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Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

Subordinate legislation considered by the Delegated Powers and Law Reform Committee on 2 October 2018



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Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



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Introduction

1. At its meeting on 2 October 2018, the Committee agreed to draw to the attention of the Parliament the following instruments-

First-tier Tribunal for Scotland Social Security Chamber and Upper Tribunal for Scotland (Composition) Regulations 2018 [draft]; and

First-tier Tribunal for Scotland Social Security Chamber (Procedure) Regulations 2018 (SSI 2018/273)

2. The Committee's recommendations and conclusions in relation to these instruments are set out in the following sections of this report.
3. The Committee determined that it did not need to draw the Parliament's attention to the instruments set out at the end of this report (organised by relevant lead committee).

Points raised: Instruments subject to affirmative procedure

The First-tier Tribunal for Scotland Social Security Chamber and Upper Tribunal for Scotland (Composition) Regulations 2018 [draft] (Social Security)

Overview of Regulations and Background

4. The Regulations provide for the composition of the Social Security Chamber of the First-tier Tribunal for Scotland, when dealing with appeals under certain provisions of the Social Security (Scotland) Act 2018 ("the 2018 Act"). They also provide for the composition of the Upper Tribunal for Scotland, when dealing with appeals from the Social Security Chamber.
5. In general and depending on which tribunal is hearing a particular case, members of the Scottish Tribunals can be ordinary members, legal members, or judicial members, according to criteria contained in and under the Tribunals (Scotland) Act 2014 ("the 2014 Act"). This instrument (in regulations 2 to 5) sets out which member or members may deal with the various types of social security cases under the 2018 Act, before the First-tier Tribunal Social Security Chamber, and the Upper Tribunal on appeal from that Chamber.
6. If approved by the Parliament, the Regulations would come into force on 22 November 2018.

Committee Consideration

7. The Committee considered whether regulation 5 complies with section 40 of the 2014 Act, which sets out provisions relating to the composition of the Upper Tribunal, as between ordinary members, legal members, and judicial members.
8. Section 40(3) of the 2014 Act provides that where the Regulations provide for a matter to be determined by a single member of the Upper Tribunal, the regulations *must* include provision for determining whether the single member is to be an ordinary, legal or judicial member of the Tribunal.
9. Section 40(4) provides that where the Regulations provide for a matter to be decided by two or more members of the Tribunal, the regulations *must* include provision for determining how many (if any) of those members are to be—
 - (a) an ordinary member,
 - (b) a legal member,
 - (c) a judicial member.

10. Regulation 5(1) of these Regulations provides in five subparagraphs for alternative compositions of the Upper Tribunal, when deciding a case appealed from the First-tier Tribunal Social Security Chamber. There appears to be a doubt whether regulation 5 complies with the requirements in section 40(3) and (4).
11. Accordingly there appears to be a doubt whether regulation 5 is *intra vires*. The regulation does not include provision for determining whether a single member deciding a case is to be a legal member or a judicial member. It also does not include provision for determining, where two or more members decide a case, how many are to be legal members or judicial members. Regulation 5(4) provides only that the President of the Scottish Tribunals has authority to determine which alternative composition specified in regulation 5(1)(a) to (e) would apply.
12. The Committee explored the issue with the Scottish Government. The Scottish Government is of the view that section 22 of the Interpretation and Legislative Reform (Scotland) Act 2010 applies, and that accordingly words in the singular include the plural. Therefore, the Scottish Government does not see any difficulty in providing for either of the two different types of member to be able to act alone, in cases where the Upper Tribunal is composed of a single member. The Committee has considered that the rule of interpretation in section 22 does not assist to resolve the issue. It is plain from subsections (3) and (4) of section 40 of the 2014 Act that subsection (3) imposes a requirement in circumstances where there is a single member of the Upper Tribunal, and subsection (4) imposes a requirement where there are two or more members. The issue raised is whether those requirements are implemented.
13. The Scottish Government also considers (contrary to the view of the Committee) that it is clear that regulation 5(4), which enables the President of the Scottish Tribunals to determine the alternative compositions of the Upper Tribunal, complies with the requirements of section 40 of the 2014 Act. The relevant correspondence is reproduced in Annex A.
14. Having considered the Scottish Government's response, the Committee considered that there appears to be a doubt whether regulation 5 is *intra vires* (i.e. within the scope of the powers conferred by the 2014 Act to make the instrument). Given that a doubt as to the *vires* of the regulation questions the validity of the provision for the composition of the Upper Tribunal, when deciding a case appealed from the First-tier Tribunal Social Security Chamber, it appears that if the provisions of the draft Regulations are not adjusted, it is possible that doubt could be raised subsequently, as to the composition of an Upper Tribunal which hears a particular case under the provisions of the 2018 Act.
15. The Committee considered therefore that the draft provisions should be corrected, to remove doubt as to their compliance with section 40, by means of the Scottish Government withdrawing and re-laying the draft instrument.
16. It appears from the Scottish Government's response in Annex A that it may be possible to make the correction, while implementing the policy intention. The intention appears to be that (additionally to the provision made in regulation 5(4)) the President of the Scottish Tribunals should have authority to determine, in respect of any of the alternative compositions set out in regulation 5(1) which may hear a particular case, how the Upper Tribunal is composed, as between legal members or judicial members. That is, in the circumstances where there would be a

