

**Tribunal Procedure Committee (TPC): Telephone Meeting Minutes: Tuesday 24 March 2020 @ 4.30pm**

*(By Teleconference)*

**Present**

(Mr Justice) Peter Roth (PR)  
Michael Reed (MJR)  
Donald Ferguson (DF)  
Tim Fagg (TF)  
Christine Martin (CM)  
Jayam Dalal (JD)  
Mark Loveday (ML)  
Gabriella Bettiga (GB)  
Shane O'Reilly (SoR)  
Catherine Yallop (CY)  
Tony Allman (TA)  
Vijay Parkash (VP)  
Will Ferguson (WF)

**Guest**

Philip Brook Smith, QC (PBS)

**Minutes**

**1. Introduction/Background**

- 1.1 PR thanked the TPC members for agreeing to hold a teleconference meeting at short notice to discuss emergency rule changes in response to the Covid-19 pandemic.
- 1.2 The Senior President of Tribunals (SPT) had requested emergency tribunal rule changes to be made with the concurrence of the Lord Chancellor (LC) through the Tribunal Procedure Committee (TPC) to mitigate the impact of the virus and enable the tribunals to function. The SPT anticipated the resulting amendments would assist the First-tier Tribunal (FtT) and the Upper Tribunal (UT) to adjust their ways of working appropriately.
- 1.3 The TPC considered that if it received a direction from the LC (under paragraph 29 of Schedule 5 to Tribunal, Courts and Enforcement Act 2007) this might be a factor weighing against carrying out a public consultation.
- 1.4 The SPT's office had been working on what would be required in emergency rules and related guidance. A briefing note had been circulated to the TPC on 20 March. The note detailed the SPT office's supporting arguments for his proposals and information about proposed new practice directions (PD) that the SPT was planning to introduce.
- 1.5 The proposed rule changes would be a temporary measure put in place during the crisis, via a statutory instrument (SI) to be named the 'Tribunal Procedure (Coronavirus) (Amendment) Rules 2020'.
- 1.6 PR asked MoJ policy officials to confirm the status with the preparation for the SPT's PDs, the legislative progress of the Coronavirus Bill 2020 ('the Bill') and whether the SPT's comments (below) had been incorporated into a revised briefing note that would

be put up to the LC with other related advice on this topic. PR said he had made the following comments to the SPT's office:

- The direction from the LC to the TPC should state that the rules are being made as a temporary measure;
- The direction should preferably not specify a time within which the rules have to be made (although it could say that they should be made urgently) and
- The actual terms and wording of the resulting rules are a matter for the TPC.

1.7 SoR advised that the Bill had a sunset provision that provides that the law shall cease to have effect after a 2 years period, unless further legislative action was taken to extend the law.

1.8 TA said that the PDs and the supporting advice were presently with the LC's private office and that the Bill was presently being debated in the House of Lords. The Bill was expected to complete all the parliamentary stages in both houses and receive royal assent on 25 or 26 March. VP said that he understood that TPC's comments had been incorporated into the final briefing put up to the LC and that he would circulate the final briefing note to the TPC after the teleconference meeting had concluded.

**AP/08/20: – To circulate the final briefing note put up to the LC to TPC members - TPC Secretariat.**

1.9 The requested amendments to the present Tribunal Procedure Rules to be included in the SI, would introduce the following temporary measures:

- (i) A new rule that applies to all of the jurisdictions within the unified tribunals, which allows the FtT and the UT to make a decision on the papers without the parties' consent, in circumstances where a decision is urgent and a hearing is not reasonably practicable by any other means;
- (ii) To amend Rule 37 of the Tribunal Procedure (First-Tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 to extend the timeframe for hearing Section 2 cases under the Mental Health Act 1983 from 7 days to 10 calendar days, with the option of extending the time limit further if 10 calendar days is still not practicable and
- (iii) To amend rule 11 of the Tribunal Procedure (FtT) (Property Chamber) Rules 2013, so that there is 28 days in which to pay the fee.

1.10 In addition, an amendment in respect of private hearings was sought:

- (i) The introduction of a new rule to allow the FtT and UT (unified tribunals) to direct a remote hearing to take place privately, if it is not practicable for that hearing to be broadcasted to the public in a Court or Tribunal building. If a hearing does take privately it will be recorded and any person may access that recording afterwards. This proposal for a change had not been made under direction from the LC but instead, to remedy a gap in the Bill.

1.11 PR summarised the comments/observations to the initial draft briefing note that had been subsequently presented to the TPC members leading up to the teleconference meeting. CY provided an update for the progress by the SPT's office and MoJ policy to prepare the tribunals PD.

1.12 The TPC agreed that the proposed SI would be made as part of emergency measures to mitigate against the impact of COVID-19 on the unified tribunals. The Rules would be designed/drafted to be temporary and would be in place throughout the pandemic and accordingly would be subject for review and monitoring by the TPC as appropriate.

