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Some Jottings on Administrative Justice

by Lord Justice Carnwath – Senior President of Tribunals

“Writing is easy. All you do is to sit staring at the blank sheet of paper until the drops of blood form on your forehead” (Red Smith)

“You just jot down the ideas as they occur to you. The jotting is simplicity itself – it is the occurring which is difficult.” (Stephen Leacock)¹

The Palace of Westminster

1. We start appropriately at the Palace of Westminster in London. Picture the scene at the Opening of Parliament in November 2006. Banks of robed peers and tiara-ed ladies in the splendid gothic chamber, and judges sitting before the throne on the woolsack dressed in full regalia with full-bottomed wigs (among them your correspondent); the Commons, led by the prime minister and leader of the opposition, forming an untidy rabble at the servants’ end of the chamber; all awaiting the arrival of Her Majesty, who in due course appears in full regal pomp, announced by trumpets and accompanied by numerous flunkeys with exotic titles and uniforms to match. Then a hush falls, as the Lord Chancellor on bended knee presents the speech, which the Government has kindly written for her, outlining their programme for the year. She reads solemnly through the turgid list of mostly well-leaked government initiatives, until at last she comes to the momentous words - “my government will present legislation for reform of the tribunal system.”
2. I felt like leaping to my feet and shouting “Bingo”. That would have been undignified and my wig might have fallen off. But it was a truly exciting moment for me, having been directly involved in the reform project since

¹ Quoted in *Decisions, Decisions*: Louise Maillot and James Carnwath.

summer 2004, and having seen so many delays, changes of direction, and frustrating stops and starts. The Queen may not perhaps have been aware of the impact of her words on one of her audience. For her no doubt, this is just the curious way in which the system chooses to reveal to the public the government's legislative programme for the year. But those present know that it conceals a long process of political infighting, and inter-departmental haggling. Until the words are spoken, one is never quite sure what is in and what is out. So for me those words was the sign that our tribunal reform project was back on track and was really going to happen.

3. Happily, HRH and her government proved as good as their words. In July 2007 the Tribunals Courts and Enforcement Act 2007 completed a relatively trouble-free passage through both houses, and Her Majesty graciously gave her approval. In October, on the recommendation of the Lord Chancellor, with the concurrence of the Lord Chief Justice, the Lord President of the Court of Sessions, and the Lord Chief Justice for Northern Ireland, the Queen graciously invited me to become the first Senior President of Tribunals. And in November I was duly sworn in before the Lord Chief Justice, the Master of the Rolls and the President of the Family Division.
4. Now you may be saying to yourselves – gosh they make a meal of things in the old country! And you are probably right. But all this pomp and ceremony, besides being good fun, does have a symbolic point in our case. The key message of the new Act is that tribunals are no longer the Cinderellas of the justice system. Tribunal justice is real justice, and a distinctive and vital part of the judicial system; and tribunal “judges” (as they will now be called –

rather than commissioners, panellists, adjudicators or whatever) are full members of the independent judiciary. Section 1 of the Tribunals Act underlines the point, by extending to them the statutory guarantee of judicial independence, conferred on the court judiciary by the Constitutional Reform Act 2005.

Bangkok

5. At this point the scene shifts to the other side of the world, and to another ancient kingdom. As luck would have it, in the week following my appointment, the International Association of Supreme Administrative Judges (IASAJ) was holding its triennial conference in Bangkok, hosted by the President and judges of the Supreme Administrative Court of Thailand. The event was closely linked to the 80th birthday of the King. As you would expect the entertainment was lavish, including an audience with the King. There were also some fascinating discussions, mainly on judicial independence and training, with delegates from countries as diverse as China, Panama and the Czech Republic.

6. Hitherto the UK, not having a supreme administrative court, has had only observer status. But I managed to persuade the authorities that in my new role I should be allowed to represent the UK, and to apply for full membership. The constitution of the IASAJ defines a supreme administrative court as including any jurisdiction, irrespective of its title, which is “empowered to adjudicate in the final instance in disputes arising from the action of public administration”. The French influence is obvious, and it is the French Conseil d’État which has hitherto led the way. The common law jurisdictions, in which

administrative law has never had the same status, have played a more limited role.

