



# **MEMBERS HANDBOOK**

**(Revised edition January 2006)**

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**CARE STANDARD TRIBUNAL**  
**MEMBERS HANDBOOK (revised edition January 2006)**

**His Honour Judge David Pearl**

**1. INTRODUCTION**

**1.1.** *The Protection of Children Act Tribunal* was established by s 9 *Protection of Children Act 1999* to provide a right of appeal by individual child care workers who are included on the list of those deemed unsuitable to work with children and, separately, to individual teachers, whose right to work with children has been removed or restricted. *The Care Standards Act 2000* conferred additional functions on the Tribunal as set out in Part II (establishments and agencies), Part IV (social care workers), Part VI [inserting Part XA into the *Children Act 1989*] (Childminding and day care), and Part VII (*Protection of Vulnerable Adults*). Section 164 of the *Education Act 2002* further extends the jurisdiction of the Tribunal in relation to a proprietor of an independent school who may appeal against a refusal to approve a material change, a determination to remove the school from the register, and orders requiring the taking of specified action or refusal to vary or revoke such an order.

**1.2.** There is no statutory basis for calling the Tribunal the “*Care Standards Tribunal*”. However, the extended powers given to the Tribunal by the *Care Standards Act 2000* made the title “*Protection of Children Act Tribunal*” no longer appropriate, and the working title “*Extended Protection of Children Act Tribunal*” had no admirers. The Statutory Instrument containing the procedural Rules is the *Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002 (SI 2002/816 as amended)*, and the title “*Care Standards Tribunal*” therefore has secondary legislative force.

**1.3.** The purpose of this revised Handbook can best be explained by stating what it is not; namely, it is not a handbook on the law. The main statutory provisions are contained in the Jordans publication “*Care Standards Legislation Handbook*” that has been sent to all legal and lay members and which has gone through three editions, with a fourth edition hopefully to be published in the early Summer 2006. The Tribunal cases are all published on the Care Standards Tribunal website ([www.carestandardtribunal.gov.uk](http://www.carestandardtribunal.gov.uk)) and on the British and Irish Legal Information Website ([www.bailii.org/ew/cases/EWCST](http://www.bailii.org/ew/cases/EWCST)). The cases are summarised in “*A Digest of Cases heard by the Care Standards Tribunal*”, a publication that is updated twice a year. Issue 6 is published in early 2006. The Digest is also available on the website, together with a categorised index. Given the existence of the Jordans publication and the “*Digest of Cases*”, it is not necessary to set out the statutory provisions or the cases again. Detailed information on the law relating to Childminders and Child Care providers, the Protection of Children Act list, and the Education Direction, is provided in Clarke Hall and Morrison on Children (Division 1A). The most useful volume on Care Homes and other Agencies is “*Care Standards Manual*” by Richard Jones (Sweet and Maxwell, 2004 although it must be remembered that that book states the law as it existed in June 2004.)

**1.4.** The purpose of this handbook is to provide straightforward and practical guidance to various procedural aspects of our work. Much has happened since the distribution of the first edition of this Handbook, and this revised edition reflects these changes, brought about by the Case law, amendments to the Regulations, and the work of the three committees of the Tribunal, namely the General Purposes Committee, the Education and Training Committee, and the Rules Committee. It is hoped that this revised edition will serve members of the Tribunal up until our projected transfer from our current sponsoring department, the Department of Health, to the Tribunal Service of the Department for Constitutional Affairs. This is scheduled at the present time for April 2007.

## **2. THE APPEAL FORMS**

**2.1.** The Regulations state that Appeal forms may be used to initiate appeals. They are all available on the CST website. It is not strictly necessary to fill in the Appeal Form, so long as the Secretariat receives the particulars as specified within paragraph 1 to the various schedules. If an Appeal Form is not used, but the relevant particulars are sent to the Tribunal within the statutory timescales, then the case will be registered and the Secretariat will send the Applicant an appropriate Appeal Form to fill in. This will be done for administrative convenience.

**2.2. Appeal Forms:** The *Schedule 4* appeals [from confirmation on the *PoCa list*, and Directions made under the *Education Act 2002* (the latter known colloquially as “*list 99*”)] and *Schedule 5* appeals [*PoVa appeals*] use the “**A Forms**”.

**2.3.** The “**B Forms**” are used for Appeals;

- from decisions of the Commission for Social Care Inspection (CSCI) and decisions of the Health Care Commission;
- from decisions of the Chief Inspector of Schools in England (Ofsted) (except for suspension decisions) and decisions of the body responsible for the approval of home child care providers;
- from decisions of the National Assembly for Wales (NAW) (except for suspension decisions);
- from decision of the General Social Care Council (GSCC) or Care Council Wales;
- from decisions of the Secretary of State for Education and Skills in respect of the registration of an independent school.
- From an emergency Order (against cancellation or imposition of conditions) made by a justice of the peace in respect of the registration of establishments and agencies; and registration of childminders and day care providers.

**2.4. “C Forms”** are used in appeals against a decision of the Chief Inspector of Schools or National Assembly for Wales in respect of the suspension of registration of child minders, and day care providers.

**2.5. Response forms** (to be completed by the Respondent)

**“A Forms”**: Response to appeals against:

- inclusion on Protection of Children Act List or Protection of Vulnerable Adults List;
- Restriction or prohibition from working in schools
- Provisional inclusion on Protection of Children Act List or Protection of Vulnerable Adults List.

**“B Forms”**: Response to appeals against:

- a decision of the Commission for Social Care Inspection (CSCI) or decision of the Health Care Commission;
- a decision of the Chief Inspector of Schools in England (Ofsted) or a decision of the Body responsible for the approval of home child care providers (except for suspension decisions);
- a decision of the National Assembly for Wales (NAW): (except for suspension decisions);
- a decision of the General Social Care Council (GSCC) or Care Council Wales;
- a decision of the Secretary of State in respect of registration of an independent school;
- an Order made by a Justice of the Peace (JP) in respect of registration of establishments and agencies; and registration of childminders and day care providers.

**“C Forms”**: Response to appeals against decisions of the Chief Inspector of Schools in respect of the suspension of registration of child minders and day care providers.

## **2.6. Further Information Forms (Applicant/Respondent)**

Further Information from both the applicant and the respondent in respect of appeals against:

- inclusion on PoCA/PoVA list and Prohibition/Restriction of working with children in schools and Further Education Establishments;
- the CSCI, GSCC, NAW, Chief Inspector of Schools, approval body for home child care providers (registration, cancellation or imposition of conditions on establishments and agencies, childminders and early years' providers home child care providers, social workers, and social care workers);
- JP orders in respect of CSCI, Ofsted & NAW decisions.

**2.7.** There are no Further Information Forms in the case of suspension appeals given that the hearing has to take place within ten days of the Response to the appeal.

**2.8.** The purpose of the forms is twofold. First, it enables a degree of consistency in the paper work for the cases that come before us; and, secondly, it provides information in order to allow the parties to consider whether to request a preliminary hearing for the purpose of obtaining Directions as set out in **Regulation 6**. It also provides information to the President to consider whether a preliminary hearing is necessary.

