One judiciary, but many pathways to justice

As a prelude to the article on page 12, which discusses the judicial approach to litigants in person, *Paula Gray* revisits two articles by Andrew Bano that were published previously in *Tribunals*.

The first of two articles on the inquisitorial aspect of tribunals, written by my colleague Andrew Bano, who recently retired as an Upper Tribunal judge, was entitled 'Fundamentally different from courts' (Summer 2011). I considered simply adding a question mark to that statement as my title for this piece, given that since his article was published we have seen the unification of courts and tribunals, initially administratively under the HMCTS umbrella, and now the judiciary too.

To be 'one', however, is neither to be the same, nor is it to strive for equivalence; our strength is in recognising our differing roles as well as acknowledging our many similarities. The goal may be the same, but not necessarily the direction of travel, and the moment at which we are embracing our communality is probably as good a time as any to take stock of our different approaches to see whether they would and should survive as we 'boldly go' into the new judicial universe, and to reassess the use that we can make of what have always been seen as our historical differences.

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At issue in Andrew's first article was the extent to which tribunals exercise an inquisitorial jurisdiction. The case that is often cited as confirmation of the inquisitorial approach is *R v Medical Appeal Tribunal (North Midland Region) ex parte Hubble* [1958] 2 QB 228, in which a tribunal in what is now the Social Entitlement Chamber was able to decide the case on a basis which had not been put forward by either of the parties.[1] However, the basis of the decision was not that the tribunal's jurisdiction was inherently inquisitorial, but that such an approach was demanded by the legislation that had to be applied in that case. As Lord Diplock (then a judge sitting in the Divisional Court) said:

> 'In such an investigation the Minister or the insurance officer is not a party adverse to the claimant. If analogy be sought in other branches of the law, it is to be found in an inquest rather than an action.'

That was also the position in the more recent case of *Kerr v Department for Social Development* [2004] UKHL 23 in which Baroness Hale, again in the context of entitlement to a social security benefit, notably eschewed the concept that the classic burden of proof is generally determinative, preferring to rely on the duty to produce relevant evidence by the party in possession of it, the role of both parties being to cooperate in ascertaining the true facts; only rarely should the outcome depend on the burden of proof.

Nuanced approach

So, each of our many tribunals, dealing with a different aspect of the law that has at its heart particular core legislation, will need to consider whether in applying that legislation an inquisitorial or a more adversarial approach is called for; the answer may differ from tribunal to tribunal and the legislation involved. This nuanced approach is frequently ignored in favour of the mantra that tribunals are inquisitorial.

Sir Andrew Leggatt in his 2001 report 'Tribunals for Users' had concluded that neither the

traditional adversarial approach of the common law nor a fully inquisitorial approach, on the Australian model, was appropriate for tribunals:

> '[7.4] . . . tribunal chairmen may find it necessary to intervene in the proceedings more than might be thought proper in the courts in order to hold the balance between the parties, and enable citizens to present their cases . . . The balance is a delicate one, and must not go so far on any side that the tribunal's impartiality may appear to be endangered . . .'

Tipping point

Pausing there to note in this quote a historic acknowledgement of the difficulties in recognising the tipping point between enabling a litigant and stepping into the arena, it is a fact that our current tribunal framework, the legacy of Leggatt as enshrined in the Tribunals, Courts and Enforcement Act 2007 (TCEA), does not expressly require tribunals to act inquisitorially although an inquisitorial approach may be implicit in the principles of tribunal justice set out in section 2 of the Act, which include injunctions that the tribunal should be expert and accessible.

The legislation with which we work can confound even the masters of statutory interpretation.

The view of our former Senior President of Tribunals, then Carnwath LJ, expressed in a paper published in the journal *Public Law* just prior to the coming into force of the TCEA, was that the Act was neutral on the question of whether tribunals should be adversarial or inquisitorial, but he pointed out that the principles of accessibility and expertise gave an indication that court procedures would not necessarily provide the model for tribunals. He later bolstered the inquisitorial, or at least enabling, approach by issuing his Practice Direction in respect of vulnerable witnesses;[2] the category of those who should be considered under that PD also appears to be widening, or if it is not, arguably should be lest tribunals fall behind the courts in this sphere.[3]

In a practical sense, vis-à-vis most courts, our less formal procedure and relative evidential simplicity (the issue being simply the probative value of any evidence proffered, evidence being generally admissible unless excluded to give effect to a particular right such as legal professional privilege) make the process easier for all, particularly those representing themselves. However, that is often where the simplicity ends. The legislation with which we work can confound even the masters of statutory interpretation.

