

**Tribunal Procedure Committee (TPC) Meeting Minutes
Friday 03 November 2023**

Meeting (Hybrid) at 7 Rolls Building, London

Present

- Mrs Justice Joanna Smith (JS)
- Michael Reed (MJR)
- Christine Martin (CM)
- Philip Brook Smith (PBS)
- Michael Reed (MJR)
- Stephen Smith (SS)
- Donald Ferguson (DWF)
- Mark Loveday (ML)
- Razana Begum (RB)
- Shane O'Reilly (SOR)
- Hannah Polanszky (HP)
- Vijay Parkash (VP)

Guests

- Mark Blundell (MB)
- Matt Jackson (MJ)
- David Franey (DF)
- Fiona Monk (FM)
- Gareth Wilson (GW)
- Nicholas Lee (NL)
- Simon Block (SB)

Apologies

- Susan Humble (SH)
- Jeremy Rintoul (JR)
- Alasdair Wallace (AW)
- Julian Phillips (JP)

Minutes

1. Introductory matters

- 1.1. JS welcomed the attendees to the meeting and informed the attendees that regrettably Timothy Fagg (TF) has tendered his resignation, effective from the 9 October 2023. JS acknowledged the wealth of expertise TF has brought to the Committee during his tenure and the TPC members collectively expressed their gratitude for TF's valuable contribution during his two terms of service as a TPC member as well as the Chair of the Confidentiality Subgroup. The Judicial Office (JO) will shortly be launching an expression of interest (EOI) competition to appoint a replacement.

- 1.2. JS informed the TPC that FM had been nominated by the Senior President of Tribunals (SPT) in the capacity as a leadership judge. She would be joining the TPC as a guest for the purpose of assisting on proposed rule changes around the provision of 'Written Reasons' in the First-tier Tribunal (FtT). A paper had been prepared by SOR (on behalf of JO) on proposed rule changes around the provision of written reasons in the FtT Chambers.
- 1.3. NL (Deputy Director- Strategy and Change in JO) and SB (JO Principal Strategy Adviser) were attending to support SOR and assist the TPC in relation to the proposals for wider working practices changes in the FtT and Employment Tribunal (ET).
- 1.4. JS informed the attendees that Amir Khandoker has joined the TPC Secretariat and that he will attend his first TPC meeting on 8 December 2023.

TPC appointments/membership

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

- 1.5. JS provided an update of the position of the ongoing recruitment exercise for the vacant non-legal Tribunal member role (Lord Chief Justice's appointment). The expression of interest exercise (EOI) was launched on 20 July 2023 and closed on 18 August 2023. JO received three applications. JS confirmed a sift exercise has been undertaken and a suitable candidate has been identified by the recruitment panel to fill the post. JS added that she has not received from JO any further update in relation to the progress of the recruitment exercise specifically in connection with the start date and related formal announcement details. SOR confirmed that he understood that the appointment exercise has reached the point where the Lord Chancellor (LC) is currently being consulted by the Lord Chief Justice.
- 1.6. JS thanked SOR for the update but expressed concern at the delay that is occurring between the commissioning of an appointment exercise and the concluding stage of the process, i.e., when a recommended candidate is ultimately appointed to the TPC. JS added that the delay results in the TPC having to work at below its required capacity, which inevitably undermines the TPC's efficiency and productivity. JS requested that SOR pass on her observations to the relevant JO officials with a view to asking them to explore how improvements could be made to speed up the recruitment/appointment process.
- 1.7. In relation to the appointments of DF and MJ to the TPC, JS said that there has also been a further delay to the commencement order to validate their formal appointments.
- 1.8. JS said the Ministry of Justice (MoJ) intended to lay the necessary commencement order in the week commencing 9 October 2023, however

apparently setbacks occurred which resulted in the commencement order being deferred to 1 November 2023. The commencement order is expected to be signed off by the MoJ Minister during the week beginning 6 November 2023.

