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Administrative Justice Without Borders -
Developments in the United Kingdom
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Introduction

1. I am grateful to CCAT for their invitation to attend their 4th International Conference and for the opportunity to speak to you all today. I notice this session is to be followed by one entitled the “State of Independence in Various Administrative Justice Communities.” I thought it might be of some interest if I provided an overview of developments in the UK tribunal system with a particular focus on how I think these will affect the independence of that system.
2. The main hallmarks of tribunals, as compared to the courts, are the specialist expertise and experience of the members; and the flexibility which enables each 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. This expertise is important to users’ perception of an authoritative and fair tribunal system. However whilst tribunals do different work, and often work in different ways, from courts, they still adjudicate on individual’s rights. In principle the task is the same. The current period of transformation in the UK tribunal system was preceded by a report of a former Lord Justice, Sir Andrew Leggatt *“Tribunals for Users One System, One Service.”* Leggatt made wide ranging recommendations on reform of the system but he commented:

“Tribunals are an alternative to court, not administrative, processes. They will keep the confidence of users only in so far as they are seen to demonstrate similar qualities of independence and impartiality to the courts.”¹

¹ Tribunals for Users One System, One Service, Report of the Review of Tribunals by Sir Andrew Leggatt, March 2001, Chapter 2 paragraph 2.18

3. Tribunals have a long history in the UK justice system, starting in the 17th C with special panels set up to deal with disputes over taxes and excise duties. In more recent times numerous specialist tribunals were created to provide an independent means of challenging administrative decision-making (e.g. in tax, social security and mental health) and to deal with some party-party disputes (e.g. employment). Between them these tribunals now handle over half a million cases each year. It was felt that a weakness of the system was its lack of perceived independence. Tribunals were often administered by the Government departments whose decisions were being challenged in the tribunal and this led to comments that “to users every appeal is an away game.”²
4. The fact that tribunals are increasingly seen as judicial bodies in the UK differs from their status in some other common law jurisdictions, where they are regarded as administrative bodies. How far this distinction matters in practice may be open to debate. However, it has become an important tenet of the UK tribunal system. This approach can be traced back to the 1957 report of the “Franks Committee” which had been asked to look at the working of tribunals and inquiries established under statute. They said:

*“tribunals should properly be regarded as machinery provided by Parliament for adjudication rather than as part of the machinery of administration. The essential point is that in all these cases Parliament has deliberately provided for a decision outside and independent of the Department concerned, either at first instance ... or on appeal from a decision of a Minister or of an official in a special statutory provision ... Although the relevant statutes do not in all cases expressly enact that tribunals are to consist entirely of persons outside the Government service, the use of the term “tribunal” in legislation undoubtedly bears this connotation, and the intention of Parliament to provide for the independence of tribunals is clear and unmistakable.”*³
5. This view of tribunals as a machinery for adjudication has become even more prevalent given other recent constitutional changes in the UK, such as the Human Rights Act 1998 which confirmed that fair and impartial tribunals should determine citizens’ rights.

The current reform programme

² Ibid Overview paragraph 3

³ Report of the Committee on Administrative Tribunals and Enquiries (Chairman The Rt Hon Sir Oliver Franks, GCMG KCB CBE); Cmnd 218; July 1957, paragraph 40

6. A former Lord Chancellor, Lord Irvine, recognised the importance of tribunals to the UK Government's programme for modernising the justice system, initiating the review under Leggatt. A central recommendation of Leggatt's report was that tribunals should be brought together in a single, coherent tribunal system to be administered by a new agency reporting to the Lord Chancellor. This, and other recommendations, were broadly accepted by the Government, which issued a White Paper in July 2004, *"Transforming Public Services: Complaints, Redress and Tribunals"*.⁴
7. It was at this point that I was invited by Lord Woolf, the then Lord Chief Justice, to act as "Senior President of Tribunals Designate", pending the creation of a statutory post. Almost my first task was to participate in the selection of a shadow Chief Executive for a new tribunal service, and since then I have worked closely with him on all aspects of implementation. The new Tribunal Service was launched in April 2006, as an Executive Agency, reporting to the newly established Department for Constitutional Affairs. It has already taken over the management of the biggest and most significant tribunals, and others will follow over the coming years – I have set out at the end of my paper the current position and the timetable for future transfers.
8. The structural changes to the tribunal system required legislation and a draft Tribunal, Courts and Enforcement Bill was published in the summer of 2006 for public consultation.⁵ It was introduced into the House of Lords in November 2006 and is currently proceeding at a rapid pace through the Parliamentary stages. It is expected to become law by summer 2007. However, implementation of the Bill's provisions is not expected to be complete for a further 18 months or so.

