JUDICIAL COLLEGE

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SUMMER 2011

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JUDICIAL REVIEW

Kenny Mullan **summarises the decisions of the Supreme Court in *Cart* & *MR* and *Eba*.**

TO WHAT EXTENT is a decision of the Upper Tribunal, otherwise unappealable through the statutory machinery, amenable to judicial review? In these cases, the Supreme Court has provided the answers. In all three cases, the appellant sought a judicial review of the refusal of permission to appeal by the Upper Tribunal.

The approach in *Cart* & *MR*

Lady Hale delivered the leading judgment in *Cart* & *MR* [2011] UKSC 28. She thought that the court could be clear on three points. First, there was nothing in the 2007 Act which purports to oust or exclude judicial review of the unappealable decisions of the Upper Tribunal. There would have to be clear provisions in the legislation to that effect and there were no such provisions. Additionally, the argument that making the Upper Tribunal a superior court of record was sufficient to do this was rejected in the Court of Appeal by Laws LJ and had not been resurrected. Second, it would be completely inconsistent with the new structure introduced by the 2007 Act:

> '. . . to distinguish between the scope of judicial review in the various jurisdictions which have now been gathered together in that new structure. The duties of the Senior President, set out in section 1(2) of the TCEA 2007, clearly contemplated that the jurisdictions would retain their specialist expertise, so that one size does not necessarily fit all; but the relationships of its component parts with one another and with the ordinary courts are common to all. So too must be the principles adopted by the High Court in deciding the scope of judicial review.'

She then set up the question for the Supreme Court, as follows:

> 'Third, the scope of judicial review is . . . to ensure that, within the bounds of practical possibility, decisions are taken in accordance with the law, and in particular the law which Parliament has enacted, and not otherwise. Both tribunals and the courts are there to do Parliament's bidding. But we all make mistakes. No one is infallible.

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EDITORIAL

HOW, IF AT ALL, do tribunals differ from the courts? Is it in their flexibility – removing the need for unnecessary case management hearings (see Judge Nicholas Warren on page 6). Or in their inquisitorial nature – promoting consistency in decision-making and an 'equality of arms' (see Judge Andrew Bano on page 16).

Consistency is also a theme of Judge Christopher Ward's consideration, on page 2, of the ways in which the Upper Tribunal has been able to promote a standardised approach to the common core of procedural rules within the Tribunals Service. Are there possible dangers in attempting to go too far, too fast?

Whatever the characteristics of a tribunal, it is better to get things right in the first place than put appellants through an expensive and stressful appeal process. On page 19, Richard Thomas and Professor Alice Brown summarise a recently published report of the AJTC which aims to help public services get their decisions right first time.

Finally, we are pleased to include a short supplement with this issue on pages 11 to 14, summarising the discussion at a conference organised jointly by the UCL Judicial Institute, the Nuffield Foundation and the tribunals judiciary. The topic was the future of tribunals – their identity, users and employment of training and technology.

Kenny Mullan

Please send comments on the journal to *publications@judiciary.gsi.gov.uk*.

A VEHICLE TO DELIVER CONSISTENCY

Christopher Ward considers the way in which the decisions of the Upper Tribunal are developing a common core of procedural provisions for the First-tier and Upper Tribunals, and the extent to which the benefits intended by the tribunal reform programme are being secured.

AMONG THE BENEFITS offered by the tribunal system created by the Tribunals, Courts and Enforcement Act 2007 was the creation of a more structured framework for second appeals to replace that whose lack of coherence was noted by Sir Andrew Leggatt. Indeed, as the Senior President of Tribunals observed:

> 'The establishment of the new Upper Tribunal . . . provides an unprecedented opportunity to build on the existing case law of the different jurisdictions and to develop a more coherent approach to the many common themes of tribunal justice.' [1]

The common core

This article takes one of those 'many common themes', namely the common core of procedural provisions [2] and examines what the Upper Tribunal, and in particular its Administrative Appeals Chamber (AAC), which has been around longest, has and has not as yet been able to accomplish.

The statutory Tribunals Procedure Committee, in framing rules, has had to strike a balance between the demands of particular jurisdictions and the desirability of standardisation . . .

The statutory [3] Tribunals Procedure Committee, in framing rules, has had to strike a balance between the demands of particular jurisdictions and the desirability of standardisation, which if appropriately applied can yield real benefits for advisers and tribunals staff, among others. It has resolved this, at any rate initially, by 'adopt[ing] common rules across tribunals wherever possible, so that rules specific to a chamber or a tribunal are permitted only where there is a clear and demonstrated need for them'. [4] In practice therefore, at First-tier level, while each chamber has its own rules, those for the Social Entitlement, Health, Education and Soc ial Care, General Regulatory and Finance and Tax Chambers all have significant elements in common. For the Immigration and Asylum Chamber the nature of their case load made it appropriate to retain the old rules. The (general) Upper Tribunal rules contain significant elements of the common core while the Lands Chamber has its own rules containing elements of the common core and significant elements derived from its previous rules.

Ruling on the common core

It follows that the Upper Tribunal may end up ruling on points within the common core either in relation to its own practice and procedure in the course of deciding appeals, or in its decisions on appeals from (or judicial reviews of) the First-tier Tribunal. It is difficult to draw firm conclusions as to the former, as in general only final decisions are published. The latter, however, are a different matter and those who care to search [5] the AAC's selected decisions online will find a growing number of decisions concerning procedural issues, many of them in relation to the common core. A rather smaller number appear among the decisions of the Tax and Chancery Chamber available online. In the AAC, three-judge panels have been convened, taking advantage of the fact that chamber presidents of the First-tier Tribunal

and their deputies are also judges of the Upper Tribunal,[6] and thus securing additional practical experience of the operation of procedures at First-tier level.

Interlocutory decisions

Deciding an appeal was always liable to involve consideration of procedural rules. Further, challenges specifically to interlocutory decisions have recently become more straightforward in the AAC as a result of the decision in *LS v LB Lambeth*.[7] This clarifies that the right of appeal to the Upper Tribunal attaches to any 'decision' of the First-tier Tribunal, an expression wide enough to encompass anything that is not an 'excluded decision' as defined. In other words, there are not, in effect, types of decision (in ordinary language) that are not 'decisions' for this statutory purpose.[8]

Whether this will result in more challenges to interlocutory decisions is, however, debatable. The AAC had previously taken the view that if a challenge to an interlocutory decision was not appealable, it could be challenged by way of judicial review and would then in the vast majority of cases fall to be considered by the Upper Tribunal anyway.[9] Further, the three-judge panel in *LS* was at pains to point out that permission to appeal an interlocutory point might be refused on the ground of prematurity and that the grant of permission depended on all the circumstances, including in the case of an appeal against an interlocutory decision the likely length of the underlying litigation.

Decisions clarifying concepts

One key conceptual issue with which the Upper Tribunal has had to grapple is the extent to which, if at all, principles derived from the Civil Procedure Rules (CPR) are to be applied to the Tribunal Procedure Rules. In *CB v Suffolk CC,*[10] the three–judge panel, considering whether to punish for contempt of court, observed:

> 'We do so however not against a background of the provisions of the Civil Procedure Rules and associated Practice Statements which would apply in the High Court, nor of statutory provisions such as section 36(4) of the Senior Courts Act 1981, whose impact we consider to be confined to the High Court. Rather, we consider that in passing the 2007 Act, Parliament was intending to confer upon the Tribunal Procedure Committee the power to make the necessary provisions to regulate the issuing of witness summonses by the First-tier Tribunal and the conduct of references to the Upper Tribunal. It would be in our view both surprising and undesirable – not least in view of the aims stated in section 22(4) of the 2007 Act – if it was necessary to apply a raft of measures from other sources, so that one could not take at face value what was stated in the Tribunal Procedure Rules.'

Opportunities have also arisen and been taken to provide guidance to help secure that mechanisms in the common core deliver the benefits intended for them.

In other areas, too, judges of the AAC and also the Tax and Chancery Chamber have shown a disinclination to applying the CPR by analogy, at any rate without an appropriate degree of modification to reflect the distinctive characteristics of tribunals: see *Information Commissioner v PS*[11] (extensions of time), *LM v LB Lewisham*[12] (production of documents), and *Connect Global Ltd v HMRC*.[13]

Securing intended benefits

Opportunities have also arisen and been taken to provide guidance to help secure that mechanisms in the common core deliver the benefits intended for them. A well-known example is the decision in *R(RB) v First-tier Tribunal (Review),*[14] where

there was an evident concern that the manner in which the power of the First-tier Tribunal to review its own decisions was used could cause additional delay, when its purpose was to provide a quicker remedy for the more clear-cut errors of law. The wish to maintain a degree of agility in the system is likewise evident in a number of early decisions highlighting that the appropriate way to challenge a direction is by way of application to amend, suspend or set aside the first. The existence and proper use of this power to adjust makes it quicker and easier to issue directions in the first place, in general without a hearing and often without the need to invite representations.

