A COMPARATIVE INTRODUCTION TO TRIBUNALS AND PUBLIC LAW.

A. Introduction

1. The aim of this seminar is to examine the historical development and present role of Tribunals in Public Law decision making.

    a. We examine the evolution of the Tribunal and its role in Public Law;

    b. The Tribunal – individual versus state;

    c. The unique function of the "specialist" Tribunal in Administrative Law and deference of the Higher Courts;

    d. Where Tribunals fit in the system of Public Law decision making;

    e. What public law issues apply across the Tribunals.

B. A brief history of the "evolution" of Tribunals

2. Modern Tribunals are exclusively judicial bodies which operate in a manner which distinguishes them from other courts, namely concerning specialist subject matter, fact finding, rules of evidence and powers.

3. The word "Tribunal" has a long history but often merely as a synonym for Court and it is still used in this context for the purposes of Article 6 of the European Convention on Human Rights and Fundamental Freedoms.

4. Nevertheless, a Tribunal as a distinct form of judicial body is a twentieth century innovation. This definition first appears in its modern usage from the Military Service Act 1916.

5. Prior to the twentieth century usage there have been a number of bodies which we would now recognise as a Tribunal which proliferated in the nineteenth century but they were not exclusively judicial. They often went under the name of Commission or Commissioner and they may not be fully extinct. For example old housing benefit review boards were closely linked in structure and practice of their respective local authorities to be independent judicial bodies and were only replaced by a route of appeal to a judicial body in 2001.

6. Tribunals emerged as exclusively judicial bodies in the twentieth century with the development of early forms of social welfare provision, such as the local

pension committee under the Old Age Pensions Act 1908, and the umpire under the National Insurance Act 1911. The origins and development of the present Tribunal system have often been intimately linked to the complex relationship between the individual and the state combined with cost. There has been an increased recognition of the judicial status of tribunals and they have developed their own distinct identity.

7. The development of Tribunals relate to three public inquiries, the first being the Donoughmore Committee (Cmd. 4060, 1932). This was set up in part to consider the safeguards required on judicial and quasi-judicial decisions to secure the supremacy of the law.

8. The Committee distinguished between tribunals that were independent of Ministerial influence, the Specialised Courts of Law, and those which were not. The Committee did accept that the difference was one of degree and not of nature.

9. The Committee recognised the value of tribunals but it was concerned with the circumstances in which they were established and the safeguards on their use and not their internal workings. On the issue of internal workings the Committee recommended that judicial decisions be left to the ordinary courts of law. Further that Tribunals should be established only on special grounds and if the advantages provided by a Tribunal over ordinary courts were beyond doubt. When Tribunals were used the Committee recommended that the rules of natural justice were to be observed and that there was some supervision of their operation by the courts to ensure that Tribunals operated within their powers. It appears the constitutional position of Tribunals was established.

10. The Franks Committee of 1957 was set up, in part, to consider the constitution and workings of statutory tribunals. The Franks Committee endorsed their value and focussed on their judicial nature, the standards they should attain and the supervision required of them. It based its recommendations around three principles of openness, fairness and impartiality.

11. The Franks Committee rejected the official evidence of that “tribunals should properly be regarded as part of the machinery of administration, for which the Government must retain close and continuing responsibility” in favour of the evidence that “tribunals should be properly regarded as machinery provided by Parliament for adjudication rather than part of the machinery of administration.” The Committee made a series of recommendations on constitution, procedure

and control over particular decisions by appeal and judicial review. This led to the Tribunals and Inquiries Act 1958 under which the Councils on Tribunals (separate council for Scotland) were given powers of general supervision in respect of many tribunals. The 1958 Act was replaced by the Tribunals and Inquiries Act 1992.

12. During this period of development a large number of statutory tribunals were developed in specialist areas of law to review administrative decision making such as in Immigration and Asylum, Welfare benefits, Mental health, Parole and Criminal Injuries Compensation which concerned decisions and disputes between the Individual and an arm of the state. Further there was a rapid development of many other statutory tribunals such as employment tribunals and various tribunals considering issues related to land.

13. By the end of the twentieth century Sir Andrew Leggatt's report (*Tribunals for Users –One System, One Service*) accepted Tribunals as judicial bodies and addressed issues of effectiveness and efficiency. The Key recommendation, however, was that tribunals should be freed from their sponsoring department and brought within a single coherent structure with uniform powers, rules and appeals.

14. Following this report a consultation paper and in 2004 a White Paper on *Transforming Public Services: Complaints, Redress and Tribunals* (Cm 6243) this proposed a co-ordinated approach to administrative justice. Administratively the Tribunals Service was established in parallel to the Courts Service and the Tribunals began to move from their sponsoring departments to the DCA and now the MOJ in 2006.

