

Tribunal Procedure Committee (TPC) Meeting Minutes
Thursday 05 October 2023

Meeting (Hybrid) at 7 Rolls Building, London

Mrs Justice Joanna Smith (JS)
Michael Reed - (MJR)
Christine Martin (CM)
Jeremy Rintoul (JR)
Michael Reed (MJR)
Susan Humble (SH)
Stephen Smith (SS)
Tim Fagg (TF)
Donald Ferguson (DWF)
Mark Loveday (ML)
Alasdair Wallace (AW)
Razana Begum (RB)
Shane O'Reilly (SOR)
Hannah Polanszky (HP)
Vijay Parkash (VP)

Guests

Mark Blundell (MB)
Gareth Wilson (GW)
Matt Jackson (MJ)
David Franey (DF)

Apologies

Gabriella Bettiga (GB)
Philip Brook Smith (PBS)
Julian Phillips (JP)

Minutes (DRAFT)

1. Introductory matters

- 1.1. JS welcomed the attendees to the meeting and introduced Mathew Jackson (MJ) and David Franey (DF) as upcoming members of the TPC. DF and MJ are attending the meeting in the capacity as guests pending the commencement of their new TPC posts once the relevant provisions of the Judicial Review and Courts Act 2022 come into force. GW was attending the meeting to deputise for JP.

- 1.2. The Ministry of Justice (MoJ) intend to lay the necessary commencement order to validate both appointments to the TPC in the week commencing the 9 October 2023. JS referred to the valuable experience and expertise that DF and MJ will bring to the TPC's work and the new Employment Tribunal subcommittee. She thanked them both for attending their inaugural TPC meeting.

TPC appointments/membership

Lord Chief Justice appointment: (non-legal Tribunal member post)

- 1.3. In respect of the recruitment exercise for the vacant non-legal Tribunal member role (Lord Chief Justice's appointment), JS reported that the expression of interest exercise was launched on 20 July 2023 and closed on 18 August 2023. Judicial Office (JO) received three applications. JS confirmed a sift exercise has been undertaken and a suitable candidate has been identified by the panel to fill the post. Hopefully the successful candidate will be approved in due course.

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

- 1.4. JS provided a position update on the ongoing exercise for the transfer of responsibility for the making of Procedure Rules in the Employment Tribunal (ET) and Employment Appeal Tribunal (EAT) to the TPC. The legislative change is planned to commence in October 2023. Currently responsibility for the ET Rules remains with the Department for Business and Trade (DBT).
- 1.5. The TPC requested a meeting with senior members of the Judiciary in order to plan and prepare for the related forthcoming ET Rules work (following the formal transfer of responsibility of ET Rules planned in October 2023). JS reported that the meeting took place on 3 October 2023. JS attended together with ET Presidents Judge Clarke- President for the ET (England and Wales) and Judge Walker- President of the ET (Scotland). Also present were the members of the proposed new ET subgroup of the TPC (MJR, DF and MJ) and MoJ policy officials (Robin Rimmer (RR) and VP). The topics discussed included the management of a future ET Rules exercise and the expected prioritisation of ET Rule changes to be incorporated in a future TPC rules statutory instrument (SI) package.
- 1.6. JS provided the TPC with an overview of the main issues/points arising from the aforementioned meeting. JS said that she had previously understood that, owing to a lack of capacity, DBT has been unable to undertake any rules changes, notwithstanding that these have been outstanding for a very long time (the ET Presidents completed a wish list in December 2022). JS reported, however, that the latest update from RR (MoJ policy lead) indicates that the DBT may now have capacity to undertake the ET Rule making exercise. RR has suggested that the transfer could therefore be delayed in order to enable time for the DBT to take through the package of required rule changes ahead of the formal transfer.
- 1.7. JS added that there is a willingness amongst ET Presidents for the DBT to be given the opportunity to make the rules changes, if possible. This approach would permit the rule change exercise to be concluded more quickly than would be possible once the power to make rules changes is transferred to the TPC due to the TPC's statutory procedural protocol (i.e., the need for consultation etc.). JS asked the TPC to express their views.

