JUDICIAL COLLEGE

TRIBUNALS

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A NEW START

Jeremy Cooper **considers the significance to the tribunals judiciary of a single Judicial College.**

IN OCTOBER 2010, the Lord Chief Justice and the Senior President of Tribunals resolved that the Judicial Studies Board and the resources for judicial training in the Tribunals Service should be combined to create a single judicial training organisation. The impetus driving this decision was a commitment on both sides to ensure that the training of all those who exercise judicial functions, whether it be in court or tribunals, is of a uniformly high and exacting standard and also to enable best practice to be widely shared and disseminated.

The new organisation is named the Judicial College and came into being on 1 April 2011 to coincide with the creation of the newly integrated courts and tribunals service (the HMCTS). From that date the Judicial Studies Board ceased to exist. Overall responsibility for leading the development of the new Judicial College is vested in the college's governing board, chaired by Lady Justice Hallett. The Judicial College will organise training for judicial office-holders (judges and members) in the UK who come under the leadership of the Lord Chief Justice or Senior President of Tribunals, which includes not only judges in England and Wales but judges and members of reserved tribunal jurisdictions in Scotland and Northern Ireland.

Both courts and tribunals have much to offer and to learn from each other in the training field and courts and tribunals will be equally represented on the Board. This fact alone should send out a strong message that this is a partnership between the courts and tribunals that cannot be dominated by one side of the equation. In particular the specialist skills of tribunal members will be robustly recognised and preserved under the new training arrangements.

The initial membership of the Board is as follows:

- Lady Justice Hallett DBE.
- Mr Justice Owen.
- Mrs Justice Thirlwall.
- Judge Nick Warren.
- The Directors of Studies of the Judicial College.
- The Executive Director of the Judicial College.

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EDITORIAL

TWO of the characteristic features of tribunals are their accessibility and adoption of an enabling role. A key aspect of ensuring accessibility and promotion of an enabling role involves permitting the appellant to present their case in the best possible way. We do this by being expert, user-friendly – and by employing our case management powers and the overriding objective.

But how interventionist should a tribunal be? Approaches vary between jurisdictions, and characterising a tribunal's approach methods and style as either inquisitorial and adversarial can be overly simplistic and unhelpful. The approach depends on the nature of the case, the issues which are raised, and on the attributes of parties before the tribunal. The issue is brought into focus particularly when one party lacks legal representation.

We are pleased to include three articles touching on aspects of this issue: a series of practical tips (page 2), consideration of the jurisprudence of the higher courts (page 4) and a review of a recent book on this topic (page 8).

Finally, I would like to take the opportunity to welcome you to the new Judicial College, under whose auspices the journal is now published.

Kenny Mullan

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

From intervention to INTERFERING

Leslie Cuthbert **builds on the advice of previous articles on the particular need for a tribunal to be active, interventionist and enabling when one party is unrepresented or when their representation is poor.**

In *Mongan v Department for Social Development*,[1] Kerr LCJ noted that: 'A poorly represented party should not be placed at any greater disadvantage than an unrepresented party' and that 'close attention should be paid to the possibility that relevant issues might be overlooked where the appellant does not have legal representation'. In previous articles in this journal,[2] the authors also highlighted the importance of proper preparation, effective case management and a focus on the overriding objective.

Inquisitorial questioning

This is a difficult area and the proper procedure will vary depending on the particular case and the jurisdiction in which it is being heard. (On page 4 of this issue, Julia O'Hara considers the finely balanced role that a tribunal must play in dealing with the unexpected.)

It is worth noting here that the labels inquisitorial and adversarial can be misleading – few tribunals are simply one or the other and much depends on the subject matter and the particular case. Generally speaking, most tribunals take an inquisitorial approach. Those tending more to the adversarial include the Lands Tribunal, the Immigration and Asylum Chamber, the Road User Charging Adjudication Tribunal and the Employment Tribunal, although views may differ even between judges in the same jurisdiction.

However, the message from Kerr LCJ's comments seems to be that it is part of the role of tribunals to be interventionist and to explore issues that might be relevant and have been overlooked as the result of a lack of proper representation.

It is incumbent upon tribunals to explore how any concessions have been reached.

Probing – issues and evidence

There may be a fine line to be drawn, however, between interventionist and interfering and a tribunal should exercise caution in initiating new arguments or propositions. In *Muschett v Prison Service*,[3] Rimer LJ sounded this word of warning:

> '[A]n employment judge, like any other judge, must satisfy himself as to the law that he must apply to the instant case; and if he assesses that he has received insufficient help on it from those in front of him, he may well be required to do his own homework. But it is not his function to step into the factual and evidential arena.'

The distinction would appear to lie between inquiring into an issue which is clear and apparent from the evidence, and which anyone with knowledge of the tribunal would raise, rather than going through all *possible* arguments that a party might put forward or taking over the case for one party or the other.

A tribunal is in a position, however, to be more probing in exploring the evidence before it in order to make a determination to the requisite standard of proof. Once the tribunal has the evidence to enable it to make its determination as to the validity of the assertion, it may stop its queries. If, for example, an argument is put forward by one party with no supporting evidence, it may be proper to probe the evidence to uncover any facts which may support the proposition.

Timing is an important factor in these matters. While a tribunal is not to be encouraged to raise new issues during the course of a hearing – and certainly not at the end of a case after the evidence has been heard – the process of clarifying the issues at a case management discussion or at the start of the hearing might identify additional or separate arguments.

Poor representation

Mr Justice Hickinbottom recently wrote:[4]

> 'Advocates may be inexperienced, or simply poor. A judge needs to have a temperament such that he is never seen to lose his temper, even in the face of ineptitude or ignorance of those before him.'

Remaining calm and non-judgmental is the order of the day. Tribunals may wish to wait until both parties have asked questions, or made submissions about an issue, before beginning to explore the subject themselves. In the First-tier Tribunal (Mental Health), some panels allow the patient's representative to ask their questions before the panel asks its own.

There are some advantages to this approach:

- It allows the panel the opportunity to assess the effectiveness of the representative and adjust its questioning accordingly.
- If the representative is effective, it helps the panel to focus on the issues in dispute.

This approach also has validity in a more adversarial setting.

Concessions

It is incumbent upon tribunals to explore how any concessions have been reached. A party may be oblivious to the concession they are making, and the tribunal should check that both parties understand the consequences. If the panel is not satisfied there has been a 'meeting of minds', it can request evidence on the point.

Level playing field

Finally, the following points are a useful checklist in ensuring a level playing field, particularly where one party is unrepresented, or does not attend.

- Appropriate and effective case management.
- A simple, clear and thorough introduction.
- Using basic language and explaining technical terms.
- Avoiding making assumptions based on knowledge or experience.
- Consider each issue to be decided from each party's perspective.
- Attentive listening – where you are focused on what the other person is saying, or essential listening – where you are more focused on what the other person is saying than on yourself, understanding the essence of what they are saying.