Changes of practice needed?

Other decisions have highlighted areas where aspects of the common core may indicate the need for something of a change of practice. Thus a short series[15] of decisions have highlighted that before going ahead without a hearing, in considering whether it is able to decide the matter without a hearing, a tribunal must (as in other respects) apply the overriding objective and must be prepared to explain, if only briefly, its conclusion. A similar approach has been taken to deciding whether it is in the interests of justice to proceed with a hearing in the absence of a party.

Information Commissioner v PS is also an interesting example of a judicial decision in which the judge strove to give effect to the aim of encouraging a consistency of approach across the tribunal system, where appropriate.

Reasons: synthesising authorities

One area of the common core which has received repeated scrutiny is, of course, the giving of reasons. I do not dwell on it here, as it could be a topic in its own right. Further, much of the activity has been more in the nature of applying existing authorities, notably the Court of Appeal's decision in *H v East Sussex County Council,*[16] to individual cases. It is however an area which has seen some attempts to synthesise the authorities on reasons across a number of jurisdictions falling under the auspices of the AAC, a process seen, for instance, in *DC v LB Ealing.*[17]

Restraint on appeal

While there have been areas where intervention has been appropriate, there has also been recognition that case management decisions are pre-eminently a matter for the First-tier Tribunal hearing the case and that an appellate body will only intervene either where the wrong approach in principle has been adopted or where it had reached a conclusion that no tribunal, properly directed, could have reached.[18]

One such area where the need for restraint on appeal has been reiterated in the early years of the AAC's operation is extensions of time. *Information Commissioner v PS*[19] is the latest in a number of cases on the topic reiterating that extensions of time are quintessentially a matter of judicial discretion. As well as the view that CPR should not be applied by analogy, the judge endorsed a previous AAC decision[20] which had argued that the impact of the overriding objective is such that in this area:

> 'Any further guidance by the Upper Tribunal would either be so general as to be meaningless or would be likely to spark time-consuming and unnecessary satellite litigation.'

Cross-chamber consideration

Information Commissioner v PS is also an interesting example of a judicial decision in which the judge strove to give effect to the aim of encouraging a consistency of approach across the tribunal system, where appropriate. His review of authorities took him not only to AAC decisions in fields as diverse as care standards and criminal

injuries compensation (thus continuing the approach seen in *DC v Ealing*), but also to decisions of the First-tier Tribunal (Finance and Tax Chamber).

Progress so far

The AAC and other chambers of the Upper Tribunal, like any court or tribunal, can only decide on the cases that come before them. As seen above, decisions have probed a number of key areas, but coverage is far from comprehensive. However, on page 6 of this issue, Nick Warren writes persuasively of the dangers of professional enthusiasm for spotting interesting points of law and of test cases. There may thus be dangers in attempting to go too far, too fast, in search of a judicially created standardisation of approach. Many of the benefits may only be fully yielded over time. Nor is the judicial decision-making process the only way forward – the Upper Tribunal (like tribunals more generally) also has the opportunity of input into the rule-drafting process, by virtue of its membership of the Tribunal Procedure Committee as well as through the committee's practice of drawing on other tribunal judges for specialist assistance as and when needed and through its consultation exercises.

Future issues

Nonetheless, there may be a number of issues going forward. How best can it be ensured that judicial decision-making most effectively furthers the promotion, where appropriate, of good practice and standardisation in relation to the common core, to the benefit of users, representatives, tribunal judges and administrators alike? With more chambers of the Upper Tribunal now having occasion to rule on, and themselves apply, the common core, the dangers of inconsistent approaches are increased. Questions of the methods of promulgation of decisions arise. Members of one chamber may need to know what members of another are doing. Representatives need to be able to advise their clients and to draw to the attention of tribunals relevant authorities, whether from the same or a different chamber, without a burden of research, and hence cost, that may be beyond many tribunal representatives, never mind lay users.

Linked to these questions are the mechanisms for peer review of decisions (for instance, as part of a process leading to a decision to report a particular case) and of precedent. It is understood that the Senior President of Tribunals is establishing a group to work through such issues. With the AAC having been in existence for over two years and the other chambers firmly established and active, this will be a useful step – to build on what has already been done and to enable the benefits anticipated by Leggatt and the ensuing White Paper to be further realised.

Christopher Ward is a judge of the Upper Tribunal.

[1] First Implementation Review, quoted in Annual Report 2010 at para 21.

[2] The expression is intended to include the associated provisions of the 2007 Act as well as relevant Tribunal Procedure Rules.

[3] TCEA 2007, s22.

[4] Per Elias LJ in the Annual Report for 2010.

[5] It is possible to search against 'Category of decision' for 'Tribunal procedure and practice, including UT'.

[6] TCEA 2007, s5(1)(i).

[7] [2010] UKUT 461 (AAC).

[8] It may be that the Tax and Chancery Chamber, without the inheritance of social security case law, has not perceived this as such an issue: see e.g. *Capital Air Services Ltd v HMRC* FTC/45/2010 at para 16.

[9] i.e. under the terms of the Lord Chief Justice's 'Direction – Classes of Cases specified under section 18(6) of the Tribunals, Courts and Enforcement Act 2007.'

[10] [2010] UKUT 413 (AAC).

[11] [2011] UKUT 94 (AAC).

[12] [2009] UKUT 204 (AAC).

[13] [2010] UKUT 372 (TCC).

[14] [2010] UKUT 160 (AAC).

[15] See e.g. *MH v Pembrokeshire CC* [2010] UKUT 28 (AAC); *AT v SSWP* [2010] UKUT 430 (AAC).

[16] [2009] EWCA Civ 249.

[17] [2010] UKUT 10 (AAC).

[19] See e.g. *Connect Global* at para 48; *CB v Suffolk CC* at para 29.

[19] See note 8.

[20] *Ofsted v AF* [2011] UKUT 72 (AAC).

No time for fussing and FIGHTING

Nick Warren **wonders if, in their haste to embrace principles of case management, tribunals are losing something, and recommends concentrating on those directions that will help reduce the wear and tear of legal proceedings.**

Public law tribunals now have their 'mission statement' in the form of rule 2 of the Procedure Rules, often referred to as the 'overriding objective'. All the chairmen are now called judges and 'judicial case management' is seen as the effective way forward. And yet, there is also a feeling around that we may be losing something. Individual case management soon seems to give way to forms containing standard directions. There is a search for alternative methods of dispute resolution. It is perhaps not a coincidence that many are beginning to ask themselves how, if at all, tribunals now differ from courts.

Difference

I believe that one fundamental difference is that tribunals have always accepted an obligation to reduce to a minimum the emotional and financial wear and tear associated with court-based litigation. Let no one underestimate the importance of this for access to justice. Hardly anyone has enough money to conduct civil litigation in the county court or High Court. Very few would willingly expose themselves to the anxieties and fears of doing so. Unless the lifting of these burdens is at the heart of our case management then we risk undermining the very purpose of a tribunal's existence.

Proportionate

Before exploring what this might mean in practice, it is necessary to admit that one size does not fit all. There may be some tribunal litigation which is inherently complex and in which an approach similar to that taken by the courts is appropriate. All tribunals, I would suggest however, do have smaller cases in which it is important to take a proportionate approach to case management.

Language

The language we use in case management can be important. One traditional way of reducing the burden on appellants has been to adopt an enabling role. It is now second nature for a tribunal judge to try to put an appellant – indeed all parties – at their ease, explain the procedure and reassure them that they will be listened to. All these 'soft skills' are unlikely to be effective if, in the lead up to the hearing, the tribunal has spoken to the citizen in terms of 'orders' and 'directions'. This language, unthinkingly borrowed from the courts, is foreign to a non-lawyer. Nor, when parties are legally represented, does such language help to foster the spirit of cooperation enshrined in rule 2(4). On the contrary, some solicitors seem to get very excited if the other side is two days late in obeying a direction. It seems to suggest a whiff of contempt of court and prompts requests for disproportionate strikeouts or for the defaulting party to pay the costs of drawing the omission to the tribunal's attention.

