



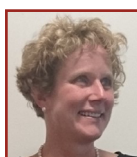
JUDICIAL
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TRIBUNALS TRIBUNALS EDITION 1 — 2018 TRIBUNALS

Editorial 2018 Edition 1

EDITORIAL

By **Christa Christensen**



Welcome to the first edition of *Tribunals* journal for 2018. The board has decided to adopt a new naming system for the three editions that appear each year.

I am very pleased that we have been able to publish a follow-on piece from Deputy Chamber President of First-tier Tribunal (Health, Education and Social Care) Judge Meleri Tudur's article in the last journal (Winter 2017), which looked at the delegation of functions by judges to Registrars and the development of Tribunal Case Workers. In this edition we publish accounts from individuals who undertake these roles. These are Registrars in the Employment Appeal Tribunal, Upper Tribunal (Administrative Appeals Chamber), Special Educational Needs and Disability, General Regulatory Chamber and Case Workers in Social Security and Child Support. This gives valuable insight into the working relationships that have been developed, the range of work that is undertaken and gives thought as to how these roles might be further developed.

We learn something about the involvement of tribunal judiciary in training projects, exchanges and international relations in countries across the globe and the benefits that come from cross-fertilisation of ideas amongst judges across continents and cultures.

International matters are the subject of the article by Upper Tribunal Judge Judith Gleeson. Judith writes about her responsibilities as the international lead role for the Tribunal judiciary. We learn something about the involvement of tribunal judiciary in training projects, exchanges and international relations in countries across the globe and the benefits that come from cross-fertilisation of ideas amongst judges across continents and cultures.

A corridor conversation that I had at the Civil Justice Centre in Bristol with Jo May, Head of Civil, Family & Tribunals (CFT) in the South West, prompted Jo to write her article **Two sides of the story**. Jo explains something about her frustrations at the seemingly silent 'T' in Her Majesty's Courts and Tribunal Service, the need to do more work to raise the profile of tribunals and to see things from all sides. Jo writes about some important innovations and this journal would welcome any further pieces from other Heads of CFT who can contribute thoughts to ensure efficient working between courts and tribunals.

It is with some sadness that I report the departure from the board of David Bleiman, who has reached the end of his term of appointment. The *Tribunals* journal is much indebted to David for his contributions during his period of serving as a board member. True to form, David has written a final article as his parting gift on a perennially important topic. His article addresses the issue of vulnerable people and the duty of fairness, and reviews the decision of and guidance given by the Court of Appeal in *AM (Afghanistan) v Secretary of State for the Home Department* [2017] EWCA Civ 1123.

CONTENTS

2 [*Two sides of the story*](#)

The silent 'T' in HMCTS
Jo May

4 [*Handling complaints*](#)

In the Employment Tribunal
Richard Byrne

7 [*Making communication work*](#)

Tips from an intermediary
Naomi Mason

10 [*Vulnerable people*](#)

The duty of fairness
David Bleiman

13 [*Delegation: from the desktop*](#)

Registrars and Case Workers
Various authors

17 [*Tribunals judges*](#)

International work
Judith Gleeson

20 [*External Links*](#)

Recent Publications
Adrian Stokes

21 [*An extraordinary resource*](#)

Equal Treatment Bench Book
Paula Gray

The journal ran an article from the Judicial Complaints and Investigation Office (JCIO) in Summer 2017. This explained the JCIO processes. I am now very pleased to publish a follow-up article from Regional Employment Judge Richard Byrne setting out the particular way in which complaints are handled in the Employment Tribunal. This will ensure that judges and non-legal tribunal members can develop a better understanding of how that process will work in the event that a complaint is made against them. Richard breaks it all down and demystifies the process.

The article by Naomi Mason addresses the ever-important topic of improving communication skills. Naomi works as a court intermediary and is highly skilled in facilitating communication with vulnerable people. Naomi explains that intermediaries are most commonly used in the sphere of family and criminal cases but poses the question – could they be used in tribunals? The vulnerability issue raised in David Bleiman's piece and the Court of Appeal guidance in the *AM (Afghanistan)* is also highlighted in Naomi's article.

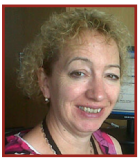
Christa Christensen is Chair of the Editorial Board

[Back to contents](#)

Two sides of the story

THE SILENT 'T'

By Jo May



The formation of Her Majesty's Courts and Tribunals Service (HMCTS) in 2011 brought together a range of jurisdictions under one umbrella. Seven years on are we all sheltered under one canopy or are some of us out in the rain? Here's the story from my perspective.

I am a lifelong civil servant. My parents, both civil servants, met at Flowers Hill in Bristol (up until recently part of the HMCTS Finance team were still based there). It was also at Flowers Hill that fresh from school I started my career. Until retirement, my father was the manager of the Legal Aid office in Bristol, so I have ended up where I was always destined to be.

The early years

Apparently, I am fairly unique as an HMCTS senior manager with a tribunals background. I joined the Employment Tribunals Service in 2001. Scratch the surface and you find my earlier career in Benefit Offices and Jobcentres, and before that as a shampooist in a hairdressers. Proof that you can change specialisms but still be viewed as an expert in your field.

The first judge I worked with was the Regional Chairman for Bristol, Christopher Tickle (or the 'inimitable A.C. Tickle', as The Times referred to him in a rather humorous account of the Employment Tribunal case of Neil "Razor" Ruddock v Swindon Town Football Club – I still have the press cutting). I learnt a lot from him. I suspect he was horrified when I started as the new 'Regional Secretary' with zero knowledge of tribunals. What I did bring was experience of managing teams in a government department responsible for delivering a service to the public.

*Seven years on
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The office was struggling with huge backlogs of work and my challenge was to try and put things right. It took a while, but Judge Tickle and I both wanted the same thing; the situation wasn't good for the staff, judiciary or the tribunal users. It was a real team effort to turn things around and get back on track but we did it and when I left over six years later, the office was consistently one of the best performing Employment Tribunals (ET) in the country. I am very proud of that fact and feel it's a notable example of how by working together, the administration and judiciary, we can make tangible changes for the better.

My current role

I worked in London for a while before returning to my roots in the South West in 2014, taking on the role of 'Head of Civil, Family and Tribunals (CFT)'. This is probably one of the best jobs I have ever had, although it is hard to explain what exactly I do other than become increasingly familiar with the M5 and A303!

Each HMCTS Region has a Delivery Director with overall responsibility for the administration of all courts and tribunal offices within their geographic area. That's a very wide-ranging responsibility so each Delivery Director has a Head of Crime and a Head of CFT working with them to focus on issues pertinent to their specific jurisdictions, including change initiatives. Each of the Heads of CFT takes a lead role nationally on a specific jurisdiction. Not surprisingly, mine is Employment Tribunals.

A question of parity

It struck me, coming back to the South West, that there was still a distance between jurisdictions. It's not something that is unique to tribunals. There can be tensions between Family and Civil work; if you are short of a judge, Family hearings can take priority given the nature of the cases, but Civil claimants, sometimes acting entirely on their own, will have personally paid a fee for a specific service yet their claim appears to take lower priority.

I've had complaints from Civil judges that staff are leaving Civil administrative work in favour of clerking a tribunal, the human 'in person' outweighing the paperwork, which could be equally if not more important. We get complaints from one tribunal when we can't accommodate their hearing as we already have another tribunal booked in. It's this sort of day to day juggling that local staff regularly face. One judge said to me it's a question of parity and that's the line I always try to take, but it's not always easy with conflicting priorities. At the root of each one is a real person who just wants their case resolved.

The silent 'T'

There is still a perception occasionally that there is a silent "T" in HMCTS. It was from a conversation I had with Christa Christensen (Director of Tribunals Training and editor of this publication) when I was feeling quite dejected about this that resulted in me writing this article. Given my background I am ideally placed to challenge disparity across any CFT jurisdictions. I have taken issue when, for example, I am discussing tribunal sittings and am informed they don't 'do' tribunals in a particular location, or that a member of staff should leave their 'own' work to go and clerk one of 'those' tribunal hearings. I have on several occasions had to spell out what HMCTS stands for. It doesn't help that we still have some way to go in integrating our various IT systems and even our signage. All the time staff, who frequently work across jurisdictions, see the differences; they may struggle with obtaining the sense of parity.

From both sides now

We need to see the issue from all sides. I remember when the Tribunals Service was formed in 2006 it felt like we (the Employment Tribunal) were being swallowed up by the Social Security & Child Support Tribunal. I admit I didn't like the feeling. There have been many times where various tribunals have told me that their tribunal is 'different' from the others with the implication it needs special treatment (the 'all tribunals are special, but some are more special than others' philosophy). This again isn't unique to tribunals and you see it across all jurisdictions.

There is also an issue about knowledge and understanding. At times I've had to explain that tribunal panel members are judicial office holders, so they can use the various facilities in the local court building in the same way as Magistrates and other judiciary. However, tribunals are still an unknown entity to some judiciary and staff and because the workload tends to be smaller and in a limited number of locations, many HMCTS people will have infrequent contact with that enigmatic 'T'.

We have made some progress. To ensure judiciary are kept informed and can contribute to the Reform agenda and upcoming changes, a network of Local Leadership Groups (LLGs) has been set up and these feed into Regional Leadership Groups (RLGs). Membership is broadly representative across all jurisdictions, so there should be tribunals representatives on these groups to make sure all have a voice. If you aren't personally involved and don't know who your representative is, then I am happy to find out for you, while information on LLG structures can be found on the Judicial Intranet. It's crucial we keep the cycle of communications going between local, regional and national levels and these groups help address this. Equally importantly the LLGs present an opportunity to bring all jurisdictions to the table, so it's important Tribunals have a voice.

