

TRIBUNAL REFORM IN THE UK – A QUIET REVOLUTION

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Tribunals in the UK

1. Tribunals may not have a high profile in the UK, but they represent one of the most important pillars of our system of justice. At the last count, there were some 70 different tribunals in England and Wales alone, between them handling nearly 1 million cases a year. More people bring a case before a tribunal than go to any other part of the justice system.
2. One reason for the relative neglect of this area of the justice system is that it is not easy to find a common theme or characteristic shared by all tribunals. They have grown up, largely over the last century, to meet the needs arising from particular statutory regimes, mainly connected with welfare or regulation.
3. Earlier examples, dating from the 17th Century, were concerned with tax or excise duties. The Commissioners of Customs and Excise were given powers to determine disputes over such matters. These were criticised by legal commentators at the time as a serious breach of the principle that decisions on legal rights or obligations were the exclusive province of the courts. Dr Johnson went further. His Dictionary defined “excise” as -

... a hateful tax levied upon commodities, and adjudged not by the common judges of property, but wretches hired by those to whom the excise is paid.¹

4. In more recent times a multitude of tribunals has been created dealing with such diverse issues as social security, property rights, employment, immigration, mental health and many other subjects. By far the most important in terms of volume is the so-called “Appeals Service”, which deals with social security appeals and decides some 200,000 cases per year. Other important tribunals are the Employment Tribunals (100,000 cases a year); the Asylum and Immigration Tribunal (100,000 cases); Mental Health Review Tribunals (20,000 cases), and the General Commissioners of Income Tax (25,000 cases). At the other end of the scale are a number of tribunals which appear never to have sat in recent times and perhaps never at all.²
5. It is important also to understand that in the UK the tribunal system, unlike that of the mainstream courts, follows no consistent or logical demarcation lines in terms of geographical jurisdictions. While there is clear separation between the courts of England and Wales, of Scotland and of Northern Ireland,³ tribunals enjoy no such clear dividing lines. Some (for example, tax and immigration) extend to the UK as a whole; some (e.g. social security, and transport) extend to England, Wales

¹ See Wade and Forsyth *Administrative Law* 9th Edition p 907.

² For example, the Antarctic Act Tribunal has the function of deciding appeals against the Secretary of State where a permit for an Antarctic expedition is revoked or suspended. However it seems that to date no such claim has arisen, and the Tribunal has never met and has no members.

³ Led respectively by the Lord Chief Justice for England and Wales, the Lord President of the Court of Sessions, and the Lord Chief Justice for Northern Ireland. The Constitutional Reform Act 2005 (see below) has introduced a convenient collective term “the Chief Justices”.

and Scotland only; some (e.g. Lands Tribunal) to England and Wales; and some (e.g. Special Educational Needs) only to England. Where the jurisdiction is limited to one part of UK there are usually parallel jurisdictions in other parts, some of which may have close working relationships with those administered from London. The task of harmonising these diverse jurisdictions has been complicated considerably by the devolution arrangements introduced by the present Government, and the very different legal, practical and political issues which have to be addressed in each country.

The nature of tribunals

6. Most of these tribunals are concerned with claims by the citizen against the state, either claims for benefits of some kind, or appeals against regulatory decisions of some kind. However that is not true of all of them. Employment tribunals of course are concerned for the most part with disputes between private individuals and organisations. Leasehold Valuation Tribunals are concerned with disputes between lessees and lessors over service charges or the valuation of properties for the purpose of enfranchisement. Also, many tribunals are administered by local authorities, rather than central government – for example, Admission Appeal Panels for schools (66,000 cases) or Parking Adjudicators (35,000 cases).
7. It would be wrong to think of tribunals as concerned only with small-scale disputes. Individual cases relating to social security may concern only a few hundred pounds, but they may carry much wider implications when spread across the whole system. On the other

hand, cases before the Special Tax Commissioners or the VAT Tribunal can raise issues as complex as anything in the High Court, and the amounts involved may run into millions of pounds. Similarly the regulatory functions of tribunals may range from local issues, such as the disqualification of local bus operator (before the Transport Tribunal), to issues of national importance, such as a well-publicised case before the Financial Services and Markets Tribunal, concerning an appeal by one of the most important major national insurance companies against a fine of over £1m imposed by the Financial Services Authority for alleged mis-selling of policies.⁴

8. What then is the hallmark of a tribunal, which distinguishes it from the ordinary courts? To my mind there are two main factors. First, there is the specialist expertise and experience of the members. Although most tribunals are presided over by a lawyer (in some cases a serving judge), he or she will normally be sitting with non-lawyers who either have specialised qualifications (perhaps medical) or are lay-men or women with specialised experience. For example, in employment tribunals the chairman will sit with lay representatives drawn from people with experience of both sides of industry. The other important characteristic is the flexibility which enables the tribunal to develop and vary its procedures to suit the particular characteristics of the jurisdiction, and the needs of its users, be they unrepresented individuals or sophisticated City institutions.