Contents of response

In general, tribunals encourage cooperation, not by individual case management but by policy work such as meeting appellants and respondents at tribunal user groups. Tribunals should also discuss with respondents the form which their responses to an appeal (previously termed submissions) might take. The department's response must explain to the appellant the case against him or her – that is, the reasons for its original decision. The language should be simple and clear and should tell the citizen about the law which applies to the case. The response should assist the tribunal to reach the correct decision.

So it should contain all the relevant evidence and any procedural information which affects the form of the tribunal's decision. The response should also argue the respondent's case. Case management on disclosure will be unnecessary if the respondent is aware of the duties of public authorities to produce to an appeal tribunal all relevant evidence regardless of whether it is favourable to their own case or not.[1]

Written statements

It is common to direct appellants to file witness statements and that these should stand as evidence in chief. This is not always necessary. Civil courts adopted this stratagem to deal with the amount of time wasted by advocates asking a witness to try to remember what was in his or her statement when the judge did not have a copy. Unrepresented users are unlikely to be accustomed to preparing written statements. In an ordinary case, tribunals can usually pick things up on the day.

Case codes

The tribunal should agree case codes with respondents which are sufficient to distinguish simple cases from complex ones and to identify the type of information which the appellant is likely to need. For example, a case code for fitness for work appeals might generate information about how to obtain your medical records. A case code concerning the amount of someone's capital might stimulate a fact sheet about producing copy bank statements. Appellants are more likely to be once-in-a-lifetime visitors. They need information, be it by leaflet, DVD or website, about what is likely to happen at a tribunal hearing. Such guidance may have to be general. Case codes could be used to provide more specific information. Guidance to appellants and agreed procedures with respondents will enable tribunals to decide many cases with little more than the letter of appeal, the response and the reply. Individual case management should be reserved for those appeals which are unusual or going badly wrong. Even then the guiding principles should be proportionality and the need to reduce wear and tear.

New problems

If this is right, then tribunals should abandon the practice of producing a number of specimen directions and inviting the parties to pick and mix those which are appropriate. The lists are inevitably lengthy and this method leads too easily to unnecessary work with each side anxious to put its case. It is a mistake to decide that you want to present everything in apple pie order for the hearing. If you do, you risk searching for and thinking of new problems which might never have occurred to anyone else; and if the problem is capable of being sorted out on the day by a flexible judge, then case management gains nothing.

It is a mistake to decide that you want to present everything in apple pie order for the hearing.

Evaluating as a whole

Preliminary issues retain popularity in some quarters despite the Court of Appeal's conclusion that *Greville v Venables*[2] should 'stand simply as yet a further reminder of the necessity for great caution before preliminary issues are ever embarked on'. They look efficient but it is often surprisingly hard to identify the preliminary issue correctly. They prevent the tribunal from evaluating a witness's evidence as a whole – it may be more plausible or less plausible on the preliminary issue. It is usually safer and quicker to proceed normally. The tribunal can always take a preliminary point at the hearing if it wishes to do so.

Tone

There may be positive directions that will help reduce wear and tear. Their tone, however, should be friendly to the tribunal user. An occasional 'please' might not go amiss. For example, it may make sense to require an appellant to state whether a given set of assertions in the response are accepted as true. Depending on the circumstances this might lead to a reduction in any need for the

respondent to prepare or bring evidence on the points. It may even lead to the possibility of a strikeout for no reasonable prospect of success. There is a case for encouraging respondents to ask for directions from the tribunal before the response is filed if there is a possibility that the direction may lead to the appeal being allowed by consent or to it being struck out.

Professional enthusiasm

Specialist tribunals are perhaps particularly prone to spot interesting points of law. They should not forget the burden which the development of these points may place on the tribunal user. In this connection, the recent judgment of Baroness Hale in *R (Smith) v Oxfordshire Assistant Deputy Coroner*[3] has a chilling warmth. The warmth comes from the judge's humanity in starting straight away with the person most affected by the proceedings, Mrs Smith, whose son died of heatstroke while serving with the army in Iraq. Everyone agreed that the original inquest was flawed. The form which the new inquest should take was also agreed. That was all that was needed to decide the case, but as Baroness Hale explained:

> 'The Ministry of Defence have appealed to this court because both the trial judge and the Court of Appeal accepted the invitation of both parties to decide more than they needed to decide. Of course they meant to be helpful. But because the Ministry of Defence did not like what they said Mrs Smith has had to wait more than two years for the case to be over so that the fresh inquest can be arranged. Perhaps worse, it is not at all clear what this court is doing.'

The chill comes from the effect of all this on Mrs Smith. Baroness Hale is describing a piece of litigation that has gone badly wrong in consequence of professional enthusiasm. Big cases which develop the law often lead to lots of smaller cases being stayed while the big case makes its way through the appellate system. This looks at first sight a first-rate efficient use of judicial resources. The reality is often different. The resultant delay can be a serious problem for the tribunal user. At present, one quarter of cases in one jurisdiction have been stayed, some for years.

Need for speed

If instead the case goes ahead then there must be an outside chance of the judge getting the law right anyway and the parties may well be happy to accept the decision in this one case, even though two years later the Court of Appeal might rule that the law was something different. Moreover, test cases or lead cases often change shape or direction in the course of litigation. It is surprising how often they do not supply the answer in the case which has been stayed. Nothing is saved if it should turn out that the facts of the stayed case are such that the legal dispute becomes irrelevant. It seems essential, if you are considering whether to stay a case pending a decision in another one, that you know how long people are likely to wait. It would make sense for stayed cases to be reported automatically to the Chamber President, who then might alert a colleague in the Upper Tribunal to the need for a speedy decision. In *Nancollas v Insurance Officer*,[4] the Master of the Rolls indicated that a similar arrangement might be available in the Court of Appeal, but I have never known it used.

The tribunal judge must sometimes rein in enthusiasm. The effect on the users must be at the forefront of procedural decisions. As the Beatles pointed out, 'life is very short and there's no time for fussing and fighting my friends'. We have a better chance of working it out if we apply that principle, or something like it, to case management.

Judge Nick Warren is President of the General Regulatory Chamber.

[1] See CIS/0473/2007 paras 36-37.

[2] [2007] EWCA Civ 878.

[3] [2011] 1 AC 1.

[4] [1985] 1 All ER 833.

Changes of form and not SUBSTANCE

Colin Bishopp continues a series of articles by newly appointed Presidents of the Upper and First-tier Chambers in considering the work of a Chamber that, despite its name, is not confined to tax.

It is now a little more than two years since the Tax Chamber of the First-tier Tribunal came into existence, and an opportune moment for looking back at what we have achieved. For most of that time the Chamber was under the leadership of Sir Stephen Oliver QC, who also undertook a great deal of the planning in the run-up to its creation. Stephen retired in April 2011, and I am very grateful to him for the quality of the legacy he has left to me.

Range of work

The Chamber is the successor to the General Commissioners, lay people who dealt with the (usually but not always) lower-value and simpler direct tax cases, the Special Commissioners, made up of salaried and fee-paid specialist tax judges who dealt with the more high-value and complicated direct tax appeals, and the VAT and Duties Tribunal, also made up of salaried and fee-paid chairmen and members, dealing with the full range of indirect tax appeals.

The range of the tax work now undertaken by the Chamber is probably wider than that of any other Chamber.

The range of the tax work now undertaken by the Chamber is probably wider than that of any other Chamber. At one extreme we deal with modest penalties, usually £100, for the late filing of a tax return. At the other are complicated schemes, sometimes devised for tax avoidance purposes but often ordinary commercial arrangements, whose tax treatment has led to a dispute.

We are also unusual in that the Upper Tribunal tax judges not only can but frequently do sit at First-tier level. I divide my own time roughly equally between the two tiers.

Expansion

Despite the name of the Chamber, our work is not confined to tax. We, and the VAT and Duties Tribunal before us, have jurisdiction in some money laundering and Proceeds of Crime Act appeals, and more recently we were awarded, if that is the right word, the jurisdiction to hear appeals by MPs in relation to their expenses although, so far, there has not been even a whisper of such an appeal reaching us. Doubtless our jurisdiction will evolve and other new avenues of appeal will be allocated to us over time. Nevertheless, despite the expansion of our jurisdiction, tax will make up by far the majority of our work for the foreseeable future.

Concern

Although the creation of the Chamber brought with it comprehensive changes to the procedural rules of the predecessor tribunals, and we are now administered rather differently, most users of the Special Commissioners and the VAT and Duties Tribunal seem to have recognised very quickly that the changes were for the better, and that they made little difference of substance rather than of form to the way we conduct our business. There was, however, considerable concern by users of the General Commissioners that their very informal and easy-going approach would be lost in the move to a fully professional tribunal. That was a concern we have been anxious to address.