single member, whether it would be a legal member or a judicial member; and where there are two or three members, how many are to be legal members or judicial members.

Recommendation

17. **Accordingly, the Committee draws the Regulations to the attention of the Parliament on reporting ground (e), as there appears to be a doubt whether regulation 5 is intra vires for the reasons set out in particular in paragraphs 8 to 11 above.**
18. **The Committee recommends that the provisions should be corrected to remove doubt as to their compliance with section 40, by means of the Scottish Government withdrawing and re-laying the draft instrument.**

Points arising: instruments subject to negative procedure

First-tier Tribunal for Scotland Social Security Chamber (Procedure) Regulations 2018 (SSI 2018/273) (Social Security)

Purpose and Background

19. The instrument establishes a new chamber of the First-tier Tribunal for Scotland to consider appeals in relation to social security cases in the Scottish system. This follows the passing of the Social Security (Scotland) Act 2018, which legislated under new powers contained in the Scotland Act 2016 to establish certain devolved benefits.
20. The instrument is made under the powers contained in the Tribunals (Scotland) Act 2014, which allows rules to be made to regulate the practice and procedure of both the First-tier Tribunal for Scotland and the Upper Tribunal for Scotland. That Act allows rules to be made by the Scottish Ministers until such time as responsibility for rule making passes to the Court of Session.
21. The instrument is subject to the negative procedure and comes into force on 22 November 2018.

Committee consideration

22. Rule 9(3)(a) requires a person who receives due notice of the appointment of a representative to provide to that representative any document which is required to be provided to the represented party. The Scottish Government explained that this requirement applies to all documents that require to be provided in the case and not just to any documents that require to be provided after the notice of appointment is received. The Committee considered that this could be clearer.
23. Furthermore, the Committee considered that there are the following two drafting errors in the instrument:
 - (a) There is a drafting error in rule 22(4)(g) insofar as it refers to a failure to send a notice more promptly to the Scottish Ministers, when the reference should be to a failure to send it to the First-tier Tribunal; and
 - (b) In relation to rule 35:
 - (i) paragraph (5) should refer to the notice provided under “paragraph (4)”, rather than “paragraph (7)” as drafted; and
 - (ii) paragraph (7) should refer to a notice of the decision on a review under “paragraph (1)”, rather than “paragraph (4)” as drafted.

24. These issues were explored with the Scottish Government. The Government has committed to laying an amending instrument to correct the errors. The relevant correspondence is reproduced in Annex B.

Recommendations

25. **The Committee draws the instrument to the attention of the Parliament:**
- (a) On reporting ground (h) on the basis that the meaning of rule 9(3)(a) could be clearer as set out in paragraph 22 above; and**
 - (b) On the general reporting ground in respect of the errors in rule 22(4)(g) and rule 35 as set out in paragraph 23 above.**
26. **The Committee welcomes the Scottish Government's commitment to lay an amending instrument to correct these errors.**

No points raised:

Rural Economy and Connectivity

Road Traffic (Permitted Parking Area and Special Parking Area) (Falkirk Council) Designation Order 2018 (SSI 2018/279)

Parking Attendants (Wearing of Uniforms) (Falkirk Council Parking Area) Regulations 2018 (SSI 2018/280)

Road Traffic (Parking Adjudicators) (Falkirk Council) Regulations 2018 (SSI 2018/281)

Plant Health (Scotland) Amendment (No. 2) Order 2018 (SSI 2018/283)

Marketing of Ornamental Plant Propagating Material Amendment (Scotland) Regulations 2018 (SSI 2018/284)

Islands (Scotland) Act 2018 (Commencement) Regulations 2018 (SSI 2018/282 (C.19))

Social Security

First-tier Tribunal for Scotland (Allocation of Functions to the Social Security Chamber) Regulations 2018 [draft]

