

Tribunal Procedure Committee (TPC): Online Meeting Minutes: Thursday 08 October 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)
Tim Fagg (TF)
Gabriella Bettiga (GB)
Susan Humble (SH)
Shane O'Reilly (SOR)
Rebecca Lewis (RL)
Vijay Parkash (VP)
Rebecca Fowler (RF)

Apologies

Mark Loveday (ML)
Louis Kopieczek (LK)
Catherine Yallop (CY)

Minutes

1. Introductory matters

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

1.2 PR welcomed SH and RF to their first TPC meeting. RF was shadowing the TPC meeting as she had joined the TPC Secretariat to assist with administrative duties.

1.3 The draft minutes of the TPC meeting held on 09 July 2020 were approved subject to minor amendments.

AP/52/20: To amend the 09 July TPC meeting minutes to reflect comments received from TPC Members. –TPC Secretariat

Matters arising

Tribunal Procedure (Amendment Rules) 2020

1.4 The Tribunal Procedure (Amendment Rules) Statutory Instrument (SI) had come into force on 21 July 2020.

1.5 The TPC agreed that the arrangements for the timing for the next SI would be deferred from January 2021 to March 2021.

Pre-Action Letters

1.6 SoR said the two judicial review claims that had been issued challenging the Immigration and Asylum Chambers (IAC) Presidential Practice Statements (which provided guidance on the practice in the First-tier Tribunal's IAC to manage cases during the pandemic) were still awaiting permission decisions. Permission had been granted for a separate judicial review claim against guidance issued for the same purpose by the President of the Upper Tribunal (UT) IAC. Neither case challenges the lawfulness of any Rules made by the TPC.

Litigation Friends

1.7 PR said that Tony Allman (TA) had circulated in August 2020 a first iteration of his policy research paper on Litigation Friends to the TPC, although it had appeared that some of the TPC members had not received the paper. PR asked VP if he could recirculate the paper as TA had been waiting for the TPC's feedback to his proposed recommendations.

AP/53/20: To recirculate the draft Litigation Friends report to the TPC members. –TPC Secretariat

1.8 The TPC agreed that individual members who wished to contribute to the draft Litigation Friends report should send their response directly to TA copying the TPC Secretary. The TPC Secretariat would collate all the responses including DF's response and circulate a summary note for the 05 November TPC meeting.

AP/54/20: To send any comments/observations regarding the draft Litigation Friends report directly to Tony Allman, copying in the TPC Secretary. –TPC members

AP/55/20: To circulate a summary of received TPC Litigation Friends comments for the 05 November TPC meeting. –TPC Secretariat

1.9 The TPC agreed that they would revisit the Litigation Friends topic and whether new Rules would be required to address this issue once the policy approach had been settled.

AP/56/20: To add the topic of Litigation Friends as an agenda item for the 05 November TPC meeting. –TPC Secretariat

TPC Action Log

1.10 The TPC action log had been updated.

1.11 PR told RL that he would like to schedule a meeting with Lord Justice Lindblom, who had been appointed as the new Senior President of Tribunals (SPT). He would raise with the SPT action point: 48/20 (if there were any plans to revise the SEND practice direction following the judgment '*F v Responsible Body of School W*' being discussed by the TPC).

2. 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

2.1 MJR reported that there had been a setback to progress the work to prepare a modified version of the draft IACSG consultation paper and a draft letter to the Home Office (HO) seeking to clarify if the HO had any agreed timescale targets for sending out notice of their decisions before a decision was made. He would try to prepare an updated draft consultation paper for the 05 November TPC meeting and would update the TPC regarding the HO's position for the deemed service/postal rule issue. CM and GB agreed to assist MJR with the drafting exercise.

2.2 MJR agreed to send the latest version of the draft IACSG consultation paper to the IACSG members for their input prior to the TPC secretariat circulating the latest version of the draft to the TPC members.