### **Time limits**

**2.9.** The Regulations set out specified times for appealing, for the filing of the Response and for filing of Further Information Forms. The Secretariat is responsible for ensuring that these times are followed. Any application for an extension of the time limits for the filing of the Response and Further Information forms is placed before the President or the nominated Chairman for consideration. The President or the nominated Chairman may extend time limits if in the circumstances **(a)** it would be unreasonable to expect it to be, or to have been, complied with; and **(b)** it would be unfair not to extend it.

**2.10.** There is now a power to reduce the time limits, by virtue of **Regulation 35(1A)**. This can be done, when the President or nominated Chairman considers it reasonable to do so and the parties in the case agree to the reduction.

**2.11.** Time limits for initiating an appeal are governed by Statute and **Regulation 35**. Time limits for initiating *Schedule 1* appeals (**28 days from the initial decision**) cannot be extended as they are contained in the primary legislation. Time limits for initiating an appeal under *Schedules 2, 6, 7, or 9* (**28 days from the initial decision**) cannot be extended by virtue of **Regulation 35(3)**. Time limits for initiating a *Schedule 3, 4 or 5* appeal (**3 months from the initial decision**) can be extended if **Regulation 35(3)** is applicable. The President or the nominated Chairman may extend the time limits for appealing in *Schedule 3,4 or 5* cases if in the circumstances **(a)** it would be unreasonable to expect it to be, or to have been, complied with; and **(b)** it would be unfair not to extend it.

**2.12** It is likely that there will be amendments to the Regulations in the near future to accommodate European law that provides non-UK nationals with up to 3 months to apply to the Tribunal against a decision to refuse registration as a child minder, day care provider or registration on the Social Care Register. It is obviously discriminatory if a UK national has only 28 days in which to appeal, when a non-national has 3 months. Members will be informed of the changes when they are brought into force.

### **3. CASE MANAGEMENT**

**3.1.** *Part IV* of the Regulations sets out details relating to the Case Management of the appeals. **Regulation 5(1)** states that the President shall, at such time as he considers it appropriate to do so, nominate a chairman and two members of the lay panel to determine the case. At the present time, and probably for the next year or so, the view has been taken that the President does not nominate a chairman until a date for the hearing has been fixed in accordance with **Regulation 7(2)**. This means that the President, rather than a nominated Chairman, is responsible for most of the Case Management of all the cases. Increasingly, however, it is likely that the President will nominate a Chairman immediately the Further Information Forms have been filed and the nominated Chairman will then be responsible for all subsequent *Part IV* case management.

**3.2.** The Directions, whether after a preliminary hearing or otherwise, will set a timetable for the sending of witness statements (**Regulation 14**) and other documents (**Regulations 11 and 12**). The Directions will direct whether exchange of such material be simultaneous or sequential (**Regulations 6(3), 11(2)**), and as to the number of copies of relevant material to be sent to the Tribunal. In particular cases, there may be Directions on whether:

- There should be disclosure and inspection of documents (**Regulation 12(1)**),
- To appoint an expert to assist the Tribunal (**Regulation 13**);
- To direct that a document or the evidence of a witness other than the applicant be excluded from consideration (**Regulation 14(3)**). [It is important to remember that in this context, instead of excluding evidence, the President or the nominated Chairman or the Tribunal may permit it to be considered on such terms as he or it thinks fit, including, the making of a costs order; **Regulation 14(4)**];

- To issue witness summonses (**Regulation 16**)
- Where two or more cases relate to the same person, establishment or agency, a direction that they shall be heard together (**Regulation 8**);
- there should be a direction requiring a person who is not a party to the proceedings to disclose any document or other material to a party who has made such an application (**Regulation 12(2)**).

**3.3.** The Directions Hearing, if there is one, will establish a timetable for all of these procedural steps and set a hearing date with a time estimate. Many Direction Hearings are dealt with by telephone conference in order to save costs both for the parties and the Tribunal. It is likely that a telephone conference will be most useful when one or both of the parties live outside London and when both parties are represented by a Solicitor. It is much more difficult to hold a telephone conference when the appellant is a litigant in person, although such conferences have occurred without too much difficulty and at a fraction of the cost to the parties. The Secretariat arranges the telephone conference, and the Tribunal has a BT Conference account number.

**3.4.** An important provision in these Regulations is **Regulation 10**, which is designed to provide some “teeth” to the powers of the Tribunal in relation to case management. **Regulation 10(1)** states that the President or the nominated chairman may at any time make an order to the effect that, unless the party to whom the order is addressed takes steps specified in the order within the period specified in the order, the case may be determined in favour of the other party under **Regulation 10(3)**.

**3.5.** This is a draconian measure, and the application of **Regulation 10(3)** must be proportionate. **Regulation 10(5)** enables an application to be made subsequent to a **Regulation 10(3)** determination for the determination to be set aside. Such an application must be made not later than 10 working days after the date upon which the notice of the determination was sent to the party to whom the order was addressed.

#### **4. APPOINTMENT OF CHAIRMAN AND MEMBERS FROM THE LAY PANEL**

**4.1.** The current practice is that it is usually only after the hearing date has been fixed that the nominated Chairman and the two members of the lay panel will be appointed. The Secretariat maintains a roster of Chairmen and lay members, and it is important that up to date contact details (telephone and email) are communicated to the Secretariat. The CST has a responsibility to ensure that all Chairmen and lay members are provided with an opportunity to sit as regularly as possible. The Secretariat maintains a list of the invitations to sit, whether these invitations were accepted, and the number of days each legal and lay member actually sat.

**4.2.** The lay members will be nominated by the President bearing in mind **Regulation 5(5)**; namely, that he shall nominate members of the lay panel who appear to him to have experience and qualifications relevant to the subject matter of the case. The Secretariat has obtained information relating to each lay member's qualifications, and this information is used to allocate cases to the lay members. Subject to the provision in **Regulation 5(5)**, the President and the Secretariat will ensure that each lay member is given adequate opportunities to sit.

**4.3** There is a commitment to attend training days and accordingly members will jeopardise their sitting opportunities if they have been unable to attend the training programme.

## **5. OTHER PART IV DIRECTIONS**

**5.1.** Part IV also envisages as part of case management, issues relating to;

- the giving of evidence by children and vulnerable adult witnesses,
- Restricted Reporting Orders;
- Orders excluding the press and public.

**5.2.** The view has been taken that these are closely related to the hearing of the appeal, and therefore it is more appropriate for these matters normally to be dealt with by the nominated Chairman once he has been appointed, either as additional Directions prior to the hearing under **Regulation 9** or, in the case of Restricted Reporting Orders and exclusion of the press and public, by the Tribunal itself at the commencement of the hearing.

**5.3** A Restricted Reporting Order may be made at an early Direction stage, but it may be necessary for the Tribunal to consider its continuation either at the beginning of the hearing or at its conclusion.

