

# Tribunal Procedure Committee (TPC): Meeting Minutes: Thursday 14 July 2022

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

### Present

(Mrs Justice) Joanna Smith (JS)  
Philip Brook Smith (PBS)  
Donald Ferguson (DF)  
Gabriella Bettiga (GB)  
Mark Loveday (ML)  
Michael Reed (MJR)  
Tim Fagg (TF)  
Christine Martin (CM)  
Beth Stuart-Cole (BSC)  
Susan Humble (SH)  
Sue Pitt (SP)  
Shane O'Reilly (SoR)  
Alasdair Wallace (AW)  
Razana Begum (RB)  
Vijay Parkash (VP)

### Guests

Julian Phillips (JP)  
Mark Blundell (MB)

## Minutes

### 1. Introductory matters

1.1 JS informed the attendees that she would need to leave the meeting at 10.30am to carry out her duties as the designated judge to hear an urgent interim application. PBS had agreed to chair the TPC meeting in her place.

#### Matters arising

1.2 The draft minutes of the TPC meeting held on 09 June 2022 were approved subject to a minor amendment.

#### TPC Action Log

1.3 The TPC action log had been updated.

#### TPC Appointments/Membership

1.4 JS reported that the expression of interest recruitment exercise to fill the vacant Lord Chief Justice (LCJ) post for an Upper Tribunal (UT) judicial representative on the TPC had been held on 23 June 2022. The panel had assessed 6 applications during the paper exercise. JS confirmed the panel had selected an appointable candidate.

1.5 JS stated that the panel had been very impressed by the second placed candidate who had also met the role criteria. The panel considered the second placed candidate would be an excellent contender for membership to the TPC. She had been discussing with the Senior President of Tribunals (SPT) the viability to appoint the candidate. JS said that one option to appoint the candidate was under the terms of paragraph 24 Schedule 5 to the Tribunals, Courts and Enforcement Act 2007. Presently there were 3 TPC members that had been appointed by this appointment route.

1.6 JS asked the TPC members for their views in relation to her proposed approach to supplement the TPC membership, specifically whether they had any concerns. The TPC supported the proposal. JS said she would write to the SPT to progress the matter.

**AP/43/22: To investigate the practicalities to appoint an additional TPC member. To provide the findings to Mrs Justice Smith who would accordingly formally write to the SPT. – SoR and VP**

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

### New Plan for Immigration programme

2.1 MJR confirmed that the IACSG had held another meeting on 05 July 2022 with officials from the MoJ New Plan for Immigration (NPI) policy team. The opening segment (prior to a full discussion between the IACSG and the MoJ NPI team) was for the IACSG to discuss and refine the first draft of the consultation paper prepared by MJR.

2.2 MJR said that the second segment chiefly covered 2 points that were raised by the IACSG in relation to the Expedited Judicial Process (EJP) draft rules i.e., to the power of the UT to transfer an EJP appeal to continue in the First-tier Tribunal (FtT) where it is the only way to secure justice is done. The NPI team had subsequently provided their comments to clarify the points raised by the IACSG.

2.3 JS thanked MJR and the IACSG members for their work to date to prepare a draft consultation paper. She made 2 overarching points that she asked the IACSG to consider and incorporate when revising the draft consultation paper, in relation to:

- Expert Witnesses, being a non-legislative policy measure, should be separated from the Nationality & Borders Act measures requiring new or updated tribunal rules.
- To clarify throughout the document the distinction between the work being driven by the Government to establish a faster and fairer asylum system and the statutory role the TPC had when making new or amending tribunal rules.

2.4 MJR said he would incorporate the points made by the TPC in relation to the Nationality and Borders Act in the planned revision of the draft consultation paper, i.e., the Government's position for introducing several changes to extend legal aid provision in immigration and asylum cases, information on the cohorts and geographical criteria for the EJP. The IACSG would consult on the premise that there were currently 2 parallel administrative processes being operated in the IAC (FtT), i.e., the traditional legacy process and appeals handled under the digital reform procedures.

**AP/44/22: To provide any additional comments, to identify any areas in the draft consultation paper which require revision/ or a different approach to be considered. – TPC members**

2.5 MJR said the IACSG would schedule a meeting in the next few weeks to progress the exercise to prepare a final or close to a final draft consultation paper. The IACSG would aim to circulate the document prior to the TPC meeting scheduled on 22 September 2022.

