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# REPORTING CASES

**David Williams** describes the major advantages of a standardised system of reporting tribunal cases.

THE UNIFICATION of tribunals has presented the challenge of reconsidering how decisions are named, cited and published. The Senior President's Practice Statement on *Form of Decisions and Neutral Citation* issued on 31 October 2008 is to be followed in all his tribunals.

The Direction requires that all published tribunal decisions be given a neutral citation number (NCN) of a standard format and use numbered paragraphs. Decisions of the Upper Tribunal Administrative Appeals Chamber, for example, use the format [2010] UKUT (AAC) 32 (where 32 is the 32nd decision published that year by the Upper Tribunal, not the chamber). A First-tier Tribunal Tax Chamber decision will have the format [2010] UKFTT (Tax) 316. NCNs are issued to tribunals by the Upper Tribunal Office. The Practice Statement requires any citation of such a decision to include the NCN at least once.

A decision given an NCN is put on the tribunals website ([www.tribunals.gov.uk](http://www.tribunals.gov.uk)) – and on Bailii ([www.bailli.gov.uk](http://www.bailli.gov.uk)), which can be searched by a standard web search engine.

In addition, the Administrative Appeals Chamber has changed the way it names its cases, so that from 2010 all decisions have names and 'flags'. Most cases are still anonymous. The flags describe the focus of the decision. For example, (DLA) flags a decision about disability living allowance.

The Administrative Appeals Chamber will also publish its decisions from 2010 as a series of annual volumes of *Administrative Appeals Chamber Reports* (AACR). If a decision is reported in this series, it will have a report citation and number in the format: [2010] AACR 32 (where 32 is the number of the report in the volume). So, a full citation for a reported decision about tax credits will look like this: FR v HMRC (TC) [2011] UKUT (AAC) 56, [2012] AACR 13.

Tax and Chancery Chamber, and first-tier tax, decisions are published on websites and commercially. They follow the standard practice of those reports: see *Simon's Tax Cases*.

**David Williams** is an Upper Tribunal judge.

EDITORIAL



IN CALENDRIAL terms, we may or may not have entered a new decade, but this first issue of the journal in 2010 represents a new period when, with pleasure, I take over as Chairman of the Editorial Board. The Board looks forward to building on the journal's existing strengths and qualities.

The article by Neville Harris and Sheila Riddell (page 13) raises interesting questions on the co-relation of mediation to judicial determination of individual disputes. We hope to continue to analyse this theme in a short series on the subject in the next few issues.

We are also pleased to start an analysis of the initial decisions of the Upper Tribunal, which is beginning to consider the context and extent of the new procedural rules for First-tier Tribunals. On page 7, the decision of the Upper Tribunal (Administrative Appeals Chamber) in *MA v SoS for Work and Pensions*, which considers the 'overriding objective', is the subject of analysis by Charles Blake.

**Kenny Mullan**

Send comments on the journal to [publications@jsb.gsi.gov.uk](mailto:publications@jsb.gsi.gov.uk).

# A LIGHT THAT ILLUMINATES THE OBSCURE



Expert evidence may be exciting and dramatic but it must be relevant and, to deserve the appellation of ‘expert’, should provide information or analysis that is not within the common knowledge of the non-expert decision-maker, says **Mark Hinchliffe**.

**I**HESITATE TO BEGIN by reference to the ‘problem’ of expert evidence, and yet there *are* problems. These can relate to untested claims to expertise, the provenance of facts relied upon, the suspicion of an underlying agenda or a lack of professional objectivity, unchallenged expert evidence from only one side, irreconcilable conflict between two experts and the relationship of an expert witness with a specialist tribunal with its own expertise.

However, just because a witness is a professional person, they are not necessarily an expert and many professional witnesses remain witnesses of fact and of history. They have an opinion and their experience of, say the pupil or patient, will be valuable, but this does not necessarily trump the independent expertise of the panel, and the witness may not have the depth of involvement, or of professional knowledge, to justify the label ‘expert’.

There is an argument that judicial testing of the sufficiency of expertise is, on occasion, insufficiently rigorous. Arguably, it is part of tribunal culture to ‘let it all in’ and then weigh everything up in the round without becoming too analytical. It could be time, however, for this to change. The judgments from the High Court and Court of Appeal are far from consistent, and some (it respectfully seems to me) have raised expectations that are a little unrealistic. Having said that, it does appear that a more pragmatic trend is emerging, and it is a trend that, thankfully, recognises and respects our expertise.

*The proliferation of expert evidence has been hard to control, although tribunals have used case management as one possible way.*

The courts are used to looking beneath the surface when it comes to claims of expertise, whereas tribunals – with no duty to protect a jury from material that is superficially impressive but that lacks the essential characteristics of expert evidence – have generally been more sanguine. The proliferation of expert evidence has been hard to control, although tribunals have used case

management as one possible way. Further, tribunals have struggled to explain in their decisions why an expert’s opinions have not been embraced, especially when the evidence was unchallenged or, at least, un-contradicted. For a panel member’s concerns not to be raised during the hearing, and the decision not to include any reasons, is an approach with which the appellate courts have disagreed.

## **Integrity**

Of course, it must be recognised that there are many cases where we need the help of the specialist experts and where justice depends on their integrity and upon our willingness, when appropriate, to put our faith and trust in them. We are duty bound, in every case, to receive and consider expert evidence with a completely open mind.

In *English v Emery Reimbold and Strick Ltd* [2002] 1 WLR 2409, the Court of Appeal felt that ‘a coherent, reasoned opinion expressed by a suitably qualified expert should be the subject

of a coherent, reasoned rebuttal’ and that the decision-maker ‘should provide an explanation as to why he has accepted the evidence of one expert and rejected that of another’, although the case did not involve a first-instance decision-maker that could call upon its own expertise.

**Types**

Expert evidence encompasses various forms of testimony and it is important to recognise exactly what sort you are dealing with. There is a difference between:

- Evidence of the latest theoretical understanding of a specialist subject.
- Case-specific evidence of fact.
- Case-specific evidence of opinion.

The following types of expert evidence may be identified:

- Evidence of relevant facts – the observation, comprehension and description of which does *not* require expert explanation to properly comprehend or interpret.
- Evidence of relevant facts (such as properly conducted examinations) – the observation, comprehension and description of which *does* require expert explanation.
- Relevant background information.
- Explanation of relevant technical subjects or terms.
- Expert opinion on inferences from relevant facts where based upon specialist knowledge.

The relevance of the evidence is key and the tribunal must retain a clear understanding of the material issue and ensure that the expert does not either stray outside their expertise or beyond the field of inquiry. Expert evidence may be exciting and dramatic but it must be relevant and, to deserve the appellation of ‘expert’, it should provide pertinent information or analysis that is not within the common knowledge of the non-expert decision-maker.