⁴ Reported in The Times 24.1.05

The Leggatt Review and the White Paper

9. The former Lord Chancellor, Lord Irvine, recognised the importance of tribunals to the government's programme for modernising the justice system. He initiated a review by a team under Sir Andrew Leggatt, a former Lord Justice. Their report, published in March 2001⁵ observed that:-

The present collection of tribunals has grown up in an almost entirely haphazard way. Individual tribunals were set up, and usually administered by departments, as they developed new statutory schemes and procedures. The result is a collection of tribunals, mostly administered by departments, with wide variations of practice and approach, and almost no coherence. The current arrangements seem to us to have been developed to meet the needs and convenience of the departments and other bodies which run tribunals, rather than the needs of the user.

10. The report recommended that the tribunals should be rationalised and brought together in a single, coherent tribunal system to be administered by a new agency reporting to the Lord Chancellor. A key feature would be independence from the Departments whose decisions were under scrutiny. They also made a number of detailed recommendations for improvements to such matters as administration, routes of appeal and procedures.

11. Those recommendations were broadly accepted by the Government, which issued a White Paper in July 2004, *"Transforming Public*

⁵ *Tribunals for Users - one System one Service* HMSO 2001. The report drew extensively on insights gained during a visit to Australia.

Services: Complaints, Redress and Tribunal".⁶ That set out a programme for a phased process of integration over a period from 2006-8. The new Tribunal Service would be launched in April 2006, as an "Executive Agency", reporting to the newly established "Department for Constitutional Affairs" (see below). Initially it would be based on the 10 largest central tribunals,⁷ and other smaller tribunals already administered by the DCA. A Tribunals Bill would provide for the transfer of existing tribunal office-holders into a single "Tribunals Judiciary", under the leadership of a "Senior President of Tribunals". He or she would be a Lord Justice of Appeal, appointed by the Lord Chief Justice (with the concurrence of his counterparts in Scotland and Northern Ireland), who would work closely with the Chief Executive of the new Tribunals Service, and would have general responsibility for maintaining judicial standards, training and independence.

12. The White Paper did not limit itself to improving and rationalising existing procedures. It proposes a "radical approach". The new organisation would be expected to innovate and "re-engineer" traditional processes. The unified system would be transformed -

... into a new type of organisation which will not only provide formal hearings in authoritative rulings where these are needed but will have as well a mission to resolve disputes fairly and

⁶ CM 6243

⁷ This involves the transfer to the DCA of some major tribunals previously administered by other Departments, including the Appeals Service (social security), Employment, Mental Health Review, and Special Educational Needs.

informally either by itself or in partnership with the decision-making department, other institutions and the advice sector.⁸

In line with these changes the Council on Tribunals would be reconstituted as an Administrative Justice and Tribunals Council, with a supervisory role for the whole administrative justice sector –

... concerned to ensure that the relationships between the courts, tribunals, ombudsmen and other ADR routes satisfactorily reflect the needs of users.⁹

13. The White Paper attracted general approval, and was strongly supported by the tribunals themselves. Its preparation had been the subject of unusually close co-operation between judges, tribunals and government. For more than a year the emerging proposals had been subject to discussion by a “Tribunals Presidents’ Group” (TPG), which brought together the judicial leaders of the main tribunals, and the key government officials, under the chairmanship of Lord Justice Brooke. Shortly before the publication of the White Paper, I was invited by Lord Woolf to act as “Senior President Designate”, pending the creation of the statutory post. Almost my first task, in August 2004, was to participate in the selection of a shadow Chief Executive for the new tribunal service (Peter Handcock), appointed more than a year in advance of the expected launch of the new service in April 2006. Since then Peter and I have worked very closely on all aspects of

⁸ White Paper *op cit* para 4.20 In line with these wider objectives, two pilot studies are already under way: one of cost-effective means of providing information and advice to users, the relating to the use of early neutral evaluation and other alternative dispute resolution methods.

⁹ White Paper *op cit* para 11.12

implementation, and the TPG, now under my chairmanship, has continued to be actively involved.

