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WINTER 2015/16

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SKILLS ARTICLES NOW ONLINE

Welcome to the winter 2015 issue of *Tribunals*. We are delighted to include as a new regular feature for the journal, the Senior President of Tribunals' column, to which you are invited to respond via your Chamber/Tribunal president or directly via the details on page 22.

This issue also heralds the launch of Judicial Skills Framework Resources (available here). David Bleiman and Stephen Hardy provide an introduction to the scope and purpose of this new online resource (page 4).

Mr Justice Langstaff, President of the Employment Appeal Tribunal until the end of December 2015, reflects on four years of change (page 2).

Rebecca Lewis outlines issues affecting the judiciary concerning the Data Protection Act and the Freedom of Information Act (page 6).

Paula Gray revisits the theme of an inquisitorial approach, discussed in previous issues by Andrew Bano (page 9). This leads into an article in which Paula and Melanie Lewis engage with the challenges of ensuring a fair hearing to litigants in person, sharing their knowledge to suggest helpful approaches (page 12).

Julian Phillips reviews an authoritative work on immigration law entitled 'The Law and Practice of Expulsion and Exclusion from the United Kingdom: Deportation, Removal, Exclusion and Deprivation of Citizenship' (page 15).

Edward Mitchell provides an overview of Welsh devolution (page 16), following a theme started in winter 2014, when David Bleiman wrote about tribunals in Scotland (see page 19 for proposals on devolution in Scottish Employment Tribunals).

Highlighting relationships developed at training events, Sheridan Greenland and Siobhan McGrath report on the 7th International Organization for Judicial Training Conference (page 20).

The term of appointment of Leslie Cuthbert on the editorial board came to an end in December 2015, and the board would like to wish him well – his insightful contributions and enthusiasm will be missed in equal measure.

Jeremy Cooper, Chairman of the Editorial Board.

e-mail: jcpublications@judiciary.gsi.gov.uk

For some time, the Justices of the Supreme Court have encouraged the Judicial College to include them in training programmes where their expertise and experience could enhance and enrich the occasion. The College has responded positively to this open invitation and a steady flow of Justices has been booked into this year's tribunals training programme.

Lord Neuberger spoke at a recent Residential Property Tribunal training event on the topic 'Construction of Leases'. The event was filmed and his presentation is available on the LMS.[1] Lord Neuberger indicated that he will be willing to speak to the Chamber again on other topics.

Lord Carnwath has been invited to speak at an Employment Appeal Tribunal event in March 2016, to talk about appeals to the Upper Tribunal. Lord Carnwath will also be speaking to the General Regulatory Chamber in 2016.

Lady Hale delivered, at Bristol University in November, a Judicial College Academic Lecture on 'Diversity and the Judiciary'.

Both Lady Hale and Lord Kerr have agreed to speak at Mental Health Tribunal training events in 2016.

[1] https://judicialcollege.judiciary.gov.uk/mod/resource/view.php?id=14560

From glut to famine and the impact of FEES

Sir Brian Langstaff **assesses the changing face of the Employment Appeal Tribunal over his four-year term as President, during which the number of appeals dealt with dropped by half.**

It has been a tale of two halves! As the end of my (extended) term as President of the Employment Appeal Tribunal (EAT) came after four years on 31 December, I look back first to the beginning 20 months when there was an increasing appellate load. It was difficult to cope. We (it is *we*, as I had the full support of the judicial and administrative team, and it was *our* policy) adjusted our procedures so we could keep our heads above water.

The second half? In August 2013, there was a cliff-face drop in the number of receipts of applications to appeal, following the introduction of fees for bringing such appeals; and there has been a slight decline since, probably a downstream consequence of the introduction of fees at the same time in Employment Tribunals from which almost all of the appeals come. The Employment Tribunals have a workload that is numerically around 25% of what it was. The number of appeals coming has dropped by just over half. Instead of managing glut, we have been managing famine.

Did [fees] eliminate unmeritorious appeals, as many had predicted? The answer is a clear 'no'.

Future of fees

One of the key roles of a President is to have a vision for the future. To achieve it needs planning. But it has been difficult to form any clear vision – a bit like trying to take a photograph with a camera while the raindrops fall on the lens. Some things are certain, such as further cutbacks in resources. Some are much less certain, such as whether fees will stay as they are, whether they will reduce, whether they will be abolished, and if so whether in one part of the UK alone, i.e. Scotland.

There are two significant reviews of fees currently under way, and the Scottish Government has proposed that they be abolished. Reasons for their unpopularity are clear: there is no other obvious candidate for a cliff-face drop in receipts such as has occurred, with the expectation of a sheer rise should they be abolished – but how does one plan for an in between of which one knows nothing?

During the 'second half' we pored over our statistics to see how fees affected the quality of appeals. Did they eliminate unmeritorious appeals, as many had predicted? The answer is a clear 'no'. The percentage of applications which succeed in whole or in part on appeal is almost exactly the same as it was when no fees were imposed. What has changed, however, is the number of cases being brought, and what this means is that for every two 'good' appeals that were brought before the introduction of fees, there is now one. It may give pause for thought that charging fees has apparently had an impact upon access to justice, since it might be thought that it has prevented half the appeals which should have succeeded being brought.

Restructuring

How does one plan to provide justice in such a climate? Possibly by a restructuring of the courts and tribunals to use less resources per case, while improving decision-making. It is unclear how the employment courts might be reorganised to do this. The Law Society has called for four tiers of employment cases; the President of Employment Tribunals envisages

an expansion of jurisdiction to include both employment and equalities more generally. Has the time now come for the Employment Appeal Tribunal to cease to operate in its present form and to become more clearly that part of the High Court which deals with the most serious employment matters as well as appeals from tribunals? To have an original jurisdiction as well as an appellate one? And while the EAT remains a 'reserved tribunal' in Scotland, but has a ticket for the departure lounge, what policy can easily be made for the whole of Great Britain? The difficulty of shaping policy when there are these imponderables might seem frustrating; I have preferred to see it as challenging, and offering opportunity.

More disappointing is to have presided over a decline in the use of lay members – again, a policy of government. The consequential increase in judges sitting alone, however, leaves the EAT more closely aligned to a superior court than it was to a tribunal. A lot, therefore, of the 'extra time' that I have played out as President – since my term was extended for a year from 31 December 2014 – has been concerned with where the future might place the Employment Tribunal.

More disappointing is to have presided over a decline in the use of lay members . . .

