

Tribunal Procedure Committee (TPC): Online Meeting Minutes: Thursday 04 June 2020

Via Microsoft Teams

Present

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

Guests

Philip Brook Smith (PBS)

Apologies

Gabriella Bettiga (GB)
Catherine Yallop (CY)
Louis Kopieczek (LK) – (Liaison Judge- Upper Tribunal)

Minutes

1. Introductory matters

1.1 Apologies were received from: GB, LK and CY.

1.2 The draft minutes of the TPC meeting held on 14 May 2020 were approved subject to minor amendments.

AP/33/20: To amend the 14 May TPC meeting minutes to reflect comments received from TPC Members. –TPC Secretariat

TPC Action Log

1.3 The TPC action log had been updated.

1.4 In relation to AP/59/19, TF said that the update in respect of the 'Dring' case noted on the TPC Action log was incomplete. It was his understanding that the confidentiality questionnaire in respect of the (First-tier Tribunal) Social Entitlement Chamber (SEC) had not yet been completed due to a change in senior judicial roles following the retirement of Judge Aitken, the former SEC President. He expected the acting SEC Chamber President would reply to the confidentiality questionnaire that the Senior President of Tribunals (SPT)'s office had circulated to the Chamber Presidents of the First-tier Tribunal (FtT) and Upper Tribunal (UT) seeking their thoughts.

Matters arising

Lord Chancellor's appointments

1.5 PR said the MoJ Public Appointments Team (PAT) had submitted their final submission to the Lord Chancellor detailing their appointment recommendations. He added that the PAT had advised the TPC Secretariat that due to the ongoing Covid-19 pandemic that there would be a delay for the TPC appointments to be confirmed, i.e., to expect a longer response time for Ministers, the subsequent consultation exercise with Lord Chief Justice and security clearance checks to be settled.

1.6 PR said it was likely that a ministerial decision would be announced by the end of June 2020 and that he anticipated the new TPC members to be in post by early August 2020.

2. 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 IAC administrative processes

2.1 MJR said that following the IAC reform topic being discussed by the TPC on 14 May the IAC Reform team had prepared a note and associated papers which had been circulated to the IACSG on 03 June. The objective of the note was to provide an update to the IACSG and TPC with the latest developments in respect of the digital online reforms in the IAC, a summary of requested judicial observations and provide clarification for the other associated questions asked by the IACSG, i.e., in respect of updates for suggested changes to the current IAC procedure rules (to assist HMCTS to achieve end-to-end digital online working, as part of the reformed IAC digital service) and any likely modifications to the present legal aid payment regime that the IACSG should be aware of to prepare a consultation paper.

2.2 MJR said that since the substantial amount of detail/information provided by the IAC Reform Team had only just been received, the IACSG had not had an opportunity to digest the information and to discuss the matter, which would be sensible before it was discussed fully by the TPC.

2.3 PBS commented that a substantive change highlighted in the note was that the anticipated end date for the IAC reform project had been extended to the 31 March 2021. MJR said the IACSG may hold an online meeting before the 09 July TPC meeting to discuss the IAC reform material.

2.4 MJR said that he would provide his appraisal at the 09 July TPC meeting which would include the IACSG observations for any change to the approach and scope of the draft consultation paper that he had already been developing. PR said the TPC would revisit the IAC online reforms topic at the 09 July TPC meeting.

AP/34/20: To add the 'IAC Digital online reforms' topic as an agenda item for the 09 July IACSG meeting. – TPC Secretariat

3. HSW Sub-group (HSWSG)

Consultation on Mental Health Tribunal (MHT) reforms

3.1 PR said that the TPC had received a revised draft of the consultation reply prepared by CM. He had passed on his feedback to CM regarding correcting some minor formatting issues and a suggestion for her to expand on the narrative explaining the TPC's decision to postpone making a final decision on a permanent change to rule 37 of the HESC Rules (that had been proposed in the MHT consultation) due to the emergency temporary changes made to the Tribunal Procedure Rules introduced by the Tribunal Procedure (Coronavirus)(Amendment) Rules 2020 to extend the timeframe for starting the hearing of a section 2 appeal during the outbreak.

