Council on Tribunals Conference (15.11.05)

Tribunals under the Constitutional Reform Act

By Lord Justice Carnwath

Introduction

A year ago I addressed this conference in my new role as Shadow President of Tribunals, in the expectation that before too long I would be converted into a real person by a Tribunals Act. Shortly before the conference, the Government had announced its legislative programme in the Queen's Speech. It included a reference to a draft Tribunals Bill. Everyone knew that the programme was likely to be overtaken by the election. But there was a reasonable hope that, assuming a Labour Government, the Bill would figure in the new programme.

That did not happen. I am afraid that I am still a shadow person. Indeed you may think that my credentials for addressing you today are open to doubt. The Bill was not in the programme announced in Queens Speech after the election. We were told that (in the time-honoured phrase) it would be introduced when Parliamentary time became available. That remains the position, even though predictions of its prospects seem to change almost from week to week. Such is the roller-coaster of our legislative system, which is dominated by the current political agenda, and is apparently unable to find a place for sensible and uncontroversial proposals for nuts-and-bolts law reform, such as this Bill. As you have heard, even as vigorous and committed a champion as Cathy Ashton has not been able to move things forward.

Fortunately, the launch of the new Tribunal Service is not dependent on legislation, and it will go ahead as planned next April. Personally I am now reconciled to the likelihood that there will not be legislation this session. On the whole, I would prefer certainty one way or the other. There is plenty to do without it. I would favour early publication of the

draft Bill for consultation. This would maintain the impetus of legislative reform, and perhaps pave the way for a firm assurance of a slot in the next Parliamentary session. It would also provide a focus for discussion of the detailed issues which remain to be resolved.

Constitutional Reform

With or without a Bill, we are faced with major change next April, as part of the wider constitutional reform programme. The Constitutional Reform Act 2005 was designed to implement the Government's proposals to revolutionise the relationship between the courts and the executive. They had been announced, unexpectedly and in rudimentary form, in June 2003. They were developed in much more detail in a so-called Concordat agreed between Lord Woolf LCJ and Lord Falconer early in 2004. When the Leggatt report on tribunals was published in 2001, the wider reforms were probably not even a gleam in the Government's eye. Although the White Paper came later, the implications of the Concordat were barely touched upon. Those responsible for the White Paper on Tribunals (perhaps sensibly) did not attempt to grapple with issues which at that stage were still subject to heated Parliamentary debate.

It has only been in the last few months, during the preparations for the implementation of the CRA next April, that its implications for the tribunal reform programme have begun to become fully apparent.

This delayed reaction is perhaps not surprising. Those who have studied the CRA will know that many of its treasures are well hidden.

In this paper I will concentrate on five key features of the new settlement, now embodied in the Act –

- The statutory guarantee of independence of the judiciary, which the Lord Chancellor is obliged to uphold, and defend (s3) The "judiciary" is defined as

including the judiciary of the courts of any part of the United Kingdom, and of any international court. Tribunals are not mentioned.

- Power for the "chief justice" of any part of the United Kingdom to make written representations to Parliament on "matters of importance relating to the judiciary, or otherwise to the administration of justice" (s 5). The "judiciary" is not defined in this context. But the term "administration of justice" seems wide enough to include tribunals.
- Statutory recognition of the role of the Lord Chief Justice as "President of the Courts of England and Wales", and as such responsible for leadership and deployment of the judiciary, and for their "welfare, training and guidance" (s 7). The "courts" for which he is made responsible by the section include magistrates courts, but not tribunals.
- A new independent Judicial Appointments Commission, responsible for judicial appointments (s 61ff). The offices for which the JAC will be responsible (s 85) include not only the court judiciary, but all the tribunal appointments currently made by Crown or the Lord Chancellor (set out in a long and indigestible list in Schedule 14). As part of the selection process, the JAC is required to consult the Lord Chief Justice, and a person "who has held the office for which a selection has to be made or has other relevant experience" (s 88(3)).

  (Other tribunals, within the wider remit of the Council on Tribunals, remain outside the Act for the time-being; but there is a general power for the Lord Chancellor or Ministers seek the assistance of the JAC for other appointments: s 98.)
- A new statutory system for discipline of holders of judicial office, under which the Lord Chief Justice is given specific powers to discipline and suspend holders of judicial office, with the agreement of the Lord Chancellor (s 108ff). The definition

of “judicial office” for this purpose includes all the tribunal offices listed in Schedule 14. The Lord Chief Justice is given specific power to nominate another “judicial office-holder” to exercise his disciplinary functions (s 119).

In applying these provisions to tribunals, there is the added complication of what I call “cross-border” issues, as they affect non-devolved tribunals (such as the Scottish Employment Tribunals), or tribunals with jurisdictions extending beyond England and Wales (such as tax, immigration and social security).

Here again the CRA eschews simple solutions. The guarantee of judicial independence (though not applied to tribunals) extends throughout the United Kingdom (s 3). The power to make written representations to Parliament, on the judiciary and the administration of justice, is extended to the Lord President and the Lord Chief Justice for Northern Ireland, as “chief justices” for their respective jurisdictions (s 5). The LCJ(NI) is given equivalent responsibilities to those of the LCJ for “welfare, training and guidance” of the court judiciary in Northern Ireland, but again not for tribunals. There is no equivalent for Scotland (no doubt because under the Scotland Act administration of justice is a matter for the Scottish Parliament.) For judicial appointments, Scotland and Northern Ireland have separate arrangements under different statutes. The role of the Judicial Appointments Commission accordingly relates generally to England and Wales. But, in so far as the Lord Chancellor is currently making appointments for some cross-border and non-devolved tribunals, that function will come to the JAC. Where the appointee will be working wholly or mainly in Scotland or Northern Ireland, it is the Lord President or the LCJ(NI), rather than the Lord Chief Justice, who must be consulted by the JAC (s 97). Similarly, in relation to discipline, the functions of the Lord Chief Justice, in relation to judicial office-holders who sit wholly or mainly in Scotland or Northern Ireland, will be exercised by his counterparts in those jurisdictions (s 120-1).

