



JUDICIAL  
COLLEGE

# TRIBUNALS TRIBUNALS EDITION 2 — 2019 TRIBUNALS

## Editorial 2019 Edition 2

### EDITORIAL

By [Christa Christensen](#)



Welcome to this summer Edition of the Tribunals Journal, the second of 2019.

I start by reiterating an invitation mentioned in my last Editorial to readers who sit on or are involved in the widest range of judicial and quasi-judicial bodies. If you are such a reader and have ideas for an article that may be of interest to the Tribunals Journal, please get in touch. The Editorial Board is keen to assist in the cross fertilisation of themes arising across all such decision-making bodies.

The Aims of the Journal are:

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.

*I start by reiterating an invitation mentioned in my last Editorial to readers who sit on or are involved in the widest range of judicial and quasi-judicial bodies.*

In this Edition we start with the second of two articles by Employment Judge Juliette Nash addressing questions of Human Trafficking. In Edition 1 Juliette explained the significance of this issue in our modern age, the vulnerabilities it creates and how it might manifest itself in the tribunal room. This next article moves on to examine how trafficking and its victims are having an impact on the work Tribunals do. Juliette looks in particular at the Employment Tribunal, Criminal Injuries Compensation Tribunal, Immigration Tribunal, Social Entitlement Tribunals and Gangmaster Licensing Appeal Tribunals.

From there we move to an article by the President of the Social Entitlement Chamber, Judge John Aitken. John writes about the fascinating work of the British Columbia Civil Resolution Tribunal (BCCRT) which is a wholly on-line entity. We learn something of how the BCCRT is finding new multi-faceted ways of resolving complex disputes that do not involve the usual formula of bringing the parties in dispute to an oral hearing and then issuing a decision. Its focus instead is on letting members of the public ask 'How will you solve my problem?'. The work of the BCCRT and the recent development referred to in the article, of extending its reach to traffic injury, is written about in [The Law Society Gazette \(17 June 2019\)](#).

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Staying with online dispute resolution, readers may be interested in a recent [Law In Action](#) radio programme which can be found on BBC Sounds. The relevant part runs from minute 6.40 to 22.00. John Aitken is interviewed talking about the development of the new Continuous Online Resolution option available with the Social Entitlement Chamber which deals with appeals against the refusal of social benefits.

The Global Judicial Integrity Network, launched by the United Nations in Vienna in April 2018 is the focus of the article written by Tribunal Judge Anisa Dhanji. Anisa looks back to the Bangalore Principles, endorsed in 2003, but focuses on the reality of how political, societal and digital developments have created new challenges for all judiciaries around the world in the past 20 years. The Network is exploring a number of issues including Integrity and Accountability, Judicial Selection and Social Media use by judges.

Editorial Board member, Tribunal Judge Bronwyn McKenna, contributes an article in which she gives a personal account of her transition from being a fee-paid judge to a salaried judge within a new generic selection exercise to appoint judges to the First Tier Tribunals. Bronwyn gives valuable insight into the process, which will be of interest to readers.

Upper Tribunal Judge Paula Gray, also an Editorial Board Member, writes about the work of the Gender Recognition Panel (GRP). This Panel was established in 2005 in light of the Gender Recognition Act 2004. Paula reminds us of the same point that Anisa makes in her article; that the world and societal norms have moved on quickly and the statutory framework underpinning the work of the GRP is under review.

The next two articles both relate to the importance of good communication in tribunals. In the first, Employment Judge Tamara Lewis writes about some new Intercultural E-Learning Modules that have been developed for Judicial Office Holders by the Judicial College. These address such issues as naming systems, different cultural communication styles, the importance of linguistic differences and the use of interpreters. The modules give many practical tips and pointers to Judicial Office Holders in these areas. The second is our regular Equal Treatment Bench Book corner in which Upper Tribunal Judge Paula Gray writes of the recent report by JUSTICE called 'Understanding Courts' and in which we are reminded that 'members of the public often feel baffled by the at-times impenetrable language and convoluted jargon' used in courts and tribunals.

Our regular column from the Senior President of Tribunals gives an update on the Tribunals Change Network Meeting that took place on 1 May 2019. Sir Ernest refers to his Innovation Plan which sets out how tribunals projects are intended to develop to the next stage of reform and stresses the importance of continuing communications on this topic.

And finally, our regular Recent Publications section lists those that will be of interest to our readers.

Christa Christensen is Chair of the Editorial Board

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## Human Trafficking and Modern Slavery

PART TWO

By Juliette Nash



The first article on trafficking and modern slavery covered the nature of trafficking in the UK and our system of victim support.

This second article seeks to explore how trafficking and its victims are having an impact on the work Tribunals do. This is particularly in light of the growing concerns about long-term rehabilitation of victims and preventing their falling back into exploitation. The Parliamentary Work and Pensions Committee in their [2017 report](#) described the lack of long-term support for victims as 'inexcusable'.

The article concentrates primarily on compensation but also covers other Tribunals.

### Employment Tribunal

[Financial compensation](#) for victims can play a very significant role in rehabilitation and reducing victims' risk of future exploitation.

Employment Tribunals have led the way in clarifying the law and establishing the practice of victims obtaining compensation from their traffickers. Article 15 of the *Council of Europe Convention against Trafficking* provides:

3. Each Party shall provide, in its internal law, for the right of victims to compensation from the perpetrators.
4. Each Party shall adopt such legislative or other measures as may be necessary to guarantee compensation for victims in accordance with the conditions under its internal law.

There is no dedicated domestic civil remedy for victims as against their traffickers. This was highlighted by the Supreme Court in [Taiwo v Olaigbe and another: Onu v Akwivu and another \[2016\] UKSC 31](#). Lady Hale discussed victims who had brought race discrimination complaints against their traffickers at paragraph 34: -

'... these appeals must fail. This is not because these appellants do not deserve a remedy for all the grievous harms they have suffered. It is because the present law, although it can redress some of those harms, cannot redress them all. Parliament may well wish to address its mind to whether the remedy provided ... is too restrictive in its scope and whether an employment tribunal should have jurisdiction to grant some recompense for the ill-treatment meted out to workers such as these...'

The government has taken no steps to implement Lady Hale's suggestion. So victims must rely on existing domestic law.

Nevertheless, in practice it is the Employment Tribunal that has an unmatched record of compensating victims. Compensation in six figures is not unusual.

In [Turkey v Chandok and anor ET/3400174/2013](#), the Tribunal awarded a victim £266,536 in compensation. This included [an award for £183,773](#) in respect of the traffickers' failure to pay her the National Minimum Wage.

*...in practice it is the Employment Tribunal that has an unmatched record of compensating victims. Compensation in six figures is not unusual.*

### What claims are brought in the Employment Tribunal?

A claim for the National Minimum Wage (as a deduction of wages) is often the most significant. However, since 2014 [the Tribunal only has jurisdiction to consider wage claims going back two years](#), even if a victim was exploited for far longer.

There may also be claims in respect of payslips, written contracts, working time, failure to allow rest periods, annual leave, etc. There may be an unfair dismissal claim (whether constructive or express).

Discrimination claims offer significant advantages to claimants.

- Compensation for injury to feelings and personal injury is available.
- Complying with an Employment Tribunal three-month deadline is often not a priority for a victim upon leaving their trafficking situation and the discretion to extend time in discrimination claims is more flexible.
- It may be possible to recover the National Minimum Wage for longer than two years as an act of discrimination.

The Employment Tribunal, arguably, has other advantages for victims.

- It is, usually, a quicker and less costly process than the High Court.
- It is less intimidating.
- It is less difficult to obtain legal aid.
- It is a specialist employment jurisdiction.
- Costs do not usually follow the event.

Nevertheless, victims have the option of proceeding in the courts. Thus far there are very few court judgments [in favour of victims](#). Suggested reasons for this include the costs regime leading to a higher rate of settlements, there are fewer lawyers with the necessary skills and experience, and the significantly slower pace of High Court litigation.

### Criminal Injuries Compensation Tribunal

The Criminal Injuries Compensation Authority (CICA) provides compensation for blameless victims of crimes of violence. This can be the only and crucial option if the victim is too intimidated seek compensation from the trafficker, or if the trafficker cannot be traced or has no assets within the jurisdiction. CICA published [a guide for victims of human trafficking](#) in 2014.

However, there are a number of potential barriers to victims accessing CICA compensation.

- Victims may have a criminal record, including for crimes arising out of their trafficking.
- They may not have co-operated sufficiently with the criminal investigation (perhaps for fear of their trafficker).
- Victims may not have claimed within the two-year time limit.
- Legal aid is not available for CICA applications, although a medical report may be required for mental injury.
- Victims may be refused on the basis that they are not victims of crimes of violence.