What we tried to instil from the start was a sense we would treat all with parity, no jurisdiction taking priority over another...

When you can counter the lack of knowledge and overcome any wariness, you see results. In Bristol we moved the Employment Tribunal into the Civil & Family Justice Centre (CFJC). It was a successful exercise but it wasn't all plain sailing and it's fair to say there was initial concern amongst the resident judiciary that another jurisdiction was moving in. In June 2017 we had to vacate the CFJC owing to a flood which caused extensive damage to the electrical systems. We were unable to use the building for over four months. Judges and staff from across all jurisdictions had to 'camp out' and share facilities in the remaining buildings. What we tried to instil from the start was a sense we would treat all with parity, no jurisdiction taking priority over another when it came to use of rooms, chambers, admin, workloads, overtime etc. It was heart-warming to see the Regional Employment Judge, the Designated Family Judge and the Designated Civil Judge working together with the court managers in planning the move back into the building. I am not naïve enough to think everything is perfect, but what the Bristol incident demonstrated was that we can all work together, and that it's in developing the mutual understanding of each other's issues that helps us create good working relationships.

Recently I was thrown right back into the Employment Tribunal (ET) world following the Supreme Court judgment on fees. There was a great deal of work required to develop the process for repaying those who paid an ET or Employment Appeal Tribunal (EAT) fee and how we might reinstate those claims or appeals that were struck out for non-payment. Being right back in my comfort zone, I really enjoyed the challenge. It also demonstrated how having a good working relationship between the administration and the judiciary is incredibly beneficial. I liaised with the two ET Presidents on some of the detail and they have been a tremendous help whilst still (don't worry) keeping judicial independence from what is an administrative process. It's this level of joint working and mutual respect that we need to establish across the whole organisation.

Two sides to the story

My title was deliberate and came to me when I was considering the process behind most of our work. Fundamentally CFT jurisdictions examine a case from two perspectives; someone is claiming or wanting something from someone else. Naturally there will be at least two views to this. Our task is to gather the details of that story and determine the best outcome.

There have been other examples of 'two sides' in my story: staff v judiciary; Civil v Family; Tribunals v HMCS; Tribunals v Tribunals; Paper work v People work; Fees policy v Supreme Court ruling; and even 'Razor' Ruddock v Swindon Town Football Club!

I would argue however that there is only one story, and the more we can all work together to get a common and mutual understanding, the better placed we will be to move forward within this organisation.

Jo May is Head of Civil, Family & Tribunals South West Region (Operational lead on ET)

[Back to contents](#)

Handling complaints in the Employment Tribunal

COMPLAINTS

By Richard Byrne



What happens when a complaint of judicial misconduct is made against an Employment Judge or a non-legal Tribunal member? How is it investigated and what are the practical issues that can arise in dealing with it? The purpose of this article is to answer those questions and to provide an insight into the regulatory framework in place which applies to all such investigations.

Any complaint of judicial misconduct must be investigated under the provisions of the [Judicial Conduct \(Tribunals\) Rules 2014](#), which came into force on 18 August 2014.

The rules apply 'to a tribunal member' (Rule 3), which is defined as 'a person who holds an office in column 1 of the Schedule to these rules'. The Schedule lists the titles of all tribunal judges, including Employment Judges, chairmen and members of all United Kingdom and Northern Ireland tribunals. This article will look at the application of the rules in relation to complaints involving Employment Tribunals, but the principles apply equally across all tribunals.

Who investigates?

The rules provide that the Presidents of particular tribunals and chambers have the power to investigate, but that they can delegate that function to a tribunal member with 'suitable experience' (Rule 8). In the Employment Tribunals in England and Wales, initial assessment of a complaint is undertaken by the President of Employment Tribunals, Judge Brian Doyle.

The President may sometimes delegate his powers in that regard to a Regional Employment Judge (REJ). This delegation may now be to the REJ of a different region to that in which the individual complained about sits. That is a relatively recent development, which has been adopted because it may not be appropriate in many cases for an REJ conducting the investigation to have a leadership judge role in relation to the tribunal member being investigated. Using the REJ from a different region may assist in ensuring that the process is carried out at 'arm's length'.

Who can complain?

Any individual who considers that judicial misconduct has taken place can bring a complaint. I have considered complaints of misconduct made by the mother of a claimant, the partner of a claimant and by a friend of a claimant. Complaints must be made in writing, contain an allegation of misconduct on the part of a named or identifiable tribunal member, state the date or dates of the alleged misconduct and provide full details including the address of the person making the complaint (Rule 19). A complaint must not be accepted in a case where the complainant states they do not want the tribunal member concerned to see a copy of the complaint document.

What are the time limits?

A complaint must be brought within three months of the latest matter complained of (Rule 22). If it is outside that time limit, the complainant must be informed that it has not been accepted because it is outside the time limit and that they may make representations for an extension. An extension can only be made in exceptional circumstances (Rule 25); the fact that the complaint contains an allegation of misconduct is not in itself sufficient reason to extend the time. I have seen an extension granted where, for documented medical reasons, there was a short delay beyond the three months in submitting the complaint, but the circumstances must be exceptional.

Initial assessment

Assuming that the complaint is in time, Part 2 of the rules requires an initial assessment by the relevant President or the delegated REJ. The first point to consider is whether an allegation of misconduct has been made.

What is misconduct?

Consideration of the [*Guide to Judicial Conduct*](#) (revised in 2016) is relevant when considering what is meant by misconduct. Chapter 5, headed Propriety, contains helpful guidance. It is intended to offer assistance to judges rather than to prescribe a detailed code, but it is a helpful reference when considering allegations of misconduct. It includes these statements:

‘A judge, like any other citizen, is entitled to freedom of expression, belief, association of assembly, but in exercising such rights, a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary.

A judge will not allow the judge’s family, social or other relationship improperly to influence the judge’s judicial conduct and judgment as a judge.’

In contrast to the position in tribunals, complaints of judicial misconduct arising in the Courts are dealt with initially by the Judicial Conduct Investigations Office (JCIO).

Individuals considering making a complaint will often look online for guidance before pursuing their complaint and the [*JCIO website*](#) does provide helpful guidance. There is a section on that website headed ‘What Can I Complain About?’ which makes the point that it is not possible to provide a definitive list of what is or what is not personal misconduct but provides some examples of what can and cannot be investigated. These examples apply equally to complaints of misconduct in tribunals.

Under the heading ‘We Can Investigate’ is listed:

- Racist, sexist or offensive language
- Falling asleep in court
- General rudeness
- Misusing judicial status for personal gain or advantage
- Criminal convictions
- Failure to declare a potential conflict of interest

And under the heading ‘We Cannot Investigate’ is:

- A judgment, verdict or order
- Sentencing decisions
- What evidence should be, or has been considered
- The award of costs and damages
- Whose attendance is required at court
- Who should be allowed to participate in a hearing
- Recusal – whether a particular judge should preside over a case or hearing
- Allegations of criminal activity, for example perverting the course of justice

Consideration of the Guide to Judicial Conduct (revised in 2016) is relevant when considering what is meant by misconduct.

Rule 34 provides that a complaint must be dismissed if it falls into any of the following categories:

- a. it does not adequately particularise the matter complained of;
- b. it is about a judicial decision or a judicial case management, and raises no question of misconduct;
- c. the action complained of was not done or caused to be done by a tribunal member;
- d. it is vexatious;
- e. it is without substance;
- f. even if true, it would not require any disciplinary action to be taken;
- g. it is untrue, mistaken or misconceived;
- h. it raises a matter which is already being dealt with whether under the rules or otherwise does not present any material new evidence;
- i. it is about a person who is no longer a tribunal member;
- j. it is about the private life of a tribunal member and cannot reasonably be considered to affect their suitability to hold judicial office;
- k. it is about professional conduct in a non-judicial capacity of a tribunal member and could not reasonably be considered to affect their suitability to hold judicial office;
- l. for any other reason it does not relate to misconduct by a tribunal member.

Where a complaint has not been adequately particularised, a complainant must be given a reasonable opportunity to provide adequate details of the complaint and if they still fail to do so it will be dismissed. Many complaints of judicial misconduct are disposed of at this stage, because they lack particularity or are about a judicial decision or case management, and not about issues which could constitute misconduct.

Sources of independent evidence

There is an obligation in Rule 36 where 'if any account of facts given by a complainant differs from the account given by the tribunal member concerned' consideration should be made of any source of independent evidence which exists and which may help to verify the facts in dispute. Where an Employment Judge has been sitting with members, in assessing the complaint it may be necessary to have comments from the members on the specific allegations made. Similarly, it may be appropriate to obtain comments from anyone else present in the hearing, including representatives.

...the vast majority of the complaints tend to be about judicial decisions or judicial case management.

What is not misconduct?

In my experience, the vast majority of the complaints tend to be about judicial decisions or judicial case management, which Rule 34 makes clear is not judicial misconduct. Complainants are inevitably unfamiliar with tribunal proceedings and legal processes and robust case management, which they may well view as oppressive.

However, on occasion, a judge may cross the line between robustness and rudeness. Telling a party to "Shut up" is clearly rudeness, as opposed to saying "I am not going to allow you to say anything further about that because it is irrelevant to the claims and issues in this case".

