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| SENIOR PRESIDENT |  
| OF TRIBUNALS |

# Senior President of Tribunals' Annual Report



February 2015

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# Introduction

## By the Senior President of Tribunals, Sir Jeremy Sullivan

This is my third and last report as Senior President of Tribunals. I retire from judicial office later this year. This report is an opportunity to reflect on my term as Senior President and also to consider what the future may hold.

I was fortunate to inherit a structure ably put in place under the leadership of Robert Carnwath following implementation of the Tribunals, Courts and Enforcement Act. In my first report I wrote that my early impressions were of an organisational and leadership structure that worked well. My experience of the last three years has reinforced that view. The structure has proved to be both robust and flexible. We have since added the Property Chamber to the First-tier Tribunal and expanded the jurisdictions of other Chambers. The tribunals structure is fit for purpose.

The Chambers structure and in particular the role of the Chamber and Tribunal Presidents is of critical importance. It provides a coherent framework for both judicial leadership and an effective partnership between the tribunal judiciary and the administrators in HMCTS. These are two key strengths of the Tribunals system. Having inherited a robust and efficient structure, my role has simply been to keep the show running, supporting the Chamber Presidents and their colleagues, and only intervening where necessary.

My term as Senior President has coincided with a lengthy period of austerity in public finance. This has highlighted the need to innovate and to make the most of the resources we have, both financial and judicial, to ensure that tribunals remain accessible and that we remain true to the Leggatt ideal that tribunals are for users and not the other way around. In my previous reports I have highlighted some of these innovations; hearings outside normal working hours and increased use of video link in more remote areas being examples. I have encouraged the Chamber Presidents both to make greater use of registrars to take on more case management functions and to consider whether changes to panel composition within their chambers might be appropriate.

Volatile workloads, creating fluctuating pressures across the various jurisdictions are a particular characteristic of the work of tribunals. The workload of tribunals is much influenced by Government policy and by other factors such as the state of the economy which are beyond our control. This volatility brings its own specific demands, but it also gives us opportunities to innovate and use our resources more flexibly. As things currently stand, receipts in Social Security and Child Support and in the Employment Tribunal are lower than for some

considerable time. The Immigration and Asylum Chamber, on the other hand, has seen an unexpected increase in managed migration receipts over a short period of time, as the Home Office attempts to clear historical backlogs, and the forecasted decrease in appeals failed to materialise as there was a higher propensity to appeal. It is anticipated that the new powers conferred on HM Revenue and Customs will increase the workload of the Tax Chamber.

Meeting these challenges has required close partnership working between judges and administrators. On the judicial side, among other things, we have started to make more use of assignment to make the most of our judicial resources. The pressing need for more judges to deal with an increase in receipts in the Immigration and Asylum Chamber has been met through a large scale assignment following a recent expression of interest exercise for judges in the Employment Tribunal and the Social Entitlement Chamber.

The first tranche of 122 judges was trained in October. After sitting in on hearings as observers, some started hearing immigration and asylum appeals at the end of January. The remaining judges will be trained in February. I am grateful to Michael Clements and his office for the administration of such a large scale exercise and also to the leadership judges who undertook the time consuming task of providing references for every application.

Small scale assignments between Chambers within the tribunal system are not new. We now also have the ability to flexibly deploy tribunal judges into the court system within the statutory framework provided by the Crime and Courts Act. The large scale 'cross-nomination' exercise which was carried out for tribunals judges, both salaried and fee-paid to deal with an unexpected increase in the work of the Court of Protection was the first of its kind. The exercise was led by Mr Justice Charles, in his capacity as Vice-President of that Court. Twenty-two salaried judges and 225 fee-paid judges were selected to undertake this work.

I am sure that there is much we can learn from conducting assignment exercises of this size that will benefit future similar exercises. To that end I have asked my office to conduct a review of the Senior President's assignment policy. I will share the findings with the Tribunals Judicial Executive Board.

The flexibility of the tribunals' structure to adapt to new areas of work has been demonstrated by the success of the transfer of immigration judicial reviews from the Administrative Court to the Upper Tribunal Immigration and Asylum Chamber. Over 90% of all immigration and asylum judicial reviews now fall within the jurisdiction of the Upper Tribunal. This has relieved much of the workload pressure on the Administrative Court and has demonstrated very effectively the capacity and the capability of the Upper Tribunal judiciary to take on work which has hitherto been regarded as "High Court" work.

It has been a pleasure in each of my Annual Reports to highlight a good news story on judicial

diversity. This annual report is no exception. Now 45% of tribunal judiciary are women and 13% are from BAME backgrounds. While these figures compare favourably with other jurisdictions, there is no reason to be complacent. There is still much to be done particularly to attract applicants from an ethnic minority background. The commitment to diversity is one I share with the Lord Chief Justice for England and Wales. I am pleased that tribunal judges are actively engaged through the work they do as Diversity and Community Relations Judges and also as members of the Judicial Diversity Committee of the Judges' Council.