7. Left to myself I would have had some doubts as to my credentials, since the new Upper Tribunal, over which I will preside, will have the Court of Appeal and the new Supreme Court above it. But as so often, the Australians have felt less inhibitions. It was my friend, Garry Downes, President of the Australian Administrative Appeals Tribunal (AAT), who encouraged me to apply. His jurisdiction, though very wide, is like ours subject to onward appeal (to the Federal Court of Appeal and the High Court). However, it has been accepted as a full member of the IASAJ, on the basis that it is the highest purely administrative jurisdiction in Australia. Not only that, but the AAT has been selected, jointly with the Federal Court of Appeal, to host the next triennial conference in 2010. Encouraged by that precedent I made my case to the Council of the IASAJ, and was accepted. I look forward to 2010, and I hope the Canadians will also be there.

London and Paris

8. A final shift of scene to King's College, London, where fresh from Bangkok, the following week, the Vice President of the Conseil d'État, M Jean-Marc Sauvé gave a remarkable paper (in perfect English) on the historical evolution and future development of that formidable body.
9. The history of the Council in its present form started from Article 52 of the 1799 constitution which stated simply:

“A Council of State shall be responsible for drafting the bills and regulations of public administration and for solving difficulties arising in administrative matters”.

10. On that foundation was built what Professor WEIL described in an article as “Le miracle du Conseil d’État”, providing:

“...on the one hand, an independent advisor to the government and, on the other hand, a sovereign court in the field of administrative law whose independence is customary though very strong, building an ambitious body of case law which is legally binding for every single public officer, including the President, the Prime minister and members of the Cabinet whenever they act as administrative authorities.”

11. Two themes in M Sauvé’s speech struck me in particular. First that by very different historical routes our two jurisdictions have been moving to similar solutions for administrative justice. Since the last war the Council’s jurisdiction has undergone a gradual evolution to adapt it to modern conditions. In 1953 first instance jurisdiction in most cases was transferred from the Council to administrative tribunals (now forty one), and the Council’s role became largely appellate. In 1987 six (now eight) administrative courts of appeal were established, to hear appeals from administrative tribunals, subject to the final review by the Council. In 2001 a new administrative justice code was issued in order to simplify the rules of procedure being observed by all administrative courts in the country.

12. One may compare our own reforms under the new Act, which will bring together a large number of separate administrative tribunals into an integrated,

hierarchical structure with first instance and appellate levels, separate from the ordinary civil courts. True perhaps to the classic Gallic/British stereotype, their process of evolution has been principled and top down, whereas ours has been haphazard, pragmatic and bottom up. But the end result, at least in few years time, may look similar. As M Sauvé said: the challenges of judging the administration in a modern democratic society are very similar on both sides of the Channel.

13. The other striking point from the speech, however, represents a real difference between the two systems – and where we seem if anything to be moving away from each other. That is the advisory role of the Council. M Sauvé recognised this as a sensitive issue, particularly in the context of the principles of judicial independence enshrined in article 6.1 of the European Convention of Human Rights, and he was aware that it might seem “a bit odd” for common law judges and lawyers, but –

“As far as we are concerned, we view this fundamental link between our advisory work and our mission as the highest administrative judge, not as a threat for our independence, but on the contrary as the cornerstone of the enforcement of the rule of law by public authorities.”

14. Later in his talk he spoke of the “Chinese Walls” which operate within the Council to counter possible conflicts of interest arising from the Council’s “dual mission”, and of his plans to seek legislation to strengthen those protections. Hitherto, these measures seem to have been sufficient to enable the Council to resist challenges in the European Court of Human Rights.

15. This story may strike a chord for those who have followed the debate on the reform of our own House of Lords. The case for ending the historic appellate role of the House and setting up a new independent Supreme Court rested principally on the supposed demands of judicial independence under Article 6. Personally I always regarded that as a specious argument, and an impediment to serious and practical debate on the proper role of a final court. That is not the subject for this conference, but it has some relevance and I will return briefly to it.

And finally Toronto...

16. All this has been a somewhat roundabout way of getting to Toronto, and the theme of this conference. Tomorrow, we will be talking in more detail about the process of tribunal reform in various jurisdictions. I have submitted a paper outlining the UK experience and plans. In this address, Lorne Sossin invited me to look a little wider – “to capture your sense of where administrative justice is heading, what its defining characteristics will be 5, 10, 25 years in the future...” That brief involves a rather longer time span than I would care to predict. It also begs an important question: what we mean by “administrative justice”, in a common law system, and whether it is the same as “tribunal justice”.