15. Key legislation was introduced as the Tribunal, Courts and Enforcement Act 2007 (TCEA 2007). This established a First Tier Tribunal which makes findings of fact on review of an administrative decision. An Upper Tribunal which provides a route of appeal from the First Tier Tribunal on decisions which can be appealed on a point of law. The Upper Tribunal is a court of record and in respect of administrative decisions and decisions of the First Tier Tribunal which cannot be appealed can hear applications for Judicial Review, including matters transferred from the High Court with High Court judges being able to sit in the Upper Tribunal.

16. In April 2011, the Tribunals Service merged with HMCS to create HMC and Tribunals Service. The idea was that administrative merger may lead to greater judicial integration and assimilation.

17. There are often different rules and guidance in different jurisdictions, i.e. Wales, Scotland and Northern Ireland. The issue of the impact of devolution of different powers and their impact across national borders is yet to be resolved.

C. Why do we need these "specialist" tribunals and what is their value for Public Law decisions.

18. In the report by Sir Andrew Leggatt, *Report of the Review of Tribunals: Tribunals for Users-One System, One Service* the aim of the review was described as:

> "The object of this review is to recommend a system that is independent, coherent, professional, cost-effective and user-friendly. Together tribunals must form a system and provide a service fit for the users for whom they were intended." (my emphasis).

19. This was to be achieved by the administration of tribunals grouped by subject matter into divisions which should be clear to their users and to be governed by a common set of rules. The second key change related to appeals to a corresponding appellate tribunal (Upper Tribunal) and thence to the Court of Appeal (as a second appeal) together with a limited Judicial Review jurisdiction in respect of decisions which cannot be appealed and in specialist jurisdictions. The two tiered system is designed to have an expert judge or an expert panel at the first tier of expert judicial scrutiny of an administrative decision, for example a Mental Health Tribunal, an expert Immigration or expert social security judge examining both issues of fact, expert evidence and law in respect of an administrative decision to, for example, continue to detain someone in psychiatric hospital for treatment, deny them refugee status or deny them some entitlement to welfare benefits.

20. Although the Leggatt recommendations have been introduced by the TCEA 2007 not all tribunals operate within this two tiered system and some tribunals still operate slightly outside this system. For example, under the Safeguarding Vulnerable Groups Act 2006 the appeal is from the Disclosure and Barring Service to the Upper Tribunal as a 1st Tier of judicial scrutiny and also there is no appeal chamber from a first tier decision of the tribunal concerned with the Criminal Injuries Compensation Scheme, Victims of Overseas Terrorism Compensation Scheme, s 60(1) or (4) of the Freedom of Information Act 2000 or sections 28(4) or (6) of the Data Protection Act 1998 concerning national

security certificates which are challenged by way of judicial review which can be heard in the Upper Tribunal. These are all tribunals which are exercising a combination of fact finding and Administrative law decision making. Although the latter Upper Tribunals appear similar to the High Court the former tribunals are different given the First Tier fact finding jurisdiction combined with the appellate and judicial review jurisdiction in the Upper Tribunal.

21. The Upper Tribunal's main functions are:

    - To take over hearing appeals to the courts, and similar bodies from the decisions of local tribunals;
    - To decide certain cases that do not go through the First-tier Tribunal
    - To take over some of the supervisory powers of the Courts to deal with the actions of tribunals and of the government departments and other public authorities whose decisions may be appealed to tribunals; and
    - To deal with enforcement of decisions, directions and orders made by tribunals.

22. The Upper Tribunal is divided into chambers with the Administrative Appeals Chamber being relevant to Public Law decisions.

23. All the decision-makers in the Upper Tribunal are judges or expert members. They take the judicial oath, and their judicial independence is protected in the same way as court judges under the Constitutional Reform Act. They are specialists in the areas of law they handle. Some of the judges and members are full time appointments to the Upper Tribunal. For example, Social Security Commissioners who transferred in are now Judges of the Upper Tribunal. Surveyor members of the Lands Tribunal have transferred into the Lands Chamber and continue to hear cases as they did previously. High Court judges, county court judges and other judges may also sit as full-time or part-time Judges of the Upper Tribunal.

24. As part of its powers, the Upper Tribunal has powers to conduct a judicial review of decisions or actions that cannot be appealed. In all cases, you must have permission from either the High Court or the Upper Tribunal to bring the action for judicial review. And you must show that you have a sufficient personal interest in the matter that you seek to challenge. You must also make any application without undue delay. Guidance also reminds judges of a more

general power to transfer other judicial review cases to the Upper Tribunal if certain conditions are met. The main conditions are that the case does not seek to call into question anything done in a Crown Court and that when hearing the case the Upper Tribunal will be headed by either a High Court Judge or another judge specifically nominated to hear these cases. The conditions are set out fully in section 18 of the TCEA 2007.

