

## **Tribunal Procedure Committee (TPC): Online Meeting Minutes: Thursday 09 July 2020**

Via Microsoft Teams

### **Present**

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

### **Guest**

Tony Allman (TA)- MoJ Administrative Justice Strategy Team

### **Apologies**

Louis Kopieczek (LK)  
Catherine Yallop (CY)  
Rebecca Lewis (RL)

## **Minutes**

### **1. Introductory matters**

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

1.2 The draft minutes of the TPC meeting held on 04 June 2020 were approved subject to minor amendments.

**AP/44/20: To amend the 04 June TPC meeting minutes to reflect comments received from TPC Members. – TPC Secretariat**

#### **TPC Action Log**

1.3 The TPC action log had been updated.

#### **Matters arising**

##### **Lord Chancellor's appointments**

1.4 PR said the Lord Chancellor (LC) had agreed to the recruitment selection committee recommendations to appoint PBS and Susan Humble as his selected appointments on the TPC. PR expected that the LC would announce publicly the new TPC appointments during August 2020.

1.5 PR said he expected Susan Humble to attend the next TPC meeting scheduled on 08 October 2020.

##### **Lord Chief Justice appointments**

1.6 PR said that CM has been reappointed by the Lord Chief Justice as the Upper Tribunal Judge Member of the Tribunal Procedure Committee. Her reappointment was for a three-year term and would run until July 2023.

##### **Pre-Action Letters**

1.7 PR said he had received an update from the TPC Secretary on the ongoing legal proceedings following the matter being discussed on 14 May TPC meeting. The proposed legal claims challenged the temporary emergency measures that had put in place to mitigate the impact of the Covid-19 pandemic in the

Immigration and Asylum Chambers (IAC). It was noted that the TPC had not been named as a proposed respondent alongside the IAC Presidents and the Lord Chancellor in the judicial review challenge.

### Tribunal Procedure (Amendment Rules) 2020

1.8 PR said that the Tribunal Procedure (Amendment Rules) Statutory Instrument (SI) has been laid in Parliament on 30 June 2020 and that the SI was expected come into force on 21 July 2020.

### Reply to the Mental Health Tribunal Rule Changes Consultation

1.9 PR said that the response to the TPC Mental Health consultation paper was published on the TPC consultation website page on 23 June 2020.

## **2. Litigation Friends**

2.1 TA provided an update to the TPC regarding his continuing work to prepare a policy research paper on the topic of 'Litigation Friends in the unified tribunals'. He said he was close to finalising the exercise and that he had included a series of recommendations in his draft paper inviting ministerial consideration:

- i) The means of funding Litigation Friends specifically to what was considered as 'reasonable expenses';
- ii) What should be the administrative process to implement where no Litigation Friend (for whatever reason) was identified.

2.2 TA said he would send his draft paper to the TPC and to other interested parties that had contributed with their observations (as part of his exercise to research the topic). He confirmed that his draft paper had not yet been considered by MoJ Ministers and that it would be for MoJ senior civil servants to determine how the policy recommendations detailed in his draft paper was managed and if any of his recommendations would be taken forward in the future.

2.3 TA confirmed he had been working with MJR and DF to formulate any required new rules and that he would provide a further progress update to the TPC at their 08 October TPC meeting.

**AP/45/20: To add the 'Litigation Friends' topic as an agenda item for the 08 October TPC meeting. – TPC Secretariat**

## **3. Immigration & Asylum Chambers 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

3.1 MJR said the IACSG had considered the position note and associated information that had been prepared and circulated by the HMCTS IAC Reform team in June 2020. He had circulated a discussion note to the TPC that summarised his preliminary observations about the latest position for the shifting direction for the IAC reform project's vision and had highlighted several key topics seeking the TPC's input at the meeting.

3.2 MJR said he had identified several key points in relation to 3 key elements:

- i) An evident acceleration in the HMCTS implementation timetable to introduce some of the new reformed parts of the digital process in the IAC;
- ii) The approach to address 'appellants in person' and the administrative process for the postal rule in respect of 'deemed service'. The TPC would need how best this would be illustrated in any new rule amendments.
- iii) Whether the proposed framework and approach for the proposed IAC consultation that he had already been developing needed to be modified to address points (i) and (ii).