### **The evidence of children and vulnerable adult witnesses (Regulation 17).**

**5.3.** A child (defined under the CSA as a person under 18 years of age) shall only give evidence in person where the President or the nominated chairman has given the parties an opportunity to make written representations before the hearing or representations at the hearing; and having regard to all the available evidence, and the representations of the parties, the President or the nominated chairman considers that the welfare of the child will not be prejudiced by doing so. The welfare of the child is the only consideration in reaching a view under **Regulation 17**. If a view is taken that the welfare of the child will not be prejudiced, then the President or the nominated Chairman shall “secure (sic) [This may be a misprint for ‘ensure’] that any arrangements he considers appropriate (such as the use of a video link) are made to safeguard the welfare of the child; and appoint for the purpose of the hearing a person

with appropriate skills or experience in facilitating the giving of evidence by children”. (**Regulation 17(2) (a) (b)**).

**5.4.** Pocock St has a purpose built video suite that should be used, if possible, for all cases where evidence is given by children. There are video suites outside London, for example in Crown Courts around the country, but it may be thought that a Crown Court would not be an appropriate venue for many of our hearings. If a case involves evidence by children (or vulnerable adults) and the venue is not in Pocock St, the Secretariat will need adequate time to arrange a venue that has video facilities.

**5.5.** The Crown Courts have established a database of people with appropriate skills or experience in facilitating the giving of evidence by children (or vulnerable adults) and it is likely that we would use this provision if necessary. It is important that the person who is appointed be an independent person who has no knowledge of the case or of the people involved. For example, it would be wrong for the appropriate person to be the child’s social worker or carer.

**5.6.** Please bear in mind that under **Regulation 22(3)** no child may be asked any question except by the Tribunal or the person appointed under **Regulation 17(2)**. This provision may cause some difficulties and only experience will tell how it should be applied. It is necessary to interpret this provision, of course, in the light of *Article 6 of the European Convention on Human Rights*. **Regulation 20(1)** allows the Tribunal to regulate its own procedure, and the approach suggested (but only, it must be stressed, suggested) is that, with agreement, the Tribunal should allow cross examination of the child to take place by the appellant or his representative but with the Chairman taking a proactive approach, perhaps all questions being addressed to the witness through the Chairman. The facilitator will be in the video room with the child and he or she will ensure that the child is in no way distressed and will alert the Chairman to any problems.

**5.7.** Similar arrangements apply to “*vulnerable adults*.” “*Vulnerable adult*” is defined in **Regulation 1(2)** as a person who is not a child and who – (a) suffers from mental disorder within the meaning of the *Mental Health Act 1983*, or otherwise has a significant impairment of intelligence and social functioning;

or (b) has a physical disability or is suffering from a physical disorder. Note that the definition of “vulnerable adult” in s 80(6) of the Care Standards Act 2000 is only relevant to that part of the Care Standards Act 2000 and the governing provision for our purposes is **Regulation 1(2)**.

**5.8.** Before a Direction can be made under **Regulation 17**, the decision has to taken as to whether the potential witness is or is not a vulnerable adult. The President or the nominated Chairman must make this decision on the basis of medical evidence that addresses the exact definition within the Regulations, and it is suggested that no decision should be taken without having considered that evidence. Attention should also be given to *Article 6*, and the appellant should have the opportunity of making representations as to whether the witness is a vulnerable adult. A full note should be made of these representations and the decision on this issue should be incorporated into the final written decision.

**5.9.** The “*vulnerable adult*” provisions are different from the “*child*” provisions. The child shall only give evidence where the President or the nominated Chairman considers that he will not be prejudiced by doing so, and then the evidence must be given in accordance with **Regulation 17(2)** in, for example, a video room with a facilitator present. In the case of the “vulnerable adult” **Regulation 17(3)** places the responsibility on the President or the nominated Chairman to decide:

- Is the witness a vulnerable adult?
- If so, might it not be in the best interests of that adult to give oral evidence in the normal way to the Tribunal?
- If having regard to all the available evidence, it is considered that it would prejudice the vulnerable adult’s welfare to give oral evidence in any circumstances, he shall direct that the vulnerable adult shall not do so
- Alternatively, if it is considered that it would prejudice the vulnerable adult’s welfare to give oral evidence otherwise than in accordance with **Regulation 17(5)** he shall direct that **Regulation 17(5)** shall apply.

- If he directs that **Regulation 17(5)** shall apply, then the evidence will be given using, for example, a video link, and a person will be appointed with appropriate skills or experience in facilitating the giving of evidence by vulnerable adults.

**5.10. Regulation 17(4)** states that where a direction has been made under **Regulation 17 that 17(5)** applies, then the vulnerable adult may not be asked any question except by the Tribunal or a person appointed under **Regulation 17(5)**. Again, it is suggested that this provision be used in a way that allows cross-examination of the vulnerable witness, but that the Chairman adopts a proactive approach in the same way as he would in relation to a child.

**5.11.** In approaching the issue of child witnesses and vulnerable witnesses, it is suggested that it will be appropriate for the Tribunal to adopt relevant provisions of the Home Office Guidance entitled “*Achieving Best Evidence in Criminal Proceedings: Guidance for Vulnerable or Intimidated Witnesses, including Children.*” We must ensure, as in *para 5.8 of the Guidance*, that we take an active role in the management of the case involving children and vulnerable witnesses and ensure in particular, that elements of the process that causes undue stress is minimised. Explanations of what is happening must be given to the witnesses. It may be that we should adopt *para 4.52 of the Guidance* that suggests that the Tribunal, accompanied by legal representatives, and in our Tribunal the appropriate person, meet such witnesses informally before they give their evidence.

**5.12.** If the witness is giving evidence in the hearing room, attention should be given to the layout of the room. It may be necessary to switch the seating arrangements so that the witness is further away from the appellant and/or his counsel. In one case this was done so as to protect the “professional witness” from too close an eye contact with an energetic appellant’s Counsel who was only doing his job!

**5.13. Regulation 17(6)** states that fees are paid to the appropriate person of an amount that the President or nominated Chairman may determine. No guidelines have been established yet as to how much should be paid. It is suggested that this should be left to the President to decide, although a note should be sent to the President by the nominated Chairman of the time the appropriate person spent on the case.

### **Restricted Reporting Orders (Regulation 18).**

**5.14. Regulation 18(1)** states that if it appears appropriate to do so, the President or the nominated chairman (or, at the hearing, the Tribunal) may make a Restricted Reporting Order. Such an order, by Regulation 18(2), prohibits the publication (including by electronic means) in a written publication available to the public, or inclusion in any programme for reception in England and Wales, of any matter likely to lead members of the public to identify the applicant, any child, any vulnerable adult or any other person who the President or the nominated chairman or the Tribunal considers should not be identified. By **Regulation 18(3)** an order that may be made under this Regulation may be made in respect of a limited period and may be varied or revoked by the President or the nominated Chairman before the hearing (or by the Tribunal at the hearing).