25. When deciding judicial review cases in England and Wales, the Upper Tribunal judges are required to apply the same principles of law that the High Court would apply to those cases. Other rules apply in Scotland and Northern Ireland.

26. In practice, judicial review cases in the Upper Tribunal will be heard either by the Senior President or a High Court Judge, perhaps sitting with one or more Judges of the Upper Tribunal.

27. The powers of the Upper Tribunal when hearing these cases include powers to make orders requiring or prohibiting action by public bodies, declarations, injunctions and in some cases damages. The Upper Tribunal does not have the powers of the High Court to hear challenges against Acts of Parliament under the Human Rights legislation. If the Upper Tribunal does not have power to decide a particular judicial review case, it will refer it to the High Court for decision.

28. The relevant legislation is extracted below. Section 15 of the Act provides for the Upper Tribunal's judicial review powers

> **15 Upper Tribunal's "judicial review" jurisdiction**
>
> (1) The Upper Tribunal has power, in cases arising under the law of England and Wales or under the law of Northern Ireland, to grant the following kinds of relief—
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> (a) a mandatory order;
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> (b) a prohibiting order;
>
> (c) a quashing order;
>
> (d) a declaration;
>
> (e) an injunction.
>
> (2) The power under subsection (1) may be exercised by the Upper Tribunal if—
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> (a) certain conditions are met (see section 18), or

(b) the tribunal is authorised to proceed even though not all of those conditions are met (see section 19(3) and (4)).

(3) Relief under subsection (1) granted by the Upper Tribunal—

(a) has the same effect as the corresponding relief granted by the High Court on an application for judicial review, and

(b) is enforceable as if it were relief granted by the High Court on an application for judicial review.

(4) In deciding whether to grant relief under subsection (1)(a), (b) or (c), the Upper Tribunal must apply the principles that the High Court would apply in deciding whether to grant that relief on an application for judicial review.

(5) In deciding whether to grant relief under subsection (1)(d) or (e), the Upper Tribunal must—

(a) in cases arising under the law of England and Wales apply the principles that the High Court would apply in deciding whether to grant that relief under section 31(2) of the Supreme Court Act 1981 (c 54) on an application for judicial review, and

(b) in cases arising under the law of Northern Ireland apply the principles that the High Court would apply in deciding whether to grant that relief on an application for judicial review.

(6) For the purposes of the application of subsection (3)(a) in relation to cases arising under the law of Northern Ireland—

(a) a mandatory order under subsection (1)(a) shall be taken to correspond to an order of mandamus,

(b) a prohibiting order under subsection (1)(b) shall be taken to correspond to an order of prohibition, and

(c) a quashing order under subsection (1)(c) shall be taken to correspond to an order of certiorari.

29. Section 16 provides for applications

16 Application for relief under section 15(1)

(1) This section applies in relation to an application to the Upper Tribunal for relief under section 15(1).

(2) The application may be made only if permission (or, in a case arising under the law of Northern Ireland, leave) to make it has been obtained from the tribunal.

(3) The tribunal may not grant permission (or leave) to make the application unless it considers that the applicant has a sufficient interest in the matter to which the application relates.

(4) Subsection (5) applies where the tribunal considers—

(a) that there has been undue delay in making the application, and

(b) that granting the relief sought on the application would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.

(5) The tribunal may—

(a) refuse to grant permission (or leave) for the making of the application;

(b) refuse to grant any relief sought on the application.

(6) The tribunal may award to the applicant damages, restitution or the recovery of a sum due if—

(a) the application includes a claim for such an award arising from any matter to which the application relates, and

(b) the tribunal is satisfied that such an award would have been made by the High Court if the claim had been made in an action begun in the High Court by the applicant at the time of making the application.

(7) An award under subsection (6) may be enforced as if it were an award of the High Court.

(8) Where—

(a) the tribunal refuses to grant permission (or leave) to apply for relief under section 15(1),

(b) the applicant appeals against that refusal, and

(c) the Court of Appeal grants the permission (or leave),

the Court of Appeal may go on to decide the application for relief under section 15(1).

(9) Subsections (4) and (5) do not prevent Tribunal Procedure Rules from limiting the time within which applications may be made.

17 Quashing orders under section 15(1): supplementary provision

(1) If the Upper Tribunal makes a quashing order under section 15(1)(c) in respect of a decision, it may in addition—

(a) remit the matter concerned to the court, tribunal or authority that made the decision, with a direction to reconsider the matter and reach a decision in accordance with the findings of the Upper Tribunal, or

(b) substitute its own decision for the decision in question.