Informality

Replication of the General Commissioners was not a possibility, but we have set out to offer in a different way what we believe to be an equally informal means of dealing with cases where the taxpayer is likely to be in person, or represented by a tax practitioner accustomed to appearing before the General Commissioners. Because of the range of the cases we handle, our rules require that they are allocated to one of four categories.

Categories

'Default paper' cases are, as the name indicates, normally dealt with on written submissions alone, and the category is designed for those appeals in which an attendance by either side would be disproportionate to the amount at stake, though the parties may ask for a hearing if they wish. 'Basic' cases broadly mirror the 'turn up and talk' approach of the General Commissioners, and there is very little exchange of written material in advance of the hearing. The 'standard' category includes all appeals which are not allocated to another category, while the 'complex' category covers those cases where there is a difficult issue of law, a large amount at stake, or a great deal of evidence. In complex cases (but not others) we have a full costs-shifting jurisdiction, though the taxpayer may opt out, and in the most complex of all there is the possibility of a transfer of the appeal to the Upper Tribunal, though such transfers are very rare.

'. . . we have broadly achieved the objective of providing a convenient, inexpensive and quick means of resolving relatively minor disputes . . .

Acceptance

Almost all the appeals which would formerly have been heard by the General Commissioners come within the default paper and basic categories, which together constitute almost 90%, numerically, of our workload, though in terms of the use of judicial resources, they account for well below 50%. After some initial resistance by users to the changes, the available evidence, I am pleased to say, indicates that we have broadly achieved the objective of providing a convenient, inexpensive and quick means of resolving relatively minor disputes, and that we have replaced the General Commissioners in a manner which has won increasing acceptance.

Document-heavy cases

Like every other Chamber we face challenges in providing a good level of service for our users while subject to budgetary constraints. So far we have been able to withstand the pressure, but we do face one major challenge which we are finding difficult. It is the large number of document-heavy cases we have which are expected to last three weeks or more (and sometimes much longer). Most, but not all, of these are the so-called missing trader cases in which millions of pounds of VAT are at stake. Finding the judges and members able and willing to sit for such long periods is difficult, since we are heavily reliant on fee-paid judiciary as we have, at present, only four full-time judges, including me. However, one (to us very important) benefit of the reform of the Tribunals Service and, now, the merger to form HMCTS, is that the large courtrooms we need for such cases, formerly almost inaccessible to us, are now quite readily obtained.

Feedback

Of course we have made mistakes – we, too, have been finding our way round new rules, and getting to grips with a completely new administrative system – but the feedback I have from our users suggests that, while there is still some room for improvement, we are managing to provide for our users the standard of service they are entitled to expect.

Colin Bishopp is a Judge of the Upper Tribunal (Tax and Chancery Chamber) and President of the Tax Chamber of the First-tier Tribunal.

THE FUTURE OF TRIBUNALS

TRIBUNALS

The 'Future of Tribunals' was a one-day event held by the UCL Judicial Institute in association with the tribunals judiciary and Nuffield Foundation on 27 June 2011. The objectives of the day were two-fold:

1. To identify the key policy areas of concern for tribunals in the new merged service in order to contribute usefully to policy debate and development.
2. To identify priority areas for research in the field of tribunals and non-court adjudication.

The day was organised as a working event with three 'roundtables', each centring on a key topic of concern for tribunals. Each roundtable was introduced by a facilitator and included several commentators who identified key difficulties and benefits that may arise in a merged service, as well as future challenges and research needs. Several discussion leaders seated in the audience then gave a critique of those views before a full audience discussion.

The roundtable participants were:

Roundtable 1: 'Identity'

Facilitator: **Judge Jessica Burns**, Regional Tribunal Judge, Social Entitlement Chamber.

Commentators: **Judge Elisabeth Arfon-Jones**, Vice-President, Upper Tribunal Immigration and Asylum Chamber; **The Hon Mr Justice Hickinbottom**; **The Rt Hon Sir Stephen Sedley**; **Professor Graham Zellick CBE QC**, President, Valuation Tribunal for England.

Discussion leaders: Roderick Bagshaw, Magdalen College, Oxford; **Professor Susan Corby**, University of Greenwich; **Gillian Fleming**, Employment Tribunal.

Roundtable 2: 'Users and Access'

Facilitator: **Professor Dame Hazel Genn**, Dean, UCL Faculty of Laws.

Commentators: **Kevin Sadler**, Director of Civil, Family and Tribunals, HMCTS; **Richard Thomas**, Chair, Administrative Justice and Tribunals Council; **Judge Nicholas Warren**, President, General Regulatory Chamber;

Discussion leaders: Jodi Berg, Independent Complaints Reviewer and AJTC; **Christopher Evans**, Deputy Director, Decision-Making and Appeals Policy, DWP; **Brian Thompson**, AJTC and University of Liverpool.

Roundtable 3: 'Training and Technology'

Facilitator: **Professor Nick Wikeley**, Upper Tribunal Judge and Emeritus Professor, University of Southampton.

Commentators: **Judge Andrew Bano**, President, War Pensions and Armed Forces Compensation Chamber and Judge of the Upper Tribunal; **Professor Jeremy Cooper**, Director of Tribunals' Training, Judicial College; **Caroline Hamilton**, Chief Parking and Traffic Adjudicator for London; **Siobhan McGrath**, Senior President, Residential Property Tribunal Service.

Discussion leaders: HH Judge Robert Martin, President, Social Entitlement Chamber; **Dr Jane Rayner**, Co-Chair, Tribunals Medical Advisory Group; **Judge Shona Simon**, President, Employment Tribunals (Scotland).

Lord Justice Carnwath, President of Tribunals, opened the event, and Lady Justice Hallett, Chair of the Judicial College, joined Roundtable 3 providing her view on the future of judicial training across all judicial posts.

The UCL Judicial Institute has published two briefing papers drawing on the roundtable discussions and the responses provided on questionnaires filled in by participants. Both briefing papers can be downloaded from the JI website at *www.ucl.ac.uk/laws/judicial-institute.*

IN SEARCH OF DISTINCTION

What is distinctive about the tribunal system? The Franks report[1] described the key characteristics as 'cheapness, accessibility, freedom from technicality, expedition and expert knowledge of their particular subject'. In the Leggatt report, the emphasis was on specialist expertise and flexibility of procedure.

Against that background the first session endeavoured to explore the identity of tribunals. **Elisabeth Arfon-Jones** thought that the courts had much to learn from tribunals in areas such as the development of coherent appraisal schemes, flexible working conditions and the opportunity for accessing career breaks. Tribunals had also demonstrated diversity in recruitment and appointment, and a programme of judicial training that was not an optional extra. She voiced a strong view that the specialist expertise which was offered by tribunals should not be sacrificed.

IDENTITY

For **Gary Hickinbottom**, identity was made up of a combination of characteristics. He was of the view that accessibility and expertise were clearly aligned to the functions of the Senior President as set out in section 2(3) of the 2007 Act. In recent years, courts and tribunals had grown together. Tribunals had moved away from their sponsoring departments to the Ministry of Justice. Tribunals judges were subject to judicial disciplinary procedures, with direct access to the Judges' Council. In turn, the courts were becoming more specialist and were adapting their formal style in response to the increase in litigants in person appearing before them. The proper response should be more flexibility rather than more informality, the former being a key characteristic of tribunals. Those characteristics were not unique to them, and courts and tribunals had to work together more. He finished by addressing the significant role of the Upper Tribunal in developing its specialist jurisdiction.

Stephen Sedley wondered whether one implication of the decision of the Supreme Court in *Cart & MR* [2011] UKSC 28 and *Eba* [2011] UKSC 29 (see summary on page 1) might be that the unique jurisdiction which the Upper Tribunal had developed for itself might be lost. He thought that the judges of the tribunal might be more inclined to give permission to appeal on an application to it rather than face judicial review. The decision also had clear implications for the High Court judiciary who might be swamped with applications following unsuccessful proceedings before the Upper Tribunal. In this respect it was important to remember that the issues arising in a case were always important to somebody and, most significantly of all, were always important to the litigants themselves.

In a somewhat pessimistic presentation, **Graham Zellick** wondered whether tribunals had any recognisable unique characteristics. He did not accept that tribunals were easily understood by ordinary individuals.

Responses from the audience touched on the tensions between courts and tribunals. A merger with the courts brought obvious advantages but the tribunals still had to develop their own model. Additionally, while the rule of law was an obvious value, there were others which could be advanced, including alternative dispute resolution and coherent feedback to original decision-makers.