The new tribunal system

9. The Bill itself creates two new tribunals, the First-tier and Upper Tribunal. The other two major tribunal systems, the Asylum and Immigration Tribunal and the Employment Appeal Tribunal and employment tribunals, sit outside the new structure. Existing tribunal jurisdictions will be transferred into grouping of jurisdictions to be known as the "Chambers" of the two new tribunals. The members can then be "assigned" between them, having regard to their knowledge and experience. This assignment mechanism should provide for greater

⁴ <http://www.dca.gov.uk/pubs/adminjust/adminjust.htm>

⁵ http://www.publications.parliament.uk/pa/pabills/200607/tribunals_courts_and_enforcement.htm

flexibility and efficiency, by allowing members with suitable expertise to be allocated to areas of the greatest need. It should also provide much better opportunities for career development within the tribunal system.

10. The Upper Tribunal, the core of which is likely to become known as the “Administrative Appeals Tribunal,” will primarily be a specialist appellate tribunal from the First-tier tribunals. It will also hear some first instance matters, such as complex tax and finance disputes. The early development of the Upper Tribunal will be an important factor in the success of the Government’s reforms.
11. The Government has indicated that the Upper Tribunal is likely to absorb the jurisdictions of the Social Security and Child Support Commissioners and the Lands Tribunal. The Commissioners hear appeals from the first instance tribunals dealing with social security benefits – and received 6,778 applications and appeals in the year 2005 to 2006. Given that this work will form the core of the Upper Tribunal it will be important for particular attention to be given to the workings of this jurisdiction when developing the structure and procedure of the Upper Tribunal. Which other jurisdictions will join these will need to be determined during the implementation of the Tribunals Bill. The Senior President will preside over the Upper Tribunal. (If I am appointed, I would expect to divide my time roughly equally between the Upper Tribunal and the Court of Appeal.) Other judges of the Upper Tribunal will include not only existing Social Security Commissioners and other senior tribunal judges, but also High Court and Circuit judges seconded for the purpose by agreement with the Lord Chief Justice (as happens now in the Employment Appeal Tribunal).
12. There is the possibility of appeal, with permission, from the Upper Tribunal to the Court of Appeal, and thence to the House of Lords. Both the First-tier and the Upper Tribunal will have a power to review their own decisions, as some tribunals already do, where these are clearly wrong - avoiding the need for an appeal. The tribunals will have the power to correct accidental errors, amend reasons given for a decision or set aside a decision.
13. The Bill also allows the Upper Tribunal to hear suitable judicial review cases, transferred from the High Court under arrangements to be agreed with the Lord Chief Justice. This limited transfer of the UK High Court’s supervisory jurisdiction was referred to as a “constitutional revolution” in some of the Parliamentary debates on the Bill. However, it is likely to be confined to those categories of case which are particularly suitable for the specialist expertise of the

Upper Tribunal. As the Government Minister promoting the Bill in the House of Lords said:

*“We are trying to make sure that we get the best possible service that the justice system can provide to users by making it possible that cases can benefit from the specialist skills and the knowledge of a senior judge in a tribunal, rather than – and I mean this in the best sense of the word – the generalist skill and knowledge of a judge in the administrative court.”*⁶

14. During the passage of the Bill its provisions were amended to provide that transferred judicial review cases would be heard in the Upper Tribunal by either High Court Judges, or other persons as agreed between the Senior President and the Lord Chief Justice, would hear judicial reviews transferred to the Upper Tribunal. The Lord Chief Justice’s letter to the Minister on this issue was quoted in the House of Lords. He said:

*“... some cases in the Upper Tribunal will need High Court judges to hear them, and I intend to make such judges available to sit on those cases. However, it is imperative that there is flexibility in relation to the circumstances where cases should be transferred to the upper tribunal, and flexibility as to who they will be heard by.”*⁷

