

Tribunal Procedure Committee (TPC): Meeting Minutes: Thursday 07 April 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)
Tim Fagg (TF)
Christine Martin (CM)
Beth Stuart-Cole (BSC)
Susan Humble (SH)
Mark Loveday (ML)
Alasdair Wallace (AW)
Razana Begum (RB)
Shane O'Reilly (SoR)
Vijay Parkash (VP)
Liam Halewood (LH)

Guests

Sue Pitt (SP)
Julian Phillips (JP)
Alexandra Yates (AY)

Apologies

Gabriella Bettiga (GB)

Minutes

1. Introductory matters

1.1 An apology was received from: GB.

1.2 JS welcomed JP and AY to the meeting. JP had been nominated by the President of the IAC (First-tier Tribunal) as his representative on the IAC Sub-group. AY was attending to assist the TPC with any questions on the 'single joint experts' policy proposal.

Matters arising

TPC Appointments

1.3 JS was pleased to report that CM had been appointed as a Lord Chief Justice (LCJ) representative at the request of the Senior President of Tribunals (SPT). Her current term would run from 31 March 2022 to 31 March 2025.

1.4 JS said that TF had been reappointed for a second term, which would run from 01 January 2022 to 31 December 2024.

1.5 JS confirmed that the 'expression of interest' competition for CM's replacement (LCJ appointment- Upper Tribunal (UT) judge representative) had ended on 25 March 2022. Judicial Office expected her successor to be in post before the summer break.

Lord President of the Court of Session- TPC representative

1.6 JS reported that DF had been reappointed for a third term on the TPC as the representative for the Lord President of the Court of Session. His new term is due to end on 22 March 2025.

Tribunal Procedure (Amendment) Rules 2022

1.7 JS confirmed that the TPC statutory instrument (SI) was laid before Parliament on 16 March 2022. The SI came into force on 06 April 2022.

1.8 PBS highlighted that the schedules within the consolidated Tribunal Procedure (Upper Tribunal) Rules 2008 were incorrect. The TPC Secretariat agreed to investigate the matter and, with the assistance of RB, correct any inaccuracies identified.

AP/12/22: To investigate and correct the inaccuracies in the consolidated Tribunal Procedure (Upper Tribunal) Rules 2008 posted on GOV.UK - TPC Secretariat

1.9 The draft minutes of the TPC meeting held on 03 March 2022 were approved subject to minor amendments.

TPC consultation papers on GOV.UK

1.10 LH confirmed that he had investigated the matter previously raised by the TPC at the March meeting in respect of the location of TPC consultations and replies on the TPC webpage. LH clarified the logistical process to the attendees, i.e., that when a consultation was due for publication, the TPC Secretariat filled out a web submit form that informed the MoJ web team about the location for the publication and any relevant information that the TPC web page should display.

1.11 LH said that the same process is followed for publishing consultation replies but the MoJ web team do not create an additional web page. Rather, the MoJ web team update the original consultation page with the outcome of the consultation, which provides a complete picture of the consultation process from start to finish. LH commented that this would be easier for readers to consume but acknowledged that this process may give the impression that GOV.UK have published the consultation reply but not the original consultation itself. The TPC were content with this explanation.

TPC Action Log

1.12 The TPC action log had been updated.

Changes to bail consent in the Nationality and Borders Bill

1.13 LH provided an update in respect to AP/05/22 (to obtain the Home Office's (HO) agreement to provide the draft SI for the TPC's consideration prior to it being laid before Parliament).

1.14 LH confirmed that he had obtained explicit confirmation from the HO that the TPC will be given sight of the draft SI containing the procedural rule change to the bail consent timeframes. JS asked LH if he could share the email correspondence between the MoJ and HO.

AP/13/22: To send to Mrs Justice Smith the correspondence in respect to bail consent confirming agreement to parliamentary procedure - TPC Secretariat

TPC 'Conflict of Interests' policy

1.15 JS thanked the TPC members for their comments on her draft policy note on the 'conflict of interests' topic (following the matter being discussed at the March 2022 meeting).

1.16 The TPC discussed whether the document should cover any other potential situations/circumstances in respect of the procedure to be introduced. The aspects deliberated included:

- Actual conflict of interest;
- Potential conflict of interest;
- Perceived conflict of interest;
- Conflict of duty;
- Direct interests and
- Indirect interest

1.17 JS said she would circulate an amended note incorporating the TPC members' observations following the meeting, with the desired intention that the policy document would be signed-off by the TPC at the May 2022 meeting. Subsequently the document would be published on the TPC webpage.

