SENIOR PRESIDENT OF TRIBUNALS

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TRIBUNAL JUSTICE – A NEW START

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Introduction

1. T-Day has come and gone, without I think any T-5-type disasters. It has been a remarkable achievement by all involved, not least because, until only three weeks before, the timetable was still hanging in the balance. I acknowledge with gratitude the contribution of all those with whom I have been privileged to work over the last four years.

2. The Times headline on 3rd November put it rather dramatically "Tribunal service reform to create 2,700 new judges". It was not quite what I had said at the interview. But it did make the crucial point that tribunal judges and members will from now on be full members of the judicial family. As a further mark of that we began the process of swearing in the first members of the Upper Tribunal. I was particularly pleased that the Lord Chief Justice was able to attend, and to sit beside me while the oaths were taken. That symbolised the close links which he is as keen as I am to foster between the courts and tribunal systems. I am afraid I cannot promise he will be attending the swearing-in ceremonies that we will be arranging over the coming months (the logistics of which are a little frightening), but I have no doubt that he will be there in spirit.

3. As you know, T-Day was the culmination of a process which started with the publication in 2001 of review of the tribunal system by Sir Andrew Leggatt, a former Lord Justice. I was reminded last week by Lord Irvine of the vital role he played in starting the project, and getting the government committed to it.

4. The Leggatt vision was to achieve:

> "... a system that is independent, coherent, professional, cost-effective and user-friendly... a service fit for the users for whom they were intended."[1]

He hoped that tribunals would acquire –

> "... a collective standing to match that of the Court System and a collective power to fulfil the needs of users in the way that was originally intended."[2]

5. The structural changes needed for the creation of the new system have now been largely achieved: the administrative side in April 2006 with the establishment of the Tribunal Service, and now the judicial side. On 3rd November 2008 (T-day) the First-tier and Upper Tribunals came into being. Over the coming months we will be joined by a number of other jurisdictions in further chambers at each level. The next important milestone will be 1st April 2009, when we will welcome the Lands Tribunal and the tax and duties jurisdictions of the Special and General Commissioners and the VAT Tribunal, as part of the largest reform of the tax appeal system for many decades. The progress on the judicial side is described in my First and Second Implementation Reviews, available on the website.

6. This project will I believe come to be seen as a textbook example of what can be achieved by judges and administrators working in partnership, with clear policy objectives and consistent support from Government. But this is only the beginning. We will now have the tools and system to enable us to plan together to provide a better service to our users in practical ways. The structural changes are no more than a means to this end.

What is tribunal justice, and how will it develop?

7. Fifty years have passed since the Franks report[3] confirmed the modern status of tribunals in the UK as part of the judicial system. Yet, it is only recently that the courts have begun to pay much attention to the special features of tribunals, as distinct from the courts.

8. The influence of Baroness Hale (a former member of the Council of Tribunals) has been much in evidence. In a Scottish case in 2006,[4] she spoke of the transition of tribunals from being objects of "the deepest of suspicion" to their acknowledged role as "an essential part of our justice system". She referred to the advantages of tribunals identified by Franks:

> "... cheapness, accessibility, freedom from technicality, expedition and expert knowledge of their particular subject."[5]

9. She highlighted some "facts of tribunal life", for example -

   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";

   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"; 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."[6]

10. However, when talking about tribunals, generalisations are difficult. Tribunals vary greatly in the complexity of the cases before them, their financial significance, and the degree of procedural formality appropriate to them. *Gillies* was concerned with the role of the medical member of a social security tribunal in assessing disability benefit. In such cases, no doubt, cheapness, accessibility and freedom from technicality are desirable and achievable objectives. But there is no obvious parallel

with, for example, a major case before the Special Commissioners of Tax or the Lands Tribunal. The sums there involved may be as great as in any case in the High Court, and the legal and factual issues equally complex. A degree of procedural formality is unavoidable if justice is to be done, and the specialist expertise of the tribunal is unlikely to be an adequate substitute for expert representation of the parties. There may be little in reality to distinguish such a "tribunal" case from a case before a specialist "court", such as the Technology and Construction Court.