3.2 The TPC signed off the MHT consultation reply. PR thanked CM and the HSWSG for their hard work during the exercise to settle the consultation reply. PR said the consultation reply should ideally be published before the summer recess and asked VP to make the necessary arrangements with No.10 and the MoJ Externals Communication team, i.e., to secure a grid-slot to publish the consultation reply on the TPC website page.

AP/35/20: To secure/agree a grid-slot date from No.10/MoJ External Communications team to publish the TPC MHT reply- TPC Secretariat

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

3.3 CM said the TPC Secretariat had circulated the MHT papers to the TPC that had been identified at the 14 May TPC meeting. The information comprised: the 2018 Victims' Commissioner's report and the Practice Direction for representations from victims.

3.4 The TPC Secretary had circulated a further letter to the TPC from the author of the article 'Victims and the Mental Health Tribunal' which detailed further observations on the topic 'victims' involvement in the MHT', and his arguments about whether the existing HESC Rules permitted the MHT sufficient scope to

include victims' involvement in tribunal proceedings. The author advocated that the TPC should consider making rule changes to provide for the participation of victims in MHT's proceedings.

3.5 PR said that the 2018 Victims' Commissioner's report had recommended victim impact statements to be presented in criminal cases. He understood that the Government had adopted this recommendation in the criminal justice process.

3.6 CM said that the recent letter referred to a 2002 case, which had highlighted concerns that she considered were no longer valid because they predated the current HESC procedure rules. The current HESC procedure rules incorporated changes referred to in that specific case and that these Rules and supporting presidential guidance for victim impact statements appeared to be satisfactory (under the current statutory provisions to provide guidance to tribunal users for victims' arrangements in MHT proceedings). The rationale for making changes proposed in the letter was a policy matter for Government to contemplate/introduce rather than a matter for the TPC. The existing rights of victims were provided by statute under section 2 of the Mental Health Act 1983.

3.7 The 2018 Victims' Commissioner's report had already been circulated to the relevant policy team within the MoJ for their deliberation. PR said that the issue appeared to be a policy matter for the Government to progress, i.e., to consider any recommendations detailed in the report in respect of modifying the current arrangements to include victim impact statements in tribunal proceedings.

3.8 The TPC members agreed with PR's assessment that responsibility for taking forward this matter rests with the Government. SoR said he was aware that the MoJ Victims policy team had considered this issue in 2019 and had not taken any further action to introduce this specific recommendation (following the 2018 Victims' Commissioner's report being published). PR asked SoR to find out from the MoJ Victims policy team whether there had been a formal response from the MoJ to the Victims' Commissioner's June 2018 report on victims of mentally disordered offenders.

AP/36/20: To find out from the MoJ Victims policy team if there had been a formal response from MoJ to the Victims' Commissioner's 2018 report on victims of mentally disordered offenders - SoR

3.9 PR said the appropriate approach would be to reply to the author of the article advising him of the Government's policy position (once confirmed by SoR) and if the author wanted to pursue this matter further, that he should approach the relevant governmental department to discuss the matter (as the appropriate body to consider and address the author's concerns) and not the TPC. The TPC agreed to return to the topic at the 09 July TPC meeting, at which time SoR would be able to confirm to the TPC what action had been carried out by the MoJ Victims policy team.

AP/37/20: To add the topic 'Victim's accountability' as an item for the 09 July TPC meeting agenda. –TPC Secretariat

Judgment 'F v Responsible Body of School W'

3.10. UT Judge Ward directed that a copy of the decision in respect to the discrimination case '*F v Responsible Body of School W*' to be sent to the TPC for their consideration. The matter had been deferred until CM and the HSWSG had the opportunity to consider the judgment and were able to provide their initial observations/comments to the TPC.

3.11 CM said she had considered the issues raised by UT Judge Ward in his judgment. Her preliminary view was that the TPC should consider making a rule change to clarify what test is being applied.