AP/14/22: To circulate a revised draft policy on 'Conflict of Interest' for those involved in TPC work. – JS

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

Nationality and Borders Bill 2022

2.1 JS said that the passage of the Nationality and Borders Bill 2022 (NBB) was currently at the 'report stage' in the House of Lords for the consideration of amendments.

New Plan for Immigration programme

2.2 MJR said that the TPC had received a package of policy papers and an accompanying cover note prepared by the New Plan for Immigration (NPI) policy team, Ministry of Justice (MoJ). The NPI policy papers covered the following proposals:

Accelerated Detained Appeals (ADA)

- Accelerated immigration and asylum appeals for those in detention. The NBB sets out some of the timings for when appeals must be filed, heard and when onward 'permission to appeal' applications must be determined, and states that procedure rules must allow transfer out of ADA.

Expedited Appeal Procedure in Upper Tribunal

- Certain appeals following the new 'Priority Removal Notice' will be appeals to the Upper Tribunal (UT) (rather than First tier Tribunal (FtT)), to be brought and determined in shorter timeframe than appeals in FtT. "Related appeals" as defined will be joined to and heard with expedited appeals. Appeals can be transferred out of the expedited route where it is the only way to ensure justice is done.

Judge's written credibility findings

- A new duty on judges to provide written reasons as to when and how they have considered credibility, in asylum and protection claims.

Wasted Costs Orders measures

- A requirement for rules to be made in the Immigration and Asylum Chambers (IAC) which:
(a) prescribe conduct that in the absence of evidence to the contrary is to be treated as unreasonable, negligent, improper, or is an unreasonable act [ie the tests for WCOs and unreasonable costs orders and new tribunal wasted resource]; and
(b) provide that where the tribunal is satisfied the behaviour in (a) has occurred, it must consider the making of an order.

Single Joint Expert Evidence (Non-NBB legislative measure)

- Introducing rules around when permission is sought to rely on expert evidence and the use of single joint expert evidence.

2.3 MJR confirmed that a policy paper on 'Age Assessment Appeals' was expected to follow. A paper on the 'Fixed Recoverable Costs' proposal was anticipated in due course.

2.4 AY, the MoJ policy lead for 'single joint experts' (SJE) summarised the policy developments since his initial paper was discussed by the TPC in November 2021. The TPC proposed that the SJE policy could be delivered in the form of a tribunal practice direction rather than through drafting new tribunal procedural rules. MJR asked AY to consider the TPC's comments/observations and the TPC agreed to return to the SJE topic in May, if AY required further input from the committee.

AP/15/22: To confirm whether the SJE policy topic is needed to be added as an agenda item for the May meeting. – TPC Secretariat and AY

2.5 JS said that the NPI team had offered their support/resource to provide draft new or amended rules for the TPC's consideration for each measure. If the TPC would find this helpful, MoJ legal officers would be instructed to draft these rules following initial feedback from the IACSG. MoJ had also offered to assist with consultation drafting to accompany proposed rule changes and to respond to any questions or concerns that the TPC may have.

2.6 MJR suggested that the IACSG's slot on the meeting agenda should be utilised by the TPC to agree an approach for the future planning of the subgroup's time and resource in considering the NBB measures, as set out in the policy papers.

2.7 Following a full discussion, the TPC regarded it as a necessary action for the NBB measures to be subject to a prioritisation exercise. Given the TPC's existing busy work schedule, potential new work and the volume and complexity of the procedural rules required from the NBB, the TPC agreed it was not feasible to deliver all six distinct workstreams by the MoJ's stated 'April 2023' target date.

2.8 The TPC appreciated MOJ's offer to assist with the rule making process. With respect to the proposal to assist with consultation drafting, the TPC do not, as a matter of principle, regard this as appropriate. However, the TPC has identified areas that MoJ input would be useful to inform their consultation drafting.

2.9 The IACSG agreed to meet MoJ officials (legal and policy) virtually to discuss the next steps in relation to the accelerated detained appeals, expedited related appeals, and credibility provisions. MJR expressed the view that, ideally, the IACSG meeting would take place before the next TPC meeting scheduled on 05 May 2022.

AP/16/22: To arrange the timing and cast list for an IACSG meeting with MoJ policy and legal officials. – TPC Secretariat

2.10 In respect of the Wasted Cost Orders (WCO) measure, JS said that the TPC had previously raised at ministerial level the difficulty in identifying an exhaustive list of behaviours that would be regarded as 'improper, unreasonable or negligent' and trigger the tribunal's consideration of making a WCO. Minister Pursglove expressed on 30 November 2021 that MoJ officials were examining the case law on WCOs and would be prepared to share their analysis with the committee to support the drafting of rules.