(2) The power conferred by subsection (1)(b) is exercisable only if—

(a) the decision in question was made by a court or tribunal,

(b) the decision is quashed on the ground that there has been an error of law, and

(c) without the error, there would have been only one decision that the court or tribunal could have reached.

(3) Unless the Upper Tribunal otherwise directs, a decision substituted by it under subsection (1)(b) has effect as if it were a decision of the relevant court or tribunal.

18 Limits of jurisdiction under section 15(1)

(1) This section applies where an application made to the Upper Tribunal seeks (whether or not alone)—

(a) relief under section 15(1), or

(b) permission (or, in a case arising under the law of Northern Ireland, leave) to apply for relief under section 15(1).

(2) If Conditions 1 to 4 are met, the tribunal has the function of deciding the application.

(3) If the tribunal does not have the function of deciding the application, it must by order transfer the application to the High Court.

(4) Condition 1 is that the application does not seek anything other than—

(a) relief under section 15(1);

(b) permission (or, in a case arising under the law of Northern Ireland, leave) to apply for relief under section 15(1);

(c) an award under section 16(6);

(d) interest;

(e) costs.

(5) Condition 2 is that the application does not call into question anything done by the Crown Court.

(6) Condition 3 is that the application falls within a class specified for the purposes of this subsection in a direction given in accordance with Part 1 of Schedule 2 to the Constitutional Reform Act 2005 (c 4).

(7) The power to give directions under subsection (6) includes—

(a) power to vary or revoke directions made in exercise of the power, and

(b) power to make different provision for different purposes.

(8) Condition 4 is that the judge presiding at the hearing of the application is either—

(a) a judge of the High Court or the Court of Appeal in England and Wales or Northern Ireland, or a judge of the Court of Session, or

(b) such other persons as may be agreed from time to time between the Lord Chief Justice, the Lord President, or the Lord Chief Justice of Northern Ireland, as the case may be, and the Senior President of Tribunals.

(9) Where the application is transferred to the High Court under subsection (3)—

(a) the application is to be treated for all purposes as if it—

(i) had been made to the High Court, and

(ii) sought things corresponding to those sought from the tribunal, and

(b) any steps taken, permission (or leave) given or orders made by the tribunal in relation to the application are to be treated as taken, given or made by the High Court.

(10) Rules of court may make provision for the purpose of supplementing subsection (9).

(11) The provision that may be made by Tribunal Procedure Rules about amendment of an application for relief under section 15(1) includes, in particular, provision about amendments that would cause the application to become transferrable under subsection (3).

(12) For the purposes of subsection (9)(a)(ii), in relation to an application transferred to the High Court in Northern Ireland—

(a) an order of mandamus shall be taken to correspond to a mandatory order under section 15(1)(a),

(b) an order of prohibition shall be taken to correspond to a prohibiting order under section 15(1)(b), and

(c) an order of certiorari shall be taken to correspond to a quashing order under section 15(1)(c).

19 Transfer of judicial review applications from High Court

(1) In the Supreme Court Act 1981 (c 54), after section 31 insert—

"31A Transfer of judicial review applications to Upper Tribunal

(1) This section applies where an application is made to the High Court—

(a) for judicial review, or

(b) for permission to apply for judicial review.

(2) If Conditions 1, 2, 3 and 4 are met, the High Court must by order transfer the application to the Upper Tribunal.

(3) If Conditions 1, 2 and 4 are met, but Condition 3 is not, the High Court may by order transfer the application to the Upper Tribunal if it appears to the High Court to be just and convenient to do so.

(4) Condition 1 is that the application does not seek anything other than—

(a) relief under section 31(1)(a) and (b);

(b) permission to apply for relief under section 31(1)(a) and (b);

(c) an award under section 31(4);

(d) interest;

(e) costs.

(5) Condition 2 is that the application does not call into question anything done by the Crown Court.

(6) Condition 3 is that the application falls within a class specified under section 18(6) of the Tribunals, Courts and Enforcement Act 2007.

(7) Condition 4 is that the application does not call into question any decision made under—

(a) the Immigration Acts,

(b) the British Nationality Act 1981 (c 61),

(c) any instrument having effect under an enactment within paragraph (a) or (b), or

(d) any other provision of law for the time being in force which determines British citizenship, British overseas territories citizenship, the status of a British National (Overseas) or British Overseas citizenship."

(2) In the Judicature (Northern Ireland) Act 1978 (c 23), after section 25 insert—

"25A Transfer of judicial review applications to Upper Tribunal

(1) This section applies where an application is made to the High Court—

(a) for judicial review, or

(b) for leave to apply for judicial review.