17. I should confess at once that (unlike Garry Downes’ AAT) the tribunals within my care are not confined to those concerned with administrative decisions. One of the busiest of our tribunals is the Employment Tribunal, supervised by its own Employment Appeals Tribunal. That will retain its identity as a distinct “pillar” of the new tribunal system. It is an important jurisdiction

dealing a fundamental aspect of everyday life, but it is hardly administrative. Other tribunals are hybrids. For example the Lands Tribunal deals with disputes about rating and compensation for public expropriation of land, but also appeals on valuation and service charge disputes between landlords and tenants.

18. This caused some conceptual problems in the drafting of the new Act. For example, an important supervisory player in our system has been the Council on Tribunals, set up 50 years ago following the Franks review. Its statutory role, as its name suggests, was principally directed to the decision-making within tribunals. One of the objects of the reforms (outlined in the 2004 White Paper) was to extend its supervisory role to the whole administrative justice system, including processes of courts, tribunals, ombudsmen, mediators and internal departmental review. The new body, it was proposed, would be renamed the “Administrative Justice Council”. Enthused by the new role, the Council jumped the gun by adopting a suitably punning name for its magazine: “Adjust”. Unfortunately that sparked a protest from the Employment Tribunals, who were happy with the supervision of the Council but did not want to be seen as part of an Administrative Justice system. So the name in the Act is the less euphonious “Administrative Justice and Tribunals Council”; the magazine title remains.²
19. For my part, I see no difficulty in embracing party/party tribunals. A rigid division between administrative and non-administrative decision-making does

² I was interested to note, from the recent annual report of the New South Wales “Administrative Decisions Tribunal”, that they are apparently less sensitive to such linguistic problems. In spite of its title, a significant part of its work (the “Retail leases divisions”) is concerned with commercial and residential issues, which have no necessary connection with administrative decisions.

not seem to me a realistic way of defining the proper role of tribunals. Tribunals are well-adapted to providing an accessible and flexible means of applying the law which most directly affects people in the ordinary lives – their homes, their jobs, their health, their welfare. Whether they are provided by state or private agencies is not usually fundamental to the nature of the dispute or the best means for resolving it.³

20. Of the other hand I welcome the wider view of administrative justice embodied in the new Act, which sees it as concerned not just with tribunals, but the whole process of decision-making in relation to individuals by public or publicly accountable bodies – whether at departmental level, or at the level of courts, tribunals, ombudsmen or mediators. Further, the techniques which are developed in that context for improving decision-making are likely to be useful, if only by analogy, to the settling disputes between individuals and other providers.

Tribunals and courts

21. That leads onto another issue: what is so special about tribunals, as distinct from courts? why indeed do we need two separate systems? Particularly, now that tribunal judges are to have the same status and statutory independence as court judges,⁴ what is the logic of the difference? Again a search for clearcut distinctions is unhelpful. The traditional hallmarks of tribunals, at least in the

³ This has raised some difficult issues in the post-Thatcher world, in which public authorities have been encourage many forms of service previously provided direct by the state. See e.g. *YL v Birmingham City Council* [2007] UKHL 27, where the House decided, controversially and by a narrow majority, that privatised care services for the elderly, although provided under statutory arrangements with the local authority, were not “functions of a public nature” within the Human Rights Act 1998.

⁴ In Australia, the different constitutional framework has had the effect that the AAT is regarded as an “administrative” rather than a “judicial” body. However, from my discussions with Garry Downes I am unpersuaded that this makes much practical difference in the way the AAT operates, which is as fully independent adjudicative body.

UK, have been specialisation, flexibility of procedures, and involvement of non-lawyers with relevant expertise or experience. On the other hand we also have specialised courts, which are able to develop flexible procedures to suit their particular markets, for example the commercial court, and the technology and construction court. They are not in practice materially different, in composition, expertise or procedures, from, say, the Special Commissioners of Tax, who are the tribunal dealing with complex tax disputes.

22. Of late the House of Lords, particularly since the arrival of Baroness Hale, has tended to affirm the distinct and important role of tribunals. As she said in a recent case⁵:

“Tribunals were once regarded with the deepest of suspicion but they are now an essential part of our justice system.”

