'WE ALL MAKE MISTAKES'

Paula Gray **offers her '10 top tips' on how tribunal judges can avoid having their decisions overturned.**

UNTIL ABOUT a year ago I bought into the myth that the wicked, conniving judges of the Upper Tribunal were out to get the blameless, hard-working judges of the First-tier Tribunal. Indeed, my vision was of one of them manning the guillotine and the others sitting, like the tricoteuses, watching for the heads to roll and gloating. What happened to dispel that myth? Well, of course I learned better after I was appointed to the UT, or, some may say, after I treacherously changed sides. Now, as I prepare an induction course for yet more newly appointed potential tricoteuses, despite my many inadequacies I feel that I am sufficiently fledged to share some home truths. So this is, put simply, my 10 top tips to avoid getting turned over!

Fact-finding

First, believe me, the UT have enormous respect for the fact-finding jurisdiction of the FTT. Actually, we love your fact-finding role so much that we wish you would do more of it . . . a lot more. Far and away the main reason FTT decisions are overturned is inadequate fact-finding. Sometimes there is none at all, merely a recitation of the evidence without an explanation of what you made of it. What you make of the evidence constitutes your facts. We like to say that mere disagreement with the facts found is not a point of law. If you tell us what those facts are, and if they were available for you to find on the evidence before you, we will not wade in . . . unless, of course, you have not adequately explained how you arrived at them. No longer can we follow the advice of Lord Mansfield: 'Never give your reasons; for your judgment will probably be right, but your reasons will certainly be wrong.'

The modern doctrine is set out well in *Bassano v Battista* [2007] EWCA Civ 370 at para 28:

> 'The duty to give reasons is a function of due process and therefore justice, both at common law and under Article 6 of the Human Rights Convention. Justice will not be done if it is not apparent to the parties why one has lost and the other has won. Fairness requires that the parties, especially the losing party, should be left in no doubt why they have won or lost.'

Your reasoning does not have to be long or complicated. It simply has to justify why you accepted certain evidence and rejected other evidence or, if you drew inferences from the information before you, why you came to your conclusions. And it is a test of adequacy, not a test of perfection; we genuinely do appreciate that this is a workaday document and not a candidate for a Pulitzer Prize.

When less is more

What about the law? My own view is that, generally speaking, the less said about the law the better. With straightforward propositions such as the standard of proof, we actually will assume that you have applied the civil standard unless you tell us otherwise. On such matters, less is generally more. So far as the more complex legal propositions are concerned, there is a very good argument that quoting tracts of law is best avoided on the basis that the parties will probably not understand it and the UT ought to know it already. If you do state the law, however, make sure you do it accurately; if you try to summarise a statutory provision it may be unclear whether or not you applied the proper legal test.

Other than the lack of fact-finding, certain basic howlers will lead to a set-aside. We all use cut-and-paste up to a point. The key is to proof read. Then do it again. We are not going to set you aside for grammatical mistakes but if you consistently refer to Mr Smith in Mrs Jones's

decision, with the associated confusion over personal pronouns, it is very hard to feel that she has had a fair deal.

We are really asking ourselves the following questions. Have you addressed the central issues? Have you made factual findings, rather than simply restating the evidence or the statutory tests? Have you explained why you came to your conclusions? Will the parties understand it? On the latter issue, I pray in aid Lord Reid:

> 'We are here to serve the public, the common ordinary reasonable man . . . What he wants and will appreciate is an explanation in simple terms which he can understand. Technicalities and jargon are all very well among ourselves . . . But in the end if you cannot explain your result in simple English there is probably something wrong with it.'

If the UT can tick the boxes for the above questions, you are pretty safe. The three Ws are a basic checklist. Who won? What was decided? Why? Trite but true.

Helpful input

In a fact-finding jurisdiction when you are sitting with another member who has particular expertise, keeping a good note of their input will help you a great deal when you come to write up. Do not, however, include your deliberations on the record of proceedings, which may be disclosable to the parties; you would not allow them to sit in and listen while you discuss your decision. Like your preliminary notes, any note of your deliberations is really part of the preparation of your judgment, and as such should not be disclosed: (*McIntyre v Parole Board* [2013] EWHC 1969 (Admin)).

Do not pussyfoot. If you start every sentence with 'On balance we found that . . .' you will soon lose the confidence of your audience. Your decision has been arrived at by an expert tribunal following a full evaluation of the evidence; so say it as if you mean it. If you did not believe the appellant you must say that, and honestly, but choose your words with care; do not be unkind. Many tribunal jurisdictions deal with vulnerable people who, even if they have not been wholly frank with us, have enough problems without us destroying the little dignity they may have left. After all, if we make a mistake and are overturned we would rather that it was done with the kid gloves than the iron fist.

If you are overturned, do console yourself with the fact that we are all in the same boat, and that I am sitting here writing this just waiting for the Court of Appeal to give me a good mauling. As Lady Hale said, in the quotation that forms the headline of this article: 'We all make mistakes.'[1]

Finally, let me distil this into the promised 10 top tips for judgment writing:

1. Good notes are the start.
2. Use the expertise of the tribunal.
3. Evaluate the evidence.
4. Find (and set out) the facts.
5. Keep the law to a minimum.
6. Avoid formulaic reasons.
7. Say it as if you mean it – but be temperate.
8. Check for the three Ws: who, what, why.
9. Proof read for consistency and issues of cut-and-paste.
10. If you have done the above, don't worry – we all make mistakes.

Paula Gray sits in the Upper Tribunal (Administrative Appeals Chamber). She adds: 'I speak only for myself and I cannot, of course, comment upon any other chambers of the UT.'

[1] *Cart v Upper Tribunal* [2011] UKSC 28, Lady Hale [37].