What of the future? Undoubtedly the most significant impact on both the courts tribunals will come from the Government's proposals to reform HM Courts & Tribunals Service. On 31st March 2014, the Lord Chancellor announced a significant programme of investment in the courts and tribunals system. Through the use of modern technology, an improved estate, and modernisation of current working practices, this programme will provide a more effective, efficient courts and tribunals administration. This is an opportunity to design new working practices around the capability of the IT system, rather than merely apply IT to existing paper based processes. An improved service, long overdue, will be provided to the public at a lower cost. The HMCTS Board of which the Senior President of Tribunals is a member, will be responsible for this five-year programme of reform.

The reform programme is in its early stages, but I am pleased to see that the planning so far has seen the position of tribunals within the wider justice system fully recognised. Our job will be to ensure that this recognition continues, and that the tribunals system, its judges, members and (most importantly) its users, will all benefit to the fullest extent from the promised investment over the coming years. Whatever emerges from the programme of reform, I am convinced that we will need to retain the key features of the current tribunals structure.

Devolution, too, is a hot topic, likely to have an impact on the operation of tribunals. Hitherto, unlike the courts, many tribunal jurisdictions have been GB or UK-wide. Proposals from the Smith Commission now responded to in the form of legislative clauses look set to change that settlement. This is an area which my successor will have to keep a close eye on. It will be important that we all work together to ensure that the legislation now anticipated can be implemented as efficiently and effectively as possible with the minimum of disruption to users.

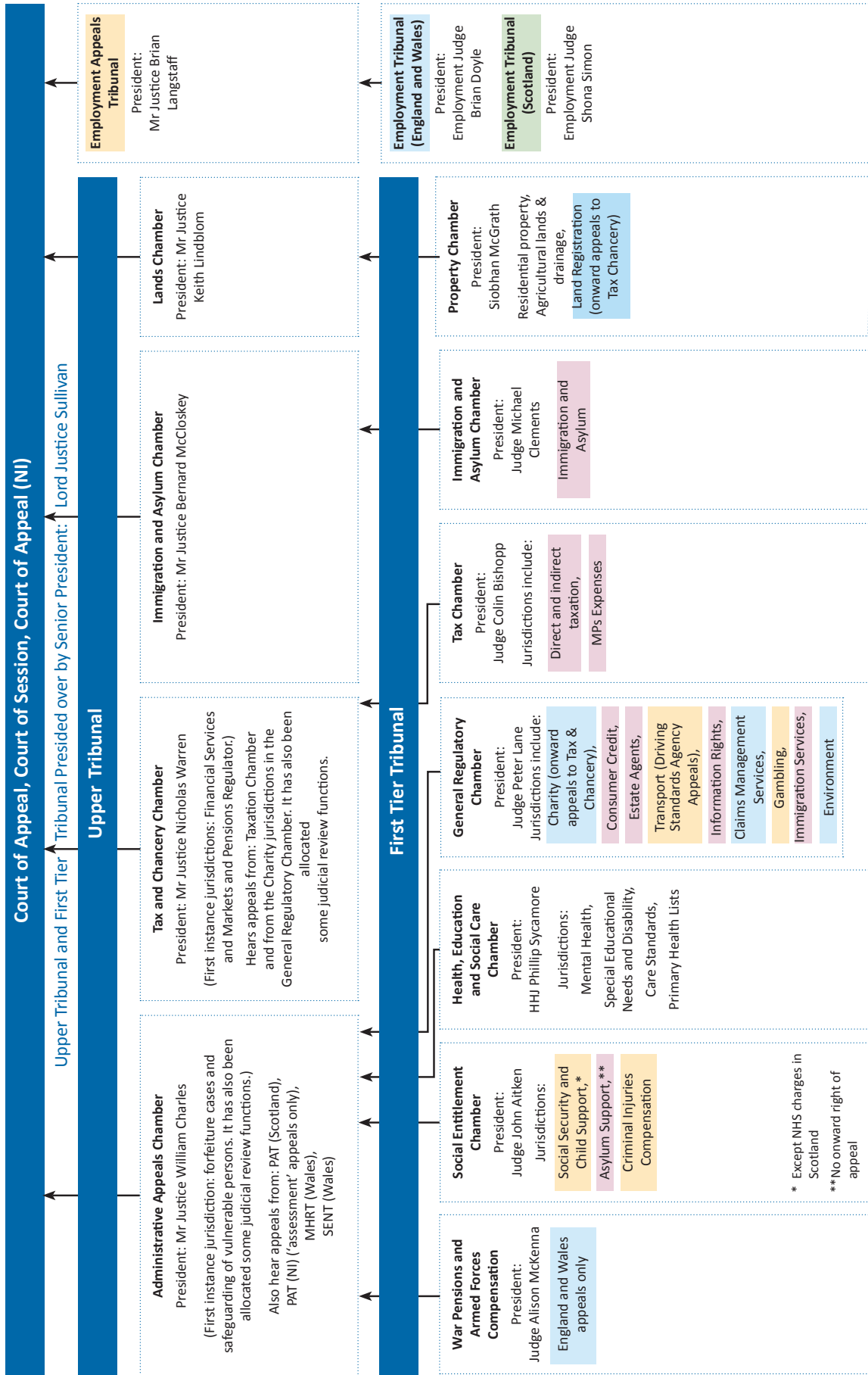
The focus on the user is a key feature of the tribunals system. As colleagues in the courts get to grips with the increase in unrepresented parties following cuts in legal aid, the Litigant in Person continues to be the norm in tribunals. We must ensure that tribunals remain accessible with relatively informal and straightforward procedures. In this respect, while the courts have much to learn from tribunals, I am sure that tribunals have much to learn from the procedures adopted by Ombudsmen. As we continue to look for more innovative and cost-effective ways to ensure that tribunals remain accessible to users, we must take advantage of the possibilities provided by online dispute resolution.