### Timetable and approach

3.3 MJR said that the IAC Reform Project's current timetable for the 'Appellant in Person' strand of the project had been suspended in April 2020 because of the pandemic and that IAC Reform team had expected their work to restart during November 2020; with the overall project expected to end in March 2021.

3.4 MJR summarised the 3 three different approaches for the IAC Chamber appeals process:

- Current IAC rules: a detailed notice of appeal completed by the appellant, followed by a comprehensive response from the respondent (Home Office (HO)) and a substantive hearing being listed by HMCTS.
- The Pilot approach (with representatives): in which there was a succinct notice of appeal, followed by a response from the HO, then followed by a detailed skeleton argument from the Appellant's representatives. A hearing was then only listed once the parties had agreed upon a schedule of issues.
- The Pilot approach (Appellants in Person): in which there was a brief notice of appeal, followed by a response from the Home Office. The Appellant was then invited to explain 'Why the HO's decision was wrong'. A Tribunal Caseworker (TCW) was then able to ask clarifying questions and, if necessary, a case management appointment would be scheduled with a TCW to clarify the dispute before a substantive hearing was listed.

3.5 MJR said that initially the TPC had intended in principle to consult based on a single transition date, when all IAC cases would switch over to a new digital approach, although the TPC stance had accordingly changed following the presentation by the IAC Reform Team at the 12 March 2020 TPC meeting. As the IAC Reform Team had revealed that they expected a period of 'dual running' in which some IAC cases (particularly those involving 'Appellants in Person') would continue to run under the old system while others (particularly those involving 'Represented Appellants' would run under the new system).

#### Appellants in Person

3.6 MJR said the judicial note prepared by the IAC Presidents had set out their intended approach. MJR asked SoR for drafting support in terms of making IAC rules amendments to address their observations for rule changes.

#### Deemed Service / Postal Rule

3.7 MJR said that the key issue was how 'time limits and deadlines' were measured in respect of the timing from when tribunal documents were sent by HMCTS to parties involved in the proceedings. He added that difficulties had arisen because it was not always apparent to the parties when the date for the notice of decision has been sent. The IAC Presidents had raised this as an important concern in their note.

3.8 MJR said a possible solution to resolve this issue was for the TPC to introduce 'deeming' rules that would state that the notice of decision was sent 2 working days after the date that appears on the notice of decision. Or, in certain out of country appeals, that these documents would be deemed to be received 10 working days after the date on the notice of decision.

3.9 MJR said it would be helpful to discuss this matter with the HO to clarify if they had any timescale targets for sending out notice of their decisions before a decision was made by the TPC if they considered rule changes were required. There were also other issues in 'principle and practice' that required the TPC's consideration, such as proof of postage on a date for any digital reforms that were being introduced for in-country appeals, as appeals must be received no later than 14 days from being sent the notice of decision.

**AP/46/20: To provide a note to the TPC Secretary regarding deemed service/postal rule that requires input/clarity from the Home Office. –MJR/TPC Secretariat**

## **4. HSW Sub-group (HSWSG)**

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

4.1 SoR said that the MoJ Victims policy team had confirmed that they hadn't submitted a formal response to the Victims' Commissioner report in respect of the entitlements and experiences of victims of mentally disordered offenders. They had started work to address the recommendations through commitments made in the U.K Government's Victims' Strategy and through discussions and work on a revised Victims' Code with the relevant key stakeholders.

4.2 The TPC noted SoR's advice and agreed as it was a policy matter for MoJ to action, that no further involvement was required to be started by the TPC as they were not the appropriate body to consider and address the member of the public's concerns.

4.3 PR said he would reply to the member of the public who had asked for the TPC's observations regarding this matter to confirm the TPC's position and to suggest that they contact the MoJ Victims policy team to continue/progress their query.

**AP/47/20: To reply to the member of the public in respect of the 'Victims and the Mental Health Tribunal' issue. – PR**

#### Judgment 'F v Responsible Body of School W'

4.4 CM said that she had consulted Judge Tudur, the Deputy Chamber President of (FtT) Health, Education & Social Chamber (HESC) and Principal lead judge for the (FtT) Special Educational Needs Disability (SEND) jurisdiction in respect of the issues raised by Upper Tribunal (UT) Judge Ward in his judgment '*F v Responsible Body of School W*' that had been previously considered by the TPC during previous TPC meetings.