- 1.8. Members of the proposed ET Subgroup expressed concern at the need to avoid a potential situation causing further delays to the making of ET rules and suggested that, if DBT were to proceed with their ET rule making exercise, a clear timeline should be imposed with a completion target date of December 2023 to make the legislative changes. JS agreed, noting that it is unsatisfactory to be told at the last minute that the DBT may in fact have some capacity without being given any details. She said that it remains unclear whether (even assuming that they are able to make rules changes) the DBT will action all or only some portion of the highlighted ET rules changes, and when this might be possible. She awaits a further update from RR confirming DBTs proposition/ final position on the matter and has been promised that update within a week.
- 1.9. JS addressed an issue raised by Judge Clarke in relation to how information on the TPC website page describing the work of the TPC in relation to the making of Rules would need to be amended to reflect the fact that the ETS sits outside the unified tribunals structure. An appropriate description will need to be used to reflect that distinction.
- 1.10. JS reported that Judge Walker expressed the importance of ensuring that the Scottish ET Procedure Rules are dealt with appropriately and that the TPC must consult the Lord President if the relevant ET Rules contain provisions relating to proceedings in Scotland. JS confirmed that the TPC have full regard for Scotland and are careful to ensure that the TPC address Scottish Rules changes as and when appropriate.
- 1.11. JS said that it was agreed at the meeting that DF would prepare a list of desired rules changes in the ET sphere identifying immediate priorities and all other proposed revisions (including those that could be addressed as part of a single rules change) in order to facilitate the ET rules prioritisation exercise. This would be on the assumption that DBT would not in fact facilitate any rules changes in advance of the transfer of responsibilities to the TPC. This list is to be shared with JS ahead of the 03 November 2023 TPC meeting. DF confirmed that the draft note has already been circulated to the ET Subgroup and will be shared with JS in due course. JS expressed her gratitude to DF for his work on this exercise.

AP/ 106/23- To update the TPC website page in due course to reflect judicial observations. - VP

- 1.12. MJR said that, at an appropriate time in the future and subject to the TPC's workload resource capacity, the TPC may wish to reassess the current EAT Rules and may need to undertake a full review. The purpose of such a review would be the development of a new set of rules designed to ensure that EAT cases can be managed more effectively, flexibly, proportionately and consistently in order to replicate the current tribunal procedure rules already in place.

Freedom of Information (FOI) Request- Confidentiality Subgroup

- 1.13. JS briefed the TPC on a recent Freedom of Information (FOI) request in relation to 'the releasing of documents to third parties in tribunal proceedings in relation to Dring v Cape'. The information requested under the Freedom of Information Act (FOIA) 2000 has been released. The MoJ was unable to disclose a component of the FOI request in respect of a "blank questionnaire template" because the related information was not held by the MoJ, as the document is in fact owned by the JO. The JO is separate from the MOJ and is not subject to a legal requirement under FOIA. The TPC consider this FOI matter now closed.

EU Law Revocation and Reform Act 2023

- 1.14. The DBT submitted a policy paper that was previously considered on the 05 July 2023 in relation to the commencement of a provision in the Retained European Union Law (Revocation and Reform) (REUL) Act 2023. The DBT have advised that the provision will impact the current tribunal procedure in every tribunal chamber and may therefore necessitate some amendments to the current tribunal rules, tribunal practice directions, or guidance before they are brought into effect in the spring of 2024.
- 1.15. The TPC requested further information/clarification in order fully to consider the proposals for potential rules changes in relation to REUL. VP confirmed that no further information has been received from the DBT. The TPC consider there is no more that can be done until additional information is received.

AP/ 107/23- To seek a legislative position update from the DBT. - VP

Matters Arising

- 1.16. The draft minutes from the 05 July 2023 meeting were agreed by the TPC.

2. Immigration & Asylum Chambers Subgroup (IACSG)

New Plan for Immigration programme: Nationality and Borders Act 2022/ Illegal Migration Act 2023

- 2.1. JS received a paper from MoJ New Plan for Immigration team providing a position update regarding the Home Office (HO) plans for progressing the provisions resulting from the Nationality and Borders Act 2022 (NABA) and the Illegal Migration Act 2023 (IMA).
- 2.2. The TPC agreed that the update did not provide any new information upon which the TPC could proceed with planning and preparation for the recommencement of the 'tranche one' NABA provisions, consulted on in 2022-23. The TPC considered that there is nothing further it can do at this present time. Once the HO/MoJ provide the TPC with information as to the proposed implementation timetable, the TPC will accordingly review its plans with a view to progressing the related rules work.

Correspondence from the Immigration Law Practitioners' Association and Public Law Project

- 2.3. JS reported that the TPC Secretariat has received correspondence, from the Immigration Law Practitioners' Association (ILPA) and the Public Law Project (PLP), in the form of two letters.