Many complaints are allegations that could be perceived as rudeness. For example, "the judge would not let me explain my case" or "the judge told me that what I wanted to say was not relevant". These invariably fall within the ambit of case management.

Falling asleep

Very rarely, an allegation of misconduct will be that a tribunal member fell asleep in the course of a hearing. It might be that tribunal member had a medical condition which resulted in giving the appearance of being asleep when in fact they were alert and engaged with the proceedings. From the point of view of the parties at any hearing, in those circumstances it is understandable that they would feel that they had not had a fair hearing and that the tribunal member in question was neglecting their legal duties.

If a tribunal member has a medical condition which might result in the impression being given that they are not alert to and engaged in proceedings they should tell their colleagues at the outset of the hearing so that the circumstances can be explained to the parties.

Deferring an investigation

On occasion, an investigation may be deferred if the complaint relates to a judgment that has been appealed. An example of this is where one of the grounds of appeal is that the judge exhibited bias during the hearing, and the complainant has already raised various complaints about the judge's alleged behaviour at the hearing. In those circumstances, it is invariably inappropriate to conclude any investigation of the complaint of judicial misconduct until the appeal has been determined.

When a complaint goes further

What happens where a complaint is not dismissed under Rule 34? In those circumstances the relevant President (or the delegated REJ) must consider the complaint, determine the facts of the case, determine whether the facts amounted to misconduct and advise whether disciplinary action should be taken and, if so, what (Rule 51). Any question of whether a fact is established must be decided on the balance of probabilities (Rule 52).

Following that further consideration, the complaint may be dismissed. Alternatively, it may be dealt with informally (where it may be directed that it be considered as a pastoral or training matter) or there may be a recommendation that disciplinary action should be taken. If a complaint is sufficiently serious or complex that a detailed investigation is required to establish the facts of the complaint, it will be referred to an investigating judge. They must then decide how to conduct that investigation, notifying the judge or tribunal member concerned of the proposals for the conduct of the investigation including whether oral evidence will be taken. The investigating judge will then prepare a report which, after comment from the judge or tribunal member, is submitted to the Lord Chancellor and the Lord Chief Justice.

In certain circumstances, the investigation process can involve a disciplinary panel. Complaints may be referred to a disciplinary panel by the JCIO, by the Lord Chancellor or Lord Chief Justice or by the Judicial Appointments and Conduct Ombudsman if, on the review of an investigation, they consider the allegations made should be referred to a disciplinary panel. Where a disciplinary panel is convened, it must be chaired by a judicial officer holder that is senior to the judge or tribunal member concerned and that person will sit with lay members appointed to sit on disciplinary panels with knowledge of the jurisdiction concerned.

Complaints are investigated objectively, sensitively and carefully...

The role of the Ombudsman

What happens if a complainant is unhappy at the rejection of their complaint? In those circumstances, if they feel that the complaint has not been handled properly, they can complain to the Judicial Appointment and Conduct Ombudsman. The Ombudsman has no power to investigate the original complaint – only to consider a complaint about the handling of the complaint.

Final remarks

I reinforce the point that the majority of complaints are about judicial decisions or judicial case management. Some litigants are surprised to learn that a judge will exercise firmness in the course of case management (for example when identifying the claims and issues) or in the conduct of a hearing (for example when keeping parties to time and keeping questions relevant to the issues for determination). This is usually just because they are unfamiliar with legal proceedings. They can perceive this approach by a judge as oppressive. Mostly, their perception is wrong. On rare occasions, however, complaints about excessive robustness in case management or rudeness may be directed against the same judge by unconnected complainants – and reveal a concerning pattern.

That is not to say the judge is necessarily guilty of misconduct, but it may be that they lack awareness as to how they present to other people. Such a complaint may appropriately be dealt with by the giving of informal advice to the judge by their Chamber President, inviting them to reflect on how they present to the parties before them and what steps they might take to communicate more empathetically in hearings. That could involve their President or immediate leadership judge observing them in a hearing and providing constructive feedback.

Dealing with human sensitivities and concerns is never going to be easy. In my experience, great care is taken in the investigation of complaints of judicial misconduct in the Employment Tribunal. Complaints are investigated objectively, sensitively and carefully, and the judge or tribunal member under investigation, and the complainant, are all kept fully informed throughout the process.

Richard Byrne is a Regional Employment Judge (South East Region)

[Back to contents](#)

Making Communication Work

TIPS FROM AN INTERMEDIARY

By Naomi Mason



Intermediaries have the first active new role at trial for hundreds of years. Since 2004 they have been working with witnesses in police interviews and criminal courts, and more recently with defendants and in the family courts. Yet it is likely you have not yet heard of them.

So, who are these intermediaries and what can they offer?

An intermediary is a highly-skilled communication specialist who is commissioned by the court to facilitate communication with a vulnerable person. That person may have a learning disability, a mental health condition, a brain injury or a progressive illness (e.g. Parkinsons), or they may simply be vulnerable because of being young. Whatever the reason, they will have difficulties accessing and participating in a system which relies on tradition and on a great deal of complex spoken and written language.

Intermediaries come from a range of professional disciplines. Many of them are qualified and experienced Speech and Language Therapists, who have carried out additional training for the intermediary role. Others are from a psychology background. Those working as an intermediary with young children may be experienced teachers. What they all have in common is specialist knowledge of assessing someone's communication strengths and difficulties and a common sense and pragmatic approach to how a vulnerable person can best be assisted to understand and express themselves in court.

Intermediaries assist the justice system at all levels by advising and working with police officers, lawyers, judges, magistrates, Witness Service supporters and court personnel, in order to maximise communication effectiveness. They may, for example, help police officers plan how to ask questions at interview, or suggest ways in which the environment for questioning is adapted to minimise anxiety so that the person can give their best evidence.

Their role, if and when the vulnerable person gives evidence, is simply this: to ensure that they understand the questions asked, are able to give the answer they wish to give, and that the key players in court understand the answers given. However, the role may be much broader when working with defendants in criminal trials, or with parents in family courts. In addition to assistance at the time of giving evidence, these vulnerable people may also need help to understand the whole of the case, to instruct their legal team, to understand their right to give evidence or not and their right to change their plea.

An important concept to grasp is that an intermediary is not on anyone's side, but an impartial officer of the court, with the sole job of facilitating communication between all parties.

As mentioned above, intermediaries work principally in the fields of crime and family. What about tribunals? Currently, there is doubt over the powers of judges in tribunals to appoint intermediaries and doubt over the funding mechanism that would be available if they wished to do so. It may be that recent case law on the power of judges in tribunals to appoint Litigation Friends has a bearing on this important question: see the EAT's judgment in *Jhuti v Royal Mail Group* (EAT/0061/17), which concerns the Employment Tribunal, and the Court of Appeal's judgment *AM (Afghanistan) v Secretary of State for the Home Department* [2017] EWCA Civ 1123, which concerns the Immigration and Asylum Chamber. If there is an implied power to appoint a Litigation Friend in order to ensure a fair hearing, why not an intermediary? And if it includes an intermediary, could HMCTS be persuaded to pay? Some guidance on this would no doubt be welcomed by judges as well as parties.

...an intermediary is not on anyone's side, but an impartial officer of the court, with the sole job of facilitating communication between all parties.

Until such guidance is provided, judges in the various tribunals are rather left to their own devices to make sure that complex concepts are understood by vulnerable litigants in person. In the Employment Tribunal and the Tax Chamber, for example, claimants/appellants may be on the autistic spectrum but high functioning. In contrast, in the Social Entitlement Chamber, when dealing with Social Security and Child Support appeals, a range of more complex needs may be in play.

In the absence of an intermediary, a tribunal judge has the difficult challenge of working out how best to explain matters to someone who might have a range of communication difficulties, and seek their view. Difficulty with understanding (known as 'receptive language') is a hidden disability which is often masked by a person's ability to understand and chat competently about a range of topics in their everyday experience, for which they may know the vocabulary and set phrases which are used.

How and why is understanding language so complex?

Many people with disabilities might find it difficult to concentrate for longer than a few minutes at a time, particularly in an unfamiliar environment where they are tempted to look around and be distracted by the novelty of a room they have not been in before. Someone with an Autistic Spectrum Condition may be hypersensitive to noise, and therefore find the buzz of the electric lights or the rustling of paper excruciatingly painful to their ears, in a similar way to how some people respond to fingernails scraping down a blackboard.

Then there is the jargon/vocabulary used. A person with a learning disability may know the meanings of substantially fewer words than someone who has no learning disability and who has been exposed to much wider life experience. Words such as 'vehicle', 'accommodation' and 'assist' may mean nothing to them, but using everyday words such as 'car', 'house' and 'help' may give them a better chance of participating. This is before we even get to phrases such as 'reasonable adjustments', 'range of reasonable responses' and 'burden of proof'.

There is also the issue of how much language any person can take in at once. If you have ever asked directions to somewhere you will know exactly how frustrating it feels to be overloaded! Using short sentences or questions and giving ample time for the vulnerable person to process what you have said before expecting them to reply is the best way forward. Judges under considerable time pressure might find this very difficult, but it is worth the effort.

People with limited understanding of language may struggle to understand turns of phrase or figurative speech. Anyone who has learned a foreign language will know that some expressions, if understood literally, may cause considerable misunderstanding. For example, in Spanish, 'esta como una cabra' means literally 'he is like a goat', although in everyday language it means 'to be a little bit different'. In French, 'il a un poil dans la main' means literally 'he has a hair in his hand' but is used non-literally to mean that a person is lazy. In English, idioms such as 'hit the nail on the head', 'feeling under the weather' and 'it is important we don't cut corners' may well be problematic.