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

- 1.9. JS provided a position update from Robin Rimmer ((RR)-MoJ Policy) on the ongoing exercise for the transfer of responsibility for the making of procedure rules in the ET and Employment Appeal Tribunal (EAT) to the TPC. The legislative change is planned to commence in October 2023.
- 1.10. The Department for Business and Trade (DBT) had advised that it may have the staffing resource capacity to undertake the related Rules work ahead of the October 2023 target date. JS had understood that the TPC would receive a final decision from the DBT to confirm its position in relation to its resource capacity to undertake all or part of the required ET rules changes by mid-October 2023. Regrettably, the latest update received from RR on the 2 November 2023 (prior to the meeting), indicates that the DBT is still considering its position on the matter.
- 1.11. JS expressed serious concern that the continued delay by DBT to confirm its position with regard to the handover of ET Rules work to the TPC was delaying rule changes which have been identified as urgent by the ET Presidents/ senior judiciary. These rule changes have been outstanding for over a year. She added that the continuing delay could potentially result in a ripple effect, delaying other required ET Rules changes that have been provisionally designated non-critical. JS is concerned that the continuing uncertainty and failure on the part of the DBT to progress this matter will cause difficulties for the TPC in its management and prioritisation of its already substantial workload. JS said that the delay is likely to add additional pressure on the TPC (through no fault of its own) when the ET Rules are ultimately transferred over.
- 1.12. MJR remarked that the delay would also have a damaging impact on the ET's performance and efficiency. The ongoing digital reform process undertaken by HMCTS to make the ET administrative processes simpler, fairer and accessible for all users would be at risk if this delay were to continue. He understood it was HMCTS's ongoing intention to introduce digital reforms to expand the system to include all case types as well as changes to manage evidence and present cases.
- 1.13. DF had prepared a document identifying the desired rules changes in the ET sphere (provided to the TPC in advance of the meeting) categorising the proposed rule changes into distinct tranches: i) immediate priorities and ii) more substantial revisions. The purpose of this paper is to facilitate the ET rules prioritisation exercise.

- 1.14. To try to mitigate against the effect of any further delay as a result of the DBT's ongoing failure to decide whether it intends to make the rule changes (as identified by DF and endorsed by the ET Presidents), the TPC agreed that the DBT should be given a deadline by which to confirm their position.
- 1.15. JS said she would return to RR to ask him to express to the relevant DBT policy officials the TPC's dissatisfaction at this ongoing lack of progress and to ask for a firm decision one way or the other (at least in respect of the urgent rules changes as identified in the DF paper) in advance of the December 2023 meeting.
- 1.16. The TPC agreed that, if no action was taken by the DBT to resolve this matter before the transfer of the powers to the TPC, there would be considerable pressure on the TPC to expedite an exercise to make urgent rules changes. JS said she would contact RR to request that her remarks be put before the relevant DBT Ministers. JS will update the ET and EAT Presidents of the current position.

AP/116/23- To report back to the SPT on the identified urgent rules changes matter-SOR

AP/117/23- To email the ET/EAT Presidents to update them of the current status position. - JS

AP/118 /23- To relay the TPC's concerns in relation to DBT's inactivity/ ongoing delays – JS; To request that the DBT provides its decision on this specific issue by 08 December 2024.- JS/RR

Matters arising

- 1.17. The draft minutes from the 5 October 2023 meeting were agreed by the TPC subject to an amendment.

2. Immigration & Asylum Chambers Subgroup (IACSG)

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

- 2.1. The TPC have received no further 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. The TPC considered that there is nothing further it can do at this present time. Once the HO/MoJ provide the TPC with an implementation timetable, the TPC will review its plans to progress the associated rules work that was paused in March 2023.

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

- 2.2. JS reported that she and the TPC Secretariat had replied to the Immigration Law Practitioners' Association and the Public Law Project following their correspondence being discussed by the TPC at the October 2023 meeting.

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

2.3. 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. The consultation response on changes to the Citizens' Rights Appeals/ Rule 22A of the Tribunal Procedure (Upper Tribunal) Rules 2008 was published on GOV.UK on 10 October 2023.

The Nationality and Borders Act 2022 (Consequential Amendments) Regulations 2023

2.4. JS informed the TPC that by a HO paper provided to the TPC shortly in advance of the November 2023 meeting, the HO has informed the TPC that it had laid a statutory instrument (SI) on 25 October 2023 in respect of Section 46 of the Nationality and Borders Act 2022 (Removals: notice requirements). The SI amends paragraph 41(5) of the Tribunal Procedure Rules to amend the existing 14 days' timeframe to 21 days. HO has advised that the statutory instrument will come into force on 20 November 2023.

