# Giving effect to the overriding objective

**In the Autumn 2009 issue, Kris Gledhill speculated on how judges of the First-tier Tribunal might exercise their discretion in light of the overriding objective. *Charles Blake* considers the Upper Tribunal's recent guidance on the matter.**

In *MA v Secretary of State for Work and Pensions* [2009] UKUT 211(AAC),[1] the Administrative Appeals Chamber of the Upper Tribunal (formerly the Social Security and Child Support Commissioners) for the first time considered the overriding objective in the procedure rules governing hearings before the First-tier Tribunal in social entitlement issues, e.g. in income support or disability-related benefit claims.[2]

The appeal concerned a claim for attendance allowance (a cash benefit paid to those whose need for personal attendance passes a threshold specified in legislation). The Secretary of State rejected the claim. An appeal came before the First-tier Tribunal. The appellant's representative asked for an adjournment to obtain more medical evidence. The tribunal refused the adjournment and went on to hear the appeal. The Upper Tribunal[3] found that the tribunal had investigated the claim in detail. The refusal to permit an adjournment (but not the tribunal's findings on the evidence before it) was appealed to the Upper Tribunal.

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## Fairly and justly

The procedure rules contain a power to adjourn appeals. The overriding objective of those rules, taken closely from the Civil Procedure Rules, is to deal with cases fairly and justly. A number of non-exhaustive examples of such dealings are given. For example, an appeal must be dealt with in ways which are proportionate to the importance of the issues, the anticipated costs and the resources of the parties. Unnecessary formality must be avoided. Delay must be avoided so far as compatible with proper consideration of the issues. So far as practicable, the parties must be able to participate fully in the proceedings. The parties must help the tribunal to further the overriding objective and must cooperate with the tribunal generally.

The tribunal must give effect to the overriding objective when exercising any power under the procedure rules and when interpreting any rule or practice direction. The question of whether there is a difference between dealing with cases (a) fairly and (b) justly is an arcane point best left to further elucidation by the Upper Tribunal.

## Balancing act

Judge Jacobs thought that the above examples (and others which space does not permit us to set out) would not generally dictate the procedural decision that the tribunal should make. There would often have to be a balancing exercise between competing considerations. Different tribunals might properly make a different assessment of the factors at play. The Upper Tribunal would not find an error of law merely because it would have made a different assessment. Of course, this would be in accordance with the usual approach taken by appellate courts to matters of judgment and discretion. Such decisions by the Upper Tribunal would rarely amount to binding precedents. Judge Jacobs then applied the above procedural law to not only the facts of the appeal before

him but also gave guidance to any tribunal faced with an application for an adjournment. The duty to cooperate with the tribunal generally meant that the parties should be ready for the hearing on the date and at the time fixed. On the facts the appellant and his advisers had over three and a half months within which to prepare. The appellant's representatives were experienced social security advisers.

Account had to be taken of the interests of the Secretary of State. Her duty was to assist the tribunal in reaching a correct decision on fact and law on the claimant's entitlement to benefit. In overpayment cases there may be instances in which a party takes tactical steps to postpone the day for repayment. But this was not the present case.

## Wider interest

The next conclusion is particularly interesting. Judge Jacobs thought that the interests of the functioning of the system as a whole are unlikely to be of great significance in the vast majority of cases. If an adjournment were otherwise to be granted it would be rare for it to be refused solely on account of the needs of the system as a whole. This is plainly correct. But it may be added that every appeal that is adjourned will cause delay to some unknown case or cases pending in the system as a whole. Contrast the far more general overriding objective in the Asylum and Immigration (Procedure) Rules 2005.[4] It is to 'secure that proceedings are handled as fairly, quickly and efficiently as possible and, where appropriate that members of the tribunal have responsibility for ensuring this, in the interest of the parties to the proceedings and in the wider public interest.' These final words are very interesting. The wider public interest seems to include the interest of other appellants waiting for their cases to be heard in there not being needless adjournments. It must also include the public interest in the adherence by the Crown to international instruments such as the Refugee Convention and the European Convention on Human Rights. The interest of the parties to the proceedings includes that of the UK Borders Agency in removing the appellant if the appeal fails although removal often takes a long time. In any event, these procedure rules contain express and restrictive provisions relating to adjournments.[5]

Judge Jacobs ended a robust but scrupulously fair decision by finding that, on the facts, the tribunal was correct to refuse an adjournment. It took account of all relevant factors. It was material for it to consider the special knowledge of its members in enabling a fair decision to be reached. It balanced fairness and efficiency with the right of the appellant to take a full part in the proceedings.

**Charles Blake is an immigration judge.**

A transcript of this case can be found at *www.bailii.org/uk/cases/UKUT/AAC/2009/211.html.*

[1] UK Upper Tribunal (Administrative Appeals Chamber).
[2] SI 2685/2008. See *www.opsi.gov.uk/stat.htm*.
[3] Judge Edward Jacobs, formerly a Social Security Commissioner.
[4] SI 2005/230. By the time this note appears in print the AIT will have become visibly part of the post-Leggatt structure and the rules may well have changed with a broader overriding objective.
[5] See Rules 21 and 47.

***R (Rex Cart, U and XC) v Upper Tribunal and Special Immigration Appeals Commission* [2009] EWHC 3052 (Admin) (Laws LJ and Owen J)**

**Does designation of a tribunal as 'a superior court of record' prevent that body from being judicially reviewed by the High Court? If it truly is such a court (e.g. the Upper Tribunal), judicial review will not lie. But if it is not (e.g. the Special Immigration Appeals Commission on a true analysis of its statutory basis), then judicial review will lie to correct errors of law.**

**Further analysis of this case, which is now the subject of an application for permission to appeal to the Court of Appeal, will appear in a future issue of this journal. A transcript is available at *www.bailii.org/ew/cases/EWHC/Admin/2009/3052.html.***