11. So what are or should be the distinctive features of tribunal justice? What is the common theme linking these very different types of litigation?

12. A key provision is section 2 of the TCEA, which can be seen as defining the distinctive characteristics of tribunals. Under it the Senior President is required in exercising his functions to have regard to the need for tribunals to be accessible, for proceedings to be handled quickly and efficiently, for members to be "experts in the subject-matter of, or the law to be applied in, cases in which they decide matters",[7] and to the need to develop "innovative methods of resolving disputes" of the type that come before tribunals".[8]

13. So accessibility, efficiency and expertise are key-notes. The expertise is not just of specialist lawyers, but of other professionals or experts who have particular skills or experience in the relevant field. Efficiency connotes the ability to mould the procedures to suit the particular type of dispute and the particular client group, to set ourselves realistic targets for reaching fair decisions quickly and economically, and to meet those targets. Accessibility means making those procedures understandable and available in a practical way to all who need them.

Vertical integration

14. What about innovation? The Government White Paper in July 2004[9] gave a lead. The unified tribunals system would -

> "... become a new type of organisation, not just a federation of existing tribunals. It will have a straightforward mission: to resolve disputes in the best way possible and to stimulate improved decision-making so that disputes do not happen as a result of poor decision making."[10]

15. The idea that tribunals are concerned with more than simply refereeing adversarial disputes between citizen and state is not a new one. As long ago as 1958 Diplock J emphasised the inquisitorial role of social security tribunals:[11]

> "A claim by an insured person to benefit under the Act is not truly analogous to a *lis inter partes*. A claim to benefit ... requires investigation to determine whether any, and if so, what amount of benefit is payable out of the fund. In such an investigation, the Minister or the insurance officer is not a party adverse to the claimant. If analogy be sought in the other branches of the law, it is to be found in the inquest rather than in an action."

16. More recently Lady Hale picked up the same point, noting that the process of benefits adjudication is "a co-operative process of investigation in which both the claimant and the department play their part." [12]

17. Underlying all these statements there is a broader concept, what I would call "vertical integration" – the idea that tribunals are just one stage in a hierarchical process designed in the public interest to achieve fairness and finality for the citizen in the

most efficient way possible. This process starts with the original decision-maker, and includes not just tribunals, but public and private advice agencies, ombudsmen, mediators and the courts. The same broader concept was also reflected in the White Paper's vision for the new Administrative Justice and Tribunals Council, as "an advisory body 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".[13]

18. The citizen's engagement with these various agencies should be a logical progression with clear access routes and signposts along the way. It should not be a game of snakes and ladders.

19. The framework provided by the Act, and the emphasis on innovation, 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 expect 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.

20. In what follows I want to focus on two aspects of this broader approach: in one direction, feedback to decision-makers; in the other, the role of the Upper Tribunal and the higher courts.

Feedback

21. Ideally the process should start and finish within the department responsible. The initial decision needs be made, or action taken, on the basis of the fullest appreciation of the facts and the law. If not, internal review procedures may bridge the gap. Tribunals can help to improve the internal decision-making by constructive feedback from the cases before them.

22. The President of the Social Security Tribunals has for some years submitted a statutory report to Ministers on the quality of decisions. Section 43 of the TCEA envisages that practice being continued, and extended to other jurisdictions. But feedback is one thing. Learning from it and putting the lessons into practice are quite another. The decision-making Departments need to accept that challenge. Successive reports have shown how much more could and should have been done by more effective internal review processes.