While courts could learn from tribunals, there was concern as to whether that outcome or aspiration was likely to be achieved. Were the key characteristics of accessibility and expertise enough? And did recent developments, including the according of judicial titles and the development of the Upper Tribunal's specialist jurisprudence, help the litigants themselves? There was a clear requirement to focus on the needs of those participants. Did the development of paper hearings, for example, mean that the oral tradition had been lost and the litigants did not have the opportunity to have their say?

[1] 1957. Cmnd 218.

BALANCING DIVERSE NEEDS

USERS AND ACCESS

Hazel Genn opened the second session by describing how tribunals are very different to courts, because of the greater accommodation of diversity within the tribunals system, with judges and members consciously thinking about how they work and how they can best meet the needs of diverse users. She identified two main issues affecting users' access and participation:

- The increasing numbers of unrepresented, unprepared and unadvised appellants, with little understanding of the tribunal process.
- The current emphasis on alternative methods of dispute resolution served to undermine the value of an oral hearing, which may be a user's best chance of achieving a fair outcome.

Kevin Sadler explained that his role involved trying to balance two competing objectives: access to justice and efficiency. The Tribunals Service had attempted to address problems identified in successive customer satisfaction surveys, by managing user expectations and providing better explanations of what will happen when. He identified the main challenges for HMCTS as:

- 'Segmentation' of customers to understand individual needs.
- Fewer but accessible hearing venues.
- Getting more decisions right first time.

Richard Thomas identified the main risks and threats which could mean less justice for users as:

- The increasing number of cases.
- Less money for administration and advice.
- The 'junior status' of tribunals and threats to their distinctive characteristics.
- The attractions of 'easy options' to limit appeals, such as fees and reduced rights of appeal.

He referred to the AJTC's recently published report on Right First Time (see further, page 19) and the forthcoming report on Proportionate Dispute Resolution, which recommends greater use of 'triage' to identify the best way of resolving disputes according to individual circumstances. He urged tribunals to resist further 'judicialisation', and suggested there was much to learn from the techniques used by Ombudsmen or bodies such as the Social Fund Commissioner (soon to be abolished), designed to deal with large volumes of cases without formal hearings while still engaging directly with users and feeding back to decision-makers.

Nicholas Warren stressed that access for users extended to supporting users in pursuing an appeal. The fear of appearing before a court or tribunal and undergoing cross-examination was widely underestimated, and for some users even a positive outcome was not worth the stress involved. It was important to build users' confidence by:

- Providing local access.
- Using informal procedures and everyday language and avoiding stressful cross-examination.
- Ensuring that public agencies responding to appeals are well informed and effective, and willing to withdraw cases where appropriate.
- Providing clear guidance, on paper and web.
- Establishing a local reputation for courts and tribunals.

The discussion that followed included comments:

- That different parts of the administrative justice system work in 'silos' making it impossible for users to change track, even if a different process might resolve their dispute more easily.
- On information flow to assist initial decision-makers, as well as parties to a tribunal.
- On the need for help and advice for users to understand the process, access relevant information and ask the right questions.

OPPORTUNITIES ABOUND

At the third session, **Judge Andrew Bano**, **Siobhan McGrath** and **Caroline Hamilton** spoke of the opportunities offered by information technology, and the ways in which it had been used by particular tribunals to promote efficient and effective decision-making. With their flexibility and high-volume case turnover, some tribunals had shown a willingness to make use of technology to improve accessibility including the use of video conferencing, Skype, telephone hearings and e-mail as part of the case management process. A brief update was given on the unification of tribunals and courts training, with the launch of the Judicial College earlier this year, and the ways in which technology might be used in the delivery of a training programme for tribunal judges and members.

TRAINING AND TECHNOLOGY

The discussion after those short presentations centred on the linked areas of training and technology. Both could help tribunals re-enforce their distinctive mission to administer complex and rapidly changing areas of the law in a forum free from the technical rules of evidence.

There were some areas of common ground with courts, and joint training initiatives with the courts' judiciary might help define those areas, and help tribunals to go on to articulate and develop their differences. As to the training itself, courts and tribunals believe in equal measure:

- That training on a continuing basis is an essential requirement for all judicial office holders.
- That such training should cover both the content and the context of the law.
- That trainers should be part of the system in which they train, and should involve trainees actively in the training process.

We also all share the belief that training should be adequately funded with appropriate time given to trainers to develop and deliver their programmes, that those programmes should be independently evaluated and provide jurisdictions with opportunities to learn from one another and to share best practice.

It was argued that the creation in April 2011 of the Judicial College, bringing together into one training organisation some 40,000 judicial office-holders, offered a huge opportunity to tribunals, citing the words of Sir Andrew Leggatt: 'The principal way to address the fundamental issues that confront tribunals is by training.' The challenge falls into two parts; first to identify where cross-jurisdictional training might bring about positive benefits; and second to ensure and maintain separate training programmes to address jurisdiction-specific needs.

Possible areas where cross-jurisdictional 'generic' training between tribunals and courts might be developed include aspects of judgecraft, risk assessment, child evidence, use of experts, handling the media, judicial management, the use of technology and e-learning. It was mooted that areas of obvious difference such as the application of different approaches to the burden of proof or the admission of evidence might paradoxically also be best explored through joint rather than separate training programmes.

Other benefits of a unified Judicial College included access to expert training advisers and the sharing of innovative methods of teaching and evaluation.

Case management systems in tribunals remain largely traditional and paper-based. A tribunal case typically starts with a decision-maker's file, and digitisation of those files would be expensive and require a large-scale IT capacity. However, the lack of rules of evidence in tribunals might allow the development of a 'systems approach' where a 'virtual tribunal' obtains the information it needs to reach a decision electronically, with hearings only occurring in those cases where it is necessary for tribunal members and parties to be in each other's physical presence.

Continued from page 1

> The question is, what machinery is necessary and proportionate to keep such mistakes to a minimum? In particular, should there be any jurisdiction in which mistakes of law are, either in theory or in practice, immune from scrutiny in the higher courts?'

There were three possible approaches which the court could take. First, it could accept the view of the courts below in *Cart* & *MR* that the new system is such that the scope of judicial review should be restricted to pre-*Anisminic*[1] excess of jurisdiction and the denial of fundamental justice. Second, judicial review of refusals of leave to appeal from one tribunal tier to another should continue to be available. Third, the court could adopt a middle course, namely that judicial review in these cases should be limited to the grounds upon which permission to make a second-tier appeal to the Court of Appeal would be granted which are that: a) the proposed appeal raised some important point of principle or practice; or b) there was some other compelling reason for the court to hear the appeal.

Lady Hale concluded that:

> '. . . the adoption of the second-tier appeals criteria would be a rational and proportionate restriction upon the availability of judicial review of the refusal by the Upper Tribunal of permission to appeal to itself. It would recognise that the new and in many ways enhanced tribunal structure deserves a more restrained approach to judicial review than has previously been the case, while ensuring that important errors can still be corrected. It is a test which the courts are now very used to applying. It is capable of encompassing both the important point of principle affecting large numbers of similar claims and the compelling reasons presented by the extremity of the consequences for the individual.'[2]

The approach in *Eba*

In *Eba* [2011] UKSC 29 the main judgment was given by Lord Hope and the principal question for him was whether or not the approach which was taken in *Cart & MR* should be followed in Scotland. The decision of the Supreme Court in *Cart & Eba* not to endorse the approach of the Court of Appeal:

> '. . . made it much easier for the Scots approach to the supervisory jurisdiction in relation to unappealable decisions of the Upper Tribunal in Scotland to find common ground with that which must now be taken in England and Wales.'[3]

'Two factors seem to me to carry particular weight.'

Lord Hope

Further:

> 'Two factors seem to me to carry particular weight. One is the familiar point that the court should be slow to interfere with decisions that lie within the expertise of specialist tribunals . . . The other is the fact that the limitation on the scope for second appeals in section 13(6) of the 2007 Act has been reproduced in rule 41.59 of the Rules of the Court of Session: see paras 22 and 23, above. That rule gives effect to a particular intention about when questions of law should be subject to further scrutiny by a higher court. It would not be consistent with that intention, to which the amendment to the Rules has given effect, for the court to provide a wider opportunity for the decisions of the Upper Tribunal to refuse permission to appeal to itself to be reconsidered by way of judicial review.'[4]

[1] *Anisminic v Foreign Compensation Commission* [1969] 1 AC 147.
[2] Para 57.
[3] Para 44.
[4] Para 47.