**AP/45/22: To provide a progress report in relation to the IACSG consultation exercise to Mrs Justice Smith following the IACSG meeting. – MJR**

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

### Charities Act 2022

3.1 PBS provided a position update on his work to progress rule changes arising from Schedule 36 of the Charities Act 2022, in relation to 'authorised costs orders' enabling applications akin to Beddoe applications (in the High Court) to be made to the General Regulatory Chamber (GRC) and the UT. PBS confirmed that the Department for Culture, Media and Sport wished this section to be implemented on 1 October 2022.

3.2 PBS said that he would be seeking any observations from the Presidents of the GRC and the Tax and Chancery Chamber (UT) on the GTCLSG's final proposal for rule changes.

3.3 RB asked PBS if he could expedite the judicial engagement exercise to finalise the costs rule changes as the draft TPC statutory instrument (SI) had to go through several stages of legal checking within MoJ Legal before a final agreed version of the TPC SI would be circulated to the TPC for sign-off.

### Conservation Covenants

3.4 PBS summarised the GTCLSG's proposals for changes to the Tribunal Procedure (UT) (Lands Chamber) Rules 2010. The GTCLSG's ultimate proposal for rule changes included input from Judge Martin Rodger QC, ML and RB.

3.5 PBS explained his thinking/methodology for an amendment to rule 1 (Citation, commencement, application and interpretation), and a new Part 6A (for the process to be followed for applications under section 130 and section 135 of the Environment Act 2021- discharge or modification of a conservation covenant, and declarations in respect of conservation covenants).

3.6 The TPC agreed that the 'Conservation Covenants' rule changes as suggested by the GTCLSG to be added to the Autumn TPC Amendment Rules SI package.

**AP/46/22: To add the 'Conservation Covenants' rule changes to the Autumn TPC Amendment Rules SI package. – RB**

Property Chamber (FtT) proposed change to Rule 31

3.7 PBS said that Judge Siobhan McGrath, the President of the Property Chamber (FtT) had proposed a change to rule 31 (decision with or without a hearing) to the GTCLSG. The purpose of the rule change was to accommodate the ability to achieve early disposals on paper of Part 4A Electronic Communications Code cases involving 'unresponsive grantors'.

3.8 PBS reported that these were cases in which a lessee in occupation in a multi-dwelling building had requested a telecommunications service from an operator, and to connect the property the telecoms operator requires an access agreement with another person such as the landlord. After a series of required steps to contact the person (e. g. a landlord/manager) of whom the operator needs to grant permission to gain access and install equipment, the intended grantor remains unresponsive.

3.9 The TPC discussed the matter and the 3 presented options (as detailed in the position paper prepared by PBS) in relation to whether an amendment was needed for rule 31. The TPC approved option 2 and agreed to include the rule change as drafted to be added to the Autumn TPC Amendment Rules SI package.

**AP/47/22: To add the 'Property Chamber rule changes to the Autumn TPC Amendment Rules SI package. – RB**

**4. HSW Sub-group**

Direct Lodgement – (First-tier Tribunal) War Pensions and Armed Forces Compensation Chamber

4.1 CM reported that the TPC consultation had been launched on 30 June 2022 and was due to close on 22 September 2022.

Consultation on possible amendments to the Tribunal Procedure (First-tier Tribunal) (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 regarding proposed changes to the way that the First-tier Tribunal lists hearings in relation to applications by patients detained under section 2 of the Mental Health Act 1983

4.2 CM reported that the TPC consultation had been launched on 21 June 2022 and was due to close on 16 August 2022.

Rule Changes in (First-tier Tribunal) Mental Health jurisdiction (MHT)

4.3 CM reported that she had met with Judge Sutherland-Williams, the President of the Health, Education and Social Care Chamber (FtT). The judge had indicated he would like to have a permanent rule to extend the permission to decide cases that are referrals, not patient applications, on the papers from only community patients (those on Community Treatment Orders) to include hospital-based patients. It would remain the patient's right to request an oral hearing. CM had agreed to bring the matter to the attention of the TPC.

4.4 The TPC discussed the matter and decided that a public consultation would be needed to establish the views of interested stakeholders. CM said that before she started the drafting exercise to prepare a draft consultation paper that she would return to Judge Sutherland-Williams to request any available statistical data and anecdotal information to support his request/arguments for a potential rule change.