23. She referred to the role of tribunals in securing justice between citizen and state in a wide variety of contexts, and the recognition over the years of their “important advantages over courts of law”: “cheapness, accessibility, freedom from technicality, expedition and expert knowledge of their particular subject” (quoting the 1957 Franks report⁶).

24. The also referred to some “facts of tribunal life”, including

- i) “the great advantage, both to its users and to its decision-making, of being able to call upon the people with the greatest expertise in the subject matter of the claim” (para 40);

⁵ *Gillies v Secretary of State for Work and Pensions* [2006] UKHL 6

⁶ Report of the Franks Committee on Administrative Tribunals and Enquiries (Cmnd 218, 1957) para 38.

- ii) the objectivity of the system: “the system is there to ensure, so far as it can, that everyone receives what they are entitled to, neither more nor less” (para 41); and
 - iii) the special role of the chairman: “It is also a fact of tribunal life that they are presided over by lawyers whose role is not only to conduct the hearing in a fair and user-friendly fashion, to understand the relevant law, and to explain it to their colleagues. It is also to assist those colleagues to address the relevant issues in a reasonable and fair-minded way and then write the reasons for their decision.” (para 46)
25. Recognition of the special qualities of tribunals has also led the House to counsel a hands-off approach for the higher courts. Again I quote Baroness Hale in a an appeal from the Asylum and Immigration Tribunal:
- “This is an expert tribunal charged with administering a complex area of law in challenging circumstances. To paraphrase a view I have expressed about such expert tribunals in another context, the ordinary courts should approach appeals from them with an appropriate degree of caution; it is probable that in understanding and applying the law in their specialised field the tribunal will have got it right...”⁷
26. Under the new Tribunals Act the tribunal system will be structurally independent, and the post of Senior President is a free-standing statutory role, independent of that of the Lord Chief Justice or his counterparts in the other jurisdictions. On the other hand the Act acknowledges the close links between

⁷ *Home Secretary v AH(Sudan)* [2007] UKHL 49 para 30 (referring to her comments in the Court of Appeal in *Cooke v Secretary of State for Social Security* [2003] 3 All ER 279 para 16)

the two systems. There are specific duties of mutual co-operation on issues such as training and welfare. Court judges already preside over⁸ or sit regularly on various tribunals. This practice is preserved by the new Act, by constituting the court judges, at all levels, as potential members of the new tribunals, subject to request by the Senior President. More controversially, the Act provides that, subject to direction by the Lord Chief Justice, judicial review powers, traditionally the preserve of the High Court, may be transferred in selected cases or categories of case to the new Upper Tribunal.

Administrative Justice in the new System

27. In the context of this conference, this interesting question is where this process or reform will leave the administrative justice system. This question needs to be considered at three levels: decision-making generally, the role of the new tribunals, and the role of the higher courts.
28. I have no doubt that the framework provided by the Act, particularly the wider role of the AJTC will lead to more attention being given to extra-judicial means of dispute resolution. That is already happening. There is a lively debate about the role of internal review within departments, the use of mediation, and a more flexible relationship between courts and ombudsmen. I hope that within the foreseeable future we will take it for granted that these different methods and agencies are parts of an integrated system, contributing to a single goal: the fair, efficient and economical resolution of differences in the administrative field.

⁸ The Asylum and Immigration Tribunal and the Employment Appeal Tribunal are presided over by High Court judges, appointed by the Lord Chief Justice.

29. At the tribunal level, I have made the point that we are concerned with more than purely “administrative” justice. However, those who have read my paper on the reforms, will have notice that the division into “Chambers” will result in a practical division between administrative and other jurisdictions; and at the upper level, the creation of an “Administrative Appeals Chamber”, with an appellate jurisdiction on points of law from most administrative tribunals. There is some danger of confusion, since it will be operating in parallel with the existing Administrative Court, which is in fact simply a division of the High Court. Tribunal decisions, which are currently subject to review by High Court in the Administrative Court. For example decisions of the Mental Health Appeal Tribunals, will now be subject to appeal to the Upper Tribunal. There we have the advantage of being able to use not only High Court judges, transferred by agreement with the LCJ, but also the specialist skills of judges and other experts with experience of sitting on mental health cases. I see us developing a practical partnership in which we can relieve the Administrative Court of some of its burden in relation to specialist tribunals, and thus help it to concentrate on its central role as guardian of constitutional rights.
30. What of onward appeals? The possibility of appeal to the Court of Appeal and thence to the new Supreme Court will remain, but only with permission. Appeals to the Court of Appeal will normally be regarded as second appeals, for which permission to be granted only for cases of general importance or in other special circumstances. If the Upper Tribunal is doing its job properly, its decisions should come to be regarded as sufficiently expert and authoritative for onward appeals to be rare, particularly given the hands-off approach advocated in recent House of Lords decisions.