Fundamentally different from courts

Andrew Bano describes how the terms of the relevant legislation, the public interest in consistency in decision-making and the need to ensure 'equality of arms' all make it necessary for tribunals to act inquisitorially – thus marking them out from other judicial bodies.

It is often said that one of the defining characteristics of tribunals is that they are 'inquisitorial'. However, there is as yet no clear consensus on how far the duty to act inquisitorially extends, or whether it is even desirable for tribunals to operate in a way which is fundamentally different from courts. In the run-up to the merger of the courts and tribunals, it is important to be clear about how the inquisitorial character of tribunals marks them out from other judicial bodies.

First appearance

The term 'inquisitorial' in the tribunal context seems to have made its first appearance in 1958 in *R v Medical Appeal Tribunal (North Midland Region) ex parte Hubble*.[1] Mr Hubble was a coal miner who sustained a slipped disc as a result of an accident at work. He appealed against a final assessment of disablement of 5 per cent. The Minister did not challenge the assessment, but the tribunal nevertheless removed Mr Hubble's award altogether, on the ground that his disablement was due to the aggravation of a pre-existing condition. In upholding the tribunal's decision, the Divisional Court rejected the argument that the tribunal should not have decided the appeal on a basis which had not been raised by the parties. Diplock J held:

> 'A claim by an insured person to (disablement) benefit is not truly analogous to a *lis inter partes*. A claim to benefit is to receive money out of the insurance funds fed by contributions from all employers, insured persons and the Exchequer. Any such claim requires investigation to determine whether any and if so what amount of benefit is payable out of the fund. In such an investigation the Minister or the insurance officer is not a party adverse to the claimant. If analogy be sought in other branches of the law, it is to be found in an inquest rather than an action.'

Extended

The approach in *Hubble* was adopted and significantly extended by the House of Lords, this time to the claimant's advantage, in *Kerr v Department for Social Development*.[2] Mr Kerr claimed a payment for the funeral expenses of a brother on the basis that the brother had no relatives in closer contact. Mr Kerr's claim was rejected because he was unable to show that that condition was satisfied. However, the House of Lords upheld the claim, on the basis that the department was in possession of national insurance records from which it could obtain the information necessary to decide Mr Kerr's entitlement to benefit. Having set out the somewhat complex legislative provisions, Baroness Hale concluded:

> '[62] What emerges from all this is a cooperative process of investigation in which both the claimant and the department play their part. The department is the one which knows what questions it needs to ask and what information it needs to have in order to determine whether the conditions of entitlement have been met. The claimant is the one who generally speaking can and must supply that information. But where the information is available to the department rather than the claimant, then the department must take the necessary steps to enable it to be traced.

'[63] If that sensible approach is taken, it will rarely be necessary to resort to concepts taken from adversarial litigation such as the burden of proof. The first question will be whether each partner in the process has played their part. If there is still ignorance about a relevant matter then generally speaking it should be determined against the one who has not done all they reasonably could to discover it.'

Legislation

It is however noteworthy that the basis of the decisions in *Hubble* and *Kerr* was not that social security tribunals are inherently inquisitorial, but that an inquisitorial approach was required by the terms of the legislation which the tribunals in those cases had to apply. It may therefore be necessary for tribunals in other jurisdictions to consider whether the legislation with which they are concerned also calls for an inquisitorial, rather than an adversarial, process of adjudication.

Public interest

In deciding how far to act inquisitorially, it may also be necessary to take into account the public interest. The responsibilities of many tribunals, for example in the fields of immigration and mental health, are every bit as important as those of the courts. Quite apart from the public interest in ensuring that tribunals reach a just and correct decision, there is an increasing recognition of the importance of consistency in decision-making, particularly in asylum and immigration appeals.[3]

Consistency

Even employment tribunals, dealing with disputes between private individuals, may need to bear in mind the public interest in consistency of decision-making when deciding how to exercise their powers in cases involving important matters of wide public interest. In *Harvest Town Circle Limited v Rutherford,*[4] for example, an employment tribunal was held to have erred in law in not joining the Secretary of State as a party in a dispute concerning the discriminatory effect of the upper age limit for bringing a claim of unfair dismissal.

As long ago as 1948, Denning J pioneered a system of 'signpost' cases in war pensions appeals, observing that 'when the material facts are indistinguishable the results should be the same.'[5] The notion of 'factual precedent' has been described by the Court of Appeal as 'benign and practical' in asylum appeals[6] and there is provision for treating specified decisions in asylum and immigration cases as binding. Although the concept of 'factual precedent' has not as yet achieved a significant foothold in other jurisdictions, it may nevertheless be necessary for tribunals to act inquisitorially in those jurisdictions in order to ensure that inconsistent decisions on similar facts are as far as possible avoided.

As long ago as 1948, Denning J pioneered a system of 'signpost' cases in war pensions appeals, observing that: 'when the material facts are indistinguishable the results should be the same.'

Flexibility

The 1957 Franks Report came down firmly on the side of tribunals forming part of the judicial system, rather than part of the machinery of administration. The Tribunals and Inquiries Act 1958, which was passed in response to the report was, in the words of the late Professor Wade, 'the first real step towards applying general standards of procedure based on ideals cherished in the traditional courts of law'.[7] However, the Act did not seek to establish a rigid legal or procedural framework for tribunals and, in particular, did not bind tribunals to the common law rules of evidence. Although tribunals after 1958 therefore satisfied the legal requirements necessary for them to be considered as judicial rather than administrative bodies, they retained the flexibility necessary to conduct proceedings in the most appropriate and efficient way in any particular case.

Equality of arms

That flexibility left the 2001 Leggatt review free to concentrate on the organisation of tribunals, rather than having to consider whether legal changes in tribunal practice and procedure were necessary to achieve a 'user-focused' approach. Leggatt noted the implications for tribunals of the principle laid down in *Airey v Ireland*[8] that Article 6 of the ECHR requires 'equality of arms' in order to ensure that the parties to a dispute are procedurally in a relatively equal position.

The Leggatt review concluded that neither the traditional adversarial approach of the common law nor a fully inquisitorial approach, on the Australian model, were appropriate for tribunals. The report stated at para 7.4:

> '. . . tribunal chairmen may find it necessary to intervene in the proceedings more than might be thought proper in the courts in order to hold the balance between the parties, and enable citizens to present their cases. All the members of a tribunal must do all they can to understand the point of view, as well as the case, of the citizen. They must be alert for factual or legal aspects of the case which appellants may not bring out, adequately or at all, but which have a bearing on possible outcomes. It may also be necessary on occasion to intervene to protect a witness or party, to prevent proceedings to become too confrontational. The balance is a delicate one, and must not go so far on any side that the tribunal's impartiality may appear to be endangered . . .
>
> 'We are convinced that the tribunal approach must be an enabling one: supporting the parties in ways which give them confidence in their own abilities to participate in the process, and in the tribunal's capacity to compensate for the appellant's lack of skills or knowledge.'

Enabling

In his paper in *Public Law*[9] written on the eve of the coming into force of the 2007 Act, Sir Robert Carnwath noted that the Act was neutral on the question of whether tribunals should be adversarial or inquisitorial, but pointed out that the principles of accessibility and expertise gave an indication that court procedures would not necessarily provide the model for tribunals. Within the flexible structures created by the Tribunals and Inquiries Act 1958 and replaced by the Tribunals and Inquiries Act 1992, tribunals are free to adopt the enabling approach called for by Leggatt and to put into effect the principles of tribunal justice enshrined in section 2 of the 2007 Act. But as we have seen, there may be a need for an inquisitorial approach for other reasons: the terms of the relevant legislation, the public interest, and the need to ensure 'equality of arms'.

As pressures on public funding result in litigants in person becoming an ever more common feature of litigation in the courts, the inquisitorial approach of tribunals is likely to become increasingly more relevant across the whole justice system.

Andrew Bano is President of the War Pensions and Armed Forces Compensation Chamber of the First-tier Tribunal.

This article is based on a presentation given to the Tribunals Judicial Training Group on 20 February 2011. The author will consider the meaning of the word 'inquisitorial' in a future issue of *Tribunals*.

1 [1958] 2 QB 228.

2 [2004] UKHL 23; [2004] 1 WLR 1372.

3 See the observations of Sedley LJ in *Shirazi v Secretary of State* [2004] 2 All ER 62 [69].

4 [2001] IRLR 599.

5 *Armstrong v The Minister of Pensions, Larkin v The Minister of Pensions* (1948) 3 WPC 1449.

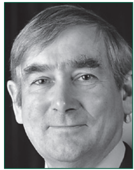
6 *S v Secretary of State* [2002] EWCA Civ 539.