There have been a number of changes to Presidencies during the period of this report. Two long serving Presidents, David Latham (Employment, England & Wales) and Robert Martin (Social Entitlement) retired and have been succeeded by Brian Doyle and John Aitken respectively. Alison McKenna has been appointed as President of War Pensions and Armed Forces Compensation taking over from Acting President Clare Horrocks who ably led the Chamber in very difficult circumstances following the death of Hugh Stubbs. After a distinguished judicial career, Nick Warren stepped down as President of the General Regulatory Chamber to be succeeded by Peter Lane. I offer thanks to those who have preceded me into retirement and congratulations and best wishes to those embarking on the next stage of their judicial careers.

I could not end this foreword, or my three years as Senior President without recording my thanks to all those who have been members of the Tribunals Judicial Executive Board (TJEB) for the tremendous collegiate support it has provided throughout this time. Comprising the Chamber and Tribunal Presidents, as well as cross-border representatives, it has proved to be a valuable forum for helping me to understand the pressures and constraints under which tribunal judges and members operate. I am grateful to each and every President, past and present, and to Anne Smith and Libby Arfon-Jones for representing Scottish and Welsh views respectively. It is invidious to mention any particular Chamber or Tribunal President, but I do wish to record my gratitude to Phillip Sycamore for the numerous occasions he has deputised for me in his role of Senior Tribunals Liaison Judge.

I would like to thank all those in the tribunals system; judges, members, administrators, for their dedication and hard work in pursuing the goal of making tribunals accessible to the user. Finally, I extend my very best wishes to my successor as Senior President of Tribunals, whoever he or she may be.

A handwritten signature in black ink, appearing to be 'J. Latham', with a long horizontal flourish extending to the right.



key: United Kingdom    Great Britain    England and Wales    England only    Scotland only



# Chapter One – Upper Tribunal

## Administrative Appeals Chamber

### Chamber President: Mr Justice (William) Charles

#### The Jurisdictional Landscape

The UT(AAC) has a UK wide jurisdiction covering some 25 appellate and first instance jurisdictions. Its main work, in excess of 90% of its caseload, in terms of numbers of appeals (but not time) is deciding appeals on points of law from decisions of the First-tier Tribunal (SEC) relating to the Social Security and Child Support jurisdiction.

It is well known that the number of cases being heard by the First-tier Tribunal (SEC) has dropped dramatically for a number of reasons. The impact of this has not yet had a significant effect on the number of appeals to the UT(AAC) from that source but it is expected that it will give rise to a significant drop in our caseload for a period of time. How long that period will be and the extent to which our caseload will then increase is difficult to predict with any accuracy.

Appeals in the Upper Tribunal naturally broadly reflect the case load of the First-tier Tribunal. Thus, almost half of the social security appeals from the Social Entitlement Chamber this year concerned employment and support allowance. Three-judge panels sat to consider the matters to be taken into account when considering whether a claimant can reasonably be expected to mobilise using a manual wheelchair (*SI v SSWP (ESA)* [2014] UKUT 308 (AAC)) or whether a claimant can cope with social engagement (*JC v SSWP (ESA)* [2014] UKUT 352 (AAC)) or whether there would be a serious risk to anyone's health if the claimant were found not to have limited capability for work-related activity (*IM v SSWP (ESA)* 2014 UKUT 412 (AAC)). Many of the decisions of single judges in employment and support allowance cases were concerned with procedural issues, including the scope of an appeal against a decision to terminate an award of the contributory allowance after 365 days (*MC v SSWP (ESA)* [2014] UKUT 125 (AAC)), whether it is permissible for the First-tier Tribunal to use Google Maps to check a claimant's evidence as to the distance he could walk (*HI v SSWP (ESA)* [2014] UKUT 238 (AAC)) and whether there was a breach of the rules of natural justice when a misleading information leaflet led a claimant not to explain why he was requesting a postponement which was consequently refused (*GC v SSWP (ESA)* [2014] UKUT 224 (AAC)).

Nearly another quarter of the social security cases concerned disability living allowance. Many of these also raised procedural points, such as the considerations relevant when deciding whether a child should give evidence (*JP v SSWP (DLA)* [2014] UKUT 275 (AAC)), but the Upper Tribunal has also been able to give guidance on the meaning of “a state of arrested development or incomplete physical development of the brain” in the light of up-to-date medical evidence (*NMcM v SSWP (DLA)* [2014] UKUT 312 (AAC)).