Mental health conditions bring with them a plethora of potential communication difficulties. It is so difficult to concentrate when being distracted by hearing voices or seeing things in the room that other people cannot see. Anxiety and depression will not only affect attention span but may also impact on the person's desire to communicate and their ability to use the communication skills they have to the best of their ability. Moreover, any feelings of paranoia may be exacerbated by being questioned by someone who is writing down everything you say.

We may think we can get around this by asking the person if they have understood – but they may not realise they have misunderstood and, even if they do realise, they may not want to tell you. Also, they may feel there is a stigma attached to not understanding – and let's face it, we all sometimes pretend we have understood in the hope that in time we will get more information that might make it clearer.

...feelings of paranoia may be exacerbated by being questioned by someone who is writing down everything you say.

Expressive communication difficulties may also complicate matters, with the person having very simple sentence structures, unclear speech, or perhaps a stammer which is intensified by the tribunal setting. Judges may not be experienced in facilitating clear and coherent evidence from people with these difficulties. An experienced intermediary may be able to assist in the evidence being clear, coherent and accurate and also save time.

Appellants or claimants may be required to read and understand complex written information in advance, remember the content, and then navigate around documents during the hearing. Putting myself in their shoes (so to speak), I would find it difficult and exhausting to navigate a complex document that is in small print and contains jargon. How much worse must it be for the person with limited literacy?

For best practice, the simpler we can make our communication, the better.

A few top tips

- Allow the person time to settle into and look around the room before commencing.
- Take a hard look at your introduction, and endeavour to write a version that is as brief and as simple as possible. This will prevent you setting off on the wrong foot at the outset.
- Use short simple sentences and questions. Avoid preambles such as "in your recollection" and "bearing in mind the account already given by X".
- Speak slowly, pausing between sentences. This may take more time but will avoid having to repeat yourself to enable understanding.
- Use simple everyday words. Avoid jargon.
- Check understanding – not by asking "do you understand" but by asking "what did you understand?"
- Give time for the person to respond. Don't worry about long pauses – they may not have finished but be thinking how to formulate the next sentence.
- Listen with all your senses. Hear the words spoken, but look for signs of anxiety/distress. A person who is in a state of emotional arousal will not be able to take in information.

Vulnerable people and the duty of fairness

THE OVERRIDING OBJECTIVE

By David Bleiman



In a recent Court of Appeal case brought by a young asylum-seeker from Afghanistan, Sir Ernest Ryder, Senior President of Tribunals (SPT), gives a leading judgment which provides a salutary reminder of the approach which should be adopted to ensure the effective access to justice by incapacitated and vulnerable individuals and how such a person might be heard.

AM (Afghanistan) v Secretary of State for the Home Department, [2017] EWCA Civ 1123, was the case of an asylum-seeker born in Afghanistan who arrived in the UK in 2013. He claimed asylum on grounds of a well-founded fear of persecution by both the Taliban and the Afghan police. He was claimed to have mental health and psychological difficulties. His appeals against the refusal of asylum to the First-tier Tribunal (FtT) and then the Upper Tribunal (UT) were both rejected, despite two reports, one psychological and the other relating to the objective conditions in Afghanistan.

Since it became clear that the tribunals had not taken account of these reports, the appellant and the Secretary of State both appealed to the Court of Appeal for guidance on the grounds that the tribunals did not properly consider the impact of the appellant's age, vulnerability and learning disability. They jointly asked what steps should be taken to ensure a fair hearing in these circumstances.

Giving the leading judgment, the SPT criticises the tribunals for ignoring the strong advice of the psychologist regarding ground rules to be adopted in relation to court procedure and the appellant's access to justice. He concludes that the tribunals had displayed:

'...a failure of the system to provide sufficient and adequate protection [for] a highly vulnerable child. There is a consensus that the critical errors arose from the focus on the credibility of the appellant's account and the failure to properly have regard to the objective evidence and to give it priority over the ability of the appellant to provide oral testimony.'

...the judgment [is] of much broader relevance to access to justice across all the jurisdictions.

He endorses what was a consensus of the parties that:

'...procedural fairness would have been provided had the tribunals had regard to the Rules, Practice Directions and Guidance that already exist and if careful consideration had been given to the same at an early stage in the process and certainly at the outset of the hearing to determine whether or not oral evidence was necessary and appropriate in this case. That would have focused attention on the key issues in the case, the objective evidence in particular from the two experts and its significance for the fair and proper determination of the appeal. Critically, the appellant's age, vulnerability and learning disability could have been recognised and taken into account as factors relevant to the limitations in his oral testimony. Likewise, the tribunals' procedures could have been designed to ensure that the appellant's needs (including his wishes and feelings) as a component of his welfare were considered to ensure that he was able to effectively participate.'

He comes to:

'...the firm view that the UT Judge took no sufficient steps to ensure that the appellant had obtained effective access to justice and in particular that his voice could be heard in proceedings that concerned him. Procedurally, the proceedings were neither fair nor just. That was a material error of law. The appellant was a vulnerable party with needs that were not addressed. In my judgment the overriding objective in rule 2 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 ['the FtT Rules'] and in rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008 ['the UT Rules'] was ignored and ... there was a fundamental procedural unfairness sufficient for this court to intervene.'

Much of the judgment focuses on the core principles of asylum law and practice. However, it is (with some reservations discussed towards the end of this article) of much broader relevance to access to justice across all the jurisdictions. This case note will confine itself to these wider ramifications.

Tribunal Rules and the overriding objective

A leading theme of the judgment is the flexibility available, within the *First-tier Tribunal Rules*, to provide procedural fairness to a vulnerable party. This includes a broad power to admit evidence that would not be admissible in a civil trial. In the case of *AM*, for example, a number of options had been outlined by the psychologist, including the preparation of a witness statement in preference to giving evidence by answering questions in court. Consideration should have been given at an early stage in the process and certainly at the outset of the hearing to determine whether or not oral evidence was necessary and appropriate in this case. This was in the context that there was other evidence available, in particular objective evidence from the two experts.

Rule 4 gives the FtT powers to regulate its own procedure. Rule 10(1) allows a party to be represented by any person not prohibited from representing. Rule 14 gives wide-ranging powers on the evidence which may be admitted and the manner in which it may be provided.

All of these Rules are to be read in the light of the 'overriding objective' set out in Rule 2.

An overriding objective 'to deal with cases fairly and justly' was introduced into Tribunal Procedure Rules (TPR) by the *Tribunals Courts and Enforcement Act 2007*. The task of framing the Rules for the Tribunals within the new Chambers was undertaken by the Tribunal Procedure Committee (TPC).¹ The new Rules retained some variations according to the needs of the jurisdictions but the *overriding objective* was the common core of the rules. This approach was already familiar in the civil courts where, in April 1999, an overriding objective 'enabling the court to deal with cases justly' was introduced in the *Civil Procedure Rules 1998*.

The overriding objective: Rule 2 of First-tier Tribunal Rules

1. The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
2. Dealing with a case fairly and justly includes –
 - a. dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal;
 - b. avoiding unnecessary formality and seeking flexibility in the proceedings;
 - c. ensuring, so far as is practicable, that the parties are able to participate fully in the proceedings;
 - d. using any special expertise of the Tribunal effectively; and
 - e. avoiding delay, so far as is compatible with proper consideration of the issues.
3. The Tribunal must seek to give effect to the overriding objective when it –
 - a. exercises any power under these Rules; or
 - b. interprets any rule or practice direction.
4. Parties must –
 - a. help the Tribunal to further the overriding objective; and
 - b. co-operate with the Tribunal generally.

The SPT concludes that:

'...it is accordingly beyond argument that the tribunal and the parties are required so far as is practicable to ensure that an appellant is able to participate fully in the proceedings and that there is a flexibility and a wide range of specialist expertise which the tribunal can utilise to deal with a case fairly and justly.'

Guidance materials

To assist parties and tribunals a Practice Direction, *First-tier and Upper Tribunal Child, Vulnerable Adult and Sensitive Witnesses*, was issued by the then Senior President, Sir Robert Carnwath, with the agreement of the Lord Chancellor on 30 October 2008. In addition, in the immigration and asylum jurisdiction, joint *Presidential Guidance Note No 2 of 2010* was issued by the then President of Upper Tribunal (Immigration and Asylum Chamber), Blake J and the acting President of the FtT (Immigration and Asylum Chamber), Judge Arfon-Jones.

The SPT holds that the directions and guidance contained in them are to be followed, saying that failure to follow them will most likely be a material error of law.

He refers also to further guidance to which reference can be made, including guidance relevant to child asylum claims and, of wider relevance, the *Equal Treatment Benchbook* issued by the Judicial College. That important resource has recently been thoroughly updated and revised.

¹ Nick Warren described the approach of the TPC in *Ambitious Route*, *Tribunals*, Summer 2009.

A litigation friend?

The SPT goes on to conclude that, notwithstanding the lack of provision within the tribunal rules for the provision of a litigation friend, there is the power to do so:

‘I have come to the conclusion that there is ample flexibility in the tribunal rules to permit a tribunal to appoint a litigation friend in the rare circumstance that the child or incapacitated adult would not be able to represent him/herself and obtain effective access to justice without such a step being taken. In the alternative, even if the tribunal rules are not broad enough to confer that power, the overriding objective in the context of natural justice requires the same conclusion to be reached.’

