

# Tribunal Procedure Committee (TPC): Meeting Minutes: Monday 26 July 2021

Via Microsoft Teams

## **Present**

(Mr Justice) Peter Roth (PR)  
Philip Brook Smith QC (PBS)  
Michael Reed (MJR)  
Christine Martin (CM)  
Donald Ferguson (DF)  
Mark Loveday (ML)  
Gabriella Bettiga (GB)  
Susan Humble (SH)  
Elizabeth Stuart-Cole (ESC)  
Alasdair Wallace (AW)  
Razana Begum (RB)  
Vijay Parkash (VP)  
Liam Halewood (LH)

## **Guests**

Sue Pitt (SP)

## **Apologies**

Tim Fagg (TF)  
Shane O'Reilly (SoR)

## **Minutes**

### **1. Introductory matters**

1.1 Apologies were received from: TF and SoR.

#### **Matters arising**

##### **TPC Chair (EOI) competition**

1.2 PR said that the Judicial Office would be launching an expression of interest (EOI) competition on 26 July to recruit his replacement as Chair of the TPC. As the EOI period runs into the summer break, the deadline for applications had been extended from 10 September to 30 September to provide potential applicants with additional time to apply. PR confirmed that he would continue in his role until his successor was in post.

1.3 The draft minutes of the TPC meeting held on 03 June 2021 were approved subject to minor amendments.

##### **TPC appointments**

1.4 PR confirmed that the Lord Chief Justice had agreed to extend ML's stay on the TPC to a second term. MJR's term on the TPC had been extended by two years by the Senior President of Tribunals (SPT).

#### **TPC Action Log**

1.5 The TPC action log had been updated.

##### **Tribunal Procedure (Upper Tribunal) Rules 2008, rule 13**

1.6 The HMCTS reform process to initiate the sending and delivery of documents to the Upper Tribunal (UT) and parties to assist the use of the CE file system had been discussed by the TPC at the May and

June meetings. The TPC acknowledged that there was an obligation to encourage the use of CE-Filing and were eager to support the judicial working group, whose representatives had presented their case for a potential rule change at the June meeting.

1.7 AW had prepared legal advice on the operation of the various Tribunal Procedure Chamber Rules in respect to the digital handling of appeals.

1.8 AW provided several observations regarding the proposal draft amendment to rule 13 to enable CE-filing in the UT:

- AW considered how an amendment to rule 13 of the Tribunal Procedure (UT) Rules to enable permissive use of CE-Filing might look if the TPC agreed to replicate the approach the Civil Procedure Rules applied to the practice for CE-Filing for the Civil Division of the Court of Appeal, the High Court and the County Court.
- AW expressed his thoughts for what form provision for digital matters takes across the various sets of rules more generally, and how far this might be done by Practice Notes rather than Practice Directions (PD).
- That the various tribunal chamber rules were quite similar in this regard, so a model which would work for them all if done as an amendment to rule 13 of the UT rules with an adjustment as deemed necessary .

1.9 AW confirmed that the only provision made in statute for provision about practice and procedure in Tribunals to be made other than in Tribunal Procedure Rules was in section 23 of the Tribunals, Courts and Enforcement Act 2007 (TCEA). The TCEA provided the legislative framework allowing directions to be made as to practice and procedure. This could be achieved either by the SPT with approval of the Lord Chancellor (LC) or by a Tribunal Chamber President (as to practice and procedure in the Upper Chamber) with approval of both the SPT and the LC. The provision in paragraph 17 of Schedule 5 TCEA enables rules effectively to delegate a matter to a PD.

1.10 AW suggested that the most flexible way of covering all options would be to adopt the approach of the Civil Procedure Rules Committee (CPRC). The CPRC had produced CPR Practice Direction 5C (the CE-Filing PD) with a provision in the rule allowing for provision about electronic working to be made in a PD.

1.11 The TPC discussed the approach suggested by AW to enable the lodging and filing of documents in the Immigration and Asylum Chamber (UT) and Lands Chamber (UT) by parties using the online CE-Filing system.