Other benefits have thrown up a wide variety of issues. These have included whether there can be a valid appeal in respect of a tax credit when HMRC disputes the validity of the claim for tax credit (*ZM v HMRC (TC)* [2013] UKUT 547 (AAC))<sup>1</sup>, whether an agreement relating to a mobile home could amount to a long tenancy in Scotland for the purposes of state pension credit (*NR v SSWP (SPC)* [2013] UKUT 647 (AAC)), whether a reduction in the value of stock in trade was to be taken into account in calculating the income of a self-employed earner for the purpose of carer’s allowance (*SSWP v SK (CA)* [2014] UKUT 12 (AAC)), whether a Lithuanian claimant was “self-sufficient” for the purposes of European Union law merely because he had not made a claim for benefit and whether he had comprehensive health insurance by virtue of the rights he had acquired to treatment under the National Health Service so as to have a right to reside in the United Kingdom for the purposes of jobseeker’ allowance (*VP v SSWP (JSA)* [2014] UKUT 32 (AAC)) , whether a claimant had “exclusive use” of his home for the purposes of housing benefit even though his ex-partner was living there (*JS v Cheshire West and Chester BC (HB)* [2014] UKUT 36 (AAC)) and whether a claimant’s carer was “regularly” staying overnight for the purposes of the reduction of housing benefit for under-occupation of social housing (*SD v Eastleigh BC (HB)* [2014] UKUT 325 (AAC)).

Child support cases have raised issues about the treatment of earnings from abroad from companies not registered in the United Kingdom (*AT v SSWP (CSM)* [2013] UKUT 625 (AAC)), whether an agreement to pay capitalised child maintenance prevented an application for child support (*SJ v SSWP (CSM)* [2014] UKUT 82 (AAC)), whether tax and national insurance payments were to be deducted from an estimate of employed earner’s earnings (*DA v SSWP (CSM)* [2014] UKUT 142 (AAC)), the implications of the First-tier Tribunal barring a non-resident parent from taking any further part in proceedings (*SL v SSWP (CSM)* [2014] UKUT 128 (AAC) and *CW v SSWP (CSM)* [2014] UKUT 290 (AAC)) and whether losses in one business may be offset against profits in another when calculating a person’s income (*ML v SSWP (CSM)* [2014] UKUT 299 (AAC)).

Appeals from the War Pensions and Armed Forces Compensation Chamber show a continuing reduction in the number of cases under the old war pensions schemes, partially offset by a rise in the number of cases under the Armed Forces Compensation Scheme. It has been held that

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1 See table of cases below

there is no breach of natural justice in a serving officer sitting as a member of the First-tier Tribunal to consider claims under both schemes (*PL v SSD (WP & AFCS)* [2014] UKUT 285 (AAC)). The longest ever hearing in the Administrative Appeals Chamber involved appeals by claimants who witnessed the nuclear testing on Christmas Island in the 1950s (*Abdale & others v SSD (WP)* [2014] UKUT 0477 (AAC)). A three-judge panel has also considered whether injuries sustained when one soldier assaulted another were “caused ... by service” (*JM v SSD (AFCS)* [2014] UKUT xxx (AAC)).

The remainder of the work relates to appeals on points of law from decisions of the Health, Education and Social Care Chamber and the General Regulatory Chamber of the First-tier Tribunal and from decisions of the Pensions Appeal Tribunals for Scotland and (in relation only to assessment cases) Northern Ireland, the Mental Health Review Tribunal for Wales and the Special Educational Needs Tribunal for Wales. In addition the Chamber hears appeals from the Disclosure and Barring Service and from Traffic Commissioners. It also has a judicial review jurisdiction and determines references under section 4 of the Forfeiture Act 1982.

As with last year, approximately 20 new rights of appeal to the Chamber were introduced mostly from the First-tier Tribunal General Regulatory Chamber. They are not expected to give rise to a significant number of appeals.

Examples of the cases heard during the year are set out in the attached table.

There are two salaried judges of the UT(AAC) who sit mainly in Scotland. They and the Edinburgh based Deputy Judges do not have jurisdiction over those areas covered by the Health Education and Social Care Chamber (HESC) of the First-tier Tribunal as HESC deals exclusively with cases in England and Wales. The cases covered by that Chamber are devolved and appeals at present either go to the Sheriff Court or the Court of Session. The Scottish Parliament has now passed a Tribunals Act. Amongst the jurisdictions which will form part of the Scottish Tribunal Service are those which cover the work of the HESC jurisdiction in England and Wales. There are provisions in the Act which will enable Upper Tribunal Judges to sit by invitation and agreement in the Upper Tribunal created by the Scottish Act. One of the salaried Upper Tribunal Judges in Scotland currently sits in the Mental Health Tribunal in Scotland for twenty days a year. One of the fee paid judges also holds an appointment in that tribunal.

The UT (AAC) also has jurisdiction in Northern Ireland to deal with appeals from the First-tier Tribunal in relation to freedom of information and data protection, certain environmental matters, certain transport matters, the regulation of estate agents, consumer credit providers and immigration service providers, and appeals in Vaccine Damage cases. It also hears appeals from the Pensions Appeal Tribunal for Northern Ireland in assessment cases. We have a small but significant on-going caseload in freedom of information and data protection and war

pension assessment cases.

Two salaried judges sit in Northern Ireland. They combine their UT (AAC) functions with their roles as Chief Commissioner and Commissioner respectively.

In the period under consideration, the UT (AAC) has received the first appeals arising from the Goods Vehicle (Licensing of Operators) Act (Northern Ireland) 2010. One of the Northern Ireland salaried judges has joined the UT (AAC) Transport Judicial Group which has jurisdiction in connection with appeals arising from the 2010 Act.

