

Tribunal Procedure Committee (TPC): Telephone Meeting Minutes: Thursday 26 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)
Shane O'Reilly (SoR)
Tony Allman (TA)
Vijay Parkash (VP)
Will Ferguson (WF)

Guest

Philip Brook Smith, QC (PBS)

Apologies

Gabriella Bettiga (GB)
Catherine Yallop (CY)

Minutes

1. Introduction

1.1 PR thanked the TPC members for agreeing at short notice to participate in a follow-up telephone meeting following the 24 March telephone meeting.

1.2 PR said that the LC had written to him (in his capacity as the TPC Chairman) on 25 March 2020. The LC's letter detailed the objective of his ministerial direction in respect of:

- A rule amendment extending the timeframe for starting the hearing of an appeal under Section 66(1) (a) of the Mental Health Act 1983 in the First-tier Tribunal from 7 to 10 calendar days, with the option of extending the time limit further if 10 calendar days is still not practicable.
- The creation of new rule, which allows both the First-tier Tribunal and Upper Tribunal to decide on the papers without the parties' consent. This power would be applied by the tribunal in circumstances where a decision is urgent, and a hearing is not reasonably practicable.

1.3 PR said that the TPC had agreed on 24 March in principle to make these rule changes due to the unique and specific set of circumstances outlined in the LC's letter. Similarly, the TPC had agreed to make a general rule amendment to allow the First-tier Tribunal (FtT) and the Upper Tribunal (UT) to direct a remote hearing and in circumstances where a hearing does take privately, the arrangements the tribunal should follow for the recording of proceedings.

1.4 SoR said he had incorporated the comments received from the TPC members to his initial draft set of rules that he had circulated to the TPC following the initial

teleconference on 24 March. PR thanked SoR for his endeavours to have a comprehensive set of proposals ready for the TPC to consider/discuss at the meeting.

1.5 PR said that the aim would be to discuss the latest draft rule revisions, with an aspiration to agree a near final version for the proposed drafting of the rule amendments to be included in a draft Tribunal Procedure (Coronavirus) (Amendment) Rules statutory instrument (SI). PR added this would be subject to DF's consultation with the Lord President, which was a statutory obligation. PR added that the amendments and the new rule changes needed to be consistent with the overarching requirement in section 22(4)(b) of the Tribunals, Courts and Enforcement Act 2007 that the tribunal system is accessible and fair.

1.6 The TPC discussed the proposed /wording text for the draft rules:

Mental Health, Section 2 cases

1.7 The TPC agreed the amendment to rule 37 of the HESC Rules. The rule change would extend the time limit within which the hearing of an appeal under 66(1)(a) of the Mental Health Act 1983 must be started, and to provide the Tribunal with the discretion to extend that time limit when it is not reasonably practicable for it to be complied with.

Open Justice

1.8 The TPC agreed the drafting for a rule amendment about when hearings are heard in private or public. SoR said that the plan was for the rule amendment to be inserted into each set of tribunal rules other than the current Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules. ML referred to the requirement for a "public" hearing in Article 6 of the European Convention on Human Rights. The emergency rule is amply justified by the exceptional circumstances of the coronavirus pandemic. There is a need to ensure (i) the administration of justice does not endanger public health by having unnecessary 'live' hearings, and (ii) proceedings are not unduly delayed. A final determination might not happen for a very long time if an oral hearing was required in the current circumstances.

Remote & Private and Public hearings

1.9 PR said at the 24 March meeting the TPC had agreed in principle the formula for the wording/text of the draft amendment for public and private hearings and a new rule on recording of remote hearings in each set of tribunal rules. The SPT's office had advised that the Practice Directions (PD) and associated guidance would be changed to give priority to paper determinations or, where necessary, remote hearings (by telephone, Skype, video, or online where the technology was available) and that remote hearings will be recorded.

1.10 The TPC discussed the revisions to SoR's initial draft for the new audio/video hearings rule in respect to public and private hearings, following comments from the SPT's office and TPC members. The TPC referred to the SPT's PD on the conduct of proceedings during the Covid-19 pandemic and the changes being introduced by section 29ZA (as inserted into the Tribunals, Courts and Enforcement Act by Schedule 25 to the Coronavirus Bill 2020).

1.11 PR said that if a video or audio hearing was classified as a public hearing, then in accordance with the new section 29ZA the Tribunal may direct that it is broadcast to the public and/or that a recording of the hearing is made. However, schedule 29ZA does not apply to a private hearing.

- 1.12 PR recapped that the SPT's PD had referred specifically to accessing the recording in a tribunal or court building. The TPC considered that the proposed rule should be more flexible with regards to access "in such manner as the Tribunal may direct."
- 1.13 PR said that the objective of the new rule would be:
- to enable a video or audio hearing that cannot be broadcast in a court or tribunal building to be classified as public hearing on the basis that a "media representative" can access it and
 - to enable there to be a video or audio hearing which a media representative cannot access and which is thus a private hearing, but with provision for it to be recorded so that anyone can apply to access that recording.
- 1.14 There was discussion as to whether "media representative" needed definition. SoR explained that in the Criminal Procedure Rules the term is also used without definition. The TPC recognised that formulating a definition would be difficult and that its interpretation was therefore better left to the Tribunal's judgment in the particular case.
- 1.15 The TPC discussed how the rule would be applied for the following scenarios:
- what if more than one media representative wanted to access the proceedings; and
 - what if members of the public (but no media representative) wanted to access the proceedings.
- 1.16 It appeared that provided that one media representative can access the proceedings, the proceedings will be classified as 'public proceedings' with the consequence that the new section 29ZA would apply. Consequently, the Tribunal would be able to direct that a recording is made. Hence, anyone could apply to access that recording, as for all other public hearings. Since other media representatives would be able to access the recording they don't need to be given the right to do so under the proposed new rule.
- 1.17 The TPC agreed to modify the draft rule to make it clearer to Tribunal users that the public had a right to access a recording of a "public hearing". The TPC asked SoR to add a sub-rule to address the arrangements for a hearing to show when it is not a private hearing only because a media representative is able to access it.
- 1.18 PBS and ML asked about status of the Fees issue that had been discussed on 24 March in respect of the SPT's office proposal whether the TPC would consider amending rule 11 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, so that there is 28 days in which to pay the fee was no longer a matter.
- 1.19 PR said there had been further legal and policy advice since 24 March that this issue did not need an amendment to the current Property Chamber Rules and that he didn't expect this matter required any further consideration by the TPC. The TPC would revisit this matter if required.
- 1.20 The TPC agreed that the Chamber Presidents should be consulted by the SPT's office about the proposed emergency amendments. The TPC considered it was important for the judiciary to have the opportunity to provide their comments.
- 1.21 The TPC discussed what further actions were required input from the Committee to finalise the SI exercise. SoR agreed to circulate a revised draft of the SI following the

meeting. The TPC agreed that the draft SI would be circulated to the Tribunal Chamber Presidents by the SPT's office.

AP/14/20: – To update the set of draft rules and circulate to TPC members and SPT's office- SoR.

AP/15/20: – To circulate draft SI to chamber Presidents - VP/SPT's office.

1.22 SoR said he would contact the TPC members about the arrangements to sign-off the final SI.