

Tribunal Procedure Committee (TPC): Meeting Minutes: Thursday 01 December 2022

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

Present

Mrs Justice Joanna Smith (JS)
Philip Brook Smith (PBS)
Christine Martin (CM)
Timothy Fagg (TF)
Mark Loveday (ML)
Gabriella Bettiga (GB)
Donald Ferguson (DF)
Stephen Smith (SS)
Jeremy Rintoul (JKR)
Alasdair Wallace (AW)
Razana Begum (RB)
Shane O'Reilly (SOR)
Vijay Parkash (VP)
Cerys O'Keeffe (COK)

Guests

Mark Blundell (MB) - (UT IAC- Liaison Judge)
Robin Rimmer (RR) (MoJ Policy Adviser)

Apologies

Susan Humble (SH)
Michael Reed - (MJR)
Beth Stuart-Cole (BSC)
Julian Phillips (JP)

Minutes

1. Introductory matters

1.1. JS welcomed JKR to his inaugural TPC meeting. JKR joins the Committee's membership as a Lord Chief Justice appointment at the request of the Senior President of Tribunals (SPT). His term started on 01 October 2022 and is due to end on 31 September 2025.

1.2. Apologies were received from SH, MJR, BSC and JP.

TPC Sub-group membership

1.3. As per his request, JS confirmed that JKR should join the membership of the Immigration & Asylum Chambers Sub-group (IACSG) and the HSW Sub-group.

1.4. JS confirmed that CM could be released from the IACSG in order to focus on overseeing the work of the HESC Sub-group. CM remains willing to support the IACSG if needed.

Consolidated Tribunal Rules on GOV.UK

1.5. RB has updated the consolidated tribunal rules posted on GOV.UK concerning First-tier Tribunal (FtT) Property Chamber Rules and the Upper Tribunal Rules. JS thanked RB for her efforts on this exercise thus far.

Matters Arising

1.6. The draft minutes of the TPC meeting held on 10 November 2022 were approved by the TPC subject to minor corrections.

Transfer of responsibility for the making of Procedure Rules in the Employment Tribunal (ET) and Employment Appeal Tribunal (EAT) to the TPC

1.7. JS welcomed RR to the meeting (via MS Teams) who is a Policy Official in MoJ. RR provided an update to the TPC regarding the transfer of responsibility for the making of Procedure Rules in the Employment Tribunal and Employment Appeal Tribunal to the TPC.

- The ET/EAT rule making powers are being transferred from the Department for Business, Energy & Industrial Strategy (BEIS) to the TPC under the Judicial Review and Courts Act 2022.
- There is a possible backlog of potential rules changes to be made in the ET and EAT due to a lack of policy resources within BEIS. BEIS consider that the TPC is better equipped to progress these rule amendments as an Independent Body which is set up to efficiently make rules changes. The TPC agreed that BEIS should aim to progress any outstanding rule changes before the transfer of rulemaking responsibility.
- The TPC will have the same rule making powers over the ET/EAT as it presently has in respect of the rules governing the practice and procedure to be followed in the First-tier Tribunal and Upper Tribunal.
- The Judicial Review and Courts Act provides for 2 additional TPC members with expertise in ET; One Lord Chancellor Appointment and One Lord Chief Justice Appointment. Recruitment for these positions is on-going.

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

New Plan for Immigration Programme (NPI) & Nationality and Borders Act 2022

TPC Consultation Exercise

2.1. Further to the discussion in the 10 November TPC meeting, JS expressed her concerns about meeting the 06 April 2023 deadline to lay the Tribunal Procedure Amendment statutory instrument (SI) with the first tranche changes responding to the Nationality and Borders Act 2022. JS explained the steps she had taken to manage expectations around the production of the rules, whilst at the same time identifying a realistic timetable:

- JS met individually with Andrew Key (Chief Executive - Judicial Office MoJ), the Senior President of Tribunals (SPT) Sir Keith Lindblom, and Daniel Flury, Acting Director for Access to Justice Policy, MoJ.
- The conclusion of these meetings is that JS has made clear the uncertainties around the rule-making process in terms of timing and the absolute autonomy of the TPC. She has rejected offers of drafting assistance from MoJ and has made clear that, while assistance is likely to be required from the MoJ/HO to ensure a proper understanding of policy issues, the timing of the production of the rules will, in part, depend upon the speed with which this assistance can be provided. She has agreed that the TPC will make every effort to meet the deadlines sought and to progress the SI rule making exercise as quickly and efficiently as possible.
- MoJ has offered to assist in the task in any way that is viable.

2.2. JS opened a discussion as to how the TPC can sensibly achieve and plan the various activities needed to meet this urgent deadline.

- The secretariat will ensure they are in the best position to collate consultation responses as they are received and accordingly route them to the IACSG.
- MJR consented to being sent the responses on a rolling basis in advance of the 19 January 2023 consultation closing date, to allow for an earlier consideration of the responses by the IACSG.
- SOR agreed to provide his support to analyse the responses for any policy related issues or questions that require answers/clarification from the Home Office (HO) or MoJ in order to have the information/data available as soon as possible after the consultation closing date.
- JS re-iterated that the TPC is not seeking any external assistance with drafting the response from HO or MoJ. The TPC agreed it is for the TPC alone as the statutory rule making body to analyse the responses to the consultation and draft the rules changes.
- The IACSG may find themselves with enormous amounts of work to do if there are a significant number of consultation responses. Steps are being taken to release the TPC members who are salaried IAC judges on the IACSG from their sitting days in the period immediately after the consultation closes in order to focus their time and efforts solely on this endeavour.
- JS then laid out the provisional timetable with which the TPC will need to adhere if it is to complete the preparation of a consultation response sufficiently far in advance of the April 2023 deadline to enable the rules to be included in the April SI.
- JS emphasised the importance of everyone on the committee making themselves available for two TPC meetings in February 2023.