Grand concepts

Much of the work of both halves pales into insignificance beside these grand concepts, though it is part of the stuff of regular judicial life: amended rules; a clearer concept of justice as including not only 'getting it right' but doing so within a reasonable time, at reasonable cost and (new to some people) without taking an unreasonable share of the courts' resources away from other cases; a new practice direction; two practice statements; the introduction of the 'familiar authorities bundle' – cases so often cited that it is unnecessary for litigants to chop down trees to photocopy them, since there is a bundle in every court; a culture of marking authorities for judges to see, which has caught on too; closer links with the Employment Tribunals, with employment judges invited every month, nominated by their regional judges, to observe the process.

And some decisions of huge importance: our, and my, core work. A particularly pleasant bonus is the number of overseas judges who have sought me out because I head up the EAT. Among them are Thokozile Masipa, a woman of deeply impressive quiet dignity who presided over the Oscar Pistorius trial, and the Presidents of the Industrial Court of Trinidad and Tobago, and of New South Wales (with whom I had the honour of sharing a platform at UCL).

Final reflections

Is there a rainbow at the end of the rainstorm which obscures the lens? Perhaps. There are the opportunities to realign the Appeal Tribunal within the court system; the remarkable cohesion of a wonderful staff who have made my time so much easier than it might have been; a committed cadre of judges; the support of lay members who have been understanding of the reductions there had to be in their work; the splendid facilities which we continue to enjoy at Fleetbank House.

In short, the Appeal Tribunal has been a satisfying place to work. There have been difficult and challenging issues to resolve, almost all endorsed by the Court of Appeal where that has proved important, and it has been both a fulfilling and enjoyable four years. I shall envy my successor.

And as for the Chinese curse – to live in interesting times – I think, on reflection, it has been more of a blessing!

Mr Justice Langstaff was succeeded as President of the Employment Appeal Tribunal by Mrs Justice Simler on 1 January 2016.

Now online: a 'reservoir of rapid INSPIRATION'

David Bleiman **and** ***Stephen Hardy*** **announce a new skills resource that draws on articles published in** ***Tribunals*** **to provide a rich store of ideas and guidance.**

In times of change, we fall back on our own resources. That applies as much for the system as for the individual. For our courts and tribunals, faced with providing effective access to justice in the most challenging environment, the skills and abilities of all of our judicial office-holders are undoubtedly the key resources to work with. But equally, each of us as individuals, faced with new challenges such as ever more litigants in person, redeployment to a new jurisdiction, sharing a hearing centre or grappling with new technology, can fall back on our own skills and abilities, those generic judgecraft skills of which the *Tribunals* journal has long been a leading exponent.

The new judicial skills resource is available at: *www.judiciary.gov.uk/?p=61323*

We have often come across colleagues who, tucked away at the back of a file or folder, retain a well-thumbed copy of an old article from *Tribunals* which they continue to find a helpful resource. But we have also met others who, when this was a printed publication, did not receive a copy or, as newly appointed members, found the back copies less accessible.

Now, with the launch of 'Judicial Skills: An Essential Reading List for Tribunals', all that has changed.

Back catalogue

We have compiled those key articles from our back catalogue into a helpful reading list, with a précis of the content. Each article is also tagged to the relevant judicial skills which are engaged. For instance, the wealth of content from technical matters on burden of proof and decision-making to more practical matters, such as interpreters, litigants in person or experts, including the theoretical underpinning of inquisitorial hearings and the important tasks of effective team-working, as well as decision-writing. Further, we have, of course, referred to the Judicial Skills and Abilities Framework 2014. This framework of judicial abilities and qualities is intended to identify the knowledge, skills, behaviours and attitudes that the judiciary are expected to demonstrate in performing their judicial role.

The framework sets out the key competences of:

- Assimilating and clarifying information.
- Working with others.
- Exercising judgement.
- Possessing and building knowledge.
- Managing work efficiently.
- Communicating effectively.

Sound foundation

All at first sight seem overwhelming, yet on a practical level provide a sound foundation for the delivery of justice. Thus the framework provides an essential self-development aid to individuals. Accordingly, while the framework gives us the skeleton, the selected articles, arranged under each competence, provide the flesh to the bones.

To that end, this Essential Reading online resource promises to be an easy-to-use resource, which can be browsed repeatedly and trawled as required for specific ideas and guidance. We

remind new readers that all of these articles are succinct – most can be scanned in five minutes and thoroughly digested in half an hour. There is nothing onerous here but an energising reservoir of rapid inspiration and refresher learning or signposting.

Compelling reasons

There are three compelling reasons to access and promote this new resource.

First, as the Senior President of Tribunals (SPT) reminds us in his foreword, the Judicial Skills and Abilities Framework 2014 brings together a single set of skills and abilities providing clear expectations common to all jurisdictions[1] and against which judicial office-holders are selected, trained, encouraged and appraised. A single standard – one skills framework for one judiciary – provides a helpful basis to facilitate the more flexible deployment which the system requires. It also gives each of us, as individuals, a reference point for our own continuing professional development and a baseline for expertise and confidence in our generic skills, on which we can build when responding to new challenges.

. . . all tribunals judicial office-holders will be all too aware of the recent and current turbulence in the caseload.

Second, all tribunals judicial office-holders will be all too aware of the recent and current turbulence in the caseload. There is not the luxury of being able to settle into a single jurisdiction and to count upon a steady stream of work. Changes in the nature of the problems and conflicts that individuals face in our society, together with government policies that have an impact on the volume of claims and the extent of legal representation, have caused major fluctuations in workloads. Again, this creates pressures on individuals just as much as on the system. For example, fee-paid judiciary may need to follow the work to fresh jurisdictions as a matter of livelihood.

Third, and finally, there is the emerging reform programme. As expected, the Comprehensive Spending Review 2015 has given both courts and tribunals a reducing current budget. However, with £700 million provided for investment, the Lord Chief Justice and the SPT were able to express some optimism about the future. This investment, they reported, will provide an improved, modern system of justice which will maintain its world-class status.[2]

Three limbs of reform

The SPT has suggested that the reforms should have three limbs: the creation of one system of justice, the development of one judiciary, and the enhancement of access to specialist justice.[3] The concept of one judiciary is, as we have seen, already grounded in the generic skills and abilities framework common to us all. The SPT aims for a framework that enables flexible deployment to maximise opportunity and efficiency and facilitate those judges with leadership responsibilities being able to plan, allocate and distribute work between judges; to plan future recruitment; and to better implement judicial training to improve skills and facilitate merit-based promotions.[4] But it goes somewhat further and, despite resource and other challenges, we should not underestimate the ambition of the reform programme.