2.5. The TPC discussed this paper and expressed grave concern that the HO had not consulted the TPC about this rule change. Furthermore, the HO's intention to make the change to the primary legislation (NABA) had not been notified to the TPC by the HO.

2.6. The TPC agreed that JS should write to the relevant MoJ policy officials to express their disquiet and to remind the HO that it should not be thought that a precedent can be set which involves by-passing the rule making powers and responsibilities of the TPC in this way.

AP/119/23: To write to the MoJ NPI policy lead to express the TPC's views in respect to this issue– JS

3. GTCL Subgroup

3.1. PBS said the GTCL subgroup received three policy papers from government departments that were circulated for the October 2023 meeting in respect of potential rule changes for i) Biodiversity Net Gain appeals rights, ii) Electronic Communication Code cases and iii) Economic Crime (Anti Money Laundering) Levy.

3.2. PBS summarised his assessment arising in respect of each paper and provided the TPC with an update in relation to the GTCL subgroup's work since the October 2023 meeting.

Biodiversity Net Gain appeals route

3.3. The Department for Environment, Food and Rural Affairs (DEFRA) have requested amendments to Rule 22 (Notice of Appeal) of the General Regulatory Chamber (GRC) Procedural Rules in respect of Biodiversity Net Gain (BNG) appeals to the FtT, 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 had asked the TPC for its view on a proposed technical rule change to be introduced by April 2024 if possible.

- 3.4. A point was raised at the October 2023 meeting in relation to seeking DEFRA clarification around the concept of when a party is “aware” of something. The TPC had been concerned at the potential for the interpretation of this word to create difficulties and to lead to satellite litigation. PBS said he had discussed the matter with Judge O’Connor, the General Regulatory Chamber President, who had suggested a possible mechanism for dealing with the issue surrounding the meaning of “becomes aware” together with a second issue raised in the policy paper, namely the absence of a ‘decision notice’ by the appellant when filing an appeal. The possible mechanism had been raised with DEFRA, but a further option had been suggested: the relevant appeal period running from the date on which the register was amended or removed (to be recorded on the register). Judge O’Connor had regarded this option as workable, and it had the benefit of meaning that a late appeal would not be admitted unless ‘relief from sanctions’ was granted by the Tribunal. Generally, the scope for issues arising in relation to this appeal right was thought to be very limited.
- 3.5. PBS supported this approach and provided his views to the attendees. He suggested that any potential rule changes will not require a public consultation, unless the GRC President raises issues later which may require one. The TPC agreed with PBS’s suggested approach. It was agreed that the amendment to Rule 22 (Notice of Appeals) of the GRC rules will be included in the forthcoming April 2024 SI.

Electronic Communication Code cases

- 3.6. 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 Upper Tribunal (UT).
- 3.7. DSIT are requesting the TPC to make an amendment to rule 13 (order for costs, reimbursements of fees and interest on costs) of the Property Chamber Procedure Rules so that the existing cost rule applies to all Code cases which will be heard in the Property Chamber.
- 3.8. PBS provided the TPC with an update of his work on the matter - having reviewed the proposal from DSIT, the TPC agreed in principle to make potential rule changes to the Property Chamber Procedure Rules to accommodate Code cases. The TPC agreed a public consultation would not be required as they considered it a technical rule change. The SI will be included in the April 2024 SI Triage.

- 3.9. ML updated the TPC on his progress in relation to his contribution on the drafting of the amended rule and added that a consultation will not be required in relation to an amendment to Rule 13 (order for costs, reimbursements of fees and interest on costs) of the Tribunal Procedure (Property Chamber) Rules 2013 as it was deemed simply a technical rule change.

Economic Crime (Anti Money Laundering) Levy appeals route.

- 3.10. His Majesty's Treasury (HMT) is seeking the TPC's agreement to amend the GRC Rules to allow Gambling Commission levy cases that are currently heard in the Gambling jurisdiction of the GRC to be heard 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.
- 3.11. PBS provided an overview of his work in relation to the matter and confirmed that an amendment to the definition of 'HMRC' in the Tax Chamber Procedure Rules (to include the Gambling Commission when carrying out functions in respect of these levy cases) was required. This would accommodate HMRC in undertaking/responding to these appeals. Having considered the proposal and requested rule changes the TPC agreed to proceed with the rule changes. PBS added that due to the simple/technical nature of the rule change a public consultation would not be deemed necessary. The TPC is content that the simple change is appropriate and will proceed on that premise.