Constitutional Reform

14. It is now necessary to step back in time for a moment. Orderly progress towards tribunal reform had been interrupted, in June 2003, by a much more dramatic constitutional upheaval. The government announced, without any advance warning, that the ancient office of Lord Chancellor was to be abolished, and new arrangements were to be put in place to secure the separation of the judiciary from the executive and the legislature. In February 2004 detailed arrangements for the division of powers were set out in a “Concordat”, agreed between Lord Woolf, as Lord Chief Justice, and Lord Falconer, as Secretary of State in the newly created “Department of Constitutional Affairs”.¹⁰ The new constitutional settlement was in due course given legislative effect in the Constitutional Reform Act 2005. Lord Woolf had extended his tenure as Lord Chief Justice until August 2005, in order to negotiate and oversee the detailed terms of the new settlement. That stage having been successfully completed, it has fallen to his successor, Lord Phillips, to lead the way in preparing for the commencement of his new role on 1st April 2006, including the establishment of a substantial new administration in the Royal Courts of Justice.

15. It is not possible in this paper to do more than touch on some of the main changes. At the forefront are a new statutory guarantee of judicial

¹⁰ Although he retained the title “Lord Chancellor”, it was initially envisaged that this would not continue once the necessary legislative arrangements had been made for disposing of the Lord Chancellor’s many historic statutory functions. However, following parliamentary pressure, the government agreed to retain the office and title, albeit shorn of much of their historic significance.

independence, and the confirmation of the position of the Lord Chief Justice as head of the judiciary of England and Wales (including the magistrates), with responsibility for representing their views to Parliament and to Ministers, for their welfare, training and guidance, and for judicial deployment. The Lord Chancellor is responsible, on behalf of government, for upholding judicial independence, and for ensuring the provision of adequate resources. The Act contains elaborate provisions defining their respective functions, including new disciplinary procedures for judges conducted by a Judicial Complaints Office, acting under the Lord Chief Justice, but requiring the approval also of the Lord Chancellor at key stages. The Act also establishes a new Judicial Appointments Commission (JAC) to manage the process of judicial appointments, with representatives of judges, the professions, the tribunals, and the general public. Last, but not least, the Act provides for the establishment of a new Supreme Court, to take over the UK appellate functions of the House of Lords and the Judicial Committee of the Privy Council.¹¹

Tribunals under the CRA

16. The architects of the new constitutional settlement were aware of the special problems presented by tribunals, not least the problem of jurisdictions extending beyond that of the Lord Chief Justice for England and Wales. They did not attempt a complete solution. This was perhaps understandable, not only because to do so would have introduced an added layer of complexity, but also because it was

¹¹ The establishment of the new Supreme Court has been delayed by the problems of finding a suitable site. Present plans envisage the use of the old Middlesex Sessions building on the other side of Parliament Square, but this will not be ready before summer 2009.

envisaged that remaining issues would be addressed in the separate legislation required in any event to implement the Leggatt reforms.

17. The result is somewhat patchy. Thus the “judiciary”, of which the Lord Chief Justice is head, is defined in a way which does not include tribunal judiciary. On the other hand, the “judicial office-holders”, to which the new JAC will be recommending appointments, will include most of the tribunal judges and panellists. (Indeed they will probably form the largest part of its work.) Similarly, tribunal judges are included in the new arrangements for judicial discipline under the Judicial Complaints Office. However, detailed rules have been agreed under the Act which will enable the bulk of ordinary complaints to be dealt with (as now) by the tribunal presidents, so that only the most serious complaints will be referred up to the Lord Chief’s office. Meanwhile, the fundamental question¹² of who, as between the Lord Chief Justice and the Lord Chancellor, is ultimately responsible for the tribunal judiciary has not in terms been addressed.

18. Some answers would have been given by the draft Tribunals Bill, which was prepared in the course of 2005, and was at one time expected to find a place in the legislative programme for the present session. By the end of 2005, however, it became clear that, because of other (more politically urgent) pressures on the parliamentary timetable, the Tribunals Bill would be delayed. The government remains committed to the principle of the Bill, and the draft is due to be published for consultation this summer. But the timing of actual legislation remains

¹² This ambivalence may appear strange to Australian eyes, familiar with a strict constitutional separation of judiciary and administration, in which the federal administrative appeals tribunal is clearly part of the latter.

uncertain. This has not meant any delay in the launch of the new Tribunal Service, as an administrative entity, since that does not require any new statutory underpinning.

19. Provided it is not unduly prolonged, this delay in the Tribunals Bill is not unwelcome. We need time to absorb the major changes involved in the establishment of the Lord Chief Justice' office, the Judicial Appointments Commission, and the Tribunals Service, and to allow the new arrangements time to settle down, before we attempt further structural change.