**5.15.** We should balance the requirement for open justice with the need to protect young people and vulnerable people. It is suggested that the Tribunal consider;

- The age of the person who is to be protected by this provision;
- The social and cultural background if relevant;
- The domestic and employment circumstances if relevant;
- Any religious or political beliefs if relevant;
- Any behaviour towards this person by others;
- Any views expressed by the appellant and the Respondent;

**5.17.** A practice has developed in many of the *Schedule 2, 4 and 5* cases for the President, in his Directions, to issue a **Regulation 18** Order either up until the date of the hearing or sometimes up until the conclusion of the hearing. This will then enable the Tribunal to decide, if appropriate, both before the hearing and at the close of the hearing whether to continue the Order for the duration of the hearing and beyond. If a Restricted Reporting Order is extended it should be specified as part of the decision, and if the duration is limited, this also should be specified. Failure to comply with a

**Regulation 18 Order** without reasonable excuse is an offence and on summary conviction carries a fine not exceeding level three on the standard scale (£1,000) (*POCA 1999 s 9(5)*).

**5.18.** Linked to the Restricted Reporting Order is the Regulation dealing with the Publication of the Decision (**Regulation 27**). The President is mandated to make arrangements for the publication of Tribunal decisions. This has been done by electronically posting them (as **Regulation 27(2)** anticipates) on the Tribunal website and on the Bailii website. Some cases have been sent to Family Law to be published by them (*C v SSH July [2002] Fam Law 515* and there is an extensive article in *Family Law* for September 2005 on *Lisa Arthurworrey v Secretary of State [2004] 268.PC* ).

**5.19.** Applications are frequently made in the *Schedule 2, 4, 5 and 7* cases for the Decision to be published in an edited form, or subject to certain deletions. The President or the nominated chairman must consider such a request bearing in mind **Regulation 27(3)**:

- The need to safeguard the welfare of any child or vulnerable adult
- The need to protect the private life of any person
- Any representations on the matter that either party has provided in writing
- The effect of any subsisting Restricted Reporting Order
- The effect of any direction under **Regulation 15** (the provision relating to the withholding of a medical report from disclosure in exceptional circumstances).

**5.20.** Cases will of course all vary, but it may be that the following advice will be of help to determine whether to continue a reporting restriction. If the allegations involve alleged abuse, as many *Schedule 4 and 5* cases do and indeed a few *Schedule 1* cases do, then it is appropriate to continue a Restricted Reporting Order during the hearing and pending the promulgation of the decision to the parties. It is suggested that in some cases the Order should continue in force for the ten-day period that is available after the decision has been sent to the parties, for the parties to consider whether to lodge an application for a review. There is a period of 28 days available to the parties

to lodge an appeal to the High Court. In some cases, it may be thought appropriate to continue the restricted reporting order for this time as well.

**5.21.** The normal approach is not to anonymise the decision. A contrary approach should be adopted only after taking account of **Regulation 27(3)**. It is suggested that if one or both of the parties wishes an Order to the effect that the decision be anonymised prior to publication, then representations on the matter should either be considered at the hearing or be sent in writing. The approach has been taken that the nominated chairman should decide whether to anonymise the decision, prior to its publication. If the view is taken to continue a Restricted Reporting Order for a period of time beyond the ten days after the sending of the decision (or in some cases for the period of 28 days available to consider whether to lodge an appeal on a point of law to the High Court), then the decision will not be published except in an edited form so as to comply with the Restricted Reporting Order. If the Order is lifted, then it is likely that the case will not be anonymised. What must be made clear to all at the outset, of course, is that decisions on continued reporting restrictions and publication in an edited form cannot be determined by whether the appellant wins or loses the case.

**5.22.** In the case of *Schedule 2* and *Schedule 7* cases, it is very important to protect the private lives of the children involved. This requirement will be given absolute priority even if it means that the appellant's name will be anonymised.

### **Exclusion of Press and Public (Regulation 19)**

**5.22.** The hearing is a public hearing unless a direction is made by the President or the nominated chairman or at the hearing by the Tribunal that;

- Any member of the public specified in the direction
- Members of the public generally
- Members of the press and members of the public

be excluded from all or part of the hearing. This can only be done when the President, the nominated Chairman or the Tribunal is satisfied that such a Direction is necessary in order to **(a)** safeguard the welfare of any child or vulnerable adult; **(b)** protect a person's private life; or **(c)** avoids the risk of injustice in any legal proceedings.

**5.23.** The approach has been taken that the Tribunal should deal with such matters at the hearing although there will be cases where a Direction under **Regulation 19** has been made prior to the hearing. No order should be made for a private hearing where a Restricted Reporting Order would suffice. On the other hand, if there is to be a private hearing, a Restricted Reporting Order should also normally be made. If a Direction is made under **Regulation 19**, certain persons are entitled under **Regulation 21(2)** to attend the hearing. These are a member of the Council on Tribunals. This is in the singular, and the Council would be most unlikely to send more than one observer. If however two or more did turn up, it would be unfortunate if we were to only allow one to be present! The President is entitled to be present, as is the clerk, and “any person whom the President or the nominated chairman permits to be present in order to assist the Tribunal”. Presumably, this provision would include for example an expert appointed under **Regulation 13**, a technician helping the Tribunal in the video evidence being presented and an Appraiser who is appraising one of the members of the Tribunal.

**5.24.** There may be some query as to the definition of “members of the public”. Do they include officials of the Respondent in training, or newly appointed Tribunal members who are observing cases as part of their induction, or trainees of the appellant’s lawyers? A pragmatic approach will have to be taken in these cases. It is necessary for the future development of this jurisdiction that ample opportunity is taken for the cases to be observed by all those who will have to deal with future matters, in whatever capacity. Thus, even with an exclusion order in place, it is hoped that Tribunals will be able to allow such people to remain in the hearing. The hearing rooms at Pocock St are large enough to ensure that no one is intimidated by the presence of even large numbers of people who are not part of the legal teams. The Respondent has been asked to inform the Secretariat in advance when they intend to send to the Tribunal hearing, officials in training. It is important that an appellant in person is not unduly affected by large numbers of people sitting in the hearing room who appear to be part of the Respondent’s team.

## **6. ADJOURNMENTS AND CHANGES OF VENUE**

**6.1. Regulation 7(3)** states that the Secretary must inform the parties in writing of the date, time and place of the hearing no less than 20 working days before the date fixed for the hearing. This date and place will invariably be the date that has been agreed at the Directions hearing, if there has been one, by the parties and the Tribunal.

**6.2.** Once the date has been fixed, **Regulation 7(6)** states that the President or the nominated chairman shall not adjourn the hearing unless satisfied that refusing the adjournment would prevent the just disposal of the case. There is therefore a presumption against an adjournment, and an application to adjourn must be accompanied by strong documentary evidence as to why an adjournment is requested. If an adjournment is granted or refused, the President or the nominated chairman should provide a ruling with reasons why the adjournment request was successful or refused. When considering an adjournment application, it is necessary to hear both sides by way of an oral application, paper submissions, or a telephone conference.