23. The previous President expressed some frustration in 2004-5 report

> "The areas for improvement should form part of a strategic plan for improvement informed by the sources of feedback currently provided and implemented and monitored by the Agencies operationally with time limits on improvements. There seems little point in my colleagues and I providing more feedback or the Department commissioning further studies from the Appeals Service or their own Standards Committee when no discernible improvement in decision-making is the result."

24. In the most recent (and last) report as President of the former tribunal, Robert Martin repeated this concern. He has set in train discussions with the Department a

view to improving the effectiveness of feedback, and shifting the emphasis from generalised comment to "feedback that is focussed and of practical use."[1]

25. I hope to use my position as Senior President, with the help of the Chamber Presidents, to build on this experience, and extend it across the system more generally. Two years ago I asked Martin Partington to report on this subject, in the light of a full review of existing practices and research material. His illuminating paper is available on the AJTC website.[2] I know there are sensitivities about the extent to which we, as independent judges, should engage directly with decision-makers without jeopardising our independence. Martin Partington comments:

> "This argument can be overstated. No one suggests that the provision of feedback should be about individual decisions in individual cases. The emphasis must always be on general problems, for example how evidence is collected in particular types of case, or general procedural questions."

26. Personally I am not unduly worried by this issue. I see no difficulty with exchanges between judges and decision-makers, and indeed representatives of user groups generally, for example by judges speaking at training conferences or seminars. What matters is that it is done openly and responsibly. The involvement of the AJTC may help to mitigate any perception of loss of independence.

Guidance

27. In any event, there are other more traditional ways in which we can assist the decision makers. The 2004 White Paper envisaged that it would be an important part of the Upper Tribunal's role to provide guidance with a view to achieving consistency across the tribunal system.[14] The role of specialist appellate tribunals in selecting appropriate cases in which to give general guidance for the lower tribunals is already well-established.[15] The reform of the tribunal system, and the establishment of the Upper Tribunal, will provide opportunities to develop the guidance role across the whole tribunal system.

28. This is not only of importance in guiding the tribunals themselves. It should also help to provide a framework for early resolution of disputes without recourse to formal procedures. As Trevor Buck has observed:

> "When it is delivered, (the tribunal reform) is set to further push the centre of gravity of administrative justice from the generation of formal legal disputes towards an expanded sphere of early intervention, alternative dispute resolution (ADR) and settlement. If that vision is delivered there will be an even stronger case to establish a more efficient and accountable system of precedent, in order that the earlier exit points in dispute resolution are negotiated against the backdrop of a well-defined 'shadow' of law."16

The Upper Tribunal and the Higher Courts

29. The establishment of the Upper Tribunal is a major innovation. It provides an unprecedented opportunity to work towards a more coherent and distinctive system of tribunal justice, drawing together the strands of the principles developed for the various jurisdictions. This was one of the key recommendations of the Leggatt report.

[1] http://www.appeals-service.gov.uk/Documents/SSCSA_PresRep07_08FINAL.pdf
[2] http://www.ajtc.gov.uk/docs/Feedbackissuespaper.pdf

He described the current system of appeal routes as "haphazard, having developed alongside the unstructured growth of the tribunals themselves".[17] He envisaged that it would be the function of the new appellate tribunal –

> "...to develop, by its general expertise and the selective identification of binding precedents, a coherent approach to the law."[18]

30. The Upper Tribunal will be a "superior court of record",[19] presided over by the Senior President. It will be based in London, but will sit at other main centres when required.[3] The standard model is for the appeal to be on point of law only,[20] and subject to permission. Where an error of law is found the Upper Tribunal has all the necessary powers to substitute its own decision on the merits, and to make findings of fact.[21] The TCEA also provides for the Upper Tribunal to have powers of judicial review, in cases transferred (by category or on a case-by case basis) from the High Court in accordance with arrangements to be agreed with the Lord Chief Justice. It follows that, on matters within its jurisdiction, the powers of the Upper Tribunal will be at least as extensive as those of the Administrative Court.