**AP/48/22: To add the topic '(FtT) Mental Health' potential rule change to section 2 of the TPC Work programme. – TPC Secretariat**

## Rule Changes in (First-tier Tribunal) Special Educational Needs and Disability (SEND)

4.5 CM reported that Judge Sutherland-Williams had also indicated he would like to have a permanent rule to allow the Tribunal to decide that a case can be decided on the papers, provided that the appellant consents. It would mean that the Local Authority's consent would not be required. CM had agreed to bring the matter to the attention of the TPC.

4.6 The TPC discussed the matter and decided that a public consultation was warranted. CM said that due to her availability/ time constraints after the summer break that she would aim to circulate the MHT and SEND draft consultation papers for the December TPC meeting.

**AP/49/22: To add the topic '(FtT) Special Educational Needs and Disability' potential rule change to section 2 of the TPC Work programme. – TPC Secretariat**

**AP/50/22: To add the topics potential rule changes for 1) (FtT) Special Educational Needs and Disability' and 2) (FtT) Mental Health as agenda items for December 2022 TPC meeting. – TPC Secretariat**

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

### Amendments to the Tribunal Procedure (First-tier Tribunal) Property Chamber Rules 2013

5.1 ML summarised the position paper he had prepared detailing the Costs Sub-group's recommended approach for how the TPC could handle potential amendments to rule 13 (orders for costs, reimbursement of fees and interest on costs) arising from two recent pieces of legislation: i) the Leasehold Reform (Ground Rent) Act 2022 and ii) the Building Safety Act 2022.

5.2 MS said that Judge McGrath has indicated that for these 2 new jurisdictions, she would like the existing 'default' costs provisions in the Property Chamber Rules to apply, i.e., there should be no costs shifting powers, other than for cases of unreasonable conduct. Judge McGrath has remarked that she would like any agreed changes to rule 13 to also apply to 2 jurisdictions that presently sit in the General Regulatory Chamber (GRC) (FtT) but were due to transfer into the Property Chamber (FtT) in late 2022.

5.3 ML said in the long term that the TPC may wish to consider adopting an approach to 'future proofing' rule 13 so that the TPC did not have to consider making an amendment to the rule because of future legislative changes creating new tribunal appeal rights/jurisdictions.

### 'Cider of Sweden' and Third-party Costs Orders in the Tax Chamber (FtT)

5.4 ML said he had prepared a position paper on the issues raised by Judge Poole in the case of *Cider of Sweden Limited v HMRC and Ernst & Young LLP [2022] UKFTT 00126 (TC)*. The matter had been briefly discussed at the 09 June 2022 TPC meeting.

5.5 Judge Poole had asked the TPC to consider the issues he had raised in his judgment, specifically his proposal for changes to tribunal procedural rules in respect of costs in the Tax Chamber (FtT).

5.6 ML said the issues raised by Judge Poole related to the interaction between rules 1, 10, 20, 21 and 23 of the Tribunal Procedure (FtT) (Tax Chamber) Rules 2009, in the context of an application by a non-party for access to documents in tribunal proceedings. ML confirmed that the costs decision had been made on the papers without a hearing.

5.7 ML summarised the Costs Sub-group's thinking on the matter and highlighted that existing case law had established a public right of access to certain tribunal documents (in the Tax Chamber (FtT)). But there was no provision in the Rules guiding the procedure for exercising (or contesting) that right. He added that there was no equivalent to Civil Procedure Rule (CPR) 5.4C, a provision which has been updated and developed over the years in response to increased awareness of rights to information and the public policy in favour of transparency.

5.8 The TPC discussed ML's points in relation to whether there should be an equivalent CPR 5.4C in the Rules that apply to the Tax Chamber (FtT), i.e., whether a new rule should apply to all tribunals that do not have any equivalent to CPR 5.4C and the categories of document that might be specified as being disclosable as of right. The TPC observed that may vary from chamber to chamber.

5.9 TF said that the matter had already been flagged up in the '*Dring*' case that had been heard in the Supreme Court in relation to confidentiality of documents, the accessibility and sharing of Tribunal

information and documents, the publication of decisions. TF added that the matter had been brought to the attention of the former SPT in 2019. The former SPT had agreed to take this matter forward by way of a Practice Direction, but it appeared there had been no progress to date to resolve the matter.

5.10 . SoR reported that this work had been delayed due to the prioritisation for other work by the SPT. The SPT would welcome the TPC's input to progress this matter.

5.11 The TPC agreed to write to Judge Poole, thanking him for bringing this matter to the TPC. To confirm that the matter would be taken forward by the Costs Sub-group, i.e. to consider whether the TPC should consult on a new rule (or rules) equivalent to CPR 5.4C. The TPC would also use this opportunity to consider whether they should apply a similar rule change to other FtT and UT chambers.