Conclusion

The overriding objective of the procedure rules – 'to enable the tribunal to deal with cases fairly and justly' – gives a tribunal a large degree of scope in how to manage a hearing. As long as a tribunal does not act outside its discretion – including by not doing something it should have done – there is a great deal that can be done to meet the various challenges inherent in dealing with both unrepresented and poorly represented parties.

Leslie Cuthbert sits on the First-tier Tribunal (Mental Health) and Road User Charging Adjudication Tribunal.

[1] [2005] NICA 16.

[2] 'The more preparation the better', *Tribunals*, winter 2010, Martin Williams. 'Walking a tightrope to a solution', *Tribunals*, summer 2009, Melanie Lewis.

[3] [2010] EWCA Civ 25.

[4] 'What Makes a Good Judge', *Judicial Appointments, Balancing Independence, Accountability and Legitimacy*, www.judicialappointments.gov.uk/static/documents/JA_web.pdf.

How to handle tales of the UNEXPECTED

In a tribunal that is intended to be informal and where many parties appear unrepresented, what is the appropriate response to an unexpected point? *Julia O'Hara* offers advice.

In *Peifer v Castlederg High School* [2008] NICA 49, Lord Justice Girvan said:

> 'Tribunals should not be discouraged from exercising proper control of proceedings to secure those objectives through fear of being criticised by a higher court which must itself give proper respect to the tribunal's margin of appreciation in the exercise of its powers in relation to the proper management of the proceedings to ensure justice, expedition and the saving of cost.'

But what are the powers of a tribunal judge to deal with unexpected points under their procedural rules and, in particular, the overriding objective?

Unexpected points can appear in various ways:

- A point not being identified in pre-hearing documents.
- Questions asked during a hearing that raise different legal issues from those disclosed in the pleadings.
- The tribunal identifying an issue which the parties have not raised.
- Issues becoming apparent to the panel making a decision after the hearing has concluded.

Overriding objective

Procedural rules are tribunal-specific and each jurisdiction has its own version of the overriding objective. For example, the duty to ensure that the parties are on an equal footing is absent from the rules of the Social Entitlement Chamber of the First-tier Tribunal, a fact presumably intended to reflect the 'citizen v state' nature of the hearing. The Employment Tribunal's procedure rules provide significant flexibility to manage unexpected points, as will be seen below.

Nature of proceedings

Where an unexpected point arises, the nature of the proceedings – adversarial or inquisitorial – may affect the response. One clear statement of what the terms mean is:

> 'The basic idea underlying the adversarial system is that the truth is best discovered by allowing parties who allege conflicting versions of what happened (or of what the law is) each to present, in its strongest possible form, their own version of the truth, and leave to an impartial third party to decide which version more nearly approximates to the truth. An inquisitorial system depends much more on the third party making investigations and, by questioning each of the parties and other relevant persons, deciding where the truth lies.' [1]

Inquisitorial

Referring to the process of benefits adjudication – which she described as a 'cooperative process of investigation' between claimants and decision makers – Baroness Hale commented in the House of Lords decision in *Kerr v Department for Social Development*: [2]

> '. . . it will rarely be necessary to resort to concepts taken from adversarial litigation such as the burden of proof.'

This is not to say that each party in a hearing before this tribunal does not have to prove

matters relevant to the decision. Baroness Hale was referring to the inquisitorial nature of decision-making at the benefit entitlement stage. Appeals from decisions made by departmental decision makers lie to the Social Entitlement Chamber of the First-tier Tribunal. In hearings before this tribunal, depending on the issues in any given appeal, both sides need to prove the elements of their case although the tribunal may take a more active role in eliciting relevant information from witnesses and documents. The rules of procedure in this jurisdiction also provide extensive case management powers to the tribunal to identify the issues on which it requires evidence and strike out claims with no reasonable prospect of success. This type of tribunal is therefore a mixture of inquisitorial and adversarial.[3]

Natural justice

Common to all jurisdictions are rules governing procedure, such as the rules of natural justice and Article 6. The rules of natural justice include two main principles, the rule against bias and the fair hearing rule.

The natural justice safeguards of a fair hearing include:

- Notification of time, date, place of hearing.
- Adequate time to prepare one's case in answer.
- Access to all materials relevant to one's case orally or in writing or both.
- A right to examine and cross-examine witnesses.
- A right to have the decision based solely on material which has been available to (and answerable by) the parties.
- A right to a reasoned decision which takes proper account of the evidence and addresses parties' arguments.

They can also include a right to be represented, possibly by a lawyer.

Aware

In other words, a fair hearing is one where each side is aware of the principal allegations or claims made by the other and has a reasonable opportunity of meeting them. This can mean allowing amendments to claims and responses as well as adjournments to give parties the opportunity to investigate issues of which they have not received notice. At the beginning of or during a hearing it may become apparent that one party is raising a new point. If it was not in the pleaded case, it can still be considered. The Social Security Commissioners held that the tribunal was not restricted to the words in an appeal letter and could look at the substance of the appeal.[4] The problem was described thus by Mr Justice Langstaff:

> 'It cannot, however, be the case that a party's contentions are frozen artificially yet definitively at some time prior to the hearing. Thus the rules make provision for the amendment of an originating application or, as the case may be, a defence to it. It is often desirable for the sake of clarity that there should be a formal amendment . . .' [5]

Article 6

Article 6 is an increasingly important source of procedural norms. One of the features inherent in the concept of a fair trial is the existence of a judicial process which requires each side to have the opportunity to have knowledge of and comment on the observations filed or evidence adduced by the opposing party.[6] As stated by the European Court of Human Rights:

> 'The effect of Article 6(1) is, *inter alia*, to place the "tribunal" under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant to its decision.'

Commissioner Jacobs preferred to explain a decision on a procedural ground of appeal in

terms of the claimant's Convention right to a fair trial. He made the observation that while tribunals may be familiar with the principles of natural justice, he found that, increasingly, they were not applying them.

> 'I could, no doubt, have reached the same conclusion under domestic principles of natural justice. However, the Human Rights Act 1998 provides a convenient opportunity for Commissioners to rebase their decisions on procedural fairness in fresh terms. In my view, this would be desirable . . . The introduction of the language of balance would provide a touchstone for tribunals.' [7]

New point

When a new point comes up during the hearing, the tribunal will need to consider whether to give the parties the chance to deal with it. In practical terms, the later the point emerges the more difficult this will be. Lady Justice Smith spoke about the failure by an Employment Tribunal to give the parties the opportunity to make representations about a finding of fact for which neither party had contended:

> '. . . the giving of such an opportunity is not an invariable requirement. The Employment Tribunals Regulations give the employment tribunal very wide discretion on procedural matters which is wide enough to encompass a decision as to the appropriate course to take where this kind of situation arises. In any event, if the legal effect of the findings of fact that are to be made is obviously and unarguably clear, no injustice will be done if the decision is promulgated without giving that opportunity. Even if an opportunity should have been given and was not, an appellate court will set aside the decision only if the lower court's application of the law was wrong.' [8]

An appeal against a tribunal decision on a procedural matter will only succeed if the appellate court finds that the tribunal exercised its discretion wrongly.

