ANNUAL UPPER TRIBUNAL (UTAAC / UTIAC) LECTURE

14 OCTOBER 2021

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'COURTS AND TRIBUNALS'

Here we are in the Rolls Building – a court building. When I began in the law, courts and tribunals sat in different buildings and were very different animals. In recent years they have become much more alike. I should like to ask whether that is such a good thing. And in particular, should tribunals become more like courts or should courts become more like tribunals? Should they even merge into the same system? Or should they remain different?

I go back a long way in tribunals. My very first judicial post in the late 1970s was as a legal presiding member of Mental Health Review Tribunals. I was then an academic lawyer at the University of Manchester. But I was recruited by the Manchester barrister who was then the regional chairman because I had written a textbook on *Mental Health Law*, based on my experience teaching social workers, who had to operate the law, so I fitted the bill as someone who knew something

about the subject. Then from 1980 to 1984 I was a member of the Council on Tribunals. The Council's role was to strengthen the independence of tribunals and the fairness of their procedures, principally through advising government when changes were underway or new tribunals were being established. We visited and reported back on a wide variety of tribunals, which was great fun. We sat in on tribunal training, which was less fun. The amendments which became the Mental Health Act 1983 were going through at the time and we advised on the procedures for Mental Health Review Tribunals. The National Insurance Local Tribunals and the Supplementary Benefit Appeal Tribunals (having previously been thought so separate that objection was taken to my husband chairing both) were being amalgamated into the Social Security Appeal Tribunals. I can claim credit for the choice of name. I also learned a lot from academic colleagues who sat on tribunals, not only NILTs and SBATs, but also Rent Tribunals, Rent Assessment Committees, Local valuation Tribunals and many more.

Tribunals fell into two broad categories then and still do. The great majority deal with relations between the citizen (in the broadest sense) and the state – tax, benefits, immigration (asylum came later). But there are also the tribunals set up to police the various statutory schemes which interfere in freedom of contract in order to protect the person thought to be the weaker party. The earliest dealt with landlords and

residential tenants – administering the schemes for rent control and security of tenure. They were later joined by what used to be called industrial tribunals – dealing with workers' rights against their employers, for redundancy payments, for compensation for unfair dismissal, and later for discrimination and much, much more. This seems to correspond to the Australian distinction between tribunals which exercise so-called administrative powers and tribunals which can resolve *inter partes* civil disputes.

The legal profession were always very suspicious of tribunals. Some of this was for good reasons. They were thought to be insufficiently independent of their sponsoring departments. And some of their practices and procedures were palpably unfair. But things did improve. Lawyer chairmen were introduced throughout (except in the Lands Tribunal, which was a sore point with the rent assessment and leasehold valuation tribunals). Fairness became more apparent. Presenting officers no longer stayed with the tribunal while it deliberated. The law became more transparent. Social Security Commissioner's decisions were no longer locked in the bosom of the presenting officers but published to the world.

Despite such deficiencies, their strengths were also apparent. The foremost was expertise. This began with the law. The senior civil servant who devised the

industrial tribunals was shocked to see that lawyers had to explain the law to the judges in court. The tribunal should know the law and not have to have it explained. But tribunals were also expert in the factual context of the dispute. Most tribunals had two wing members. They might be broadly representative of each side of the argument, employers and unions in social security and employment cases. Or they might bring relevant expertise to the decision, psychiatry in the Mental Health Review Tribunals, valuation in the property tribunals, medicine in the disability benefits or war pensions tribunals.

This expertise meant that claimants or appellants were supposed not to need legal representation and for the most part they did not have it. Legal aid was, of course, not available. Non-legal assistance was quite common – from trade unions in employment cases, from the British Legion in war pensions cases, and so on. Research showed that this sort of representation led to better chances of success. Even so, tribunals were supposed to operate in a user-friendly way – with introductions from the chairman about who everyone was and how the proceedings were going to go. It is not an accident that the Leggatt report was called *Tribunals for Users*.

Another great strength was their flexibility of procedure. This was an aspect of being user-friendly. But it was also an aspect of their expertise. There were horses for courses. In Mental Health Review Tribunals, the psychiatrist member examined the patient and his records and reported back to the tribunal. In property cases, the valuer would value the property (and the chairman's job was to drive the tribunal to the property – not a good optic when my husband had a Mark 6 Bentley).