**Expert disciplines**

In many cases, there are significant difficulties in establishing whether the expert is properly described as such and whether the field of expertise is a recognised speciality. Is an area of expertise always in a recognised discipline, governed by professional standards and rules of conduct?

Tribunals should not just take it for granted that professional evidence is ‘expert’ evidence without exploring further what the specialty is, what the precise connection is between the witness’s profession and the specialty claimed, and its relevance to the case.

*... a witness can be invested with expert status without there being any evidence of academic study...*

**Regulation**

Not all fields of expertise are subject to any formal regulation. Although this will not rule out a witness’s claim to special expertise, heightened judicial scrutiny will be required. Moreover, there are degrees of expertise. One expert may be a competent practitioner but lack the academic understanding

needed for detailed explanation. Experts must stay within their field of expertise and competence.

In psychiatry and psychology, the appropriate professional bodies have codes of practice in relation to professional conduct, which will cover the professional obligations of their members when offering an expert opinion. But many fields do not have such schemes, and accreditation can be little more than a register to which you can add your name for a fee. Moreover, it has long been recognised that there is no pre-requisite that a witness possesses formal qualifications or training, and a witness can be invested with expert status without there being any evidence of academic study and without the witness having passed any test or assessment of knowledge. Expertise can be acquired solely by means of practical experience. For this reason, tribunals are entitled to carefully explore the backgrounds, and experience, of experts.

### Structure

In the case of *R v Parenzee* [2007] SASC 143, a South Australia Supreme Court decision, the court suggested a structured list of helpful questions, which can be condensed as follows:

- Is the evidence offered something that the panel needs expert help with?
- Is the expert really an expert?
- Is the evidence within the expert's field of expertise?
- Is the claimed speciality recognised, tested and accredited?
- What is the source of the factual matrix relied upon?
- What case-specific work has the expert done?
- Is the expert banging a drum?
- Are good reasons given for opinions and recommendations?
- Is there any alternative expert evidence?
- Has there been any opportunity to obtain alternative expert views?
- Do the decision-makers have their own expertise, which either confirms or raises doubts about the reliability of the expert evidence?
- Can the decision-maker reject the expert's opinion in favour of its own expert view?

Answers to these questions may provide the basis for accepting or rejecting expert opinions.

### Jurisprudence

In the special educational needs and mental health jurisdictions, case law is showing an increasing willingness by the courts to respect our own independent specialist knowledge and, subject to the rules of natural justice, to permit us to rely upon our own expertise, especially when choosing between two different professional or expert opinions. With the advent of the Upper Tribunal, we may well see this trend continue.

In *R (L) v London Borough of Waltham Forest and Another* [2003] EWHC2907 (Admin),

the judge said that if a tribunal rejects expert evidence 'it should state so specifically', in some circumstances saying why it rejects it, and where it uses its expertise to decide an issue, 'it should give the parties an opportunity to comment on its thinking and to challenge it.' In *X and X v Caerphilly Borough Council and SENDIST* [2004] EWHC 2140 (Admin), Keith J found that:

'... in the absence of any reasoned justification for the approach that the tribunal adopted, the tribunal's conclusions must be regarded as flawed in law.'

To many at the time, these judicial strictures did not seem to fully grasp the relatively informal nature of tribunal proceedings and imposed too high a burden on decision-writers. Thankfully, the jurisprudence referred to above can now be seen as qualified by more recent judgments.

In *W v Leeds City Council and SENDIST* [2005] EWCA Civ 988, the Court of Appeal took the opportunity to re-state the law on giving reasons. Wall LJ confirmed that a tribunal decision should not be an elaborate, formulistic product of refined legal draftsmanship. It simply had to contain an outline of the story that gave rise to the case, a summary of the tribunal's basic factual conclusions and a succinct statement of reasons explaining why it reached the conclusion that it did on those basic facts. In short, the parties were entitled to be told why they had won or lost. At a recent JSB course, Lord Justice Sullivan reminded delegates that a decision is primarily 'a letter to the loser' although there also had to be a sufficient account of the facts and of the reasoning to enable an appeal court to see whether any question of law arose.

In *F Primary School v Mr and Mrs T and SENDIST* [2006] EWHC 1250 Admin, James Goudie QC, sitting as a Deputy High Court judge, said:

'Of course, tribunals must not give evidence to themselves which the parties have had no opportunity to challenge. But this tribunal

was not giving evidence to itself. It was, in my judgment, performing its function as a specialist tribunal, of evaluating all the evidence before it at the hearing and legitimately using its specialist expertise for that purpose.’

At about the same time, in *R (H) v West Sussex County Council* [2006] EWHC 1275, Holman J approved of the way a tribunal had dealt with (and rejected) the evidence of two psychiatrists and a psychologist. He thought that the tribunal members clearly had these expert opinions ‘in the forefront of their minds’ and added that:

‘... it is not necessarily requisite that a specialist tribunal such as this, precisely because it is bringing its own expertise to bear, has to give detailed reasons for preferring its own expertise over some expert evidence ... placed before it.’

Further support for a more benign approach from the appellate bench comes from the dictum of Baroness Hale in the case of *AH (Sudan) and Others v Home Secretary* [2007] 1 AC 678:

‘This is an expert tribunal charged with administering a complex area of law in challenging circumstances. To paraphrase a view I have expressed about such expert tribunals in another context, the ordinary courts should approach appeals from them with an appropriate degree of caution; it is probable that in understanding and applying the law in their specialised field, the tribunal will have got it right ... Their decisions should be respected unless it is quite clear that they have misdirected themselves in law.’

Commenting on this passage, Waller LJ in *H v E Sussex CC and Others* [2009] EWCA Civ 249 thought that the point made by Baroness Hale was particularly important to bear in mind where the rejection was of expert evidence offering an opinion in the very area where the tribunal has its own expertise and on the very point that the

expert tribunal has, itself, to decide. Nevertheless, the panel should tell the parties in brief what it thought about the evidence. In *Jones v Norfolk CC and SENDIST* [2006] EWHC 1545 (Admin), Crane J allowed an appeal against a decision of SENDIST where it preferred the evidence of one witness to that of others without properly acknowledging the range of opinions and explaining its selection. In essence, there is a world of difference between using specialist knowledge to displace a witness’s assessment of the position by substituting your own views without giving anyone the opportunity to respond, on the one hand, and using your specialist expertise to help decide which of two conflicting courses supported by evidence should be preferred, on the other.

### **Mental health**

The mental health jurisdiction demonstrates an unashamedly participatory approach to the deployment of its own expertise with a member of the tribunal – invariably the medical member – examining the patient before a hearing in order to form an opinion of the patient’s medical condition. The member may examine the patient in private, examine records and take notes and copies of records. The results of this examination are then reported to the panel before it hears evidence from witnesses. The judge will endeavour to convey to the parties the ‘significant findings’ arising from the examination but, importantly, those findings must only be a preliminary view. As Stanley Burnton J said in *R (S) v MHRT* [2002] EWHC 2522 (Admin), the medical member must not form his or her final opinion until the conclusion of the case ‘since otherwise the outcome of the hearing would be prejudged, and the hearing an ineffective charade’.