Unfinished business

If that all sounds a bit of a muddle as far as tribunals are concerned, it is – but not irredeemably so. For tribunals, the constitutional reforms are unfinished business. It seems clear that in early 2004, when Harry met Charly, and the provisions of the new settlement were being worked out, tribunals were not at the forefront of their minds. (Thus, for example, they provided for only one tribunal member to sit on the 15-person JAC, even though (as is now accepted) in terms of numbers most of its work will be on tribunal appointments.)

As a result fundamental questions have been left unanswered. The Tribunal White Paper envisaged the creation of a "unified tribunal judiciary" under the leadership of a Senior President. But where do they stand in the new constitutional world? Are tribunal judges real judges - their independence guaranteed by the statute, with the Lord Chief Justice as their leader and spokesman? Or are they some form of hybrid – judges for the purpose of appointments and discipline, but for nothing else? And where, in the new scheme, stands the Senior President of Tribunals?

Some answers – with and without the Tribunals Bill

The Tribunals Bill, if enacted in its present form, would provide a few answers.

Tucked away in paragraph 14 of Schedule 6 of the draft Bill, under the heading "Consequential and other Amendments", you will find a very important provision. It tells us that a new subsection (7A) is to be added to section 3 of the Constitutional Reform Act 2005 (the statutory guarantee of the independence of the judiciary). The new subsection will extend the definition of "judiciary" to "include every person who holds an office listed in Schedule 14".

That seems to point the way. But the logic is not carried through into other provisions. The Lord Chief Justice's leadership role as President of the Courts, and his responsibility for "welfare, training and guidance", are not in terms extended to tribunals. The Tribunals

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Bill would create the new statutory office of Senior President of Tribunals, who would be given responsibility for “training” of tribunal judges, and for their assignment between different tribunals. But nothing is said of their “welfare and guidance”. Nor is anything said of the lines of responsibility between the Senior President and the chief justices; nor of the Senior President’s functions, if any, in respect of appointments or discipline.
Under the CRA it is possible for statutory authority for some purposes to be conferred on a de facto “Senior President”, under powers delegated by the Lord Chief Justice. For example, I am already acting as his statutory nominee on the panel conducting interviews for the appointment of the tribunal representative on the JAC. [But there appears to be no equivalent power for him to delegate his function as a statutory consultee in the actual selection process.] Similarly, he could decide to delegate to me (as a judicial office-holder) his disciplinary functions in respect of tribunals in England and Wales; but this could not extend to tribunal members sitting wholly or mainly in Scotland or Northern Ireland, and the chief justices for those jurisdictions cannot delegate their powers to an English judge.
In practice, I have been able to act as a channel of communication between the Lord Chief’s office and the tribunal presidents, on a number of important issues arising out of the preparations for the CRA. Other members of the Tribunal Presidents’ Group have sat on various committees concerned with the CRA. (I am particularly grateful to Mark Rowland, Acting Chief Social Security Commissioner, for representing us on the committee under Arden LJ, concerned with issues of conduct and discipline. I have also been able, with the support of the DCA, to appoint Professor Martin Partington to act as my research adviser, and to establish jointly with the Council on Tribunals, a tribunal research advisory committee.) I have also had valuable meetings with the Lord President and the LCJ(NI). They have led to the establishment of tribunal groups in each country, chaired by senior judges (Lord Hamilton and Coughlin J, respectively). These

will, I hope, pave the way to a unified approach to tribunal reform across the whole of the UK, regardless of the complexities of devolution.

But I have to remember (and remind others) that I have no formal status to represent tribunal judges. My authority, if any, rests on consensus with those who have the real power and responsibility, that is, on the one hand the chief justices in each jurisdiction, and on the other the tribunal presidents.

A Tribunals Concordat

With or without a Tribunals Bill, we need an agreed framework in which this work can continue. I have no doubt what the strategy should be. The principal objective of the Leggatt reforms is to overturn decades of haphazard and piecemeal development of tribunals, and to confirm a position in which, in the words of Professor Wade:

> "… statutory tribunals are an integral part of the machinery of justice in the state, and not merely administrative devices for disposing of claims and arguments conveniently".[1]

I strongly believe therefore that tribunal judges must be seen as an integral part of the judiciary, answerable to, and protected by, the chief justice in each jurisdiction. With or without a Bill, there is I think a place for a "Senior President", with a distinct, UK-wide role, reflecting the different territorial jurisdictions or the various tribunals. But the office should be seen in principle, not as a separate source of power, but as deriving its authority from the chief justices as heads of the judiciary, and as providing the essential link between them and the Tribunal Presidents.

The creation of the new agency will provide the starting point for the new tribunal system, to be launched in April 2006. Many of the White Paper objectives can be advanced by improvements in administrative and judicial practices, without legislation. But the precise position of the tribunal judiciary remains a vital issue, which must be

resolved. Given the uncertainties over the progress of the Bill, I will be pressing for some other means to establish and record a clear understanding of the constitutional position of tribunals in the new settlement, and their working relationships between the different agencies. The Concordat agreed in 2004 was unfinished business as far as tribunals are concerned. What we need now is a Tribunals Concordat to finish the job.

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[1] Wade and Forsyth, Administrative Law 9th Ed p 906