Changes to the Rules arising from the Nationality and Borders Act 2022/ the Tribunal Procedure Rules for appeals relating to suspensive claims under Illegal Migration Act 2023

- 2.4. ILPA and the PLP have requested the TPC to give consideration to further consultation on the Rules relating to accelerated detained appeals and expedited appeals in the Upper Tribunal (UT), particularly in light of any other amendments to the Rules introduced by the IMA and the capacity/resource constraints of the First-tier Tribunal (FtT) and UT, and practitioners. The letter was addressed directly to JS and was also sent to HMCTS and the HO. JS agreed to send a reply to this letter, explaining the TPC's position, namely that:
- 2.4.1. the decision has already been taken that the first set of rules will be made by the Lord Chancellor rather than the TPC and it is understood that those rules have been drafted and that consultation has taken place. The TPC has not been involved in this planning process and has not seen the draft rules. Once the statutory instrument has been laid, the TPC has every intention of reviewing the Rules with a view to determining whether they require amendment to reflect the need for compliance with section 22 of the Tribunals, Courts and Enforcement Act 2007. This may well involve a consultation on changes to those rules which ILPA and the PLP would be welcome to respond to at the appropriate time. The TPC is unable to provide ILPA and PLP with any information as to the timeframe for implementation of the various provisions by the Government mentioned in their letter.
- 2.5. The second letter relates to the Tribunal Procedure Rules for appeals relating to suspensive claims under IMA. ILPA & PLP have recommended that the Rules are made, in the first instance, by the TPC rather than the Lord Chancellor and have also asked to be consulted in relation to any procedural rules changes. This letter has also been sent to the HO, and the Lord Chancellor.
- 2.5.1. In response to questions 1-4, the TPC has no control over, and no visibility around, when the provisions relating to priority removal notices, expedited appeals in the UT and accelerated detained appeals may be implemented. The question of whether a further consultation will be needed on changes to the rules must remain in abeyance until there is more clarity as to the provisions that are to be brought in force. As the TPC made clear in its consultation response of April 2023, when and if similar provisions to those originally proposed are brought into force it will then consider the implications this has for the Tribunal Procedure Rules. It will also consider what, if any, further consultation is required. The TPC has no update on this position.

- 2.6. JS said that she would draft a reply to ILPA and PLP in respect to their questions 1 to 4. VP would reply to ILPA and the PLP in respect to their question 5, the query had been formally treated as a 'Freedom of Information' (FOI) request and he would disclose the information in due course, in accordance with that FOI request.

AP108/23 - To respond to the queries detailed in the ILPA's/PLP's communication – JS & VP

- 2.7. JS said that GB had disclosed that she is an ILPA trustee and has reported this matter as a conflict of interest to the IACSG.

Immigration (Citizens' Rights Appeals) (European Union Exit) Regulations 2020- Rule 22A

- 2.8. The TPC consulted on changes to the Citizens' Rights Appeals/ Rule 22A of the Tribunal Procedure (Upper Tribunal) Rules 2008. The consultation ran over a 6-week period and closed on the 29 August 2023.
- 2.9. The latest version of the draft consultation reply document prepared by SS was circulated ahead of the meeting. Following some observations and suggested amendments by the Committee, the TPC aim to sign-off the draft response paper by 12 October 2023. The intention is to publish the response on GOV.UK by mid-October 2023 if possible.

AP/109/23- To send an ultimate version of the consultation response to the TPC Secretariat for publication. - SS

3. GTCL Subgroup

- 3.1. The GTCL Subgroup received three policy papers that were provided for the October meeting in respect of potential rule changes for 1) Biodiversity Net Gain appeals right, 2) Electronic Communication Code cases and 3) Economic Crime (Anti Money Laundering) Levy.
- 3.2. In PBS's absence, JS summarised the position arising in respect of each paper and asked the attendees for their views.

Economic Crime (Anti Money Laundering) Levy appeals route

- 3.3. His Majesty Treasury (HMT) is seeking the TPC's agreement to amend the Rules to allow Gambling Commission levy cases that are currently heard in the Gambling jurisdiction of the General Regulatory Chamber (FtT) to be heard instead by the Tax Chamber (FtT) in the near future. HMT's rationale for the proposed rule change and the change in redress designation is to ensure consistent judicial decision-making and fairness for the in-scope appellants.