Independence of the tribunal judiciary

15. Before turning to other changes to the UK’s tribunal system under the Tribunals Bill it may be helpful for me to say a few words about the Government’s wider programme of constitutional change, which can more aptly be described as a constitutional revolution. In June 2003 the Government announced that it would abolish the office of Lord Chancellor as head of the judiciary and transfer most of his judicial functions to the Lord Chief Justice. This led to the so-called 2004 “Concordat” between the Government and the judiciary, which sought to define the relationship and division of functions between the judiciary and the executive. In turn the main terms were embodied in the Constitutional Reform Act 2005, much of which came into force in April 2006.
16. Central to the settlement under the 2005 Act was the affirmation of the “existing constitutional principle of the rule of law;” and a statutory guarantee of judicial independence. The Lord Chancellor is required to uphold the “continued

⁶ Hansard, House of Lords, Report, 31 January 2007, Column 247. The “administrative court” is not a separate court, but is the name given to the section of the High Court, Queens Bench Division, which deals with administrative cases (including the former prerogative writs).

⁷ Hansard, House of Lords, Third Reading, 20 February 2007, Column 1009

independence of the judiciary,” and to ensure adequate support to enable them to exercise their functions. This statutory guarantee of judicial independence is now extended to all tribunal judiciary in the first clause of the Tribunals Bill, and they are given the same status and protections as the judges in the courts. As the Minister promoting the Bill in the House of Commons stated:

“The purpose of the clause is manifest. It puts beyond doubt the fact that the tribunal judiciary are independent of the Executive.”⁸

17. There will also now be a consistency of approach in relation to the title given to legally qualified members of tribunals, as the Tribunals Bill calls them tribunal judges. Previously a diverse range of terms have been used to describe legal members of tribunals including “Commissioner”, “Chairman” and “Arbitrator,” to name but a few. The legally qualified members of the Asylum and Immigration Tribunal have already been afforded the statutory title of judge⁹ but the subject remained a matter of some controversy, because of the perceived need to protect the informality of tribunal proceedings. The President of the Asylum and Immigration Tribunal, Mr Justice Hodge, was quoted in Parliament as supported title “judge”:

“I know that there is very widespread support within the tribunals judiciary as a whole for the use of the title to be adopted. The adoption of the title will be seen by them as a recognition of the important work that is done by the Tribunals Service for the administration of justice as a whole. Further, I believe every effort should be made to maintain and promote the cohesion of the judicial ‘family’ and conferring the title ‘judge’ on those who adjudicate in administrative tribunals will serve this end.”¹⁰

18. The Bill creates the new statutory office of “Senior President of Tribunals”. He will be the judicial head of a unified tribunal judiciary, and will work in co-operation with the Lord Chief Justice and the other chief justices. The Senior President’s general duties are to ensure that tribunals are accessible, that proceedings are handled efficiently, that the members have specialised expertise, and that innovative methods of resolving disputes are developed. He will also be responsible for the training, welfare and guidance of tribunal judges, and for representing the views of tribunal judges to Parliament, the Lord Chancellor and other Ministers. The Lord Chancellor for his part is under a duty to ensure there is an effective system of support and services for the reformed tribunal system.

⁸ Hansard, House of Commons, Committee, 15 March 2007, Column 5

⁹ Asylum and Immigration Tribunal (Judicial Titles) Order 2005, SI 2005/227

¹⁰ Hansard, House of Commons, Committee, 15 March 2007, Column 13

19. The Constitutional Reform Act 2005 also provided for the creation of the new “Judicial Appointments Commission” for appointments in England and Wales (there are separate bodies in Scotland and Northern Ireland). The composition of the 15 members of the Commission is laid down by the Act, and is designed to achieve a very precise balance between judicial, professional and lay elements. The Act provides that selection for judicial offices must be based on merit after fair and open competition, but the Commission must also have regard to the need to encourage diversity in appointments. These arrangements extend to tribunal appointments.

Administrative Justice and Tribunals Council

20. The Tribunals Bill also covers the reform – or evolution – of the British Council on Tribunals (the Council’s remit does not extend to Northern Ireland). The Council had more formal beginnings than the CCAT - which I understand came from an idea developed around a dinner table in the 1980s for a conference for administrative law decision-makers. The Council was established as a statutory advisory body, following the publication of the report of the Franks Committee to which I referred earlier. The Franks Report proved a turning point in the history of administrative justice in the UK. The “Franks principles” of openness, fairness and impartiality became the watchwords for how tribunals should operate. The Council on Tribunals was set up to ensure that those principles were applied in practice and was given a very broad remit under the subsequent Tribunals and Inquiries Act 1958, to “oversee the constitution and working of tribunals.”. Its’ current functions are set out in the Tribunals and Inquiries Act 1992.

