

Tribunal Procedure Committee (TPC): Online Meeting Minutes: Thursday 05 November 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)
Gabriella Bettiga (GB)
Mark Loveday (ML)
Susan Humble (SH)
Shane O'Reilly (SoR)
Rebecca Lewis (RL)
Vijay Parkash (VP)
Rebecca Fowler (RF)

Apologies

Tim Fagg (TF)
Louis Kopieczek (LK)
Catherine Yallop (CY)

Minutes

1. Introductory matters

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

1.2 The draft minutes of the TPC meeting held on 08 October 2020 were approved subject to minor amendments.

AP/65/20: To amend the 08 October TPC meeting minutes to reflect comments received from TPC Members. – TPC Secretariat

TPC Action Log

1.3 The TPC action log had been updated. PBS pointed out that the target date for AP59/20 was incorrect and should be amended to reflect that a deadline for the GTCLSG to prepare a draft *Devani* consultation paper was a provisional target to be actioned by the GTCLSG if possible, by the 05 November TPC meeting. SH said she would contact PBS after the TPC meeting to discuss/agree the approach to prepare a draft consultation paper on the *Devani* topic.

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 PR said it would be beneficial for the TPC to revisit the consultation approach after they agreed in principle what rule changes would be consulted upon. To achieve this they would work through the consolidated First-tier Tribunal (FtT) Immigration and Asylum (IAC) Rules document prepared by Judge Zucker that showed the suggested changes (that included his additions and deletions) to the FtT IAC Rules for:

- Rule 1 (Citation, commencement, application and interpretation)
- Rule 3 (Delegation to Staff)
- Rule 4 (Case management powers)
- Rule 5 (Procedure for applying for and giving directions)

- Rule 8 (Substitution and addition of parties)
- Rule 10 (Representatives)
- Rule 12 (Sending, delivery and language of documents)
- Rule 17 (Withdrawal)
- Rule 19 (Notice of appeal)
- Rule 23 (Response: entry clearance cases)
- Rule 24 Response: other cases)
- Rule 38 (Bail applications)

2.2 MJR said he had circulated a reworked version of the IAC Reform document that included his observations and supplementary track-changes, and also the slides detailing an overview of the reformed IAC process in represented and unrepresented appeals. After a full discussion the TPC agreed the set of potential rule changes that would be included in the IACSG consultation.

2.3 MJR said that after he had made his amendments, he would send the updated IACSG consultation paper to the IAC Reform team for their input/observations prior to circulation of a final draft to the TPC members.

2.4 The TPC agreed that they would aim to sign off the IACSG consultation paper at the next TPC meeting on 03 December and to launch the TPC consultation during December 2020, subject to the TPC Secretariat securing a grid-slot from No.10 to publish the TPC consultation paper on GOV.UK.

AP/66/20: To circulate an updated draft IACSG consultation paper for the 03 December TPC meeting. –TPC Secretariat

3. HSW Sub-group (HSWSG)

Judgment: *F v Responsible Body of School W*

3.1 CM asked PR if there had been any further developments to establish the views of the Senior President of Tribunals (SPT) to the advisory note prepared by Judge Tudur in respect of the issues raised by Upper Tribunal (UT) Judge Ward in his judgment '*F v Responsible Body of School W*' (AP/61/20). The note detailed the judge's recommendation for a revision to be made to the existing practice direction 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.

3.2 PR confirmed he had sent the judicial note to the SPT's office for their consideration. He was planning to discuss the topic at an introductory meeting with the SPT which should be held very soon.

3.3 CM said that there were no urgent issues requiring the TPC's immediate attention.

4. GTCL Sub-group (GTCLSG)

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

4.1 PBS had prepared a draft consultation reply on possible changes to the Tribunal Procedure General Regulatory Chamber (GRC) Rules in relation to withdrawals of appeals, following the first draft version being discussed at the 08 October TPC meeting. PR and the TPC members thanked PBS for his hard work.

4.2 PBS talked through the latest changes he had made to the revised draft.

4.3 PBS said that after gaining SoR's input that he had shared a version of the updated draft reply with Judge Mark O'Connor, the acting GRC President who had no further comment.