1.12 After a full discussion the TPC noted that it was intended by HMCTS that users would still have the opportunity, at least for the present, to file paper documents and that mandating the use of electronic filing, even for a restricted class of user, raised issues concerning access to justice.

1.13 The TPC decided that it would be desirable for an amendment to be made to rule 13(1) which would expressly set out the procedure for CE-Filing in the Rules rather than leaving it to a PD. This approach would also avoid the need for a consultation. This MR agreed to provide proposed wording to RB and AW in respect to amending rule 13(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to state that CE-Filing is an alternative means by which documents may be provided. The TPC agreed to review the operation of the e-filing process in a year, when there should be enough experience/anecdotal evidence including statistical data for the TPC to revisit the proposal enabling mandatory use of CE-Filing.

**AP/30/21: To provide proposed wording for draft Rule in respect to CE-Filing to VP/RB/AW. –MJR**

Proposed amendment of Rule 10(4) of the Tribunal Procedure (First-tier Tribunal) (FtT) General Regulatory Chamber (GRC) Rules 2009

1.14 AW summarised the background behind his proposed drafting approach for a rule amendment to correct the issue reported by the Joint Counsel of Statutory Instruments in respect to rule 10(4) of the

Tribunal Procedure (FtT) (GRC) Rules 2009. The TPC agreed that this action was appropriate to correct the unforeseen slip-up.

**AP/31/21: To add the amendment for Rule 10(4) to the Autumn TPC Amendment statutory instrument. – TPC Secretariat & RB/AW**

## **2. Immigration & Asylum Chambers Sub-group (IACSG)**

### **Consultation on possible changes to the Immigration and Asylum Chambers Rules in relation to Tribunal Reform**

2.1 MR reported that the TPC consultation on IAC Reform had closed on 14 July 2021. The TPC Secretariat had received 2 responses.

2.2 MR said the IACSG would convene during September to discuss the responses. It was the IACSG's intention to prepare a draft response that would be circulated to the TPC prior to the next scheduled meeting in October.

**AP/32/21: To send the IACSG reform consultation response summary to the IACSG. – TPC Secretariat**

### **Application of rule 17 of the IAC rules (withdrawals)**

2.3 The TPC considered whether an amendment was required to rule 17 of the Tribunal Procedure (FtT) (IAC) Rules 2014 in respect to the procedure for the application for withdrawals (the topic had been initially discussed at the May meeting following a Home Office request). The TPC noted that as there was an ongoing legal challenge in the Court of Appeal related to this rule and that it would be appropriate to wait until the outcome of the case before considering the matter. The TPC decided that this issue, although not strictly a procedural matter, should be added to the 'Watching Brief' of the TPC Work Programme.

**AP/33/21: To add the topic 'application of rule 17 of the IAC rules (withdrawals)' to Watching Brief of the TPC Work Programme. –TPC Secretariat**

### **New Plan for Immigration programme (NPI)**

2.4 MJR said that the IACSG had received an update note from the NPI MoJ policy team on the Nationality and Borders Bill 2021, setting out the previously reported measures and regarding the introduction of new measures that were being taken forward through marker clauses.

2.5 The TPC agreed that the topics: wasted cost orders and fixed recoverable costs to be added to the 'Watching Brief' of the TPC Work programme.

**AP/34/21: To add the topics: wasted cost orders and fixed recoverable costs to the Watching Brief of the TPC Work Programme. –TPC Secretariat**

## **3. HSW Sub-group**

3.1 CM confirmed that there were no urgent issues requiring the TPC's immediate attention.

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

### **Judgments: *Devani v SSHD* [2020] & *SSE Generation limited v HMRC* [2021]**

4.1 PBS said that the TPC consultation had closed on 13 July 2021. The TPC Secretariat received 3 responses.

4.2 PBS said the GTCLSG would aim to have prepared a draft consultation response for the October meeting.

## Oral renewal hearings in the Upper Tribunal for permission to appeal in cases considered totally without merit

4.3 PBS said that the consultation launched on 21 June 2021 was due to end on 13 August 2021. Presently the TPC Secretariat have received 2 responses.