Yet another strength was the diversity of tribunal membership. In part this was down to the wing members. But it also applied to the legally qualified chairmen. These were recruited from all walks of legal life, not just from barristers and solicitors in self-employed practice. There were a lot of academics. And it was helped by the fact that a great many were fee-paid part-timers rather than full-time salaried appointments. At one time it seemed that the chairmen of London Rent Assessment and Leasehold Valuation Committees were principally recruited from the wives of the senior judiciary. That diversity has been maintained. I am told that the gender and ethnic make-up of the legally qualified tribunals judiciary roughly mirrors that of the working population in the same age group, which is a great achievement.

I would add a further strength which is not often talked about. In those days, the sponsoring departments saw their tribunals, not as a threat, but as an essential means

of ensuring that the decisions reached were the best that they could be. The right amount of tax would be paid. The right amount of benefits would be claimed. Not a penny more but also not a penny less. The new employees' rights would be properly safeguarded. There might be such a thing as being too independent.

Despite all these advantages, the system was very untidy and the quality variable. The chaotic picture offended tidy minds. There were still concerns about independence. Our observation on the Council on Tribunals was that the first instance tribunals were very independent of their sponsoring departments. Like all judicial officers, they were much more worried about the appellate tribunal than about the department. But for the most part they were appointed by those departments.

So along came Leggatt and the 2007 Act. We now have a single structure into which most of the tribunals and their appeal processes have been fitted (although there are some notable exceptions). This was very soon followed by the amalgamation of the courts and tribunals services, and the sharing of buildings and other services.

Inevitably this has eroded the differences between courts and tribunals. It was not inevitable that it would make tribunals more like courts, rather than courts more like

tribunals, but it has. The Senior President of Tribunals, who ranks alongside the Lord Chief Justices in the parallel world of tribunals, has a legal duty to have regard to the need for tribunals to be accessible, cases to be handled fairly, quickly and efficiently, members to be experts in the subject-matter or the law, and to develop innovative methods of dispute resolution – in other words, everything that we hope for in the tribunal system. Nevertheless, the first Senior President, Robert Carnwath, listed the following as advantages of the new system:

i) Tribunal judges are now called judges. They swear the same judicial oaths and are protected by the same guarantees of judicial independence.

ii) They are led by a Court of Appeal judge, as Senior President, and by High Court judges as Chamber Presidents in the Upper Tribunal.

iii) Court judges (Court of Appeal, High Court, and Circuit) sit regularly as members of Upper Tribunal.

iv) They are appointed by the same processes as court judges, through the Judicial Appointments Commission.

v) They are subject to the same disciplinary procedures, generally under the Lord Chief Justice.

vi) The Chief Justices and the Senior President have duties to co-operate on arrangements for training, welfare and guidance.

vii) Tribunal judges and members are represented on the Judges' Council, a body chaired by the Lord Chief Justice and representing all levels of the judiciary in England and Wales.

It is not entirely clear to me why putting court-based judges in charge was thought to be such an advantage. Most of them will have had very limited experience of the everyday tribunals dealing with everyday folk or of the areas of law with which they have to deal. Many of them will have shared the suspicion of tribunals which was so apparent in the legal profession when I was around.

The promise of two-way traffic – from tribunals to courts as well as vice versa - has not really materialised. There are, of course, some notable examples of tribunal judges becoming senior court judges – eg Gwynneth Knowles and Peter Lane in the High Court, Gary Hickinbottom in the Court of Appeal, and Vivien Rose in the

Supreme Court. But there are those who have good reason to think that judicial experience in tribunals – even in the Upper Tribunal - is not properly understood by the Judicial Appointments Commission and not rated as highly by them as are other sorts of judicial experience. Yet there have been consistent calls from reports into ways of increasing judicial diversity, especially at the top, for example from Baroness Neuberger and the more recent report of JUSTICE, for a more coherent system of career progression within the judiciary – including transfer between tribunals and the courts.

Robert Carnwath also saw the new system as improving the confidence of the courts in what the tribunals did (thus rather bearing out my accusations of a lack of confidence – not necessarily justified - in the past). In fact, he cited some words of mine in the Court of Appeal, dating back to 2001, long before the new system, referring to the Social Security Commissioners (*Cooke v Secretary of State for Social Security* [2001] EWCA Civ 734, [2002] 3 All ER 279):

> '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.'