First-tier Tribunal for Scotland (Chambers) Amendment Regulations 2018 [draft]

Upper Tribunal for Scotland (Social Security Rules of Procedure) Regulations 2018 (SSI 2018/274)

Social Security Appeals (Expenses and Allowances) (Scotland) Regulations 2018 (SSI 2018/275)

Scottish Tribunals (Eligibility for Appointment) Amendment Regulations 2018 (SSI 2018/276)

Annex A

First-tier Tribunal for Scotland Social Security Chamber and Upper Tribunal for Scotland (Composition) Regulations 2018 [draft]

On 20 September 2018, the Scottish Government was asked:

Section 40(3) of the Tribunals (Scotland) Act 2014 provides that where regulations provide for a matter to be decided by a single member of the Upper Tribunal ('UT'), the regulations must include provision for determining whether the single member is to be an ordinary, legal or judicial member of the Tribunal.

Regulation 5(1) of this instrument provides that the UT, when deciding a case appealed from the First-tier Tribunal to the UT, must consist of one of the membership compositions set out in subparagraphs (a) to (e). Subparagraph (a) provides that there may be a member of the UT acting alone. Regulation 5(3) provides that, for the purposes of the regulation, a member may be a legal member or a judicial member (but not an ordinary member). Regulation 5(4) provides that the President of the Tribunals may determine which of the alternative compositions in those subparagraphs (a) to (e) applies.

(1) Is it considered that regulation 5(1) and (3) breach the requirement in section 40(3), as the regulation does not appear to include provision for determining whether the single member is to be a legal or a judicial member? If not, please fully explain why it is considered that the provisions comply with section 40(3)?

(2) Is corrective action proposed?

The Scottish Government responded as follows:

Section 40(3) of the Tribunals (Scotland) Act 2014 ("the 2014 Act") says that the regulations must include provision for determining which of three categories of member can sit as a single member, where a single member can act alone in a matter. That subsection applies to draft regulation 5(1)(a), which makes such provision.

The rule of statutory construction is that words in the singular include the plural (see section 22 of the Interpretation and Legislative Reform (Scotland) Act 2010), therefore the Scottish Government does not see any difficulty in providing for two different types of member to be able to act alone in such cases.

As the question implies, the only issue can relate to how the determination between the two available categories of member is to be made in particular cases.

The Scottish Government considers that provision for that determination would be made by regulation 5(3), which provides—

"The authority to determine the composition of the Upper Tribunal in respect of the alternative compositions referred to in paragraph (1) is delegated to the President of the Scottish Tribunals."

In the draft regulations, paragraph (1) has five sub-paragraphs setting out various compositions that the Upper Tribunal can take. Within those sub-paragraphs some choices require to be made and it is helpful to consider paragraph (1)(b), which provides for "two or

three members of the Upper Tribunal” to decide a case. The 2014 Act contains a separate requirement requiring provision to be made for determining the types of member who can decide such cases, at section 40(4). Again the draft regulations provide that the member can be a legal member or a judicial member, but not an ordinary member. Three potential compositions are therefore possible for a two member Upper Tribunal, two members of either type, or one of each type.

The provision at draft regulation 5(1)(a) provides for two potential compositions where a member of the Upper Tribunal acts alone. That member can either be a legal member or can be a judicial member.

In either situation, the provision for the President of the Scottish Tribunals to determine that composition addresses the statutory requirements, at subsections (3) and (4) of section 40 of the 2014 Act.

The Scottish Government does not see a need for corrective action.

Annex B

First-tier Tribunal for Scotland Social Security Chamber (Procedure) Regulations 2018 (SSI 2018/273)

On 20 September 2018, the Scottish Government was asked:

Each of the following questions relate to provision made in the schedule of the instrument.

1. Rule 3 delegates to staff of the Scottish Courts and Tribunals Service (SCTS), subject to the approval of the President of the Scottish Tribunals, functions of a judicial nature which are permitted or required to be undertaken by the First-tier Tribunal (“FTT”), provided they are of a preliminary or an incidental nature.

(a) Please clarify (including by giving examples) which judicial functions “of a preliminary or an incidental nature” are so capable of delegation to SCTS staff, with the approval of the President?

(b) The enabling powers cited in the preamble to make the scheduled rules (paragraph 4(2) of schedule 9 of the Tribunals (Scotland) Act 2014) do not expressly permit the delegation of judicial functions to members of staff of SCTS. In this instance judicial functions have been conferred on the FTT by legislation. As a general rule, there requires to be an express power to sub-delegate, and otherwise the person on whom a power to legislate is conferred cannot use that power to confer further power which has legislative effect. One might expect to see particularly clear wording authorising the delegation of judicial functions to civil servants.