7 HWR Wade, *The Cambridge Law Journal,* Vol 16 No 2, Nov 1958.

8 (1979) 2 EHRR 305.

9 Sir Robert Carnwath, *Tribunal Justice – a New Start,* [2009] PL Issue 1, 2009.

Practical steps towards better decisions



***Richard Thomas* and *Alice Brown* summarise a recently published report of the AJTC which aims to help public services organise themselves in a strategic and systematic fashion so that they get their decisions right first time.**

Original decisions by public bodies constitute the foundation of the administrative justice system, and calls to get more of these decisions right first time are nothing new. Indeed, as a mantra it seems self-evident; it must be better to get things right in the first place rather than having to put them right through often expensive and stressful appeal and complaint processes.

The 2004 White Paper pointed to the potential benefits of feeding back information from tribunals to decision-makers. The scene seemed set to reduce the number of successful complaints and appeals made against original decisions. And yet mounting evidence suggests that 'right first time' has not become a mantra or practice for decision-makers.

'Right first time means a better result for the individual, less work for appeal mechanisms and lower costs for departments.'

2004 White Paper

Lessons

As the representative of the voice of the user, the AJTC considered it important to investigate this issue further. As well as looking at the problem itself, we wanted to identify positive examples of initiatives that had improved the quality of decision-making and to use these case studies to produce lessons that could be transferred across the public sector. Our report, published in June 2011, highlights the fundamentals of 'right first time' and offers practical steps to decision-making bodies before making recommendations to government departments and parliamentary bodies across the UK and even to tribunals themselves.

Wrong first time?

Over the course of 2010–2011 the Tribunals Service handled more than 800,000 appeals. Complaints to the Parliamentary and Health Services Ombudsman (in relation to its parliamentary work) have increased to 8,543 over recent years. Not only are these high volumes worrying, but the percentage of successful challenges creates the impression of a public sector struggling to make fair decisions. Adding to this impression is a succession of reports from a variety of sources, all criticising the quality of decision-making by different departments and agencies.

Of course the statistics do not necessarily mean that decision-makers got these cases wrong first time; given the nature of judgments that have to be made in many cases, and in view of the complexity of many aspects of the administrative justice system, there will always be cases that are won on appeal. However, it seems undeniable that too many decisions are incorrect.

Feedback

Making the situation even worse is the apparent failure of public bodies to learn from their mistakes. Too few public bodies have in place feedback mechanisms to ensure that the outcomes of appeals and complaints are understood throughout the organisation. In addition, too few of them send representatives to appeals and so cannot discover and learn from how they went wrong.

This situation is unsatisfactory both financially and in terms of providing an acceptable standard of public service for individuals.

Costs of getting it wrong

We wanted to calculate the overall financial cost to the taxpayer of poor decision-making, but hit a wall. It seems that while public bodies are able to report on their budgets, they devote little attention to breaking down the costs of making decisions and then handling appeals and complaints. We recognise the innate difficulties in calculating unit costs, and note also that the full costs are not borne by the decision-making bodies themselves. Some costs of handling appeals or complaints are transferred or off-loaded to the Tribunals Service, Ombudsmen or other dispute resolution bodies. But this lack of financial awareness seems to us to contribute significantly to the problem.

Until organisations look closely at their processes and outcomes, know how much each stage costs and can recognise the financial consequences of their actions, it will be very difficult to develop cost-efficient mechanisms for promoting a 'right first time' approach. Although the precise costs are not known, there is clearly potential for some significant financial savings to be made by public bodies, not to mention the reduction in costs and the stress for individual members of the public in pursuing an appeal or complaint.

Practical tool

Over the past year we have been alerted to a number of initiatives aimed at improving decision-making. We welcome in particular collaborations between the Department for Work and Pensions and the Tribunals Service, and consider this type of action to be very much in the spirit of Leggatt.

But we wanted our report to be a practical tool that would provide advice on how to tackle the problem rather than just a commentary on the situation on the ground. We spoke to two public sector organisations where steps had been taken to address concerns about the volumes and costs of appeals – the UK Border Agency (Midlands and East) and the Criminal Injuries and Compensation Authority (CICA).

As a result of a 'right first time' initiative, the allowed appeal rate at UKBA (Midlands and East) dropped from an average of 33 per cent to 19 per cent of asylum cases. The National Audit Office reported that CICA had reduced the cost of processing an application by 36 per cent, and had worked with the Tribunals Service to make similar reductions in the costs of processing appeals. We used these studies to set out what we mean by right first time and to establish the fundamentals of a 'right first time' organisation, coming to the conclusion that without leadership, culture, responsiveness, resolution and learning as its foundations, an organisation will struggle to get things right in a strategic and systemic fashion. We also highlighted a range of practical steps, which we hope all public sector organisations will be able to adapt to their own circumstances.

'Polluter pays'

Although we hope that the practical steps will be a helpful tool for public bodies, only a concerted effort from all involved in the design and delivery of public service will turn 'right first time' from an aspiration into reality.

We join the voices of the Law Society of England and Wales and the House of Commons Justice Committee is asserting that the time has come to adopt a 'polluter pays' approach to help fund the Tribunals Service. There is currently little financial incentive for public bodies to improve the quality of their decisions, and in the environment of public expenditure cuts it seems that financial imperative is as likely to produce positive outcomes for users as any appeal to the innate public benefit of good administration. Therefore the report includes a recommendation that the Cabinet Office and the Lord Chancellor,

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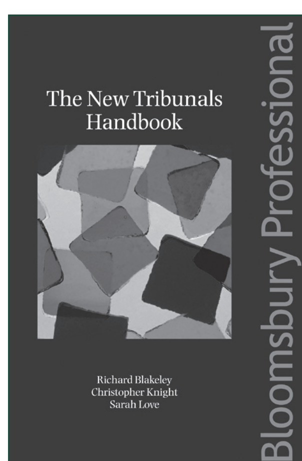
A HIT ON A MOVING TARGET

Jane Talbot **describes a new handbook which manages to identify common ground in subject matter and procedure between tribunal jurisdictions, as well as to elucidate differences.**

THIS HANDBOOK is aptly described in the foreword by the Senior President of Tribunals, Robert Carnwath, as 'a valuable and timely addition to the growing body of works on the new tribunal system'. He further comments that 'the pace of reform has created its own problems for those who are having to adapt their practices to the new format and procedures'. Incidentally, the Senior President has his own entry in the book, describing the office, functions and incumbent office-holder of the role.

Moving target

The authors, Richard Blakely, Christopher Knight and Sarah Lowe, recognise in their preface that they have 'tried to hit the moving target that has been the successive expansions of the tribunal system' so that the final publication is a larger work than originally anticipated when consultant editor, Richard Gordon QC, first conceived the idea of a handbook along the lines of the *Crown Court Index*.



The New Tribunals Handbook by Richard Blakeley, Sarah Love and Christopher Knight. Published by Bloomsbury Professional, December 2010. ISBN 978 1 84766 535 5.

The result is impressive and authoritative: a comprehensive, thorough and detailed reference book in an encyclopedic format, with an alphabetical arrangement and extensive cross-referencing between sections. It covers a wide range of subjects from the Administrative Appeals Chamber through to witnesses. The appendices contain the Tribunal Procedure Rules for all Chambers and the Upper Tribunal.

Variety

The various tribunal jurisdictions can be accessed not only by the administrative name of the Chamber, with which readers will be familiar, but also by areas of work, such as 'environment cases' and 'transport cases'. It is fascinating, for example, for a curious reader to discover that the tribunals system can potentially encompass statutory regulation as varied as the Sludge (Use in Agriculture) Regulations 1989 and the Motor Cars (Driving Instruction) Regulations 2005.

Case management

With a focus on tribunal practice and procedure, the handbook covers the case management powers of both the First-tier and Upper Tribunals, giving a non-exhaustive list of powers and the types of orders that can be made, cross-referencing to specific related entries such as parties, hearings, striking out, documents and evidence. This section also discusses the appropriate principles to be considered in an application for adjournment, through analysis of *MA v Secretary of State for Work and Pensions* [2009] UKUT 211 (AAC), with the comment that 'the principles set out in *MA* will be of significant analogous use in other appeals'. This reflects attempts throughout the handbook to identify common ground as well as to elucidate differences between tribunal jurisdictions.