### Judicial Training

There is a particular vibrancy about training in UT AAC, a number of the judges being former academic lawyers who are always happy to contribute. In addition to training in the new welfare law reforms, social welfare law being the core work of the Chamber, we have considered aspects of law and procedure in relation to Safeguarding Vulnerable Groups and Information Rights, and looked at a variety of more general topics including human rights and the European Charter. The focus of this year's training however has been a comprehensive induction training programme for our 12 newly appointed judges.

As well as assisting with generic training for courts and tribunals judges for the Judicial College, our judges have participated in the training of First-Tier judges in the Social Entitlement and War Pensions Chambers. Joint training with the Social Entitlement Chamber and the Upper Tribunal Immigration Appeals Chamber on topics of common interest is being planned. Maximising the use of in-house training facilities this year has resulted in a considerable financial saving.

### People and places

In last year's report I noted the Chamber's forthcoming Judicial Appointments Commission competition which was to be launched in September 2013. From April this year, I have been very pleased to welcome in London six new salaried Judges: Edward Mitchell, Alison Rowley, Mark Hemingway, Kate Markus QC, Gwynneth Knowles QC and Rachel Perez. I was equally pleased to welcome four new London based Deputy Judges Kate Brunner, Judith Farbey, Mark Sutherland Williams and Eleanor Grey QC and two Edinburgh based Deputy Judges Marion Caldwell QC and Ailsa Carmichael QC.

The JAC competition included one salaried judge for Scotland, however, the Judicial Appointments Commission declined to make a recommendation for a salaried appointment. Two fee paid judges who are over 70 had their appointments extended. Both salaried judges required extended sick leave. One of the First-tier District Judges, James Lunney who holds

an Upper Tribunal appointment sat for an extended period in the Upper Tribunal and I am grateful to him for the assistance he rendered and to the First-tier Tribunal for agreeing that he could sit with us.

The chamber is fortunate to have a cadre of twenty-seven fee-paid Deputy Judges who sit regularly; twenty sit wholly or mainly in England, seven sit wholly or mainly in Scotland. Deputy Judges deal mostly with appeals from the Social Entitlement Chamber and the War Pensions and Armed Forces Compensation Chamber but this year due to a change in the approach in dealing with the caseload particularly during a time of depleted judicial resource until the new judges were in post, some of the more experienced Deputy Judges have also been dealing with applications for permission to appeal. The chamber has been fortunate that four of its former salaried judges have been appointed as Deputy Judges following retirement from their salaried roles, which has meant the chamber has retained their expertise and knowledge during this period.

The chamber also has a number of fee-paid specialist Judges and Members who sit on appeals from Traffic Commissioners, Information Rights cases transferred on a discretionary basis from the F-tT to the UT and specialist members who sit on Disclosure and Barring Service cases. We benefit from and are grateful for the specialist knowledge they bring to the chamber and their contribution to its work.

The chamber's judges' work has continued to be supported by a team of 10 specialist Registrars and 2 Legal Information Officers led by Simon Cockain in London who was promoted to lead Registrar last November following the retirement of Jill Walker. Christopher Smith is the AAC's Registrar in Edinburgh and Niall McSperrin in Belfast. The London office welcomed 3 new Registrars this year, Julia Smailes, Alexandra Lewenstein and Amanda-Jane Field.

Following a period of illness, sadly, Registrar Christopher Hall died earlier this year. He is missed by his colleagues having been with the chamber for many years.

Paul Farren continues to manage the administrative staff in London. Heather Woodfield was promoted to temporary Cluster Manager in June and continues to have oversight of the operations of the chamber with Paul. Mrs Terry Stewart and Gillian McClearn continue in their respective roles as operational managers in Edinburgh and Belfast.

File no	Name	Description	Issue
GIA/2230/2012  <b>[2013] UKUT 560 (AAC)</b>	All Party Group on Extraordinary Rendition v  The information Commissioner and Foreign and Commonwealth Office	Information rights	<p>The All Party Parliamentary Group on Extraordinary Rendition (APPGER) made various Freedom of Information Act (FOIA) requests relating to UK-based detainees. The Foreign &amp; Commonwealth Office's (FCO) refused many of them. The First-tier Tribunal (F-tT) for the most part dismissed APPGER's appeals against the Information Commissioner's unfavourable decisions. The Upper Tribunal (UT) upheld that part of the appeal relating to the F tT's treatment of the "control principle" and the public interest test under FOIA section 27(1) (international relations). In particular the UT found that the procedure adopted by the F-tT, including a closed hearing, meant that APPGER was ignorant of the FCO's primary case, namely: the harm that would be caused if any of section 27 information was disclosed and its impact on the sharing of intelligence information between the US and the UK. This was compounded by the failure of the F-tT to hold a further hearing or allow further submissions, following the parties' comments on the draft decision, which was not confined to typographical matters, a process which both caused and perpetuated unfairness. The UT made some general observations on how such problems might be avoided in future.</p>

<b>File No</b>	<b>Name</b>	<b>Description</b>	<b>Issue</b>
GIA/177/2014 <b>[2014] UKUT 255 (AAC)</b>	Niebel v The Information Commissioner	Data Protection - Monetary Penalty Notice	The Information Commissioner imposed a Monetary Penalty Notice (MPN) on Mr Niebel for breach of the Privacy and Electronic Communications Regulations 2003 claiming that he had sent some hundreds of thousands of unwanted text messages seeking out potential claims for mis-sold loans or accidents. However, before the F tT the Information Commissioner relied on only 286 text messages as the basis for the contravention. The F-tT allowed the appeal and set aside the MPN. The Upper Tribunal dismissed the Commissioner's appeal holding, among other things, that the F-tT had been entitled to conclude that a contravention involving 286 text messages was of a very different kind from one involving hundreds of thousands of text messages and that it was not possible to import the very much larger number in order to determine the nature of a contravention involving a much smaller one.