4.4 The TPC signed off the draft consultation reply subject to a few agreed changes to be actioned by the GTCLSG. PBS said he would send the final version of the GTCLSG consultation response to the TPC Secretary who would then commence the exercise with the MoJ External Communications team to secure a grid slot from No.10 to publish the GTCLSG consultation response on the TPC website.

AP/67/20: To make arrangements to publish the TPC Withdrawal consultation reply on GOV.UK. –TPC Secretariat

Judgment: *Devani v SSHD* [2020]

4.5 PBS confirmed that the GTCLSG ~~would aim~~ to prepare a draft consultation paper for the 03 December TPC meeting. The proposed draft consultation document would cover the issues that had been previously discussed by the TPC at their 08 October meeting in respect of the *Devani* judgment, including the practical operation of rule 24 of the Upper Tribunal Rules in the various UT chambers.

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

4.6 PR asked SoR if he was able to update the TPC about any new developments regarding the proposal by his MoJ policy client to remove the first permission to appeal stage between the First-tier Tribunal (FtT) and the UT following his advice at the 08 October TPC meeting.

4.7 SoR said that the Ministry of Justice (MoJ) was still working toward publishing a policy consultation in mid-December 2020 on a range of possible measures to reform the tribunal system, including the potential impacts on the UT. Subject to that consultation, the MoJ was working towards including the streamlining permission proposal in a proposed legislative Bill to be introduced in April 2021. The Lord Chancellor (LC) has already discussed the streamlining permission proposal with the SPT. SoR added, that while the streamlining permission proposal is not a matter for the TPC to decide, his policy client would of course welcome any views the TPC's members may have, particularly on whether the proposal might have any unforeseen effects (particularly drawbacks) in the various tribunal jurisdictions they were familiar with.

4.8 The TPC discussed the potential streamlining permission proposal and agreed to postpone considering UT Judge's Wikeley's proposals that had been put to them about permission to appeal in the UT, pending developments with the MoJ's proposal.

4.9 PR asked SoR to relay the following observations on behalf of the TPC that might be of interest to his MoJ policy client:

- the Social Entitlement Chamber (FtT) makes 'a comprehensive' use of review. Salaried FtT judges consider applications for permission to appeal from the decision of fee-paid FtT judges, and those decisions can sometimes involve mistakes which the review power will be used to correct without burdening the UT. Review is also common in mental health cases. It is less common in the IAC, but the use of review is increasing.
- The additional workload for the UT and related judicial resource implications required to take on this new work. It is almost certain to increase the burden on the UT and is likely to receive a negative response from senior judges who would be asked to undertake this additional work.
- The potential increase in the volume of *Cart* judicial reviews which would create an increased burden on the High Court.

4.10 PR said he would write to UT Judge Wikeley to update him about the approach the TPC had agreed, i.e., to pause any work to consider his proposal due to the MoJ developing policy proposals on streamlining the first permission to appeal stage between the FtT and the UT. He would also discuss this matter with the SPT during their meeting.

4.11 PBS said he would write to the relevant UT Chamber Presidents after the TPC meeting to update them about the TPC's agreed approach following SoR informing the TPC at the 08 October TPC meeting that the MoJ had recently revisited the policy work to develop streamlining proposals.

AP/68/20: To write to UT Judge Wikeley to inform him that the TPC had considered his note although they would not take any action at this present time due to the MoJ revisiting the policy. –PR

AP/69/20: To share/discuss the TPC's observations/concerns in respect of the streamlining permission proposal with his MoJ policy client. –SoR

Correspondence received

4.12 The TPC had a preliminary discussion about questions received by the TPC Secretariat from a member of the public who was also a respondent to the GTCLSG consultation on withdrawal of appeals. The TPC is to return to the discussion at their 03 December meeting, when they would expect to reach a conclusion.

5. Costs Sub-group

Electronic Communications Code cases

5.1 ML confirmed that he had shared his proposed drafting of a rule in respect of the Electronic Communications Code (ECC) (that had been discussed and agreed at the 08 October TPC meeting) with Judge McGrath, the President of the Property Chamber (FtT). The Property Chamber President had provided her observations and a proposed reworked drafting of the rule change that SoR commented was acceptable.