Of course, I tried to say much the same when I got into the House of Lords (*AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49, [2008] 1 AC 678, para 30). But which has come first? Has that increased confidence led to the increased transfer of judicial review jurisdiction to the upper tribunal? Or has the increased experience of judicial review led to increased confidence in their decisions? Is it the chicken or the egg? (Or are the reasons more mundane than that?)

In the meantime, some of the distinctive features of tribunals have been eroded. The judges are still expected to know the law, but they no longer have the benefit of expert knowledge of the factual context. Many cases are now handled at first instance by a tribunal judge sitting alone. The hands-on experience of the workplace or life on the breadline is no longer there.

A further concern, for which I must take a large part of the blame, is the reduced reliance on fee-paid part time judges: this was not only good for diversity but also

for expertise. But then Mr Recorder O'Brien challenged the rules which denied them a judicial pension. The case came to the Supreme Court three times: first, on the question of whether judges were workers, which we referred to the Court of Justice of the European Union (*O'Brien v Ministry of Justice*, [2010] UKSC 34, [2010] 4 All ER 62), and eventually answered 'yes'; second, on whether the discrimination was justified, which we answered 'no' ([2013] UKSC 6, [2013] 1 WLR 522); and third on how the resulting pensions should be calculated, which again we had to refer to the Court of Justice ([2017] UKSC 46, [2017] ICR 1101). The result was that fee-paid part-time judges had to be paid pro rata pensions. While I am very happy for the judges in question, especially those with portfolios of appointments which amount to full time work, it has further eroded the distinctive features of the tribunal system.

Another efficiency has been the greater use of 'cross-ticketing' – enabling, even expecting, full-time tribunal judges to be able to turn their hands to a greater variety of jurisdictions. I know of no evidence that this has led to a loss of specialist expertise – but there is obviously a risk that it might. And the even greater risk is that, bit by bit, it may lead to a flattening out of the approach to hearing these cases – one size being made to fit all.

Which leads me to the biggest worry of all. Does this 'one size fits all' approach lead to tribunal processes becoming more and more like court processes? Of course, some tribunals have always made very big money decisions. Decisions of the tax chamber may mean that the taxpayer or the Treasury lose many millions. Decisions of the property chamber may mean that residential leaseholders have to pay large sums to buy the freehold from their landlords or much more in annual service charges than they expected. The more money is involved, the more likely it is that lawyers will be involved – the less powerful party faced by a high-powered lawyer will feel the need to have a high-powered lawyer of their own. Once lawyers are involved on both sides, the proceedings begin to feel more and more like court proceedings. The tribunal may do its best to resist this – for example by insisting that the lawyers address them sitting down – but it is not always easy.

This may not matter so much in big money cases, but employment tribunaI cases are not usually big money cases. Yet I fear that they had already become courts in all but name. A chairman I visited in my Council on Tribunals days even referred to going into 'my court'. The higher courts did not help. They tended to expect the parties to behave as they should in ordinary litigation. So if they did not know what claims they should make, what procedures they should follow, what arguments they should raise, they would lose. Yet this is the reverse of the 'user-friendly' tribunal

model, where the tribunal is supposed to know what claims can be made, to advance solutions which the parties do not, and the procedures are supposed to be so designed that parties do not need lawyers to guide them through. The government did not help either. They made in-roads into the 'no costs' environment, which was also an important part of the user-friendly model. Worse still, was their approach to tribunal fees (of which enough said).

So there are many ways in which tribunals have become more like courts. And so what should be the relationship between the tribunals and the courts? Should they be seen as two separate systems, each with their own strengths, or should they be seen as an integrated whole? There are several ways in which they are still distinct.

(1) One feature – and a major disadvantage - of tribunals is that they can't enforce their own decisions. The successful claimant has to go to court to do so. This was not surprising when most disputes were between the citizen and the state. The state could properly be trusted to abide by the tribunal's decision. But it is less acceptable in private law disputes – employment, residential property and now land registration - where the parties cannot necessarily be trusted to abide by the tribunal's decisions, so enforcement adds an additional layer of complexity.