31. The new "Administrative Appeals Chamber" will in due course become the principal agency for appeals on law or judicial review of decisions for administrative tribunals. For example decisions of the Mental Health Appeal Tribunals, formerly challengeable by judicial review in the Administrative Court, will now be subject to appeal to the Upper Tribunal. For this work it will have the advantage of being able to combine the skills of High Court judges with the specialist expertise and experience of judges and other experts who practice regularly in the field. 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.

32. However, this is only the beginning. The purpose is not simply to replicate the function of the Administrative Court, under a different guise. Implicit in the TCEA is the proposition that conferring these powers on a new dedicated judicial institution will bring benefits that the Administrative Court cannot give. The legislature has thus recognised the advantages, particularly in relation to complex welfare or regulatory schemes, of supervision by judges who are specialists in the particular law and practice under review.

33. In this respect the Act is a logical development of a trend which has been evident in recent cases in the courts. Hale LJ (as she then was) sowed the seeds of the new approach in the Court of Appeal, in *Cooke v Secretary of State*.[22] That concerned the circumstances in which permission should be granted to appeal from decisions of the Social Security Commissioners to the Court of Appeal. She advocated a cautious approach, with respect to the Commissioners' greater familiarity with the "complex legislation":

> "The commissioners will know how that particular issue fits into the broader picture of social security principles as a whole. They will be less likely to introduce distortion into those principles. They will be better placed, where it is appropriate, to apply those principles in a purposive construction of the legislation in question. They will also know the realities of tribunal life. All this should be taken into account by an appellate court when considering whether an appeal will have a real prospect of success."

[3] See the Second Implementation Review for a description of the proposed procedures.

She referred to social security law as "highly specialised" and "rarely encountered in practice" by most lawyers. The link of an appeal to the ordinary courts was important to maintain "fidelity to the relevant general principles of law", but the courts should approach their task with "an appropriate degree of caution".[23]

34. This passage is striking, and potentially controversial, in its apparently upside-down approach to the relationship between courts and tribunals. Traditionally, questions of law are the province of the courts, which are assumed to be competent to deal with the whole body of the law, whatever its subject-matter.[24] Lady Hale is drawing a clear distinction between "general principles of law", which are seen as clearly within the competence of the courts, and the "highly specialised" aspects of the social security scheme, which are "rarely encountered" by the courts, and on which, it is suggested, the Commissioners are better qualified, having regard to their understanding of the scheme as a whole. More recently, Baroness Hale returned to the theme in the House of Lords,[25] citing the same passage in support of a similarly cautious approach to decisions of the Asylum and Immigration Tribunal.[26]

35. With that encouragement at the highest level, it is possible to consider how the Upper Tribunal might develop a role which goes beyond the traditional limits of judicial review, as practised by the courts. Even if the jurisdiction of the Upper Tribunal is limited to appeals on points of law, there is scope for it to develop a more extensive supervisory role, which may cross the traditional boundaries between law and fact as understood in the courts.

36. 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 only be allowed 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. The establishment of the new Supreme Court, due to open in October 2009, provides an opportunity to develop this relationship.

Conclusion

37. Tribunals have come to play a central part in the UK civil justice system, particularly in relation to administrative law. Their principal distinguishing features, as compared to the courts, are flexibility, specialisation, and accessibility. The present system is the result of piecemeal and incoherent development of many decades. The TCEA has provided the statutory framework for a radical restructuring of the existing tribunal jurisdictions into a coherent two-tier model. The establishment of the Upper Tribunal will bring procedural advantages, in the welcome rationalisation of the confused and illogical network of appeal routes which tribunal claimants have to negotiate under the present law. It will also present an opportunity for the development of more coherent approach to tribunal justice.

38. Legal problems in tribunals do not often attract much political interest, but they can affect large 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 in practice. I believe that we will develop a flexible and co-operative relationship with decision-makers and with all the other agencies involved, including ombudsmen and the upper courts, and the AJTC, so that together we can provide, in Leggatt's words, "a service fit for our users".