Good practice requires identification of the issues for determination before the hearing begins and checking with the parties and representatives that they agree with those identified by the tribunal. Rule 14 of the Employment Tribunal's procedural rules gives the panel a discretion to make such enquiries of parties and witnesses as it consider appropriate and otherwise conduct the hearing in such a manner as it considers appropriate for the clarification of the issues and just handling of the proceedings. This provides a certain amount of inquisitorial leeway in an essentially adversarial tribunal determining disputes between two parties. Other tribunals can identify their issues by reference to the possible outcomes of a hearing.

Artificially truncating

Judgments enlarging or constricting the issues are another example of the exercise of a discretion to which the rules referred to above apply. In a race discrimination case, Lord Justice Sedley said this:

> 'Employment Tribunals need to bear in mind that in carrying out their useful role of defining the issues in complicated cases in advance of the hearing they must avoid setting limits which artificially truncate a necessary narrative, a very different exercise from the one of cutting out things that are irrelevant or legally inadmissible.' [9]

In that case, the claimant was represented by a pupil barrister employed by Harrow Council for Racial Equality.He had conceded a time point at a pre-hearing review. The Employment Tribunal dismissed the claim. The EAT allowed an appeal but the Court of Appeal, with some regret, upheld the tribunal decision. Lord Justice Mummery expressed surprise that the tribunal had not allowed an amendment to the originating application or exercised its discretion

to extend time on the just and equitable grounds in the Race Relations Act, as it then was. Facts helpful to the claimant had not been pleaded but were included in the claimant's witness statement. According to Lord Justice Mummery, those facts showed that the claimant '. . . may have had a good case'. He emphasised the very wide and flexible jurisdiction to do justice in the case, as contained in the Employment Tribunal's procedural rules.

Representation

In its proposals for the reform of legal aid, the Government maintains that legal aid for advocacy before most tribunals is 'not justified given the ease of accessing a tribunal, and the user-friendly nature of the procedure'.[10]

Judicial colleagues are acutely aware that the absence, presence and quality of legal representation can have an impact on the conduct of a hearing. Where a party has the benefit of effective representation, the task of the tribunal in identifying the issues in the case and dealing with unexpected points by way of amendment or adjournment can be facilitated. Conversely, without such representation, the tribunal will need to make a careful judgment about the level of user friendliness with which they feel it appropriate to engage.

Conclusion

An appeal against a tribunal decision on a procedural matter will only succeed if the appellate court finds that the tribunal exercised its discretion wrongly. Much of the case law on procedural issues shows that the appellate courts give tribunals a wide margin of appreciation in these types of issues. Ultimately, if tribunals show in judgments on procedural points that they have taken all relevant factors into account, fully explain the reasons why they allowed or refused an amendment or adjournment, refer to the overriding objective and demonstrate sound judgment in the outcome they will be exercising their discretion appropriately.

Julia O'Hara sits on the First-tier Tribunal (Social Entitlement Chamber) and the Employment Tribunal and teaches employment law at Sheffield University.

1 Administrative Law, Peter Cane (4th ed, Clarendon Law Series).
2 [2004] UKHL 23.
3 See *Mongan v Department for Social Development* [2005] NICA 16 and *Tidman v Aveling Marshall Ltd* [1977] IRLR 218.
4 CDLA/1000/2001.
5 *Ministry of Defence v Hay* [2007] IRLR 928.
6 *Ruiz-Mateos v Spain* [1993] 16 EHRR 505.
7 CJSA/5100/2001. Available on *www.osscsc.gov.uk*.
8 *Judge v Crown Leisure Ltd* [2005] IRLR 823.
9 *Ahuja v Inghams* [2002] ICR 1485.
10 *www.justice.gov.uk/consultations/legal-aid-reform-151110.htm*.

Continued from page 1

In its first year, the college will focus on ensuring that training promised in the JSB and tribunals training programmes for 2011–12 will be delivered in the usual way. But the college will also be looking at ways in which best practice can be shared, different training methods can be pioneered and extended and (where appropriate) judicial skills training might be delivered across jurisdictional boundaries.

Judicial College

An exploration of the greater use of e-learning, and a concentration on the development of a lifelong learning strategy for individual judges and tribunal members to match their professional career development need also to figure high on the college agenda. The development of a working relationship with those tribunals outside the HMCTS will also be given priority. In the longer term, the desirability, practicalities and affordability of establishing a permanent home for the college will also need to be carefully explored.

Professor Jeremy Cooper sits on the First-tier Tribunal (Mental Health) and is Director of Studies for Tribunals Judiciary at the Judicial College.

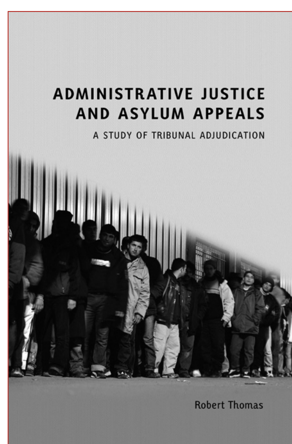
A comprehensive guide FULL OF INSIGHT

In his new book, Robert Thomas considers the persistent controversy in the way judges should go about eliciting evidence on which to base findings of credibility and fact. *Richard McKee* describes why he found the book so interesting and useful.

This is a dense book (or perhaps that epithet could more aptly be applied to the reviewer). What I mean is, the book is densely packed with information, interest and insight. The interest will principally be for people working in the asylum field, since the whole phenomenon – from the initial assessment of asylum claims by the Home Office (now the UK Borders Agency), through the two-tier system of statutory appeals, and on to further appeals in the higher courts and collateral challenges by way of judicial review – is thoroughly and accurately described. But it is interesting also as an example of how one part – admittedly, a rather unusual part – of the unified Tribunals Service fits into the broad scheme of administrative justice as it has developed since the Franks Committee.