The reform programme is also about specialist justice which in the SPT's own words means that reform is only part of the story. It must be complemented by quality that is a drive to ensure that our judiciary is capable of recognising and applying good practice and innovating and developing their specialist knowledge.[5]

Conclusion

Among potential innovations canvassed are: developing and using our specialist knowledge,

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Data and information: a guide in TWO acts

Rebecca Lewis **highlights the differences between the two regimes that are concerned with the storage of information and their relevance to judges and judicial office-holders.**

The Data Protection Act 1998 (DPA) and the Freedom of Information Act 2000 (FOIA) provide two separate regimes in respect of the provision of information to individuals. The Acts are often spoken about interchangeably. However, they serve different purposes. Therefore, this article aims to set out the relevance of each to the judiciary in the day-to-day business of judging, without referring in detail to specific legislative provisions.

In any event, detailed guidance has been issued in respect of data protection matters by the Lord Chief Justice and the Senior President of Tribunals. It is available on the judicial intranet.[1] Revised guidance was issued in September 2015, alongside an executive summary, and all judicial office-holders (JOHs) should be familiar with it.

Data protection rights

The DPA enables an individual to apply in writing (e-mail is fine) in order to obtain a copy of all personal data held by an individual or organisation that is responsible for the data. They are entitled to their personal data unless any of the exemptions set out in the DPA apply. Individuals making the application are known as data subjects. The person or organisation holding the information is known as the data controller. These applications are known as subject access requests (SAR). A fee may be payable. The purpose of the SAR provisions is to enable individuals to know what personal information is being held about them and for what reason.[2] It also enables people to require incorrect information to be amended. For the sake of greater clarity, JOHs are data controllers for personal data which they (either alone or jointly with other persons) determine the purpose for which, and the manner in which, any personal data is or will be processed. Judges may process personal data in the exercise of their judicial functions and any leadership responsibilities they have (including appointment, assignment disciplinary and other such functions).

Notably, the judiciary is not listed as a public authority in the FOIA. This means that information held by the judiciary is not required to be disclosed.

Freedom of information obligations

The FOIA enables individuals to see what information is held by public authorities (specified in the Act). Applications must also be in writing (again, e-mail is fine) and no fee is payable.

Notably, the judiciary is not listed as a public authority in the FOIA. This means that information held by the judiciary is not required to be disclosed. However, the FOIA is applicable to information held by the Ministry of Justice and HM Courts and Tribunals Service. It is in this way that most JOHs will come into contact with the FOIA, and will have to consider who holds the information.

Information may be held by officials and judges. Judges must always be consulted in respect of judicial information but do not need to respond directly. Knowledge and Information Officers (KILOs) are members of staff trained to handle requests for information. When a request is received in respect of judicial information, they will work with the relevant JOH to prepare a response.

Anybody can apply for information under the FOIA. It does not matter what they want the information for, and once provided it may be used publicly. There is no power to require an applicant to give reasons for their request. However, if there are justifiable grounds to believe the request is vexatious then this can be relied upon in declining to disclose. Moreover, if an individual applies under the FOIA for their own personal data (which often happens because there is a fee to pay under the DPA but not the FOIA) then there is an exemption as the DPA should be applied. Equally, there are safeguards in respect of the personal data of other people. Personal data contained in information that is to be disclosed under the FOIA can be redacted.

If an individual is unhappy with a response to an application, they may complain to the Information Commissioner. Appeal from a decision of the Information Commissioner is to the First-tier Tribunal (General Regulatory Chamber) and then onwards to the Upper Tribunal (Administrative Appeals Chamber) and beyond.

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In terms of guidance, the case of *R (on the application of Evans) and another (Respondents) v Attorney General (Appellant)*[3] went as far as the Supreme Court. Most people will have heard of the case as it involves the so-called 'black spider memos', written by Prince Charles to various government departments.

Mr Evans was a journalist who worked for the *Guardian* newspaper. He requested disclosure of the communications under the FOIA.[4] The government departments refused and the Information Commissioner agreed. Mr Evans appealed to the First-tier Tribunal and the matter was transferred to the Upper Tribunal, which decided that many of the letters should be disclosed. There was no appeal against this decision by the government departments.

Instead, the Attorney-General relied on the power under section 53(2) of the FOIA and issued a certificate. The effect of the certificate would have been to prevent disclosure, despite the decision of the Upper Tribunal, cutting across principles of constitutional law.

The Supreme Court, by a majority of 5:2, found that the certificate was invalid (albeit for different reasons, and there were limited circumstances where it would be open to issue a certificate). Full analysis of the case (at 74 pages long) is food for another article. It is not directly relevant to the daily business of the judiciary under the FOIA, but is an interesting read. In particular, Lord Neuberger said of the Upper Tribunal that it:

> '. . . is an independent court, which is both an expert tribunal and a superior court of record, effectively with the same status as the High Court . . .'[5]

He noted that the First-tier Tribunal did not have the same status and was not a court of record. However, he formed the view that the limitation on grounds upon which a certificate could be issued following the decision of the First-tier Tribunal are the same as following a decision of the Upper Tribunal.[6]

Practical issues for JOHs

Returning to requests for information, more generally: applications often do not specify whether they are made under the DPA or the FOIA (and sometimes refer to neither). Regardless of what the application says, if it amounts to either an SAR under the DPA or request for information under the FOIA then it must be treated as such. There is a duty to provide advice and assistance. This means helping to clarify the request if necessary.

In some circumstances, JOHs might conclude that there is no requirement to disclose

information, but equally there is no good reason to withhold it. It remains open to the judiciary to provide the information. This has the benefit of being open and transparent to members of the public, and improving confidence in the judiciary. Responses, which will be drafted for JOHs by a KILO, should make clear the basis on which the information is being provided and should always be discussed in advance with the relevant leadership judge in the Chamber. This will ensure consistency of approach, and advice from the Chamber President can be sought if necessary.

In conclusion, judges should be aware that, once information is provided, there is no control over how it is used. Care must be taken to redact any personal data contained within information before it is released. In deciding whether or not to release information outside the scope of the legislation, it should be noted that if a particular type of information is released it may be difficult to justify not releasing it to somebody else in the future. This is a complicated area of law and JOHs are strongly advised to work in collaboration with leadership judges before responding to requests for information.

Rebecca Lewis is Legal Adviser to the Senior President of Tribunals.

[1] *https://intranet.judiciary.gov.uk/publications/dpa-it-and-information-security-guidance-for-the-judiciary*

[2] Various types of personal data are in scope. An area of contention is notes written by judges, which will form part of a separate article in a future issue of *Tribunals*.

[3] [2015] UKSC 21.

[4] Mr Evans also sought the information under the Environmental Information Regulations 2004 (EIR), which is a separate, but very similar, regime to the FOIA. It relates to documents containing environmental information. The EIR is not discussed in this article.

[5] Para 16 of *Evans*.