Please explain therefore why rule 3 is properly made within the enabling powers to make the instrument, given that the rule delegates to the President the ability to specify certain judicial functions of the FTT (of a specified description in specified circumstances) to be exercisable by SCTS staff?

(c) By virtue of section 61A of the Judiciary and Courts (Scotland) Act 2008, the Parliament has defined the administrative support functions of SCTS for the Scottish Tribunals and their members. Please also explain why it is considered to be a usual and expected use of the temporary powers to make the rules of the Scottish Tribunals contained in paragraph 4(2) referred to above, that this instrument delegates certain judicial functions of the Upper Tribunal to SCTS staff?

2. The rules do not appear to require intimation to the other parties either by the FTT or the party making an application for: an order of the FTT (rule 5); permission to appeal (rules 33 and 34); or a review of a decision (rule 35).

(a) Is there a reason why such provision is not made?

(b) Please explain how the lack of provision on intimation complies with article 6 of the Convention (see e.g., *Schmidt v Latvia* (app. no. 22493/05), which requires “Contracting States to ensure that the domestic authorities have acted with the requisite diligence in apprising the litigants of the proceedings so that their right to fair trial is not jeopardised”).

3. In relation to rule 13(3), is it intended that the respondent would only need to inform the FTT, and not the appellant, that a particular form of communication (other than post) should not be used to provide documents to that party for the rule to apply that the appellant must not use that form of communication?

4. In relation to rule 9(3)(a):

(a). Is the policy intention that the requirement to provide documents to the representative only applies prospectively to any documents required to be provided after the notice of appointment is received by the person, or does it also apply to all documents in the case which have been provided to the represented party (or their previous representative) before that party was represented?

(b). Is this sufficiently clear?

5. The Policy Note states at the foot of page 6 that provision for expenses has been removed from the rules of procedure for the Social Security Chamber. Is there any inconsistency with this policy intention, insofar as rule 16(2)(b) requires that the citation of a person who is not a party must make provision for the person's necessary expenses of attendance to be paid and to state who is to pay them?

6. Rule 22(2) provides that an individual must start appeal proceedings against a process decision by sending a notice of appeal and any accompanying documents to the FTT. However, rule 22(3)(g) refers to providing reasons why the notice of appeal was not sent or delivered *to the Scottish Ministers* sooner (where the notice of appeal is received after the end of the 31 period but within 1 year of being informed of the decision). By way of contrast, equivalent rules 20(3) and 20(5)(g), which apply to more general appeals, both refer to providing the notice of appeal *to the Scottish Ministers*. Is there a drafting error in rule 22(2), insofar as it refers to sending a notice to the FTT?

7. Rule 29(1) provides that the FTT may give reasons for a decision which disposes of proceedings – (a) orally at a hearing; or (b) in a full written statement of reasons to each party. The word “may” (rather than “must”) in rule 29(1) appears to confer discretion on the FTT not to provide any reasons (unless a party subsequently applies in writing for a full written statement of reasons – rule 29(2)). In what circumstances would the FTT not providing reasons comply with the requirement in article 6(1) of the Convention that the courts give sufficient reasons for their decisions (*H. v. Belgium*).

8. In relation to rule 35:

(a) Paragraph (5) refers to the notice provided under “paragraph (7)”. Should this instead be a reference to “paragraph (4)”?

(b) Likewise, please explain why reference is made to a notice “under paragraph (4)” in rule 35(7)? Is paragraph (7) not the notice of the FTT's decision on a review, which follows after receiving any response to the application and the FTT's provisional views on that application?

The Scottish Government responded as follows:

1. (a) Judicial functions of a preliminary or incidental nature capable of delegation to SCTS might include—

- making a decision on whether a request to extend the time limit for complying with a particular rule should be extended, in terms of rule 4(3)(a), and
- making an initial assessment as to whether a notice of appeal submitted under rule 20 contains sufficient information to be considered valid.

The rule has intentionally not been drafted to specify particular functions which may be delegated to staff; it is a matter for the Chamber President to determine what functions may appropriately be delegated.

1. On (b) and (c), the Scottish Government considers that delegation of functions to SCTS staff is catered for by section 69(2)(c) of the Tribunals (Scotland) Act 2014. This permits something to be done on behalf of certain persons, one of whom is the Chamber President. Although this provision is not cited expressly in the preamble to the Regulations, the Scottish Government considers this to be caught by the reference to “all other powers enabling [the Scottish Ministers to make the Regulations]”.