File No	Name	Description	Issue
HM/1538/2013  <b>[2013] UKUT 365 (AAC)</b>	AM v South London & Maudsley NHS Foundation Trust	Mental Health	<p>The appellant, who had a history of mental illness, was removed by the community health team to a hospital by a warrant issued under the Mental Health Act 1983 (MHA) for assessment under section 2. The First-tier Tribunal (F-tT) refused the appellant's application for discharge. A further application was made before a second F-tT where it was unsuccessfully argued on the appellant's behalf that she should be discharged as she could stay in hospital on a voluntary basis. The issue before the Upper Tribunal (UT) was the proper approach to be taken by decision-makers when applying the "necessity test" under the MHA including the possible application of the Mental Capacity Act 2005 (MCA) and the Deprivation of Liberty Safeguards (DOLS). The UT held that to be compatible with Article 5(1)(e) of the European Convention on Human Rights the relevant sections of the MHA had to be applied on the basis that there was no less restrictive way of achieving the proposed assessment or treatment. That DOLS provided an alternative basis upon which to authorise the deprivation of the liberty of incapacitated persons for their assessment or treatment in hospital and therefore a decision-maker when applying the "necessity test" under the MHA should consider whether DOLS ought to be used in the particular circumstances of each case. The UT gave detailed guidance for the decision-maker on the approach involved.</p>



<b>File No</b>	<b>Name</b>	<b>Description</b>	<b>Issue</b>
CTC/2325/2011 CTC/2326/2011  <b>[2013] UKUT 547 (AAC)</b>	ZM and AB v Her Majesty's Revenue and Customs (TC)	Tax credits and family credit	Mr M's wife Mrs B was subject to immigration control under the Immigration and Asylum Act 1999. They submitted a joint claim to Her Majesty's Revenue and Customs (HMRC) for tax credits. Their claim was refused apparently because Mrs B had no national insurance number (NINO). However, under the Tax Credits (Claims and Notification) Regulations this requirement did not apply to anyone subject to immigration control. HMRC later confirmed that the claim had been refused because Mrs B had failed to provide proof of her identity. Therefore, the particular regulation, whereby an NINO was not required, had not been overlooked rather the condition for its application had not been established. In these circumstances, the First-tier Tribunal (F-tT) considered that it had no jurisdiction. The appellants appealed to the Upper Tribunal (UT) but, before the appeal could proceed, the HMRC awarded tax credits to the appellants – it accepted Mrs B had not understood what proof was needed to confirm her identity (neither she nor Mr M understood English). The appellants continued with their appeal so as to establish whether the F-tT had acted correctly. The UT allowed the appeal holding, among other things, that the F-tT had erred in law in not applying section 3(1) of the Human Rights Act 1998 so that it was possible to read and give effect to section 14(1) of the Tax Credits Act 2002 which, when read together with section 38 of the same Act, had the effect that HMRC was compelled to take a decision which then became appealable.

<b>File No</b>	<b>Name</b>	<b>Description</b>	<b>Issue</b>
CG/185/2013 <b>[2013] UKUT 436 (AAC)</b>	SA v Secretary of State for Work and Pensions (BB)	Bereavement and death benefits	The appellant's deceased husband, Mr A, had come to the UK from Pakistan. In 1975 he pronounced a talaq divorce of a Mrs J, via a statutory declaration sworn in England, and married the appellant, Mrs A, in Pakistan. She was granted entry clearance to the UK. In 2004 Mr A successfully claimed retirement pension including the adult dependency increase for Mrs A. Mr A subsequently died and Mrs A claimed bereavement benefit. The Secretary of State refused her claim on the basis that she was not a widow: as Mr A had been living in the UK he could not have entered into a polygamous marriage abroad and his talaq was ineffective. During the First-tier Tribunal (F-tT) hearing it was argued, amongst other things, that Mr A's only marriage was to Mrs A, while the alleged marriage to Mrs J was a fraud designed to take advantage of the child tax allowance system. The F-tT inferred from the statutory declaration that Mr A had married Mrs J and rejected the appeal. The issues before the Upper Tribunal (UT) was how the evidence for a foreign marriage should be tested and what weight should be attached to a statutory declaration. It held that the F-tT placed so much weight on the statutory declaration as to err in law and also failed to engage properly in the process of weighing it against all of the other available material evidence.