It is possible that the Tribunal will see legal challenges over these issues in the future until the correct approach to victims of trafficking is clarified.

## Immigration Tribunal

Despite the high number of UK victims, [the majority of victims are from abroad](#). Trafficking arises in the Immigration and Asylum Chamber in a number of contexts. This article concentrates on non-EEA nationals.

The law is changing rapidly. For this reason, the article will not go into details but will point to some areas of interest.

- Risk of re-trafficking on return.

If a victim can establish that, due to vulnerability (inherent or at the hands of traffickers) she is at real risk of harm upon return, she may be entitled to asylum or humanitarian protection.

- The immigration consequences of a state failure to comply with its Article 4 duties to protect.

The state is subject to duties under Article 4 of the Human Rights Convention to take steps to protect victims and potential victims. For instance, the state should provide individuals entering on an overseas domestic worker visa (who are recognised as being high risk, see my first article in [Tribunals Journal edition 1 of 2019](#)) with information on their rights. Although case law is unsettled in this area, it has been found that a failure to do so, resulting in significant harm to a victim who did not know of her rights, and hence her ability to access health care, can result in an immigration remedy.

*Despite the high number of UK victims, the majority of victims are from abroad.*

- Interaction between the National Referral Mechanism and asylum.

Between the commissioning and writing of this article, the impact of NRM decisions on a victim's asylum claim altered, arguably significantly. Following a Court of Appeal decision ([MS Pakistan](#)) immigration advisors feared that going into the NRM would prejudice a victim in an asylum claim. This led to some victims avoiding the NRM, leaving them vulnerable to further exploitation. At the time of writing, this has been clarified in victims' favour. However, this shows that the NRM does not operate in a vacuum and there are many challenges to its effective operation.

- Appeals on human rights grounds by former victims.

Victims may have been in the UK for long periods and may have children or health care issues.

- A tribunal is faced by an on-going trafficking situation.

A tribunal may be concerned that an immigration application is being made to facilitate trafficking – e.g. sham marriage cases. Such incidents can happen in 'real time' during a hearing and be particularly challenging.

- Challenging negative NRM and residence permit decisions

These challenges are brought by Judicial Review to the Upper Tribunals.

## Social Entitlement Tribunals

Once an individual is conclusively recognised as a victim of trafficking, they lose NRM support. As [recognised by the Work and Pensions Committee](#), this is a time of acute vulnerability for victims.

The article concentrates on EEA nationals who are refused welfare benefits after exiting the NRM and losing support.

EEA nationals do not enjoy an absolute right to benefits in the UK; conditions became more stringent with the 2014 Habitual Residence Test. With apologies to those who know the legal complexities, a very rough summary is that EEA

victims may have significant difficulties in securing benefits unless they can show that they have been working during their trafficking situation.

This can lead to a victim who has suffered significant abuse having to argue that their situation amounted to ‘work’.

Appeals involving victims can be hard-fought. It has been known for the Secretary of State to instruct senior counsel for a full day’s hearing when an otherwise straightforward case turns on the rights of a trafficking victim. The anti-trafficking sector is concerned to establish precedent on victims’ entitlements. So these cases appear likely to go on appeal until the case law is settled.

## Gangmasters Licensing Appeal Tribunals

In the wake of the [Morecambe Bay cockle pickers tragedy](#), it was made a criminal offence to provide labour in the agriculture and shellfish sectors without a licence from the Gangmasters Licensing Authority (as was).

The Authority operates a penalty point scheme and gangmasters who have their licence revoked may appeal to the GLA Tribunal.

This title of ‘worst gangmaster ever’ belongs to DJ Houghton Catching Services.

According to GLA Chief Executive Paul Broadbent:

‘Employees as young as 17-years-old were forced to work for days at a time in filthy conditions without a bed, a shower or proper food. They grafted through the nights and were forced to sleep through the days on a minibus as they were driven from the south east to jobs as far away as Penzance, in Cornwall, Cumbria and even into Scotland.’

This case also vividly illustrates the attitude found amongst some traffickers.

‘The directors of DJ Houghton have been pleading their innocence for months, complaining to the local press and their MP about how the GLA has deprived them from earning an ‘honest living’. The fact is that these workers were treated like slaves.’

The company failed 18 separate licensing standards – enough for its licence to be revoked more than ten times over. The GLA assessed DJ Houghton Ltd as having recorded a total of 320 points – the highest score in the Authority’s history.

*‘Employees as young as 17-years-old were forced to work for days at a time in filthy conditions without a bed, a shower or proper food... The fact is that these workers were treated like slaves.’*

## The Equal Treatment Bench Book

The following chapters in the Bench Book may be helpful.

- Chapter 2: [Children, young people and vulnerable adults](#)
- Chapter 7: [Modern slavery](#)
- Chapter 11: [Social exclusion and poverty](#)

## Other tribunals and the future

Those working in other jurisdictions will know of issues arising in their tribunal. The UK is only beginning to work out how to prevent trafficking, and protect and rehabilitate victims. The obligations owed by the state to victims have only started to be explored in law. There is an active and well-informed trafficking sector dedicated to helping victims. We may confidently expect further developments.

**Juliette Nash** is a Fee-paid Employment Judge, a Fee-paid Judge of the First Tier Tribunal (Immigration and Asylum Chamber) and a solicitor in the Anti Trafficking and Labour Exploitation Unit

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# Alternative routes to fairness

BRITISH COLUMBIA CIVIL RESOLUTION TRIBUNAL

By John Aitken



One of the most remarkable insights into the public need by the British Columbia Civil Resolution Tribunal (BCCRT) is the critical assessment of what a member of the public requires from a tribunal or court. It is commonly assumed that what is required is a public place to voice one's case. The fairness and expertise of the tribunal providing the rest of a formula which will then amount to justice. In many respects though that formula is not sufficient. What use a place to voice one's case, if it is so complex that it's not really understood? A procedure so formal as to cause bewilderment, or taken advantage of by an uneven distribution of power or resources? Tribunals are an effort in themselves to deal with such questions; our role to be innovative, informal and expert in assisting citizens to overcome just such hurdles. The BCCRT and the President Shannon Salter have arguably gone further and considered that a more far reaching question is really being asked by the public: "How do I solve my problem?" Not simply, "Give me a fair hearing and make a decision". To that end multiple layers of resolution techniques are provided, in many respects providing the guidance a lawyer might in suggesting ways not just to present a case but also to settle, mediate or otherwise resolve it.

One of the effects of reframing the question, and one which can be seen from this process, is that an oral hearing of the type generally considered the pinnacle of providing a fair system and indispensable to a just system doesn't figure at all, or at least so little as to be inconsequential. In a December 2017 discussion with Joshua Rosenberg, Shannon Salter, at that stage having run the tribunal for about 18 months, said:

"We don't rule out the idea of having an in-person hearing one day, but it hasn't happened yet. In fact, an oral hearing hasn't happened yet. One thing that has surprised us is that no party has so far requested one."

There have been a number of oral hearings since, largely by telephone, but very few in person and the procedure rules make no direct provision for oral hearings.

Despite largely dispensing with that which is usually considered to be indispensable, the tribunal receives very high rates of satisfaction from the public. In the period April to December 2018, [82% of participants felt they had been treated fairly](#). There has been much study and commentary on the methods by which the BCCRT deals with cases; in fact it may be that how it doesn't deal with cases is, in the longer term, more interesting.

The British Columbia Civil Resolution Tribunal was brought into effect by the *Civil Resolution Tribunal Act 2012* and a 2015 amendment. The administration is physically located in both Victoria, the State Capital on Vancouver Island, and in nearby Vancouver; for its public face it seeks no physical location. The BCCRT is a wholly online entity, although that does not preclude post and telephone calls and the President is also adamant that it does not preclude dealing with their cases in an appropriate and human way. The tribunal was created initially to deal with "strata" disputes, that is disputes arising out of communal living in apartment blocks. The disputes are common such as failing to pay rent and consequent threats to evict, and nuisance behaviour such as noise and animals. Until 2015 such disputes had one legal course, issue in the Supreme Court of British Columbia, a court with a jurisdiction analogous to our own High Court, and with similar costly and complex procedures to enable all types of disputes to be resolved. The difficulties and reluctance of citizens to avail themselves of the Supreme Court was the guiding principle behind the creation of the tribunal and such cases must now be brought before the BCCRT. All tribunals deal with significant and sometimes complex legal issues, and the BCCRT is no exception. See for example this [commentary](#)<sup>1</sup>. The tribunal has been so successful that its jurisdiction has been extended to small claims to a value of \$5,000 CAN, and in [April 2019](#) to traffic injury cases up to \$50,000, demonstrating a remarkable flexibility. Once again, as with the jurisdictions previously exercised, resolving the dispute appears to be key with no provision within the rules for an oral hearing, although they are not excluded.