'Judicial family'

The principal insight for me was Dr Thomas's contention that the system for providing administrative justice is not to be regarded as aligned exclusively with the judicial member of the triad formed by the traditional 'separation of powers': the legislature, the executive and the judiciary. Of course, the Tribunals Service is independent of the government departments from which its various chambers originally sprang. The recent attribution of the title 'judge' to the legally qualified members of tribunals has enhanced their status, while the merger of Her Majesty's Courts Service with the administration of the Tribunals Service has further blurred the distinction between the ordinary courts and the tribunals. The designation of the Upper Tribunal as a superior court of record, to which judicial reviews may be transferred from the High Court, and on which judges of the High Court and Court of Appeal are now regularly sitting, reinforces the notion that we are all now one big 'judicial family'.



Administrative Justice and Asylum Appeals: A study of tribunal adjudication by Robert Thomas, Hart Publishing (Oxford 2011)

Making policy

None of that detracts, however, from Dr Thomas's point that the tribunals which dispense administrative justice are not like the civil courts, in which the judges are the impartial umpires in disputes between parties, or the criminal courts, in which innocence is established or guilt punished. Rather, the tribunals are themselves engaged in implementing government policy, and sometimes even make policy themselves. Thus, it is government policy that the United Kingdom should carry out its obligations under international treaties to afford protection to those who have a well-founded fear of persecution in their own countries. The function of the Immigration and Asylum Chambers of the First-tier and Upper Tribunals is to help carry out those obligations by determining whether asylum seekers who complain that they have been wrongly refused refugee or similar status are indeed entitled to it. An example of how the tribunal might itself effect policy changes may be seen in the development of 'country guidance' by the Upper Tribunal. By this method, appeals are heard in which copious evidence is adduced concerning particular categories of asylum seeker in

particular countries. By identifying 'risk categories' and 'risk factors', the tribunal influences the way in which initial applications are assessed by the Border Agency of the Home Office, which in turn affects refugee flows into the United Kingdom.

Quality

A nagging question for Dr Thomas is how to evaluate the quality of administrative justice in the context of asylum. How does one know whether the 'right' decision has been made in an asylum appeal? If an appellant has been successful despite having fabricated his claim, that is unlikely ever to come to light. If he is unsuccessful and is returned to his own country (not an inevitable consequence of failure, as the ratio of removals to dismissed appeals is low), we are unlikely to hear if he comes to any harm.

'Front loading'

Implementation of the policy of giving refuge to genuine asylum seekers generates inevitable tensions. There are limited resources with which to achieve this aim. How are they to be deployed? Every so often, like re-invention of the wheel, the notion of 'front loading' comes back into fashion. That means devoting more effort to Home Office caseworkers making good decisions on initial applications. It is said that asylum seekers whose claims are rejected for good reasons will be less likely to appeal to the First-tier Tribunal. But as Dr Thomas observes, they have nothing to lose by appealing. They will be legally aided (asylum will remain 'in scope' when the axe falls on legal aid) provided they pass the merits test, and indeed there is a very high level of appeals both against initial decisions by the Home Office, and against decisions of the First-tier Tribunal. Onward challenges in the asylum jurisdiction dwarf anything else in the Tribunals Service.

Research

Dr Thomas spent two years conducting empirical research at hearing centres of the Asylum and Immigration Tribunal (as it was before it joined the Tribunals Service in February 2010), interviewing judges, representatives, Home Office Presenting Officers, interpreters, tribunal staff, expert witnesses and other stakeholders (as we must now call them), as well as observing numerous appeal hearings and reading numerous determinations. He gained unprecedented access to the workings of the tribunal, and this has given him an insight of remarkable depth into its processes and problems. Just a few of those can be mentioned here.

Credibility

How, for example, is credibility to be assessed? It is notorious that asylum seekers often do not have any documentary evidence to back up their claim, but when they do, the reliability of those documents may be suspect. Consistency is regularly correlated with credibility, but it is trite that a basically truthful story may be told in a different way at different times, whereas a well-rehearsed liar may be able to tell an untruthful story with a lack of hesitation or deviation worthy of the BBC Radio 4 programme *Just A Minute* (it will have to be repeated, of course). Medical evidence may be adduced in support of the appellant's claim, but the scars described by the doctor may not have been caused in the way the appellant says, while the symptoms of depression or post-traumatic stress observed by the psychiatrist may have arisen from causes other than those recounted by the appellant.

An essential aid to assessing credibility is up-to-date information about conditions in the appellant's country of origin, but how reliable are the sources of that information? Appellants will sometimes instruct 'country experts' who have specialised knowledge of the country concerned, but, just as with the evidence provided by doctors and psychiatrists, immigration judges may not go along with the expert's opinion. Similar to the problem of internal consistency (a consistently told story need not be true) is the problem of external consistency. A story that fits with objectively verifiable conditions in the country of origin is more likely to be a true story, but equally those conditions might provide a good basis for a false story.

Eliciting evidence

Another persistent controversy concerns the way in which judges should go about eliciting the evidence upon which to base their findings of credibility and fact. One way is to sit back and let the parties slog it out in the traditional adversarial mode. The appellant will present his account, usually in the form of a witness statement standing as evidence in chief, and will then be cross-examined with a view to probing his credibility. Inconsistencies in his evidence may be exposed. But what if there is no Home Office Presenting Officer (a not infrequent occurrence), and the judge nevertheless notices inconsistencies in the appellant's account?

In one famous Scottish case, the Outer House of the Court of Session said that adjudicators (as they were called in those days) were under no obligation to put inconsistencies to the appellant and ask for an explanation. After all, a skilled cross-examiner who had exposed inconsistencies in the witness's evidence might well not ask him to explain them. If they were not addressed in re-examination, he would be able to submit triumphantly to the judge that the witness's evidence was riddled with unexplained inconsistencies. That, as the Inner House later observed, might be all very well in a *lis inter partes*, but was not suitable for refugee status determination.

Dr Thomas finds that many judges favour a more interventionist approach . . .

Interventionist

Dr Thomas finds that many judges favour a more interventionist approach, and this may indeed become more necessary as a growing number of appellants appear unrepresented, while the UK Border Agency, having had its own budget cut, is unlikely to make up the shortfall in Presenting Officers to appear before the tribunal. Dr Thomas also identifies a third way, an 'enabling' approach that conforms with the user-friendly model of tribunals. Thus, a judge will do what he can to enable an unrepresented appellant to put his case, while if the respondent is unrepresented, the judge will not let the Home Office case go by default. The judge's task, after all, is to assess whether the initial decision to refuse the asylum claim was wrong.

A combination of the inquisitorial and enabling approaches will be needed if Dr Thomas's proposal for a radical reform of the system is ever implemented. This would make immigration judges the initial decision-makers on asylum claims, with their own researchers to produce country information. They would still be independent of the Home Office, and the system would both achieve economies by eliminating one layer of decision-making and would be perceived as fairer. Although such a model exists in other countries, there seems little chance of it ever being introduced here.

