WALKING A TIGHTROPE TO A SOLUTION

Melanie Lewis **describes a number of strategies that can be used by a tribunal faced with a poorly represented party without compromising the impartiality of the hearing.**

MUCH JUDICIAL TRAINING focuses on how to provide a fair hearing to a person who is unrepresented. What is less straightforward is the approach to be used when a representative appears to be doing more harm than good, either through incompetence, lack of preparation, lack of familiarity with the jurisdiction, or because the representative is a friend or supporter and out of their depth. Some representatives are unaware of their weaknesses, which can present the tribunal with particular difficulties. In other cases, the representation may simply be inappropriate for the case. Very occasionally, the tribunal may suspect that the representative is dishonest.

Range of representation

Of the jurisdictions in which I sit, the wide range of representation in asylum and immigration cases has long been recognised. While there is an accreditated scheme for all publicly funded advisers; the preparation of those solicitors still working in the area is often financially constrained. Most of the presenting officers representing the Home Office are not legally qualified and the quality of representation often depends on the level of experience. The Home Office is working towards a new model where a case manager will not only make the first-instance decision but also defend it at the appeal stage, which may have some implications for objectivity.

There are no restrictions on who can appear before the First-tier Tribunal in cases relating to Special Educational Needs and Disability (SEND). Some appellants are advised and also represented by voluntary bodies, others by one of the small number of lawyers who specialise in the field. Other lawyers work on a pro bono basis. Local authorities rarely instruct lawyers. Cases are usually presented by the manager from the special needs department, many of whom have worked hard to try to achieve an agreement with parents and can find it difficult to switch to being challenged openly before the tribunal. Some authorities employ consultants to present cases at the tribunal. They can take a detached overview, but may lack a detailed knowledge of the history of the case.

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In care standards cases in the First-tier Tribunal, which hears many appeals against decisions of regulatory authorities, experienced counsel or solicitors will often be instructed. There are few specialised voluntary bodies undertaking representation, although parties often receive representation or support from a friend or partner, more in the role of a McKenzie friend.

Inquisitorial or adversarial?

The tribunal's approach to representatives will depend in part on whether the process is adversarial or inquisitorial, although in many jurisdictions the nature of the process may be somewhat ambiguous. In SEND, the position is relatively clear. The inquisitorial hearing is run like a purposeful business meeting, focusing on issues identified with the parties at the commencement of the hearing, rather than a

formal presentation of each party's case. Care Standards cases are more of a mixture. How close to an adversarial model a hearing is depends, to some extent, on whether lawyers are instructed.

It might be thought that the Asylum and Immigration Tribunal (AIT) is adversarial, but nothing is that straightforward. In his preface to Mark Henderson's *Best Practice Guide to Asylum Appeals*, Lord Justice Sedley remarked that the asylum jurisdiction is poised uneasily between the adversarial and inquisitorial.

Discomfort

In the University of Manchester's School of Law, Dr Robert Thomas has been conducting research into the procedures and determination of asylum appeals by the AIT. His research has found that, while most judges preferred the adversarial approach, they were not entirely comfortable with it.

Their concerns included their desire to ask questions to plug gaps in the evidence, the quality of the examination of appellants or witnesses, and failures to pursue an obvious point concerning someone's credibility. Some immigration judges expressed a wish to have more control over the process of questioning, in order to elicit the evidence necessary to determine the case properly, although this meant embarking on a judicial examination of the appellant or witness. Not surprisingly, the upshot of this was that hearings varied tremendously between individual judges and even between different cases dealt with by the same judge. The central issue in determining the approach to take is the degree of intervention required to enable the tribunal to collect the necessary evidence in order to produce a good decision, and whether such intervention is acceptable.

In the Tribunals Service, Parliament has given some help. The overriding objective set out in the new rules of procedure for the Upper Tribunal and First–tier tribunal is 'to deal with cases fairly and justly'.[1] This includes: avoiding unnecessary formality and seeking flexibility in the proceedings; ensuring, so far as practicable, that the parties are able to participate fully in the proceedings; and using any special expertise of the tribunal effectively. Hopefully, this may provide an opportunity to get behind the representative and hear directly from the appellant. It may be helpful to remind the parties that they must help the tribunal to further the overriding objective and cooperate with the tribunal generally. Until 2010 the AIT is still a separate pillar but there is a similar overriding objective set out in the procedure rules, although the rule is not so flexible.[2]

Preparation

Preparation is one of the most important requirements for an effective tribunal hearing. It is, of course, essential that the judge takes the necessary time to identify the issues. In panel hearings, everyone should prepare carefully, so that the tribunal can make full use of its expert and non-specialist members. It is often helpful to

Key points

- **Have a broad understanding of how public funding works and who is eligible for it.**
- **Always prepare – and make sure you have identified the relevant issues.**
- **Be prepared to explain the legal framework in plain English.**
- **Focus the evidence by setting out what the appellant will have to establish.**
- **Explain to the parties that they must help the tribunal to further the overriding objective.**
- **Use the case management review to establish the representative's role, and the degree of intervention that may be necessary.**

know the basis on which representation has been arranged, and something of the representative's background. This might be ascertained at the case management review and help identify the level of intervention, or any limitation of the representative's role, that may be necessary. It should also establish if a representative is there just to support and assist, and identify those representatives who (as happens in SEND) are partisan advocates for certain models of education.

It is also helpful to have a broad understanding of how public funding works and who is eligible for it. The limits of public funding may explain why representation is limited to advice and why it was not possible to submit certain evidence.

The hearing

It is essential that the judge has the ability to explain the legal framework for the case in plain English. Setting out at the beginning of the hearing what the appellant will have to establish focuses the evidence, but must not suggest that the tribunal has in any sense made up its mind. This is often necessary even when there are lawyers and accredited representatives. Unfortunately, this explanation is sometimes the first time that the appellant really understands their likely chance of success, and why their case might not succeed.

Asylum cases essentially turn on credibility. All questions from the judge should focus on clarification and not suggest that they have descended into the arena.

The judge should also clearly explain the procedure to be followed. Where the representative is no more than a friend, it is best to treat the appellant as if they were unrepresented. The tone should be user friendly but the boundaries clearly set.

Questions

How far can the tribunal ask questions? Under the SEND inquisitorial model they can, and they do. In Care Standards, we use a similar approach which is less contentious if there is no representative, and much more difficult when the representation is simply poor, when the tribunal has to discover the purpose of the question, and to whom it is directed. Asylum cases essentially turn on credibility. All questions from the judge should focus on clarification and not suggest that they have descended into the arena.

Conclusion

It is not the function of any tribunal to monitor poor representation, and if it does so excessively it could undermine its stated independence and impartiality. Any referral to a senior judge, allowing them to take up cases with the accredited body such as the Office of the Immigration Services Commissioner or the Law Society, must be evidence-based, and this takes time. It may also be possible to take up the issue in a more indirect way through user groups, which exist for both my HESC jurisdictions.

Conclusion

The difficulties presented by poor representatives are not easily solved. Any strategy must promote, not undermine, the tribunal's independence and perceptions of fairness. It can be a fine line, even a tightrope. The solution will depend on the nature of the panel, the case and the representative. Above all, we must do justice. And walking that tightrope may be the only way.

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[1] Rule 2. The Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chambers Rules) 2008 SI 2699/2008.

[2] Rule 4. Asylum and Immigration Tribunal (Procedure) Rules 2005.