[6] Ibid, para 85.

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learning from one area to apply knowledge creatively in others, maybe applying more investigative or problem-solving approaches or taking active steps to secure equality of arms. Here, *Tribunals* has long been in the vanguard of reform.

The authors of the articles now compiled adopt a variety of styles, ranging from the learned to the anecdotal and humorous. The views they express are their own. What all the authors share is a common passion to help those who sit on tribunals to maintain high standards of adjudication while remaining sensitive to the needs of those appearing before us.

For all of us, this new resource can help us in the drive to uphold and develop quality. What is more, it is a reading list which can be enlarged and updated (at least annually) as new ideas and experiences are added to the modern jurisprudence of judgecraft.

David Bleiman is a member of the Employment Appeal Tribunal.
Stephen Hardy is a judge in the First-tier Tribunal (Social Entitlement).

[1] This applies to all judicial office-holders, judges and members alike, in both courts and tribunals. Magistrates are the only exception, their competence frameworks being set out within the National Training Programme for Magistrates.

[2] Spending Review Announcement, LCJ and SPT on 25 November 2015, Judicial Intranet.

[3] 'In the Shadow of Magna Carta', SPT speech in Washington DC, 13 November 2015.

[4] Ibid.

[5] Ibid.

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.

At issue in [the] first article was the extent to which tribunals exercise an inquisitorial jurisdiction.

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.

Paula Gray sits in the Upper Tribunal (Administrative Appeals Chamber).

[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.

FAIR PROBING – OR DESCENT INTO THE ARENA?

Paula Gray **and** ***Melanie Lewis*** **discuss the issue of judicial intervention in light of the increasing number of cases where parties are unrepresented.**

WE ARE ALL AWARE of the importance of the issue of judicial intervention in cases involving litigants in person, particularly in the current climate of austerity which has resulted not only in more LIPs but a lack of even pre-case advice for many of those who appear before us. There is a clear need to discuss the extent to which judges may, without trespassing into the arena, intervene in probing the evidence or in relation to points of law.

There are a number of moves afoot, including a working party under the auspices of Mrs Justice Asplin on the extent to which judges hearing civil and family cases should intervene to facilitate a fair hearing where one or both parties are unrepresented. The intention is to produce a DVD with a number of scenarios to provoke discussion and enable judges to benefit from the views of others as well as to offer guidance for judges.

The group consists of both tribunal and courts judges. Given the remit of the group this is perhaps an acknowledgement that this is an area where tribunals, which broadly speaking have an inquisitorial function, have a great deal of practical experience which can be shared to general benefit.

Levels of expertise

The writers of this article are the tribunal judge members of this group and, while we believe that the concept of judicial collaboration and the mining of our ideas is a good one, we would be the first to acknowledge that, just as tribunals themselves are not homogeneous and there are certain tribunal jurisdictions that are unsuited to an interventionist approach, some courts judges have at least equivalent experience to tribunal judges in dealing with unrepresented parties. What comes across in discussions with the various judges from High Court to District Bench in what we often refer to as the 'Uniformed Branch' is the very different experiences and thus levels of expertise that they have in relation to LIPs.

> *What comes across in discussions . . . is the very different experiences and thus levels of expertise that [judges] have in relation to LIPs.*

Judges who sit on the District Bench in particular are used to having people before them who are unrepresented. They also frequently sit in their chambers, a more informal venue than many tribunals. Despite their loftier position, both physically and metaphorically, High Court judges encounter LIPs not infrequently, so are used both to explaining complex legal concepts simply and, often, communicating the unpalatable fact that this is probably the end of the road in relation to the claim.

Diverse backgrounds

When considering judicial experience of LIPs we must not overlook the fact that, particularly recently given the advent of more judicial progression through the ranks, many judges now have experience of a variety of jurisdictions including tribunal appointments and so have experience and awareness of the issue in differing contexts, and as the judiciary tends towards more diverse backgrounds a multiplicity of experience and skills are available to meet the challenge.

In light of the above, we have asked ourselves whether the perceived distinction between the court versus tribunal approaches may be unhelpful. In our experience as judges and former members of the Bar, a court judge who has familiarity with their legal area, tends to act in a similar way to a tribunal judge with an inquisitorial function, in that they will ask relevant questions of witnesses despite counsel's presence as well as when representation is not there.

Points of law

In point-of-law jurisdictions, whether the Court of Appeal or the Upper Tribunal, a judge experienced in the area of law, given sufficient time to research the points at issue, can generally manage quite well without an advocate. That is certainly not to concede that this is easy; it is considerably more difficult where the fundamental legal parameters are not laid out by the parties and without the benefit of balancing arguments, but it is yet possible to do justice. The procedure, however, may need to be markedly different.

Difficulties . . . can be avoided by giving a witness a chance to tell a little of their story even where it is already on paper.

In making submissions, a party acting for themselves, even if they have had some preliminary legal advice, may have written submissions that they simply want to read out. What they want to say may not be of particular relevance to the legal issues under consideration. Nonetheless, a judge trying to shortcut that approach by insisting on reading the submission to themselves, or asking questions during the presentation can lead to objective concerns as to possible injustice in relation to the right to be heard, and, in a very practical sense, may result in the LIP needing to go back to the beginning and start again.

An LIP is unlikely to have the ability of a competent advocate to argue point A, but be taken by an astute (or irritating) judge to a different point, which they have as their point E and deal with it, continuing the submission from point F onwards, perhaps realising that the points in the middle are no longer material or, if they are, being able to come back to them later in a circular way. This of course is an academic approach which as lawyers we are used to, both in front of and on the Bench, but we would probably all agree that it is our legal training and experience which has enabled us to think in that way. If that is accepted, it is probably uncontentious to say that any probing of the legal submissions of an LIP is likely to be of little value and may even be counterproductive. Patience is truly a virtue in these cases, and adequate time both in preparation and for the hearing is critical.

Fact-finding

In the fact-finding arena, whether that is the High Court or a First-tier Tribunal, the judicial role should be one of enabling a litigant to participate in the proceedings by telling their story. A series of short, easily comprehensible open questions from the judge is the best way to facilitate a good account. If oral evidence is being heard on the issues from the outset, the questions that are asked by the judge appear to arise naturally from the evidence, whereas if the evidence in chief is paper evidence which a judge has read and then asks questions about, those questions may appear to the litigant as cross-examination by the judge; a perception of pre-judgement can be created where there is no 'preamble'.