(2) If Conditions 1, 2, 3 and 4 are met, the High Court must by order transfer the application to the Upper Tribunal.

(3) If Conditions 1, 2 and 4 are met, but Condition 3 is not, the High Court may by order transfer the application to the Upper Tribunal if it appears to the High Court to be just and convenient to do so.

(4) Condition 1 is that the application does not seek anything other than—

(a) relief under section 18(1)(a) to (e);

(b) leave to apply for relief under section 18(1)(a) to (e);

(c) an award under section 20;

(d) interest;

(e) costs.

(5) Condition 2 is that the application does not call into question anything done by the Crown Court.

(6) Condition 3 is that the application falls within a class specified under section 18(6) of the Tribunals, Courts and Enforcement Act 2007.

(7) Condition 4 is that the application does not call into question any decision made under—

(a) the Immigration Acts,

(b) the British Nationality Act 1981,

(c) any instrument having effect under an enactment within paragraph (a) or (b), or

(d) any other provision of law for the time being in force which determines British citizenship, British overseas territories citizenship, the status of a British National (Overseas) or British Overseas citizenship."

(3) Where an application is transferred to the Upper Tribunal under 31A of the Supreme Court Act 1981 (c 54) or section 25A of the Judicature (Northern Ireland) Act 1978 (transfer from the High Court of judicial review applications)—

(a) the application is to be treated for all purposes as if it—

(i) had been made to the tribunal, and

(ii) sought things corresponding to those sought from the High Court,

(b) the tribunal has the function of deciding the application, even if it does not fall within a class specified under section 18(6), and

(c) any steps taken, permission given, leave given or orders made by the High Court in relation to the application are to be treated as taken, given or made by the tribunal.

(4) Where—

(a) an application for permission is transferred to the Upper Tribunal under section 31A of the Supreme Court Act 1981 (c 54) and the tribunal grants permission, or

(b) an application for leave is transferred to the Upper Tribunal under section 25A of the Judicature (Northern Ireland) Act 1978 (c 23) and the tribunal grants leave,

the tribunal has the function of deciding any subsequent application brought under the permission or leave, even if the subsequent application does not fall within a class specified under section 18(6).

(5) Tribunal Procedure Rules may make further provision for the purposes of supplementing subsections (3) and (4).

(6) For the purposes of subsection (3)(a)(ii), in relation to an application transferred to the Upper Tribunal under section 25A of the Judicature (Northern Ireland) Act 1978—

(a) a mandatory order under section 15(1)(a) shall be taken to correspond to an order of mandamus,

(b) a prohibiting order under section 15(1)(b) shall be taken to correspond to an order of prohibition, and

(c) a quashing order under section 15(1)(c) shall be taken to correspond to an order of certiorari.

20 Transfer of judicial review applications from the Court of Session

(1) Where an application is made to the supervisory jurisdiction of the Court of Session, the Court—

(a) must, if Conditions 1, 2 and 4 are met, and

(b) may, if Conditions 1, 3 and 4 are met, but Condition 2 is not,

by order transfer the application to the Upper Tribunal.

(2) Condition 1 is that the application does not seek anything other than an exercise of the supervisory jurisdiction of the Court of Session.

(3) Condition 2 is that the application falls within a class specified for the purposes of this subsection by act of sederunt made with the consent of the Lord Chancellor.

(4) Condition 3 is that the subject matter of the application is not a devolved Scottish matter.

(5) Condition 4 is that the application does not call into question any decision made under—

(a) the Immigration Acts,

(b) the British Nationality Act 1981 (c 61),

(c) any instrument having effect under an enactment within paragraph (a) or (b), or

(d) any other provision of law for the time being in force which determines British citizenship, British overseas territories citizenship, the status of a British National (Overseas) or British Overseas citizenship.

(6) There may not be specified under subsection (3) any class of application which includes an application the subject matter of which is a devolved Scottish matter.

(7) For the purposes of this section, the subject matter of an application is a devolved Scottish matter if it—

(a) concerns the exercise of functions in or as regards Scotland, and

(b) does not relate to a reserved matter within the meaning of the Scotland Act 1998 (c 46).

(8) In subsection (2), the reference to the exercise of the supervisory jurisdiction of the Court of Session includes a reference to the making of any order in connection with or in consequence of the exercise of that jurisdiction.

21 Upper Tribunal's "judicial review" jurisdiction: Scotland

(1) The Upper Tribunal has the function of deciding applications transferred to it from the Court of Session under section 20(1).