1.13 There was discussion as to whether a single set of rules may not be appropriate to be introduced across all the tribunal jurisdictions for the circumstances identified by the SPT. This was because an 'one size fits all' approach may not be appropriate, for example the proposed rule(s) to be applied for 'private hearings' may not be suitable for the Criminal Injuries Compensation jurisdiction due to the unique nature/circumstances of the cases that are heard in that unique jurisdiction. SoR said he would review the current set of chamber tribunal procedure rules to identify whether any jurisdictions/tribunals should be excluded from the general rule(s). SoR said it was likely that the final agreed provisions to be inserted into each set of tribunal rules would be nearly identical. The draft SI's explanatory note and the accompanying explanatory memorandum would point out to tribunal users which tribunal jurisdictions had been omitted for each set of tribunal rules.

**AP/09/20: – To redraft the wording for the uniform Rule(s) and circulate to the TPC - SoR.**

1.14 DF reported that the Lord President had been consulted on the proposed temporary emergency measures and that he was content with what was proposed.

1.15 PR said it was important to share the draft SI with the tribunal chamber presidents to obtain their views on the proposed amendments as they had the specialist knowledge for their respective chamber and therefore would be best placed to identify any issues or concerns requiring the TPC's further consideration. CY said she would share the draft SI with the chamber presidents and report back to SoR and the TPC Secretariat their comments/observations.

1.16 In view of the urgency of the situation, it was agreed that wider consultation was not practicable at this time.

**AP/10/20: – To circulate draft SI to Chamber Presidents and report back their findings to VP and SoR - CY.**

### Open Justice

#### Paper based decisions

1.17 PR said that the SPT had asked the TPC to consider making a new Rule in respect of paper-based decisions following the Government's urgent advice recommending to the public against making any unnecessary travel during the crisis. The TPC agreed that the physical attendance by the public at tribunal hearings would increase the risk of infection for all parties involved in the tribunal proceedings and would be in conflict with Government self-isolation advice.

1.18 The SPT considered the new Rule was necessary because he was mindful that some jurisdictions in the unified tribunals didn't allow for cases to be determined on the papers without the parties' consent. Therefore, the TPC had been asked to introduce a

rule change only in the circumstances where a decision was deemed urgent, and a hearing is not reasonably practicable. The amendment would reduce the risk of infection between tribunal users, HMCTS staff and the judiciary by allowing the tribunal in certain prescribed circumstances to make decisions without the need for a hearing.

### Private hearings

- 1.19 The proposed rule amendment in respect of 'Open Justice' issues regarding modifying the process for private hearings would not be made under the direction from the LC. The TPC commented that the existing tribunal rules provided the tribunal with the power to grant access to specified parties to recordings already.
- 1.20 CY said that the SPT's Office and HMCTS had been working jointly to examine what measures needed to be put in place during the crisis to make it possible for tribunal hearings to be heard remotely in circumstances where cases cannot be dealt with on the papers. The SPT's Office had initially thought that a rule change was not needed to deal with this issue, as the Bill has provisions in clause 53 and schedule 23, which allowed a court or tribunal to direct that hearings could take place via a video link or audio hearing, and with some amendments to the Bill, those new provisions would have covered the issue for the arrangements to conduct a tribunal hearing during the ongoing crisis.
- 1.21 CY said that a rule change was deemed important because the Bill enables the public to observe hearings that proceed via remote technology but does not explicitly cover the situation where some of that technology is not in a court or tribunal building. CY added that during the crisis, HMCTS (responsible for the administration for tribunals) may not have the necessary IT infrastructure to allow all remote hearings to be accessed. Judicial office had proposed an amendment to the Bill to deal with this issue, but MOJ Policy had confirmed prior to the teleconference meeting that the LC had not been able to consider/pursue the amendment due to time constraints involved before the Bill was expected to receive royal assent.
- 1.22 CY explained that the Bill allowed for the public to observe hearings that proceed through remote technology from an offsite location. However, a disparity arises as the Bill does not cover circumstances where that technology to access remote hearings is not available in a Court or Tribunal building. With the limited audio and video link capabilities throughout HMCTS it would be impossible for all remote hearings to be accessed by the public through either video or audio means. CY added that this issue was further exacerbated by the fact that tribunal buildings with the proper technology would be closed and that operational staff required to operate the equipment were now working from home. Therefore, the proposed rule change would allow the unified tribunals to direct remote cases to be heard in private if they could not be broadcast and accessed by the public, to ensure access to justice for tribunal users.
- 1.23 CY said the SPT planned to issue a PD as a temporary measure until the TPC SI came into force. CY added that where a case was being heard remotely, the Tribunal may direct that the case takes place in private if it is not practicable for that hearing to be broadcast to the public in a Court or Tribunal building or accessed by a media representative. The PD would also state that where a media representative was able to access the proceedings remotely while it was taking place, the proceedings would constitute a public hearing. However, any hearing that does take place in private must be recorded via either video or audio, where it is practicable. Any person may then access these recordings after a decision had been reserved.
- 1.24 CY said that this approach had already been followed by the Civil Procedure Rules Committee and that the Master of the Rolls (MR) was planning to imminently issue a PD

under Civil Procedure Rules (CPR) Part 51 (transitional arrangements and pilot schemes), which enables 'pilot schemes' to be introduced which have the force of rules. CY added the purpose for the MR issuing the PD was to ensure that the provision comes in immediately, pending a SI to amend the CPR. Simultaneously with the preparation of the MR PD, an SI was being prepared by the MoJ Civil Policy team and MoJ lawyers. Once in force, the SI would add the rule change to the CPR and replace the pilot scheme PD.