- 3.4. Having reviewed the proposal and requested rules change the TPC agreed in principle to proceed with the rules changes to the Economic Crime (Anti Money Laundering) Levy appeal rights. The TPC agreed a public consultation would not be required.
- 3.5. MJR questioned whether TPC are likely to expect more rules changes relating to HMT's policy for this matter, and if so, questioned whether having a general definition of a respondent would be a more efficient way of handling these types of cases to the FtT.
- 3.6. SH said that, from a practical perspective, she does not expect that there will be a significant amount of traffic in relation to appeals dealing with Economic Crime related cases and does not consider there to be a need to look into the matter more widely at this stage.
- 3.7. In order to scope out the potential volume of Economic Crime/Anti-money laundering related cases expected to arise/ enter the Tax chamber, the TPC suggested that VP consult the MoJ policy leads to seek additional/further information in relation to potential volumes of such cases and report back to the TPC ahead of the next scheduled meeting in November.

AP/110/23 - To contact the MoJ policy lead to obtain information regarding any foreseeable or potential anti-laundering/ economic crime rules changes. -VP

Electronic Communication Code cases

- 3.8. The Department for Science, Innovation and Technology (DSIT) have prepared a paper detailing their proposal to amend the Electronic Communications Code (Jurisdiction) Regulations 2017 ("the Code"). The proposed rule change is to ensure that all Code cases are to commence in the Property Chamber (FtT), rather than in the Lands Chamber (UT), which is presently the default position for Code cases, with the exception of the more complex Part 4A Code cases that would be transferred from the FtT to the UT.
- 3.9. DSIT are requesting the TPC to make an amendment to Rule 13 (order for costs, reimbursements of fees and interest on costs) of the Tribunal Procedure (Property Chamber) Rules 2013 so that the existing cost rule applies to all Code cases which will be heard in the Property Chamber (FtT).
- 3.10. Having reviewed the proposal from DSIT, the TPC agreed in principle to make rules changes to the Property Chamber Rules to accommodate Electronic communication Code Cases. The TPC agreed a public consultation would not be required.

Biodiversity Net Gain appeals route

- 3.11. The Department for Environment, Food and Rural Affairs (DEFRA) have requested amendments to rule 22 (Notice of Appeal) of the General Regulatory Chamber (GRC) Rules in respect of appeals for Biodiversity Net

Gain (BNG) under section 100 of the Environment Act 2021. *‘BNG is an approach to development, and/or land management, that aims to leave the natural environment in a measurably better state than it was beforehand’*. DEFRA would like rules change to be introduced by April 2024, if possible, to deal specifically with the time period in which third parties might appeal any decision of which they were not notified at the time it was made. It was suggested that time for any appeal could run from the date on which the third party became “aware” of the appeal decision.

- 3.12. JS provided an overview of the context in which the proposed rules change arises and expressed concern at the potential difficulties caused by a rule which commenced a time period by reference to the “awareness” of a third party – that being an inherently ambiguous and tricky thing to determine, capable of giving rise to satellite litigation. JS asked the TPC for their views on the matter.
- 3.13. The TPC discussed the matter and agreed that giving effect to the current proposal could have the potential to give rise to significant difficulties and unintended consequences resulting in disputes around the question of when a party became ‘aware’ of their right to appeal and would need to be carefully considered in the context of making any such rule. The TPC was of the view that it was likely that there would be a need to consult on the proposed rule change.
- 3.14. VP suggested that he should communicate the TPC’s concerns to the relevant MoJ policy official in order to clarify the issue and said that he would report back his findings to the TPC before the November meeting. The TPC agreed with VP’s suggested approach.

AP/111/23 -To contact the Defra policy lead in relation to the proposed rule change relating to Biodiversity Net Gains appeals right. To report any findings to the TPC. - VP

4. HSW Subgroup

Mental Health Tribunal- Rule 35 proposed change

- 4.1 CM provided the TPC with an update in respect of the consultation responses regarding the proposed change to Rule 35 of the Health, Education and Social Care Chamber (HESC) Rules. Rule 35 is concerned with the management of these cases and, in particular, the types of cases which may be disposed of without a hearing.
- 4.2 The consultation on proposed rule changes to Rule 35 of the Health, Education and Social Care Chamber (Health, Education and Social Care Chamber (HESC) Procedure Rules ran for a 6-week period and closed on the 29 August 2023.
- 4.3 The TPC discussed the responses which pointed toward a significant concern from the respondents around issues relating to the tribunal safeguarding responsibilities

to hospital-based patients/appellants. Following detailed discussion, the TPC decided that there was a need to reconsider the nature of the rule change and the timing of any such rule change. In order to address the safeguarding concerns raised in the responses to the consultation, the TPC considered that (unusually) it would be appropriate to consult again on the proposed change to rule 35, expressly addressing the concerns noted by respondents by amending the scope of the consultation proposal to include added safeguarding measures designed to accommodate the need of a vulnerable person.