(2) The powers of review of the Upper Tribunal in relation to such applications are the same as the powers of review of the Court of Session in an application to the supervisory jurisdiction of that Court.

(3) In deciding an application by virtue of subsection (1), the Upper Tribunal must apply principles that the Court of Session would apply in deciding an application to the supervisory jurisdiction of that Court.

(4) An order of the Upper Tribunal by virtue of subsection (1)—

(a) has the same effect as the corresponding order granted by the Court of Session on an application to the supervisory jurisdiction of that Court, and

(b) is enforceable as if it were an order so granted by that Court.

(5) Where an application is transferred to the Upper Tribunal by virtue of section 20(1), any steps taken or orders made by the Court of Session in relation to the application (other than the order to transfer the application under section 20(1)) are to be treated as taken or made by the tribunal.

(6) Tribunal Procedure Rules may make further provision for the purposes of supplementing subsection (5).

30. The Asylum and Immigration Tribunals fall into this two tier system now but It is still the case that Employment Tribunals operate outside this structure as do the Parole Boards but these share key features with the First Tier Tribunal.

Key features

31. Key features of tribunals are that:

- tribunals are classified as judicial bodies which operate in a way which distinguish them from other courts;
- tribunals are creatures of statute and their purpose is to determine a person's legal position in respect of a private law dispute or a public law entitlement, whether initially or on appeal;
- it is given only a narrow and limited jurisdiction;
- the membership are likely to be limited to experts in the jurisdiction, including non-lawyers with relevant knowledge or experience;
- the procedures are likely to be simple, user friendly and to deal with matters quickly and efficiently;
- Independence of parties to the proceedings.

32. In summary, the tribunal is an expert, independent standing statutory body, available to deal with all those cases within it jurisdiction and easily accessible by users and tend to be inquisitorial in nature rather than adversarial where the rules of evidence are more flexible (see also sections 2(3) and 22(4) TCEA 2007. Now in addition the Upper Tribunal has the power of the High Court and is a court of record, as is the Employment Appeals Tribunal.

D. Deference to the expert nature of the tribunal and its membership.

33. We will focus on those tribunals making a decision in respect of a public law entitlement.

34. Tribunals are inevitably specialised and the Senior President has the duty under TCEA 2007 s 2(3) (c) to have regard to the need for members to be expert in the subject matter of, or the law to be applied in, the tribunal. This may result from the members appointed on account of knowledge, experience or expertise or acquired as a result of acquisition through particular legal and factual issues

that arise before the tribunal. The specialism may be related to the relevant law but may also include medical or financial specialism. In theory this should lead to a rapid development of the case law.

35. As a consequence the Higher Courts respect this specialism but have also sought to control its use[1].

E. Sources of deference

36. Courts and higher tribunals may be required to defer to the decision because the legal structure requires it as in Edwards v Bairstow [1956] AC 14 at 38:

> As I see it, the reason why the courts do not interfere with commissioners' findings or determinations when they really do involve nothing but questions of fact is not any supposed advantage in the commissioners of greater experience in matters of business or any other matters. The reason is simply that by the system that has been set up the commissioners are the first tribunal to try an appeal, and in the interests of the efficient administration of justice their decisions can only be upset on appeal if they have been positively wrong in law.

37. Also by reference to assuming they are familiar with basic legal principles and not being too easily satisfied that a tribunal failed to take account of a matter that was not expressly mentioned[2].

38. It is based on the specialist knowledge, experience or expertise of a tribunal and applies both the judicial review and on appeal, to substantive law and discretion. It applies to an established scheme and a new scheme.

39. Deference is shown for interpretation and application of the law by individual decision of the tribunal but reconciled by the courts giving guidance. For example in R v Preston Supplementary Benefits Tribunal ex p Moore [1975] 1 WLR 624, 631 – 632:

> The courts should not enter into a meticulous discussion of the meaning of this or that word in the Act. They should leave the tribunals to interpret the Act in a broad reasonable way, according to the spirit and not to the letter: especially as Parliament has given them a way of alleviating any hardship. The courts should only interfere when the decision of the tribunal is unreasonable in the sense that no tribunal acquainted with the ordinary use of language could reasonably reach that decision: see *Cozens v. Brutus* [1973] AC 854, 861. Nevertheless, it must be realised that the Act has to be applied daily by thousands of officers of the commission: and by 120 appeal tribunals. It is most important that cases raising

[1] Autologic Holdings plc v Inland Revenue Commissioners [2005] 1 WLR 52 at [60] and [78] the dissenting judgments of Lord Hope and Lord Walker.
[2] MA (Somalia) v Secretary of State for the Home Department [2010] UKSC 49.