Starting with what was almost a clean slate, with a brief to make an accessible system for litigants in person. The President turned to technology to assist. The first stop for all claims is online filing but before that is completed a "solution explorer", a form of artificial intelligence or decision tree program, seeks details of the case to see whether it needs to be litigated further or can be dealt with to the parties' satisfaction. Where rent arrears are the problem, for

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<sup>1</sup> [Douglas C Harris & Sophie Marshall, An Error of Law and the Credibility of the Civil Resolution Tribunal \(25 April 2018\)](#).

example, it may suggest an offer to pay arrears in addition to the current rent. If both parties agree, they are asked for details which are put into documents recording the agreement, and [71% found the online tools easy to use](#).

Where an automated solution cannot be found the parties are urged to mediate, and where this fails written material is assembled to enable an adjudicator to make a decision on the evidence. Only occasionally is it necessary to move to oral evidence by telephone and rarely in person. There is a good amount of guidance offered, and despite the lack of a physical presence interaction with staff is frequent and highly prized by users. Extensive training is given to the staff, and the President is clear that there is no question of saving money by cutting staff interaction, and that she regards this as key to public confidence.

Nonetheless, the tribunal is saving costs in other ways: by streamlining procedures and no physical presence; not proceeding on the basis that a hearing is the desired outcome; and enabling litigants in person to tackle cases in a manner they consider fair. The tribunal and its procedures were carefully constructed with much input from welfare and legal charity organisations. The result is a surprising endorsement from users of all aspects. Vancouver despite being a prosperous city has a [well publicised drug problem](#), and many of those who involved in the tribunals cases have welfare problems. Sherry MacLennan, (Vice President, Public Legal Information & Applications at Legal Services Society of BC, an organisation close to Citizens Advice in the UK) has found the online tribunal helpful to their own adjustment to providing advice by online means rather than through physical clinics.

Even those at the margins of society appear to have in some ways benefitted from the tribunal's online presence. Ryan Teraverst (the Manager of Advocacy Services at the Kettle Project in Vancouver, a project which seeks to assist those with mental health difficulties and who often have no realistic prospect of engaging with courts and tribunals meaningfully) made it plain that being able to sit with a user in his office and file documents or information was often a much better system than trying to arrange for attendance of a user in person when that user was leading a chaotic life.

Similar views were expressed by Jamie Maclaren, the Executive Director of Pro Bono Society BC. The welfare and representative organisations particularly praised the efforts at consultation in advance of the establishment of the tribunal and its continuing commitment to user views. Indeed, all pages on the tribunal website invite comment on helpfulness, the results of which are considered quarterly to ensure the website stays useful and simple to navigate.

BCCRT is not without critics, and this is likely to increase as the jurisdiction increases, to include areas formerly dealt with by lawyers such as vehicular personal injury cases to a value of \$50,000 CAN. Two criticisms in particular are made by Professor Judith Resnick of Yale University<sup>2</sup>. Firstly, that the whole entity is set up to discourage users from public adjudication, being a move away from a system of public justice determining results to a system that encourages settlement and compromise. That she argues is symptomatic of legal systems worldwide; case filings are declining, as are trials as mediation and other tools are used to discourage expensive adjudication by public bodies. Secondly, a fully paper or online system, as the BCCRT is, does not admit the public and is held in private thereby depriving the public of research and accountability tools and preventing justice being seen to be done. The tribunal does publish its decisions, divided between small claims and strata disputes. Perhaps the question is whether publishing a case decided on the papers is rather more open than a theoretically open hearing which, in practice, no one attends. In [Cran v City of Port Coquitlam 2019 BCCRT 146](#) it is possible, for example, to see the reasoning behind the claimant losing her case to have the local authority remove stumps of trees from her land, a decision which at an oral hearing might have been restricted to the parties.

There is much of interest to the UK in pursuing reform. Firstly, with the need to develop systems that have as much user engagement as possible, BCCRT has reaped the benefits of wide consultation and a good feedback loop. There is a tremendous desire to be part of a reformed system rather than to have it imposed. It should not be underestimated how much engagement is necessary to satisfy users. Secondly, the need to ensure that users are properly looked after in the system. BCCRT does not offer itself as any sort of example of computers providing customer care. For that they have well trained staff while the computers provide alternatives to standard litigation paths. Thirdly, the need for robust software. BCCRT has not had a computer outage. During our recent one almost all tribunals continued because of the resilience of existing systems and the goodwill to work them. When the paper disappears, such solutions may be impossible and the systems will have to be very robust. Fourthly, the systems of the future need not mimic the past. BCCRT is successful because it has not sought to do things the same old way. Fifthly, even a popular

*Where an automated solution cannot be found the parties are urged to mediate, and where this fails written material is assembled to enable an adjudicator to make a decision on the evidence. Only occasionally is it necessary to move to oral evidence by telephone and rarely in person.*

system may need changes for policy reasons outside of the tribunal itself. If Professor Resnick is correct, the tribunal benefits from the history of open justice but does not contribute, and such an overdraft will be ultimately damaging. Thus, a solution to the open justice problem, if it exists, may need to be found. Lastly, in the UK as in Canada, users place a high value on speed. It is the central dominating issue in SCS surveys, and has been since before the tribunal joined the Tribunals Service. In BCCRT they achieve an enviable 90-day average for cases being dealt with.

Seeing how successful, efficient and popular an innovative system aided by technology can be, it is however difficult to contradict the central argument of Shannon Salter that the purpose of her tribunal, or indeed any tribunal, is not to provide a place where lawyers and judges are comfortable, but one which the public feels has answered its central question: “How will you solve my problem?”

John Aitken is President of the Social Entitlement Chamber

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## The Global Judicial Integrity Network

JUDICIAL CONDUCT AND ETHICS IN THE 21ST CENTURY

By Anisa Dhanji



‘A judiciary of undisputed integrity is the bedrock of democracy and the rule of law. Even when all other protections fail, the judiciary provides a bulwark to the public against any encroachments on rights and freedoms under the law.

These observations apply both domestically—in the context of each nation State—and globally, for the global judiciary is seen as one great bastion of the rule of law throughout the world. Ensuring the integrity of the global judiciary is thus a task to which much energy, skill and experience must be devoted.’

(From the preface to the *Commentary on the Bangalore Principles of Judicial Conduct*, September 2007.)

### The Global Judicial Integrity Network

In April 2018, following two years of planning, seven regional preparatory meetings, and extensive consultations with about 4,000 judges and other professionals, the United Nations Office on Drugs and Crime (UNODC), launched the Global Judicial Integrity Network (‘the Network’), to an audience of around 350 judges (including some from the UK), and 35 Chief Justices from around the world. The two-day launch event in Vienna, was also an opportunity for attendants to present recommendations on strengthening judicial integrity at a global level.

And yet, I would venture, that most UK judges will not have heard of the Network. Fewer still, will know of its aims, or have considered why (or whether), it matters.

The Network’s story has its genesis almost two decades ago, with the formation of the Judicial Integrity Group. Legal historians would point out that in fact, the story starts much earlier, with a range of national and international instruments<sup>1</sup>. However, while in no way minimising this enormous contribution, twenty years is a more useful time frame to explain the conception and purpose of the Network.

1 See for example:

- [Draft Principles on the Independence of the Judiciary](#) (“Syracusa Principles”) formulated by a representative committee of experts in 1981;
- [The Minimum Standards of Judicial Independence](#) adopted by the International Bar Association in 1982;
- [The United Nations Basic Principles on the Independence of the Judiciary](#), 1985;
- [The Draft Universal Declaration on the Independence of Justice](#), 1988 (the “Singhvi Declaration”);
- [Recommendation No.R \(94\) 12](#) of the Committee of Ministers of the Council of Europe on the *Independence, Efficiency and Role of Judges*, 1994;
- [The Beijing Statement of Principles of the Independence of the Judiciary](#) adopted by a conference of Chief Justices of the Asia-Pacific region in 1995;
- [The European Charter on the Statute for Judges](#) adopted in 1998;
- [The Universal Charter of the Judge](#) adopted by the International Association of Judges in 1999; and
- [Canadian Judicial Council Ethical Principles for Judges](#) (1998).



Starting with the formation of the Judicial Integrity Group is also appropriate because of the significance of what it achieved. It was its work that led to *Bangalore Principles of Judicial Conduct* ('the Bangalore Principles'). In turn, the Bangalore Principles led to our *Guide to Judicial Conduct* (published in 2004 and revised several times since, most recently in March 2019), and it was also the basis for many other judicial codes of conduct around the world.