2.3 The TPC agreed that they would aim to launch the TPC consultation in December 2020, subject to the TPC Secretariat securing a grid-slot from No.10 to publish the TPC consultation paper on GOV.UK.

AP/57/20: To circulate an updated draft IACSG consultation paper for the 05 November TPC meeting. – MJR/IACSG

3. HSW Sub-group (HSWSG)

Judgment: *F v Responsible Body of School W*

3.1 At the 09 July TPC meeting, the TPC endorsed their support for a revision to the existing practice direction (PD) rather than a rule change in respect of the issues raised by UT Judge Ward in his judgment '*F v Responsible Body of School W*'.

3.2 CM reported that Judge Tudur was content for her advisory note to be sent to the SPT's office for their consideration/views. The note detailed the judge's recommendation for a revision to be made to the existing PD 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. PR said he would send the note to the SPT's office for their consideration.

AP/58/20: To check with the SPT's office if there are any plans to revise the SEND practice direction. - PR

4. GTCL Sub-group (GTCLSG)

4.1 SH agreed to join the membership of the GTCL Sub-group.

Judgment: *Devani v SSHD* [2020]

4.2 Following the discussion at the 09 July TPC meeting, PBS had agreed to return to the UT Chamber Presidents and research why rule 24 was drafted as it was.

4.3 PBS provided his observations on the background/history as to why rule 24 was drafted in its present form in the UT Rules. He summarised the key elements from his position paper on the issue of rule 24. He reported he had received additional input from the UT Chamber Presidents or their nominated UT judges regarding the *Devani* case.

4.4 The TPC discussed the key topics that PBS had highlighted:

- whether there should be a possible TPC consultation for a change to rule 24.
- exploring whether an alternative way forward could be introduction of standard/tailored practice directions across the UT Chambers to better inform tribunal users the correct practice for how rule 24 would be operated in that specific Chamber.
- possible drafting for an amendment to rule 24 and
- the issue of cross-appeals/respondent notices.

4.5 The TPC agreed that the GTCLSG should prepare a draft consultation paper and for the topic to be revisited by the TPC at their next scheduled meeting on 05 November 2020.

AP/59/20: To prepare a draft consultation paper for the 05 November TPC meeting if possible. –PBS/SH

4.6 PBS said he would return to the UT Chamber Presidents to advise them that the TPC had decided to conduct a consultation on the *Devani* matter. RL agreed to inform Judicial Office via the SPT's office about the TPC's approach.

Oral renewal hearings in UT for permission to appeal in cases considered totally without merit

4.7 Following a request from the SPT's office, the TPC Secretariat had circulated a paper prepared by UT Judge Wikeley on behalf of the (UT) Administrative Appeals Chamber (AAC).

4.8 The paper proposed an amendment to the Tribunal Procedure (Upper Tribunal) Rules 2008 which would confer a power on judges to certify applications on the papers for permission to appeal (PTA) to the UT (from the First-tier Tribunal (FtT)) as totally without merit. It would mean applicants could not renew their application at an oral hearing. As the proposed change would affect UT (Tax and Chancery Chamber), the SPT's office had already sent a copy of the paper to the President of the (UT) TCC Mr Justice Zacaroli. Mr Justice Zacaroli had confirmed that he had consulted his salaried judges and that they were in favour of this potential rule change.

4.9 PBS had prepared a position paper in respect of UT Judge Wikeley's proposals setting out the GTCLSG approach to a potential rule change. PBS asked the TPC for their views and also whether they considered that there should be a consultation on such a rule change.

4.10 SoR informed the TPC that the Ministry of Justice (MoJ) was considering a policy proposal to take away the FtT PTA stage, in case it would change their view. SoR added that the streamlining proposal if

progressed swiftly could be included in a legislative vehicle to be introduced in Parliament as soon as early 2021.

4.11 PR asked SoR if there had been any judicial engagement with the SPT's office and the Tribunal Chamber Presidents about the streamlining permission proposal. SoR said that there had not yet been any since work on the proposal had only recently been restarted.