[1] *Ibid* para 1
[2] *Ibid* para 8
[3] Report of the Franks Committee on Administrative Tribunals and Enquiries (Cmnd 218, 1957)
[4] *Gillies(AP) v Secretary of State* [2006] UKHL 2 para 36
[5] Franks *op cit* para 38
[6] *Gillies* (above) paras 40-46
[7] TCEA s 2(3)
[8] *Ibid* s 2(3)(d). This reflects the policy of the 2001 White Paper, which called for "a radical approach" to the traditional role of tribunals: "to re-engineer processes radically so that just solutions can be found without formal hearings at all."
[9] White Paper . '*Transforming Public Services: Complaints, Redress and Tribunals*', July 2004.
[10] *Ibid* para 6.1-4
[11] *R v Medical Appeal Tribunal (North Midland Region) Ex parte Hubble* [1958] 2 QB 228 at 240
[12] *Kerr v Dept for Social Development* [2004] 4 AllER 385; [2004] UKHL 23 paras 61-3, per Lady Hale.
[13] *Ibid* para 11.12
[14] White Paper *op cit* para 7.20
[15] See generally Trevor Buck *Precedent in Tribunals and the Development of Principles* (2006) 25 CJQ 458
[16] Trevor Buck *op cit* p 465
[17] *Op cit* para 6.8 See also Lord Justice Woolf *A Hotch-Potch of Appeals – the need for a blender* Civil Justice Quarterly, Jan 1988 pp 44-52.
[18] *Op cit* para 6.32.He recommended the system of the Social Security Commissioners and IAT of designating selected cases as binding: para 6.26.
[19] The precise legal significance of this expression is not entirely clear: see *Halsbury's Laws* 4th Ed paras 308-9. Leggatt thought that it meant that the tribunal would escape judicial review (para 6.31), but thought that it might also have the undesirable effect that all its decisions would be binding (para 6.32). There is high authority for the view that a "superior court of record" is not amenable to judicial review: *In re a Company* [1981] AC 374, 384F per Lord Diplock; *R v Manchester Crown Court ex p DPP* [1993] 1 WLR 1524, 1528 per Lord Browne-Wilkinson, but the issue was left open recently by the Court of Appeal in relation to the Special Immigration Appeals Commission (*G v Secretary of State* [2005] EWCACiv 265)
[20] TCEA s 11. Provision is made for wider appellate powers of existing constituent tribunals (for example, the Lands Tribunal's appellate jurisdiction in respect of law, fact and valuation practice) to be preserved where appropriate: s 11(6).
[21] TCEA s 12
[22] *Cooke v Secretary of State for Social Security* [2001] EWCA Civ 734, [2002] 3 All ER 279
[23] *Ibid* paras 15-17.
[24] See e.g. *Edwards v Bairstow* [1956] AC 14, in which the House of Lords overturned the decision of the Special Commissioners on whether a particular activity was "an adventure in the nature of a trade". Lord Radcliffe criticised the tendency of the courts to treat such questions as "pure questions of fact", so as to exclude review. The reason for the courts' reluctance to interfere was "not any supposed advantage in the Commissioners of greater experience in the matters of business or any other matters", but rather that "by the system that has been set up the Commissioners are the first tribunal to try an appeal, and in the interest of the efficient administration of justice their decisions can only be upset on appeal if they have been positively wrong in law" (p 38).
[25] *AH (Sudan)v Secretary of State* [2007] UKHL 49 para [30]. Although only Lord Hope expressed specific agreement, there was no dissent from her other colleagues.
[26] Similarly, Lord Hoffmann, in *Hinchy v Secretary of State* [2005] UKHL 16, [2005] 1 WLR 967 paras 29-30, had criticised the Court of Appeal for paying insufficient respect to the expertise of the Commissioners on the practicalities of the social security system.