

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

**Present**

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

**Guests**

Mark Blundell (MB)  
Julian Phillips (JP)

**Apologies**

Christine Martin (CM)

**Minutes**

**1. Introductory matters**

1.1 An apology was received from: CM. JS welcomed CoK who had joined the TPC Secretariat.

**TPC Lord Chief Justice Appointment**

1.2 In relation to retaining an additional TPC member (from the latest recruitment competition for candidates to be appointed as a Lord Chief Justice (LCJ) appointment). JS reported that she understood that a response was awaited from the recently appointed Lord Chancellor. She hoped the matter would be resolved before the November 2022 meeting.

**Transfer of responsibility for the making of Procedure Rules in the Employment Tribunal and Employment Appeal Tribunal to the TPC**

1.3 JS confirmed that she and VP had met with the Ministry of Justice (MoJ) policy official leading on the exercise to transfer the responsibility for the making of procedure rules in the Employment Tribunal (ET) and Employment Appeal Tribunal (EAT) to the TPC.

1.4 The MoJ official had provided a position update on the implementation progress for the Judicial Review and Courts Act 2022 (JRCA) together with an indication as to expected timing of the transfer to the TPC of responsibility for making/reviewing the ET and EAT Rules. JS reported that:

- Implementation of the JRCA is progressing; MoJ anticipate that the ET and EAT rules transfer will commence in January or February 2023.
- Judicial Office (JO) has launched the advert for the Lord Chancellor's appointment to the TPC. The closing date has been extended by two additional weeks in light of the disappointing level of responses (currently only one applicant). Further the JO has attempted to widen the communication channels for the TPC advertisement in the hope of attracting additional potential candidates.

- The advert for the Lord Chief Justice's appointment is due to be launched before the end of October 2022.
- MoJ expect to conclude the TPC appointments process by the end of December 2022.

1.5 JS asked members if they could canvass their colleagues or other potentially suitable candidates for the new roles.

1.6 JS explained that the MOJ would like to understand the TPC's views on how best to achieve the transfer of powers in conjunction with the new appointments. In particular whether

- the appointments should be made at the same time as the transfer over of powers (this would require only one Commencement Order); or
- the appointments should be made first, so as to allow some time for the new members of the TPC to familiarise themselves with its workings before the powers are transferred over (this would require two Commencement Orders).

1.7 After a discussion, the TPC decided that it would be better to allow some bedding in time for new members so as to enable them to familiarise themselves with the TPC's work processes/procedures. JS said that she expected a new TPC Sub-group to be created which would be responsible for making and reviewing the ET and EAT Rules.

1.8 For succession planning, the TPC agreed that VP should check with the Department for Business, Innovation and Skills (the government department that presently has responsibility for making the ET/EAT rule amendments) the extent of their current work programme and whether they had a "legacy list" of rules changes which would be transferred to the TPC. It appeared likely that rules changes had been put on the "back burner" pending the transfer.

1.9 JS expressed concern at the potential for the TPC to be met with a surge of potential rules changes requiring immediate attention and resource at the time of transfer. The TPC agreed that this possibility made it all the more important to ensure that the new members with employment expertise had obtained an understanding of the workings of the TPC in advance of the transfer of powers. JS also expressed concern at the indication from the MoJ official that there would be an expectation that necessary rules changes would be implemented swiftly once powers were transferred (and in time for the October 2023 Statutory Instrument). JS noted the heavy workload currently being undertaken by the TPC and the importance of managing time and resources. As things stand, and at the request of the Government, the TPC's current main priority is to address the various rules changes required by the Nationality and Borders Act 2022. With only a finite resource and a substantial existing workload, there will be a limit to what can sensibly be achieved when the powers in respect of ET and EAT rules are transferred.

1.10 JS asked VP to invite the MoJ policy official to the December 2022 meeting to provide a policy update to the TPC.

**AP/61/22: To canvass colleagues/appropriate people to join the TPC membership via the recent recruitment campaigns. – TPC Members**

**AP/62/22: To invite the lead MoJ policy official to the December 2022 meeting to provide a position update on the JCRA. – TPC Secretariat**

#### Matters arising

1.11 The draft minutes of the TPC meeting held on 22 September 2022 were approved.

#### TPC Action Log

1.12 The TPC action log had been updated.

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

### New Plan for Immigration programme

2.1 MJR thanked RB for providing the IACSG with her advice on their questions in relation to: i) permission to appeal, ii) Accelerated Detained appeals (ADA) and iii) Age Assessment appeals (AAA) following the topics being discussed at the 22 September 2022 online meeting.

