

Tribunal Procedure Committee (TPC): Online Meeting Minutes: Thursday 14 May 2020

Via Microsoft Teams

Present

(Mr Justice) Peter Roth (PR)
Michael Reed (MJR)
Jayam Dalal (JD)
Christine Martin (CM)
Donald Ferguson (DF)
Gabriella Bettiga (GB)
Mark Loveday (ML)
Tim Fagg (TF)
Shane O' Reilly (SOR)
Rebecca Lewis (RL)
Vijay Parkash (VP)

Guests

Philip Brook Smith (PBS)
Louis Kopieczek (LK) – (Liaison Judge- Upper Tribunal)
Bill Dowse (BD)- (Ministry of Justice-Head of Administrative Justice Team)

Apologies

Catherine Yallop (CY)

Minutes

1. Introductory matters

1.1 An apology was received from: CY.

1.2 PR said that Adam Smith (AS) had left the TPC Secretariat and moved to a new role in the MoJ Judicial Review policy team. VP said that the TPC Secretariat would be acting to recruit his replacement in due course. The TPC wished AS the best success in his new policy role.

1.3 The draft minutes of the TPC meeting held on 12 March 2020 and the teleconference meetings held on the 24, 26 and 27 March (to discuss the drafting for rules to be included in the Tribunal Procedure (Coronavirus) (Amendment) Rules 2020 statutory instrument were approved subject to minor amendments.

AP/17/20: To amend the 12 March TPC meeting minutes and 24, 26 & 27 March TPC teleconference meeting minutes to reflect comments received from TPC Members. –TPC Secretariat

TPC Action Log

1.4 The TPC action log had been updated.

Matters arising

Lord Chancellor's (LC) appointments

1.5 PR said there had been a delay in finalising the report by the chair of the selection committee (due to Covid-19 priorities) which had impacted on the timing for the LC appointment exercise to conclude. He understood that the TPC Chair report had now been sent to the MoJ Public Appointments Team for their consideration and further action. He expected the LC appointment exercise would be resolved shortly and he would provide an update at the 04 June TPC meeting.

Lord Chief Justice's appointments

1.6 PR said that the Lord Chief Justice (following concurring with the LC) had agreed to extend JD's term on the TPC until the 31 March 2021. PR thanked JD for her ongoing support and dedication to the Committee.

2. Tribunal Procedure (Coronavirus) (Amendment) Rules 2020

2.1 PR asked SoR and BD if there were any new developments in respect to the pre-action protocol (PAP) letters challenging the arrangements in the Immigration & Asylum Chamber (IAC) of the First-tier Tribunal (FtT) following the note circulated by BD to the TPC regarding the legal challenges.

2.2 BD said that the Government Legal Department has responded to the four PAP letters, rejecting the challenge on all grounds for each appellant's PAP letter. BD added that he would update the TPC if there were any further developments regarding the legal challenges.

AP/18/20: To update the TPC with any further developments regarding the pre-action protocol letters. –BD and TPC Secretariat.

3. HSW Sub-group (HSWSG)

Consultation on Mental Health Tribunal (MHT) reforms

3.1 CM said that the TPC consultation exercise on MHT reforms had ended on 07 April 2020. The TPC Secretariat had received 61 replies. She had prepared a draft consultation reply which had been circulated to the HSWSG for their initial comment and any suggested revisions prior to the draft reply being discussed by the TPC. PR and the TPC members thanked CM and the HSWSG members for all their effort and time devoted to progressing this work.

3.2 The TPC noted that some of the replies opposed the timing of the TPC consultation, given that the Government had not announced which recommendations, it would be adopting following the independent review of the Mental Health Act 1983 and subsequent report published in December 2018. The 2018 report set out recommendations for government on how the Mental Health Act 1983 and associated practice needed to change.

3.3 The TPC noted that since this consultation process began, the Tribunal Procedure (Coronavirus) (Amendment) Rules 2020 SI had already put in place rule changes, to extend the timeframe for Section 2 appeals in the MHT (replicating the proposal as set out in the TPC MHT consultation), albeit on a temporary basis to mitigate the impact of Covid-19 on the existing listing practice.

3.4 The TPC agreed that it would not be appropriate to introduce new permanent rules for Section 2 appeals as consulted, given that the equivalent change had now been made on a temporary basis until a reasonable time had lapsed for the judiciary and HMCTS to gather reliable evidence/data to evaluate the experience with this change. Following the evaluation exercise, the gathered evidence and any anecdotal feedback from tribunal users, the TPC can consider this further. It was agreed to issue a Reply to the consultation on that basis and PR asked the TPC members to pass on any further comments in respect of the suggested revisions to the draft Reply to CM.

3.5 The TPC agreed to discuss the revised draft MHT reply at the 04 June TPC meeting.

AP/19/20: To provide any comments/ suggested revisions for the draft MHT Reply to CM. –TPC Members.

