

TRIBUNALS (SCOTLAND) ACT 2014

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 6 – Review or Appeal of Decisions

Internal review

Section 43 – Review of decisions

174. **Section 43** provides powers for the First-tier and Upper Tribunals to review their own decisions without the need for a full onward appeal. The power is discretionary and it will be for each Tribunal to decide whether or not it should review one of its own decisions.
175. Under section 43(2), a decision may be reviewed at the Tribunal's own instance or, with the Tribunal's agreement, at the request of a party in the case.
176. Under section 43(3), no decision may be the subject of a review if it is an excluded decision (see sections 51 to 54 on excluded decisions). Tribunal Rules (see commentary on section 68) made under section 43(3)(b) may also make provision excluding other decisions from being reviewed or otherwise restricting the powers of the Scottish Tribunals to review their own decisions.
177. A decision to review or not to review a prior decision of the Tribunal may not, itself, be reviewed or appealed (section 43(4)) and the fact that a decision has been reviewed does not affect a party's rights of appeal under the Act (section 43(5)).

Section 44 – Actions on review

178. **Section 44** sets out the courses of action which are available to the Tribunals in determining any review. These include taking no action, setting the decision aside, and correcting minor or accidental errors. If the First-tier Tribunal sets aside a decision of its own it must either re-decide the matter concerned or refer the matter to the Upper Tribunal to re-decide. Where the Upper Tribunal sets aside a decision of its own, it must re-decide the matter itself.

Section 45 – Review only once

179. **Section 45** provides that no decision of the First-tier or Upper Tribunal may be reviewed on more than one occasion. A decision on review to set aside an earlier decision and a re-made decision are, however, to be regarded as separate decisions from the earlier decision which was subjected to review and can, therefore, be the subject of a further review. Subsection (3) provides that the power of the Scottish Tribunals to review their own decisions does not affect their powers to correct minor or accidental errors in a decision administratively.

Appeal from First-tier Tribunal

Section 46 – Appeal from the Tribunal

180. **Section 46** makes provision for a general right to appeal a decision of the First-tier Tribunal to the Upper Tribunal. Such an appeal can only be made by a party in the case on a point of law and with the permission of the First-tier Tribunal or (if refused by the First-tier Tribunal) the Upper Tribunal.
181. The general right to appeal a decision of the First-tier Tribunal to the Upper Tribunal under section 46 is not universal and does not apply to excluded decisions (see sections 51 to 54) or a decision of the First-tier Tribunal to review or not to review one of its own decisions (see section 43(4)). Section 55 (process for permission) also prevents a decision of the First-tier Tribunal to refuse permission to appeal to the Upper Tribunal from being appealed to the Upper Tribunal (a separate application can, however, be made to the Upper Tribunal under section 41(3)(b) should the First-tier Tribunal refuse permission to appeal).
182. Permission to appeal to the Upper Tribunal under section 46 is only to be granted if the Tribunal whose permission is sought is satisfied that there are arguable grounds for the appeal (section 46(4)).

Section 47 – Disposal of an appeal

183. **Section 47** provides that, in determining an appeal made under section 46, the Upper Tribunal may uphold or quash the decision of the First-tier Tribunal on a point of law. Where the Upper Tribunal quashes the decision of the First-tier Tribunal it may re-make the decision, remit the case back to the First-tier Tribunal to be re-decided or make such other order as the Court considers is appropriate.
184. Where the Upper Tribunal elects to re-make a decision, subsection (3) enables the Upper Tribunal to make findings in fact and, otherwise, to do anything that could have been done by the First-tier Tribunal if it was re-making the decision.
185. Where the Upper Tribunal elects to remit the case to the First-tier Tribunal, it may direct the First-tier Tribunal as to issues of fact, law and procedure (subsections (4) and (5)).

Appeal from Upper Tribunal

Section 48 – Appeal from the Tribunal

186. **Section 48** makes provision for a general right to appeal a decision of the Upper Tribunal to the Court of Session. Such an appeal can only be made by a party in the case on a point of law and with the permission of the Upper Tribunal or (if refused by the Upper Tribunal) the Court of Session.
187. The general right to appeal a decision of the Upper Tribunal to the Court of Session under section 48 is not universal and does not apply to excluded decisions (see sections 51 to 54) or a decision of the Upper Tribunal to review or not to review one of its own decisions (see section 43(4)). Section 55 (process for permission) also prevents a decision of the Upper Tribunal to refuse permission to appeal to the Court of Session from being appealed to the Court of Session (a separate application can, however, be made to the Court of Session under section 48(3)(b) should the Upper Tribunal refuse permission to appeal).
188. Permission to appeal to the Court of Session under section 48 is only to be granted if the Upper Tribunal or Court of Session is satisfied that there are arguable grounds for the appeal (section 48(4)) except in relation to permission to make a second appeal (see commentary on section 50).

Section 49 – Disposal of an appeal

189. **Section 49** provides that, in determining an appeal made under section 48, the Court of Session may uphold or quash the decision of the Upper Tribunal in question on a point of law. Where the Court of Session quashes the decision of the Upper Tribunal it may re-make the decision, remit the case back to the Upper Tribunal to be re-decided or make such other order as the Court considers appropriate.
190. Where the Court of Session elects to re-make a decision, subsection (3) enables the Court of Session to make findings in fact and, otherwise, to do anything that could have been done by the Upper Tribunal if it was re-making the decision.
191. Where the Court of Session elects to remit the case to the Upper Tribunal, it may direct the Upper Tribunal as to issues of fact, law and procedure (subsection (4) and (5)).