The issue was further considered by Munby J in *(RD) v MHRT and SSHD* [2007] EWHC 781 (Admin), where he held that:

‘The communication by the medical member of her “very preliminary” view was manifestly lawful ...’

## Upper Tribunal

One of the first authoritative decisions of the Upper Tribunal relates to an error of law in relation to the treatment of expert evidence in the Mental Health Tribunal. In *BB* [2009] UKUT 157 (AAC), Mr Justice Walker, sitting with two Upper Tribunal judges, considered the way the original panel had dealt with the independent expert evidence of one Dr Cripps:

‘It is not our function to decide whether Dr Cripps was right. The only question for us concerns the adequacy of the tribunal’s reasons for disagreeing with Dr Cripps. Counsel for BB submitted that it was not sufficient to rebut the careful and detailed analysis of Dr Cripps simply to refer to the experience and role of the responsible clinician.

‘If the tribunal were preferring the evidence of the responsible clinician over that of Dr Cripps, then at the very least the tribunal needed to give some explanation as to the substantive content of what the responsible clinician had said in answer to Dr Cripps and why it was a persuasive answer. It would of course be open to the tribunal to form its own views independently of those of the responsible clinician, but in the Reasons for Decision the tribunal gave no indication of whether or the extent to which it had adopted such a course.’

As stated earlier, imaginative use of case management may offer a partial solution to the challenge of controlling expert evidence so that it can be used properly and confidently. Rule 15(1) (c) of the First-tier Tribunal (HESC) Rules 2008 allows a tribunal to give directions as to whether the parties are permitted, or required, to provide expert evidence and, if so, whether the parties must jointly appoint a single expert to provide such evidence. But then we come up against parties who are not used to being managed and

who are reluctant to be pinned down. In the special educational needs jurisdiction, an issue arose recently as to disclosure of instructions. In *LM v London Borough of Lewisham* [2009] UKUT 204 (AAC), the Upper Tribunal proposed a direction in the following terms:

‘If the further evidence sent in by either party includes specialist reports, then any such report must state the substance of any material instructions (other than instructions protected by legal advice privilege) supplied, whether written or oral, on the basis of which the report was written and include details of all records and reports seen by the specialist. No specific document of instruction need be disclosed but a party may append such a

document to the report instead of including the substance of the instructions contained in the document in the report itself.’

Similarly in civil cases, an expert report must, more often than not, disclose the written instructions upon which he or she is acting.

*We should never lose our critical faculties, nor our willingness to be persuaded, when appropriate.*

In the end, it boils down to this. Expert evidence can be the key to the case or it can appear to do the opposite. We need, always, to recognise what we are dealing with and ask a few basic questions. We should never lose our critical faculties, nor our willingness to be persuaded, when appropriate. And those of us on expert tribunals are entitled to hope that experts called before us *as experts*, rather than as professionals who are involved in the case on a day-to-day basis, will add something extra and shine an illuminating light into dark corners that, without their help, would remain hidden and obscure. For if they don’t do that, what use are they?

**Mark Hinchliffe** is Deputy President, Health, Education and Social Care Chamber (Mental Health) of the First-tier Tribunal and the JSB’s Director of Tribunal Training.

# GIVING EFFECT TO THE OVERRIDING OBJECTIVE



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

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

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

## Fairly and justly

The procedure rules contain a power to adjourn appeals. The overriding objective of those rules, taken closely from the Civil Procedure Rules, is to deal with cases fairly and justly. A number of non-exhaustive examples of such dealings are given. For example, an appeal must be dealt with in ways which are proportionate to the importance of the issues, the anticipated costs

and the resources of the parties. Unnecessary formality must be avoided. Delay must be avoided so far as compatible with proper consideration of the issues. So far as practicable, the parties must be able to participate fully in the proceedings. The parties must help the tribunal to further the overriding objective and must cooperate with the tribunal generally.

The tribunal must give effect to the overriding objective when exercising any power under

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

## Balancing act

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

*Such decisions by the Upper Tribunal would rarely amount to binding precedents.*



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

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

### Wider interest

The next conclusion is particularly interesting. Judge Jacobs thought that the interests of the functioning of the system as a whole are unlikely to be of great significance in the vast majority of cases. If an adjournment were otherwise to be granted it would be rare for it to be refused solely on account of the needs of the system as a whole. This is plainly correct. But it may be added that every appeal that is adjourned will cause delay to some unknown case or cases pending in the system as a whole. Contrast the far more general overriding objective in the Asylum and Immigration (Procedure) Rules 2005.<sup>4</sup> It is to 'secure that proceedings are handled as fairly, quickly and efficiently as possible and, where appropriate that members of the tribunal have responsibility for ensuring this, in the interest of

the parties to the proceedings and in the wider public interest.' These final words are very interesting. The wider public interest seems to include the interest of other appellants waiting for their cases to be heard in there not being needless adjournments. It must also include the public interest in the adherence by the Crown to international instruments such as the Refugee Convention and the European Convention on Human Rights. The interest of the parties to the proceedings includes that of the UK Borders Agency in removing the appellant if the appeal fails although removal often takes a long time. In any event, these procedure rules contain express and restrictive provisions relating to adjournments.<sup>5</sup>

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

### Charles Blake is an immigration judge.

A transcript of this case can be found at [www.bailii.org/uk/cases/UKUT/AAC/2009/211.html](http://www.bailii.org/uk/cases/UKUT/AAC/2009/211.html).

<sup>1</sup> UK Upper Tribunal (Administrative Appeals Chamber).

<sup>2</sup> SI 2685/2008. See [www.opsi.gov.uk/stat.htm](http://www.opsi.gov.uk/stat.htm).

<sup>3</sup> Judge Edward Jacobs, formerly a Social Security Commissioner.

<sup>4</sup> SI 2005/230. By the time this note appears in print the AIT will have become visibly part of the post-Leggatt structure and the rules may well have changed with a broader overriding objective.

<sup>5</sup> See Rules 21 and 47.

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

Does designation of a tribunal as 'a superior court of record' prevent that body from being judicially reviewed by the High Court? If it truly is such a court (e.g. the Upper Tribunal), judicial review will not lie. But if it is not (e.g. the Special

Immigration Appeals Commission on a true analysis of its statutory basis), then judicial review will lie to correct errors of law.

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

# A SMOOTH TRANSFER

**George Bartlett** (below) describes how the work of the Lands Tribunal has been successfully accommodated into the two-tier, chamber-organised system.