### The Bangalore Principles

Much has been written about the Bangalore Principles. What follows is a quick overview.

Premised on the recognition that an independent and effective justice system that safeguards human rights and equal access to justice is a core aspiration held the world over, and that integrity, independence and impartiality are key prerequisites for an effective and functional judiciary and judicial system, the aim was to formulate a set of universally accepted principles of judicial conduct. This would provide global standards of ethical conduct, which in turn would offer guidance for individual judges and for the judiciary in regulating judicial conduct, encourage public understanding of the judicial system, and inspire confidence in the integrity of the judiciary.

Drafting the Bangalore Principles was not simply an exercise conducted by judges (which incidentally, included the iconic Ruth Bader Ginsburg, then a judge of the Federal Circuit Court in the United States, now a Justice of its Supreme Court), and academics in airless meeting rooms. Over 18 months, an initial draft was widely disseminated and discussed amongst senior judges in both common and civil law jurisdictions. It was translated into multiple languages, so that it could be reviewed by judges, judges' associations, and constitutional and supreme courts, of individual countries. There was significant engagement and contribution towards the evolving draft from many individuals and stakeholders from around the world, including by the Consultative Council of European Judges, then representing the judicial systems of thirty European countries.

In its final incarnation, the draft became the Bangalore Principles, which was widely endorsed, including by the United Nations Human Rights Commission in 2003. In the years that followed, they have become the international standard for judicial integrity, transparency, and independence.

The Bangalore Principles are stated as six values:

1. Judicial independence.
2. Impartiality.
3. Integrity.
4. Propriety and the appearance of propriety.
5. Equality (of treatment).
6. Competence and diligence.

A 125-page [Commentary on the Bangalore Principles](#), published in 2007, was aimed at assisting judges and teachers of judicial ethics to understand, amongst other things, the cross-cultural consultation process of the Bangalore Principles, the rationale for the values and principles it incorporates, and also to facilitate a wider understanding of their application to a range of ethical and conduct-related challenges. In due course, and again with wide consultation, an additional supporting document was prepared, namely, the self-explanatorily named [Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct](#).

### Judging in the 21st Century

In the past two decades, the world has changed in ways that could not have been imagined when the Bangalore Principles were drafted. Judicial codes of conduct (like all such instruments), are living documents which need to be updated to reflect a changing world.

When historians write about the social, cultural, and intellectual forces that shape the world in a particular age, they have the advantage of the perspective that time and hindsight offer. Judges and others, entrusted to serve the public, have the challenge of doing so when the goal posts are still moving. We also, however, have the great privilege of shaping that world, and leading in a way that others might be inspired to follow. The responsibility for upholding a

*In its final incarnation, the draft became the Bangalore Principles, which was widely endorsed, including by the United Nations Human Rights Commission in 2003. In the years that followed, they have become the international standard for judicial integrity, transparency, and independence.*

nation's justice system, is weighty and self-evident, but day to day, it can be easily forgotten as we labour under the demands of an ever-increasing workload, with ever-reducing resources.

Some regard the transformations in our world over the past two decades as being of equivalent impact as the Industrial Revolution, when mechanisation of agriculture, technology, transportation and manufacturing, heralded sweeping societal changes. Machines replaced workers, causing significant unemployment, with large numbers of people moving to urban centres in search of work. There was a fundamental change in living standards, a redefining of traditional family and employment structures, and a profound change in people's relationships with authority figures, as well as with political and religious institutions.

We may each have somewhat differing views about the nature of the forces that are re-shaping our world today, but chief amongst them is indisputably technology, with social and politics relationships (both also driven in part by technological change), as close seconds.

Twenty years ago, Google was a young start-up. Facebook was not yet even a twinkle in Mark Zuckerberg's eye. Today, there are almost 3 billion active social media users around the world. The internet, then in its infancy, now impacts virtually every aspect of our lives, from how we communicate and interact, shop, entertain and inform ourselves. Mobile phones are no longer just communication devices, but full-fledged personal computers, and 95% of adults in the UK have them. Everyone is now a publisher. That may be good news for musicians and artists, but problematic when our world view is shaped by a tsunami of information, true or false, without the tools, the will, or the skill, to distinguish between the two. The use of Facebook to spread false information resulting in violence against Rohingyas in Myanmar, is but one example of this. Equally pervasive, is the ease the internet provides for the use and misuse of personal data, and the multitude of ways in which individual privacy can be, and is, invaded and exploited, both for profit motives and for state control. And it's not just China; Google's relationship with U.S. national security agencies is no secret. Technology also facilitates the de-territorialisation of allegiances. It is re-shaping employment structures, as ever more people work in the "gig" economy, with zero hours contracts, and minimal rights. Jobs for life, and indeed skills for life, are becoming outdated concepts, further exacerbating job insecurity. And around the corner, lies the power of Artificial Intelligence ("AI"), which may eclipse all this - but a bit more about that later.

*The responsibility for upholding a nation's justice system, is weighty and self-evident, but day to day, it can be easily forgotten as we labour under the demands of an ever-increasing workload, with ever-reducing resources.*

Transformations of prevailing social norms, reflected particularly (though not only), in our changing expectations about gender roles, and indeed about gender itself, are inescapable. Mainstream acceptance of same sex relationships, and global social movements, like #MeToo, and Black Lives Matter, are driving discourse about legal rights, and impacting traditional structures at work and at home. Such is the head-spinning pace of change, that 'revenge porn' and 'upskirting', phenomena barely understood two years ago, let alone two decades ago, are now criminal offences. Add to this, the widespread concerns about climate change and the environmental damage caused by fossil fuels and plastics, the growing acknowledgement of mental health issues, and the demands for diversity in corporate and public life, and society's values and expectations look very different from even 20 years ago. Judges appointed then could find themselves startlingly out of touch with the experiences, concerns, and expectations, of those they judge today.

Political changes, at home and abroad, have been equally profound, in their reach and impact. 20 years ago, the Twin Towers were still standing, and water in our hand luggage was just water, not a potential explosive. Now, the challenges of dealing with terrorism, while maintaining fundamental freedoms and social cohesion, feature large in public discourse. Migration of peoples across boundaries on an unprecedented scale, is adding to apprehension about control, culture and identity. The ever more difficult choices between principle and expediency (how many countries are prepared to call out the Chinese authorities about the approximately millions of Uighurs reportedly being held in re-education camps?), the multitude of concerns ranging from actual or perceived elitism, failure to hold accountable those responsible for the financial crisis of 2008, and the growing inequalities of income, are having a clear impact at the ballot box, at home and abroad.

There cannot be many in our ranks, regardless of jurisdiction, whose substantive work has not been affected by these seismic changes. However, the impact goes much further than in the laws we apply.

Of particular concern in our work as judges, is the erosion of trust between the public and those positions and institutions which depend on public trust. Windrush, Grenfell, and Oxfam, are a few of the many reasons for that erosion, while the disclosures 10 years ago about MPs' expense claims, may have forever changed the relationship in

this country between the elected and the electorate. The moral authority of the Church has been tarnished, perhaps irrevocably, by decades of sex abuse and cover-ups. In the wake of 9/11 (Guantanamo - 17 years and still going, secret prisons, extraordinary rendition, waterboarding, and Abu Ghraib), what survives of the western world's claim to be the standard bearer of human rights? And what of our commitment to the sanctity of every human life, in view of the loss at sea of thousands of desperate people trying to reach our shores, while an increasingly populist and nationalist Europe argues about who has responsibility to provide refuge?

Our system of justice functions largely on voluntary compliance. If traditional deference cannot be assumed, respect needs to be constantly re-earned, and fiercely safeguarded against reputational damage and threats to our independence. The rule of law and the public's reliance on law as a mechanism for resolving disputes depends on confidence in the judiciary. What may seem entrenched and enshrined, can be destroyed in a nanosecond. Shortcomings in integrity, and a disconnect between the ethical standards we profess, and those we apply to our own conduct, can erode the public trust and respect that is essential for an effective judiciary, and in turn, for a healthy and functioning democracy. The cost and prize are no less.

Instant communication makes us subject to intense scrutiny, as any judge who has been the subject of tweets, or has used social media imprudently, will know, often to his or her cost. A casual remark, an unfortunate turn of phrase, an out of touch question, a controversial decision, and the world will know and will be posting opinions about it, at the speed of a click. Cases like that of Charlie Gard in 2017, can generate an outpouring of emotion on social media, reverberating around the world, and prompting protests on the streets, and public criticism of the judiciary, well-informed or not.