**6.3.** The Tribunal has decided on a working rule that cases will be heard at the Tribunal hearing centre at Pocock St in all cases where the applicant and the primary witnesses live within a one and a half hour commuting distance from London. If that is not the case, then the Secretariat will be responsible for finding another venue outside London, unless of course the parties are content to have the hearing in London. All Welsh cases are heard in Wales as we have a Memorandum of Understanding with the National Assembly that such appeals be heard in the Principality. The venue must be communicated to the parties within 20 working days of the hearing (**Regulation 7(3)**) although the Secretary may, in consultation with the President or nominated chairman, alter the place (although not the date) and, without delay, inform the parties in writing of the alteration (**Regulation 7(4)**). It is our practice to use Court or other Tribunal premises. We attempt to avoid using hotel accommodation if at all possible, and a view has been taken that using CSCI premises, for example, is not appropriate. Chairmen and lay members, once appointed to a particular case, are strongly advised to consider the suitability of a venue as soon

as they have been told of it. If there is any concern at all, the Secretariat and the President should be informed so that alternatives can be considered. Members are also strongly advised to complete the information in the Self Assessment Form about the venue, so that the information can be used for future hearings.

## **7. THE TRIBUNAL BUNDLE**

**7.1.** The Respondent is responsible for filing a Tribunal bundle to be used by all parties and Tribunal members. We have applied the President of the Family Division's Directions, and the bundle should be a paginated agreed file of **(i)** the pleadings **(ii)** the Directions **(iii)** the witness statements and **(iv)** the documents. Sometimes, the Directions will ask for an agreed statement of the issues that the Tribunal is asked to address, for any preliminary outline submissions by way of a skeleton argument with authorities, a "Scotch schedule" of the allegations by the Respondent and the Response by the Appellant and a chronology. The Bundle should be with the members in all cases, except the *Schedule 7* cases, with two clear weekends prior to the hearing. By definition, *Schedule 7* cases (the suspension appeals) must be heard no later than ten days after the date the Secretary receives notification of the Response (**Regulation 7(2A)**). Accordingly, the Hearing Bundle may well arrive only the day before the hearing. *Schedule 7* cases will not involve many documents, and, although unsatisfactory, the problems of last minute delivery of Bundles in *Schedule 7* cases has, by and large, been overcome by the members. In appeals that are likely to last a long time, or in appeals with considerable reading material, the President will build in a reading day as the first day that the members are asked to attend the hearing.

## **8. NO HEARING APPEALS**

**8.1. Regulation 6 (2) (c)** envisages that there will be some cases where the applicant requests that the case be determined without an oral hearing. According to **Regulation 6(3A)**, if at any time it appears to the President or the nominated Chairman that the appeal is of such a nature that it should be determined at an oral hearing, he may (after considering any representations from the parties) direct that such a hearing shall be held. Otherwise, the case shall be determined without an oral hearing if the applicant has so requested. In those situations, the President shall give a direction as to the date, which shall be not less than 10 working days after the last date on which he has directed that any document, witness statement or other evidence be sent to the Tribunal. The parties will be invited in no hearing appeals to submit written representations.

**8.2.** The Tribunal members will be appointed as soon as the Further Information Forms have arrived at the Tribunal. The Directions are likely to ask for the documentation to be exchanged simultaneously within 20 working days after Further Information forms have arrived, and thus the meeting of the Tribunal to consider the case would normally be fifteen working days thereafter (5 days to prepare the Tribunal bundle giving the Tribunal members 10 working days to read the material).

**8.3.** The panel will meet to discuss the matter and to take their decision. Although the Rules are silent on this point, it is recommended that the meeting take place in private.

## **9. HEARINGS**

**9.1.** All members sitting on the Tribunal panel should play an active role in the hearing. **Regulation 20** states that the Tribunal may regulate its own procedure, and the following paragraphs are designed to be helpful rather than in any way prescriptive.

### **Reference Books**

**9.2.** Members should bring with them copies of the Jordans Legislation Handbook, and the “Digest of Cases” for reference, although there are copies of both available at Pocock St. We have built a small library of relevant material, such as the Social Services Encyclopaedia and Clarke Hall and Morrison on Children. The President has a set of all ER, European Human Rights Reports, and the journals such as Family Law and the Medical Law Review. We also have copies of all the National Minimum Standards (NMS).

### **The start of the hearing**

**9.3.** The first day of the hearing will be set to start either at 10.30 am or 11.00am and this will provide members with an opportunity of considering the papers together in advance of the hearing. It is suggested that the members put all their undoubtedly voluminous papers in the hearing room before the parties enter, and then retire. The Secretariat will provide a clerk at least for the first part of the hearing, and he or she will bring in all the parties first. He will then bring in the panel.

**9.4. Regulation 20(2)** states that at the beginning of the hearing the Chairman must explain the order of the proceedings that the Tribunal proposes to adopt. The normal approach is that the party upon whom rests the burden of proof begins the case. In *Schedule 4 and 5* and cancellation cases in *Schedule 1 and 2* appeals, this will be the Respondent (the Department or the Regulator). In the case of application cases, where the burden is on the applicant [*Jones v CSCI [2004] EWCA 1713*] it is usually more sensible for the Respondent to start first, so that the applicant knows the case against

him even though he has the burden of proof on him. This is particularly going to be the case when the Applicant is unrepresented.

**9.5.** The opportunity should be taken at the beginning of the hearing to introduce the panel. The suggestion is that the Chair introduces himself or herself and explains that he or she is an independent Chairman who is a lawyer and who has been appointed by the Lord Chancellor (New appointments after April 2006 will be made by the Judicial Appointments Commission.) Explain also that the President of the CST has nominated him to be the Chairman for this particular Tribunal hearing.

**9.6.** The Chairman should then ask the two panel members to introduce themselves explaining that they also have been appointed to the CST by the Lord Chancellor and that they have a range of experiences and expertise as laid down in **Regulation 3**. It is not advisable for the panel members to spell out any of their particular expertise. If an issue arises, it is suggested that the Chairman inform the parties that the President has nominated this particular person from the panel of lay members because he is of the view that this person has experience and qualifications relevant to the subject matter of the case. (**Regulation 5(5)**).

**9.7.** After the Tribunal has identified itself it is sensible for the Chairman to ask the people in the room to identify themselves. If there are visitors, such as the President, an Appraiser, or a member of the Council on Tribunals they also should be drawn to the attention of the parties and the Chairman should make clear that they will play no part at all in the decision-making. The Chairman should emphasise the independence of the Tribunal, and the fact that he will be responsible for ensuring that both parties have an adequate opportunity of presenting their case.

### **Recusal**

**9.8.** There have been cases in other jurisdictions surrounding the circumstances when a panel member should recuse himself or herself from hearing an appeal. (*Re Medicaments Related Class of Goods (No 2) 2001 1 WLR 700.*) The test is whether a fair-minded and informed observer would conclude that there was a real possibility, or a real danger, the two being the same, that there could not be or would not be a fair trial.