5.2 The TPC agreed that the reworked drafting was satisfactory and signed off the ECC rule change. The rule change would be included in the next scheduled TPC Rules (Amendment) statutory instrument package.

6. Confidentiality Sub-group

Dring Case and access to documents

6.1 RL reported that the work being led by CY on the draft PDs to deal with requests for access to recordings of hearings and to deal with requests from third parties for documents and recordings was still ongoing.

6.2 RL said that the draft PDs would be amended to incorporate judicial feedback and to possibly cover the Employment Tribunal jurisdiction. RL expected the framework for the final practice directions to be wide enough to cover all tribunal jurisdictions and for the exercise to be finalised sometime in December 2020.

AP/70/20: To share the draft confidentiality practice directions with the TPC members as soon as they were available. –RL

7. Litigation Friends

7.1 PR clarified that DF's comments (on behalf of the Lord President's office) that had earlier been communicated to Tony Allman's (TA) had been specific to Scotland and that he would revisit the topic once TA had refined his policy paper and circulated a second draft to the TPC.

7.2 The TPC agreed that they would revisit the Litigation Friends topic and the related drafting exercise for any new Rules to address this issue once the policy approach had been settled by MoJ.

8. Overview Sub-group (OSG)

TPC Work Programme

8.1 The TPC work programme had been updated and circulated as at 02 November 2020.

8.2 It was agreed that the TPC work programme should be updated as follows to amend/remove:

Section 1 of the TPC Work Programme

- Remove entry 4: (Victim's accountability/ involvement in the Mental Health Tribunal proceedings)
- Transfer entry 3: (Litigation Friends) to section 3: the 'Watching Brief'.
- Transfer 'Dring' topic from entry 6: (Confidentiality) to section 3: the 'Watching Brief'.

AP/71/20: To amend the TPC Work programme to reflect comments received from TPC Members. - TPC Secretariat

9. Employment Tribunals

The transfer of responsibility for the making of Procedure Rules in the Employment Tribunals and Employment Appeal Tribunal

9.1 PR reported that the MoJ was presently preparing plans with the Home Office for a joint Bill to be introduced before Parliament in the early part of 2021, tentatively entitled the Policing, Violence, Justice and Sentencing Bill. It was the LC's intention to include in this legislation the following provisions:

- i. to transfer the responsibility for the making of Employment Tribunals (ETs) procedure rules from the Secretary of Business, Energy and Industrial Strategy (SoS BEIS) to the TPC and
- ii. to transfer responsibility for procedure rules in the Employment Appeal Tribunal (EAT) from the LC to the TPC.

9.2 PR added that the LC also wished to make some consequential reforms to the practice, procedure and arrangements in the ETs and EAT to:

- iii. widen the existing power to make rules in the ET and the EAT so that it is equivalent to the TPC's rule making power under the Tribunals, Courts and Enforcement Act 2007 and
- iv. provide for two additional members to be appointed to the TPC: an employment judge or lay member to be appointed by the Lord Chief Justice and an employment practitioner to be appointed by the LC.

9.3 PR added that the MoJ had consulted the SPT on these reforms involving the TPC and that the SPT was in agreement. The LC would be shortly be writing to seek policy and legislative clearance to include these measures in the Policing, Violence, Justice and Sentencing Bill. PR said he would keep the TPC updated with any further developments.

9.4 SoR confirmed that he was working on the proposed Bill and responsible for these provisions in it. PR asked SoR if he could update the TPC at their 03 December meeting.

AP/72/20: To provide an update on the transfer of responsibility for the making of Procedure Rules in the Employment Tribunals and Employment Appeal Tribunal. - SoR

10. AOB

TPC Meetings scheduled for after December 2020

10.1 The TPC agreed the timetable for TPC meetings after December 2020 up to July 2021, i.e., the TPC meeting would be scheduled on the first Thursday of each month.

Next Meeting: Thursday 03 December 2020, 9.30am