There are many examples of judges behaving inappropriately, and sometimes being unaware they were doing so. Some have lost their careers as a result. Allegations of racism, dishonesty and conflicts of interest, are sadly not rare. In a post Weinstein world, the spotlight is now on abuses of power. For judges, the point at which robust case management becomes a personal conduct issue, is starting to shift. Following a posting on Twitter in 2017 by a female barrister about judicial bullying, others have come forward. Professor Jo Delahunty, QC, has examined the prevalence of judicial bullying of advocates, and how much of it goes unchallenged because of the fear of career consequences. Others have referred to the 'striking parallels' between the #MeToo campaign and judicial bullying. The picture is similar in other countries, including the United States, and even in progressive New Zealand, where the results of a survey last year about harassment and bullying by judges, prompted a public statement from the Chief Justice that she expects all judges to deal with litigants, witnesses and counsel, with respect and courtesy. We expect no less, of course, from those appearing before us.

*Shortcomings in integrity, and a disconnect between the ethical standards we profess, and those we apply to our own conduct, can erode the public trust and respect that is essential for an effective judiciary, and in turn, for a healthy and functioning democracy.*

### So back to the Judicial Integrity Network

Codes of conduct are one way to provide common standards and accountability. To be effective, though, there needs to be shared expectations about the standards of judicial conduct, and a shared commitment to applying, valuing and protecting them.

An important aspiration of the Network is to create a space for judges to discuss existing and emerging challenges to judicial integrity and to share good practices, and lessons learned. The Network's website houses an online database featuring extensive resources. It also posts regular podcasts and opinion pieces, along with updates on its work.

Alongside this, the Network seeks to explore specific issues. At its launch in Vienna in 2017, sessions included topics such as:

- Integrity & Accountability;
- Transparency and How to Demystify the Work of the Courts;
- Impact of Digitisation;
- Financial Disclosure for Judges;
- Balancing Independence and Accountability;
- Drafting Codes of Conduct – Do's and Don'ts;
- The Risks and Benefits of the Use of Social Media by Judges;

- New Approaches to Promoting Judicial Integrity;
- Sextortion; and
- Judicial Selection and Appointment.

The Network is also forming expert groups. Two such groups have already been formed to examine:

- gender-related judicial integrity issues; and
- the use of social media by members of the judiciary.

The first group met in December 2018, in Seoul to discuss the draft of a dedicated issue paper on existing practices, cases, and experiences in training and accountability, as well as expert consultations. Nancy Hendry, a consultant to the Network, who drafted the paper, reminded the meeting that ‘...some gender biases and stereotypes are so deeply entrenched that they are not recognized as biased or inaccurate’, while Beatrice Duncan, Policy Advisor at UN Women (the UN entity whose goal is gender equality), stressed the importance of making the issue integral to the hiring process, from the start, because otherwise ‘...we are putting on the bench people who do not understand and do not believe in gender equality’.

Inevitably, there have been different perspectives about cultural relativism, with some, like Dr. J. Jarpa Dawuni, Executive Director of the Institute for African Women in Law, arguing for the ‘...need to be cognizant of gender constructs in different countries, and to allow contextual nuances as we build the framework that we are developing’, while others, like Justice Lillian Tibatemwa, of the Supreme Court of Uganda, insist there can be only one way forward and that ‘...culture and religion must be subjected to criticism from a human rights perspective’.

Where there is common ground, however, is that gender is an area where norms about appropriate conduct continue to shift, and also, that when it comes to gender-related misconduct, there is plenty of evidence that the judiciary still has a lot to learn. Because judges are rightly held to a higher standard, it is not enough to say that just because conduct is not unlawful, it is appropriate. As with all integrity issues, the judiciary must be exemplary. Indeed, the public may find it hard to accept the judiciary as the guarantor of law and human rights if judges themselves are seen to act in a discriminatory or sexist manner.

Vanessa Ruiz, President of the International Association of Women Judges, an organisation with over 6,000 members in more than 85 countries, points out that more women on the bench doesn’t simply make the judiciary more representative of the populations they serve:

‘As a court’s composition becomes more diverse, its customary practices become less entrenched; consequently, the old methods, often based on unstated codes of behaviour, or simply inertia, are no longer adequate. This can be an auspicious time for careful review, for the adoption and implementation of updated codes of judicial conduct, and for training judges according to norms that are clearly stated. The presence of new faces, with new voices, is often the most compelling spur to look at things afresh and make changes long overdue.’

*‘The presence of new faces, with new voices, is often the most compelling spur to look at things afresh and make changes long overdue.’*

A separate meeting in Seoul addressed judicial transparency and AI. If AI seems like a surprising subject in the context of judicial integrity, it shouldn’t be. American judges are already using AI, including for pre-trial risk assessments. Computer scientists at University College London have developed software that is able to weigh up legal evidence and moral questions. In trials, it reached the same verdicts as judges at the European Court of Human Rights in almost four [in five cases](#). Estonia has recently announced its intention to pilot the use of an AI “judge” to adjudicate small claims disputes. Supporters of AI believe that its use will lead to increased consistency and objectivity; others say that building algorithms based on historical data will simply reinforce the human bias that is built into that data. Nevertheless, the use of AI in the business of judging, is inevitable. Whether it is used to assist judges or to replace us, however, remains to be seen.

In relation to AI, the Network hopes to build on the conclusion reached in a dedicated session during the launch of the Network in Vienna in April 2018, that:

‘The main problem associated with digitization and predictive justice is accountability. The new pervasive role of the digital systems requires the development of new forms of accountability to preserve the fundamental values of judicial integrity, impartiality and transparency. The main answer is that technology must be aligned with the Bangalore Principles.... If the Bangalore Principles must guide judicial behaviour, they must also direct the functioning of information systems and AI....’



In addition, the Network has developed a set of Judicial Conduct and Ethics Training Tools, representing the first ever attempt to train all judges around the world, at all levels, on common standards of conduct and ethics. It comprises an interactive e-learning component (or, as an alternative, a text based self-directed training course for those without a reliable internet connection), in Arabic, English, French, Russian and Spanish (with additional language versions in the pipeline), along with a manual for trainers which allows for customisation to suit different contexts. With the active involvement of our Judicial College, several train-the-trainer sessions have already taken place, and over 40 countries have committed to be pilot sites and to roll out training based on these tools.

### ‘Integrity is their portion and proper virtue’

So said Francis Bacon about judges in his *Essay LVI: Of Judicature*.

It has been just one year since the Network’s launch, and specific outcomes will take some time. However, as is so often the case, the value lies as much in the process of exchange and deliberations, and in building a broad international consensus, as in the eventual outcomes.

Encouraging people to examine their own behaviour and to make changes, is never easy, but if the alternative is the judiciary of the 21st century being viewed as elitist, exclusive, and oblivious to changes in society, then there is much to appreciate and support in the Network’s initiative. It is hoped that as UK judges, we will want to play our part, beginning with taking a look at [www.unodc.org](http://www.unodc.org), and perhaps contributing with our views and experiences.

Anisa Dhanji is a Recorder and Tribunal Judge

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## Making the transition

FROM A FEE-PAID TO A SALARIED JUDICIAL POST

By Bronwyn McKenna



On joining the Editorial Board for Tribunals Journal, I was aware that board members are expected to contribute articles. I had looked forward to this aspect of the role but when I was asked to give my perspective – 18 months in – on joining the salaried judiciary and on the application process, I felt some trepidation. Eighteen months is a short time in a judicial post. Every day I feel that I understand a little more about what the role of a District Tribunal Judge involves (and also how much more there is to learn). On balance, I thought that writing an article might help others who have like me followed a less traditional career path and who are not sure whether a salaried judicial post is for them.

### The generic application process

I had been a fee-paid judge since 2013 when I was appointed to the SCS jurisdiction in the Social Entitlement Chamber. After a nerve shredding first day and easier second day (thanks to the kindness and patience of a vastly experienced medically qualified member) I enjoyed sitting. Professionally, there were immediate benefits too. Analysing judgements to give legal advice is easier when you have sat on the other side of the table. Writing decision notices and statements of reasons sharpens legal writing expertise.

Building instant rapport with panel members hones interpersonal skills. My job as an in-house lawyer and trade union Assistant General Secretary meant however that my sitting levels were low.

I applied in 2017 to become a salaried First-tier Tribunal Judge without any expectations whatsoever about being appointed. My background – as a solicitor who has mainly worked in-house did not seem like an ideal fit for a judge. I am also from Northern Ireland, state educated, was the first in my family to go to university and lived in social housing for much of my early life.

This selection exercise was unique. In retrospect, the open nature and scale of the process made it a much less daunting step for me to apply. It was a generic process with candidates applying for around 40 first tier Tribunal posts in the Social Entitlement, Asylum and Immigration and War Pensions Chambers. No prior judicial experience was required.