Current debate

Some entries are eminently practical, such as 'Bringing Proceedings in the First-tier Tribunals', a clear and helpful 'how to' guide to applications and appeals across the Chambers. Others are short and purely informative – for example, an explanation of citation and reporting of decisions. That said, the authors are not shy of tackling issues of interest and current debate, such as alternative dispute resolution (a recent

theme of articles in this journal). Without going so far as to express a view, the authors discuss the 'appropriateness of ADR' and note the 'tension between the emphasis on ADR in TCEA 2007 and the litigation strategy of various decision-making bodies whose decisions will be the subject of appeals to tribunals'.

Power of review

Other topics covered in a more discursive style include 'Review, Correction and Setting Aside of Tribunal Decisions' where following an analysis of 'the power of review under TCEA 2007' the authors explore 'the approach to the exercise of the power of review', whether this extends to a full 'merits review' of the original decision, or is to be used more cautiously in cases of obvious error. As elsewhere, the text includes a summary of observations of other commentators, such as Jacobs and Cane, along with clearly cited references to leading cases such as *R(RB) v First-tier Tribunal* [2010] UKUT 160 (AAC).

Overall, this handbook delivers on its jacket's claim to be 'essential reading for those requiring knowledge of the practices and approaches to the procedural issues of the new tribunal system', achieving its aims of practicability and accessibility and giving clear, practical guidance.

Jane Talbot is a judge in the Social Entitlement Chamber of the First-tier Tribunal.

Bloomsbury Professional is offering *Tribunals* readers 10% off the list price of £75 for the Handbook if they order before the end of this year. To receive the discount, simply quote TONTHB10 when placing your order, either by phone on 01235 465500 or by e-mail to *jenny.burdett@bloomsburyprofessional.com*.

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in collaboration with the National Audit Office, develop funding models for ensuring that the costs of poor decision-making are borne by the department or the public body concerned, better aligning the interests of justice with the interests of the decision-making department.

Scrutiny

We would also like to see parliaments in different parts of Britain play a stronger role in improving the quality of decision-making. We note that legislation to be applied by decision-making bodies should be clear and drafted very much with delivery in mind. We also encourage parliamentary committees to scrutinise the efforts of departments in developing a 'right first time' culture.

We think that tribunals can be more proactive too. Tribunals exist to see that justice is done in individual cases. But tribunal judges are particularly well placed to spot systemic problems, and are more likely than most to recognise when the same mistakes are being made time after time. On this basis, we think it is fair to ask that tribunal decisions highlight separately any serious and systemic problem that has been evidenced in a case. We also consider it would be appropriate for the Senior President of Tribunals to use his annual report to highlight systemic issues, along with a recommendation that the Ministry of Justice seek rectification from the relevant public body.

We very much hope that the report will not only encourage debate about this significant topic, but more importantly will lead to changes that are long overdue and result in the benefits that were articulated in the 2004 White Paper. Our recommendations will be a challenge for original decision-makers, governments, parliaments and tribunals but we trust that they will be met with open attitudes and a determination to give priority to ensuring a 'right first time' approach.

Richard Thomas CBE is Chair and Professor Alice Brown CBE is a member of the AJTC. The 'Right First Time' report can be found at *www.justice.gov.uk/ajtc*.

An opportunity to look afresh at SUPPORT

The Senior President and the Judicial Office offer assistance to tribunals judges and members as part of their wider aim to ensure the welfare of the judiciary.

The Senior President has a number of statutory responsibilities for the tribunals judiciary, similar to those that the Lord Chief Justice has for the courts judiciary in England and Wales. Among various duties, he is responsible for ensuring that, within the resources granted by the Lord Chancellor, appropriate structures are in place to ensure the welfare of the judiciary.

The creation of the role of Senior President also presented an opportunity to consider the structure and focus of judicial welfare within tribunals, and work has been taking place during the past year to develop judicial human resources (HR) within the Tribunals Service, so that the Senior President can be confident that he is meeting those statutory responsibilities.

The functions of the current system have been reviewed and policies and processes revised accordingly. The opportunity has also been taken to begin to look at new areas in detail for the first time, such as the effect of stress on judges and members. The overall purpose of policies within human resources is to assist tribunal judges and members in performing their judicial duties effectively and with appropriate support, while also helping them to manage a good work-life balance.

The aim of this article is to outline some of those policies, and to point readers to further information in a number of different areas.

Terms

The primary source of information on the HR and other resources available to tribunal judges and members are the terms of appointment and conditions of service provided on appointment.[1] Other HR policies can be found on the judicial intranet or by contacting your judicial manager or the Judicial Office.

By their nature, many of the policies – such as career breaks – apply to salaried judicial office-holders only, while others – such as salary sacrifice for childcare – apply to both salaried and fee-paid office-holders. Details are contained in each policy.

Salaried part-time working . . . is a flexible concept and sitting patterns can take a number of forms . . .

Part-time working

Salaried part-time working is part of the wider judicial diversity strategy. It is a flexible concept and sitting patterns can take a number of forms, such as sitting a set number of days a week or set weeks or months. The decision on whether a particular role is suitable for part-time sitting will be decided locally by the senior judicial and administrative officers. While there is no entitlement to sit part-time, proper consideration will be given to accommodating part-time sitting, subject to its impact on the business needs of the tribunal or the services to users.

Career breaks

A career break provides a planned period of extended unpaid leave for salaried judges or members, and should not be confused with unpaid special leave, which is used for short, unplanned periods of unpaid absence (for example, to deal with a personal crisis). It is not a substitute for sick leave. The decision on whether a career break can be accommodated is made

locally by the senior judicial and administrative officers. Again, while there is no entitlement to a career break, proper consideration will be given to the request, subject to its impact on the work of the tribunal.

Taking a career break or reducing working hours does, of course, affect your salary, pension and annual leave entitlements.

Fee-paid office-holders

There are also opportunities for fee-paid judges and members to work set days, weeks or months to suit work or family commitments subject to its impact on the tribunal.

Health and well-being

The policy on judicial ill-health and medical referral [2] applies to salaried judicial office-holders. It is not new, but details the current processes, explaining what to do if you are unwell, how sick absence will be managed and what happens if a medical referral is required. Sick absence management is the responsibility of the Chamber President in the first instance, but passes to the Judicial Office if a medical referral is requested. The reasonable adjustments policy [3] has been updated to reflect the changes arising from the Equality Act 2010, ensuring that people with disabilities can play a full role in the judicial system and that judicial office-holders with disabilities are treated fairly and consistently.

Helplines

The Judicial Helpline [4] is open to all salaried tribunal judges and members. It is a free service and is manned 24 hours a day, every day and offers practical and emotional support by trained personnel.

LawCare [5] offers similar support, free of charge, to fee-paid judicial office-holders. It is an independent charity run by volunteers from the legal profession providing help and support to other members of that profession throughout Great Britain and the Republic of Ireland. Any subsequent professional counselling or treatment will normally have to be paid for, unless available on the National Health Service or covered by private health insurance.

Security

Lord Justice Gross's leaflet on judicial security [6] provides information and contact numbers relating to any security concerns judicial office-holders may have about court or personal security. There is also advice on the judicial intranet on areas such as the use of external e-mail accounts.[7]

Pre-retirement courses

Finally, a reminder that pre-retirement courses are available for salaried judicial office-holders. Judges who are considering or planning retirement, including retirement on medical grounds, are encouraged to book their places as soon as those dates appear on the intranet.[8]

Further information

This is only a brief look at some of the support and advice that is available to tribunal judges and members. Further details on other areas, including the media guide for tribunal judges and members, workplace assessments, childcare and eye vouchers and the 'next friend' scheme, can be found on the judicial intranet, or from your Chamber President, judicial manager or the Judicial Office.

Judicial Office – Human Resources: 020 7073 1624.

[1] www.judiciary.sut1.co.uk/docs/info_about/tc-salaried-tribunal-dec2009.pdf.

[2] www.judiciary.sut1.co.uk/docs/info_about.

[3] www.justice.gov.uk/publications/policy/moj/adjustments-judicial.htm.

[4] 08000 217821.

[5] www.lawcare.org.uk.

[6] https://judiciary.sut1.co.uk/info_about/jud-sec-leaflet.htm.

[7] https://judiciary.sut1.co.uk/info_about/index.htm#js

[8] https://judiciary.sut1.co.uk/info_about/retirement-pack/pre-ret.htm.

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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.

Tribunals is published three times a year by the Tribunals Committee of the Judicial College, although the views expressed are not necessarily those of the College.

Any queries concerning the journal should be addressed to:

Publications Coordinator
Judicial College
Steel House
11 Tothill Street
London
SW1H 9LJ

Tel: 020 3334 0700
Fax: 020 3334 0789
E-mail: publications@judiciary.gsi.gov.uk
Website: www.judiciary.gov.uk