4.12 In light of this information, the TPC agreed to defer considering UT Judge Wikeley's proposal on the basis that the MoJ's proposal would probably require a rethink of the rules on how FtT decisions were challenged, and that if there were various different proposals that would reduce the amount of appeal opportunities an appellant had, it was preferable that they should be considered together.

4.13 PR asked SoR to provide an update to the TPC about the streamlining permission proposal for the 5 November TPC meeting.

AP/60/20: To provide a position update about the streamlining permission proposal for the 05 November TPC meeting. –SoR

4.14 PR would write to UT Judge Wikeley to acknowledge that the TPC had received his paper, to thank him for his contribution and advise him that the TPC were considering his proposal for a UT rule change.

AP/61/20: To write to UT Judge Wikeley confirming the TPC were considering his proposal for a rule change. –PR

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

4.15 PBS said that the GTCLSG consultation in respect for the handling of withdrawals in the General Regulatory Chamber (GRC) closed on 11 August 2020. The TPC Secretariat had received 3 replies before the consultation closed and a late response which the TPC had agreed to accept.

4.16 PBS provided an overview of the draft consultation reply he had prepared. The draft paper covered the following elements: possible changes to the GRC Rules in relation to withdrawal, the indicative drafting for proposed changes to GRC rule 17, the responses from respondents to the specific consultation questions, mandatory requirements and overall conclusions for future action to be taken by the TPC.

4.17 The TPC agreed to PBS's suggested approach for the composition of the draft consultation reply. PBS said he would incorporate the TPC's comments and that he planned to discuss the drafting of a change to rule 17 with Judge O'Connor, who was the acting GRC President (covering for Judge McKenna) and SoR.

4.18 PBS said he would prepare a revised version of the draft GTCLSG consultation response with the aim to have the final draft reply signed off by the TPC at the 05 November TPC meeting.

AP/62/20: To add the topic of GTCLSG consultation reply as an agenda item for the 05 November TPC meeting. –TPC Secretariat

5. Costs Sub-group

Electronic Communications Code cases

5.1 SoR had prepared advice about the FtT's power to award costs in cases under the Electronic Communications Code (ECC).

5.2 The advice included some suggested drafting for the potential rule change.

5.3 PR asked SoR to confirm with ML if he had shared his advice with Judge McGrath and Judge Rodger QC to establish their views as they had both been involved in earlier discussions with ML regarding the ECC topic and potential rule change.

AP/63/20: To check with ML if he had shared the proposed ECC drafting with the relevant senior judges. –SoR

5.4 The TPC agreed to include the proposed rule change in the package for the next SI scheduled for March 2021.

6. Confidentiality Sub-group

Dring Case and access to documents

6.1 RL reported that the work on the draft Practice Directions (PD) to deal with requests for access to recordings of hearings and to deal with requests from third parties for documents and recordings was ongoing. SPT's officials had met with the UT Presidents on 02 October at which time the drafts PDs were discussed and that further drafting work was continuing to incorporate their proposed amendments. A related meeting with the FtT Chamber Presidents was scheduled on 07 October to obtain their views.

6.2 RL said that she expected the drafting exercise to be completed by the end of November and subsequently she would be seeking to obtain the SPT's approval before the PDs were considered/signed off by the Lord Chancellor.

AP/64/20: To share the draft confidentiality practice directions with the TPC members. –RL

7. Overview Sub-group (OSG)

TPC Work Programme

7.1 The TPC work programme has been updated and circulated as at 05 October 2020.

8. AOB

03 December 2020 TPC meeting

8.1 PR asked the TPC members if they had any concerns if the timing for the TPC meeting scheduled on 03 December was moved, as he had a hearing listed which he may not be able to postpone. He would confirm if that was still the position at the 05 November TPC meeting.

Next Meeting: Thursday 05 November 2020, 9.30am