The wide implications of this reasoning, including for a party to party jurisdiction such as employment, are highlighted in the significant supportive judgment of Underhill LJ. The former Employment Appeals Tribunal (EAT) President, agreeing with the SPT’s conclusion that the FtT has power to appoint a litigation friend, goes on to express the strong provisional view that the employment tribunal also has such a power and that his earlier obiter remarks to the contrary in an EAT judgment in *Johnson v Edwardian International Hotels Ltd*. UKEAT/0588/07 were wrong:

‘As at present advised, I can see no reason why the reasons given by the Senior President for his conclusions on this point in the present case should not apply equally in the case of an employment tribunal.’

This provisional conclusion has since been confirmed by the President of the EAT, Mrs Justice Simler, in the case of *Jhuti v Royal Mail Group Ltd*. EAT, 31.7.17 (0061/17).

As in the case of *AM (Afghanistan)* the judgment’s focus is on the imperative requirement to ensure the full participation of a vulnerable individual in tribunal proceedings:

‘...[Employment Tribunal] Rule 29 is to be interpreted in accordance with the overriding objective as the 2013 Rules make clear. That includes dealing with a case fairly and justly and so far as practicable ensuring that the parties are on an equal footing. To continue with a hearing with an unrepresented litigant who lacks mental capacity to conduct litigation is tantamount to continuing with the hearing in that party’s absence and flies in the face of a Rule designed to ensure so far as practicable that parties are on an equal footing.’

There are two important caveats of practical importance to tribunal judges and members which must be highlighted.

What next?

The SPT, in his leading judgment in *AM (Afghanistan)* resists the request to provide a comprehensive checklist of issues to be considered in relation to vulnerable parties, for the guidance of judges and practitioners. Rather he has referred the matter to the Tribunals Procedure Committee to consider the judgment and the issues arising.

This might be expected to include how issues of capacity are to be dealt with as well as the appointment and conduct of litigation friends. Indeed, Underhill LJ expresses the hope that this aspect in particular be considered *as a matter of urgency*. The powers of litigation friends ought, he says, to be *clearly defined and regulated* as they are by Rule 21 in cases that come under the Civil Procedure Rules.

The 2008 Practice Direction concerning child and vulnerable adult witnesses may well then require revision.

The SPT touches upon the related topic of the use of intermediaries who may provide informal facilitation by assisting with communication with a vulnerable person. He notes that:

‘In a rare case where an intermediary is necessary, a direction can be made for their involvement. Care should be taken to ensure they are appropriately used and only for the parts of a hearing where they are necessary.’

There are two important caveats of practical importance to tribunal judges and members which must be highlighted.

Firstly, there is undoubtedly a diversity of experience and current practice across the jurisdictions. For example, mental health tribunals are familiar, as a matter of course, with empowering the patients who appear before them and facilitating their full role in their hearings. *AM (Afghanistan)* is likely to be more challenging for those tribunals who hear from parties whose vulnerability, where present, may be less easily recognised. Or it may be difficult to establish what is necessary to ensure that a person, who may be capable of participating in proceedings, can participate *fully* and what measures are indeed *practicable* (using the language of the overriding objective).

The issue of practicability highlights the second caveat. The measures which a tribunal may consider necessary to provide for access to justice for a vulnerable person may well require to be funded. The tribunal does not hold the cheque book but must rely on HMCTS to deliver. That should not be a problem in principle since the state must fund such measures, where directed as necessary to deal with a case fairly and justly. In practice, however, it will be helpful to have greater transparency about the funding arrangements and clarity about how tribunals may best access such support when required.

Having such provisions in the public domain would also assist parties and representatives when preparing their case and any relevant submissions as regards measures considered necessary to protect welfare or to make for effective access to justice. In the meantime, in a case where it appears that bespoke directions may be necessary and where there is a need to line up provisions and funding ahead of the substantive hearing, it may be advisable to hold a case management review hearing to avoid the twin risks of injustice or adjournment.

Further good practice guidance is thus anticipated which will assist all tribunals with the practical challenges of ensuring fairness and justice for the most vulnerable people who appear before us. In the meantime, the Court of Appeal's judgment in *AM (Afghanistan)* is recommended reading and is, of course, binding.

David Bleiman is a lay member of the Employment Appeal Tribunal.

[Back to contents](#)

Delegation: from the desktop

REGISTRARS AND CASE WORKERS

By Various authors

Despite the hype surrounding delegation of judicial functions as a concept at the moment, it is not new. There is already a range of individuals and groups of officers across the courts and tribunals who have been exercising delegated judicial functions in one form or another over many years.

In Tax and the Upper Tribunal Administrative Appeals Chamber, registrars have been working quietly to support the judiciary; in Health Education and Social Care and Social Entitlement Chamber, registrars have existed since 2011 and in Immigration and Asylum Chamber, Mental Health and Social Entitlement Chamber, Tribunals Case Workers (TCWs) are a new innovation, who have already proved their worth undertaking a breadth of different delegated judicial functions. What better way to find out what the delegation entails than to ask them to describe their own positions and aspirations?

Social Security and Child Support (SSCS) Tribunal Caseworker



The role of Tribunal Caseworker was introduced in the Social Entitlement Chamber in April 2016 to build on the successful delegation of judicial functions already in use in some Tribunals through Registrars. The overall aim of the role is to provide support to the judiciary and to increase capacity for the effective and fair administration of justice.

A Tribunal Caseworker may make all decisions that a judge assigned to the SSCS jurisdiction may make under the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008, save for those which are substantive final decisions. As with Registrars, any decision made by a Tribunal Caseworker can be challenged and a party can apply for the decision to be considered afresh by a judge.

In practice, as a Tribunal Caseworker, I exercise judicial discretion to complete mostly pre-hearing and case management work. I am supported by and co-located with a Judicial Mentor, who provides ongoing training and support. Although there is no specific funding for Tribunal Caseworkers to attend Judicial Office Holder training, I have been able to attend some events, which has been useful for learning and building relationships with Judicial Office Holders.

An example of the type of work I complete is considering applications from parties. This includes applications such as postponements of hearings, extensions of time, withdrawals and reinstatements. My role also involves assessing how best to progress appeals that for some reason are not able to proceed. For example, it may be that an Appellant has not complied in some way with the rules for appealing. Another part of my role is preparing chronologies and conducting legal research.

I previously completed an HMCTS Legal Scholarship and the Tribunal Caseworker role is my first experience of a legal role. I will soon be starting a HMCTS Training Contract and my Tribunal Caseworker duties will form part of the training programme. It is expected that I will also complete wider activities to increase the complexity of my work throughout the training. The training will also include spending time in the magistrates' and Family Courts. I believe this is the first time a HMCTS Training Contract has included training in SSCS. This experience will help to develop an alternative career structure for lawyers within HMCTS outside of the traditional Magistrates' Legal Adviser route.

A Tribunal Caseworker may make all decisions that a judge assigned to the SSCS jurisdiction may make [...] save for those which are substantive final decisions.

The Employment Appeal Tribunal

The Employment Appeal Tribunal (EAT) deals mostly with appeals from decisions of Employment Tribunals (ETs). The ETs and the EAT have been the responsibility of the Department of Employment, then the Department of Trade and Industry, and became part of the Ministry of Justice in 2006.

The role of the Registrar is judicial and was established in the Employment Tribunals Act 1996.

Until now, the member of staff filling the role of the Registrar has also been the senior member of the administrative staff at the EAT, although the two roles will be separated after the recent retirement of the Registrar.

Only two Registrars have not been legally qualified, Veronica Selio OBE, who retired in 2001 and the recently retired Julia Johnson.

The role of Registrar is the pivotal point in the EAT between the judiciary and the administration. The Registrar makes day-to-day judicial case management decisions, above the level which can be delegated to case managers, for example:

- The EAT operates a strict policy on time limits, particularly to lodge an appeal, and an appellant who lodges their appeal late must make an application for an extension of time. They must make a full, honest and acceptable explanation for the delay, and show that there are exceptional circumstances. The Registrar decides that application and make an order with reasons, referring to the relevant authorities.
- Although parties are consulted before fixing a date for most hearings, inevitably the EAT sometimes get applications for a hearing to be postponed, which are usually opposed by the other parties. The Registrar decides whether to allow the postponement.
- In order to limit the volume of documents which parties lodge for hearings, the EAT has a standard list of the documents which should be included, and requires parties to make an application, decided by the Registrar, if they want to add more than 50 extra pages.
- If a party wants to introduce on appeal, new evidence which was not before the Employment Tribunal, the Registrar decides their application, using the Ladd & Marshall principles.
- If parties disagree on what evidence was given in the Employment Tribunal, they make an application, which is decided by the Registrar, for the Employment Judge to provide their contemporaneous notes.

The role of Registrar is the pivotal point in the EAT between the judiciary and the administration.

The Registrar's judicial decisions may be appealed to a judge at the EAT (and thence onwards to the Court of Appeal).

The Registrar deals with all aspects of liaison with the judiciary, such as:

- chasing judges who take longer than usual to produce judgments;
- arranging recruitment of judges and lay members;
- telling judges that they can't have the chambers they want because another judge already has them;
- arranging the annual judicial training day, and
- making the EAT President aware of things that might need her attention.

General Regulatory Chamber



Rebecca is the only Registrar for the First-tier Tribunal General Regulatory Chamber (GRC). Her role is a cross between HMCTS administration and judicial decision making which is not subject to 'HMCTS management'; she uses a combination of these aspects to enable parties to participate in the appeals process.