- 1.25 PR thanked PBS for his initial draft that had been adopted by SoR and circulated to the TPC prior to the telephone meeting.
- 1.26 The TPC discussed the draft wording needed for the 'private hearing' rule, specifically to comply with the direction by the LC in respect of the way the recording would be made by the Tribunal. ML suggested that the draft rule adopt the same approach as CPR PD 51Y.
- 1.27 The TPC agreed that reference to 'media representative' was not deemed necessary as their proposed Rule for private hearings as redrafted by SoR was deliberately more flexible. This would be consistent with the TPC's approach of drafting simple Rules to ensure tribunal users were able to follow the tribunal procedure. The TPC discussed how a private hearing under rule 26(3A) would work in practice and how the process would work.
- 1.28 PR asked SoR if there was need for the rule on directing audio/video hearings to specifically refer to the new power under the Bill. SoR said he would consider this issue and report back his view to the TPC.

**AP/11/20: – To consider whether audio/video hearing rule needs to refer to Coronavirus Bill - SoR.**

- 1.29 To summarise, the TPC agreed in principle to introduce a new rule to cover 'private hearings'. The desired aim of the rule would provide the unified tribunals with a power to conduct remote hearings, either video or audio proceedings, in private if it is not practicable for that hearing to be broadcasted or accessed by a media representative. Those hearings which are conducted in private must be recorded, where it is practicable, in a manner directed by the Tribunal.

Mental Health, Section 2 cases

- 1.30 PR summarised the nature of Section 2 cases: they referred to individuals who were detained under Section 2 of the Mental Health Act 1983. Section 2 provides for an individual to be kept in hospital for up to 28 days for an assessment and treatment of their mental disorder. Section 2 cases must start within 7 calendar days after the Tribunal receives an application notice. The SPT's proposal was to increase this time limit to 10 days, with the option of extending the time limit if 10 calendar days was still not practicable.
- 1.31 The SPT's office had advised that the current listing arrangements would be difficult for HMCTS to comply with during the crisis. CY commented that the Mental Health jurisdiction already had difficulties in listing Section 2 cases for hearing within 7 calendar days prior to the COVID-19 outbreak. The pandemic has resulted in a reduction in staff with fewer staff available to list these cases. It was considered by the SPT's office that amending this rule would provide greater flexibility to list Section 2 cases and reduce further pressures on HMCTS.

1.32 It was noted that the TPC were currently consulting on this issue. The TPC agreed in principle to the wording for the draft emergency rule change.

#### Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013

1.33 The SPT's office had asked the TPC to consider whether an amendment to rule 11 was necessary to address the administrative process for payment of fees by tribunal users. Presently the only choice in the Property Chamber (FtT) for payment was by cheque sent in the post and there was no option for electronic payment of these fees, whether online or over the telephone. The SPT's office had expressed concern that the users of those tribunals where electronic payment is not available would struggle to obtain cheques and post them, i.e., a fee must be paid both to start proceedings and within 14 days of notice of the hearing date.

1.34 ML said that Judge McGrath, the President of the Property Chamber (FtT), had already issued emergency presidential guidance to tribunal users to address this matter. He thought the concerns outlined in the briefing paper in respect of electronic payments was no longer a live issue.

1.35 The TPC agreed with the assessment by Judge McGrath (as detailed in her guidance note circulated to TPC on 22 March) that the action/outcome desired by the SPT's office to resolve the 'fees payment' dilemma could be achieved by making an amendment to the current First-tier Tribunal (Property Chamber) Fees Order 2013. Therefore, this issue did not require the TPC's direct involvement. The TPC agreed to revisit the matter if required.

#### General

1.36 PR asked SoR to reviset his draft Rules to incorporate the comments that had been made by the TPC. He asked the TPC members to send any further feedback on the drafting of the general provisions to SoR.

1.37 PR said he hoped the draft rules changes could be agreed by the TPC out of committee but asked the participants to keep a slot available on Thursday 26 March if there was a need to hold a further teleconference to agree and finalise the draft SI.

**AP/12/20: – To send any comments on the proposed draft rules to SoR - TPC Members.**

**AP/13/20: – To redraft the draft Rule suggestion and circulate to the TPC - SoR.**

**Next Teleconference Meeting: Thursday 26 March 2020 (TBC)**