20. To bridge the gap, a Memorandum of Agreement has very recently been concluded between the Lord Chancellor on the one hand, and the three Chief Justices on the other, defining in very broad terms their respective responsibilities for tribunals, and in more detail my own role as Senior President of Tribunals. Most importantly, the Lord Chancellor, on behalf of the Government accepts that the new statutory guarantee of judicial independence will be treated as extending to the tribunal judiciary, while recognising that -

...tribunals are, and should remain as, a distinctive part of the justice system, separate from the courts judiciary, with a special responsibility to provide speedy, expert and accessible justice in specialist areas of the law.

The Senior President, as representative of the Chief Justices, is given the task of providing strategic leadership for the tribunals judiciary, and working in partnership with the tribunal presidents, and the Chief Executive of the new Tribunals Service, to develop and improve the

tribunal system. Notably the Memorandum confirms the responsibility of the Senior President for overseeing for training of the tribunals judiciary, in cooperation with the Judicial Studies Board.

21. The Memorandum does not pretend to tackle the difficult constitutional issues, but it provides a practical way forward pending further legislation. In terms of responsibility, my own position is not in doubt. I shall remain a senior member of the judiciary, and as such I shall be answerable to the Lord Chief Justice, as head of the judiciary under the CRA. My role will thus provide a direct link between the tribunals judiciary and the court judiciary. However, of more practical importance is the opportunity we now have to build an effective partnership between judges and administrators, at all levels and in all parts of the UK, in developing the tribunal system.

Re-organising the tribunals

22. Although the unified tribunal service can be established by administrative reorganisation, legislation is needed to achieve the structural changes proposed by the White Paper. In the meantime we will have to make do with the existing haphazard and disparate pattern of tribunal jurisdictions, at first instance and appellate levels. Under the proposed Bill, the 70 or so existing statutory tribunals would be reduced to two, a “first-tier tribunal” and an “upper tribunal”. Different specialisations would of course remain, but they would be provided within different “chambers” of a single tribunal. Tribunal judges would be part of a unified “tribunal judiciary”, and, subject to appropriate

training, could be assigned to different chambers to meet varying needs from time to time.

23. The most important changes would come at the upper level. It has long been recognised that the network of appeal routes from first instance tribunals is as haphazard as the unstructured growth of the tribunals themselves. They were described by Lord Justice Woolf (as he then was) in a 1988 paper under the vivid but accurate title “A Hotchpotch of Appeals – The Need for A Blender”.¹³ Some statutes provide for an appeal from the Tribunal to a specialised appeal body, such as the Employment Appeal Tribunal. Others provide for an appeal direct to the High Court (as in the case of the Tax Commissioners) or to the Court of Appeal (as in the case of the Lands Tribunal). Others provide no specific route of appeal at all, in which case there is the possibility of judicial review on traditional grounds by the Administrative Division of the High Court. In all cases there is the possibility of further appeals with permission to the higher levels of the judicial hierarchy (including, in some cases, the European Court of Justice).

24. Under the new structure envisaged in the Tribunals Bill, there will be two tiers. For the generality of cases the initial hearing will be in the lower tier, but there will be provision for appeal with permission, usually on points of law only, to the upper tier. Permission to appeal from the upper tier to the Court of Appeal (or beyond) will only be given for cases raising points of general importance. The upper tier will also have a first-instance jurisdiction for some of the more important or

¹³ Civil Justice Quarterly, January 1988 44-52. For a more detailed review, see the Law Commission report: *Administrative Law: Judicial Review and Statutory Appeals* Law Com No 226

complex categories of case, with a right of appeal on points of law direct to the Court of Appeal.

25. The Bill will provide a flexible framework, within which detailed arrangements can be made for replacing the present appeal routes by stages as the various tribunals are brought within the new service. An important provision of the Bill will be the power of the Administrative Division of the High Court, in appropriate cases, to transfer judicial review applications to the upper-tier tribunal. Ultimately, I envisage that the jurisdiction of the new upper-tier tribunal will be divided into a small number of specialised “chambers”. Thus, there might be separate chambers for employment, finance and tax, property, and asylum and immigration. The remaining jurisdictions might be drawn into a new Administrative Appeals Chamber.

Conclusion

26. In this brief overview, I hope I have been able to give you some idea of the important changes that are taking place in our constitutional structure. Tribunal reform has had a less dramatic introduction, but I believe it to be no less important. From April 2006, tribunals in the UK will be seen as constituting a unified system, with its own vital and distinctive part to play in the justice system. The tribunal judiciary will be seen as judges in their own right, with a direct link (through the Senior President) to the Chief Justices. The new Tribunal Service will have both the responsibility and the resources to set in train an active programme of research and improvements in access to justice for those who most need it. It may be a quiet revolution, but it could have

more significance for the delivery of practical justice in the UK than many other more widely trumpeted Government initiatives. I am privileged to be part of the team.

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