Charity and Estate Agents jurisdictions still have a Principal Judge and therefore her involvement in those areas is very limited. She is involved in all the other seemingly disparate subjects for which the GRC has jurisdiction.

Rebecca is based in Leicester at the administrative office; the Chamber President, Peter Lane, is in London; as he is now a High Court Judge and the Chamber President of the Upper Tribunal (Immigration and Asylum Chamber), Principal Judge (GRC) Alison McKenna has been delegated the powers of the Chamber President; her office is in Winchester. The Chamber President's PA is in Liverpool. Despite the different locations they are a strong-knit team, working together through use of telephone, email, occasional visits to each other and, as Peter said in the Summer 2017 issue of this magazine, a dose of good humour.

In 2013, the Senior President of Tribunals delegated functions to legally qualified staff in the GRC: most of the case management powers in Rule 5 (including holding Case Management Hearings), strike outs for no jurisdiction (Rule 8), adding parties (Rule 9), closing material (Rule 14), giving directions in relation to evidence and submissions (Rule 15), issuing summonses (Rule 16), withdrawals (Rule 17) and the Rule 40 slip rule.

The judicial side of Rebecca's role sees her making over 1000 delegated judicial decisions each year; only around 5% are challenged under rule 4 and in only a small number of such cases is her decision disturbed by a judge – often because the judge is given information which was not given to Rebecca.

The administrative side of Rebecca's role sees her working with administrative managers on processes and procedures that the admin team can use to progress appeals without judicial case management. Part of Rebecca's role was to see how a portfolio of differing subjects could be placed onto a similar track for dealing with an appeal. The way to achieve this was to have a rule-driven process as all the subjects coming to us are dealt with according to the GRC Rules; Rebecca drafted letters and guides to enable appeals to follow the GRC Rules from receipt to disposal, this enables some appeals to be dealt with without any judicial case management.

Rebecca's judicial and administrative roles converge when considering issues such as listing, where she has been a key figure in promoting the use of video-link for hearings, which has enabled more appellants (particularly driving instructors) to participate in their hearing. Rebecca was also a key figure in conceiving and developing the GRC's mixed listing initiative, enabling judges to be used more flexibly and therefore efficiently.

One of the challenges in the GRC is dealing with 'closed material' in information rights appeals. The administrative side is straight forward: the administrative team send all requests to Rebecca (whether an emailed application or a closed bundle is received). The legal side can be more challenging – whilst it is pretty obvious that the information a person has requested must be kept from them (!), careful consideration is needed about whether witness evidence and submissions can properly be closed. One of the skills is working out whether to ask parties to justify closure or whether in a particular appeal it is better to make a decision, which may include removing items from a closed bundle, and inform parties what has been decided.

Case Management Hearings (CMH) are not often needed in the GRC as most matters can be dealt with under the standard process of letters and written directions; occasionally a complex or multi-day appeal does need a CMH. If conducted over the telephone, Rebecca uses a local courtroom and puts the phone on speaker to allow access to justice; often it is feasible and appropriate to have parties attend a CMH, particularly when there is the possibility of moving the case further forward when parties are present at the same venue.

Rebecca's role has enabled the GRC Judges to concentrate on substantive hearings rather than deal with minor interlocutory issues. The Chamber President and the Senior President of Tribunals were so pleased with the way the GRC Registrar role has developed that at the end of September 2017 further functions were delegated to legally qualified staff and Rebecca is now able to do all types of strike outs, end cases on terms of consent and suspend the effect of the Regulator's decision for appeals where the primary legislation does not automatically suspend the effect; alongside this the Senior President of Tribunals delegated certain functions to non-qualified staff. A Tribunal Caseworker has been working in the GRC since the beginning of 2018 which has enabled Rebecca's time to be used for more complex legal matters.

Rebecca says about her role:

"The nature of the GRC is such that in a single day I may be dealing with matters ranging from national security to whether a dog is, or is not, micro-chipped; this makes the role of Registrar to the GRC stand out as one of the most interesting of my career thus far."

Despite the different locations they are a strong-knit team, working together through use of telephone, email, occasional visits to each other and [...] a dose of good humour.

First-tier Tribunal Special Education Needs and Disability (SEND)

There are currently five Registrars working in SEND. All are qualified solicitors and undertake a dual role as Registrar and Legal Adviser in the Magistrates' Courts. Work is undertaken in the administrative office in Darlington as well as remotely from the Registrars' 'home court base'. The initial pilot ran for 12 months from June 2011 and involved two Registrars who shared the workload equally. Following introduction of the scheme as 'business as usual', the original two Registrars were supplemented by a further two personnel, an additional three being added later.

One of the original pilot assignments, Paul Pearson has been acting as a Registrar since 2011. He has an extensive background working as a legal adviser in magistrates' courts in Cleveland and Durham (38 years) and has specialised

in crime, family and licensing during that time. He has a son with special educational needs and agreed to take part in the pilot scheme following a request from his Justices' Clerk. He explained:

"I was somewhat concerned initially as I had no real experience in dealing with any Tribunal work or the specific nature of the jurisdiction. However, following a short period of training, I quickly embraced the challenge and found the new experience extremely interesting and fulfilling."

During the seven years of his appointment, Paul has expanded his role from dealing with interlocutory applications to proactive telephone case management and a number of telephone case management hearings. He deals with applications relating to disability discrimination claims and has dealt with case management of Care Standards cases.

In 2013, he was appointed as an Adjudicator in the Traffic Penalty Tribunal (part-time) which he attributes directly to his appointment as a Registrar:

"Acting as a Registrar in an alien jurisdiction demonstrated that I (and my colleagues) had an easily transferrable set of skills. I found there was a huge difference between providing legal advice to magistrates and being responsible for the decisions made. Acting as a Registrar gave me the confidence to apply for appointment as an Adjudicator. The skills I developed as a Registrar assisted my transition to adjudication and drafting detailed but brief reasons for decisions."

There are currently five Registrars working in SEND. All are qualified solicitors and undertake a dual role as Registrar and Legal Adviser in the Magistrates' Courts.

The second tranche of pilot registrars, Angela Davison and Lesley Moss were appointed as Registrars in 2013, following an expressions of interest invitation in performing the role. The role had expanded to the extent that additional Registrars were required to undertake extra work such as consideration of late appeals and pro-active case management calls. They applied to enhance their role within HMCTS and to develop their professional skills. Lesley has since been appointed Legal Team Manager for Cleveland and has surrendered her assignment as Registrar.

Angela said "I thought the challenge was daunting to begin with and was worried at getting to grips with the legislation". She relished the challenge, however, and quickly built the knowledge and gained the experience to deal confidently with the applications submitted. She believes the experience of working as a Registrar has greatly enhanced her professional skill set and is looking forward to further challenges in the future.

One of the main changes she has noticed since her appointment is the moved to digital working:

"...the change to digital working presented a challenge in itself. There were delays in being able to process requests. In addition, the ease of making a request meant there were far more interlocutory applications, which in turn created an additional burden on limited resources."

Nevertheless, Angela believes that the whole tribunal has risen to the challenges presented by digitalisation and relishes her current dual role within HMCTS.

The Upper Tribunal (Administrative Appeals Chamber)



Orla Davey is employed as the Registrar to the Upper Tribunal Administrative Appeals Chamber in Scotland. This is an inquisitorial appellate tribunal which determines applications and appeals on points of law relating to Social Security, Child Support and War Pensions. Permission to appeal is required from the First-tier Tribunal Judge, or if refused or rejected, from the Upper Tribunal Judge.

The purpose of her role is to assist judges, both directly and indirectly, in the efficient and expeditious disposal of cases. Case management is judge-led, and the work of the Registrar is intended to save valuable judicial time. The principal duties are:

1. Legal advisory

Providing research and advice to judges on applications for permission or appeals, or at any other stage of an appeal.

This research can involve a specific point of law or procedure, such as researching previous decisions, investigating new legal provisions or an obscure point; checking the current law and identifying whether particular regulations apply.

A judge might also ask for more general advice, which involves studying the case papers such as the statement of reasons for decision and any grounds of appeal, and analysing the reasoning of the First-tier Tribunal in the light of the appropriate substantive and procedural law to identify any arguable errors of law.

2. Judicial Assistance

Assisting the judge may involve organising the file papers in complex cases, checking the chronology and/or chasing missing relevant documents and asking a party to clarify vague or obscure grounds of appeal.

3. Management of block cases

Blocks of cases occur where cases share the same issue; and that issue is due to be heard in a higher court or in a case pending in the Upper Tribunal. Each case has to be individually analysed on the facts, and the work involved includes identifying those cases which come within a block, giving directions, writing letters and dealing with queries from parties.

4. Interlocutory work and actions under delegated powers

Dealing with interlocutory issues. The power enabling delegation to staff is contained in Rule 4(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008. Typically, the work includes dealing with requests for extensions of time for the sending of observations, issuing directions relating to submissions, dealing with requests for oral hearings and issuing directions in existing proceedings. A party can, within 14 days, request that the directions are reviewed by a judge. The Registrar also works closely with office staff, dealing with post-decision enquiries and complaints, and more general queries.

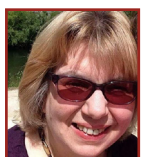
Orla qualified as a solicitor in England and Wales in 2009, and gained dual qualification enabling her to practice as a solicitor in Scotland in 2013. She was previously employed as a criminal defence solicitor, and moved to the Scottish Government to work in the Justice Directorate before taking up the post of Registrar.