2.2 The TPC discussed the latest version of the draft consultation document, focusing specifically on the latest amendments made by MJR. MJR confirmed that the draft document incorporated recent feedback from JS and PBS together with observations from other TPC members identified at the meeting on 22 September 2022.

2.3 After discussion, the TPC agreed that there remained gaps in the information that had been relayed by MoJ and the Home Office (HO). Further clarification as to resources was required in respect of Expedited Judicial Appeals (EJP) and ADA. In particular:

- Further information was required as to the policy intention for the wider use of Priority Removal Notices (PRN) (as previously reported by the MoJ/HO to the TPC). The HO had agreed this information could be referenced in the TPC consultation document.
- Confirmation of the HO's position was required on whether there was any current plan to expand the EJP scheme beyond Foreign National Offenders in the foreseeable future.
- Clarification of the HO's position in the event that EJP appeal volumes were to exceed 200 cases (or reach a 400-case ceiling) was required. In particular, whether the HO would review their policy position and accordingly pause any increase in volumes of PRNs being issued in the period 2024/25 or beyond (as previously reported by the HO to the TPC).
- Clarification from the HO as to the scope of the ADA scheme in relation to the regulations that will be made under Schedule 27 of the Nationality and Borders Act 2022 specifically as to: i) how the ADA Scheme will work in practice, ii) the types of appeal cohorts and geographical scope to be included and iii) when further information and/or the regulations themselves would be made available.

**AP/63/22: To clarify the policy position for the ADA and EJP issues with the HO/MoJ. – TPC Secretariat**

2.4 It was agreed that once the necessary issues had been clarified (or if it appears that no further information is available), MJR would finalise the Consultation paper and circulate to members for sign off. If information is not forthcoming from HO/MOJ, the TPC recognizes that it has little choice other than to go out to consultation on the basis of the information received.

**Rule 22A of the Tribunal Procedure (Upper Tribunal) Rules 2008**

2.5 JS reported that she had received a paper from Mr Justice Lane, the President of the Immigration and Asylum Chamber (IAC) of the Upper Tribunal (UT) inviting the TPC to revisit the operational working of Rule 22A of the Tribunal Procedure (UT) Rules 2008. The judicial request was for the TPC to make a rule change to resolve unnecessary administrative burdens that had transpired since the introduction of the rule amendment.

2.6 MJR and PBS remarked that Rule 22A required the IAC (UT) in an asylum case to serve its refusal of permission to appeal on the Secretary of State (SoS) (where the appellant is not the SoS) only. It was then for the SoS to serve the decision on the appellant. If the SoS does not do this within 31 days, then the IAC (UT) must serve the refusal directly on the appellant.

2.7 PBS said that the TPC had previously consulted on this matter in 2014 and subsequently the TPC had made a rule change to introduce the government policy intention to enable the SoS to prepare the way for an appellant's detention and removal (perhaps serving the decision when the appellant reported to an immigration officer). However, it now seems that the justification for making the rule change may have fallen away.

2.8 The TPC discussed the paper that had been prepared by the HMCTS administrative team. It was not apparent whether the HO supported the proposed change to Rule 22A or had been directly consulted on the matter. It was agreed that clarification should be sought on this point before the TPC took any decisions about how to progress this proposed rule change. The TPC agreed to revisit the matter to consider a rule change at the November 2022 meeting.

**AP/64/22: To clarify with HMCTS if they had consulted the HO on the Rule 22 proposal. – MB**

### 3. HSW Sub-group

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

3.1 In CM's absence, JS reported that the TPC consultation closed on the 22 September 2022. There had been 9 responses although one response was blank, so 8 substantive responses had been received and considered by the HSW Sub-group. CM would be drafting the Response and she anticipated that a first draft would be in circulation prior to the December 2022 meeting.

#### Consultation on possible amendments to the (FtT) (HESC) Rules 2008 regarding proposed changes to the way that the FtT lists hearings in relation to applications by patients detained under section 2 of the Mental Health Act 1983

3.2 JS thanked PBS and DF for their significant contribution/endeavours in CM's absence to finalise the Mental Health Tribunal (MHT) Response.

3.3 The TPC agreed to proceed with the MHT rule changes and considered it entirely appropriate to take account of the responses to the 2020 Consultation (which addressed the same point) in addition to the responses to the 2022 Consultation.

