

Tribunal Procedure Committee (TPC): Meeting Minutes: Thursday 10 November 2022

ONLINE Meeting

Present

Mrs Justice Joanna Smith (JS)
Susan Humble (SH)
Christine Martin (CM)
Timothy Fagg (TF)
Mark Loveday (ML)
Donald Ferguson (DF)
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

Philip Brook Smith (PBS)
Michael Reed (MJR)
Gabriella Bettiga (GB)
Beth Stuart-Cole (BSC)

Minutes Draft

1. Introductory matters

1.1. Apologies received from PBS, MJR, GB, and BSC.

TPC Lord Chief Justice Appointment

1.2. JS confirmed that she had received a letter dated 09 November 2022 from Judicial Office confirming the Lord Chief Justice TPC member appointment of Judge Rintoul. Judge Rintoul (JR) has served as an Upper Tribunal (UT) Judge since 2012 and is the current President of Council of Upper Tribunal Judges. He will attend his first TPC meeting on 01 December 2022.

The Tribunal Procedure (Amendment No. 2) Rules 2022 Exercise

1.3. The Tribunal Procedure (Amendment No. 2) Rules 2022 Statutory Instrument (SI) was laid on 11 October 2022. It came into force on 01 November 2022. RB said that the Joint Committee on Statutory Instruments (JCSI) asked her for further information, after a discussion with MB and PBS she will make 2 minor tweaks to the rules which can wait for the next routine SI.

Meeting with JS, RB and TPC Secretariat

- 1.4. JS reported that JS, RB, VP and COK met via MS Teams on 31 October 2022 to discuss the roles and responsibilities of the TPC legal advisor and TPC Secretariat and to go through the SI laying process. This meeting was arranged in part to address how the publication of the 'Possible amendments to the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 Consultation Response' provoked comment from the Secondary Legislation Scrutiny Committee (SLSC) because the document was published shortly after the laying of the SI. JS invited RB to explain the SI laying process and timescales to the committee.
- 1.5. RB explained the SI laying process, emphasising the importance of publishing consultation responses before the laying date of the SI. RB also explained the timeline for laying a SI and discussed the anticipated deadlines relevant to the spring 2023 SI.
- 1.6. The deadline for 'Possible changes to the First-tier Tribunal (Immigration and Asylum Chamber) Rules and the Upper Tribunal Rules arising from Nationality and Borders Act 2022' Consultation Responses to be submitted is 19 January 2023. Due to the extensive nature of the 24-question response questionnaire it was discussed that it might be possible to publish a response in time for the Spring SI 2023, although meeting this target date would be challenging.
- 1.7. JS expressed the view that the deadline may be unrealistic if a high volume of responses is received, as it is important for the TPC carefully to consider the responses with a view to ensuring that it arrives at an appropriate solution in respect of the new rules. This process should not be rushed, regardless of the potential for political pressure.
- 1.8. JS reported that she had recently met with the Senior President of Tribunals and discussed the topic in relation to potential rules needed for the Nationality and Borders Act 2022. JS remarked that it was important for the TPC to manage the Government's expectations and desired deadlines to introduce new rules. She confirmed she would discuss the matter with representatives of the SPT's Office and Judicial Office with a view to ensuring that everyone was aware of the potential for delay to the rule-making exercise, together with the reasons for that delay.

Review of the TPC Work Programme

1.9 JS suggested the TPC review the work programme more regularly. The TPC agreed to review it approximately every 3 months, starting with today's meeting.

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

1.10 Robin Rimmer (MoJ Policy) provided an update on 03 November 2022 in relation to the ongoing recruitment campaign for the Lord Chancellor appointment:

- Because of ministerial changes there is a delay in reopening the campaign.
- No extension has been granted to the end-date for the campaign, however the campaign might re-open in January 2023.
- The transfer of responsibilities for the making of Procedure Rules in the Employment Tribunal and Employment Appeal Tribunal to the TPC is therefore subject to delay.

1.11 SOR confirmed that the Lord Chief Justice appointment competition closed on Monday 07 November.

- There has been an expression of interest from suitable candidates.
- JS thanked SOR for his efforts in intervening to speed things up (including in respect of the appointment of JR).