Section 50 – Procedure on second appeal

192. **Section 50** makes provision in relation to a ‘second appeal’ which is an appeal to the Court of Session under section 48 against a decision of the Upper Tribunal on an appeal from a decision of the First-tier Tribunal under section 46 (see the definition in subsection (7)).
193. The effect of subsections (1), (3) and (4) is to prevent the Upper Tribunal and the Court of Session from giving permission to make a second appeal unless the Tribunal or Court (as appropriate) is satisfied that the appeal would raise an important issue of principle or practice or there is another compelling reason for allowing the appeal to proceed.
194. The effect of subsections (2), (5) and (6) is to enable the Court of Session, where it quashes the decision of the Upper Tribunal in relation to a second appeal, to do anything in re-making the decision that could have been done by the First-tier Tribunal or the Upper Tribunal if either of them was re-making the decision. It also enables the Court of Session to remit the case back to either the Upper Tribunal or the First-tier Tribunal with directions as to issues of fact, law and procedure. In addition, if the Court of Session remits the case to the Upper Tribunal, the Upper Tribunal itself may remit the case to the First-tier Tribunal with the directions from the Court of Session.

Excluded decisions

Section 51 – Excluded decisions

195. **Sections 51 to 54** make provision with respect to decisions of the Scottish Tribunals which may not be the subject of a review under section 43 or the subject of the general right of appeal contained in sections 46 and 48. By virtue of section 51, such decisions are known as “excluded decisions”.

Section 52 – Decisions on review

196. **Section 52** provides that certain decisions and determinations in a review under section 43 are excluded decisions. The effect of section 52 is to exclude decisions which have already been set aside under a review under section 43 as well as any decision or determination made as part of such a review (other than any matter which has been re-decided) from being appealed or further reviewed.

Section 53 – Other appeal rights

197. **Section 53** provides that any decision against which there is a right of appeal under any enactment other than the right to review contained in section 43 or the rights of appeal in sections 46 and 48 is an excluded decision. The effect of section 53 is to create a general rule excluding from the rights of review and appeal established by the Act, any decision for which another enactment makes express provision for a right of appeal.

Subsection(2) enables the Scottish Ministers, by regulations, to make exceptions to that general rule.

Section 54 – Position on transfer-in

198. **Section 54** provides that any decision made in the exercise of the functions of the First-tier Tribunal or Upper Tribunal which is specified by the Scottish Ministers in regulations made under subsection (1) is an excluded decision. Subsection (2) provides that a decision made in the exercise of the functions of the First-tier Tribunal or Upper Tribunal may only be specified in regulations if the functions were transferred-in from a listed tribunal by regulations made under subsection 28(2) and, immediately prior to the transfer of those functions, there was no statutory right of appeal against the decision.
199. The effect of section 54 is to enable the Scottish Ministers, by regulations, to exclude the rights of review and appeal established by the Act in relation to decision-making functions which have been transferred-in to the Scottish Tribunals from a listed tribunal from which there was previously no statutory right of appeal.

Miscellaneous procedure

Section 55 – Process for permission

200. **Section 55(1)** enables the Scottish Ministers, by regulations, to specify time limits within which permission to appeal must be sought.
201. **Section 55(2)** provides that a decision of the First-tier Tribunal or the Upper Tribunal to refuse permission to appeal a decision of the First-tier Tribunal to the Upper Tribunal cannot be the subject of review or appeal under the Act. Similarly, a decision of the Upper Tribunal to refuse permission to appeal a decision of the Upper Tribunal to the Court of Session cannot be reviewed or appealed under the Act.

Section 56 – Participation of non-parties

202. It is only a party in a case who can apply for a review of a Tribunal decision under section 43 or appeal a Tribunal decision under section 46 or 48. Section 56(2) enables the Scottish Ministers, by regulations, to make provision so that persons falling within a specified description can be regarded as a party to a case for the purposes of sections 43, 46 and 48.

Special jurisdiction

Section 57 – Judicial review cases

203. **Section 57** makes provision so that the Court of Session may, by order of the Court, remit a petition for judicial review to the Upper Tribunal for determination. The Court may only remit a petition for judicial review to the Upper Tribunal where the petition does not seek anything other than the exercise of the Court's judicial review function (section 57(3)) and it falls within a category specified by an act of sederunt made by the Court for the purposes of section 57(4). The effect of subsection (4) is that no petition for judicial review will be able to be transferred unless an act of sederunt has been made specifying the categories of petitions which may be transferred and the petition falls within one of those categories.
204. In addition, the Court may only remit a petition to the Upper Tribunal if it considers it appropriate to do so having regard to the functions and expertise of the Tribunal in relation to the subject-matter of the petition (subsection (2)(b)).

Section 58 – Decision on remittal

205. **Section 58** provides that the Upper Tribunal has the same powers and should apply the same principles as the Court of Session when determining a petition for judicial review. Subsection (4) makes it clear that a determination of a petition for judicial review remitted to the Upper Tribunal under section 57 is not an excluded decision and can be appealed to the Court of Session in accordance with section 48.

Section 59 – Additional matters

206. **Section 59** makes further provision so that where a petition for judicial review is remitted to the Upper Tribunal, any order made or steps taken by the Court of Session are to be treated as if made or taken by the Tribunal. Subsection (2) enables the procedural rules of the Upper Tribunal to make further provision as to the exercise of the Upper Tribunal's functions in relation to a petition for judicial review.

Section 60 – Meaning of judicial review

207. **Section 60** provides that references in sections 57 to 59 to judicial review are to the supervisory jurisdiction of the Court of Session.