AP/20/20: To circulate a revised draft of the MHT consultation reply to TPC Members. –CM.

Victim's accountability/ involvement in the Mental Health Tribunal (MHT) proceedings

3.6 PR said that he had written to the author of the article 'Victims and the Mental Health Tribunal' (following the subject being discussed at the 12 March TPC Meeting to thank him for bringing his observations to the attention of the TPC.

3.7 CM said she had reservations whether the TPC was the appropriate body to consider and address the author's concerns. Her initial view was that the TPC should be concerned only with the tribunal procedural rules governing the MHT rather than perceived flaws resulting from the underpinning primary legislation (referenced in the article) and the associated mental health policy that the government was responsible for.

3.8 The TPC discussed the issues raised in the article that related to the tribunal procedural rules and how the MHT system in Scotland worked in relation to oral representations. The TPC agreed that further study was required by the HSWSG and for the TPC to reconsider the topic at the 04 June TPC meeting after further investigation had taken place.

3.9 PR said that prior to returning to the MHT topic that it would be helpful for the HSWSG to consider the current MHT guidance available to the public for 'representations from victims', to consider the recommendations detailed in the Victims' Commissioner's report published in 2018 (in relation to the points highlighted in the article) and for CM to consult the Chamber President of the Health, Education and Social Care (HESC) (FtT) to establish their view and if they had any comments/observations for the TPC to consider in respect to the significant issues raised in the article.

AP/21/20: To identify and circulate the current guidance available to the public 'for representations from victims' to TPC Members. –CM.

AP/22/20: To circulate the 2018 Victims' Commissioner's report to TPC Members. –CM.

AP/23/20: To discuss the points raised in the 'Victims and the Mental Health Tribunal' article with the HESC Chamber President. –CM.

AP/24/20: To add the 'Victims and the Mental Health Tribunal' topic as an item for the 04 June HSWSG meeting agenda. –TPC Secretariat.

4. IAC Sub-group (IACSG)

Consultation on Tribunal Procedure Rules (FtT (IAC) Rules 2014 & Upper Tribunal Rules 2008) in relation to digital online reform changes to current administrative processes

4.1 Due to the uncertainty and impact of the coronavirus pandemic on the IAC, the TPC agreed to pause the work by MJR and the IACSG on a draft consultation. The TPC had previously agreed to consult on proposals for rule changes to assist HMCTS to achieve end to end digital online working as part of the reformed IAC service. The TPC acknowledged that the sudden coronavirus pandemic had driven HMCTS to accelerate their timetable to introduce digital online reforms in response to the Covid-19 pandemic to ensure the safe and efficient administration of justice for IAC users. Accordingly, the TPC would now aim to publish a consultation in the autumn at the earliest.

4.2 MJR said it would be helpful for the IACSG to understand the scope for any digital online process changes that had already been introduced by the IAC Reform team (following their presentation to the TPC on 12 February 2020), and any likely modifications in the legal aid payment regime. CM said she understood that the current legal aid regime was to be reconfigured away from payment for hearing to payment for preparation for legal practitioners.

4.3 MJR said that it would be useful for the IACSG to consider any judicial feedback from the IAC Presidents in relation to the new way of working for new digital online appeal types and how they considered the recent rapid introduction of reformed digital online processes had impacted on their respective chambers. MJR said this information/ update from IAC Reform Project Team and any feedback from the IAC judiciary would be useful to assist the IACSG recasting the draft consultation and for the IACSG to consider any further implications for appeals types outside of the scope of the current IAC reform online workstream, e.g.,

detained cases, out of country work and how a bespoke end-to-end service for appellants in person would be operated.

AP/25/20: To add the IAC Digital online reforms topic as an item for the 04 June IACSG meeting agenda. –TPC Secretariat.

5. GTCL Sub-group (GTCLSG)

GRC consultation

5.1 PBS said he was awaiting an update from the TPC Secretariat for whether they had secured a grid slot timing from No.10 to publish the TPC consultation 'on possible changes to the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009' on the TPC webpage on GOV.UK.

5.2 VP said he had discussing the matter with MoJ News Planning team colleagues and that they had provided him with a provisional date on 15 May 2020 for the GRC consultation to be published. The TPC had previously agreed that the consultation period would be 12 weeks.

5.3 PBS said that there were no other urgent issues requiring the TPC's immediate attention.

6. Costs Sub-group

Electronic Communications Code cases

6.1 ML reported on proposed rule changes to the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 in relation to Electronic Communication Code (ECC) cases (the topic had been first discussed at the 12 March TPC meeting).

6.2 ML said he had discussed this matter with Judge McGrath and Judge Rodger QC, who were both supportive for a rule amendment to be introduced to permit costs to be awarded for ECC cases in the Property Chamber (FtT) if a suitable case was directed to be transferred down to the FtT from the Upper Tribunal (UT).

6.3 The TPC agreed to revisit this topic at the 04 June TPC meeting. ML agreed to draft a note explaining the rationale for the Property Chamber rule changes and possibly indicative drafting for what the rule changes may look like.