As the selection exercise involved a paper sift it was clear that the online JAC form would require careful attention. I did a first draft on

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paper critically reviewing it again and again. Throughout, I considered my examples against the headings. The JAC competence wording is both detailed and dense; examples therefore need to be fully fleshed out. Some examples naturally migrated to other categories as on further reading they provided better evidence of a different competence. To my surprise, many of my stronger examples came from my day to day practice. Working in the highly regulated environment of trade unions meant that I often had to give immediate advice on technical areas of law in charged and semi-public settings. For several years I had also held an unpaid role adjudicating disputes on barristers' fees on joint Law Society and Bar Council panels. This required me to venture into new areas of law and to reach clear reasoned decisions which would be accepted by legal professionals.

The final draft of my application form drew examples from both these areas almost as much as from my fee-paid role. In total I estimate that I spent around twenty hours on the form. I used 250 words – the exact word limit – for each competence so determined was I to ensure that every word counted. The selection day was rigorous involving a role play, situational questions and a competency-based interview. I found it gruelling but was fortunate to be appointed to my first choice of Social Entitlement and to my existing region of London.

## The appointment

My salaried role began with four days intensive training in January 2018 in Daventry. I had the pleasure of meeting the rest of my cohort who have been an invaluable source of support, encouragement, collegiality and friendship ever since. There were sessions on Judgecraft and on the Equal Treatment Bench Book.

As a fee-paid judge, I had only limited contact with District Tribunal Judges. The early months of my appointment were therefore an education in the vast range of work which District Tribunal Judges are required to undertake outside of sitting duties, from interlocutory work including deciding the validity of appeals and considering applications for permission to appeal, to training and leadership responsibilities such as appraising other judicial office holders. I was allocated a mentor for my first six months, DTJ Vicky King, and am grateful to both her and my Regional Tribunal Judge Jeremy Bennett for their support.

Fee-paid judges have little exposure to the work of HMCTS staff other than that of outdoor clerks who support hearings. One of the most satisfying aspects of my new role has been working more closely with the HMCTS staff at Sutton. I now appreciate the enormous amount of work required to get appeals ready for hearing, progress Directions and carry out post-Tribunal work. Without exception I have found HMCTS staff to be unfailingly welcoming, kind and knowledgeable. Their work is demanding but they have also been good humoured and patient and as a new DTJ this was greatly appreciated.

Immediately, as a salaried judge I had the satisfaction of hearing more complex cases including cases sitting alone. My limited availability had meant that I could not offer the additional fee-paid sitting days required to take on further tickets. Hearing more complex cases required greater preparation time especially in my first few months. That was outweighed by the intellectual challenges of working out the right answer to a difficult legal question or evaluating large quantities of evidence.

My old job had involved very long hours. My days might now sometimes involve shorter hours but are no less tiring due to the intensity of focus which judicial work demands. Learning how to switch off after a day's hard concentration has been challenging. One mechanism which I have found works has been building in structured activity such as exercise, going to the theatre or an evening class to ensure there is a both an end to the working day and another activity to focus on. In my former role I also had responsibility for the union's staffing, finance, ICT, legal and property functions. This inevitably involved crisis management requiring me to constantly deal with emails. The reduction in the volume of emails helps ensure that I feel more in control of my working life and ensures greater focus.

## Conclusion

Eighteen months in, I am very happy to have made the move to a salaried judicial post. Being a judge is a privilege and I find the work of a Tribunal judge in SSCS particularly rewarding. The law is no less technical and demanding than my previous work in employment law. Being able now to consider the law objectively rather than through the prism of a client's interests and playing a part in the justice system to adjudicate disputes of great importance to the parties delivers enormous personal and professional fulfilment.

*Being a judge is a privilege and I find the work of a Tribunal judge in SSCS particularly rewarding...playing a part in the justice system to adjudicate disputes of great importance to the parties delivers enormous personal and professional fulfilment.*

# The Gender Recognition Panel

DIVERSITY

By Paula Gray



The *Gender Recognition Act 2004* (the GRA) came into force on 5 April 2005, and on that day the Gender Recognition Panel (GRP) established under that Act began its work. Since then there has been an enormous shift in understanding about transgender issues; indeed, how they should fit into our legislative framework has been the topic of a government Consultation and we may be on the brink of a significant change to the present position. This strikes me as an interesting time to take stock of the work of the GRP and the Act.

In considering the shift in attitude I remind myself that in 2004 the GRA was seen as radical legislation leading the way internationally. Personally, I think that view overstates its importance; other countries had got there well before us, although there being no need for surgery to have been carried out was, I would accept, if not unique, certainly avant-garde. Now, with some jurisdictions permitting self-selection of one's gender the evidential requirements of the GRA are seen as out of date; even oppressive by some, but of course the GRP must apply the law as it is, and, insofar as it needs to be done, interpret it on the basis of what Parliament is likely to have intended when it was passed some 15 years ago, despite evidence that this is a fast-moving area of medicine and social attitudes.

Whether revolutionary or merely evolutionary, the GRA did represent an important change, and I recall how exciting it was to be presented with this new Act and, as a small group of judges, to discuss what it meant, how it should work, and how we were going to operate within it in terms both of law and procedure. We needed only judges then for the initial fast track post-surgical route, which is how the process began; the medical members came later. The background of the medical members is varied, but we have been fortunate to have had, over the years, psychiatrists and other specialisms with experience in the field, including urologists, and endocrinologists.

Appointments to this UK wide panel are made by the Lord Chancellor with the concurrence to the appointments of, respectively, the Lord Chief Justice of England and Wales, Lord Chief Justice of Northern Ireland or the Lord President of the Court of Session in Scotland. Despite that formality of appointment, we exist in something of a twilight zone judicially. We are not wholly within the Tribunals umbrella, although we are administered by HMCTS and our judges and members have always come from within the tribunals world, and we aren't a Court, although appeals from our decisions go to the High Court rather than the Upper Tribunal.

The judges recruited for this work have an enabling attitude from their experience in the work of the Social Entitlement Chamber (SEC) which deals mainly with *Citizen v State* jurisdictions where some appellants feel that they are fighting bureaucracy, or even society, as do some of the applicants for a Gender Recognition Certificate (GRC). The SEC also had existing medics with relevant experience and already trained in what we call Judgecraft, by which I mean, in this almost exclusively paper-based jurisdiction, a judicial approach to analysing evidence.

As an initial group of judges sitting down to consider the 2004 Act we determined from the outset that our approach would be a facilitative one. Although the law was set out in the Act we had control over our processes and we wanted to give people every opportunity to show their entitlement to a GRC, even if that meant a number of chances to provide the appropriate documents. Panel Directions are normally the follow-up to a letter from the Administrative Team explaining to an applicant what documents they haven't sent in that they need to produce.

A word about that Team. We have been fortunate from the start to have an extraordinarily keen and helpful team based in Leicester. Over the years the people have changed, but the original empathetic attitude has become part of the Team's DNA, and I don't think there are many people who have come into contact with them who would give them anything other than high praise. And the Team trains together with the Panel: we have different roles but it is important that we all understand as much as we can in relation to this important and specialist field. To that effect a large number of professionals practising in the field have been invited to speak to us over the years.

As judges and panel members we are each judicially independent, but we understand the importance of a cohesive approach to avoid random decision making: that is good practice. So, our training is not just on the medical aspects but we discuss different, perhaps more helpful approaches to various situations, exchanging ideas as to framing directions, our options where there is non-compliance and other such issues.

We rarely refuse applications, and when we do it's generally due to a consistent lack of co-operation, the applicant having been given a number of opportunities to provide the necessary documentary evidence. I probably deal with about 200 cases a year-although some are previously adjourned applications and over some 14 years I think I have refused three.

Applications which are time-critical can be expedited. I recall an occasion where the Admin team asked if they could add another case onto one of my lists, because there was an imminent wedding planned which could not take place unless a certificate was granted. Sadly, I had a similarly urgent case, but where someone was dying, and, understandably wanted to be recognised in their acquired gender as a matter of law before that, and I felt privileged to be able to do that for them. I had a recent emergency application by someone who gave a credible account that they were likely to be outed by the Press as trans and wanted the (albeit limited) protection that a GRC confers: some people are happy to publicise their trans status but for many it's a matter of the utmost privacy. I asked the Team to find a Panel doctor with access to secure judicial email so that the papers could confidently be sent, and with whom I could have a conference call early the following morning. By 9 a.m. I had sent the grant to the Team to issue.