4.5 A note prepared by Judge Tudur had been circulated to the TPC in respect of the UT judgment. The note detailed the existing practice direction (PD) relating to SEND cases that had been issued by the Senior President of Tribunals (SPT) in 2008. The PD set out the procedure to be followed by parties in proceedings when making an appeal or claim and explained the additional requirements on those making or responding to an appeal or claim, over and above those set out in Rule 12 of the Tribunal (First-tier Tribunal) (HESC) Procedure Rules 2008.

4.6 In her note, Judge Tudur had asked the TPC to consider 2 issues:

- i) Whether the TPC should amend rule 12(3) to remove any ambiguity regarding the time for bringing disability discrimination claims, that a correction of rule 12(3) had already been actioned by the TPC and would be introduced by the forthcoming TPC Rule Amendment SI and
- ii) Whether any amendment to the Rules are required in order to address the issues raised by the Tribunal's approach to admitting and 'registration' of disability discrimination claims.

4.7 SoR said that the first point raised by Judge Tudur in respect of a rule change to rule 12(3) had already been actioned by the forthcoming TPC Rule Amendment SI.

4.8 The TPC discussed the second issue and agreed that a rule change was not necessary at this present time to address the issues raised by the judgment, i.e., the Tribunal's approach to admitting and 'registration' of disability discrimination claims. The TPC agreed that that it would be preferable for a revision to be made to the existing PD as soon as practicable to reflect the current statutory framework and to eliminate further errors of law arising from the early case management process for dealing with application notices. The TPC also noted that the judge had also commented that a rule change was not deemed necessary.

4.9 PR asked CM to check with Judge Tudur if she would be content for her note to be shared with the SPT's Office and subject to receiving her approval that he would then forward the note to the SPT's office for their consideration.

**AP/48/20: To check with the SPT's office if there are any plans to revise the SEND practice direction. - PR**

#### **5. GTCL Sub-group (GTCLSG)**

##### Judgment: *Devani v SSHD [2020]*

5.1 PBS said the note he had prepared in respect of the *Devani* case had incorporated the legal advice circulated earlier by SoR (that was discussed at the 04 June 2020 TPC meeting). The *Devani* case had been heard in the Court of Appeal by Lord Justice Underhill 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) and whether rule 24 should state more explicitly in what circumstances the provision of a respondent response is mandatory.

5.2 PBS said that the key issue was for the TPC to discuss and agree whether the decision in *Devani* was in line with the TPC's view as to how rule 24 should operate. He had canvassed the UT Presidents for their further observations and the President of the UT (Tax and Chancery) Chamber had confirmed that his judges had commented that the rule seemed to have been working satisfactorily without the interpretation. PBS said he hadn't yet approached the Presidents of the (UT) Administrative Appeals Chamber and (UT) IAC about whether they had any concerns or if they envisaged any practical problems if the *Devani* interpretation for a mandatory response by the respondent was correct.

5.3 The TPC discussed PBS's observations and the judicial replies regarding the current obligation to serve a respondent's notice and whether there was a need to decide against this, by making a rule change to the Upper Tribunal rules because of the circumstances highlighted by the '*Devani*' case. The TPC agreed it would be helpful for PBS to revisit this matter with the UT Chamber Presidents to establish if they considered a rule change was needed following the Court of Appeal's view for what rule 24 means.

5.4 It was noted by the TPC that it was important for the UT administration and the appellant to know what the respondent's position was to ensure that cases were dealt with promptly and are also brought swiftly to resolution. PBS said that current Rules already provided the UT with the flexibility to accept a late notice and to give directions to the respondent to comply with.

5.5 PBS said he would return to the UT Chamber Presidents and research why rule 24 was drafted as it was. The TPC agreed to have a follow-up discussion at the 08 October 2020 TPC meeting.

**AP/49/20: To add the topic '*Devani*' judgment topic as an agenda item for the 08 October GTCLSG meeting. – TPC Secretariat.**

#### Possible changes to the General Regulatory Chamber Rules in relation to withdrawals of appeals

5.6 PBS said that the consultation in respect for the handling of withdrawals in the General Regulatory Chamber was due to close on the 11 August 2020.