**9.9.** As soon as the papers arrive, it is strongly advised that panel members peruse the papers, and if there is a difficulty – in the sense that a person or institution named in the papers is known to a panel member – then he or she must contact the President and/or the nominated Chairman immediately. It is better to be safe in this area, and err on the side of caution.

**9.10.** If a party objects at the hearing itself to a member of the Tribunal sitting to hear an appeal, on the grounds that there is a conflict of interest, the views of both parties should be heard and the Tribunal should then retire to consider the position. A note should be made of the application in the Chairman’s note book, and if the decision is made to continue with the hearing, then a fully reasoned ruling should be given and it should eventually be incorporated in the final decision of the Tribunal.

### **The style of the hearing**

**9.11.** The nature of the issues at stake in cases before the CST has created a relatively formal style to the hearings. Thus, it is likely that parties will stand up when the panel enter; that panel members are addressed as “Sir” or “Madam”, and that Counsel (who are present more often than not) call each other “My learned friend”. It is important to remember however that the CST is a Tribunal and not a Court. Evidence should be given sitting down, and lawyers should also sit when they are asking questions or making submissions.

### **Notes**

**9.12.** The Chairman is responsible for keeping a full note of the proceedings. Notebooks are available for the Chairmen to write in, and it would be helpful if these books were used rather than separate bits of paper. The books can be kept by the Secretariat once the case is concluded and given back to the Chairman for his or her next hearing. Alternatively, the Chairman may want to keep the books themselves. This practice adopts the procedure in the Courts and enables the President to check back on what was or was not said if an issue arises subsequently. Lay members are not expected to keep a detailed record, although they may well wish to take a reasonably full note of the essential evidence.

**9.13.** We have facilities for recording evidence in the Tribunal hearing centre at Pocock St. Arrangements for recording elsewhere can be made as long as adequate notice is given.

### **The evidence**

**9.14.** The Tribunal has adopted the practice of the civil courts in the sense that it is not necessary for a witness to be taken through his or her evidence in any great detail. The Tribunal will have read the papers well in advance. On the other hand, it is always valuable for the witness to be asked a few straightforward questions by his representative in order to set the scene.

**9.15. Regulation 14 (2)** states that a witness statement must contain the words “I believe that the facts stated in this witness statement are true” and be signed by the person who makes it. Given this fact, it may be thought that it would be an unusual case where the Tribunal will require a witness to give evidence on oath or affirmation. However, a witness may wish to do so, and in some cases the other side may wish a witness to give evidence on oath or by way of affirmation. The Secretariat has the standard oath form that should be used, it has a Bible for those who wish to take the oath on the New Testament, and it can obtain a copy of any other relevant Holy Book from Blackfriars Crown Court (in the case of hearings in Pocock St).

### **The hearing day**

**9.16.** It is important that frequent breaks are taken, and the suggestion is to take a mid morning break and a mid afternoon break, finishing the day at a convenient point around 4.30 p.m. Explain also that either party can ask for an adjournment for a brief period at other times if necessary. It is not helpful to anyone to sit late, and the Tribunal should endeavour never to sit after 5.00pm unless everyone is agreeable. Lunch and tea/coffee is arranged by the Secretariat and is available in the members’ retiring room.

## **10. MISCONCEIVED APPEALS**

**10.1. Regulation 4A** deals with misconceived appeals or applications. This provision provides a power to the President or the nominated Chairman to strike out an appeal on the grounds that:

- (a) it is made otherwise than in accordance with the paragraph that deals with initiating an appeal;
- (b) it is outside the jurisdiction of the Tribunal or is otherwise misconceived;
- (c) it is frivolous or vexatious.

**10.2.** Paragraph (a) above could be used in cases where for example the application has not been made in writing but rather by a telephone call, or where the information has not been completed or where the applicant has not signed the application. It is also used when the appeal is filed outside the time limits for filing an appeal.

**10.3.** Before striking out an appeal, the President or the nominated Chairman must:

- (a) invite the parties to make representations on the matter within such period as he may direct;
- (b) if within the period specified in the direction the applicant so requests in writing, afford the parties an opportunity to make oral representations;
- (c) consider any representations the parties may make.

**10.4. Regulation 4A (4)** states that where a decision has been taken to strike out an appeal, the applicant may apply to the President or to the nominated Chairman who struck out the application for the determination to be set aside. If an application is made for a determination to strike out to be set aside, the practice that has developed is for the matter to be sent to another Chairman for consideration. This is not strictly required by the Regulations but would appear to be good practice.

### **Other defects in the application**

**10.5.** There is a provision within the Schedules that imposes a responsibility both on the President and on the Secretariat when applications arrive and prior to entering the application in the records. If the President is of the opinion that the applicant is asking the Tribunal to do something that it cannot do, he may notify the applicant in writing:

- (a) of the reasons for his opinion, and
- (b) that the appeal will not be entered in the records unless within five working days the applicant notifies the President in writing that he wishes to proceed with it.

**10.6.** If in the Secretary's opinion there is an obvious error in the application –

- (a) he may correct it
- (b) he must notify the applicant accordingly, and
- (c) unless within five working days of receipt of notification under (b) the applicant notifies the Secretary in writing that he objects to the correction, the application shall be amended accordingly.

## **11. THE DECISION**

### **When to deliver the decision**

**11.1. Regulation 23(2)** states that the decision may be made and announced at the end of the hearing or reserved. It is a matter for each Tribunal to decide which approach they are going to take. It is recommended, however, that for all but the most straightforward cases, and also in the case of suspension cases, it is far better to reserve.

**11.2.** If a time estimate has been given of one whole day, then the Secretariat in consultation with the Chairman or the President may book the panel for two days. This will enable the panel to close the hearing at the end of the day, and return the following day to consider the evidence and reach a decision. This is a much better way to handle difficult and complex material: starting a discussion fresh in the morning rather than sitting down to a discussion at the end of a tiring and lengthy day.

### **Unanimous and majority decisions**

**11.3.** The decision may be taken by a majority, and the decision shall record whether it was unanimous or taken by a majority. (**Regulation 23(1)**). If it is a majority decision, the question arises as to whether there should be a minority report and if so, who should write it? The Regulations are silent on this matter. The approach in some other Tribunals is for a minority report to be written by the person who dissents; in other Tribunals a brief summary of the minority view is inserted into the decision itself.

**11.4.** In the event that there is a difference of opinion, it is suggested that the President be asked for his view as to whether the minority approach should be communicated separately, in the body of the decision, or not at all. *The 2002 Regulations* are different to the original POCA Regulations where there was no provision at all for stating whether a decision was unanimous or by a majority. Now that there is such a provision, it is probably appropriate in most, if not all, cases, in the event of a split, to set out the nature of that split. Otherwise, speculation may lead to

an incorrect conclusion by the parties. Up until the beginning of 2006, only three cases have resulted in a majority decision.