**AP/51/22: To write to Judge Poole to advise him of the TPC's approach in respect of costs in the Tax Chamber (FtT). – ML**

**AP/52/22: To add the topic 'Confidentiality' as an agenda item to the October 2022 TPC meeting. – TPC Secretariat**

## **6. Tribunal Procedure (Coronavirus) (Amendment) Rules 2020 & Coronavirus Act extension**

6.1 JS confirmed that she had received the outstanding replies in relation to the judicial survey to establish if the UT & FtT Chamber Presidents wanted an extension for the temporary measures/rule changes implemented during the Pandemic.

6.2 JS said most of the Chamber Presidents had indicated that they did not wish to seek such an extension to the rule for paper-based hearings and private hearings. As reported at the 09 June 2022 TPC meeting, Judge Sutherland-Williams had indicated his support to retaining all the powers in relation to the paper-based hearings and private hearings provisions that CM/HSWSG were already progressing, i.e., the TPC had already launched a TPC consultation seeking views on retaining the rule changes for the Mental Health Tribunal Section 2 timeframes (see para 4.2).

6.3 Considering the views indicated, the TPC decided not to make permanent arrangements as regards the temporary coronavirus rules in relation to paper-based hearings and private hearings.

## **7. Tribunals Procedure (Amm No.2) Rules Exercise**

7.1 JS said RB had mentioned that the planned 2nd September laying date for the Tribunals Procedure (Amendment No.2) Rules was not achievable as the TPC have not yet signed off the 'Conservation Covenant' rules. As a result she has been unable to complete the necessary legal checks to get the draft TPC SI ready for sign-off by the TPC during the summer break.

7.2 RB said the planned 2nd September 2022 laying date had been chosen by the TPC to allow for the Mental Health Tribunal (MHT) temporary coronavirus rule change (which expires on 25 September 2022) to be made permanent. This was on the assumption that the TPC consultation would conclude with the TPC's reply confirming this permanent rule change.

7.3 JS said that RB had asked whether it would be possible to push the laying date to a later date in October 2022 (subject to the relevant clearances).

7.4 The TPC discussed the matter considering the MHT temporary coronavirus rule and whether specifically a short delay would cause difficulties for the MHT, i.e., access to justice. CM said that Judge Sutherland-Williams has expressed that he was not overly concerned if there was a gap following the date the rule expired and the date the rule was made permanent. The TPC agreed to postpone the laying date for the TPC Amendment SI to October 2022.

**AP/53/22: To add the topic 'rule change for the MHT as an agenda item to the October 2022 TPC meeting. – TPC Secretariat**

## **8. Overview Sub-group**

### TPC Work Programme

8.1 The TPC work programme had been updated and circulated on 06 July 2022.

8.2 It was agreed that the TPC Work Programme should be updated to:

#### Section 1 of the TPC Work Programme

- Add new entry: Tribunal Procedure (FtT) Property Chamber Rules 2013- proposed change to rule 31 (decision with or without a hearing).
- Add new entry: Tribunal Procedure (FtT) Property Chamber Rules 2013 -proposed change to rule 13 (orders for costs, reimbursement of fees and interest on costs).

#### Section 2 of the TPC Work Programme

- Add new entry: Mental Health (HESC) proposal for rule change to extend the permission to decide cases that are referrals, on the papers for community patients (those on Community Treatment Orders) to include hospital-based patients.
- Add new entry: SEND (HESC) proposal for a rule change to allow the Tribunal to decide that a case can be decided on the papers, provided that the appellant consents.
- Add new entry: *Cider of Sweden* and third-party costs orders in the Tax Chamber (FtT). Interaction between rules 1, 10, 20, 21 and 23 of the Tribunal Procedure (FtT) (Tax Chamber) Rules 2009. In the context of an application by a non-party for access to documents in tribunal proceedings.

**AP/54/22: To amend the TPC Work programme to reflect comments received from TPC Members. - TPC Secretariat**

#### **9. AOB**

##### TPC Meeting timetable (leading to December 2022)

9.1 The TPC confirmed the meeting timetable from October 2022 onwards, i.e., the TPC would continue scheduling TPC meetings on the first Thursday for each month.

**AP/55/22: To send TPC meeting invitations (October, November & December 2022) to the TPC members. – TPC Secretariat**

**Next Meeting (online): Thursday 22 September 2022, 5.00pm**