4.4 ML had discussed the *Devani* judgment matter with Judge Martin Rodger QC, the Deputy Chamber President of the Lands Chamber (UT) in respect to the potential impact on the Lands Chamber (UT). ML said he would share the judge's feedback with PBS in due course although the TPC noted that the consultation did not include any proposals to make any rule changes to the current Lands Chamber rules.

## **5. Costs Sub-group**

### Telecommunications Infrastructure (Leasehold Property) Act 2021: Costs in The First-Tier Tribunal (Property Chamber)

5.1 ML summarised the background behind the Costs Sub-group proposal to make an amendment to rule 13 of the Tribunal Procedure (FtT) (Property Chamber) Rules. Rule 13 sets out the practice and procedure for orders for costs, reimbursement of fees and interest on costs.

5.2 The proposed rule change seeks to accommodate the enacted provisions of 'Part 4A' in the Telecommunication Infrastructure Act 2021 that have come into force in respect to the Electronic Communications Code (EEC) cases.

5.3 The matter had previously been discussed by the TPC as part of the wider issues of costs-shifting in EEC proceedings in tribunals.

5.4 After a full discussion, the TPC agreed with the suggested proposal to amend rule 13 to include 'Part 4A' applications. The TPC agreed there was no need to conduct a consultation. ML said he would revisit the matter with Judge McGrath, the President of the Property Chamber (FtT) to update her with the TPC's decision. PR asked AW to consider and report back to the TPC if there were any vires issues or legal implications with the proposal approach to amending rule 13.

**AP/35/21: To consider if there were any legal/vires issues/implications in respect to the proposed amendment approach for rule 13. –RB/AW**

**AP/36/21: To add the amendment in the Autumn TPC Amendment statutory instrument's package. – TPC Secretariat & RB/AW**

### Conservation Covenants

5.5 The TPC agreed that any potential rule changes should be made after regulations had been prepared by the Department for Environment, Food and Rural Affairs and accordingly considered by the Costs Sub-group. ML said he would continue his discussions with Judge Rodger QC and Judge Cooke to obtain their views regarding any potential rule changes. Both judges had agreed to make suggestions to ML in respect of required changes to the current Lands Chamber Rules (UT). The TPC anticipated that, at the earliest, the potential rule changes would be introduced in spring 2022.

### Leech Homes v Northumberland CC: Costs in the Upper Tribunal (Lands Chamber)

5.6 ML summarised the '*Leech Homes v Northumberland CC*' judgment handed down by the Court of Appeal on 21 February 2021. The judgment highlighted the current procedure/practice with respect to 'costs' in compensation cases heard in the Lands Chamber (UT). The Court considered whether the UT had the power to order costs in an appeal under section 18 of the Land Compensation Act 1961 concerning a certificate of appropriate alternative development, pursuant to rule 10 of the Upper Tribunal (Lands Chamber) Rules. The Court held that such cases did not fall within the present scope

of rule 10, and added that it is a matter for the TPC to consider whether any change in the Rules is desirable.

5.7 ML agreed to prepare a paper on the '*Leech Homes*' judgment for the October meeting setting out the Costs Sub-group's views/observations and any further action required by the TPC. The TPC agreed that the topic '*Leech Homes*' judgment should be added to the TPC Work programme.

**AP/37/21: To prepare a note on '*Leech Homes*' judgment for the October meeting. –ML**

**AP/38/21: To add the topic '*Leech Homes*' judgment to Section 1 of the TPC Work Programme. –TPC Secretariat**

## **6. Confidentiality Sub-group**

6.1 TF had confirmed prior to the meeting that there were no urgent issues requiring the TPC's immediate attention.

## **7. Tribunal Procedure (Coronavirus) Rules 2020**

7.1 AW updated the TPC in respect to the Tribunal Procedure (Coronavirus) Rules 2020 statutory instrument and the TPC's future input. He advised that there would be a six-monthly review debate on the Coronavirus Act in Parliament in September, and the likely approach regarding section 55 is that the provision and the Schedules it introduces will not be offered for early expiry and will run until the 25 March 2022.