Comprehensive

This review has only picked up a few snippets from Dr Thomas's densely packed tome. While the proof-reading could have been more thorough, the same cannot be said for the content. Lord Justice Laws enjoined the tribunal to produce '*effectively comprehensive*' country guidance, and what we have here is an effectively comprehensive guide to the procedure and practice, as well as to much of the case law, of the Immigration and Asylum Chambers of the Tribunals Service. It can serve as a practitioner's textbook just as much as an academic study of asylum adjudication, and may be read with profit by judges, advocates and Home Office officials. They will find it surprisingly useful in their day-to-day work.

Richard McKee sits on the Immigration and Asylum Chamber of the Upper Tribunal.

A discount of 20% off the book price of £50 is available to *Tribunals* readers. Quote reference IJTN if ordering by phone on 01865 517530 or via *www.hartpub.co.uk*.

Is this approach worth the EFFORT?

Siobhan McGrath, who has seen mediation at the Residential Property Tribunal Service become established as a tool that can help the case management process, believes the answer to the above is 'unquestionably yes'.

In the summer 2006 issue of this journal, I wrote an article describing the then new mediation project set up by the Residential Property Tribunal Service (RPTS). Four years later, I am in a position to describe what has been achieved and consider what the next steps should be.

Since 2006

The RPTS deals with numerous jurisdictions relating to residential property. We assess rents, undertake enfranchisement valuations, decide appeals against local authority action under the Housing Act 2004 and deal with leasehold management issues. It is this latter category of case, and in particular service charge cases, that have been the focus of our mediation scheme.

On average, we deal with about four mediations a month. By the end of 2010 we had 216 cases where the parties agreed to proceed with mediation. Of those cases, 18 withdrew because the parties reached an agreement without requiring mediation, 117 mediations were successful, 50 were unsuccessful, 24 were withdrawn for other reasons and seven are still to take place. Our average success rate over the period has been in the region of 73 per cent.

The lessons learned

Service charge adjudications require the Leasehold Valuation Tribunal (LVT) to decide on the 'payability' of service charge costs. These cases can be fiercely contested and parties can become entrenched in their positions and unwilling to make concessions. However, it is important to remember that landlords and leaseholders have a relationship that will continue long after the tribunal has adjudicated on the dispute. Arguably, it is better if they are able to reach an accommodation between themselves about how much is owed by one party to another, although this depends to a degree on what it is that parties are seeking to achieve.

Where parties agree to mediate, they are given a two-hour appointment with one of a group of RPTS chairmen and members who are trained and experienced mediators, often as part of their own practice.

To illustrate how it works, I asked the newly appointed London RPTS regional manager to describe a mediation that he had observed. The following is the account he gave:

> 'The mediation at which I observed related to an application by 18 of the leaseholders of a block of 85 flats for reductions in the service charges over seven financial years. The leaseholders were represented by one of their number and a friend who had some experience of the subject matter. The landlord was represented by the property management company's solicitor and two of the property managers directly concerned with the block.
>
> 'A very similar application in relation to a neighbouring block on the same estate had been decided by the LVT a few months earlier. That decision had been substantially in the favour of the leaseholders, and this had set a clear precedent. The landlord had offered considerable reductions on a number of items following the pattern in the earlier decision, though did not concede all matters.

'As an observer unfamiliar with the case or mediations in general, it appeared to me that the landlord's agents had come with a very straightforward and workmanlike attitude. The leaseholders were courteous and equally straightforward, probably a little overawed by the responsibility of their task.

'The landlord's agents were ready to admit the failures of the firm from whom they had taken over responsibility for the block, and to make adjustments to the service charges accordingly. I was surprised that the leaseholders representatives were so unmoved by the apparent series of concessions they were winning. They were not out for a quick and easy victory, clearly conscious of the views of fellow leaseholders and the need to uphold their interests.

'The leaseholders persisted in seeking a percentage reduction in the cleaning service charges in recognition of the poor work carried out. The landlords agents resisted. I was surprised at the tenacity of the leaseholders in view of the considerable ground they had already made. They persisted in seeking recognition of the poor quality of the cleaning service, but were prepared to compromise on a lower percentage reduction.

'The tenacity of the leaseholders paid off. Following some shuttle diplomacy by the chairman, the landlord's agents recognised that with so little left in dispute, the cost to them of proceeding to a hearing would be likely to exceed the extra amount the leaseholders were seeking, and a settlement was agreed.

'The mediation was very measured, with both sides giving proper consideration of the other's position and views. The chairman's understated and quiet manner no doubt fostered the considered and respectful approach of the parties. A reduction of over £100,000 in service charges resulted.'

Lessons

This is a typical example of the sort of case we deal with in our service charge jurisdictions. I would suggest that the lessons learned from this particular case study are as follows:

- The outcome of the mediation does not seem to have been affected by the inequality of representation between the parties.
- An opportunity was given to the landlord to make sensible concessions at an early stage and in a supervised environment.
- The attitude of both parties was positive and the approach to the task was made in a spirit of compromise.
- The compromise that was reached may not have reflected each or all of the merits of the parties' respective cases.
- Litigation cost and risk properly played a part in the agreement.

Is it worth the effort?

I would say, unquestionably yes. In devising case management at the RPTS we seek to front-load the process so that parties are engaged at an early stage. Mediation is a tool that can assist this process since the scheme dictates that a mediation appointment will be given soon after the exchange of case statements and when the parties' minds are focused on the issues at hand. This is a clear benefit, whether or not mediation is successful.

Additionally, the RPTS jurisdictions do not cover all aspects of the disputes that may arise between a landlord and a leaseholder. The ambit of a mediation is not so limited and a wider resolution of issues between the parties may be resolved.

Why has the project worked?

In the previous article I speculated on the early success of the project and came up with the following explanations:

- Staff awareness and training. To inform them of the process and reassure them that if the mediation is unsuccessful the application will continue as before.
- Tribunal member awareness. To reinforce and elaborate on the message from staff.
- The availability of support and assistance from mediation friends – students trained to provide support to those involved in mediation. We have been fortunate to have had access to a mediation friends scheme run by BPP Law School, although this is not available for the whole of each year.

I now think that there are other important catalysts at play. For example, the mediation scheme has had most success in the London region, partly because we have suitable premises and sufficient conference rooms to accommodate the mediation process, which will involve the mediator seeing the parties individually in separate rooms.

I also think it is important that the mediators are RPTS chairmen and members. This gives reassurance to the parties and credibility to the scheme. The mediators do not make an early neutral evaluation about the merits of a case and will not express a view unless asked to do so by both parties. However, the way in which negotiations are steered will be affected by the knowledge and experience of the mediator even in a purely facilitative environment. I have also observed a steely determination to reach a compromise among mediators which reflects a heartening confidence in mediation as an appropriate dispute resolution tool.

At some stage, we may try to devise a better way to measure success.