There is a right of appeal under Section 8 of the GRA against the decision of the Panel to the High Court of England and Wales or the Court of Session in Scotland, on a point of law. There have been a limited number of appeals. The Panel has always been aware of some disquiet within the trans community about the need, under the Act, to show a diagnosis of gender dysphoria and details of it and details of surgery undergone or planned, but two appeals have confirmed the procedure and interpretation of the 2004 Act adopted by the Panel, that our role has always been that we are a judicial, not simply an administrative process and as such we have to assess the evidence, and that the applicant's human rights are not infringed by having to put such personal information before the Panel.

In recent years the Judicial College has been keen to see diversity training expanded, and this includes training in trans-matters. I have assisted training judges in the family court in devising a discussion scenario that had at its heart a dispute about custody and contact with children in a family where one parent was transitioning. The Immigration and Asylum Chamber develop training in trans awareness with a talk by a trans person as one aspect of that, and there are other jurisdictions which have had similar training. Recently a scenario has been filmed as part of a forthcoming Judgecraft course which features a trans actor. The ETBB, referred to elsewhere in this Journal, has a chapter about trans people and recent feedback is that it has been helpful to judges regarding terminology and approach.

As to the future, the recent announcement as to opposite sex Civil Partnerships being introduced in England and Wales will create the need for amending legislation. Under the Minister for Equalities responsible for the GRA, Penny Mourdant, the public Consultation begun last year is now closed. The Government's response was due to be issued by June 2019 but has not, at the time of writing, been published. Scotland has had its own similar Consultation. It is possible that new approaches to gender recognition will lead to the disbanding of the Panel, and if that is so of course I will understand, but I will continue to be grateful for the opportunity to sit in this highly specialist field which has provided a window onto this interesting world.

Paula Gray is an Upper Tribunal Judge (Administrative Appeals)

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## Intercultural communication in Tribunals

EQUAL TREATMENT BENCH BOOK

By Tamara Lewis



- Have you ever cut off a witness who was giving unnecessary background detail and told them to get to the point?
- Have you ever wondered whether the reason a witness paused before answering a question was because of reluctance to give a straight answer?
- When a witness has presented evidence with excessive pleading or emotion, has it ever made you a little wary about whether they are making it all up?
- If a witness is unable to answer 'yes' or 'no' to a straightforward question, do you assume they have something to hide?
- When a witness raises their voice in court, do you tend to feel they are being truculent and confrontational?

When witnesses come from a culture different from your own, misunderstandings can happen. What appears to be long-winded, evasive or uncertain, might simply be the product of a different cultural speaking style. There is considerable academic evidence that the way people speak English and structure information is heavily influenced by their first language.

Effective communication underlies the entire legal process. Yet, as the recent JUSTICE Report *Understanding Courts* points out, many people are confused, distressed and overwhelmed by what goes on during a hearing. This is compounded when a lay user does not have English as a first language. The Equal Treatment Bench Book notes<sup>1</sup> that language and culture have been identified as critical barriers in tribunal proceedings.

## The intercultural e-learning modules

In March 2019, the Judicial College launched a set of intercultural e-learning modules which aim to make judges aware of potential cultural or linguistic misunderstandings and provide practical guidance for how to avoid them. The nineteen core modules are divided into four key themes:

- Naming systems: how to pronounce names and what to do (and not do) when a judge has difficulty pronouncing a name.
- Different communication styles: How information is presented and legal argument made; use of pauses; turn-taking style; level of explicitness; use of emotion; the concept of 'Face'; and narrative style.
- Linguistic differences between languages: vocabulary and concepts; verbs; jargon and legalese; idioms; intonation and accent.
- Interpreters.

The modules are based on solid academic research and I put them together with the assistance of John Twitchin, Director of the [Centre for Intercultural Development](#). John worked for many years with the pioneer of sociolinguistics, [Professor John Gumperz](#) (former Professor of Anthropology at University of California, Berkeley), in bringing a practical application to Professor Gumperz's ideas. Over 40 judges as well as non-legal tribunal members, magistrates and some court staff were interviewed for the modules and helped bring their experiences and thoughts on how these issues arise during hearings and what can be done to avoid misunderstandings.

*...first language influences are likely to affect a person's performance in using a second language.*

## Linguistic differences leading to misunderstanding

An individual who speaks English as a second language may be able to live and work in the UK without using interpreters, but this does not mean that they will have no difficulties giving evidence in a court setting, where questions can be convoluted and precision is important. In addition, academic studies show that especially in situations of stress and cognitive complexity, first language influences are likely to affect a person's performance in using a second language.

Some years ago, a 16 month-old child was brought into hospital by her mother and step-father. Dr A, a Filipino doctor, was on duty. Although having some concerns about the possibility of child abuse, Dr A accepted the parents' assertion that the child's injuries were due to sunburn. After treatment, he released the infant back to the parents. Later that day, she died. Subsequent investigations showed the burns were in fact caused by thermal fluids. When interviewed by the FBI agent investigating the case, Dr A accepted the evidence that the injuries he had seen were indeed caused by a thermofluid burn. But during the subsequent murder trial, this exchange occurred:

Counsel – When you released the child to the parents, did you feel that the cause of the injuries was sunburn or thermofluid burn?

Dr A – I still feel it was due to sunburn.

Counsel – Did you suspect it was thermofluid burn?

[Another lawyer] – Objection your honour, it's been asked and answered.

Judge – Sustained.

Dr A was later charged with perjury on the basis of apparent discrepancies between what he had told the FBI and his sworn testimony. This was one of many examples which went to his credibility. He had previously accepted that the injuries were due to a thermofluid burn, yet now he appeared to be back-tracking. Counsel's attempt to clarify was then blocked.

Professor Gumperz has suggested this discrepancy was probably due to linguistic factors. In Dr A's native Filipino languages, tense is not indicated by the verb as it is in English. For example, 'I am eating' and 'I was eating' would not be differentiated in the verb form. Dr A's English was relatively fluent, but there were repeated uses of the present tense in English when he appeared to be talking about the past.

<sup>1</sup> [Equal Treatment Bench Book](#). See chapter 8, para 51.

This kind of difficulty is not unusual in courts and tribunals. It is not only Filipino languages which indicate the past by methods other than verb form. Polish, for example, has fewer varieties of past tense than English. In the modules, judges tell of other instances when confusion arose over what the claimant believed at the time as opposed to now, or as to how long the appellant had known a particular person or when they first met them. It's not just verbs. Many languages, for example, use the same pronoun for 'he' and 'she'. In another illustration, a judge explains that she had doubts whether an appellant had truly gone to his Embassy a few weeks previously, because he did not appear to know the gender of the person he had allegedly spoken to. Through an interpreter, the Kurdish appellant told the tribunal that, 'He or she spoke to me'. When the judge expressed her bewilderment, the interpreter explained that pronouns in the appellant's native language were gender neutral, so the interpreter had to say "he or she". When asked directly, the appellant clarified he had spoken to a man.

Judges cannot be expected to know the grammar of different languages. But awareness of these pitfalls means we should be more cautious when there is an apparent contradiction in evidence to check whether it is simply a matter of language. Reformulating questions, repeatedly using names instead of pronouns, asking a series of questions about the past in small stages, can all help clarify.

### Different communication styles

It is not only a question of linguistic differences. Speaking styles can also be culturally different. For example, an Asian speaking style typically uses what linguists call an 'inductive' style. Contextual background information and justifications are stated first, not last. The effect of this may be compounded by South Asian 'narrative style' – making a little story out of the answer. This would be considered respectful and polite. HHJ Jinder Singh Boora, a judge of South Asian family background explains, 'In my experience, witnesses from the Indian Subcontinent have a tendency to weave their evidence with unnecessary detail. This may to an untrained ear appear as if the witness is being evasive. However, I believe it's more indicative of the oral tradition of story-telling in Asia. One needs to remember that the Caxton Printing Press was introduced to England in 1476. The Printing Press was not widely used in India until almost 400 years later. Therefore, Asian culture has had far less time to adapt to the more concise form of story-telling encouraged by the written form.'

*...it is important to be aware of the possibility that a person may be communicating in a culturally different way.*

All individuals are different and within cultural style, there can be many differences. In addition, many individuals are able to operate bi-culturally. Nevertheless, it is important to be aware of the possibility that a person may be communicating in a culturally different way. This means being careful not to cut off a witness before they have made their point and maintaining concentration on what they are saying until the end. All too often, a cross-examining barrister – or even a judge – may tell a witness to 'get to the point'. Interestingly, a 2006 Research study showed South Asian users were found to be more likely than other groups to feel the tribunal hadn't listened equally to everyone in the hearing. Their complaints related to a perception of being given less opportunity to speak than the other side, or of being cut off during explanation<sup>2</sup>.