31. Finally a word about the new Supreme Court, and a reference back to the parallels with France. Although unlike the Conseil' État, its role is not limited to administrative justice, in practice a large proportion of its work is concerned with public law, notably, in recent years cases relating to the responsibilities of public authorities under Human Rights Act. As I have made clear, I was not a supporter of the proposals for a Supreme Court when they were launched in 2003, because I thought they were unnecessary and ill thought-out. However, Parliament has ruled in favour, and works are currently underway to convert the old Middlesex Guildhall in Parliament Square, with a view to opening in Autumn 2009.
32. I would be very sorry, however, if we do not take this unique opportunity to rethink the role of our highest court, and ask some basic questions: what is it for? What is its audience and how can it best communicate with it? As my cousin Mr Justice James Carnwath says, in his excellent treatise on judgment writing, "a judgment is above all an act of communication";⁹ and the first question must be to decide "why write a decision and for whom?" To me the main purpose of a judgment of a supreme court is to tell the lower courts in reasonably clear language what the law is and how to apply it, and where there are serious uncertainties to sort them out. The best House of Lords judgments are of course models of their kind in this respect, but in too many case one is left, having read 50 or more pages of densely packed reasoning of several concurring or dissenting judgments, as far from a practical solution to the real problem as when one began.

⁹ *Decisions, Decisions* Louise Maillot and James Carnwath.

33. In any event, the new supreme court should not be just a more sophisticated and long-winded version of the Court of Appeal. Its primary function should not be that of resolving individual disputes, which by the time they get there are usually beyond solving. Nor should its processes be purely adversarial. It should have a wider constitutional role to shape and develop the law, particularly in areas where Parliament has neither the will nor the technical expertise to assist. I do not see why the finest legal brains in the country should be confined to the resolution of the narrow legal disputes that happen to arise from cases before them. If that involves crossing the line between law interpretation and law reform, so be it. Similarly, if this involves seeking the contributions and expert assistance beyond that provided by the parties, it should do so. Indeed I would like to see much stronger links between the new Supreme Court and the Law Commission, in order to ensure that a full range of expertise and research is brought to bear on the resolution of difficult legal issues and the development of a more coherent system..
34. This is particularly relevant to the specialist areas of the law with which the tribunals are mainly concerned. It is not the sort of law which attracts much political interest, and it is unlikely to be at the head of the queue for legislative reform. But it can throw up difficult issues which can affect enormous numbers of people. They need to be sorted out in a practical and timely way, with proper understanding of the legal and social context, and the implications for those trying to administer the law at the coalface. If the Upper Tribunal is doing its job properly, recourse to the higher courts should only be needed exceptionally. Where it is, I do not see why we should not develop a much more flexible and co-operative relationship with the upper courts, so that

together we can provide practical solutions and clear guidance to decision-makers in the most efficient and economical way.

Conclusion

35. I will end, as I began, with another traditional British ceremonial occasion – the opening service for the new legal year in Westminster Abbey on 1st October. The assembled judges in full ceremonial dress seek God’s blessing on their activities in the new year. The Dean says a prayer for the courts and all Her Majesty’s judges, and those who administer justice. Before this year, no-one had mentioned tribunals. But this year for the first time we had been added to the list. I do not know who put him up to it, and a cry of “bingo” would have been equally inappropriate. But I knew then that we had arrived.

36. I was feeling rather pleased until at the reception (the so-called Lord Chancellor’s Breakfast) I bumped into my friend the Chief Parliamentary Ombudsman, looking rather glum. “What do I need to do”, she said, “to get a prayer for ombudsmen”. You ask me what the scene will look like 5 or 25 years hence. I hope we will have a fully integrated administrative justice system, which includes everyone engaged in the business of resolving administrative disputes, and there are prayers for all.

RC 17.1.08 Toronto