Costs

Finally, there is the issue of costs. Here I am not referring to the costs to the tribunal (although savings are undoubtedly made), but to the fact that the tribunal has no, or at least very few, costs-shifting powers. The work of the RPTS is predominantly party v party and its jurisdictions are similar or parallel to some county court jurisdictions. However, broadly speaking (and without being too technical), each party bears its own costs. I would speculate that this does have an influence on the attitude to compromise. The attitude to litigation cost and litigation risk is altered when a party considers that, win or lose, they are likely to have to pay for the case themselves.

Extending

Four years ago, I wrote of the pilot mediation project that I was confident that we were well on the way 'to getting mediation cracked'. On reflection, I think I was wrong. While we still offer mediation, and a good proportion of the mediations undertaken are successful, the focus of the project has remained relatively narrow. Now is probably the time to shake it up again and extend the scheme to other RPTS jurisdictions. In 2010 we experimented with telephone mediations for low-value or straightforward cases. This was not a success – but we may well try again.

We will, I think, need to consider how better to market mediation. I still think that parties have real difficulty in distinguishing a terminology that speaks of mediation, adjudication and also arbitration. Perhaps we should simply say to parties 'would you like to try and settle this case by agreement' and 'if so one of the tribunal members will assist in negotiations'.

Measuring success

Finally, I do not consider that the parties who have successfully mediated at the tribunal have lost out, but since mediation agreements are confidential, I do not actually know. At some stage, we may try to devise a better way to measure success. In the meantime, I am very pleased that a mediation project (that took a lot of effort to set in motion) has thrived and will continue into the future.

Siobhan McGrath is the Senior President of the Residential Property Tribunal Service.

QUICK, PRIVATE AND INEXPENSIVE

Anne Ruff **considers the lessons learnt from mediation in special educational needs cases, including which disagreements are amenable to mediation and ways in which the use of mediation might be encouraged.**

MEDIATION has many advantages. In particular:

- It encourages parties to identify areas of disagreement and propose resolutions.
- It looks to the future, rather than raking over the ashes of the past.
- It takes place in private.
- It is relatively inexpensive.
- It is quick to arrange, often within weeks of a referral.

In recent months, the Government has become evangelical about the use of mediation as a method of resolving disagreements.[1] While mediation should have an increased role to play in resolving disputes and reducing the number of appeals to some tribunals, it is not a panacea.

Background

A child has special education needs (SEN) if he or she has a learning difficulty that calls for special educational provision to be made for them.[2]

There are three main stages of special educational provision:

- *School Action*, where the school provide something additional for the child.
- *School Action Plus*, where the school consults specialists and requests help from external services.
- A statement of special educational needs after an assessment, where the child requires support beyond that which the school can provide, and the local authority arranges appropriate provision.

Local authorities have a duty to make arrangements for resolving disputes between themselves and parents, or between parents and their child's school in respect of the special educational provision made for their child.

Parental rights

Disagreements between parents and their child's school which may require mediation include issues about the precise nature of a child's special educational needs or about the amount and type of support a child requires in the classroom. In other words, what the parents want often has financial implications for the school. Initially, such costs are paid for out of the school's budget and the school may consider that the parent's request is not reasonable. Alternatively, the school may think that the request is reasonable but that local authority should bear the additional cost.

. . . what the parents want often has financial implications for the school.

Where parents are concerned that the educational provision available at the school is not addressing their child's needs, they have a right to request the local authority to undertake a statutory assessment.[3] The local authority may refuse such a request.

After receiving a draft SEN statement, the child's parents have the right to express a preference as to the maintained school at which they wish their child to be educated. The local authority is under a duty to comply with parental preference, with certain exceptions.

Parents have a right of appeal to the First-tier Tribunal (Special Educational Needs and

Disability) in respect of certain decisions made by a local authority, including a refusal to undertake a statutory assessment or to issue a SEN statement.

Why do disagreements arise?

Disagreements arise for a number of reasons, including:

- Lack of understanding by a parent, for example of their child's educational needs or of the school's provision.
- Lack of information provided by the school or the local authority to the parent.
- Lack of understanding by the local authority about the child's special educational needs.
- Limited SEN expertise within the school.
- Poor communication or lack of trust between the parents, the school and the local authority.
- Financial constraints.

Nature of SEN mediation

A trained mediator is expected to be familiar with mediation skills as well as with the legal framework and Code of Practice 2001.[4] Ideally, a mediator is supported by an administrator who is able to explain the purpose of mediation and discuss the disagreement informally with the parties involved, helping them to identify the main areas in dispute.

Mediation is voluntary and cannot be imposed on the parties. The form of mediation used is facilitative. This means that the role of the mediator is to encourage the parties to talk honestly and openly about their concerns and to help them identify how those concerns may be addressed and resolved. A mixture of joint and caucus sessions, as well as the use by the mediator of 'open questions' and 'reality testing' can enable the parties to do this. The mediator does not suggest or impose solutions on the parties.

The mediator is neutral and impartial and should try to enable all the parties to contribute fully and calmly to a discussion focusing on the child's needs. Any written agreement is not legally binding on the parties. What is discussed during the mediation is confidential.

Suitable cases for mediation

Mediation is more likely to be effective in certain circumstances.

- *Long-term relationship.* Where the parties are likely to have an ongoing relationship in the future, such as in the education of a child.
- *Lack of understanding.* Where there has been poor communication or lack of information about the other party's concerns, or because the issues are not clear cut.
- *Discretion in decision-making.* Where a decision is made using a test such as 'efficient', 'reasonable', 'suitable' or 'appropriate', an element of discretion is involved. There is probably not one 'right' answer – a range of decisions may satisfy such a test. So long as the parties are willing to be flexible, mediation can enable them to reach an agreement. For example, a local authority may offer to provide additional support at the child's existing school, which may be acceptable to a parent who initially wanted their child to attend a different school where similar support is available.
- *Particular circumstances and not policy.* Where the dispute relates to a particular pupil's needs, rather than to an aspect of educational policy or law.

Low take up

A national evaluation of SEN mediation services was undertaken in 2008[5] and identified four potential barriers to mediation from a parental perspective. These were:

- Lack of conviction of the mediator's independence from the local authority.
- A suspicion that mediation was suggested by the local authority to delay resolution.
- The perception that mediation lacked effectiveness, particularly compared with legal outcomes obtained at the tribunal.
- Confidence in winning a tribunal hearing.

Local authority officers considered that there were four other potential barriers to parents using mediation. These were:

- Advice to parents from third parties to focus on an appeal to the tribunal.
- A lack of distinction between independent mediation and other avenues for disagreement resolution.
- A lack of confidence in the credibility of mediation.
- The prospect of mediation as being too intimidating.

