

Tribunal Procedure Committee (TPC): Meeting Minutes: Thursday 03 March 2022

Hybrid Meeting at the Rolls Building, London & via MS Teams

Present

(Mrs Justice) Joanna Smith (JS)
 Philip Brook Smith (PBS)
 Michael Reed (MJR)
 Donald Ferguson (DF)
 Mark Loveday (ML)
 Alasdair Wallace (AW)
 Razana Begum (RB)
 Shane O'Reilly (SoR)
 Vijay Parkash (VP)
 Liam Halewood (LH)

Guests

Tim Fagg (TF)
 Sue Pitt (SP)

Apologies

Gabriella Bettiga (GB)
 Christine Martin (CM)
 Beth Stuart-Cole (BSC)
 Susan Humble (SH)

Minutes

1. Introductory matters

1.1 Apologies were received from: CM, GB, BSC and SH.

Matters arising

TPC Appointments

1.2 TF was appearing at the meeting as a guest attendee. JS reported that the TPC Secretariat were still progressing the appointment exercise to retain TF for a second term. The Lord Chief Justice (LCJ) had written to the Lord Chancellor (LC) to secure his support for reappointing TF (at the request of the Senior President of Tribunals (SPT)).

1.3 JS reported that CM was required to relinquish her role in her capacity as a LCJ appointment (Upper Tribunal (UT) judge representative) to the TPC, as she was due to retire as a salaried UT judge on 30 March 2022. Her current term on the TPC was due to end on 10 July 2023.

1.4 JS said that CM had agreed to continue her role and that the TPC Secretariat were working with the SPT's office and Judicial Office (JO) to progress the reappointment exercise. JS confirmed that JO had launched an 'expression of interest' (EOI) competition for CM's replacement on 23 February 2022 (via the judicial intranet), which was due to end on 25 March 2022.

1.5 JS requested the TPC Secretariat to update the TPC membership schedule to reflect the appointment changes and to circulate the document to the TPC to correspond with upcoming meetings.

AP/01/22: To circulate a TPC membership appointments table for forthcoming TPC meetings - TPC Secretariat

TPC Sub-groups

1.6 The TPC discussed the planning process to consider rule changes required to implement judicial reforms that were included within the Nationality and Borders Bill 2022 (NBB). This work has the potential to extend beyond 2023 and involve the preparation of TPC consultations, the drafting and making of new procedure rules and supporting work to effect this.

1.7 Following a discussion on the current composition of the Immigration and Asylum Chamber Sub-Group (IACSG), the TPC agreed for the membership of the sub-group to be expanded to include a First-tier Tribunal (FtT) IAC liaison judge, which would add to the practical experience and valuable contribution provided by SP (in her capacity as the IAC (UT) liaison judge).

1.8 JS said she would write to Judge Clements, the President of the IAC (FtT) to request his assistance to identify and nominate an IAC Resident Judge to take on this role.

AP/02/22: To write to Judge Clements to request his assistance to secure a volunteer to assume the role of IAC (FtT) liaison judge in the IACSG. - JS

1.9 The TPC noted that there were no urgent matters to be considered by the Confidentiality Sub-Group for potential rule changes across the tribunal chambers. The TPC agreed that it would be efficient to remove the Confidentiality Sub-Group as a standing agenda item at future meetings unless the topic required the TPC's immediate attention.

AP/03/22: To remove the 'Confidentiality Sub-group' as a standing agenda item for future TPC meetings - TPC Secretariat

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

TPC Action Log

1.11 The TPC action log had been updated.

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

Consultation on possible changes to the IAC Rules in relation to Tribunal Reform

2.1 JS confirmed that the consultation response on possible changes to the IAC Rules in relation to Tribunal Reform was published on 14 February 2022 on the TPC website. The assorted rule changes had been included in the Tribunal Procedure (Amendment) Rules 2022 package.

Nationality and Borders Bill 2022

2.2 JS said the passage of the NBB was currently at the 'report stage' in the House of Lords. The clauses in the Bill had been debated on 28 February and 2 March 2022. The final sitting to discuss the NBB was scheduled on 8 March 2022.

Wasted Costs Orders

2.3 JS summarised the events in respect of the 'Wasted Costs Orders -clauses 76 and 77' following the matter being discussed at the December meeting. JS confirmed she had met with the SPT and Lord Wolfson of Tredegar QC, the Parliamentary Under Secretary of State in the Ministry of Justice (MoJ). They had discussed the TPC's observations on clause 76 (formerly clause 63) 'wasted costs orders'. Clause 76 - *'requires the TPC to make rules requiring IAC judges to consider costs orders when certain trigger events occur, with a presumption that such order would be made absent a reasonable explanation from the party concerned. The intent is to reflect in rules the principles from case law on the circumstances, behaviours and events in which such orders be made'*.