### **Procedure**

**11.5.** The decision and the reasons for reaching it will be discussed and agreed by the panel members. The Chairman will then write a draft decision and submit it to the other members for comment. Email addresses are kept by the Secretariat and email of course saves a great deal of time. It has been possible in some cases for the members to continue their discussions either via a video link or by way of a telephone conference. If this is necessary, the Secretariat will make the necessary arrangements.

**11.6.** It is important that the tribunal promulgate its written decision promptly. The working time scale that has been adopted by the CST is ten working days from the date of the conclusion of the hearing. The panel should settle its own timetable and method of communication before it parts, and the Chairman will be responsible for sending a signed copy of the decision to the Secretariat, who will then be responsible for sending copies to the parties. The Secretariat has the signature of most if not all of our Chairs, and therefore an email copy will usually suffice and the Secretariat will scan in the electronic signature. If there is going to be a problem with sending the decision to the parties within the ten working days timetable, the Chairman should communicate this fact to the President with the reason for the difficulty.

### **Consistency**

**11.7.** Tribunal Chairmen will inevitably write in their own style. However, it is necessary to a certain extent to adopt a standard framework, so that our decisions are recognisably decisions of the Tribunal, that they are straightforward to understand, and that they contain all that is required.

**11.8.** The decisions are sent out on headed CST paper, and the application or citation number follows the neutral citation system that has been adopted by the Tribunal. If you are in doubt as to the citation for the case, you are dealing with then please contact the Secretariat. The citation depends on the decision that is being appealed against.

**11.9.** The heading should follow the following form:

**Jane Smith**

**-v-**

**Commission for Social Care Inspection**

**[2006] 666.EA**

**-before-**

**Mr Richard Red**

**(Nominated Chairman)**

**Mr Gary Gray**

**Mrs Barbara Blue**

**DECISION**

**Heard on 1<sup>st</sup> April 2006**

**The Appellant appeared in person**

**For the Respondent: Ms Greta Green of Counsel instructed by the Treasury Solicitor**

**11.10.** It is then advisable to set out the application details (e.g. The applicant appeals *under s 4(1)(a) of POCA 1999* against the decision of the Secretary of State to confirm the Appellant's name on the list kept under *s 1* of that Act etc). Please check these details carefully and ensure that the correct legislation is cited.

**11.11.** After setting out the application details, all preliminary matters should be dealt with e.g. Directions that have been given, especially about inclusion or exclusion of evidence, whether any evidence was obtained by video link, whether there are Restricted Reporting Orders in force, and so on.

**11.12.** It is then a good idea to set out any issues of law and your findings on the legal issues. The burden and standard of proof should be set out as well.

**11.13** Then set out the facts.

Then conclusions on the facts.

And finally the reasons why you have reached these conclusions.

The decision should conclude with the words: Accordingly, the appeal is dismissed/the appeal is allowed. Check the relevant legislation to make sure that the ORDER is appropriate. For example, in *s. 68 appeals* from GSCC, the Tribunal may confirm the decision or direct that it shall not have effect. It also has power to vary any conditions, to direct that the condition shall cease to have effect, and to direct that any such condition as it thinks fit shall have effect in respect of that person.

**11.14.** The decision should have all three names of the panel members at the bottom of the decision, and it should be signed and dated by the Chairman. It is necessary (**Regulation 23(1)**) to state whether the decision is unanimous or by a majority. This can be contained in a single sentence below the decision.

**11.15.** If specific orders are made, in particular in relation to *sch 4 and 5* cases, (in the event of a successful appeal, there should be a direction that the appellant's name be removed from the list), the Tribunal should order that this is to be done; and the Tribunal's order should set the Directions out clearly. Mr Justice Scott Baker has said in *SSH v C [2002] EWHC 1381 (Admin)* that the Secretary of State must comply with the terms of the Order even if he wishes to appeal. If he does not wish to comply with the terms of the Order then he must apply to the Administrative Court, in effect for a stay, pending the appeal hearing.

**11.16.** It would be helpful if all paragraphs were numbered consecutively throughout the document. This helps in referring to particular parts of the decision (e.g. on appeal) and encourages the logical arrangement of the decision. It is not necessary to summarise every fact given in evidence, but all those facts that form the basis of the conclusions should be given.

**11.17.** If conditions are attached to the decision to allow the appeal, these conditions should be set out in full.

**11.18. Regulation 23(3)** states that the reasons for the decision should be given, and the *2002 Regulations* have departed from the approach in the earlier *POCA Rules* that referred to reasons in summary form. It is doubtful that the absence of “summary” makes any difference.

**11.19.** The best test to use is this:

Can the reader (the parties, and a Judge on appeal) understand clearly:

- what the case was about;
- the arguments that were presented;
- the content of the evidence that the Tribunal considered;
- the reasons why the Tribunal came to a particular conclusion.

**11.20.** The lay members have an essential function to perform in this context, and they are asked to read the decision carefully and ask themselves whether the decision fulfils the requirements set out above.

## **12. COSTS**

**12.1. Regulation 24** is an important Regulation that deals with the power of the Tribunal to make a Costs Order. Neither the President nor the nominated Chairman alone has power to make a costs order, except when there has been a strike out (**Reg 4A(3)**), or a decision after withdrawal of the proceedings or the opposition to the proceedings not at the hearing (**Reg 33(3)**) If, in the opinion of the Tribunal or the President or nominated Chairman (in the appropriate cases), a party has acted unreasonably in bringing or conducting the proceedings, it may make a cost order requiring that party to make a payment to the other party to cover costs incurred by that other party.

**12.2. Regulation 24(2)** lays down two preconditions to the making of a costs order even in cases where it is decided that one party has behaved unreasonably. First, the Tribunal must invite the receiving party to provide to the Tribunal a schedule of costs incurred by him in respect of the proceedings. Secondly, the Tribunal must invite representations from the paying party and consider any representations he makes, consider whether he is able to comply with such an order and consider any relevant written information which he has provided. In order to determine whether the paying party can comply, it is necessary to have information relating to capital, income, and debts and outgoings.

**12.3.** It is suggested that the Tribunal deal with costs applications in all bar the most complex of cases by way of written representations. Remember that the Chairman cannot make a costs order on his own; only the Tribunal can make the order. Likewise, a decision not to make a costs order can only be a decision of the Tribunal rather than the decision of the Chairman alone.

**12.4.** If an order is made, the Tribunal has a wide discretion under **Regulation 24(3)**. It can order the payment of any agreed sum; it can order the payment of any sum which it considers appropriate having considered representations; it can order the payment of the whole or part of the costs incurred by the receiving party in connection with the proceedings as assessed. The assessment in this last situation may

be an assessment by the Tribunal or an assessment in the county court. Except in the most complicated of matters, it is probably sensible for the Tribunal to conduct the assessment itself.

**12.5** A body of case law has now built up on costs applications. These are all available on the website and a summary is in the “Digest of Cases”. Tribunal members are urged to familiarise themselves with the principles that can be drawn from these cases.