Matters arising

1.12 The draft minutes of the TPC meeting held on 06 October 2022 were approved.

TPC Action Log

1.13 The TPC action log had been updated

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

TPC Consultation Exercise

2.1 The IAC consultation paper was published on 27 October 2022. The consultation exercise is due to end on 19 January 2023.

- JS thanked MJR and the IACSG for their hard work on this.

Second tranche TPC consultation exercise: Costs Orders and Fixed Recoverable Costs

2.3 JS confirmed that the current IAC Consultation should take priority over the second tranche Consultation drafting due to the time pressure discussed at para 1.5-1.8. SS has agreed to take the lead on this drafting work.

2.4 JS asked SS if there is anything that the sub-group can be doing to advance the second tranche exercise.

- SS suggested it may be helpful to ask the Ministry of Justice (MoJ) for indicative examples of specified conduct which the new rules should address. However, he does not want indicative drafting of rules from MoJ.
- Whilst SS understands the need to prioritise the existing consultation, he believes the second consultation exercise will also be challenging so would like to progress the scoping work as early as possible.
- JS stated that she agrees with SS concerns and has already had conversations with the TPC Secretariat to start the information gathering exercise.
- JS agreed that the MoJ should be asked whether progress has yet been made in investigating indicative behaviours from existing cases. However, this was not a key priority given the work that will need to be done after Christmas on the first tranche work.

AP/72/22: To email MoJ officials regarding the second tranche rules in order to ask them whether progress has been made in identifying indicative examples of specified conduct to be addressed by the new rules. – TPC Secretariat

2.5 VP said he spoke to MJR on 09 November and briefly discussed the second tranche rules:

- MJR said he wanted to revisit the issue at the December meeting.
- JS does not anticipate having a formal response from MoJ officials by then, but thinks it will be beneficial to understand what timescales they are working to
- VP confirmed that MoJ lead on Wasted Costs policy and that Home Office (HO) lead on fixed recoverable costs policy.

2.6 MB reminded the committee that they should be speaking with one voice in relation to potential harmonisation for any changes to cost jurisdictions that may apply in the tribunal chambers and to include him and the Costs Sub-group members in any correspondence regarding costs.

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

2.7 MB has not had an opportunity to investigate this yet but expects to be able to give an update at the December meeting.

2.8 MB will remain in the meeting in order to discuss CE-Filing as he sat on the UT CE-Filing working group.

3. GTCL Sub-Group

CE-Filing

3.1 PBS is not in attendance to provide an update:

- JS expressed the hope that everyone had read the draft consultation response written by PBS.
- If any TPC members have any comments on this draft, JS asked that they be forwarded to the TPC Secretariat who will pass them on to PBS and the GTCLSG.
- Aim to sign off the response at the December meeting and PBS will share with the Upper Tribunal Chamber Presidents.

AP/73/22: Email TPC secretariat with any feedback to PBS's draft consultation response- TPC Members

4. HSW Sub-Group

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

4.1 CM provided a verbal update summarising the key issues arising from the responses to the Direct Lodgement War Pensions consultation.

- There are some detailed responses and intelligent suggestions for rule changes.

4.2 CM sought the committee's view regarding extending the timescales to rules 21 and 23 as outlined in the consultation.

- The general consensus communicated by the respondents was that, in principle, the Direct Lodgement proposal is a sensible idea. Further consideration was needed by the HSWSG to the changes required to introduce direct lodgement.
- JS suggested HSWSG share their views with CM by the 24 November so that she can prepare a draft response by the December meeting.
- CM invited the rest of the TPC to share their views also, as opposed to waiting for the topic to be discussed at the December meeting

AP/74/22: Email TPC secretariat with any feedback for CM regarding their views on the Direct Lodgement Consultation response- TPC Members

4.5 VP suggested that the HSWSG consult Judge Monk, the WPAFCC President to establish her view to the time limit issue.

- CM agreed that once she has received the views of the TPC she will do this
- TPC secretariat will share consultation responses with TPC and Judge Monk

AP/75/22: Email TPC members and Judge Monk the Direct Lodgement Consultation Responses- TPC Secretariat

TPC- Mental health Consultation 2022 Response

4.6 A query was received regarding this consultation response.

- The matter concerns whether HESC Rule 12(1) might be amended to exclude section 2 applications in relation to the submission of applications.
- CM will speak to Judge Sutherland Williams the President of the Health, Education and Social Care Chamber of the First-tier Tribunal and report back to the TPC at the December meeting.