> the same points should be decided in the same way. There should be uniformity of decision. Otherwise grievances are bound to arise. In order to ensure this, the courts should be ready to consider points of law of general application.
>
> In short, the court should be ready to lay down the broad guide lines for tribunals. But no further. The courts should not be used as if there was an appeal to them. Individual cases of particular application must be left to the tribunals..

40. This approach remains valid in respect of appeals (see Bromley LBC v SENT [1999] 3 All ER 587. 594).

(i) Lines of authority and the limits on deference.

41. Deference is shown for consistent lines of authority, for example with Commissioners in not based on statutory interpretation but on the expertise of commissioners in R v Medical Appeal Tribunal ex p Gilmore [1957] 1 QB 574, 585. In R v National Insurance Commissioner ex p Stratton [1979] QB 361 at 368 – 369 Lord Denning:

> These commissioners are judges, and their decisions are by statute made final: section 117 (1) of the Social Security Act 1975. There is no appeal from their decisions. They give hundreds of decisions on points of law regarding the interpretation of the regulations. They know just how they work…..
>
> I venture to suggest that we should proceed on this principle: if a decision of the commissioners has remained undisturbed for a long time, not amended by regulation, nor challenged by certiorari, and has been acted upon by all concerned, it should normally be regarded as binding. The High Court should not interfere with it save in exceptional circumstances, such as where there is a difference of opinion between commissioners: see *Reg. v. National Insurance Commissioner, Ex parte Michael* [1977] 1 WLR 109. A recent decision is less binding. It may be brought before the High Court with the very object of getting a ruling on a difficult point. The department itself should do it, if need be. Then the High Court can and should do whatever the justice of the case requires.

42. Also Lord Justice Bridge at page 382 based on longevity and implied legislative approval.

43. This approach was approved by the House of Lords in Presho v Insurance Officer [1984] AC 310 at 219 – 320.

44. However the limit on this deference is that it is based on a consistency of views and it neither applies to divergent views nor if there is a general principle involved (for example in R v National Insurance Commissioner ex p Michael [1977] 1 WLR 109, 112 and 115).

45. In Cockburn v Chief Adjudication Officer and Secretary of State for Social Security v Fairey [1997] 1 WLR 799, 814 per Lord Slynn:

> It is obviously sensible that the rulings of the commissioners and the practice of administering the scheme which they have laid down and which have been followed over many years should not lightly be interfered with. But if the Court of Appeal, and even more so if your Lordships' House, is satisfied that wrong distinctions have been drawn as a matter of principle which ought not to be followed they are entitled to say so.

46. Also in Hichy v Secretary of State for Work and Pensions [2005] 1 WLR 967 [49] *per* Baroness Hale (endorsed by Lord Hoffman [30]):

> …First, if the specialist judiciary who do understand the system and the people it serves have established consistent principles, the generalist courts should respect those principles unless they can clearly be shown to be wrong in law.

(ii) Deference to fact finding, specialist knowledge and judicial review powers.

47. On fact finding this is not accorded deference beyond that of a non-specialist tribunal and the issue is whether the tribunal was entitled to make the finding but again the specialist knowledge or experience may be relevant to the finding of fact.

48. The Tribunal may use its specialist knowledge or expertise of a panel member which is decisive, and should make that known to the parties. For example in Butterfield and Creasy v Secretary of State for the Defence [2002] EWHC 2247 (Admin) [14]:

> There are problems of procedural fairness here. I will examine the Tribunal's specific reasons for dismissing the appeal later, but I infer that they largely reflect the views and experience of the medical member of the Tribunal. There is a potential problem if a medical member of a tribunal is the only person present with specialist medical knowledge, and he perceives a possible medical objection to the appellant's case, particularly an objection which has not been taken in advance by the Secretary of State and of which the appellant has not had prior notice. If the medical member believes that there is such an objection, plainly he must say so. He is a member of the Tribunal because of his medical expertise, and if he thinks that his medical expertise is relevant in some specific way which has not otherwise been pointed out, he must draw on it in the course of the hearing and the tribunal's deliberations. I do not for a moment suggest that the medical member of the tribunal should in some way suppress his personal expertise and reactions to medical issues which arise. However, if the point which concerns him is a new one and might in itself be decisive, it does seem to me that fairness requires that it be explained to the appellant or to the appellant's representative, and that the

> appellant should be given a realistic opportunity to consider it. In some cases, though I hope not many, this may require the offer of an adjournment, however inconvenient and irksome that may be.

49. In respect of judicial review powers the Courts do not allow those powers to operate differently from courts on account of the specialism of the tribunal and the ordinary principles apply (IBA Healthcare Ltd V Office of Fair Trading [2004] ICR 1364, [51] – [53].)