4. HSW Subgroup

Mental Health Tribunal- Rule 35 proposed change

- 4.1. At the October 2023 TPC meeting the TPC agreed that it was appropriate to reconsider the nature of the proposed rule changes and the timing of any such rule change to be introduced, in order to address the safeguarding concerns raised by some respondents in their responses to the TPC consultation.
- 4.2. As a result, the TPC agreed to re-consult on the proposed rule 35, addressing the concerns noted by respondents by amending the scope of the consultation proposal to include additional safeguarding measures designed to accommodate the needs of a vulnerable person. CM circulated a draft hybrid consultation paper which incorporated a response to the original consultation on the proposed change to Rule 35. Subject to a few minor amendments, the draft consultation paper will be reviewed at the December 2023 meeting with the aim of signing it off and of publication in due course. The TPC agreed that the consultation period will run over a period of 12 weeks.

AP/120/23: To provide the latest version of the draft consultation paper to the TPC secretariat for the December meeting- CM

'Open Justice' in Criminal Injuries Compensation cases

- 4.3. The 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, was published on 17 October 2023. The consultation will close on 12 December 2023. JS and the TPC members thanked CM and the HSW Subgroup for their hard work in preparing the consultation document.

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

- 4.4. The MoJ Victim and Witness Policy and Strategy Team (VWPST) submitted a policy paper for the TPC's consideration. Following a full discussion, the TPC decided that, pending receipt of a draft Code, it is not in a position to take any further action on the proposal. Once the TPC has been provided with a draft Code, it will be able to consider whether action can be taken in light of the draft, or whether sight of a final version of the Code is required.
- 4.5. MJ raised a legal point in relation to the current draft of the Victims and Prisoners Bill 2023 that relates to the Victims' Code. MJ remarked that the phrase "criminal justice process" is not otherwise defined in the Bill and the phrase does not appear to arise elsewhere in similar legislation.
- 4.6. JS asked RB to consider MJ's observations and to prepare legal advice for the TPC's consideration (to be circulated for the December 2023 Meeting).

AP/121/23: To provide legal advice in respect of clause 2, Victims and Prisoners Bill following MJ's comments- RB

5.Costs Subgroup

- 5.1. ML said he had attended an UT (Lands Chamber) Users Group meeting on 05 October 2023. At the meeting the topic 'Costs in the Tribunal' had been discussed in relation to the Lands Chamber (UT) and the Property Chamber (FtT).
- 5.2. ML explained that the senior judiciary had mentioned that a number of cases since the introduction of the Tribunal's current rules on costs in 2013 suggested that there was uncertainty about their application in some of the Tribunal's first instance jurisdictions. ML said he had explained to the forum the TPC procedure for changing tribunal rules and explained that, in general, costs shifting does not apply in tribunals. However, in view of the possibility of the introduction of new potential cost shifting measures (indicated in the King's Speech 2023) the working party (of the UT Lands Chamber users group) may delay the start of such work until early 2024 which could potentially lead to potential proposals for rules changes in relation to the Lands Chamber (UT).

6. Written Reasons in the First-tier Tribunal

- 6.1. JS said the TPC has recently received a request from the JO that it considers changing the rules in the FtT relating to the right to written reasons. The SPT had personally asked JS to prioritise this rules work. Ideally the TPC would be in a position to go out to consultation in respect of these proposed rule changes in January 2024 with a view to bringing in any new changes in the Autumn of 2024.
- 6.2. The TPC discussed the paper with commentary from NL in respect of the background and supporting arguments for the proposed changes to the Tribunal Procedure Rules in relation to extempore decisions or written decisions, the recommendations for rule changes and permutations for different jurisdictions within specific Chambers outlined in the paper requiring the TPC's consideration, and related anecdotal information.
- 6.3. The TPC also discussed Judge Plimmer's preliminary observations (the President of the Immigration and Asylum Chamber (FtT) that had been shared with JO prior to the meeting). MB summarised the judicial observations in respect of retaining judicial discretion for providing written reasons to parties in the IAC (FtT) and its importance for UT judges considering onward appeals from the IAC and judicial review applications.
- 6.4. The TPC recognised that the context for the requested changes is the Lord Chancellor's consultation concerning "additional fees". The TPC acknowledged that it is not aware of the final details of proposals relating to the proposed new booking and sitting arrangements and asked NL/ JO for further details concerning the proposed sitting, writing, and booking arrangements to be provided when available.
- 6.5. JS asked whether JO had considered the option of providing transcripts of a hearing to the parties involved in the tribunal proceedings as an alternative solution to their rule change proposals. NL said that due to reasons/factors around efficiency and access to justice and issues in relation to costs, the use of transcripts was not on the agenda. The JO are exploring options around the use of speech-to-text technology for judicial use.
- 6.6. SS pointed out the inaccuracies involved in the use of alternative technology and added that speech-to-text is an unreliable means for providing oral judgments and transcriptions. He highlighted, from his own experience, the difficulties that occur within the context of practical use.
- 6.7. NL explained that the current position is that the JO are proposing a discussion with HM Courts and Tribunal Service (HMCTS) around alternative and appropriate speech-to-text programmes, just to explore potential possibilities. However, he added that no decisions have been taken regarding this and that the views of HMCTS will assist in considering whether there are any viable alternatives to transcription. NL added that he will share a paper summarising the proposal for wider working practices