2.11 To support the drafting of a consultation on the wasted costs orders provisions, the TPC asked the Secretariat to contact the NPI team and request sight of the case law examination conducted by the MoJ that identifies specific examples of 'improper, unreasonable or negligent' conduct that the MOJ considers should be set out in the rules as triggering the tribunal's consideration of making a costs order. Additionally, the TPC would be interested in examples of behaviour that MoJ deems appropriate as a 'trigger point', which may not have previously been recognised as such in the case law.

AP/17/22: To obtain from the NPI team their case law examination analysis that has been previously conducted for wasted cost orders. – TPC Secretariat

2.12 The TPC agreed that upon receipt of the age assessment policy paper, it will be added to the agenda for consideration in the May 2022 meeting.

3. GTCL Sub-group (GTCLSG)

Charities Act 2022

3.1 JS reported that she had discussed the matter of "authorised costs orders (ACO)" (comparable to the High Court's *Beddoe* order) with Mrs Justice Bacon, the President of the Tax and Chancery Chamber (Upper Tribunal). The judge had commented that the TPC may wish to consider making potential rule changes to enable the legislative changes resulting from the introduction of Section 36 of the Charities Act 2022. The legislation received royal assent on 24 February 2022 and the different provisions were expected to come into force at various stages over the next 18 months. The ACO provision is expected to commence during Autumn 2022.

3.2 PBS said that he had received a policy paper prepared by the Department for Digital, Culture, Media and Sport (DCMS) on the ACO provision. The DCMS note provided the background and rationale for suggested rule amendments for the TPC's consideration. PBS said the GTCLSG would reflect on whether rule changes would be needed for the introduction of ACOs. He would return with his preliminary assessment at the May 2022 meeting.

Conservation Covenants

3.3 PBS said that he would circulate a paper containing the GTCLSG's preliminary suggestions for the likely new draft rules for the May 2022 meeting.

AP/18/22: To circulate a paper on 'Conservation Covenants' for the May meeting– PBS

4. Costs Sub-group

4.1 ML confirmed that there were no urgent issues requiring the TPC's immediate attention.

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

5.1 JS reported that she had written to the UT Presidents to canvass their views on the terms of any practice direction relating to mandatory CE filing. JS said that she had received a reply from Mrs Justice Bacon and was awaiting further replies from the other UT Presidents.

5.2 PBS confirmed that he had begun preparing a first draft CE-filing consultation paper and that he would liaise with the other UT Presidents to obtain their input/any anecdotal information. PBS aims to circulate a draft consultation paper to the TPC for the May 2022 meeting.

AP/19/22: To prepare a draft CE-filing consultation paper for the May TPC meeting. – PBS

6. Overview Sub-group

TPC Work Programme

6.1 The TPC work programme had been updated and circulated on 30 March 2022.

6.2 It was agreed that Section 1- Tribunal Procedure Rules work plan should be updated to remove the following entries:

- Entry 2: *SSE Generation limited v HMRC*;
- Entry 3: Conservation Covenants;
- Entry 5: 'Leech Homes' judgment and
- Entry 6: Wasted Costs Orders

6.3 It was agreed that Section 1- Tribunal Procedure Rules work plan should be updated to add the following new entry:

- Charities Act 2022

AP/20/22: To amend the TPC Work Programme to reflect comments received from TPC Members. – TPC Secretariat.

7. AOB

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

7.1 VP said that the policy position for the Coronavirus Act 2020 planned extension remains unchanged from the update provided at the March 2022 TPC meeting. The TPC discussed briefly whether the temporary rules should be further extended to provide ample time to consider whether to retain the temporary rules, or something similar, on a permanent basis.

7.2 JS said that she would contact the Tribunal Chamber Presidents to establish their views for the approach to be taken in respect to the expiry date for the temporary amendments to the rules for every chamber made by the Tribunal Procedure (Coronavirus) (Amendment) Rules 2020 and the Tribunal Procedure (Amendment) Rules 2020.

AP/21/22: To contact the Tribunal Chamber Presidents to obtain their views on a planned extension. – JS.

07 June TPC meeting

7.3 JS pointed out that the scheduled 02 June TPC meeting has been now designated a UK bank holiday to celebrate the Queen's Platinum Jubilee. Consequently, the meeting date for June needs to be rescheduled. The TPC agreed the 09 June 2022 as the new meeting date.

AP/22/22: To send a new meeting invitation for the 09 June 2022 to the TPC Members. – TPC Secretariat.

Next Meeting: Thursday 05 May 2022, 10.30am