In *Secretary of State for Work and Pensions v Menary-Smith* [2006] EWCA Civ 1751, when considering the Income Support (General) Regulations 1987, Lord Justice May observed that 'the meaning of parts of Regulation 60C seems to me to be obscure to the point of near darkness', and Carnwath LJ (as he was then) rued the fact that:

> '. . . after four years since the original decision, which have seen one tribunal hearing, two reasoned Commissioner decisions, and a fully argued appeal to this court, with experienced counsel on both sides, we seem to be as far as ever from a consistent or coherent account of how the relevant regulations are supposed to work, or why it matters.'

That complexity demands that we maintain our subject expertise; we are so often the only people in the hearing room who understand what the case is about.

Citizen v State

I have made brief reference to Article 6 of the ECHR, and important in that is the requirement for 'equality of arms' in order to ensure that the parties to a dispute are procedurally in a relatively

equal position. This may be more acute in the tribunal world, where, due to the very genesis of the tribunal system, many, perhaps most, cases involve a Citizen v State dispute where the relative resources will be significantly at variance, a situation which in the public interest may require addressing. It is perhaps here where the tribunal can best use its procedural and legal expertise to enable the litigant to put their case. Even in this regard, however, the tribunal must be cautious as to the method and extent of any intervention, and the level of circumspection will probably vary between those tribunals, for example Social Security and Child Support, which strive for structured informality, and the more formal approach of, say, the Immigration and Asylum Chamber – an example of the nuanced approach to which I refer above.

As an adjunct to the discussion about litigants in person, comments from the decision of the Court of Appeal in *Hooper v Secretary of State for Work and Pensions* [2007] EWCA Civ 495, another social security case, remain particularly relevant, dealing as they do with the arguably more tricky position where a party is represented, but not very well:

> 'Where an appellant is legally represented the tribunal is entitled to look to the legal representatives for elucidation of the issues that arise. But this does not relieve them of the obligation to enquire into potentially relevant matters. A poorly represented party should not be placed at any greater disadvantage than an unrepresented party.'

So, in our tribunals, as we apply the principles of TCEA, the Practice Direction, and ensure Article 6 compliance, it will be important to take into account a variety of factors including the complexity of the issues – whether the appellant is represented and how well, their own grasp of the issues and any apparent obstacles such as disability or language difficulties that which may affect their presentation of the case, and the resources of the parties which may skew the 'playing field'. The tribunal's approach to the hearing will be infused by the extent to which any or all these factors pertain, and there are few cases I can recall where at least some were not present.

For that reason, I quote Andrew Bano's second article (entitled 'Intervention: a delicate feat of balance', Spring 2012) where he wrote these wise words:

> '. . . in the tribunal context, the principle of fairness . . . generally requires the tribunal member to play an active role in the proceedings – a role in which human skills and legal knowledge may often both be needed in equal measure.'

I conclude with what Andrew presciently wrote in Summer 2011:

> 'As pressures on public funding result in litigants in person becoming an ever more common feature of litigation in the courts, the inquisitorial approach of tribunals is likely to become increasingly more relevant across the whole justice system.'

The working group referred to in the following article is the result of those circumstances having arisen.

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[1] The tribunal, which decided to remove the claimant's entitlement to benefit without being asked to do so, would nowadays be under an obligation to warn the claimant of what it had in mind before allowing the appeal to proceed: R (IB) 2/04.

[2] Practice Direction (First-tier and Upper Tribunal's Child, Vulnerable Adults and Sensitive Witnesses) handed down in 30 October 2008.

[3] See *Counsel Magazine,* June 2015, 'Clear Direction', Professor Penny Cooper re the criminal position, and September 2015, 'A rallying call to the family bar', Gillian Geddes, Counsel, 2-3 Hind Court, as to the family law current position and work in progress.