Local authority officers themselves were reluctant to use independent mediation because:

- There were other routes for disagreement resolution.
- Resorting to mediation was an admission of failure.
- A belief that the local authority is better equipped to resolve a disagreement internally and to do so more quickly.
- A belief that mediation escalates a disagreement.
- The perception that there was no room to negotiate
- Concerns about the cost of mediation.

The following reasons, in my opinion, also contribute to the comparatively low take-up:

- The complexity of the process.
- Lack of legal requirement for a complaints procedure at the school-based stages.
- Lack of awareness about the role and availability of independent mediation.
- Lack of confidence among, for example, some voluntary organisations that parental rights will be protected.
- The formal tribunal procedures only apply to certain disagreements and only at a relatively late stage, when one or both parties' positions may have become entrenched.
- Adversarial nature of the existing dispute resolution processes.
- A perception that because mediation does not produce a legally binding agreement it is a waste of time.
- Local authorities can justify any increase in expenditure more easily when that is the consequence of a tribunal decision.

Recent figures show that 74 per cent of appeals were conceded or withdrawn before a hearing took place – about one-third shortly after an appeal is registered, and another third within a week or so of the date of the appeal hearing.

Yet the figures from the main London mediation service provider [6] suggest that such a service can enable appellants and local authorities to resolve their differences in a significant number of cases without the need for a tribunal hearing, and ideally without the need for an appeal to be lodged. They also suggest that only a small proportion of appeals lodged were referred to the mediation provider. Bearing in mind that more than two-thirds of appeals are withdrawn or conceded prior to hearing, it is surprising that the number of requests for mediation is not significantly higher.[7]

Facilitating mediation

From my perspective as an SEN mediator, the following suggestions may serve to encourage and facilitate the use of mediation:

- The Ministry of Justice and local government should produce clear information about mediation, which stresses the independence of the mediator and includes examples of disagreements resolved by mediation. The advantages listed at the start of this article should be emphasised. Such information should be included with a decision letter from a local authority, where mediation is available or where that decision gives rise to a right of appeal.

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Yes, the time is RIGHT

Kevin Sadler **considers when it is appropriate to offer a judicial service and when it might be possible to use other skills – such as those of independent mediators – in the resolution of disputes.**

I was interested to read the articles on alternative dispute resolution (ADR) in the winter 2010 issue of this journal, having spoken about the benefits and challenges of providing proportionate dispute resolution (PDR) at the Senior President's conference in November 2010. I use the word 'proportionate' deliberately, in the belief that any alternative forms of dispute resolution must ensure that cases are dealt with in the shortest time frame possible and in a cost-effective manner, while providing that the dispute is resolved fairly and in accordance with the law. The challenge is to identity which forms of ADR maximise early settlements and ensure that cases which do not require a full oral hearing are diverted away from them.

The importance of PDR

PDR brings many benefits to tribunals administrators and judiciary, as well as to users of our service. PDR ensures that cases are resolved at the earliest opportunity and builds in flexibility for the parties. Only those cases that need an oral hearing reach that stage. This means that judges are focused on the cases that need their expertise. User satisfaction is improved because of the reduced delay in hearing the case, and because interventions such as mediation can frequently achieve high levels of customer satisfaction.

Effective PDR in tribunals

By its very nature PDR must be tailored to the jurisdiction in question and at the appropriate stage. Decisions taken by the state that could result in an appeal to a tribunal should be properly considered, with reasons given and where appropriate an independent review offered. Feedback from tribunals to decision-making agencies helps them make better decisions. Measuring and publishing the number of withdrawals or cases struck out, together with the reasons for such decisions, helps establish how effective an agency is at making decisions. Delegation to staff of routine administrative decisions ensures that judicial skills are focused on complex legal issues with panel members making a real contribution to the decision in question. Effective PDR looks across the system and challenges all our preconceptions about what is appropriate.

Current developments

There are some dispute resolution mechanisms already in place. ACAS plays a large role in settling a significant number of cases in Employment Tribunals, and administrative mediation conducted by staff in the civil courts has proven very effective. Paper hearings are used very successfully in some of our jurisdictions. An ADR project has been designed for the Special Educational Needs jurisdiction. That project aims to identify and resolve as expeditiously as possible any case which is likely to be conceded or withdrawn before it reaches an appeal hearing.

In its Green Paper issued on 9 March 2011, *Support and aspiration: A new approach to special educational needs and disability,* the Department for Education proposes that parents and local authorities always attempt mediation before making an appeal to the tribunal (see Anne Ruff's article, page 14). We will need to consider how this might affect our SEN jurisdiction as well as any ADR scheme they might operate. In addition, the Tribunals Service is working with the Department for Work and Pensions and the UK Border Agency to improve their decision-making so that only those cases that require intervention by a tribunal come to us.

I agree with Robert Carnwath when he said in the last issue of the journal that 'the time is right to look at the balance of work between judges and administrators'. We have yet to fully explore what actions might be delegated to staff and we

need to look to the courts as well as tribunals for examples of effective delegation. With the unification of tribunals, the time is also right to look at the range of panel composition that exists across all tribunals and ask whether the current arrangements are the most effective.

Looking forward

Sir Andrew Leggatt noted in his 2001 report that 'users perceive the time of the whole process and not the stages which it comprises'. We need to look at the end-to-end process from the first decision to the final hearing and target points in the process where other forms of dispute resolution will have the biggest impact. While some good progress has been made, it has largely been on an *ad hoc* basis and its success has not been judged on the basis of other cost-effective options or the best use of resources.

With the creation of HMCTS we have the opportunity to share best practice and develop a variety of approaches to resolving disputes that are customer-focused and cost-effective. We need to ask difficult questions about when to offer a judicial service and when it might be possible to use the skills of others, e.g. administrative teams, independent mediators or legal officers. It is imperative we do so because decreasing resources and increasing workloads means we must make the best use of our staff and judiciary.

Kevin Sadler is Chief Executive of the Tribunals Service.

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- Financial incentives might be used. For example, mediation could be free, whereas a small fee could be charged for appealing to a tribunal which would be recoverable if the appeal is successful.
- Disputes which are amenable to mediation must be identified, as well as the stage in a disagreement at which mediation should be offered. Procedural rules might be amended accordingly. Where the parties do not refer their disagreement to mediation, the parties should be required to explain why they did not.
- The funding of independent mediation by Her Majesty's Courts and Tribunals Service rather than by one of the parties to the disagreement would emphasise the independence of the process. Another option would be for the establishment of independent local mediation organisations working in accordance with national guidelines. Such an organisation may prove more responsive to local needs that a national organisation.
- Mediation is not without its own costs. For parties to trust the process both parties should have equal access to independent expert advice. An independent expert could be appointed by the tribunal to prepare a report where required, instead of both parties obtaining their own reports from different experts. Alternatively, where one party has expertise the other party should be given access to equivalent expertise.