File No	Name	Description	Issue
CH/1140/2011  <b>[2013] UKUT 26 (AAC)</b>	DM v London Borough of Lewisham and the Secretary of State for Work and Pensions	Housing and council tax benefits	<p>The claimant, who was in receipt of housing benefit (HB), required kidney dialysis three times a week. He accepted the offer of a new property and his tenancy commenced on 26 October 2009. However, he was unable to move before 8 November 2009 as the new property had been left in a dirty condition and needed cleaning and redecorating if he was to avoid potentially serious infections. The Council accepted that the claimant could not have moved before 8 November but refused to award HB in respect of the new property before that date. The claimant's appeal to the First-tier Tribunal was dismissed on the ground that regulation 7(8)(c)(i) of the Housing Benefit Regulations 2006 did not apply because the delay in moving into the dwelling was not "necessary in order to adapt the dwelling to meet the disablement needs" of the claimant. This decision was taken in the light of Commissioner's decision <b>R(H) 4/07</b> which held that adapting a dwelling required a change to the fabric or structure of the building and not simply redecorating or carpeting the dwelling. The claimant's appeal to the Upper Tribunal was dismissed and the claimant appealed to the Court of Appeal. The Court of Appeal allowed the appeal and substituting a decision in favour of the claimant, holding that having regard to the underlying purpose of the legislation, "adapt" was to be construed as meaning "to make fit" or "to change or modify to suit a purpose"; that adapting a dwelling need not involve works of any particular type and specifically need not involve any physical interference with the structure of the dwelling or any physical addition to it and a dwelling can fairly be said to have been adapted if the process which it has undergone has resulted in it being changed to make it more suitable for the needs of the disabled person: see <b>[2014] EWCA Civ 284</b>.</p>

File No	Name	Description	Issue
CCS/738/2012 CCS/739/2012 <b>[2013] UKUT 407 (AAC)</b>	JW v Secretary of State for Work and Pensions & MC & JC (CSM)	Child support	<p>The parent with care applied for child support maintenance under the 2003 rules, the scheme introduced by the Child Support, Pensions and Social Security Act 2000. The father was employed by G4S International Employment Services Ltd as a security guard working within the British Embassy in Kabul, Afghanistan and returning for leave in the UK at regular intervals. G4S was incorporated in Jersey and the father was paid offshore without deduction of UK tax or national insurance (he had no other income). The First-tier Tribunal decided that he was habitually resident in the UK but that his income from G4S could not be taken into account and his liability for maintenance was therefore nil. The mother's appeal to the Upper Tribunal (UT) was dismissed. The UT held that the father's offshore earnings could not be brought into account within the formula under the 2003 rules; the decision on similar facts in <i>GF v CMEC (CSM)</i> <b>[2011] UKUT 371 (AAC)</b> was made under the original 1993 scheme, or "old" rules, which differed in a material respect. The Child Support (Variations) Regulations 2000 were inapplicable. The habitual residence of the father left the mother unable to apply to the court for maintenance and unable to achieve other than a nil award through the Agency, despite the father's substantial earnings. The UT held that exclusion of the offshore earnings of someone in the father's position was not a lacuna, but part of the overall child support scheme of maintenance calculation and enforcement. The European Convention on Human Rights (ECHR) would not assist the mother; Article 6 was not engaged following <i>Kehoe v UK</i> no 2010/06, [2008] ECHR 528; (2009) 48 EHRR 2, upholding the decision of the House of Lords in <i>Kehoe v R</i> on the application of the Secretary of State for Work and Pensions) [2005] UKHL 48 which had considered the child maintenance scheme and its public purpose in a broad way which precluded a challenge based on individual circumstances. Neither Article 8, nor Article 14 taken in conjunction with Article 1 of Protocol 1 would benefit her given the wide margin allowed under human rights law to State-run schemes intended to impact on the overall public good: see <i>Humphreys (FC) v The Commissioners for Her Majesty's Revenue and Customs</i> [2012] UKSC 18; [2012] AACR 46 applied in <i>MM v Secretary of State for Work and Pensions (CSM)</i> [2013] UKUT 585 (AAC).</p>

File No	Name	Description	Issue
CJS/3172/2012  <b>[2014] UKUT 32 (AAC)</b>	VP v Secretary of State for Work and Pensions (JSA)	European Union Law	<p>The claimant was a Lithuania national, single and without dependants. He had arrived in the UK in May 2005 following Lithuania's accession on 1 May 2004 to the European Union, together with the other A8 states. He worked in several low paid manual jobs. But he did not have 12 months' certificated employment under the worker registration scheme. His claim for jobseekers allowance was rejected by the Department for Work and Pensions on the basis that he had no right to reside. The First-tier Tribunal (F-tT) upheld that decision. His appeal to the Upper Tribunal (UT) involved the following legal issues:</p> <p>(1) Whether the derogation from Article 7(3) of Directive 2004/38/EC, under the Accession (Immigration and Worker Registration) Regulations 2004, was lawful or the impact on the claimant disproportionate was not decided because the claimant failed on other grounds.</p> <p>(2) He could not rely on Article 7 of Regulation 1612/68 to claim parity with national workers.</p> <p>(3) The test of self-sufficiency was to be met at the outset of the period relied upon for permanent residence i.e. not post hoc through non-reliance on benefits for five years.</p> <p>(4) For that same five year period he did not have comprehensive sickness insurance because of his rights to NHS treatment (subsequently confirmed by the Court of Appeal in SA v The Secretary of State for the Home Department <b>[2014] EWCA Civ 988</b>).</p> <p>(5) He was not assisted by the Court of Justice of the European Union's decision in <b>C-140/12 Brey</b>.</p> <p>(6) The right to reside test was not unlawfully discriminatory: following Patmalniece v Secretary of State for Work and Pensions [2011] <b>UKSC 11</b>; [2011] 1 WLR 783).</p> <p>(7) The right to reside test was not incompatible with Article 70(4) of Regulation 883/2004.</p> <p>The UT held that the decision of the F-tT involved errors of law and it was aside by the UT but only to be re made in the same terms.</p>