3.4 The TPC agreed that the 2020 Consultation effectively fell into abeyance due to the pandemic and the introduction of the Tribunal Procedure (Coronavirus) (Amendment) Rules 2020. PBS said that the TPC has assessed the impact of the temporary change during the Covid pandemic, as it indicated that it would, and has concluded that it is now appropriate to make the Rule change permanent.

3.5 PBS summarised the approach that had been taken to reworking the draft response document:

- Taking the responses to the two (2020 & 2022) consultations together, the great majority of Respondents were in favour of the rule change; the TPC considers this to be of significance. If the respondents to the 2020 Consultation had changed their views, they might have been expected to respond to the 2022 Consultation.
- Experience during the period of the temporary change shows that a 10-day listing period had been useful in 15% of cases – i.e., a material number of cases.
- The observations of the Deputy Chamber President appear to the TPC to carry significant weight in support of the rule change.
- A logical approach for the TPC to adopt was to consider whether anything concerning has emerged during the temporary arrangements that might militate against the permanent rule change. The TPC has not been provided with any evidence from respondents as to any concerns, whether in general or in relation to any particular cases.

3.6 PBS said that he would incorporate the observations made by the TPC following the meeting and circulate an updated version of the Response to JS and DF for their approval prior to providing it to the TPC Secretariat for circulation and final sign-off by the TPC. PBS said he would discuss a point raised by a respondent with CM that was not directly related to the MHT consultation.

#### Draft consultation on possible amendments to the Tribunal Procedure (FtT) (HESC) Rules 2008 regarding proposed changes to the way that the FtT decides case referred to the Tribunal pursuant to Schedule 68 Mental Health Act 1983

3.7 JS reported that CM had prepared a first version of a draft consultation paper on the potential rule change 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. The draft consultation paper has been circulated for the TPC members' information. The TPC agreed to revisit this matter at the November 2022 meeting.

**AP/66/22: To add the topic ‘potential rule changes for (FtT) Mental Health’ as an agenda item for the November 2022 TPC meeting. – TPC Secretariat**

3.8 SoR remarked that the Senior President of Tribunals (SPT) had conducted a consultation about panel composition in the FtT in early 2022. The mental health proposal, which concerned the same kind of referral cases that the TPC had been considering had been included. Any changes the SPT decided to implement would have to be made in a practice direction. SoR agreed to send the SPT consultation paper to the TPC members for their information. JS asked SoR to ensure that the TPC was kept informed of any similar consultations conducted by the SPT in the future which might have a bearing on the work of the SPT.

**AP/67/22: To send the SPT consultation paper on Panel Composition to the TPC. – SoR**

#### **4. Costs Sub-group**

4.1 ML said he was awaiting information from the SPT’s Office in response to his query in relation to the matter of ‘Cider of Sweden’ and Third-party Costs Orders in the Tax Chamber (FtT). The topic that had been discussed at the July 2022 meeting.

4.2 JS said that the matter of ‘Cider of Sweden’ and Third-party Costs Orders in the Tax Chamber (FtT) had been flagged up by ML at the July 2022 TPC meeting. The TPC at that time had agreed to revisit this matter in relation to the ‘*Dring*’ case that had been heard in the Supreme Court. The case was in relation to confidentiality of documents, the accessibility and sharing of Tribunal information and documents and the publication of decisions.

4.3 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 to the work undertaken did not resolve the matter. JS asked SoR if the present SPT was minded to revisit/progress this matter to make a Practice Direction (PD).

4.4 SoR confirmed that at this present time the SPT would not be making a PD to deal with requests for access to recordings of hearings and requests from third parties for documents and recordings.

#### **5. GTCL Sub-group**

##### CE-Filing

5.1 PBS said that a draft Response to the CE-Filing consultation was well advanced. He aimed to circulate a first draft of the Response document for the November 2022 meeting.

**AP/68/22: To include the topic ‘CE-Filing draft Response’ as an agenda item for the November 2022 meeting. – TPC Secretariat**

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

6.1 RB thanked the TPC Members for their support in providing their scanned signatures during the signing exercise for the Tribunal Procedure (Amendment No.2) Rules 2022 statutory instrument (“the SI”). She confirmed that clearance had been provided by MoJ Parly Branch to lay the SI on 11 October 2022.