ON 1 JUNE 2009 the new Lands Chamber of the Upper Tribunal came into existence as the re-establishment of the Lands Tribunal within the new structure created by the Tribunals, Courts and Enforcement Act 2007. Originally created by an Act of 1949 to determine compensation for the compulsory purchase of land and certain planning matters, to decide rating appeals, to exercise the power to discharge or modify restrictive covenants and to act as arbitrator in references by consent, by the time of the transfer the Lands Tribunal exercised jurisdiction under 80 or so statutes and a large number of statutory instruments. Its chief characteristics were the specialist nature of its jurisdictions, the fact that they were both original and appellate and both party-and-party and citizen-and-state, its specialist membership (combining lawyers and surveyors, each with full judicial powers) and the appeal route (to the Court of Appeal on a point of law).

## Transferred

Formally, the jurisdictions of the Lands Tribunal were transferred to the Upper Tribunal under a transfer order by substituting 'Upper' for 'Lands' in all the various statutes and statutory instruments; and a chamber order provided for these to be exercised by the Lands Chamber of the Upper Tribunal. The President of the Lands Tribunal was appointed President of the Chamber following a competition by the Judicial Appointments Commission, and the surveyor members became transferred-in members of the Upper Tribunal. The legal members, all circuit judges, were already judges of the Upper Tribunal under the Act, and they were assigned to the new Chamber by the Senior

President. The existing Lands Tribunal Rules were amended as necessary to enable their continued application until such time as new rules could be prepared. It was, therefore, business as usual and the chamber continues for the time being to be known informally as the Lands Tribunal.

## New appointments

Effected in this way, the transfer implemented the proposals in the consultation *Transforming Tribunals*,<sup>1</sup> which had emphasised the need for continuity and had been strongly endorsed in this respect by the responses to that consultation. There have been

immediate benefits. First, the fact that all circuit judges are judges of the Upper Tribunal has meant that much-needed new appointments have been dealt with simply and expeditiously through the assignment process. Previously each appointment had to be made by the Lord Chancellor, and after the Constitutional Reform Act 2005 a Judicial Appointments Commission competition was required. The flexibility that the 2007 Act gives to enable circuit and High Court judges with the requisite expertise

to sit in the Upper Tribunal is, I think, a major benefit, and it ought to assist in ensuring that the courts and tribunals develop as closely associated elements in a single judicial system. Another benefit is that the Senior President himself is able to sit in the Upper Tribunal, and he has already done so, together with a surveyor member.

## New rules

A further benefit of the transfer has been the putting in hand of new rules. The old Lands Tribunal Rules badly needed supplementing and updating. New rules have now been prepared

*The flexibility that the 2007 Act gives to enable circuit and High Court judges with the requisite expertise to sit in the Upper Tribunal is, I think, a major benefit . . .*

under the supervision of the Tribunals Procedure Committee, and we have reason to be grateful for the expertise and care that the committee, under the chairmanship of Lord Justice Elias, has brought to the process. Because of the different procedures required for particular Lands Tribunal jurisdictions, the view was taken, I am sure rightly, that there should be separate Lands Chamber Rules rather than that the existing Upper Tribunal Rules should be encumbered with a potentially confusing set of additional provisions. The opportunity that the rule-making process under the Tribunals Procedure Committee provides to ensure the production of rules that are well drafted and fit the requirements of particular jurisdictions while observing an appropriate degree of standardisation is, I believe, another major benefit of the new tribunals system.

#### **Appellate jurisdiction**

The transfer of the Lands Tribunal to the Upper Tribunal is only the first stage in the process of rationalising the organisation of tribunals dealing with land and property. The tribunal is the appellate tribunal for appeals from Leasehold Valuation Tribunals in leasehold enfranchisement and other landlord and tenant matters, from Residential Property Tribunals on certain housing matters and from the Valuation Tribunal in rating matters. That these tribunals should be transferred to a Lands Chamber of the First-tier Tribunal, so that the procedures for appeals under the 2007 Act apply to them, is, I think, self-evident, and I hope that it will not be long delayed. Such transfer would also enable Residential Property Tribunal and Valuation Tribunal appeals that at present go to the High Court (in Rent Act and council tax cases) to be re-routed to the Upper Tribunal. The incorporation in a first-tier Lands Chamber of these tribunals, together with the Adjudicator to the Land Registry and the Agricultural Land

Tribunals, would open the way for transferring to the First-tier Tribunal all or parts of some of the Lands Tribunal first-instance jurisdictions. In the longer term also there may well be a strong case for transferring to the Lands Chamber of the First-tier Tribunal some of the many, and increasing, environmental jurisdictions, and for transferring to the Lands Chamber of the Upper Tribunal the appeals in planning matters that at present go to the High Court.

#### **Meeting the needs**

Having experienced the operation of the 2007 Act in these its early days, what impresses me is the scope that it offers for dealing appropriately, in terms of organisation and procedure, with the great range of jurisdictions that are assigned to tribunals. It permits the rationalisation and modernisation that Leggatt found to be needed while enabling widely diverse types of cases to be dealt with at the appropriate level of the judicial system, by a tribunal suitably constituted in terms of its expertise, and under procedures that meet the needs of the case. I have mentioned particular benefits that have applied in the case of the Lands Tribunal. More generally, the transfer of the Lands Tribunal shows that it is possible for a tribunal that is already operating effectively (in its case in both first-instance and appellate roles) to be accommodated within the basic two-tier, chamber-organised system and to look forward (here together with the individual components of a future first-tier Lands Chamber) to a future of development and rationalisation within the new system.

*... what impresses me is the scope that [the 2007 Act] offers for dealing appropriately, in terms of organisation and procedure, with the great range of jurisdictions that are assigned to tribunals.*

#### **George Bartlett QC is President of the Lands Chamber of the Upper Tribunal.**

<sup>1</sup> *Transforming Tribunals – Implementing Part 1 of the Tribunals, Courts and Enforcement Act 2007* (Tribunals Service Consultation Paper 30/07).

# A NEW BREED OF REGULATOR

**Godfrey Cole** considers the similarities and differences between the different decision-making bodies on which the journal has published articles since summer 2008.

SINCE 2008, this journal has been reporting on the work done by some other decision-making bodies, those organisations outside courts and tribunals that are given responsibility for making, reviewing and implementing decisions. The choice of who to invite to contribute was not easy, and was intended to illustrate the diversity of these bodies. The time has come to stop and consider the similarities and differences between them, and between their approach to decision-making and that of the tribunals with which we are more familiar.

## Differences

The separate and specialised existence of the different decision-makers was ably demonstrated in the articles themselves. Some, such as the Competition Commission, are overtly formal in their approach. Others, such as the Independent Review Service, less so. Some, such as the Schools Adjudicator, are expanding their work, while others, such as the Independent Safeguarding Authority, are just beginning.