To have the evidence in chief on paper only is generally the practice in the civil courts, and the difficulty of a judge asking questions in these circumstances may be a potential problem as to the perception of fairness for unrepresented litigants. Difficulties, however, can be avoided by giving a witness a chance to tell a little of their story even where it is already on paper. Once

again allowing sufficient time is important; hearings may be longer not simply because counsel is able to concede or shorten points that an LIP cannot, but because more evidence may need to be heard, as opposed to just read to guard against perceptions of injustice in the judge appearing to play the part of the advocate rather than a neutral interlocutor.

Additionally, the judge who has a good factual command of the papers can more easily intervene yet retain their neutrality. Asking generalised questions risks the appearance of bias far more than asking specific questions based upon the documents; where judicial knowledge of the background is not apparent, questions may be seen as the judge requiring lifestyle or behavioural justification because of a preconceived attitude.

A relationship with litigants which has been built up as part of early and effective case management can help to confirm the judge's position as an impartial facilitator enabling intervention to be seen in those terms – such investment of judicial time, sometimes in person, sometimes by telephone hearings, can be effective in explaining the process and narrowing the issues, particularly given the wide discrepancy in the amount of detailed information available to litigants in advance in the various jurisdictions. A pro-active approach to case management could be adopted in many jurisdictions in both courts and tribunals and, while not always possible, continuity of judicial care can be of significant assistance in demonstrating the even-handedness and independence of the judge, with resulting confidence in the final tribunal.

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Conclusion

The short answer to the difficult question as to whether intervention is appropriate and where it may become inappropriate is that this varies between the jurisdictions, not merely tribunals which frequently have an inquisitorial approach and the courts with a more adversarial practice, but between the courts and tribunal jurisdictions themselves. This conclusion tends to preclude bright-line rules – a 'one size fits all' approach to the problem of when and how to intervene is not the solution. That does not mean, of course, that working groups such as ours should not strive to assist in answering this complex question with useful scenarios for discussion out of which may be derived some helpful guidance, but it is, we think, important to understand that this is a difficult issue which will take a great deal of judicial thought and acumen to be applied to each and every individual case.

Key to all of the above is sufficient judicial time to prepare the case papers properly, including time for legal research, as well as sufficient time for hearings, which will inevitably be longer than those to which we are more generally accustomed. Short cuts in either regard may create the risk of a judge being perceived as not independent, upon which genuine Article 6 issues may arise.

Melanie Lewis sits in the First-tier Tribunal (Health, Education and Social Care Chamber). Paula Gray sits in the Upper Tribunal (Administrative Appeals Chamber).

A forensic TRIUMPH

Julian Phillips **praises an authoritative work on immigration law in the expectation of an inevitable update.**

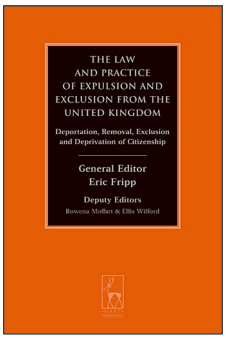
With its title 'The Law and Practice of Expulsion and Exclusion from the United Kingdom' and sub-title 'Deportation, Removal, Exclusion and Deprivation of Citizenship', it is no surprise to find a detailed and exhaustive guide to the law as it currently stands in this fascinating and politically sensitive area.

Editor Eric Fripp and deputy editors Rowena Moffatt and Ellis Wilford are experienced practitioners who regularly appear before the Immigration and Asylum Chambers and the senior courts – as such they are able to give practical and not merely academic guidance. The comprehensive and practical nature of this text shines through from the outset.

The book benefits from a foreword by Lord Hope of Craighead that adds to the gravitas of the work and is followed by a preface in which the editors clearly set out their aim. Their enthusiasm for their work is clear and infectious. Equally readable is a short section detailing the historical background against which the jurisprudence has developed. Thereafter this is a textbook comprehensively dealing with the law as it stands. It is not, and clearly it was not intended to be, a bedtime read. It is a forensic work of real authority and a triumph not only for the editors but for the team of expert contributors from Lamb Building.

Having set out the foundations of the system and turning to the detail, the book moves on to a full analysis of the legal framework. It is particularly interesting that in doing so the authors go outside an analysis of domestic and European law to look at the wider context of international human rights law (IHL). When moving on to the core areas of 'Deportation, Removal, Exclusion, Denial and Deprivation of Citizenship' this approach, looking at the domestic, European and IHL contexts, is repeated with easy reference back to the legal framework. This structured approach makes this difficult subject easy, or at least easier, to navigate and enhances the practical usefulness of this text.

The book is to be commended for an analysis that seeks to look not only at the law as it stands but also, albeit in neutral fashion, at the political context in terms of the rationale and intentions of government.



The Law and Practice of Expulsion and Exclusion from the United Kingdom. General editor Eric Fripp. Deputy editors Rowena Moffatt and Ellis Wilford. Hart Publishing 2014.

The problem for works such as this comes with the almost constant changes in legislation and jurisprudence. It is a truism that by the time of publication each edition of just about every text covering immigration and asylum law in the United Kingdom will be out of date. This work does not escape this fate with, for example, references to the now obsolete Detained Fast Track system and little information as to the effect of non-suspensive rights of appeal. With publication of the book following so closely on the heels of the implementation of the Immigration Act 2014 this could not be avoided. I have no doubt that the editors are following, and indeed are probably involved in, the inevitable development of the law in this regard particularly following R (on the application of Kiarie) Secretary of State [2015] EWCA Civ 1020.

This excellent work is an essential addition to the bookshelf of the immigration law practitioner. Surely a second edition is already on the way.

Julian Phillips is a Designated Judge and Training Judge of the First-tier Tribunal (Immigration and Asylum Chamber).

Politics with reservations: watch this SPACE

Edward Mitchell **on why proposed changes to the legal system in Wales present distinct challenges, not least of which the contentious question of a separate jurisdiction.**

The law in Wales poses particular challenges for tribunals. And, currently, the future operation of courts and tribunals in Wales is a politically sensitive matter. These features create a unique context to the operation of tribunals in and for Wales.

Why Welsh law is difficult

Often, finding out the applicable law in Wales is not straightforward. The priorities of the legal publishing sector and the focus of many practitioners create a real risk that the law relating to Wales will be overlooked.

The UK's legislative drafting tradition tends to favour textual amendment over consolidation. Without access to a paid-for legislation database, keeping track of the law is time-consuming and difficult. And the initial form of Welsh devolution involved 'silent' modifications – in a transfer of functions order – to a wide range of statutory provisions that originally conferred functions on Ministers of the Crown. These were made exercisable by the Welsh Assembly but without any express amendment of the legislation conferring the function.

Furthermore, not changing the law in relation to Wales creates its own difficulties. It can be easy to overlook that many Acts that no longer apply in England continue to apply in Wales. For example, the special educational needs legislation in Part 4 of the Education Act 1996 was disapplied in relation to England in September 2014 but not in Wales.