7.2 AW added that further consideration would be given to extending the expiration date, which could be achieved by regulations for a period of up to six months after the date on which the provisions would otherwise have expired (to align with the coming into operation of the new "open justice" provisions in the Police, Crime, Sentencing and Courts Bill 2021).

## **8. Correspondence between Lord President and Mr Justice Roth**

8.1 PR reported that he had received correspondence from the Lord President (LP) of the Court of Session in respect of the necessary consultation during the rule making process in relation to rules to tribunal proceedings in Scotland.

8.2 VP said he had discussed the matter with his counterpart in the LP's office and that they had agreed a new process for future TPC consultations that required the LP's or designated representative's consideration. The TPC Secretariat would also review the consultation process for Wales and Northern Ireland to ensure that the appropriate departments/officials had adequate time to evaluate TPC consultations and if appropriate to provide their comments/reply.

## **9. Perjury**

9.1 RB summarised the note she had prepared to clarify the application of the Perjury Act 1911 in tribunal proceedings. The matter had previously been discussed by the TPC at the June meeting. RB confirmed that offences under the Perjury Act were matters of substantive law, not practice and procedure. For this reason, it would be inappropriate for the Tribunal Rules, which govern practice and procedure only, to make any provision about perjury.

## **10. Overview Sub-group**

### **TPC Work Programme**

10.1 The TPC work programme had been updated and circulated as on 08 July 2021.

10.2 It was agreed that the TPC work programme should be updated to reflect the latest progress update for each entry.

**AP/39/21: To amend the TPC Work programme to reflect the latest position for each entry. - TPC Secretariat**

## **11. AOB**

### **Judicial Review and Courts Bill 2021**

- 11.1 It had been brought to the attention of the TPC that the Judicial Review and Courts Bill included a provision to establish an Online Procedure Rule Committee (OPRC). VP said that a letter had been written to PR from the lead MoJ policy official on 26 July regarding this, but it had not been received prior to the meeting.
- 11.2 This proposal had been previously discussed by the TPC as the OPRC provision was due to be included in an earlier legislative vehicle. However, that measure had lapsed due to the prorogation of Parliament in 2019 and the Bill was not subsequently carried over by the MoJ to the following parliamentary session.
- 11.3 The TPC had been involved with the discussions for the expansion of their jurisdiction to make rules for the Employment Tribunal and the Employment Appeal Tribunal, which included plans for increasing the TPC membership to effectively carry out its expanded role.
- 11.4 The TPC discussed the establishment of the OPRC and its potential implications for the TPC. The following concerns and observations were expressed:
- The TPC was concerned how making online rules by the OPRC would interact with the role of the TPC to consult on and make rules for the same tribunals.
  - The TPC considered whether the small size of the OPRC membership would be able to effectively manage the anticipated workload.
  - The TPC noted the lack of practical experience in tribunals or experience of advising persons involved in tribunal proceedings on the OPRC.
  - The TPC queried how the seamless interchange between online and offline rules would affect ease of understanding for litigants.
- 11.5 The TPC agreed for the topic: OPRC to be added to the 'Watching Brief' of the TPC Work programme. PR said he would reply to the MoJ official once the letter was received and take the matter up with the SPT

### **TPC Sub-group membership**

- 11.6 PR asked the TPC Secretariat to update the TPC Sub-group membership chart to reflect recent changes to the TPC membership and to circulate the updated version to the TPC.

**AP/40/21: To update the TPC Sub-Group chart and circulate to the TPC. - TPC Secretariat**

**Next Meeting: 08 October 2021, 10.30am**