2.4 JS said that the Minister acknowledged the issues that had been highlighted by the TPC in correspondence in respect of the potential practical difficulties that the wording of clauses 76 and 77 would present, if not amended. However, the Minister confirmed that it was still the Government's intention to proceed with the clauses as they had been presently drafted.

2.5 JS said that the Minister had offered to support the TPC in their consideration and preparation for the consultation exercise in respect of NBB measures requiring new or amended rules.

Single joint experts

2.6 JS informed the TPC that the anticipated second ‘single joint experts’ (SJE) paper had not yet been circulated by MoJ officials to the IACSG. Therefore, the discussion on SJE was postponed and rescheduled for discussion at the April meeting.

AP/04/22: To add the ‘single joint experts’ topic to the April meeting agenda - TPC Secretariat

Changes to bail consent in the Nationality and Borders Bill

2.7 MJR said that the Home Office (HO) had prepared a paper informing the TPC of their proposal to make a purely technical immigration bail rule change by laying a consequential amendment statutory instrument (SI). HO officials were keen to understand whether the TPC had any issue with their legislative approach to implement the consequential changes required by clause 45 NBB.

2.8 After a full discussion, the TPC agreed to the HO’s approach to make the proposed immigration bail rule change but asked the relevant MoJ policy official to reiterate to the HO that the TPC was established under section 22 of, and Schedule 5 to, the Tribunals, Courts and Enforcement Act 2007, with the function of making Tribunal Procedure Rules for the FtT and the UT and that the TPC’s agreement to this very technical amendment on this occasion should not set a precedent as to the approach to be adopted in future in circumstances of more substantial rule changes.

2.9 However, given the minor and technical nature of the change proposed and the TPC’s preference for the procedural rule to align with the primary legislation upon commencement, the TPC was content for the required rule change to be made through a HO drafted SI, in accordance with Section 80(2) of the NBB.

2.10 JS asked the TPC Secretariat to obtain the HO’s agreement to provide the draft SI containing the procedural rule change to the TPC before it is laid before Parliament so that the TPC can approve the drafting.

AP/05/22: To obtain the Home Office’s agreement to provide the draft SI for the TPC’s consideration (prior to the SI being laid). - TPC Secretariat

3. GTCL Sub-group (GTCLSG)

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

3.1 PBS confirmed that the consultation response on a proposed amendment to rule 22 of the UT Rules 2008 was published on 25 February 2022 on the TPC website. The rule change had been included in the Tribunal Procedure (Amendment) Rules 2022 package.

3.2 PBS commented that there appeared to be a glitch in respect of the location of published consultation replies on the TPC website that resulted in it not being possible to see the original TPC consultations at the same time. This may be confusing for readers wishing to see both the initial consultation paper and the subsequent reply. The TPC Secretariat agreed to investigate the process of publishing TPC consultations and replies with the MoJ web team.

AP/06/22: To investigate the rationale/process with the MoJ web team for posting the publication of TPC consultations and replies on GOV.UK. To provide an update at the April meeting - TPC Secretariat

Conservation Covenants

3.3 RB confirmed that the Department for Environment, Food and Rural Affairs (DEFRA) was still on track to commence Part 7 (and Schedules 18-20) of the Environment Act 2021 in September 2022. She asked PBS whether the GTCLSG had commenced the work to consider the potential changes to the current Lands Chamber rules that may be needed. PBS confirmed that the GTCLSG had already started their deliberation and that he would share the draft amendment rules, when agreed, with RB and DEFRA policy officials. He expected this drafting work to be completed by late April/early May.

3.4 PBS confirmed that the GTCLSG would prepare a position paper containing their preliminary suggestions for the likely new draft rules, which would be shared with the TPC at the April meeting.

AP/07/22: To prepare a position paper on ‘Conservation Covenants’ for the April meeting– PBS

4. Costs Sub-group

Leech Homes v Northumberland CC and compulsory acquisition claims: Costs in the Upper Tribunal (Lands Chamber)

4.1 ML confirmed that the reply to the consultation on *Leech Homes v Northumberland CC and compulsory acquisition claims: Costs in the Upper Tribunal (Lands Chamber)* was published on 25 February 2022 on the TPC website. The rule change had been included in the Tribunal Procedure (Amendment) Rules 2022 package.

4.2 ML said that he expected the Costs Sub-group to consider potential rule changes relating to ‘cost shifting’ powers for unreasonable behaviour in leasehold and residential cases resulting from the potential transfer of several jurisdictions from the General Regulatory Chamber (FtT) to the Property Chamber (FtT). He was discussing these matters with Judge McGrath, the President of the Property Chamber (FtT).