Anne Ruff is a mediator and sits on the First-tier Tribunal (Social Entitlement Chamber). She is a visiting senior lecturer in law at Middlesex University.

[1] See, for example, the Green Paper *Support and aspiration: A new approach to special educational needs and disability. A consultation*. CM 8027, March 2011.

[2] Education Act 1996, s312(1).

[3] Education Act 1996, s329.

[4] Special Educational Needs Code of Practice DfES/581/2001.

[5] Special Educational Needs Disagreement Resolution Services, National Centre for Social Research, Research Report DCSF-RR054.

[6] SEN Mediation Service, KIDS London, 49 Mecklenburgh Square, London WC1N 2NY. Tel: 020 7837 2900. Fax: 020 7520 0406. Web: *www.kids.org.uk/mediation*.

[7] 11(4) *Education Law Journal* (2010) 289–300 at p291, 'Mediation: Its Role in Special Educational Needs Appeals', Anne Ruff.

The POWER to issue a summons

Charles Blake **considers the implications of** ***CB v Suffolk County Council*** **[2010] UKUT 413 (AAC), where the Upper tribunal fined a witness for ignoring a summons.**

A small school in Suffolk provided special facilities for pupils with learning difficulties. It also took other pupils who did not need special facilities. A parent visited the school to see whether it would be suitable for her son (X). Mr A, the headteacher, agreed to admit X.

The school had a long-standing policy of not becoming involved in SENDIST cases. But it would provide written information on request. Mr A signed a form stating that he had agreed to admit X on or before September 2010. A tribunal hearing concerning X's needs and who would meet them was adjourned for further information. The tribunal decided to issue a witness summons against Mr A to attend the next hearing. Mr A said that he would answer written questions but he declined to comply with the witness summons. He contacted the Upper Tribunal in an endeavour to have the summons set aside. He did not attend the hearing, nor did he seek legal advice. At some time he withdrew the offer of a place to X. The First-tier Tribunal referred the issue of the summons and its possible enforcement to the Upper Tribunal.

Issuing a summons

The decision of the Upper Tribunal includes a cogent discussion of when a witness summons might be issued. The Upper Tribunal accepted that many schoolteachers could employ their time more usefully than by attending a tribunal hearing and in paragraph 29 sets out a careful and helpful statement of the factors that the First-tier Tribunal should bear in mind when deciding whether to issue a summons, whether on its own initiative or on the application of a party. The stated purpose of a summons is to require a person to attend a hearing in order to answer questions, produce documents in their possession or exercise control relating to any issue in the proceedings. The First-tier Tribunal has the power to refer to the Upper Tribunal any failure by a person against whom a witness summons had been issued to comply with its terms. The Upper Tribunal then has all of the powers of the High Court to treat a failure to comply with a witness summons as if it were a contempt of court.

Personal attendance

The First-tier Tribunal is reminded that it should always consider an alternative to personal attendance of a witness. An order might be made for a person to answer questions or to produce documents. But there will be cases in which personal attendance of a witness is appropriate. The tribunal should consider:

1. Whether evidence should be taken sequentially and, if so, at what point in the proceedings it will be appropriate to receive evidence from the witness summonsed for this purpose.

2. Dealing with an appeal justly and fairly might include enabling all parties to participate in the proceedings by questioning a witness under a summons to attend a hearing. As such evidence is given further lines of inquiry may be generated. The tribunal members and the parties may wish to pursue such issues.

3. Issuing a witness summons might avoid delay. Even if a written order might be made for the production of documents, it might be best to have everyone round a table and able to deal with the issues as they arise.

Mr A had been in breach of the witness summons by not attending the hearing. He could not rely on his withdrawal of the offer of a place to X when the only reason offered for such withdrawal was the issue of the witness summons. Under section 25 of the 2007 Act, the Upper Tribunal fined Mr A £500.

Comment

The Upper Tribunal has explained how powers with potentially draconian consequences should be exercised. After considering the factors set out in paragraph 29 it decides to issue a summons and there is an application to set it aside, it must consider the further factors set out in the following paragraphs. There is a close relationship between case management powers and the issue of a witness summons. Good case management may avoid any need to issue a summons – for example, by obtaining written statements from the parties covering the issues that lie between them. The Upper Tribunal also drew attention to the overriding objective in the Procedure Rules 'to deal with cases fairly and justly'. This prescription would frequently indicate when a witness summons should be issued.

Rules of PRECEDENT

In *SST v RB* (2010) UKUT 454 (AAC), the Upper Tribunal concluded that:

1 It is not bound by High Court decisions but like that court itself, will follow High Court decisions unless convinced they are wrong.

2 Where highly specialised issues arise, it may feel less inhibited than the High Court in revisiting the issues.

The Upper Tribunal applied the following analysis:

1 There is no doubt that, when applying the law of England and Wales, the Upper Tribunal is bound by decisions of the Court of Appeal on issues of law in accordance with the ordinary rules of precedent. This follows from its status as a higher court, to which the statute provides a direct right of appeal.

2 Where it is exercising a jurisdiction formerly exercised by the High Court, it need not regard itself as formally bound by decisions of the High Court. Subject to one qualification, the position should be the same as where the High Court is dealing with decisions of coordinate jurisdiction. Under this convention a High Court judge will follow the decision of another judge of first instance, unless he or she 'is convinced that that judgment is wrong, as a matter of judicial comity, but is not bound to follow the decision of a judge of equal jurisdiction' – see e.g. *Huddersfield Police Authority v Watson* [1947] KB 842, 848, per Lord Goddard CJ.

3 The one qualification that the Upper Tribunal has inserted into this formulation arises from the particular nature of the Upper Tribunal's jurisdiction, in line with the statement of Lady Hale in *AH (Sudan) v Secretary of State* [2007] UKHL 49, para 30 – see also *Cooke v Secretary of State for Social Security* [2001] EWCA Civ 734. She emphasised the highly specialised character of some legislation before the tribunals, and the need for the higher courts to respect their expertise. Consistent with that approach, where such specialised issues arise before the Upper Tribunal, it may in a proper case feel less inhibited in revisiting issues decided even at High Court level, if there is good reason to do so. The Upper Tribunal has been established by Parliament for the purpose of providing a specialist appeal jurisdiction on points of law, in many respects analogous to that of the High Court, and which is by statute made a 'superior court of record' (section 3(5) of the 2007 Act). On the other hand, the Upper Tribunal should be very cautious in questioning a proposition which has been accepted as correct by the Court of Appeal, and has been confirmed or applied by a series of High Court judges. For that reason, and on general principles, the Upper tribunal should not depart from their approach unless satisfied that it is wrong.

Jeremy Cooper

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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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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