(2) Another feature of the system, particularly in private law disputes, is fragmentation. Some aspects of the dispute have to go to court and some aspects have to go to a tribunal. *Hounga v Allen*, [2014] UKSC 47, [2014] 1 WLR 2889, is an example. A Nigerian girl was trafficked into this country, forced to work here illegally, and badly abused. In a sensible system, she should be able to bring all her claims for that abuse, in contract, tort and employment rights law, including the failure to pay her even the minimum wage, in one place. In practice, she brought a claim for discriminatory dismissal in the employment tribunal, because that was cheaper and easier. So the case was about the impact of the illegality on her statutory tort claim. How much better if it could have been about the impact of that illegality on her employment claims and other tort claims as well. After the Supreme Court's decision in *Mirza v Patel* [2016] UKSC 42, [2017] AC 467, she would have got a quantum meruit for her unpaid labour. Similar problems can apply in landlord and tenant disputes. There ought to be a simple way of getting everything in one place without losing the advantages of the tribunal system.

(3) And a third feature is the link into the higher courts. Links into the ordinary courts, including in particular the highest court in the land, are vital for the rule of law. As Laws LJ explained in *R (Cart) v Upper Tribunal* [2009] EWHC 3052 (Admin), [2011] QB 120) the rule of law requires that statute law be interpreted by

an authoritative and independent judicial source. This is not a denial of legislative sovereignty but an affirmation of it. It means that Parliament's laws are always effective.

In *Cart,* of course, the issue was whether the Upper Tribunal's decision to refuse permission to appeal from the First-tier Tribunal was ever amenable to judicial review. The argument was run that designating the Upper Tribunal a superior court of record negated judicial review. Robert Carnwath certainly believed that it did when the Act was passed. But Laws LJ demolished the argument comprehensively in the Divisional Court and the government did not revive it. We were left with the position that the availability of judicial review to challenge the legality of tribunal decisions, including the refusal of permission to appeal, was well-established. There was nothing in 2007 Act to take it away. So should we adopt (1) the status quo ante - free for all; (2) the solution adopted in the Divisional Court and Court of Appeal that judicial review was only available for want of jurisdiction in the pre-*Anisminic* sense or a wholesale collapse of fair procedure; or (3) adopt the same criteria as laid down for permission to appeal from the Upper Tribunal – the second-tier appeal criteria. As you know, we chose the third ([2011] UKSC 28, [2012] 1 AC 663).

Of course, what happened next was predictable. The Independent Review of Administrative Law found that *Cart* judicial review applications ran at an average of 779 a year, the largest category of judicial review applications to the Administrative Court, of course dominated by immigration. Their success in detecting error in the First-tier Tribunal decision was minimal. So the continued expenditure of judicial resources on considering applications for *Cart* judicial review could not be defended. What they called the 'practice' should be discontinued (paras 3.35 – 3.46). Clause 2 of Judicial Review and Courts Bill inserts a new section 11A into the 2007 Act. This provides that a decision by the Upper Tribunal to refuse permission to appeal 'is final, and not liable to be questioned or set aside in any other court'. Further, the Upper Tribunal is not to be regarded as having exceeded its powers by reason of any error made in reaching the decision and the supervisory jurisdiction of the High Courts and Court of Session does not extend to the decision.

That's pretty comprehensive, so I couldn't predict how it would survive a *Privacy International* style challenge (*R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [2020] AC 491).

It is completely understandable to do this. After all, the Supreme Court cannot entertain an application for permission to appeal from the refusal of permission to

appeal to the Court of Appeal (*Lane v Esdaile* [1891] AC 210*)*. So why should this be any different? Well, the Supreme Court can entertain an application for permission to appeal after permission to bring judicial review proceedings has been refused. So it is thought that judicial review is different in principle. The real worry is that the First-tier Tribunal reaches a decision because it is bound by an Upper Tribunal ruling in an earlier case. The Upper Tribunal refuses permission to appeal because it thinks that the earlier case is right. Indeed, the earlier case might be following Court of Appeal authority. But if the case got to the Supreme Court, it might turn out that they were all wrong. Does it matter?

My own view, as must be apparent, is that we must fight to preserve the distinctive and beneficial features of the tribunal system with which I began – their expertise, their flexibility, their user-friendliness. I doubt if those features could be preserved if the two systems were merged, so I would keep them separate. But I would try and solve some of the demarcation problems, so that all features of the same case could be dealt with together. And if this led to some courts becoming more like tribunals, then that would be no bad thing. The traffic should not be all one way.

Lecture given at the Rolls Building, London EC4A 1NL