6.2 RB said the SI would include Rules making the following amendments:

##### The Tribunal Procedure (FtT) (General Regulatory Chamber (GRC)) Rules 2009 and the Tribunal Procedure (UT) Rules 2008

- Amendments to the GRC Rules and UT Rules to correct cross-referencing to reflect legislative changes and to introduce provisions for applications for authorised cost orders to be made under section 324A (power to authorise costs to be incurred in relation to proceedings) of the Charities Act 2011 to the Tribunal and the Upper Tribunal, respectively.

- Amendments to Rule 32 (decision with or without a hearing) of the GRC Rules to permit such proceedings to be disposed of without a hearing where appropriate.

#### The Tribunal Procedure (FtT) (Health, Education and Social Care Chamber) Rules 2008

- Amendments to Rule 37(1) (time and place of hearings) to extend the period within which the Tribunal is required to list proceedings made under section 66(1)(a) of the Mental Health Act 1983 from 7 days to 10 days after the date the Tribunal receives an application notice.

#### The Tribunal Procedure (FtT) (Property Chamber) Rules 2013

- Amendments to Rule 4(2) and (4) to include provision to allow the Tribunal to dispose of applications made under paragraph 27D of Part 4A (code rights in respect of land connected to leased premises: unresponsive occupiers) of Schedule 3A to the Communications Act 2003 to the Tribunal without a hearing after giving 14 days' notice.
- Amendments to Rule 13 (orders for costs, reimbursement of fees and interest on costs) to provide the Tribunal with the power to make "unreasonable" cost orders as a default for all jurisdictions. The amendments preserve the existing position in relation to costs in proceedings under Part 5 of the Rent Act 1977 and Part 1 of the Housing Act 1988, by expressly exempting unreasonable cost orders from being awarded in such proceedings.

#### The Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010

- Inserting a new Part 6A which makes provision for applications to be made to the Lands Chamber (UT) under sections 130 and 135 of the Environment Act 2021 for the discharge or modification of conservation covenants, or for declarations in respect of conservation covenants.

### **7. Litigation Friend**

7.1 JS reported that the MoJ had received a potential claim from Migrants Organise. The claim was in relation to their complaint over the ongoing failure by the Lord Chancellor/ Justice Secretary routinely to ensure the provision of a litigation friend where required in the IAC (FtT) and IAC (UT). The TPC, the Official Solicitor and the IAC (FtT) and IAC (UT) had been named as potential interested parties.

7.2 JS said that she understood that the MoJ would be leading on the response to the Pre-Action Protocol letter on behalf of the Lord Chancellor. The TPC agreed that it did not have a direct role in deciding the litigation friend policy. VP said he would report back to the TPC with any further developments.

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

#### TPC Work Programme

8.1 The work programme has been updated and circulated as of 30 September 2022.

### **9. AOB**

#### Pro bono paper

9.1 JS made the TPC aware that the Access to Justice Foundation and the working party of the Solicitor General's Pro Bono Costs Committee had sent a note to the TPC detailing their proposal for introduction of tribunal rules regarding a new pro bono costs jurisdiction. The note also includes their suggested draft rule amendments. JS said that due to October's existing heavy meeting agenda that she had agreed with VP's recommendation to defer this matter to the November 2022 TPC meeting.

9.2 The TPC agreed that the matter would be directed to ML and the Costs Sub-group for their initial consideration before the matter was revisited at the November meeting for a full discussion by the TPC.

**AP/69/22: To report on the pro bono costs: proposed amended rules matter for November TPC meeting . – ML**

**AP/70/22: To add the topic ‘pro bono costs- proposed amended rules’ to the TPC Work Programme. – TPC Secretariat**

Reference to "Her Majesty" in tribunal procedure rules

9.3 Following the demise of Her Majesty Queen Elizabeth II, ML asked whether the current Tribunal Procedure Rules would be reviewed. ML asked whether section 10 of the Interpretation Act 1978 (together with section 23 which applied the Act’s provisions to subordinate legislation) had the effect that all references to “Her Majesty” would be construed as references to “His Majesty”.

9.4 RB agreed to review the current Tribunal Procedure Rules for references to “Her Majesty” and to consult the Master of Rolls’ office to establish the approach they would be taking to updating the various court rules. RB agreed to update the TPC at the November 2022 meeting.

**AP/71/22: To clarify what action was needed to amend the reference to "Her Majesty" in tribunal procedure rules. – TPC Secretariat**

November 2022 TPC Meeting

9.5 JS reminded the attendees that the November 2022 TPC meeting has been rescheduled and will be on Thursday 10 November 2022.

**Next Meeting: Thursday 10 November 2022**