2. The Scottish Government has considered the case of *Schmidt v Latvia* and regards it as being of limited relevance in relation to the rules mentioned. The principle underlying the judgment is that parties must be apprised of “the proceedings”. It does not follow that every stage in the proceedings requires intimation. The provisions to which the rules covered by the question relate do not universally require input from all parties, nor do they alter the rights of the party who is not the applicant. They are stages in the process; any party who is not the applicant would have the chance to input before their rights could be altered. For example, where the FTT does not grant permission to appeal to the UT, the status quo for the other party or parties is maintained.

In any event, the FTT requires to act in a manner which is ECHR compliant. This would require it to intimate matters to other parties, should there be any case where Article 6 ECHR so requires.

In relation to the policy that underpins the specific rules:

On rule 5, relating to giving of orders, the Scottish Government believes, in policy terms, that it makes for a more expeditious procedure for the giving of orders that parties should in general have the opportunity to challenge them after they have been given, rather than challenging prospective orders (see paragraph (5)). In practice many of the orders given are likely to be so straightforward and incidental in nature that it would not be justifiable to delay the progress of proceedings to give the other party or parties the opportunity to have an input. An example may arise where the FTT gives an order requiring a party to produce a particular document, or where one party requests a short extension of time to comply with a particular rule. Given the likely vulnerability of appellants, it is in their interests that proceedings be dealt with as quickly and efficiently as possible. This speaks in favour of avoiding delaying their progress to allow notice to be given of prospective orders of this kind. As noted above the FTT would, however, be bound to give such notice if there was a particular reason why it considered that Article 6 ECHR required it to do so.

Rules 33 and 34 – In terms of section 46 of the Tribunals (Scotland) Act 2014, reaching a decision on whether or not to grant permission to appeal a decision of the FTT is a matter for the FTT, in the first instance. The Scottish Government does not consider that involvement of the other party or parties in that process is necessary. They will, of course, be informed, and have the opportunity to input, in the event that an appeal to the UT goes ahead. This is consistent with the approach in the rules of the other chambers of the FTT.

On rule 35, express provision is made that each party be informed in the event that the FTT decides to grant a request for a review. The Scottish Government considers this is sufficient. Input from the other party or parties does not appear relevant to the FTT's decision as to whether to undertake a review of its own decision. This is, in the first instance, simply an internal re-visiting of its own decision.

In relation to rule 13(3), the Scottish Government confirms that the intention is that it is sufficient that the FTT be informed by a party that a particular form of communication is not to be used. It will fall to the FTT to advise the other party or parties.

4. In relation to rule 9(3)(a), the Scottish Government does not intend that the requirement should apply only prospectively to any documents that require to be provided after the notice of appointment is received. A representative should be in possession of all documents that the rules have required the other party to provide to his or her client. This may involve providing again some documents, that a representative may not have received from his or her client. The Scottish Government will bring forward an amendment to ensure that this intention is reflected more clearly in the regulations.

5. As regards expenses, the Policy Note is referring, at the foot of page 6, to the policy that the FTT is not to have any involvement in making decisions on payment of expenses. The references in witness citations to expenses of a witness being met is a different matter, and not inconsistent with that policy.

6. In relation to rule 22(4)(g), the Scottish Government agrees that there is a drafting error insofar as the rule refers to a failure to send a notice more promptly to the Scottish Ministers, when it is a failure to send it to the FTT. The Scottish Government will bring forward a corrective amendment.

7. On question 7, the Scottish Government has considered the case of *H v Belgium*. It refers to the well-established principle, under Scots common law as well as ECHR Article 6 where it is relevant, that parties are entitled to understand the reasons for which decisions are reached.

In some cases the reason for an outcome is so obvious that the FTT may consider no further explanation is needed. This may arise, for example, where both parties are at a hearing and it is obvious what the basis of the disposal is. For example one party may concede that the appeal is fully merited or without foundation, or the case may turn on a matter of fact that is conclusively established. The rule is drafted to give the FTT discretion for such situations.

However, in any case where the FTT does not give a full written statement of reasons for its disposal of a case, rule 29 gives any party the right to apply for such a statement. In any event, the FTT requires to act in a manner which is ECHR compliant. This would require it to give reasons for its decisions, should there be any case where Article 6 ECHR so requires. This would be the case even if no application for reasons was made.

8. On rule 35, in relation to point (a), the reference should be to paragraph (4) rather than paragraph (7). In relation to point (b), the reference should be to paragraph (1) rather than paragraph (4). The Scottish Government will bring forward corrective amendments for these points.

