrument Responses

#### **First-tier Tribunal for Scotland (Transfer of Functions of the Council Tax Reduction Review Panel) Regulations 2023 (SSI 2022/Draft)**

On 15 December 2022, the Committee asked the Scottish Government:

Paragraph 2(5) of schedule 2 of the instrument substitutes regulation 94 of the 2021 Regulations. In regulation 94(3), as substituted, is the reference to regulation 70A(2) an error? Should the reference be to regulation 93(2) or to regulation 93(4)(c)?

Please confirm whether any corrective action is proposed, and if so, what action and when.

On 20 December 2022, the Scottish Government responded:

The reference in paragraph 2(5) of schedule 2 of the instrument to regulation 70A(2) is a drafting error, with apologies. The correct reference should be to regulation 93(4)(c).

As the reference to this regulation is self-evidently an error – there is no regulation 70A in the 2021 Regulations, and regulation 94(3) makes clear it relates to preventing a “relevant authority” from notifying the applicant as under regulation 93(4)(c), as opposed to notice under regulation 93(2) where the notice is served on the relevant authority – it is proposed that the error be rectified in the instrument when made as an error that could be corrected by correction slip.

#### **First-tier Tribunal for Scotland Local Taxation Chamber (Rules of Procedure) Regulations 2022 (SSI 2022/364)**

On 15 December 2022, the Committee asked the Scottish Government:

1. One of the enabling powers cited in the preamble is section 41(1) of the Tribunals (Scotland) Act 2014. Section 79(2)(c) of the Act provides that regulations under section 41(1) are subject to the affirmative procedure. It appears that the power in section 41(1) has been used to make the provision in rule 17(1). Should the instrument have been subject to the affirmative procedure?

2. While appreciating that the preamble records that the President of Tribunals has been consulted in accordance with the requirement in paragraph 4(3) of schedule 9 of the 2014 Act, should the preamble also make reference to consultation having taken place as required by section 11(2) of the 2014 Act, in relation to the provision made under section 41(1)?
3. In rule 1, the definition of “appeal” provides:  
“appeal”, except where otherwise specified, means—... (b) an appeal under—... (ii) a council tax appeal”  
Is the intention that “appeal” should mean a council tax appeal, rather than “an appeal under a council tax appeal”? Is this sufficiently clear?
4. In rule 1, “council tax appeal” is defined as meaning an appeal under four specified provisions of the 1992 Act. However, in the definition of “respondent”, paragraph (a) refers to “a council tax appeal under Part II of the 1993 Regulations”, which is not one of the provisions specified in the definition of “council tax appeal”. Should the definition of “council tax appeal” also include an appeal under Part II of the 1993 Regulations, or should an appeal under Part II not be referred to in the definition of “respondent” (paragraph (a)) as a “council tax appeal”?
5. Should the reference in Rule 20(4) to paragraph (1) be to paragraph (2)?
6. In Rule 20, paragraphs (2), (3) and (5) all make provision in relation to what expenses may be awarded.
  - Paragraph (2) provides that the Tribunal may award expenses as taxed by the Auditor, but paragraph (5) provides that an award under paragraph (2) is to require the paying party to pay a “specified sum”. Is there an inconsistency in that, if the tribunal awards expenses as taxed by the Auditor, the figure is not known (until the Auditor has carried out the taxation), and therefore the award cannot specify it? Is it sufficiently clear whether the Tribunal may award expenses as taxed or whether the Tribunal can only award a specified sum?
  - Is there an inconsistency between paragraphs (3) and (5) in that paragraph (3) provides that the amount of expenses awarded must be “the amount required to cover any unnecessary or unreasonable expense incurred by the party”, whereas paragraph (5) is wider, providing that the award must require payment of a sum “in respect of the expenses incurred by [the] party in connection with the proceedings”? Is it sufficiently clear what expenses the award may cover?
7. Regulation 26(2)(i) refers to notice “sent under regulations made under” regulation 14. Is this an error? Secondly, should the reference to regulation 14 be instead to regulation 15 (or to another provision of the 2022 Regulations)? This second point applies also to the reference to regulation 14 in regulation 27(2)(a)(iii).
8. Regulation 26(2)(j) refers to regulation 16 of the 2022 Regulations. Should this refer instead to regulation 18?

9. Regulation 26(5) requires a notice of appeal to be served within the period of time specified in the schedule of the Valuation Timetable (Scotland) Order 2022. That Order has two schedules. Should the reference be to Schedule 1?
10. Regulation 27(1)(b) requires that, on receipt of the notice of appeal, the tribunal must send to the assessor (among other things) anything supplied under “rule 26(3)(b) (notice of appeal)”. Should this refer instead to rule 26 (or perhaps rule 26(2))?

Please confirm whether any corrective action is proposed, and if so, what action and when.