Taken together, these factors impede accessibility of the law relating to Wales, a matter which the Law Commission is currently considering as part of its project 'The Form and Accessibility of the Law Relating to Wales'. The Commission expect to report in May 2016.

Why tribunal justice in Wales is challenging

Wales poses particular challenges for the inquisitorial and enabling tribunal. The unrepresented appellant's usual difficulties in finding out the relevant law are heightened in Wales. While this ought not to trouble the 'devolved' tribunals, it calls for some steps by other tribunals to familiarise themselves with relevant Welsh legal differences. Otherwise, they risk being less inquisitorial and enabling in Welsh cases. At the Upper Tribunal (Administrative Appeals Chamber (AAC)), for example, we produce regular internal briefings about Welsh legislative developments.

> *Welsh legislation is enacted bilingually. . . . Conceptually, this is complex. The implications have yet to be considered at a higher judicial level . . .*

Welsh legislation is enacted bilingually. Both language versions have equal status and both texts 'are to be treated for all purposes as being of equal standing' (section 156(1) of the Government of Wales Act 2006). Accordingly, one version is not to be treated as a translation of the other. Conceptually, this is complex. The implications have yet to be considered at a higher judicial level but, no doubt, it will come.

The distinctive Welsh context

Specific considerations apply to the operation of tribunals in Wales, an awareness of which is

A timeline of Welsh devolution

Government of Wales Act 1998
This established executive devolution. A wide range of specified Minister of the Crown functions in 'devolved areas' were made exercisable by the National Assembly for Wales. By this route, the Welsh Assembly attained many ministerial functions in relation to devolved tribunals but not generally the function of appointing legal members.

Government of Wales Act 2006: phase 1
This gave the Welsh Assembly power to enact 'Measures' in relation to quite precisely defined subject matters. Within its sphere of competence, a Measure is akin to primary legislation. Using 2006 Act powers, the Welsh Assembly created a Welsh Language Tribunal (Welsh Language (Wales) Measure 2011). The 2006 Act also formally separated the Welsh executive (Welsh Ministers/Government) from the Welsh legislature (Welsh Assembly).

Government of Wales Act 2006: phase 2
A positive referendum vote activated more extensive primary legislative powers, the products of which are named Acts. This is the current position. The Welsh Assembly can make Acts in relation to broadly described subjects in schedule 7 to the Act but subject to specified exceptions. For example, the social welfare subject excepts 'family law and proceedings'.

The 'Silk' Commission
Chaired by Paul Silk, a former clerk in both the House of Commons and to the National Assembly for Wales, this is formally the Commission on Devolution in Wales. Established in 2011, it reported in two parts. The first was implemented by the Wales Act 2014 which extended the National Assembly's legislative competence in a number of areas, most notably tax. The second part – 'Silk II' – recommended a Scottish-style reserved powers model of legislative devolution. Briefly, under that model, a legislature has authority to legislate on any topic so long as it is not reserved.

The draft Wales Bill
This was the UK Government's initial October 2015 proposal for implementing 'Silk II'. It has been contentious. Disputes centre on reservations that include 'courts and tribunals (including, in particular, their jurisdiction)' and 'judges and members of tribunals (including, in particular, their appointment and remuneration' but not 'a tribunal whose purpose is to make determinations in relation to matters that are not reserved matters'. The Welsh Assembly's Constitutional and Legislative Affairs Committee reported on 4 December 2015 that, in their view, the reservations effectively reduced the Welsh Assembly's legislative competence. In fact, the Secretary of State for Wales has said: 'I do expect the final piece of legislation that gets Royal Assent to be significantly different from the draft.' Watch this space.

desirable for a number of reasons. Why step on an avoidable toe?

The Welsh Government promotes 'repatriation' of justice to Wales – cases involving a party located in Wales ought to be heard there. The AAC's listings policy accords with this, although it is flexible and the parties' views as to venue are taken into account.

The Welsh language looms large in Welsh life. Any tribunal that underestimates its importance to many in Wales does so at its peril. In any event, the First-tier and Upper Tribunals are subject to the Senior President's Practice Direction of 30 October 2008 on 'Use of the Welsh Language in Tribunals in Wales'. Applying to a 'Welsh case', defined as one 'in which all "individual parties" are resident in Wales or which has been classified as a Welsh case by the tribunal', this entitles a party to use Welsh at a hearing. The PD confers a similar right to rely on Welsh documentation.

Noteworthy new legislation has also been made. Section 1 of the Welsh Language (Wales) Measure 2011 declares Welsh to have 'official status' in Wales. The Measure also provides for a roll-out of enhanced Welsh language duties of certain public, and some private, bodies by

reference to statutory Welsh language standards. With its aim of normalising the use of Welsh in the public sphere, the Measure may well increase the frequency with which Welsh is used at hearings and Welsh documentary evidence relied on.

Certain assumptions and oversights about Wales and the law can cause offence or imply ignorance and are best avoided. One relatively common misconception is that Wales has no autonomous legal history. Many Welsh lawyers, however, admire the codified set of laws of Hywel Dda (Hywel the Good), a 10th century Welsh king.

This code probably had even older roots as well as a legal compass orientated to points north and west, bearing, as it does, similarities with the Brehon law of medieval Ireland and the laws of the ancient Briton kingdom of Strathclyde/Cumbria. And, while the Laws in Wales Acts 1535 and 1542 extinguished separate Welsh laws and forged a single England-Wales legal jurisdiction, they also created a unique court system for Wales (apart from Monmouthshire which was allocated to the Oxford circuit of the English assizes).

Certain assumptions and oversights . . . can cause offence or imply ignorance and are best avoided. One relatively common misconception is that Wales has no autonomous legal history.

Until its abolition in 1830, the Court of Great Sessions in Wales had the same civil law jurisdiction as the Queen's Bench Division, jurisdiction in equity and a criminal jurisdiction equivalent to the English county assizes.

Finally, it should be remembered that, currently, we have a unified law of England and Wales. One legal jurisdiction exists in that England and Wales are subject to a single body of law. This is why references in a decision to 'English law' or 'the law of England' are best avoided. They may be read as overlooking Wales. If a legal distinction needs to be drawn, it is better to refer to the 'law relating to England' or 'the law relating to Wales'.

The types of Welsh tribunal

In terms of organisational and appellate structure, there are three discernible categories of first instance tribunal in Wales:

- Tribunals with an England/Wales jurisdiction, funded by the Ministry of Justice where the onward right of appeal – normally on a point of law – lies to a specialist second-tier appeal tribunal. Examples are the Employment Tribunal and the First-tier Tribunal in many of its different guises. Some such tribunals apply a separate body of law relating to Wales. If the First-tier Tribunal hears a Welsh care standards appeal, for example, it might apply very different legislation than in an English case because the Care Standards Act 2000, which currently applies in Wales, no longer regulates adult care provision in England.