Their composition varies from a single person to committees or panels of differing sizes. So too does the expertise required of their members, the overwhelming majority of whom are not lawyers. Curiously, two of the single decision-makers – the school adjudicators and planning inspectors – are those with the most challenging interpersonal responsibilities. They frequently work in crowded hired halls where anybody with the broadest interest can make representations, whereas those sitting with others tend to sit in rooms where only parties or their representatives can make written and/or oral submissions.

## Similarities

The similarities are harder to spot. One thread – and possibly the only one – linking all of the bodies is their deep desire to abide by the rules of natural justice. What is more, there is a sense that this is part of their recognition as being the right and proper thing, and not simply to avoid criticism on appeal. Further, natural justice is seen as a set of principles that supports their desire to give reasons for their decisions and to apply the terms

of Article 6 of the European Convention of Human Rights, rather than simply as a broad concept relating to the stated statutory powers of administrative authorities. It is in this context that the lack of formal rules of procedure for many of these bodies may be a concern.

## Fairness

All of the bodies strive for fairness in whatever procedure they have elected to follow, by seeking representations, having a staged process, or encouraging oral hearings. Some have codes of guidance to assist them, others are simply told in their primary legislation that how they organise their proceedings is up to them.

They all insist on giving reasons for their eventual decision – their specialisms and individuality once again being confirmed by the range of outcome decisions available. None of these are small responsibilities to impose on non-lawyers who may be working without any formal and immediately accessible legal support.

With the exception of the Planning Inspectorate, all the bodies are of the new breed of regulator created largely since 1997. They are expected or

**Independent Review Service** (Summer 2008)

**Regulatory Decisions Committee of the Financial Services Authority** (Summer 2008)

**Planning Inspectorate** (Autumn 2008)

**Standards Committees** (Autumn 2008)

**School Adjudicator** (Spring 2009)

**Competition Commission** (Summer 2009)

**Independent Safeguarding Authority** (Autumn 2009)

obliged to apply principles of good governance, may be funded by their industry rather than by the government, have sanctioning powers and are the consequence of what has been termed the hollowing out of the state.<sup>1</sup> The newest of them all, the Independent Safeguarding Authority, goes further still: it is expected to carry out a formal risk assessment before reaching its decision as against taking account of a set of criteria set out in primary or secondary legislation.

### Specialists

Maybe easier to pinpoint are their similarities to tribunals. Like tribunals, these decision-makers specialise and work best because the decisions are made by people – often not lawyers – with particular expertise in the subject area. Their outcomes are also often idiosyncratic, with features particular to the subject area, which is of course similar to tribunals.

### Independence

Unlike tribunals, many of these bodies are not completely independent of the initial decision-maker. That is not to denigrate their efforts, as

they would almost certainly see themselves as doing more than conducting an internal review. The issue is whether they are external to the agency making the original decision within a set of rules and values, so perhaps more able to protect individual or parties' interests.<sup>2</sup> There are also differences in how their decisions can be challenged and hence how far they are capable of regulation. Most of their decisions can only be questioned through judicial review, although there are exceptions: the Independent Safeguarding Authority's decisions can be appealed to the Upper Tribunal, Standards Committees' decisions in England to the First-tier Tribunal and in Wales to the Adjudication Panel for Wales, and the Financial Services Authority decisions discussed to the Financial Services and Markets jurisdiction of the Tax Tribunal.

The authors' readiness to be critical and reflective throughout this series has, if nothing else, demonstrated the importance of these other decision-makers in their own right.

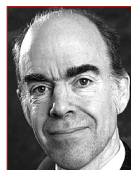
<sup>1</sup> *Tensions in the regulatory state*, J Black, 2007 Public Law 58.

<sup>2</sup> *Judicial review in the age of tribunals*, P Cane, 2009 Public Law 479.

## ‘SUCCINCT, FLUENT AND ADAPTABLE’

TWELVE YEARS AGO, Godfrey Cole wrote his first article for the *Tribunals* journal. In it, he described his expectations of those who act as representatives before tribunals – that they should be carefully prepared, capable of well-structured and open questioning, in summary ‘succinct, fluent and adaptable, able to respond to changes and new directions that the hearing might take’.

In his role of chairman of *Tribunals* editorial board, Godfrey has displayed all these characteristics, and more. Concise, and almost constitutionally incapable of getting flustered, Godfrey chaired meetings that were inclusive, but always to the point, and which never ran over their allotted time.



During his tenure, the journal moved from two issues a year to three. The content has sustained important series on judicial skills and taken on key developments, such as the establishment of the Tribunals Service.

There have been many tributes to Godfrey as he has scaled down his tribunals work, and the editorial board's thanks were marked by a particularly eye-catching pair of socks and a bottle of wine. We know both were appreciated and trust they will encourage him to continue his involvement with *Tribunals* by agreeing to write again for us.

The Judicial Studies Board and the editorial board extend their grateful thanks to him.

# IS MEDIATION IN NEED OF PROMOTION?



**Neville Harris** and **Sheila Riddell** have sought to find out how two parallel routes to redress in cases regarding the special educational needs of children in England and Scotland work alongside each other.



THERE ARE two principal dispute resolution mechanisms for parents who are in conflict with the relevant bodies over decisions concerning special educational needs (SEN) in England or additional support needs (ASN) in Scotland. One is mediation and the other is appeal to a tribunal. Although they are separate routes, there is now a link in England, due to rule 3 of the Health, Education and Social Care Chamber (HESC) Rules, that requires the First-tier Tribunal (FTT) to consider bringing any alternative dispute resolution mechanism to the parties' attention, where appropriate.

Mediation has come to the fore in the drive for an administrative justice environment based on 'proportionate dispute resolution'. To its proponents it offers a speedier process and a less adversarial environment than courts or tribunals. It is seen as conducive to better communication and long-term relations between the parties. It facilitates consideration of a wider range of issues and is thus better able to identify the true nature of the dispute. However, there are concerns that the citizen may settle for too little, negotiating away entitlement through ignorance or lack of skill, and that mediation fails to make public authorities accountable in the way that judicial scrutiny can.

Our findings are derived from nearly 50 interviews with key professionals and other stakeholders, and questionnaire replies from nearly 100 local authorities across the two jurisdictions and more than 80 parent partnership officers in England. In addition, we carried out 49 detailed case

studies in three Scottish and three English local authority areas, interviewing the parents and others.

## Mediation and the right of appeal

Nearly one in five children in England has special educational needs. Local authorities are required<sup>1</sup> to make arrangements involving 'independent persons' for the avoidance and resolution of 'disagreements' between parents and schools or local authorities, but these arrangements do not replace or supplant the right of appeal to the FTT.

*Nearly one in five children in England has special educational needs.*

In Scotland, only one in 20 children is categorised as having an additional educational need. Local authorities are required to make arrangements for 'independent mediation services' and the Additional Support Needs Tribunal (ASNT) deals with 'references' to it concerning coordinated support plans (CSPs) or 'placing requests'.<sup>2</sup>

The ASNT had 76 references in 2007–08 compared with 3,392 SEN appeals in England.