- JS indicated that it had been suggested to her that it may be possible to detach the age assessment segment of the TPC consultation from the other three key areas (accelerated detained appeals, priority removal notices/ UT expedited process and section 19 requirements relating to Tribunal reasons and credibility decisions). This is a question of priorities for MoJ/HO. Consideration of rule changes for age assessments appeals could be revisited in the second tranche exercise in mid-2023.

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

2.3. MB provided a verbal update on the Upper Tribunal (UT) rule 22A query and whether it should be removed from the UT procedure rules.

- It was addressed in the October 2022 TPC meeting as to whether a public consultation on this matter was warranted. MB confirmed that the HO were content in principle with the exercise to amend the rule.
- After a full discussion it was decided that the TPC would conduct a public consultation on this matter, but due to the technical nature of the potential rule change and the fact that it was unlikely that a bespoke consultation would receive a high volume of responses, the topic would be included with similar/related subject matter in another consultation (most likely the planned second tranche IAC rule changes consultation in 2023).

AP79/22: To track down previous consultation from 2014 that provided the background information/arguments for the TPC to agree/make the rule change, rule 22A- MB/ TPC Secretariat

Second Tranche IAC Consultation Exercise: Wasted Costs

2.4. JS and SS acknowledged the policy paper provided by MoJ regarding the topic of wasted costs in tribunals. The IACSG would consider the information carefully.

- SS explained that the IACSG and the TPC needed to understand the rationale behind the insertion of the new section 29(3A) of the 2007 Act specifically. The language of the new s.29(3A) appears to resonate with the language of unreasonable costs orders in rule 10(3)(d) of the Tribunal Procedure (Upper Tribunal) Rules 2008. It would be helpful for the MOJ to clarify the policy intent for new subsection (3A) and how it was intended to contribute to the new wasted resources charging regime that will sit in s.25A.
- It was agreed that the preparation of new rules in this area will be a significant challenge owing to the requirements of the primary legislation.
- JS said that this work strand is not a priority at the moment due to the pressing nature of the first tranche IAC consultation, however SS agreed to begin mapping out a draft consultation paper.

3. GTCL Subgroup

Changes to Upper Tribunal procedure rules to accommodate the introduction of CE-Filing on a mandatory basis

- 3.1. PBS thanked the attendees for their support in drafting the consultation response on CE-Filing. JS cleared the draft. JS thanked PBS for his hard work in finalising the response.
- 3.2. JS confirmed with RB that the rule changes will be going into the rule package to be included in the Spring 2023 SI.
- 3.3. The question of whether the CE-Filing rule amendments and other non-related immigration rule changes should be laid with the IAC rule amendments was raised due to the potentially controversial nature of the immigration rules.
 - After a discussion it was decided that the immigration/NBA rules would be laid in a distinct SI and that there would be a separate SI for rule changes relating to (i) CE-Filing in the UT, (ii) changes to the Tribunal Procedure (First-tier Tribunal (FtT)) (War Pensions and Armed Forces Compensation Chamber (WPACC)) Rules 2008 to allow appeals to be directly lodged with the First-tier Tribunal, and (iii) the updating of references in respect to “Her Majesty” to “His Majesty” following the death of Her Majesty Queen Elizabeth II and the accession of His Majesty King Charles III.
 - RB and VP will meet after the TPC meeting to discuss the available options.

4. HSW Sub-Group

Direct Lodgement Consultation Exercise

- 4.1. CM confirmed that she had met with DF, Judge Fiona Monk and Judge Marion Caldwell KC, the President of the Pension Appeals Tribunal Scotland to discuss the issues raised by the respondents in respect of appropriate timescales for the handling of tribunal documents from parties involved in the proceedings.

The HSWSG asked the TPC and Judge Monk (WPAFCC President) to consider Question 3 in the consultation (Do you agree the timescales in the proposed Rule 23?) and the other respondent observations as discussed at their meeting. (The HSWSG met on the 22 November to discuss the Rule 23 issue and other related issues raised by the respondents).

- It was agreed to extend the timescale for the respondent to send/deliver their response to the Tribunal to 28 days.
- RB and CM agreed to communicate further after the meeting to discuss/agree the approach to draft/amend rule 23 and amend the draft consultation response as necessary.

5. Costs Sub-group

- 5.1. ML confirmed there are no pressing issues to be discussed at today’s meeting

6. Confidentiality Sub-Group

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

- 6.1. 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*.
- 6.2. In that case, Judge Poole identified a potential flaw in the costs provisions of the Tax Chamber Rules, which the judge considered was of general application. He wrote to the TPC asking the TPC to consider rule changes.
- 6.3. The 'Cider' matter was discussed initially in July 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*.
- 6.4. JS thanked ML and TF for their drafting of the questionnaire to establish whether the TPC should conduct a wider consultation with stakeholders on this matter. TF confirmed it was sent to Chamber Presidents on 23 November 2023 with a deadline to reply of 20 December 2022.
- 6.5. SOR has agreed to collate the responses.
- 6.6. JS confirmed this matter can be re-visited at the scheduled March 2023 TPC meeting.

7. Overview Sub-group

- 7.1. The TPC Work Programme was reviewed and updated.

8. AOB

- 8.1. None.

Next Meeting: Thursday 02 February 2023