Draft Consultation Rule 35

4.7 JS said we do not need to go into detail because in this area there is an outstanding SPT consultation which closed in August.

- SOR confirmed there were quite a few responses. The respondents included the judiciary.
- CM and JS agreed that if the changes identified in this consultation are made, the TPC may not need to consult on this.
- JS suggested we wait for the consultation response and circle back at the December meeting.
- DF expressed reservations about this and said that BSC also shared his reservations. JS confirmed that we will revisit this once a response has been published by SPT.

AP/76/22: Review Draft Consultation Rule 35 at December meeting once we have more information

5. Costs Sub-Group

Pro-bono Paper

5.1 An oral update was given by ML. The key points were:

- The Access to Justice Foundation (AJF) had prepared a detailed paper for the TPC suggesting rule changes.
- Tribunals now have the power to make pro-bono cost awards as a result of the Tribunal Courts Enforcement Act 2022.
- The AJF argue that it is desirable to make rule changes to reflect this power. However, there is already a direct statutory power provided by the Act and so a question arises as to whether rule changes are necessary. ML recommended that the TPC should make rule changes needed for pro-bono cases.

5.2 The TPC discussed the fact that any changes made will also affect the Employment Tribunal in due course and that it may potentially be sensible to wait until transfer of responsibility has been made to the TPC in order to consider appropriate rule changes for all tribunals together rather than in a piecemeal fashion.

5.3 The question proposed by MB is whether a public consultation is needed on this matter.

- JS summarised that MB is asking the TPC to make a decision in principle as to whether rule changes should be explored.
- There was no real opposition to the idea that rule changes should be explored, although there are some cautionary voices around the need for rules changes or a consultation.
- The TPC agreed to explore this further and add it to the work program
- JS will formally respond to the AJF thanking them for their contribution.

AP/77/22: Add Pro-Bono cost potential consultation to WP- TPC Secretariat

Third party access to documents in tribunal proceedings (*Dring & Cider of Sweden*)

5.4 The proposal for a potential rule change is in relation to requests by third parties for access to documents in tribunal proceedings, following the Tax Chamber (FtT) case of *Cider of Sweden Limited v HMRC and Ernst & Young LLP*.

- The ‘*Cider*’ matter was discussed initially in July 2022 and reference was made to the previous workstream by TF and the Confidentiality Sub-group in relation to access to documents in proceedings generally, arising from the Supreme Court decision in *Dring v Cape Intermediate Holdings Ltd*.
- The TPC needs to decide whether it should revisit this matter.
- JS suggested going back to the chamber presidents to determine whether views they have previously expressed on this subject have changed. We should highlight the argument that the TPC do now need to consider rule changes.
- This work belongs in Confidentiality Sub-Group’s remit.
- JS asked TF to draft a questionnaire to go to Chamber Presidents with a covering note based on the discussion. The note will need to make it clear that rule changes may be inevitable now due to *Cider of Sweden*.
- SOR suggested involving the ET president in anticipation of the responsibility shift to TPC
- TF and MB will draft, JS will check, SOR will distribute to Chamber Presidents.

AP/78/22: Contact Chamber Presidents regarding the potential need for new costs rules as a result of *Cider of Sweden*- TF and MB

6. Overview Subgroup

TPC Work Programme

6.1 The work programme has been updated and circulated as of 02 November 2022.

7. AOB

Reference to "Her Majesty" in tribunal procedure rules

7.1 RB had identified 3 instances where the rules refer to ‘Her Majesty’. These will be changed in the next April 2023 SI.

Meeting dates for 2023

7.2 The monthly TPC meetings will continue to be held on the first Thursday of every month.

- JS confirmed for SS, as a new member of the committee, that meetings do not usually take place in January, August or September (although this year an exceptional meeting was held in September owing to the workload of the committee).

Next Meeting: Thursday 1 December 2022