AP/26/20: To provide a note about amendments to the Property Chamber (FtT) costs rules for the 04 June TPC meeting. –ML

7. Confidentiality Subgroup

7.1 This agenda topic was put back due to TF having to leave the TPC meeting for urgent personal reasons.

7.2 In relation to AP/59/19 (RL to get an update from each Tribunal Chamber of their view in light of the 'Dring' case), PR said the action point would be discussed by the TPC at the 04 June TPC meeting.

8. Tribunal Procedure (Amendment) Rules 2020 SI Exercise

8.1 PR thanked SoR for his work preparing the draft Tribunal Procedure (Amendment) Rules 2020 SI and the marked up versions of the draft rules (illustrating how some of the amendments made by the draft SI would look). PR said that the note explained to the TPC why the amendments were being made in the draft TPC Amendment SI and sought further instructions on several points.

8.2 The TPC discussed the points raised in the note that SoR had asked for their clarification. The TPC agreed the below provisions to be included in the TPC Amendment SI:

Access to recordings

8.3 To restore the omission in respect of the Tribunal Procedure (Coronavirus) (Amendment) Rules 2020 of the provision about access to recordings. The provision would be made subject to a sunset provision identical to the one in the Coronavirus Rules.

Amendments in consequence of the commencement of the Courts and Tribunals (Judiciary and Functions of Staff) Act 2018

8.4 After a full discussion the TPC agreed in principle for this rule amendment to be included but asked SoR to check with the Senior President of Tribunal's (SPT) office how they understood the word 'authorised' (cross-referenced by the related provision in the Tribunal, Courts and Enforcement Act 2007 which had been made redundant by the commencement of the Courts and Tribunals (Judiciary and Functions of Staff) Act 2018) should apply and what was involved in the SPT authorising the exercise of judicial functions by Tribunal Caseworkers.

AP/27/20: To clarify the term 'authorised' with the SPT's office following comments from the TPC. – SoR.

Immigration: deleting and updating out-of-date references

8.5 The TPC agreed to SoR's recommendation to delete some wording which was made redundant by the quashing of the detained fast track rules, amendments to address out-of-date references for the repealed Immigration (European Economic Area) Regulations 2006 rather than the current Immigration (European Economic Area) Regulations 2016 and an error in the existing paragraph (2) of rule 16 of the FtT IAC Rules to remove the reference to 'finally determined'.

Amendment to the time limit provision in disability discrimination in schools' claims

8.6 The TPC agreed to the fixing of the provision about time limits in disability discrimination in schools' cases.

8.7 SoR confirmed that the legislative timetable was unchanged and that he was still intending to make the 30 June laying date for the SI.

AP/28/20: To send any revisions to the draft SI by the 21 May 2020 to SoR. – TPC Members.

AP/29/20: To redraft the draft SI to reflect comments received from TPC Members for the 04 June TPC meeting. –SoR.

9. Overview Sub-group (OSG)

TPC Work Programme

9.1 The TPC work programme has been updated and circulated as at 01 May 2020.

9.2 It was agreed that Section 1- Tribunal Procedure Rules work plan should be updated to add the following new entries:

- Victim's accountability/ involvement in the Mental Health Tribunal proceedings and
- Judgment: *F v Responsible Body of School W*

AP/30/20: To amend the TPC Work Programme to reflect comments received from TPC Members. – TPC Secretariat.

10. AOB

Judgment: *Devani v SSHD* (UT Rule 24)

10.1 PR said SoR (via VP) had forwarded details of the *Devani v SSHD* judgment that had been handed down on 07 May 2020 by the Court of Appeal. The significant interest to the TPC was that the judgment concerned the issue 'rule 24 of the Upper Tribunal Rules' (response to the notice of appeal).

10.2 The TPC agreed to discuss the matter at the 04 June TPC meeting. SoR agreed to provide a guidance note regarding the judgment covering any issues requiring the TPC's consideration and further input.

AP/31/20: To provide a note on the *Devani v SSHD* judgment for the 04 June TPC meeting. – SoR.

Judgment: *F v Responsible Body of School W*

10.3 PR said that in a recent case (*F v Responsible Body of School W*) Upper Tribunal Judge Ward directed that a copy of the decision be sent to the Tribunal Procedure Committee. The TPC agreed to discuss the judgment at the 04 June TPC meeting.

AP/32/20: To add the topic '*F v Responsible Body of School W*' as an agenda item for the 04 June TPC meeting. – TPC Secretariat.

04 June TPC meeting

10.4 PR asked the TPC members if they had any concerns if the timing for the TPC meeting on 04 June was brought forward from 10.30am to 9.30am, as he had a hearing in the afternoon which he could not postpone. The TPC agreed for the 04 June TPC meeting to start at 09.30am.

Next Meeting: Thursday 04 June 2020, 9.30 am