- What are known as the 'devolved' tribunals are funded and administratively supported by the Welsh Government (within the Welsh Government, there is now a Welsh Tribunals Unit). Their remit is confined to Wales. Appointment functions may be split between the Lord Chancellor (legal members) and the Welsh Government (lay or specialist members). The onward right of appeal normally lies with the same specialist second-tier tribunal – the Upper Tribunal – as hears appeals from the counterpart Chamber of the First-tier Tribunal in English cases. Examples are the Mental Health Review Tribunal for Wales (appeal to the Upper Tribunal, AAC) and the Residential Property Tribunal for Wales (appeal to the Upper Tribunal, Lands Chamber).

- At least one devolved tribunal has different onward appeal and appointment arrangements. The Welsh Language Tribunal, which will hear appeals against certain decisions of the Welsh Language Commissioner under the Welsh Language (Wales) Measure 2011, is appealable to the High Court and its legal members are appointed by the Welsh Government.

Why Wales matters

With perhaps surprising speed, questions as to the future shape and control of the law and legal system for Wales have become politicised. The question whether Wales should be a separate jurisdiction remains contentious. By 'separate jurisdiction', commentators usually mean an end to the 'law of England and Wales' which may, or may not, involve extending the Welsh Assembly's Act-making competence to include reforming courts and tribunals in Wales. The debate can be confused, however, by inconsistent definitions. It is not uncommon to hear the view that the law applicable in Wales is now so different to England that Wales has already become a separate jurisdiction.

Following a 2012 consultation, the Welsh Government decided not to pursue a separate Welsh jurisdiction as an immediate priority. But policy has recently changed.

Following a 2012 consultation, the Welsh Government decided not to pursue a separate Welsh jurisdiction as an immediate priority. But policy has recently changed. The UK Government recently published a draft Wales Bill – to create a Scottish-style reserved powers form of Welsh legislative devolution – which reserves courts and tribunals generally from the Assembly's Act-making remit. In response, the Welsh Government publicly disagreed with the Bill and decided to pursue a separate Welsh jurisdiction.

The Welsh First Minister told the Welsh Assembly's constitutional affairs committee in late November 2015 that:

> 'The retention of the existing England Wales jurisdiction will result in a measure of complexity for the Welsh settlement which is incompatible with the Secretary of State's aspirations for clarity and workability.'

The Minister also supplied draft legislative provisions intended, if enacted, to create a separate Welsh jurisdiction. The provisions would also establish separate High Courts, and Courts of Appeal, for England and Wales with judges of the High Court of England and Wales being reconstituted as judges of both a High Court of England and a High Court of Wales. The position of tribunals was not expressly dealt with.

What does all this mean for tribunals? Clearly, the pros and cons of a separate Welsh jurisdiction and/or justice system are a political matter on which comment would be inappropriate. Instead, for tribunals operating in and for Wales, the aim must be that, as and when final decisions are taken about a separate Welsh jurisdiction, they are not affected by genuine concerns about the quality of service provided by tribunals in and for Wales.

Edward Mitchell is a judge of the Upper Tribunal (Administrative Appeals Chamber) with special responsibilities for Wales.

Scottish devolution proposals

A Draft Order in Council has now been published containing proposals for the planned devolution of functions of the Employment Tribunals in Scotland to the First-tier Tribunal. The Scottish Government consultation is open for responses until 24 March. Details can be found here.

MOVING TALES OF BRAVERY

Sheridan Greenland **and** ***Siobhan McGrath*** **report on sharing knowledge and experience with judicial trainers from 75 countries.**

IN NOVEMBER 2015, the International Organisation for Judicial Training (IOJT) held its 7th International Conference, in Recife, Brazil. The IOJT was created in 2002 in order to promote the rule of law by supporting the work of judicial training institutes around the world. IOJT facilitates cooperation and the exchange of information and knowledge among its 123 member institutes from 75 countries. It holds conferences at different venues around the globe every other year.

Several conferences ago, as Executive Director of the Judicial College, Sheridan Greenland was elected Deputy Secretary-General of IOJT, part of the small international executive committee. Fortunately, Executive Committee members' attendance at conferences is paid for through the conference fees, so she was able to present two sessions in Brazil.

The first, 'Judges in Jeans', showcased College e-learning and demonstrated how it can be blended with discussions about judicial ethics (e.g. in the 'Business of Judging' seminar), or used as stand-alone training (e.g. 'Becoming a Judge' e-learning[1]). The second session was a panel discussion about the governance of judicial training institutions.

Judge Siobhan McGrath's Property Chamber training approach has already been recognised as an example of best practice by the European Judicial Training Network and her practical use of simulations – scripted mock hearings – and innovative course design received similar acclaim, alongside a session considering influence and independence in judicial training.

The programme and themes

The programme for the conference was ambitious and was delivered in 45 plenary and parallel sessions including presentations from a high percentage of the 350 delegates. Under the general heading of 'Excellence in Judicial Training', the four days were divided into three main themes.

Some delegates were from countries just starting to develop training strategies and institutions and looked to those with greater experience for advice and support.

'Essential Components' dealt with the core requirements for successful judicial training – not only induction and continuous professional development training for judges but also the vital importance of institutions, funding and infrastructure. As an opportunity to understand the challenges in judicial training, the theme was very successful, providing a foundation for the remainder of the conference and a catalyst for discussion and reflection. Some delegates were from countries just starting to develop training strategies and institutions and looked to those with greater experience for advice and support. Others were able to share good practice and successes.

'Emergency Topics for Judicial Training' sought to capture the necessity for training to reflect social and political developments and included and three-part session on training for judges handling terrorism-related issues. Otherwise, the themes ranged widely, and choosing what to attend became difficult with sessions, for example, dealing with substantive issues on sentencing, judicial communication between countries, the judicial and the digital age and many more.

Finally, 'Innovation in Judicial Training' explored new approaches and techniques in training, seeking to draw on the experience of the judiciary themselves and to simulate the experience of decision makers in hearing. These sessions were fascinating, providing new ideas to engage and educate. For example, in one model, delegates were asked to design a module in advance of training, another included a design for interaction between delegate groups.

Highlights

It was particularly moving when speakers outlined their personal challenges of witness, juror and judge intimidation during terrorism trials. This graphically brought home the difficulties and bravery required to protect principles of justice and rule of law. There was a commitment to work together to design the outline of a training course to explore the particular issues involved with handling such cases.