[Back to contents](#)

Tribunal judges: international work

INTERNATIONAL

By Judith Gleeson



Tribunal judges have always played a very important role in both hosting international visitors, and travelling abroad to teach and speak on their fields of expertise. There has never been a more important time for United Kingdom judges to be seen across Europe and the wider world, demonstrating the excellence of our legal system, speaking about difficult areas of law and (through the Judicial College) providing world-class training support for judges in other jurisdictions.

However, the extent of the contribution that tribunals judges make to the high reputation abroad of the judiciary as a whole has been poorly understood or recognised.

Leadership on international activities

Following his appointment as Senior President of Tribunals, Lord Justice Ryder decided to raise the profile of the tribunals judiciary in international affairs and training. The tribunals judiciary were already represented on the European Committee of the Judges' Council. In April 2017, the Senior President of Tribunals decided to broaden the international representative role, and to delegate to me his responsibility for advising tribunals judges on the international dynamic involved with proposed travel, including coordinating international activities from a strategic point of view.

In the letter of appointment, the Senior President referred to the objectives of international judicial relations, approved by Lord Phillips when Lord Chief Justice, in consultation with the Judges' Council:

- To establish links with other judiciaries in the EU or member states of the Council of Europe, with a view to facilitating co-operation and understanding on matters of mutual interest
- To participate in the work of international associations or bodies of judges, and international conferences, so far as appropriate
- To have bilateral exchanges with the jurisdictions with whom the UK judiciary has or wishes to have close links
- To participate in such projects on law reform or judicial administration, whether in the UK, EU or elsewhere, or such projects for the promotion of English law, as the Lord Chief Justice thinks it appropriate to support
- To provide support for the judiciary in developing countries and other purposes authorised by the Lord Chief Justice.¹

¹ [International judicial relations](#)

During 2017 and 2018, overarching changes in international affairs governance resulted in the reshaping of international judicial leadership both across the judiciary, and at the Judicial College, under the leadership of the Chancellor of the High Court, Lord Justice Vos, who sits on the Judicial Executive Board and is supported by a small group of international leadership judges, chaired by Lord Justice Gross. The aim of the governance changes was to focus on using judicial resources strategically where they will best support what the Chancellor describes as 'UK PLC'.

During 2017, I joined the International Committee of the Judicial College, with the aim of better communication between the College's function of providing formal rule of law and other training internationally, and the Senior President's role in strategic planning and recording of tribunals judicial international activities. There is now an agreed common position that the activities of individual judges, and the College, form part of an overall matrix of judges travelling abroad and demonstrating the value of British justice, and receiving study visits from foreign judges, from which a great deal is learned on both sides.

Chamber Presidents reported a wealth of international activity which was not known outside the individual tribunals, including many informal visits by overseas judges to tribunals developing or arising out of long-standing connections. The International Office holds a list of languages spoken by judges, which is extremely useful for managing visits from judges who may not speak particularly good English but, on enquiry, it contained almost no information about the linguistic ability of tribunals judges. They now have a six-page list of tribunals judiciary who are competent or fluent in other languages, including French, German, Hindi, Malay, Punjabi, Romanian, Serbian/Croatian, Spanish, and Urdu.

Across the world, tribunals judges have spoken as invited guests at conferences in Albania, Canada, Croatia, the Czech Republic, Germany, Greece, Ireland, Italy, Poland, Portugal, Slovenia, Spain, Switzerland, and Tanzania on topics as varied as 'Computers and mobile phones – how judges get into trouble', the UN Convention on the Rights of Persons with Disabilities (access to justice and legal capacity), working abroad, case management and judgment writing, and international asylum and migration law. One tribunal judge volunteers at a Legal Resources Centre in Cape Town, South Africa, while others contribute to 'training the trainers' courses in Albania, the Isle of Man, Italy (for leadership judges), Latvia and Poland.

In 2016, the Employment Tribunals of England and Wales hosted a judicial exchange judge from the Arbeitsgericht Detmold, and the President of the Employment Tribunals in Scotland, Shona Simon, travelled to Brazil as an invited guest of the Brazilian government in October and November 2016, which was very successful. The President of the General Regulatory Chamber (as he then was), Mr Justice Lane, assisted with judicial training on data protection and privacy rights in Portugal.

The Employment Tribunals received incoming visits from (at least) the Spanish Supreme Court, the Colombian Employment Minister and Deputy Minister, and a delegation of German Labour Court Judges. The Upper Tribunal (Immigration and Asylum Chamber) received incoming judicial delegations from Spain, Germany, Holland, Italy and Lithuania. Other judicial study visits to tribunals were received from Bulgaria, Croatia, France, Germany, Kenya, Poland, Singapore, Slovakia, Spain, and the United States.

Officials of the Singapore government came on a study visit to the Employment Tribunals, to explore the United Kingdom's experience of flexible working legislation. A last-minute high-level visit from the Kenyan judiciary, organised on 3 weeks' notice, was prompted by Kenya's intention to introduce a Tribunals, Courts and Enforcement Act 2007 style revamp of their own tribunals system, and we were able to provide them with a useful overview of how that had been managed here, and what had been the benefits and challenges.

Working with other European judiciaries: the EJTN and the ENCJ

Many of the study visits made through the International Office are organised and funded by the European Judicial Training Network (EJTN), which arranged judicial exchanges for hundreds of judges, giving an insight into the practices and problems of another similar jurisdiction. The programmes are for judges and judicial trainers, aiming to develop mutual trust by allowing judges to get to know each other better, and work together. The programme is funded by the European Commission.

The United Kingdom hosts short term individual exchanges for judges and trainers from abroad (provided they speak English) and United Kingdom judges can apply to be considered for short term exchanges and longer study visits to other member countries. The [*call for applications for the Exchange Programme for 2018*](#) is currently open for bilateral exchanges between Courts of the European Union Member States, and study visits at the Court of Justice of the European Union, the European Court of Human Rights, Eurojust, the Hague Conference on Private International Law, and the European Union Agency for Fundamental Rights. Selection of participants is made by the EJTN's member organisations, in England and Wales through the Judicial College, and in Scotland, the Judicial Institute.

...the European Judicial Training Network (EJTN), [arrange] judicial exchanges for hundreds of judges, giving an insight into the practices and problems of another similar jurisdiction.

The European Network of Councils for the Judiciary (ENCJ), since 2008 is the representative body to the European institutions and Member States for Judicial Councils of the 28 EU Member States. Its stated aim is to reinforce an independent yet accountable judiciary and to promote best practice to enable the judiciary to deliver timely and effective justice for the benefit of all European citizens. The ENCJ also offers observer status to EU Candidate Member States and the Member States of the European Economic Area, allowing for a very broad overview of judicial issues and standards in Europe.

The ENCJ compiles projects and reports and public consultations on topics such as judicial independence, digital justice, minimum standards, funding of the judiciary, society and the media, judicial reform, public confidence. It also provides support for the independence, accountability and quality of judiciaries in Europe, including understanding of, and respect for, judicial independence; to promote access to justice across the EU in a digital age (measured in terms of efficiency, cost and timeliness); and to strengthen mutual trust among the judiciaries of Europe.

The ENCJ works in smaller groups on one or two projects each year, culminating in a General Assembly at which it adopts a Declaration, reflecting the work done during the year and recommendations to support EU justice and the rule of law.

- In 2015, the [*Hague Declaration*](#) on promoting effective justice systems recorded the importance of independent and accountable judiciaries in a high quality, effective and efficient justice system, which is considered to be a prerequisite for a well-functioning EU area of justice.
- In 2016, the ENCJ's [*Warsaw Declaration*](#) on the Future of Justice in Europe recognised the changes which the use of information and communication technology would bring to Europe's justice systems in the 21st century, including online dispute resolution and other technologies enabling justice to be delivered more effectively and quickly and at lower cost to European citizens. It noted the need to maintain and strengthen the accountability of the judiciary for the benefit of European citizens in order to ensure effective access to justice. The General Assembly recorded its increasing concern as to the transfer, suspension, removal and prosecution of judges in Turkey, which was not consistent with the principles of judicial independence, and also expressed concern about the developing situation in Poland.
- At the General Assembly in Paris in June 2017, the ENCJ adopted the [*Paris Declaration*](#) on Resilient Justice, following contributions from, among others, Lord Thomas, the Lord Chief Justice. The ENCJ stated that there was a strong need for resilient justice systems which could withstand external pressure, whilst at the same time having the ability to adjust to the changing needs of society. A survey among judges showed that generally, judges had confidence in their own independence and that of their colleagues, but that there was a perception that judicial independence was not adequately respected by other state institutions, or the media, and that in some countries, promotion and appointment was not based on capacity or experience. It was considered that Judicial Councils lacked appropriate mechanisms and procedure effectively to defend judicial independence. Appropriate structures of governance, a respect for the separation of powers, high quality performance by the judges and education and outreach to the media and the public were required: respect had to be earned, and was no longer a given.

International activities allow for a wider world view, and what is striking is the similarity of the challenges faced by judges, wherever they are.

The Paris Declaration was made against a background of continued deterioration in the rule of law in both Turkey (which had been suspended as an observer state at the end of 2016) and in Poland, since the elections in the autumn of 2016, the Polish Government has legislated in ways which were perceived as likely to damage the separation of powers and therefore, the rule of law.

The Paris Declaration called on the European institutions and Member States to guarantee judicial independence in accordance with the rule of law, and on judges and Councils for the Judiciary at all times to be resilient, in the face of the challenges before them.