## Dispute trends

We found evidence that the number of disputes has been increasing over the past few years, although the subject matters of dispute are unchanged. School placement, refusals to assess and educational provision at school remain the dominant issues.

## Mediation

There are no national figures on SEN or ASN mediation, although the general picture is that the number of disputes in which mediation is used is very small. In England, there was

an average of little more than one mediation per authority in our survey, compared with about eight appeal hearings. More than half of authorities (60 per cent) reported *no* mediations that year. In Scotland, three-quarters of the authorities reported fewer than five mediations each. A few individual mediation providers have expressed surprise at our results and say that their statistics suggest rather more mediations.

Several factors lie behind the sparse use of mediation.

- Many local authorities or schools publicise or promote mediation poorly. Consequently, many parents are unaware of it. Some authorities think that direct negotiation can achieve as much as mediation or that a case will progress to the tribunal anyway. They also cite: pressure on staff time; the cost of mediation, particularly where the authority pays per mediation case; and the lack of a specialist officer to filter cases and identify ones where mediation might help the authority.
- Some local authorities refuse to participate in mediation in individual cases. The main reason is doubt about achieving a settlement. Entering mediation is not compulsory.
- Some parents doubt the value of mediation because their previous dealings with the authority suggest that officers are unlikely to be sympathetic and willing to compromise.
- Parents' advisers and representatives and other parents may convey negative views of the process, which influence the parents (see Case Study 1).
- Some parents are so committed to following the appeal route that they have no interest in mediation. Also, some parents think that they would 'show their cards' by participating in mediation, thereby prejudicing their chances of success at the tribunal.

Notwithstanding this picture, there were strong views that, where it occurs, mediation brings the claimed-for advantages noted earlier, in addition to being less stressful to parents than

#### Case Study 1 – 'Amelia M' (Scotland).

Amelia was diagnosed with Asperger's syndrome when at primary school. Her mother, Mrs M, did not want her to be bullied at secondary school and was concerned generally about her, so she requested a CSP assessment. When the local authority refused, she made a reference to the ASNT. She was assisted by a voluntary organisation, ISEA (Independent Special Education Advice). Concerning her choice of dispute resolution mechanism, she said:

'We could have gone via the mediation service but we talked to parents who'd really advised us that you get nowhere, they're just a way of placating parents . . . [W]e wanted to go straight ahead with the appeal.'

The educational psychologist thought that if the local authority had been more communicative the appeal might have been avoided. Mrs M regarded the tribunal as friendly at one level but like a court on another, where words could be twisted. She said that having to put her case and respond to questions was challenging:

'[T]here's all these professionals . . . I'm a nurse myself and you just feel overwhelmed . . . I felt if I'd got more knowledge I might have done better because it was like a minefield, you didn't know, it's like being in a court.'

Mrs M lost her appeal but was later satisfied that the local authority wanted to ensure the success of Amelia's mainstream secondary school placement.

using the tribunal. While some parents appear to have concerns about how fairly mediation will operate, they tend to be satisfied by what occurs in practice. Professionals indicated that mediation was particularly useful where relationships between schools or authorities and parents had broken down or the dispute was deadlocked. However, a willingness to compromise was essential (see Case Study 2).

### Drawbacks

Mediation was nevertheless seen as having drawbacks: settlements are not binding; there is a greater risk that rights will not be safeguarded, with 22 per cent of parent partnership officers reporting at least one case where they considered the mediated settlement provided less to the parent than was realistically possible; key people sometimes do not attend; the process does not facilitate the participation of the child; and mediation may not counter the inherent social disadvantages experienced by some groups.

There is a theoretical concern that mediation may place parents at a disadvantage because of an imbalance of power and the 'private' nature of the process. However, our local authority and parent partnership respondents in England mostly considered that mediation was equally fair to both parties. In particular, it allows each to express their opinion and be listened to and enables the issues to be explored non-confrontationally. But a minority view was that parents are disadvantaged due to a lack of skills, experience or understanding.

### The tribunal

The tribunal has enjoyed a good reputation among professionals and academics for its fairness and expertise. Its independence was repeatedly referred to by our interviewees. However, there have been concerns, as in the recent Lamb report,<sup>3</sup> about inherent formality and legalism; the appeal process is seen as rather adversarial and stressful for the parties as compared with mediation. Parent partnership officers highlighted parents' lack of prior experience and the difficulty in preparing their case (see Case Study 1), although other research has shown that parents consider attendance at the hearing 'a good experience'.

Local authorities tended to hold negative views of the tribunal, believing that it served to encourage parental challenges or intensified disputes. They regarded the process as irksome

### Case Study 2 – 'David B' (England)

David B, aged 12, had dyslexia, dyspraxia and possibly autism. The local authority refused to assess him, but the parents successfully appealed to the tribunal. However, the parents were not happy with the subsequent statement of SEN and the school provision made for David. They had meetings with the school and were promised action but none materialised. They went to mediation twice. The first resulted in a compromise involving the parents keeping the school informed about David's condition and the authority carrying out a further assessment. Subsequently there was a falling out. The second attempt at mediation failed because Mr B considered the school to be unwilling to negotiate and walked out.

Eventually the parents received independent advice that David's statement might be unlawful. They also thought that they could get an independent school placement. They arranged for a number of private reports with a full diagnosis of David's problems. They again won an appeal. David started at the independent school. In the light of his experience, Mr B would not use mediation again. He said that mediation agreements were not binding; the school reneged; mediation was a 'waste of time'. However, the process seemed to be working, according to the mediator, who was 'surprised that things did not work out'.

and likely to go against them. Some thought that the tribunal was overly generous towards parents in the degree of procedural flexibility it allowed them, for example regarding time limits and in helping some secure a high level of resources for their child, skewing resource allocation. In Scotland, there were concerns about the tribunal's rather adversarial hearing and variable approach.

Only one-third of appeals that are lodged reach a hearing. Many of those that fail to progress



to that stage are settled or withdrawn at the last minute. HESC is concerned about the resultant inefficiencies. Voluntary organisations argued that often local authorities capitulate only at the eleventh hour. We found examples of this in three of our English case studies. There was support from several quarters for building mediation into the tribunal process itself, which might help to reduce the number of last-minute settlements.

Although the tribunal's decision is binding, there is evidence that local authorities sometimes fail to implement it or simply delay implementation. Voluntary sector interviewees explained that one reason that local authorities do not mind the relative slowness of the appeal process was because it might delay the need to commit resources if the parents succeed.