changes in the FtT and ETs with a view to providing the TPC with a more holistic view beyond the proposed rule changes.

- 6.8. The TPC discussed the complexities that arise from the use of technology in relation to transcripts/ written reason extensively. JS suggested that the issues arising from the discussion could be incorporated in the note prepared by SoR and recirculated to chamber presidents. JS said it was important that Chamber Presidents are properly consulted on the issues arising from the discussion in relation to audio recording/transcripts/speech-to-text technology. SS agreed to prepare a separate paper to go to Chamber Presidents summarising the discussion at the meeting and seeking their views in the context of a proposed consultation exercise.
- 6.9. The TPC agreed that a subgroup be formed to deal with this 'written reasons' issue. JS would chair the subgroup. The membership would comprise of: SS, PBS, SOR and FM as a guest member.
- 6.10. JS said it may be necessary to have a subgroup meeting before the end of December 2023, but that depended on how much progress the subgroup has made in obtaining the view of the Chamber Presidents to the JO proposals.
- 6.11. JS would write to the ET, EAT, FtT and UT Chamber Presidents to seek their views in respect of this specific issue in advance of the December 2023 meeting, where this topic would be revisited/ discussed further. She would send them the JO paper together with the paper to be drafted by SS. The TPC agreed it was vital for the final consultation document to capture/ reflect the senior judiciary's views as to what (if any) changes are necessary to the existing rules.

AP/122/23: To prepare a paper to be circulated to the Tribunal Presidents (with the initial JO paper)- SS

AP/123/22: To write to the Chamber Presidents to seek their views on the 'written reasons' issue- JS

7. TPC Amendment (No.2) Rules Statutory Instrument Exercise

- 7.1. At the October 2023 TPC meeting the TPC agreed in principle to defer the proposed laying date for the TPC Amendment Rules (No.2) statutory instrument ("TPC SI") to the 30 November 2023 (with a coming into force date of 21 December 2023) in order to allow for the preparatory time needed for drafting, legal checks and Ministerial approval.
- 7.2. RB provided a position update on her work to prepare the TPC SI and said that her Parliamentary Branch Legislation (PBL) colleagues have now advised that it is unlikely that the 30 November 2023 date would be secured as a laying date

for the TPC SI, and that the earliest slot that can be secured is now the 4 December 2023, with a coming into force date of 25 December 2023.

- 7.3. JS asked when RB would be circulating the TPC SI for signing in advance of the proposed laying date. RB said that she intends to circulate the final draft of the TPC SI to the Committee around the week commencing the 20 November 2023.

8. TPC Overview Subgroup

TPC Work Programme

- 8.1. The TPC work programme has been updated and circulated as of 17 November 2023.

9. A.O.B

- 9.1. ML raised the issue of TF's resignation from the TPC and the fact that TF had been the Chair of the Confidentiality Sub-group; he was a very experienced judge in the social security and child support jurisdiction. The TPC had relied on his knowledge in the area of litigation friends. ML suggested that these points need to be considered in the context of the essential skills/knowledge required of his replacement when JO prepare an EOI advertisement.
- 9.2. The next scheduled TPC meeting will take place on Friday 8 December 2023, but meetings will thereafter return to their customary slot on the first Thursday of each month from February 2024.

Next Meeting: Friday 8 December 2023