### **13. WITHDRAWAL OF PROCEEDINGS OR WITHDRAWAL OF OPPOSITION TO PROCEEDINGS.**

**13.1. Regulation 33** deals with the quite frequent situation that the appeal is withdrawn, or the Respondent withdraws its opposition to the appeal prior to the decision of the Tribunal.

**13.2. Regulation 33 (1)** states that if the applicant at any time notifies the Secretary in writing, or states at a hearing, that he no longer wishes to pursue the proceedings, the President or the nominated chairman (or at the hearing, the Tribunal) must dismiss the proceedings. If the applicant withdraws prior to the hearing, the President will dismiss the appeal by a written decision. If the withdrawal takes place at the hearing, the Chairman should ensure that he has a written notification of this withdrawal signed and dated by the applicant. This is not strictly necessary but problems have arisen in cases where the evidence is not being recorded. The Chairman should then prepare a written decision dismissing the appeal, and signed by him. If possible, this notification should be given to the parties before they leave the building. There has been at least one case where, notwithstanding a withdrawal, the Tribunal has gone on to make findings of fact. This is perhaps an exceptional situation, and should be used only when all the evidence has been produced and where for example there are concerns about child protection issues. If a case is only part heard and there is a withdrawal or a withdrawal of opposition to the appeal, perhaps in the light of the evidence up to date, there is little that can be done except possibly by reflecting the Tribunal's concern by an order for costs.

**13.3.** If the proceedings are withdrawn, the Tribunal may make a costs order.

**Regulation 24 (1) (2) and (3)** applies (See above).

**13.4. Regulation 33 (2)** deals with the situation where the Respondent notifies the Secretary in writing or states at a hearing that he does not oppose or no longer opposes the proceedings. The Regulation says that the President (not apparently the nominated Chairman) or at the hearing the Tribunal must without delay determine the case or the application in the applicant's favour. If the withdrawal takes place at the

hearing, the Chairman should ask for a written confirmation from the Respondent, and then he should prepare a decision allowing the appeal. If possible, the decision should be handed to the parties before they leave.

**13.5.** So far as costs are concerned, when the applicant withdraws his or her appeal, whether to consider the question of a costs order is a matter in the discretion of the Tribunal. In contrast, when the Respondent withdraws its opposition, a consideration of whether to make a costs order is not a matter of discretion. The Tribunal must consider (subject to **Regulation 24(1) (2) (3)**) making one.

**11.6** In practice, it is to always appropriate to consider the possibility of a costs order, and to apply the principle as laid down in **Reg 24** and as developed by the case law.

## **14. REVIEW OF THE TRIBUNAL'S DECISION.**

**14.1. Regulations 25 and 26** deal with the review of a decision. There are strictly four phases. First, the application; secondly, a preliminary “screening” of the review application by the Chairman; thirdly, the application for the review (determined by the full Tribunal); finally, the review itself.

### **The application**

(1) First of all, **Regulation 25(2)** states that an application under this Regulation must be made in writing stating the grounds in full and made not later than ten working days after the date on which the decision was sent to the party applying for the Tribunal’s decision to be reviewed. The President or the nominated chairman may extend any time limit if (a) it would be unreasonable to expect it to be, or to have been, complied with; and (b) it would be unfair not to extend it (**Regulation 35**). The approach that has been adopted in relation to extensions of time limits for Review purposes has been fairly tight. Two weeks should be ample time for the losing party and his representatives to consider the decision and to decide whether there are grounds for seeking a review.

There are only three grounds for review:

(a) it was wrongly made as a result of an error on the part of the Tribunal staff.

One possibility would be where the Tribunal intended to allow the appeal, and the reasons for the decision make it abundantly clear that the appeal is allowed; yet the actual decision or order says, “Appeal dismissed.” The application for a review is made to the President, and if this is the basis for the review, he will immediately communicate with the Chairman.

(b) A party, who was entitled to be heard at a hearing but failed to appear or to be represented, had good or sufficient reason for failing to appear.

In this situation, it will be necessary for the party to provide evidence of the “good or sufficient reason”. It may be a medical certificate may suffice. If the Tribunal panel that originally heard the case is satisfied of this ground, it shall order that the whole or specified part of the decision be reviewed and may give directions to be complied with before or after the hearing of the review.

(c) There was an obvious error in the decision.

This provision should be read alongside **Regulation 29(3)** that states that clerical mistakes in any document recording the decision of the Tribunal or errors arising from accidental slips or omissions may at any time be corrected by the nominated Chairman or the President by means of a certificate signed by him. The review procedure is not really strictly necessary in this context. Thus **Regulation 29(3)** Certificates can be used to correct matters of fact such as names, dates, references to statutory material and so on. **Regulation 25(1) (c)** is appropriate when there is an application to review the reasons for the decision because of an obvious error. It has been held that an error in the decision can include an error in the reasons for the decision, and thus a Tribunal should be able to review its reasons (although not the actual decision itself). This is obviously a sensible and relatively inexpensive way to deal with concerns raised by either side suggesting that the reasons for the decision contain an error.

The old *POCA Regulations* had a further ground for review “The interests of justice so require”. This provision, not without its difficulty, has been removed from the *2002 Regulations*, and thus the review grounds are limited and clearly designed to deal with clerical errors, obvious errors (including errors in the reasons for the decision), and the failure of a party to appear or be represented.

### **The screening process**

(2) The screening process: **Regulation 25(2)** states that an application may be refused by the President or by the Chairman of the Tribunal which decided the case (i.e. the nominated Chairman) if in his opinion it has no reasonable prospect of success. The President will pass the papers to the nominated Chairman to deal with review applications under **Regulation 25**. The Chairman should reach a decision on **Regulation 25(2)** and send his written decision to the Secretariat, for immediate dispatch to the parties.

### **The application for a review**

(3) If he decides that there is a reasonable prospect of success, the Tribunal that decided the case shall determine the application for a review, after the parties have had an opportunity to be heard.

### **The review**

(4) The fourth stage is the review itself, and stages (3) and (4) will almost certainly run together. The Tribunal may set aside or vary the original decision and substitute such other decision as it thinks fit or order a rehearing before the same or a differently constituted Tribunal. **Regulation 26(3)** states that any decision of the Tribunal under this Regulation may be taken by a majority and the decision shall record whether it was unanimous or taken by a majority. Another full written decision will need to be produced.

## **15. APPEALS**

**15.1.** An appeal lies to the High Court under *s 9(6) POCA 1999* on a point of law. Judicial review is not really appropriate (*M v London Borough of Richmond [2002] EWCA Civ 1113*).

**15.2.** The Tribunal should be sent all appeal papers. There is some doubt whether it is entitled to take part in the proceedings. The Tribunal is not a party to the proceedings on appeal. The approach that has been adopted at the present time (admittedly with the experience of only three statutory appeals) is to play no part at all in the appeal process, except to keep a look out for the decision! If the integrity of the Tribunal or of one of its members is impugned, the Tribunal may need to seek legal advice as to whether it would be appropriate for an affidavit to be sworn.

**His Honour Judge David Pearl**

**President**

**January 2006.**