#### **Assistance for parents**

Various sources of advice and representation are available to parents in England and Scotland but provision is patchy. In Scotland, use of legal representation by parents is much less prevalent than in England, whereas the opposite is true where representation of local authorities is concerned. Scottish authority websites rarely inform parents about Enquire, a specialist publicly funded national advice and information service. Specialist voluntary bodies are active in advising parents, but independent advocacy services are very thin on the ground. Local authorities have a statutory duty to comply with a parent's or young person's wish to have an advocate for discussions with or representations to an authority, but they are not obliged to provide or pay for such services. However, 2009 legislation has placed Scottish Ministers under a duty to secure provision without charge of an advocacy service in connection with tribunal proceedings.<sup>4</sup>

In England, representation at appeal hearings is better established. Tribunal statistics for

2007–08 show that 22 per cent of parents had legal representation compared to 17 per cent of local authorities. A further 25 per cent of parents had non-legal representation. Parent partnership services are also an important source of information and advice for parents in England, although not all parents use them. However, a sizeable minority of parent partnership officers do not attend mediations or tribunals, and certainly not as a representative, nor do they normally prepare appeal documentation. Parents nevertheless benefit from information provided by the tribunal itself. Voluntary organisations play a key support role in England, despite their variable level of resources and expertise. They are often very instrumental in the parent's choice of dispute resolution mechanism.

#### **Conclusion**

Mediation has clearly not taken off in the way that was intended in this field. If it is going to have a meaningful role in the future it will

need to be better promoted. Local authorities should be held accountable for failures to provide clear information about it. In any event it should be made available as a stage in the appeal process itself, provided: it has not already been tried and failed, it does not unduly lengthen the process as a whole, and there is early identification by the tribunal of cases in which it might be beneficial. This could initially be done on a trial basis and an assessment of its effectiveness and cost implications should be carried out.

**Neville Harris** is Professor of Law at the University of Manchester. **Sheila Riddell** is Professor of Inclusion and Diversity at the University of Edinburgh.

<sup>1</sup> Education Act 1996, as amended, s332B.

<sup>2</sup> Education (Additional Support for Learning) (Scotland) Act 2004.

<sup>3</sup> Brian Lamb, *Lamb Inquiry. Special Educational Needs and Parental Confidence* (DCSF, 2009).

<sup>4</sup> Education (Additional Support for Learning) (Scotland) Act 2009 inserting s14A into the 2004 Act (above).

# A REMARKABLE, AND PROUD, JUDICIAL MEMOIR



**Mary Stacey** enjoyed the honesty of Albie Sachs's autobiography and his description of his work as a judge in South Africa.

THE CONTROVERSY surrounding the appointment of Sonia Sotomayor, the first Latin-American woman judge of the US Supreme Court, and her remark 'I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male' has reignited the debate about the extent to which life experiences and background affect the judicial process.

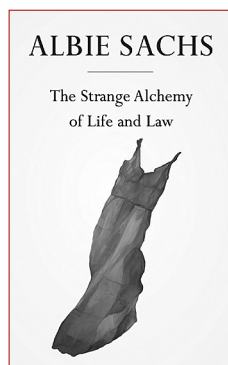
How timely that a man classified as a terrorist by the US government, who went on to become one of the first judges of the South African constitutional court, has just published his views on judgecraft as he steps down after 15 years.<sup>1</sup>

Albie Sachs's life is indeed remarkable. He describes himself as both a lawyer and an outlaw. As a practising lawyer, intellectual and ANC activist in South Africa under apartheid rule, he was subjected to frequent arbitrary arrest, detention in solitary confinement and torture by sleep deprivation. He escaped to England to complete his doctorate and lectured in law at Southampton University. In Mozambique, he narrowly survived assassination in a car bomb placed by South African government 'security agents' and was lucky to lose only his right arm and the sight in one eye. Then in 1994, Nelson Mandela appointed him to the highest court of the land in the new South Africa.

He describes how his work as an anti-racist campaigner and the infringements of his own human rights underpin his celebration of life,

unswerving commitment to human dignity and belief in the absolute supremacy of the rule of law under a progressive constitution and bill of rights. Sachs is forthright in his view that his 'over-saturated' life has influenced his judicial work as he weaves his life story with extracts from some of the court's landmark human rights judgments.

He absolutely delights in his work as a judge, and his exuberance and respect for the judicial process is infectious. But he is also frank and revealing about the challenges. How refreshing to hear:



'My judgments in fact emerge from an inchoate – even chaotic – mental firmament quite different from that suggested by their ultimate assured expression. Mixed in with the formal logic there has invariably been an enormous amount of random intuitive searching and a surging element of unruly, free-floating sensibility. At times I almost feel a sense of indignation that the apparently serene, relatively bland and cool document is all that remains of the actual warm and agitated process involved in its production.'

He would have gone so far as to call every legal judgment as a lie to describe the tortuous process of creation, had our own Supreme Court judge, Lady Hale of Richmond, not persuaded him to tone it down a bit.

He even shares with us the moment his secretary tells him he is proposing corrections to the 26th draft of a judgment and that she and his law clerks sometimes conspire to hide his

judgments to stop him making further changes. I wonder if I am alone in finding that particular confession striking a chord? Or when he muses: ‘Is floundering a necessary part of the judicial process?’ A far cry from his anticipation when appointed. ‘Surely, I had thought, judgments wrote themselves: connect the principles with the facts, and the solution will flow like water from a rock struck by Moses.’

There are several reasons for his agonising. He has a very strong sense of the privilege of the role and his duty to make his best efforts to be right. He is conscious that the court’s judgments create the basic value system of society and influence the character of the country no less. Also because a legal judgment is about so much more than pure reasoning, it ‘involves the conjugation of different elements which are weighted and evaluated according to certain agreed criteria to produce a decisive determination’.

In his chapter ‘Reason and judgment’, he describes how he tries to eliminate subjectivity in his evaluation. The case before the court challenged the prohibition of the sale of alcohol on Sundays on the grounds that it constituted religious discrimination. The argument went that deference to Christian traditions of abstinence on the Sabbath in licensing law disrespected other religions: it gave a legitimacy and superiority to Christianity that conflicted with the constitutional premise that all faiths are equal.

Sachs, from a Jewish family, was educated at a Christian school and is a committed atheist. Other South Africans would have had very different life experiences, so he constructed a hypothetical person and applied the sensibilities of ‘the reasonable South African (of any faith or of none) who is neither hypersensitive nor overly

insensitive to the beliefs in question, but highly attuned to the requirements of the Constitution’ from which to judge the case.<sup>2</sup> When it comes to leaving one’s baggage outside the door of the court, it seems he checks the contents of the suitcase first, to ensure it remains behind.

It is a brave judge who admits to crying in court, and Sachs is not shy of describing his emotion in court on occasions. In a case that conferred the right of all mothers living with HIV and their newborn babies to anti-retroviral medication,<sup>3</sup> his colleagues knew to have the tissues ready when judgment was delivered. But lest we think

him sentimental, he assures us: ‘The tears had come because of an overwhelming sense of pride at being a member of a court that protected fundamental rights and secured dignity for all.’