21. Under the next review of the tribunal system, Leggatt proposed that the Council on Tribunals should become “the hub of the wheel” of administrative justice. This phrase is perhaps more impressive than illuminating. However, there is no doubt that the Council (currently under the leadership of Lord Newton) has become a vital part of the administrative justice system, a powerful counterweight to the government influence, and the principal repository of learning and expertise.

22. The current Tribunals Bill gives the Council an even wider remit and a new name – the Administrative Justice and Tribunals Council (“the AJTC”). The new and expanded statutory functions of the Council will include keeping the administrative justice system¹¹ as a whole under review and considering ways to

¹¹ Defined as the “overall system by which decisions of an administrative or executive nature are made in relation to particular persons..”: Tribunals Bill Sched 7 para 13

make the system accessible, fair and efficient. This wider administrative justice role will be concerned with ensuring that the relationships between the courts, tribunals, ombudsmen and alternative dispute resolution routes satisfactorily reflect the needs of users.

23. It will also have a specific function of advising the Senior President on proposals for changes on those parts of the administrative justice system for which he is responsible. I already have a close working relationship with the Council and attend their monthly meetings as an observer. I have valued their enthusiastic and expert support during the reform process. No doubt this working relationship will continue to develop with the new tribunal system.

24. Lord Newton himself has commented on their involvement in the reforms:

“We saw this as contributing to our function of providing advice to Government, but in a rather more hands-on way than has historically been the case – recognising that “independence” does not necessarily mean standing back and making comment from a distance, and that influence can often be most effectively achieved by constructive engagement as policies and processes are in their formative stages.”¹²

The future

25. In this brief overview, I hope I have been able to give you an idea of some of the changes that are taking place in the structure of the UK’s administrative justice system. Indeed, there may be further changes on the horizon with the Government’s recent announcement that the UK courts and tribunals will be brought within a new “Ministry of Justice.” This may, in turn, lead to further alignment between the workings of the two systems. Whatever the developments in the future, I have no doubt that looking back in 20 or 50 years time we will see this as a period of remarkable and historic change. I believe the changes will be seen as beneficial for the prospects of tribunals within the wider UK system of administrative justice.

RC 08.05.07

¹² Administrative Review Council: 30th Anniversary Celebrations, Canberra, Australia, Speech by Lord Newton, Chairman of Council on Tribunals, October 2006 – available at http://www.council-on-tribunals.gov.uk/adjust/item/arc_speech.htm

Tribunals administered by the Tribunals Service from April 2006

- Adjudicator to HM Land Registry
- Asylum and Immigration Tribunal
- Criminal Injuries Compensation Appeals Panel
- Employment Tribunals for England and Wales, and for Scotland
- Employment Appeals Tribunal
- Finance and Tax Tribunals - includes:
 - Financial Services and Markets Tribunal
 - Pensions Regulator Tribunal
 - Special Commissioners of Income Tax
 - VAT and Duties Tribunals
- Gender Recognition Panel
- Immigration Services Tribunal
- Information Tribunal
- Lands Tribunal for England and Wales
- Mental Health Review Tribunal for England
- Pathogen Access Appeals Commission
- Pensions Appeal Tribunal for England & Wales
- Proscribed Organisations Appeals Commission
- Social Security and Child Support Appeals
- Social Security and Child Support Commissioners
- Special Educational Needs and Disability Tribunal for England
- Special Immigration Appeals Commission
- Transport Tribunal

Transfers in April 2007

- Asylum Support Adjudicators (from Home Office)
- Care Standards Tribunal (from Department of Health)

New Tribunals that will be brought within the Tribunals Service

- Charity Tribunal
- Claims Management Service Tribunal
- Consumer Credit Appeals Tribunal (currently in Department for Trade and Industry as Consumer Credit Licensing Appeals)
- Gambling Appeals Tribunal

Other Central Government Tribunals to transfer on or before April 2008

- Adjudication Panels for England (Department for Communities & Local Government)
- Estate Agent Appeals (Department for Trade and Industry shared panel with Consumer Credit Licensing Appeals)
- Family Health Services Appeal Authority (Department of Health)
- Reserve Forces Appeal Tribunal (Ministry of Defence)

Other Central Government Tribunals that may be considered for transfer

- Competition Appeal Tribunal (Department for Trade and Industry)
- Residential Property Tribunals (Department of Communities and Local Government)