3.12 CM said it would be worthwhile to consult the judicial lead for the (FtT) Special Educational Needs and Disability (SEND) jurisdiction of HESC, to establish their view before the HSWSG and the TPC considered the issue raised in discrimination cases. There may be a need for a rule change or possibly a new practice direction/statement to be created by the HESC judiciary to provide clarity for tribunal users for the legal test that was being applied. PBS suggested that the President of the (Upper Tribunal) Administrative Appeals Chamber's (AAC) view should also be attained (as the onward appeal from SEND would go to the AAC). CM said she would approach Judge Meleri Tudur, the Deputy Chamber President of (FtT) HESC, who was

responsible for SEND to obtain her preliminary view first before deciding to approach the UT (AAC) President to establish their view.

AP/38/20: To establish the view of Judge Tudur and possibly the UT (AAC) President's view to the 'F v Responsible Body of School W' judgment. –CM

3.13 PR said he would be writing to UT Judge Ward, to thank him for his observations and to confirm that the TPC were currently considering the points he had flagged up in his judgment.

AP/39/20: To write to UT Judge Ward to acknowledge the TPC were considering the points he had recommended the TPC to consider in his judgment. –PR

4. GTCL Sub-group (GTCLSG)

Judgment: *Devani v SSHD [2020]*

4.1 PBS thanked SoR for his advisory note on the '*Devani*' case that he had prepared for the TPC. The case had been heard in the Court of Appeal (CoA) and one of the issues in the case highlighted in the decision was the correct interpretation of rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (concerning the procedure for a respondent to provide a response to the notice of appeal).

4.2 PBS said he had consulted the Upper Tribunal Chamber Presidents to establish their view/any observations to the issue highlighted in Lord Justice Underhill's judgment. He reported that Mr Justice Lane, the (UT) IAC President and Mrs Justice Farbey, the President of (UT) AAC had replied to his query. The President of the UT (Tax and Chancery) Chamber, Mr Justice Zacaroli was currently canvassing his judges for their views.

4.3 PBS said that Mr Justice Lane had provided useful feedback on the likely implications of a rule change being introduced to clarify how rule 24 should operate. He had commented that he was doubtful of the practical purpose/merits for such a rule change. If introduced, it would be the Home Office as the principal respondent in appeals in the UT (IAC) who would be most affected/ suffer the greatest impact. Mr Justice Lane suggested that the TPC may wish to consider holding a public consultation to seek the views of interested stakeholders if they were minded to making the rule change indicated by the judgment.

4.4 PBS said in respect of the (UT) AAC, Mrs Justice Farbey expressed a similar view that a potential rule change was not needed and that the existing UT rule 5 (Case Management) provided another route for the judiciary to direct the respondent to provide a response.

4.5 PBS said that he did not regard this as an urgent matter requiring the TPC's immediate consideration. It could be revisited at the 09 July TPC meeting, at which time he should have received Mr Justice Zacaroli's reply.

4.6 PR said it was important for the TPC to consider this matter. There was another judgment handed down in the (UT) Tax and Chancery Chamber where the judge had considered a mandatory response by the respondent was important. Moreover, there may be other wider implications.

4.7 ML said that some of the practice directions and practice statements in the different chambers made provision for the arrangements that respondents should follow for filing their response and that it would be worthwhile investigating what the arrangements were in the different chambers as part of the scoping exercise. PR said there may be a different approach to be taken for the different chambers considering the CoA judgment; it may be appropriate to seek input from the SPT's office.

AP/40/20: To add the topic '*Devani*' judgment topic as an item for the 09 July GTCLSG meeting agenda. –TPC Secretariat

(First-tier Tribunal) General Regulatory Chamber consultation

4.8 PR said that the GTCL's consultation in relation to the withdrawals of appeals by respondents in the General Regulatory Chamber had been launched on 19 May and would close on 11 August 2020.