Some conclusions

International activities allow for a wider world view, and what is striking is the similarity of the challenges faced by judges, wherever they are. As the ENCJ has recognised, the days of judicial authority being automatically respected are over. In eastern and southern Europe, where the pressures are strongest, the rule of law and the independence of the judiciary are under serious challenge.

The other feature of present judicial life is that judges are under external pressure from the media and that the rule of law, supported by the separation of powers, is threatened, in many countries, to varying degrees. Whilst we consider it vital for judges to remain publicly apolitical, justice itself operates in a world which is increasingly politicised and where public comment is more direct and more immediate than it has ever been.

The Supreme Administrative Court in Rome has a plaque on the wall with the names of judges killed in the line of duty: fortunately, that is not common in Europe, but there is a tendency to criticise judges personally and the judiciary as a whole, rather than the laws they enforce, which places intense personal pressure on modern judges. In South Africa, a judge was suspended from office because of a racist comment she posted on Facebook; in the Kenyan Supreme Court, the judges who ordered the 2017 Presidential election to be re-run had their personal emails and mobile phones hacked, to try to demonstrate bias. In Turkey, thousands of judges have been summarily removed from office, detained and are being tried in large numbers.

There is enormous scope for comparison of working practices to see which of our traditional ways of working are essential, and which are merely habitual. The advance of digital technology, coupled with austerity and ageing court buildings, and the increase in online shopping, research, and discussion by members of the public, means that almost all jurisdictions are moving towards greater digitalisation of justice (the French call it 'dematerialisation'). French justice has been entirely 'dematerialised' since 2015, with significant financial economies being achieved. It may be that in future many cases can be effectively resolved online: the Netherlands has progressed a long way towards that already. In other countries, such as Kenya, the unification of tribunals into a single system of administrative justice is still just a future project.

The reach and influence of our expert judges, the training we deliver, and contributions we make as invited speakers are rightly respected across Europe and the wider world. We have much to learn, and to teach, in our contacts with judges in other jurisdictions, both about how much we have in common, where we differ, and how we could deliver better justice for the 21st century.

Judith Gleeson is an Upper Tribunal Judge (Immigration and Asylum Chamber)

[Back to contents](#)

Recent publications

EXTERNAL LINKS

By [Adrian Stokes](#)



This section lists recent publications of interest to readers of the *Tribunals* journal with a very short description of each (where this is not obvious from the title) and a link to the actual document. It is not intended to be a comprehensive list but is intended to bring to the attention of readers some publications of interest but which they might have missed. It also gives a number of useful links.

[Judicial College Strategy 2018-2020](#)

(6 December 2017)

[First Courts & Tribunals Service Centres launched](#)

Press release regarding the first two Courts and Tribunals administrative Service Centres. (2 November 2017)

[Designing a social security system with human rights at the core: Scrutiny of the Social Security \(Scotland\) Bill](#)

Report by the UK Administrative Justice Institute (UKAJI). (13 December 2017)

[Government's response to the Second Independent Review of the Personal Independence Payment Assessment](#)

This is the Government's response to the report by Paul Gray. (18 December 2017)

[The Second Independent Review of the Personal Independence Payment Assessment](#) (March 2017)

[Tackling Modern Slavery – Transparency in Supply Chains](#) (2017)

[Thriving at work: The Stevenson/Farmer report on mental health and employers](#) (October 2017)

[Promoting positive mental health in the workplace](#) (October 2017)

[Updated Presidential Guidance on Case Management in the Employment Tribunal \(England & Wales\)](#)

(22 January 2018)

[Equal Treatment Bench Book](#)

See article in this edition of *Tribunals* journal by Paula Gray. A public version of the Book is available on the judiciary website and an interactive version can be found on the LMS. (February 2018)

[Mental Health Tribunals: Examining current practice, rising caseloads and next steps](#)

A report on a seminar held in December 2017 funded by the University of Manchester and The UK Administrative Justice Institute (UKAJI). (8 February 2018)

Delegation of Functions to Tribunal Caseworkers First-tier Tribunal

There have been a number of announcements extending the above delegation schemes. The following are links to the announcements for various Tribunals:

[Social Entitlement Chamber](#)

[Immigration and Asylum Chamber](#)

[Tax Chamber](#)

Useful Links

[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.

[Unconscious bias](#)

Web site regarding unconscious bias, including various tests.

[Tribunal Decisions](#)

[Rightsnet](#)

[Child Poverty Action Group](#)

Adrian Stokes is a Disability Qualified Member in the First-tier Tribunal (Social Entitlement)

[Back to contents](#)

An extraordinary judicial resource

EQUAL TREATMENT BENCHBOOK

By Paula Gray



This is a very definite promotion; frankly nothing short of an advert for the brand new [Equal Treatment Bench Book](#) (ETBB), which was launched at the end of February 2018. This publication has for some years been an invaluable source of knowledge for those concerned with administering or navigating the justice system, but, in a society which has been rapidly changing, it is the first review since 2013 and the most comprehensive re-write for some years. The 2013 version was a hybrid between a re-write and an update; nonetheless, it was an important piece of work, and we owe a great deal to the authors of that edition, some of whom participated in this new ETBB project.

We are pleased to say that we have improved on that version in both accessibility and content. I am delighted to quote from the foreword of the book, written by the Chair of the Judicial College Lady Justice Rafferty, that "The profound desire of the team responsible for this revision is that all those in and using a court leave it conscious of having appeared before a fair-minded tribunal".

The task has taken some time. We formed a Committee under the chairmanship of Employment Judge Tamara Lewis late last summer, and we have pursued our vision of the new publication during the ensuing months, dovetailing meetings and other discussions, some in person, some on line, between our various sitting and other judicial commitments.¹

We rapidly discovered the variety and extent of the expertise within the group, and we built on that, reading around topics and learning about aspects that were new to us. Individual chapter writing was allocated, and then we each took on reading roles to check the various newly written sections. Once the raw material was written and reviewed we discussed, we argued, we edited, we consulted, we re-edited, we ran our fingers through our collective hair, and ate cakes, which helped.

Finally we made the difficult cut, because we could have said (a lot) more, but our feedback had included the fact that the existing publication was too long. It is still too long, but we have tried to ameliorate that by our chapter summaries, which we hope will both assist the busy Judge and provide other readers with a helpful overview of the material.

The publication is exclusively online. We make no apologies for that given the importance of it being accessible from every court and tribunal venue in the land, and the extortionate cost of that in hardcopy. The 2013 version was also online, but technology was less advanced so it was more difficult to access than in the new format. We now have the facility to make this useful publication available on laptop as well as tablets for those in the judiciary, as well as available online to the public.

For Judicial Office Holders a major advantage is clickability, each chapter having a contents page which lists headings and sub-headings that link directly to the relevant sub-section and a sidebar from which users can interrogate the text by clicking on the descriptively titled headings, and return to the chapter contents or the overall Home Page with ease. Bite sized chunks can be printed should that be necessary.

¹ Members of the Committee: Mrs Justice Geraldine Andrews; HHJ Jennifer Eady QC; Upper Tribunal Judge Paula Gray; Regional Tribunal Judge Hugh Howard; Employment Judge Rebecca Howard; Deputy Senior District Judge (Chief Magistrate) Tan Ikram; Employment Judge Tamara Lewis (Chair); Helen Pustam, Head of Legal Team, Judicial College; Senior Coroner Penny Schofield. The Committee was grateful for the oversight of the Deans of Faculty of the Judicial College, Employment Judge Christa Christensen and HHJ Andrew Hatton.

One of our major regrets has been that the public facing document, although identical, does not have the interactivity of the document in the form that it is accessible to judges and others who sit in courts and tribunals. This was a technological battle that we lost, but the format is consistently under review, and it may be something that we can remedy in due course.

There are many interesting aspects to this book. We talk about the difficulties that litigants in person may have, particularly those who come from socially deprived backgrounds who may not be comfortable with either the formats or the formalities of legal proceedings and the venues, whatever we choose to call them, where cases are heard. We have tried to explain why that is, why it matters, and what approaches judges might take to lessen those difficulties.

We explain the many ways in which those with disabilities need to be better understood, as litigants and as witnesses, in relation to what facilities they might need and how they may be enabled to give their account.

We talk about the importance of cultural and religious aspects of the society in which we live, including recognising the importance of different festivals and the possible difficulties of, and possible solutions to, embracing within our legal proceedings those who wear the veil.

As a group we recognised that some of our decisions were pioneering; as Dame Anne says in her foreword to the book, the “team has not shrunk from the hardest or knottiest of tasks”. Supported in those decisions by the Directors of Training of the Judicial College we have touched on matters such as modern slavery, the ‘gig’ economy, sexual and other forms of harassment, including on-line, and many other innovative issues. These were topics that needed to be tackled to enable judges to best serve the interests of justice and create fair hearings in our modern society in accordance with the oath that we take to “do right to all manner of people”.

We really hope that you will browse this fresh resource, as we are confident that if you do you will return, knowing that it is likely to prove invaluable when that concerning matter presents itself during a hearing.

The Judicial College recognises the contribution of this resource in enabling the judiciary to perform our role in an inclusive and socially aware manner and has appointed a residual Committee which will have charge of the ETBB until the next revision. We would be pleased to consider any queries, errata, constructive criticisms or material upon which we may build.²

2 Tamara Lewis, Paula Gray, Hugh Howard

Paula Gray is a judge in the Upper Tribunal (Administrative Appeals Chamber)

[Back to contents](#)

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