5. Confidentiality Sub-group

5.1 TF confirmed that there were no urgent issues requiring the TPC’s immediate attention.

6. Tribunal Procedure (Upper Tribunal) Rules 2008, rule 13 CE-filing

6.1 JS confirmed that she had received the completed CE-filing questionnaires from the UT Chamber Presidents. The questionnaires had been circulated to PBS and MJR for their consideration. PBS said that the supplementary anecdotal information had proved helpful in the context of the preparation of a first draft CE-filing consultation paper (which had not yet been circulated to the committee). JS thanked PBS and MJR for their work so far.

6.2 JS summarised her discussions with the SPT on this matter since the topic was previously discussed at the December meeting. She confirmed that the SPT was keen to maintain the momentum in respect of the ongoing HMCTS digitalisation reform programme, which included the project to roll out the mandated digital CE-filing process in the UT chambers. JS added that the SPT was very conscious of the statutory role of the TPC and the importance of the TPC following the appropriate process, including consultation. He respects that process and does not want to encroach on it in any way. He appreciates that the consultation must be the product of a proper analysis by the TPC as to what is required and that the TPC will need to consult such persons as it considers appropriate on the proposed changes to the rules and how these should be achieved.

6.3 The TPC agreed that it would be helpful for the UT Chamber Presidents to provide their observations on the proposed content of any CE-filing practice direction (PD) that may be put in place in order to assist the preparation of the consultation document.

6.4 PBS said he would prepare a draft note intended for the UT Chamber Presidents that covered topics/questions that required further clarification/their input for issues highlighted by the TPC.

AP/08/22: To prepare a note to be sent to the UT Chamber Presidents. – PBS

6.5 JS confirmed that she would update the CE-filing judicial working group (via UT Judge Jones) in respect of the latest developments and anticipated timeline for the TPC to launch a consultation exercise.

AP/09/22: To provide the CE-filing judicial working group with a position update. – JS

7. Tribunal Procedure (Amendment) Rules 2022 Exercise

7.1 RB confirmed that the signing exercise by TPC members had been completed on 03 March 2022.

7.2 The SI was due to be laid before Parliament on 16 March 2022 and to come into force on 06 April 2022.

8. Overview Sub-group

TPC Work Programme

8.1 The TPC work programme had been updated and circulated on 24 February 2022. It was agreed that the TPC work programme should be updated to reflect the latest progress update for each entry.

AP/10/22: To amend the TPC Work programme to reflect the latest position for each entry - TPC Secretariat

9. AOB

Tribunal Procedure (Coronavirus) (Amendment) Rules 2020 & Coronavirus Act extension

9.1 VP reported that the Coronavirus Act 2020 (CVA) was due to expire at midnight on 24 March 2022, including section 55 (and schedule 25) which facilitates the remote observation of wholly remote proceedings.

9.2 Section 90(2) of CVA provides the specific mechanism required temporarily to extend these measures (a statutory instrument) and the government was actively pursuing such an extension. This extension was to ensure that there was no legislative gap between the expiry of the temporary CVA powers and permanent replacement powers contained in clauses 196 and 197 of the Police, Crime, Sentencing and Courts (PCSC) Bill.

9.3 The current estimate was that PCSC Bill should achieve Royal Assent by late March or early April 2022. While MoJ was pursuing an extension of CVA for up to six months, they still aimed to expire section 55 of CVA as soon as possible and to bring the replacement PCSC powers into force. MoJ currently anticipate this being in April 2022.

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

9.4 VP reported that the MoJ expected that the Judicial Review and Courts Bill 2022 would receive royal assent in late Spring. It was expected that the measures would come into force two months after royal assent.

9.5 VP said that MoJ policy was working on an implementation plan for the measures and that they have engaged with JO and the Public Appointments team on the process of appointing the additional 2 TPC members.

Conflict of Interest

9.6 JS asked the attendees for their views on whether formal measures should be put in place to mitigate the risk of conflict between the TPC, TPC Secretariat and associated individuals involved in the TPC's work/activities to avoid diverging interests, points of view, or allegiances. JS confirmed that she had discussed this matter with the SPT.

9.7 The TPC agreed that it would be reasonable to produce practical guidance on conflicts arising in respect of everyone involved in the TPC's work. JS agreed to produce a short draft policy on conflicts of interest for discussion and approval at the next meeting.

AP/11/22: To prepare a draft policy on 'Conflict of Interest' for those involved in TPC work. - JS

Next Meeting: Thursday 07 April 2022, 10.30am