We developed an unexpected appreciation of our health and safety regulations having watched workmen walk away from their day's work, leaving unlit piles of cobblestones in the road.

It would be remiss not to mention the hospitality of the Brazilian hosts and the beauty of Recife and the surrounding area. However, the highlight was the opportunity to work with judges and judicial trainers from jurisdictions across the world. The challenges in providing judicial education were strikingly similar notwithstanding constitutional differences. Recurring themes included the importance of judicial independence and freedom from bias; the difficulties in securing funding for training and dealing with reluctance in the judiciary. In all cases there was enthusiasm and good humour. And then, of course, there was the beach . . .

Conclusion

The IOJT website includes an online library and newsletter with the four issues of the IOJT *Journal* published to date containing many articles on judicial education and training themes from 54 authors, including our own Director of Tribunals Training, Jeremy Cooper. Papers from past conferences are included and may provide inspiration to anyone designing for the College.

IOJT has yet to decide the venue for the 2018 conference but has already agreed that an outcome will be to establish agreed principles for judicial training.

Sheridan Greenland is Executive Director, Judicial College.
Siobhan McGrath is President of the First-tier Tribunal (Property Chamber).

[1] Available on the LMS at *https://judicialcollege.judiciary.gov.uk/course/view.php?id=1063*

What makes us special

The Transformation of Tribunals Justice: a view from the Senior President (No 1)

In November, the Chancellor of the Exchequer announced that the Government was committing over £700 million to the reform of courts and tribunals. That commitment had been eagerly awaited by many of us. Against the backdrop of Mr Osborne's more general (austerity-defined) spending review, the fact that the Reform Programme secured any funding at all, let alone at the level we achieved, was clearly encouraging. Money is of course important, but securing it was not an objective in or of itself. Far from it: it was only the beginning of a process of the transformation of justice.

Since becoming Senior President in September, I have been consistent in setting out three themes around which I believe reform will and must coalesce. Those core themes are:

- 'One system' – accessible and simple, with no second or third-class elements lagging behind the rest.
- 'One judiciary' – with flexible and responsive structures to ensure deployment and assignment that both fits the needs of jurisdictional workload and provides career progression opportunities for all.
- 'One size does not fit all' – specialist quality-assured justice with innovative approaches to dispute resolution to fit the needs of our diverse users that will be different in each tribunal and jurisdiction: it is what makes us special.

In my first message as Senior President, I wrote to all my Chamber and Tribunal Presidents inviting them to have a conversation with you and me about these key themes. In my early discussions with them we explored what each jurisdiction is doing at the moment, what needs to be preserved and what might be capable of sharing. The feedback has been both excellent and interesting. Crucially, it demonstrates that the baby that is tribunals justice is very much alive and kicking as we look forward to £700 million of new bathwater!

Your key messages to me are that:

- Each Chamber and Tribunal has a strong and individual concept of specialist justice. The knowledge of our panels of the relevant law and of our users' needs is central to the success of tribunals justice. Judges and our expert non-legal members examine evidence independently in a more informal and inquisitorial environment than the courts, which suits the often unrepresented parties before them.
- The collegiality of each Chamber and Tribunal is patent, with judicial office-holders working with each other across their jurisdictions to support, guide and help each other develop. The benefit of that close working also extends to administrative colleagues, in particular to registrars and other legal and tribunals case workers. There is a strong collaborative working environment that is evidenced through the Jurisdiction Boards where judges and officials come together to identify good practice.
- Our leadership and workload management is a central and key component of our success. The ability of leadership judges to invest time in communicating consistent messages about good practice and managing the fine detail of their jurisdictions and workloads sets us apart.

None of this requires any more money. These are things we do already. These key elements are central to what makes tribunals justice special and they will be key to the success of the Reform Programme.

Our ultimate objective is, of course, to safeguard and strengthen the rule of law. A reform programme will provide new working processes, support and infrastructure, in particular estate and information technology, but it is in the skills, experience and commitment of our colleagues that the real success of a transformation programme will be guaranteed.

I would like to invite all of you to contribute to the discussion about our future. The *Tribunals* journal has kindly offered a regular platform for us to share ideas and update on progress. Your ideas about good practice in particular during the Reform Programme will be listened to. Whether by responding direct to my office (details below), or by letting your jurisdiction board or President know of your thoughts and ideas, I strongly encourage each of you to participate in our joint endeavour.

I would like this 'one system' of justice that we design to be digital by default . . .

For my part, it is now time to develop a broad plan to build upon the themes I have identified. I would like this 'one system' of justice that we design to be digital by default and to be a 'one-stop shop' where judges are able to sit in concurrent jurisdictions so that the user experiences a more coherent approach to problem-solving. I would like to provide for the flexible deployment of tribunals judges across all courts and tribunals and to improve the user's experience by 'facilitated service' using our registrars and case officers to assist both litigants and judges alike in early neutral evaluation, triage and case management.

I have put together a small strategy group whose membership will change as the Reform Programme identifies projects in each Chamber so that the relevant Chamber Presidents can come together to share the advice of their jurisdiction boards.

The Tribunals Judicial Executive Board will not only monitor and discuss the progress of the Reform Programme but also highlight the ideas that you and our user groups identify. I hope to find ways to extend diversity and build on the excellent appraisal and peer review schemes that already exist. We must work together to discuss new ways of using our estate and other local facilities and respond to litigants in person needs by building on the good practice that already exists. These components and many more like this will be developed by us in the coming weeks and months.

I take this opportunity to thank all of you for your help this far and to invite you all to take a part in designing a courts and tribunals system that is fit for the 21st century.

Sir Ernest Ryder, Senior President of Tribunals

Judicial Office
Room E218
Royal Courts of Justice
Strand
London
WC2A 2LL

E-mail: SPTOffice@judiciary.gsi.gov.uk

AIMS AND SCOPE

1 To provide articles to help those who sit on tribunals to maintain high standards of adjudication while remaining sensitive to the needs of those appearing before them.

2 To address common concerns and to encourage and promote a sense of cohesion among tribunal members.

3 To provide a link between all those who serve on tribunals.

4 To provide readers with material in an interesting, lively and informative style.

5 To encourage readers to contribute their own thoughts and experiences that may benefit others.

Tribunals is published three times a year by the Judicial College, although the views expressed are not necessarily those of the College.

Any queries concerning the journal should be addressed to:

Publications Manager
Judicial College
3A Red Zone
102 Petty France
London
SW1H 9AJ

Tel: 0113 200 5123
E-mail: jcpublications@judiciary.gsi.gov.uk
Website: www.judiciary.gov.uk