## **6. Costs Sub-group**

### Electronic Communications Code cases

6.1 The Electronic Communications Code (EEC) costs topic had been discussed at the 08 June 2020 TPC meeting. The TPC had discussed whether to make rule changes to accommodate the possibility that cases under the EEC will be heard by the First-tier Tribunal (FtT). ML confirmed that those cases must be commenced in the UT but can then be transferred to the FtT. SoR had been asked to provide the TPC with legal advice: whether the FtT was able to award costs in ECC cases, including the costs incurred in the UT before transfer ("pre-transfer costs").

6.2 In respect of the FtT's power to award costs in an ECC cases, SOR said it was his view that no rule change was needed to permit the FtT to award pre-transfer costs in ECC cases. He explained that rule 13 of the Tribunal Procedure (FtT) (Property Chamber) Rules 2013 sets out the limitations on the FtT's power to award costs and that is why it appeared a rule change may be required for EEC cases; however rule 2 provides that "nothing in these rules overrides any specific provision that is contained in an enactment which confers jurisdiction on the Tribunal". The ECC is set out in Schedule 3A para 96 to the Communications Act 2003 and so if the 2003 Act is 'an enactment which confers jurisdiction on the Tribunal', then paragraph 96 is not subject to rule 13 and the FtT can rely on it to award costs in ECC cases.

6.3 PR asked whether there was a need for the TPC to make an 'express provision' to clarify to users how the awarding of costs for EEC cases would work. ML said that that an implied prohibition on awarding pre-transfer costs would be read into a power expressed in such general terms that it seemed sensible to make a rule change.

6.4 PBS said that he did not consider there was an urgent need for the TPC to make an urgent rule change for EEC cases although he could see the merits for a rule amendment if it improved the clarity for the user. PBS suggested that Judge McGrath and Judge Rodger QC should be asked for their further views for the

potential solutions discussed by the TPC (following SOR's advice on amendments to the Tribunal Procedure (First-tier Tribunal) Property Chamber Rules 2013 in respect of EEC disputes).

6.5 ML asked if SoR could prepare an advisory note on vires and drafting provisions relating to costs in ECC proceedings.

**AP/50/20: To prepare a note on vires and drafting relating to costs in ECC proceedings for the 08 October TPC meeting agenda. –SoR**

## **7. Confidentiality Sub-group**

### Dring Case access to documents

7.1 PR said that CY had provided the TPC with a comprehensive schedule detailing the Chamber Presidents responses in respect of the 'Dring' case (that concerned third party access to documents and the wider confidentiality topic in tribunals). PR added that he was not aware what approach the Civil Rules Procedure Committee would be taking to address the *Dring* judgment in respect of open justice.

7.2 PR said that the SPT's Office were progressing work to produce practice directions to deal with requests for access to recordings of hearings and to deal with requests from third parties for documents and recordings. The TPC agreed that this work being undertaken by the SPT's office would have a bearing on whether the TPC made rule changes in the future to address the *Dring* judgment (following a public consultaion).

7.3 The TPC discussed the approach to be taken if the TPC were minded to make a rule change to address the Supreme's Court's judgment taking into account the ongoing work by the SPT's office to produce new practice directions to safeguard the principles of open justice. The TPC agreed that it would be helpful to clarify with the SPT's office what open justice topics would be addressed in their intended PD's.

7.4 PR said he would write to CY to clarify if the SPT's intended PDs would extend to all documents in the tribunal file or is it only documents referred to in a hearing.

**AP/51/20: To write to CY in the SPT's Office to clarify the contents of the intended Practice Directions for access to documents/open justice. – PR**

## **8. Overview Sub-group (OSG)**

### TPC Work Programme

8.1 The TPC work programme has been updated and circulated as at 29 June 2020.

## **9. AOB**

### 08 October 2020 TPC meeting

9.1 The TPC agreed that the meeting on 08 October would be held on-line. The arrangements for the format of future meetings in 2020 would be discussed at the 08 October TPC meeting.

**Next Meeting:** Thursday 08 October 2020, 9.30am