Judging is a lonely business, especially the crafting of judgments. Sachs’s insight into his own brand of judgecraft is fascinating, not least because of its honesty. How many of us would admit to ‘judicial preening’ – ‘that little bit of show-off that adds a distinctive voice’ or describe the tension between intuition and legal reasoning in our judgments?

The universality of the themes is remarkable. This book sheds an entertaining light into the workings of a fine judicial mind and is a useful reminder of the importance of what we do.

**Mary Stacey is an employment judge.**

<sup>1</sup> Albie Sachs, *The Strange Alchemy of Life and Law*. Oxford University Press 2009.

<sup>2</sup> *S v Lawrence* 1997 (10) BCLR 1348 (CC).

<sup>3</sup> *MEC for Health, KwaZulu-Natal v Premier, KwaZulu Natal: In re Minister of Health and Others v Treatment Action Campaign and others* 2002 (10) BCLR 1028.

# BROAD-CANVAS VIEW THAT HAS GREAT MERIT



**Nick Wikeley** reviews *Administrative Tribunals and Adjudication* by Peter Cane, which he believes to be of interest to anyone concerned with the development of administrative justice.

FIVE YEARS AGO, in a previous life and on a balmy autumn day one April, I was sitting in Professor Peter Cane's office in Canberra, discussing his latest research project. He was planning to write a study of the Australian federal Administrative Appeals Tribunal (AAT), which would have both an analytical and an empirical element. The analytical component was to examine the development of the doctrine of merits review in Australia, while the empirical part would explore how the AAT's jurisprudence was disseminated in the four government agencies that accounted for about 90 per cent of the AAT's disparate workload.

This was a fascinating prospect: measuring the impact of appellate tribunals on decision-making in frontline departments has long been the holy grail of socio-legal researchers, and Cane's plans chimed with the debates in the UK following the Leggatt Report.

Professor Cane's latest book is a good example of how some of the best legal scholarship and research projects do not always go to plan. Logistical problems (perhaps a code for difficulties in securing access to official sources?) meant that the empirical component of Cane's project had to be abandoned. Instead, the research project was reoriented: Cane's work focused on the first component in the original design, an analysis of administrative adjudication with the AAT at its heart, but moving out in both historical and comparative dimensions. Cane's original project would have been a valuable study, but one that perhaps might have been of special interest (at least outside Australia) to the geeks of the academic community of administrative justice

scholars (including this reviewer). The book, however, covers a much broader canvas and is a 'must read' for anyone – judge, practitioner, scholar or policy-maker – who is interested in the development of administrative justice.

## Non-courts

'Administrative tribunals', of course, is a term that has rather fallen out of fashion in the UK. While it may have been a readily understandable label at the time of the Franks Report, the

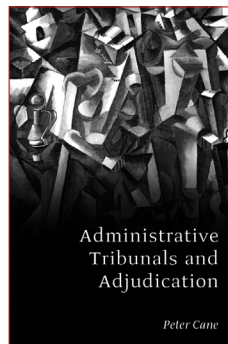
expression now carries a somewhat pejorative connotation on these shores, not least since the Leggatt Report. Cane has no such qualms, regularly referring to 'administrative tribunals', but his approach reflects one of the central tenets of the Australian Constitution – technically the AAT belongs to the executive branch of government, as the strict separation of powers means that judicial authority

can be exercised only by courts established under Chapter III of the Constitution.

So, for Cane, administrative tribunals are 'non-courts the traditional function of which is external review of public decisions, most commonly decisions made in exercise of statutory functions'.

## Models

The first four chapters of the book set the scene for the analysis that follows. After an opening survey, chapter 2 explores the historical development of adjudication by tribunals in the three main common law jurisdictions studied: Australia, the UK and the USA. This analysis is informed by a clear account of the constitutional similarities and differences of the three systems, which have



influenced the subsequent development of public law principles in each country. Chapters 3 and 4 set out four models of tribunal adjudication (the three jurisdictions above, along with France), again pointing out both common structural aspects as well as differences in their design.

### Merits review

The next three chapters provide the most important insights in the book. Chapter 5 examines the functions of tribunals and in particular the notion of merits review in Australia. Merits review has three aspects:

- The *substantive* element is that the AAT's role is to ensure that the 'correct or preferable' decision is made.
- The *procedural* aspect is that the AAT stands in the shoes of the decision-maker.
- The *remedial* component concerns the AAT's powers when reviewing a decision.

Cane explores how merits review differs from review by the courts and also from tribunal review in the comparator jurisdictions. The discussion of 'error of law' and 'error of fact' in this chapter should be compulsory reading for anyone seriously interested in administrative justice.

Chapter 6 widens the analysis to look at purpose and in particular the place of tribunals in the administrative justice system. It considers issues such as access, costs and timeliness; the scope of tribunals' jurisdiction; and evidential and procedural rules. Finally, the last chapter takes us back to the broader public law themes of the opening chapters by considering how tribunals operate in what Cane describes as 'the accountability sector'. In doing so, he revisits the issues around internal and

external review and the relationship between tribunals and government agencies.

### Tribunal review

There is now a lot of literature about the operation of different tribunals and the experience of 'users' (at least in the UK; Australia suffers from a relative dearth of such empirical studies). However, much of the UK literature is also jurisdiction-specific, limited to the particular tribunal silo being studied.

One of the great values of Cane's book is its careful analysis of the juridical nature of tribunal adjudication. Noting the changes made by the Tribunals, Courts and Enforcement Act 2007, Cane wonders how far a generic concept of tribunal review will develop in English law, and how far it will be similar to or different from review by the courts. In doing so, Cane does not pull his punches in places: for example, 'The Upper Tribunal is being groomed, it seems, as a sort of junior Court of Appeal – essentially a law-making body but lacking the clout to take on the government in the most tricky and controversial cases'.

Whether or not that proves to be an accurate assessment, I also had my doubts about the use of France as a (minor) comparative model, given the very different nature of French administrative law. But such cavils

do not detract from the book's value, which will repay not just reading but careful re-reading.

**Nick Wikeley is a judge of the Administrative Appeals Chamber of the Upper Tribunal and Emeritus Professor at the University of Southampton.**

<sup>1</sup> *Administrative Tribunals and Adjudication*, by Peter Cane. Hart Publishing 2009.

*... Cane does not pull his punches in places: for example, 'The Upper Tribunal is being groomed, it seems, as a sort of junior Court of Appeal – essentially a law-making body but lacking the clout to take on the government in the most tricky and controversial cases'.*

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## AIMS AND SCOPE

- 1 To provide articles to help those who sit on tribunals to maintain high standards of adjudication while remaining sensitive to the needs of those appearing before them.
- 2 To address common concerns and to encourage and promote a sense of cohesion among tribunal members.
- 3 To provide a link between all those who serve on tribunals.
- 4 To provide readers with material in an interesting, lively and informative style.
- 5 To encourage readers to contribute their own thoughts and experiences that may benefit others.

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