On 21 December 2022, the Scottish Government responded:

1. We thank the Committee for bringing these points to our attention. Citing section 41(1) of the Tribunals (Scotland) Act 2014 was an oversight — preliminary analysis suggested using this power, but on reflection we intended to rely upon and consider that the powers in paragraph 4(2) of schedule 9 (which confer on the Scottish Ministers the function of making Tribunal rules by regulations until the coming into force of paragraph 13(2) to (5) of that schedule) include the power to make such provision. Previous regulations setting out rules of the Chambers of the First-tier Tribunal have taken that approach and included similar provision (e.g. rule 52 of schedule 1 of S.S.I. 2016/339, and rule 19 of the schedule of S.S.I. 2017/69) in reliance on the powers in schedule 9, hence this would be consistent with the legislative practice in this area. The powers conferred by section 41(1) have not to our knowledge previously been exercised.

As the view of the Scottish Government is that this power is not being relied upon and its inclusion was an oversight, it is proposed that the preamble be amended by correction slip, if the Committee would be content with that approach in this instance. We will review this point for the future to make sure that a consistent approach is taken to these instruments.

2. As the Scottish Government does not propose to rely on section 41(1) of the 2014 Act in making these regulations, it is not considered necessary to refer to consultation in accordance with section 11(2) of that Act. The President of Tribunals was though consulted on the Regulations (and was content subject to some comments on the regulations which were accepted).
3. The Scottish Government considers the reference to “council tax appeal” in the meaning of “appeal” in rule 1 of the schedule is sufficiently clear from the context to ensure that it would be interpreted as intended, but that the definition of “respondent” should be amended to ensure effective operation. Accordingly, provision will be made to clarify the meaning by amending instrument before the regulations come into force, also correcting the following points.

4. The Scottish Government considers that the provision for expenses payments set out in rule 20 of the schedule, and in particular in paragraphs (2), (3) and (5) of that rule, are capable of being operated effectively, but provision will be made to clarify the meaning of the points raised on rule 20 in an amending instrument.
5. The Scottish Government considers that the reference in rule 26(2)(i) of the schedule to notice “sent under regulations made under” regulation 14 is sufficiently clear from the context to be interpreted as intended. However, for the avoidance of doubt provision will be made to amend the drafting to make the meaning clear in an amending instrument. That includes reference in that rule and in rule 27(2)(a)(iii) to regulation 14 of the 2022 Regulations and in rule 26(2)(j) to regulation 18 of the 2022 Regulations where provision will be also made to clarify the meaning.
6. The Scottish Government considers that the reference in rule 26(5) to the schedule of the Valuation Timetable (Scotland) Order 2022 is sufficiently clear from the context to be interpreted in the way intended. The rule relates to the date by which an appeal is to be served, and of the two schedules of the 2022 Order one relates to dates and the other lists revocations. However, provision will be made to amend the drafting to ensure the meaning is beyond doubt.
7. The Scottish Government considers that the requirement on the Tribunal to send to assessors information or documents supplied under rule 26 should be amended to ensure effective operation. Accordingly, provision will be made to clarify the meaning in an amending instrument.

### **Upper Tribunal for Scotland (Local Taxation Rules of Procedure) Regulations 2022 (SSI 2022/365)**

On 14 December 2022, the Committee asked the Scottish Government:

In schedule 1, rule 31 (reviews) and rule 32 (appeal) refer to a review under “section 43 of that Act” and “section 48 of that Act” respectively, however, “that Act” is not defined. Should these rules instead refer to “the 2014 Act”? If so, is any corrective action proposed?

In schedule 3: -

- in the first paragraph, should the reference be to the First-tier Tribunal for Scotland Local Taxation Chamber (Rules of Procedure) Regulations 2022, rather than 2023?
- should the reference to regulation 26, in the first place it occurs, be a reference to regulation 30?
- should the reference to regulation 23 be a reference to regulation 26?
- should the reference to regulation 26, in the second place it occurs, be a reference to regulation 29?

If, so is any corrective action proposed?

On 20 December 2022, the Scottish Government responded:

In relation to schedule 1, rule 31 (reviews) and rule 32 (appeal), the intention is that these rules refer to the Tribunals Act 2014. The Scottish Government considers that while the meaning would be clearer if reference was made to “the 2014 Act” rather than “that Act”, the meaning would be clear from the context, in particular the appeal procedures in the relevant provisions of the 2014 Act. However, provision will be made for the avoidance of doubt to clarify the meaning in an amending instrument before the Regulations come into force.

In relation to the references in schedule 3 to the First-tier Tribunal for Scotland Local Taxation Chamber (Rules of Procedure) Regulations 2022, the Scottish Government considers that each of the provisions identified should be amended. Accordingly, provision will be made to clarify the meaning in that amending instrument.