5. Costs Sub-group

Electronic Communications Code cases

5.1 PR thanked ML for preparing a report that detailed the Costs Sub-group recommendations/approach to:

Proposals on amendments to the Tribunal Procedure (First-tier Tribunal) Property Chamber Rules 2013 in respect of EEC disputes

5.2 ML said that the (FtT) Property Chamber and (UT) Lands Chamber had concurrent jurisdiction but applications in certain categories of Electronic Communications Code (EEC) cases could only be issued in the (UT) Lands Chamber. Judge McGrath, the President of the (FtT) Property Chamber, and Judge Rodger QC, the Deputy President of the UT (Lands Chamber) had indicated that they would like to transfer some of the EEC workload to the (FtT) Property Chamber. The issue being addressed by the proposed rule amendments is that the (UT) Lands Chamber had a wide-ranging costs jurisdiction but the costs jurisdiction in the FtT was limited by rule 13 (orders for costs, reimbursement of fees and interest on costs). If the FtT was to take on transferred EEC cases from the UT then the FtT needed to have an equivalent costs jurisdiction/ safeguards as regards those EEC cases in the future.

Telecommunications Infrastructure (Leasehold Property) Bill 2019-21

5.3 ML said that it was the Government's intention for provisions to be introduced in the Telecommunications Infrastructure (Leasehold Property) Bill 2019-21 to give the (FtT) Property Chamber primary jurisdiction in certain EEC proceedings and that costs rule changes may be required following the legislation receiving royal assent for the Tribunal to permit Leasehold EEC applications to be issued in the (FtT) Property Chamber rather than the (UT) Lands Chamber. ML added that the Telecommunications Infrastructure (Leasehold Property) Bill was still being debated as it navigated its passage through Parliament.

Future Proofing

5.4 ML said the 'future proofing' approach for a new costs provision to be introduced for the Tribunal Procedure (FtT) Property Chamber Rules 2013 had initially been flagged by TPC members concerning related costs issues for new jurisdictions transferring into the (FtT) Property Chamber. The proposal was to create a general future proofing costs rule, if further concurrent jurisdictions of the FtT and the UT wanted to transfer a matter/case from the UT to the FtT but did not have the appropriate costs jurisdiction in place to reflect the transfer. Introducing a new general costs rule would future proof any transfers of new appeal rights so that a request to the TPC for a costs rule change by the senior judiciary or other interested parties would not be needed each time.

5.5 ML said the Costs Sub-group would also need to consider how the proposals for the costs rule changes would apply to tribunals whose jurisdiction applies to Wales.

5.6 SRO agreed to consider the TPC's vires for making the proposed amendments.

5.7 PR asked the TPC members whether the TPC should consult on these three proposals. After a full discussion, the TPC agreed that the first proposal in respect of cases transferred from the UT to the FtT was a technical rule change and did not warrant the matter being consulted. However, the other two proposals in relation to rule amendments that may be necessary for EEC cases if the Telecommunications Infrastructure (Leasehold Property) Bill received royal assent and the future proofing costs rule needed to be considered further by the Costs Sub-group before a decision was made by the TPC as to whether it was necessary to consult.

AP/41/20: To prepare a note in respect of the pre-transfer/ transfer down vires issue for the FtT to the UT for the 09 July HSWSG meeting agenda. –SoR

6. Confidentiality Sub-group

Dring Case

6.1 PR asked RL about the position for the response from the (FtT) SEC in respect of the 'Dring' case concerning third party access and the wider confidentiality topic. RL said that there had been some confusion as to who should complete the SEC questionnaire following the retirement of Judge Aitken. RL

was discussing the issue with Judge Mary Clark, the acting SEC President and expected the questionnaire to be completed shortly.

6.2 PR asked RL if the SPT's office could prepare a note on the '*Dring*' case detailing all the judicial replies from the Chamber Presidents for the 09 July TPC meeting.

6.3 PR asked RL about the SPT's retirement date. RL said his last working day was on 15 June and his successor was likely to be appointed in September 2020. During this interim period Lord Justice Lindblom, the Deputy Senior President of Tribunals would cover the SPT role.

AP/42/20. To prepare a note on the '*Dring*' case summarising all the replies received from the Chamber Presidents- RL

7. Tribunal Procedure (Amendment) Rules 2020 SI Exercise

7.1 SoR provided an overview of the draft Tribunal Procedure (Amendment) Rules 2020 statutory instrument (SI) following the TPC providing its instructions at the 14 May TPC meeting.