F. Cart and the interaction with the High Court and Court of Appeal

50. The issue which has brought deference into focus is that of permission to appeal from a second tier tribunal and challenges to refusal of permission to appeal to a tribunal. The Court of Appeal has emphasised the significance of a tribunal specialism as to whether an appeal from a second tier tribunal would have a real prospect of success. In Cooke v Secretary of State for Social Security [2002] 3 All ER 279, [16] Lady Hale held:

> It is also important that such appeal structures have a link to the ordinary court system, to maintain both their independence of government and the sponsoring department and their fidelity to the relevant general principles of law. But the ordinary courts should approach such cases with an appropriate degree of caution. It is quite probable that on a technical issue of understanding and applying the complex legislation the Social Security Commissioner will have got it right. 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 may 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 of this should be taken into account by an appellate court when considering whether an appeal will have a real prospect of success.

51. Further the issue of deference concerning refusal of permission to appeal by an Appellant Tribunal arises in Judicial Review challenges to this decision (for example in Wiles v Social Security Commissioner and another [2010] EWCA civ 258).

52. In R (on the application of Cart) v Upper Tribunal [2011] UKSC 28, [2012] 1 A.C. 663, which was joined with R (on the application of MR (Pakistan)) v The Upper Tribunal (Immigration &Asylum Chamber) and Secretary of State for the Home Department and followed by Eba v Advocate General for Scotland [2011] UKSC 29 (SC) the Supreme Court held that un-appealable decisions of the Upper Tribunal were subject to judicial review by the High Court only where there was an important point of principle or practice or some other compelling reason for

the case to be reviewed which is equivalent to the test for second appeals before the Court of Appeal and applied in JD (Congo) V Secretary of State for the Home Department and others [2012] EWCA Civ 327. These decisions do suggest that there is a departure from deference in respect of decisions on when a decision should be considered for appeal by the Upper Tribunal.

53. An example can be found in R (on the application of Kuteh) v Upper Tribunal Administrative Appeals Tribunal [2012] EWHC 2196 (Admin) where the Court held allowing a judicial review claim that where a First-tier Tribunal had made findings of misconduct against a mental health nurse, included a finding that he had assaulted a patient, and had upheld his inclusion on the Protection of Children Act list and the Protection of Vulnerable Adults list, the Upper Tribunal's refusal of permission to appeal against the finding of assault amounted to a serious procedural irregularity. The lower tribunal had omitted to consider a significant witness statement and the Upper Tribunal had failed to consider that that omission might vitiate the decision

54. However, in R (on the application of HS & Ors) v Upper Tribunal (Immigration and Asylum Chamber) & Secretary of State for the Home Department [2012] EWHC 3126 (Admin) Mr Justice Charles on refusing an application for judicial review of a the refusal of the Upper Tribunal to grant permission to appeal an immigration judge held in consideration of Kuteh that Cart decided that, at the permission stage, the court was to decide whether the second-tier appeals criteria were satisfied, and not whether it was arguable that they would be satisfied at the substantive hearing; therefore, if permission was granted on that basis, the permission test was spent and was no longer the test to be applied at the substantive hearing. The grounds for a successful review in the instant case were not limited to the second-tier appeals criteria, and the instant court had to apply the well-established grounds for judicial review in determining whether the decision of the Upper Tribunal refusing permission to appeal should be set aside. Further it became apparent that the 59th update to the CPR introduced a procedure in respect of applications for judicial review of non-appealable decisions of the Upper Tribunal following Cart. CPR r.54.7A(7) supported the conclusion that, as with permission to appeal, once the second-tier appeals criteria had been satisfied at the permission stage, they were spent, and at the hearing for which permission had been given, the judicial review court had to consider the arguable errors of law.

G. How do tribunals fit in the scheme of public law.

55. It can be seen that Tribunals are having an increasing role in the review of Public Law decision making. They have evolved into an alternative statutory forum for the review of public law decisions. Tribunals in comparison to most courts are specialist in nature and have a narrow and well defined jurisdiction. They have evolved such that they have an appellate structure with the powers and recognition of a court of record. They have also have specialist powers of Judicial Review. They are seen as cost effective and their inquisitorial approach and specialist judiciary supplements the jurisdiction of the High Court which remains adversarial.

56. The difficulty is that the tribunal system is not completely a *One System, One Service* as envisaged by Leggatt. The concern on the issue deference of the Higher Courts, especially in respect of appeals, is ensuring that there is effective judicial scrutiny of the lawfulness and fairness of decision making in the expert tribunals while preserving the value of their expertise. This was an issue of concern at the outset of their development and remains a major issue today with the court showing a high degree of reluctance to interfere with their specialist role.

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