AP/112/23- To prepare a document that incorporates: i) a response to the consultation on proposed changed to rule 35 and ii) TPC thoughts on the approach regarding added safeguarding measures. - CM

AP/113/23- To inform the Chamber President and Deputy Chamber President of HESC of the TPC's decision to conduct a supplementary consultation. - CM

4.4 JS said that the Law Society have requested a meeting with the TPC to discuss their response to this consultation. The TPC agreed at this present time that such a meeting with the Law Society would be unnecessary given the TPC's decision to re-consult on the proposed amendment to Rule 35. The Law Society will have the opportunity to submit a full response to the revised consultation.

AP/114/23- To inform the Law Society of the TPC's decision in relation to their meeting request. - VP

'Open Justice' in Criminal Injuries Compensation cases

4.5 CM circulated a draft consultation paper in respect of the proposed change to rule 30(2) of the Social Entitlement Chamber (SEC) (First-tier Tribunal) Rules for the 'Criminal Injuries Compensation (CIC)' jurisdiction of the SEC, to the effect that criminal injuries compensation cases are heard in public by default. The matter had been discussed at the July 2023 meeting.

4.6 The draft consultation document was cleared by the TPC for publication following some suggested amendments. The TPC agreed an 8-week consultation period.

Victim Personal Statements in the (Mental Health jurisdiction- Health, Education and Social Care Chamber)

4.7 JS reported that the Victim and Witness Policy and Strategy Team (VWPST) have decided not to present a paper or attend the October TPC meeting and instead have chosen to work further on the open policy questions that the TPC raised at the July meeting. JS said she expected the VWPST to present a new policy paper to the November TPC meeting.

5. Cost Subgroup

5.1 ML stated that he is due to attend a meeting of the Upper Tribunal Lands Chamber user group. He expects this attendance/involvement to lead to him receiving potential proposals for rules changes in relation to the Lands Chamber (UT). ML will update the TPC on the outcome of the users meeting at the November meeting.

AP/115/23- To update the TPC in respect of any suggestions for potential rules changes in the Lands Chamber (UT) at the November meeting. - ML

6. TPC Amendment (No.2) Rules Exercise

6.1 RB provided a position update on her preliminary work to prepare the TPC (Amendment No.2) Rules statutory instrument (SI). The TPC agreed in principle to defer the proposed laying date of the 26 October 2023 to the 30 November 2023 in order to allow for the relevant time needed for drafting, legal checks and Ministerial approval. The coming into force date for the SI will likely commence on the 21 December 2023 as a result.

6.2 The TPC noted that this SI implements rules changes in respect of the following tribunal procedure rules:

- Immigration and Asylum Chambers rule changes
- Cost shifting in the Property Chamber (FtT)
- Amendments to the Tribunal Procedure (Amendment) Rules 2023

7. TPC Overview Subgroup

TPC Work Programme

7.1 The TPC work programme has been updated and circulated as of October 13 2023. It was agreed that the TPC work programme should be updated to amend/remove:

Section 1 of the TPC Work Programme

- Update entries 3 and 4 to record the latest position on the consultation on 'possible changes to the First-tier Tribunal (Immigration and Asylum Chamber) Rules and the Upper Tribunal Rules'.
- Update entry 6 to record the progress status for the consultation on 'possible amendments to the HESC Rules regarding proposed changes to the way that the Tribunal decides cases referred to the Tribunal pursuant to S.68 Mental Health Act 1983'.
- Add new entry: Open Justice in criminal injuries compensation cases.
- Add new entry: Electronic Communication cases.
- Add new entry: Economic crime: Anti money Laundering.

8. A.O.B

TPC Amendment (No.2) Rules 2023 Statutory Instrument

8.1 ML asked RB whether a draft SI will be available/presented to the TPC by the November meeting. RB said that she will aim to make the draft SI available to the TPC, however the final version of the SI will not be ready for the TPC to sign off at the November meeting.

8.2 MJR referred to the forthcoming package of ET and EAT rules changes to be inherited from DBT following the transfer of responsibility of ET/EAT rules to the TPC. He expects a heavy workload to arise from the ET/EAT rules transfer which will need to be organised into manageable tranches. Once MR receives further information from the ET Presidents, the ET Subgroup can commence planning for this rules work. MJR agreed, at the request of JS, to prepare a note in due course, detailing the ET Subgroup's thoughts and preparation plans to accommodate this coming work.

TPC Meetings- 2023 Schedule

8.3 JS reminded the attendees that the next two successive meetings will take place on the first Friday on the month. The remaining meetings are scheduled for November 3rd 2023, and December 8th 2023.

Next Meeting: Friday 3 November 2023