There are as many cultural speaking styles as there are cultures, although the extent of the differences vary. No one style is 'better' than any other. The important thing is to be careful not to interpret what might be cultural style in psychological terms. Pauses before speaking or apparent vagueness, for example, may indeed be the result of evasiveness, but with an East Asian witness could equally be the result of 'indirect / high context' speaking style or considerations of 'Face'. Further examples and good practice suggestions are discussed further in the modules.

The modules are available to judicial office holders on the Judicial College's learning management system. Sign into the judicial intranet; click 'Judicial College LMS' in the top ribbon; click the E-learning tile; click 'E-learning library' under 'expand all'; click 'Intercultural communication'.

## [2 Tribunals for Diverse Users Hazel Genn](#)

**Tamara Lewis** is an Employment Judge and the Chair of the Equal Treatment Bench Book editorial panel

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# Equal Treatment Bench Book corner

NEWS

By Paula Gray



## How well do we ensure effective communication?

'Every day, lay users are bewildered by what happens at hearings, despite the fact that court professionals have the ability to allay that lack of understanding.' So says JUSTICE in its latest report, *Understanding Courts* (January 2019).

The report is full of thought-provoking examples and ideas as to how to make courts more accessible. JUSTICE says: 'Members of the public often feel baffled by the at-times impenetrable language and convoluted legal jargon used by legal professionals during proceedings. It is therefore imperative to communicate with lay users in a clear and unpretentious manner.'

Regrettably, I think that we can include Tribunals in that disappointing assessment. The law we deal with is complex, sometimes to the point of obscurity (or, in relation to Regulation 60(c) of the *Income Support General Regulations 1987*, 'obscure to the point of darkness' according to May LJ in *Secretary of State for Work and Pensions v Menary-Smith* [2006] EWCA Civ 1751) but we must try to explain it in simple language. Perhaps even more, we must explain our procedure by telling people what is going to happen, how the hearing will progress, when they will have an opportunity to tell us what they came to say. Procedural justice, understanding and feeling part of the process, is critical in people feeling that they have been treated fairly. And it reaps rewards: I still recall how important it was to me when, as a newly appointed judge (...ouch, about 25 years ago!) someone thanked me after I had explained that they had lost, saying 'I didn't understand how this decision had been made and I still don't agree with it, but at least now I understand why.'

### From the JUSTICE report:

'I think we all think of ourselves as very good communicators but I don't think any of us would recognise that 50% of witnesses don't actually understand the question they are being asked.' (Crown Court Judge).

'I had one judge who put everyone at ease. I still remember him now.' (Young adult's experiences of the Youth Court)

### The *Equal Treatment Bench Book* has suggestions on:

- How to help Litigants in person (see chapter 1 – *Litigants in Person and Lay Representatives*)
- How to communicate interculturally (see chapter 8 – *Racism, Cultural/Ethnic Differences, Antisemitism and Islamophobia*)

Paula Gray is an Upper Tribunal Judge (Administrative Appeals)

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# Tribunals Change Network meeting

SPT UPDATE

By Ernest Ryder



On 1 May the latest Tribunals Change Network meeting was held at the Royal Courts of Justice. The group, which currently has 56 members, includes the Tribunal and Chamber Presidents, the Judicial Associations, those Judges involved in each of the reform projects, and the Tribunals Judicial Engagement Group, which advises the reform teams. The meeting took place in a slightly cramped Court 63 (unfortunately, court rooms and meeting rooms are at a premium at this time of year), but there was an excellent turnout and a lively discussion ensued. It was not intended to be a 'meeting without coffee,' but this is what happened due to an administrative error by the caterers!

The main agenda item was a plenary discussion on my *Innovation Plan for 2019/2020*, which was published on 2 April 2019. The Plan sets out how tribunals projects are intended to develop during the next stage of reform (up to May 2020), and applies the aims, principles, design concepts and solutions identified in my report on reform, *The Modernisation of Tribunals 2018*. One of my main aims as SPT is to ensure that reform is not forced upon the

tribunals' judiciary, but that we are the heart of shaping future justice. This requires a continuing conversation, so that everyone's views and ideas can be fed into projects as they move forward. To help me to achieve this, I sought advice from the Change Network on how best to communicate the Plan, what further information it might be useful for everyone to see, and whether regional or local events to discuss the Plan might be appropriate.

The views of the Network were that engagement on the Plan should initially be low-key, as it would only be appropriate to hold a national roadshow if changes are introduced which impact on your day-to-day work. It was suggested that you would welcome a focused approach, with information on how reforms specifically impact on you, and that each jurisdiction will therefore need to take the lead in delivering their part of the Plan internally. Project judges could be asked to publicise what is going to happen within each jurisdiction (but only when we are certain that it is actually going to happen), with the aim of ensuring that you are given accessible, quality information at a jurisdictional level.

In addition to this focused approach, the Network agreed that you would appreciate communications that cover what is occurring on a cross-jurisdictional basis. The aim of these broader communications would be to provide you with details of the overall strategy and plan as it develops, including acknowledging when aspects of the programme have not yet been delivered successfully. These updates would let you know about any contingency plans that are put in place to deal with issues that arise, and inform you about positive changes as they occur.

The Network also suggested that communications about modernisation should be imbedded into existing programmes, so that when you attend key meetings and training events, a reform update is provided. One example that was given of where this might work is at regional networking events, like those that have recently taken place in Salisbury and Cardiff.

I am going to discuss the Network's advice with the Judicial Office Reform Communications team and agree a strategy with them for communications during this next period of reform so watch this space.

The other item on the agenda at the meeting was the relationship between regional leadership groups and local leadership groups. I am keen to ensure that you can feed in your views at a local level, rather than policy decisions being imposed on you from above without you having a regular opportunity to provide feedback in the opposite direction. The Network felt that local leadership groups generally work well in respect of local issues and information sharing and are a useful vehicle for a collegiate approach across jurisdictions. I am aware though that some of you feel you do not have the opportunity to communicate your views on reform, as this was one of the concerns that came out of the Judicial Ways of Working exercise last year. My office and the reform team are going to be working to ensure that there is an appropriate and accessible forum for this two-way communication, to make it easier for you to play your part in shaping modernisation.

At the end of the Change Network meeting, everyone was ready for a well-earned lunch. Despite this being pre-ordered by my Office, we were let down by the caterers; however (and by no means a substitute) our discussions had provided plenty of food for thought!

I am extremely grateful for the Change Network's support and advice and I remain indebted to the Tribunals Judiciary for your wide-ranging contribution to the reform process.

*I am keen to ensure that you can feed in your views at a local level, rather than policy decisions being imposed on you from above without you having a regular opportunity to provide feedback in the opposite direction.*

Sir Ernest Ryder is the Senior President of Tribunals

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## Recent publications

### EXTERNAL LINKS

By Bronwyn McKenna



1. The [UKAJI May newsletter](#) contains an interesting blog from an academic at Exeter on video links at immigration bail hearings.
2. Law Society Gazette [article on increased case intake](#) at Employment Tribunals.
3. A new publication: [Justice in a Digital State - assessing the next revolution in administrative justice](#) by Joe Tomlinson, Lecturer in Public Law at Kings College London and Research Director of the Public Law Project.

4. The House of Commons Justice Select Committee has just completed an [Inquiry into Courts and Tribunal reform](#). There is a lot of interesting material here.
5. Similarly the Education Select Committee has just conducted an [Inquiry into SEND](#).

### Useful links

[UKAJI administrative justice research database](#) A public database of research related to administrative justice in the United Kingdom.

[International Organization for Judicial Training](#) This is an organisation consisting (August 2015) of 123 members, all organisations concerned with judicial training from 75 countries. The Judicial College is a member.

[The Advocate's Gateway](#) "provides free access to practical, evidence-based guidance on vulnerable witnesses and defendants".

<https://implicit.harvard.edu/implicit/> website regarding unconscious bias including various tests.

[Tribunal Decisions](#)

[Tribunals Journal](#) All copies of Tribunals Journal from Spring 2006 to date.

[Rightsnet](#)

[Child Poverty Action Group](#)

[The Public Law Project](#) – public law and administrative justice web site including relevant research.

[Tribunals In The United Kingdom](#) – a Wikipedia article giving an overview of the UK Tribunal System (including changes in Scotland, Wales and Northern Ireland).

[List of Tribunals in the United Kingdom](#) – another Wikipedia article giving a comprehensive list of Tribunals in the UK (both within and outside the Tribunals Service), including some which have never sat.

**Bronwyn McKenna** is a First-tier Tribunal Judge (Social Entitlement)

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### Aims and scope of *Tribunals* journal

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.

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