7.2 After a full discussion the TPC agreed that the draft SI would make the following changes:

Amendments to the: Tribunal Procedure (Upper Tribunal) Rules 2008, the Tribunal Procedure (First-tier Tribunal) (Health, Education, and Social Care Chamber) Rules 2008, the Tribunal Procedure (First-tier Tribunal) (War Pensions and Armed Forces Compensation Chamber) Rules 2008, the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008, the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, the Tribunal Procedure (First-tier Tribunal) (Immigration & Asylum Chamber) Rules 2014, the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, and the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010

Access to recordings

7.3 An amendment to each set of Rules (set out above) that inserts a temporary provision on access to recordings of remote hearings that was mistakenly omitted (due to a drafting error) from the Tribunal Procedure (Coronavirus) Amendment Rules 2020. The amendment is intended to provide clarity for the practice and procedure governing the recordings of a remote hearing when the FtT and the UT directs a remote hearing to take place privately and it is not practicable for that hearing to be broadcasted to the public in a Court or Tribunal building. The amendment to each set of Rules would expire on the same day as section 55(b) of the Coronavirus Act 2020, ie., it will cease to have effect on 26 March 2022 unless further legislative action was taken to modify the expiry date of the statute.

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

7.4 Amendments are made to the provisions on the exercise of judicial functions by staff (in each set of Rules set out above) to reflect the commencement of the Courts and Tribunals (Judiciary and Functions of Staff) Act 2018. These amendments do not widen the existing range of judicial functions that can be carried out by staff under judicial supervision.

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

Amendments to the: Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008

7.5 In consequence of the Upper Tribunal decision in '*JL v Cherry Lane* [2019] UKUT 223 (AAC)' which held that the provision which purported to extend the deadline for bringing a claim about disability discrimination in schools was ineffective. The amendment removes the ineffective part of the provision while preserving its effect in respect of special educational needs cases.

Immigration: deleting and updating out-of-date references

Amendments to the: Tribunal Procedure (Upper Tribunal) Rules 2008

7.6 To delete some wording which was made redundant by the quashing of the detained fast track rules and to update some out-of-date statutory references.

Amendments to the: Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014

7.7 To delete some wording which was made redundant by the quashing of the detained fast track and to update some out-of date statutory references.

8. Overview Sub-group (OSG)

TPC Work Programme

8.1 The TPC work programme has been updated and circulated as at 01 June 2020.

8.2 It was agreed that Section 1- Tribunal Procedure Rules work plan- entry 2 (Cost in Tribunals) should be updated to add a reference to the Telecommunications Infrastructure (Leasehold Property) Bill 2019-21.

AP/43/20: To amend the TPC Work Programme to reflect comments received from TPC Members. – TPC Secretariat

9. AOB

Statutory Instruments (SI) prioritisation September – December 2020

9.1 PR said VP had advised him that the Cabinet Office (CO) had contacted the TPC Secretariat regarding their plans for the timing they expected to lay the next Tribunal Procedure Rules (Amendment No.2) Rules 2020 SI. The next scheduled SI would usually be laid during late November/ early December 2020.

9.2 The CO had asked all government departments to de-prioritise any non-essential secondary legislation due to be laid in the period between September and December 2020 and delay their legislative timetable to lay their SIs to early 2021. This rescheduling was to allow/mitigate for the high volume of transition period legislation expected to be laid in Parliament before the end of the transition period on 31 December 2020.

9.3 PR asked the TPC members if they had any concerns if the next TPC Amendment No.2 SI was deferred to early 2021.

9.4 The TPC agreed that the next TPC Amendment No.2 SI could be laid, ideally, in January 2021.

09 July TPC meeting

9.5 The TPC agreed that the meeting on 09 July should similarly be held on-line.

TPC Meetings scheduled for after the summer break

9.6 The TPC agreed for future meetings from October onwards to be scheduled on the first Thursday of each calendar month.

Next Meeting: Thursday 09 July 2020, 9.30am