## Tax and Chancery Chamber

### Chamber President: Mr Justice (Nicholas) Warren

#### Judiciary

During the course of the year, we have seen the retirement of one of our salaried tax judges, David Demack. David has had a long career in the tribunal system, having been a Special Commissioner and a VAT Tribunals chairman before his transfer into the current tribunal structure at its inception. He has been an invaluable resource operating from Manchester away from our hub in Bedford Square. He will be greatly missed. I thank him for his hard work.

Edward Cousins has retired from his salaried role as a judge exercising our jurisdiction in relation to land registration matters but, I am happy to say, continues as a fee-paid judge.

Edward Sadler has retired from his role as a fee-paid judge. He, too, was transferred into the system at its inception from his previous fee-paid roles on direct and indirect tax appeals. He has been another invaluable resource, sitting with various Chancery Division judges on complex appeals. I am sorry to see him retire so far from his compulsory retirement age.

One member, Andrew Lund, who sat in the financial services jurisdiction, has also retired in the course of the year. I am grateful for the long and steadfast commitment which he has given first to the Financial Services and Markets Tribunal and to the Upper Tribunal following the transfer of the financial services jurisdiction to the Tax and Chancery Chamber.

Lady Rae, a Court of Session Judge, has been assigned to the Chamber.

His Honour Judge Mark Raeside and Her Honour Judge Walden-Smith have been assigned to the Chamber to exercise our land registration jurisdiction.

#### Financial services cases

As in previous years, there has been a regular flow of references from the Financial Conduct Authority. There has not been a great deal of work from the Pensions Regulator. One substantial reference due for a lengthy hearing early in 2015 has recently settled.

#### Charity cases

Cases in the Charity jurisdiction remain few and far between. There is nothing of significance to record in this Report.

## Tax Appeals

The bulk of our work continues to comprise tax appeals. There is no change to report from last year. As before, there is a steady flow of appeals and references passing through the system. Our workload in tax appeals is, again, very much as predicted. Our workload is expected to increase substantially as a result of new statutory provisions targeted on marketed tax-avoidance schemes. A recruitment exercise has recently been conducted for both the Tax Chamber and the Tax and Chancery Chamber following which we expect to appoint eight new fee-paid judges.

## Judicial review

Last year I reported that number of judicial review applications had been heard in that year, nearly all of which were made in the context of closely related statutory tax appeals. These had all been heard by a panel including a Chancery Division judge as presiding judge. The year with which this Report is concerned has seen no change from that.

## Land Registration

As I said last year, this appellate jurisdiction is exercised by a number of specialist Chancery Circuit judges who have been assigned to the Chamber for the purpose. The more complex appeals may be allocated to a Chancery Division judge. Edward Cousins, the Principal Judge in the Property Chamber dealing with land registration matters, also provides invaluable assistance in this area. Applications for permission to appeal have been running at between two and three times the number of cases projected at the time of the transfer of the jurisdiction. Our experience is that most applications for permission to appeal which are refused on paper proceed to a renewed application at a hearing. So far, only a very small number of appellants have succeeded in obtaining permission to appeal even after a hearing.

## Consumer Credit

Regulatory matters are now the concern of the Financial Conduct Authority. Decisions of the FCA in this field are subject to the same sort of review as its decisions in the financial services field with a similar right for an affected person to refer a decision to the tribunal.

## Administration

The team as always continues to provide an efficient service to the public and to the judiciary. They have handled the additional work brought about by the transfer of new jurisdictions into the Chamber with efficiency. I would once again like to express my gratitude to them. By the time this Report is published, the staff will have moved from Bedford Square to the Rolls

Building. It is unfortunate that they will no longer be under the same roof as the judges of the Chamber who are being relocated to the Royal Courts of Justice.

## **Immigration & Asylum Chamber**

### **Chamber President: Mr Justice Bernard McCloskey**

It is my great pleasure to contribute to this annual report to the Senior President of Tribunals. It is the first such report that I have compiled. I do so as the first year of my Presidency of the Upper Tribunal, Immigration and Asylum Chamber (UTIAC) comes to an end.

It has been quite a year for UTIAC. Events and developments have ranged from the merely notable to the outright momentous. The year began with a significant loss to the organisation. At the end of September 2013, the presidency term of Sir Nicholas Blake was concluded. I am his honoured successor. Sir Nicholas was the inaugural President of UTIAC. During his three and a half year term, he drove the organisation forward into a new era, successfully so. This he achieved by deploying to the full his multiple talents, foremost amongst which are his intellectual rigour, tireless enthusiasm and breadth of vision.

The achievements of Sir Nicholas included the compilation of a series of much needed Presidential Guidance instruments regulating important subjects including anonymity, unrepresented litigants, video link hearings, the reporting of judgments and the treatment of vulnerable litigants and witnesses.

One of Sir Nicholas' outstanding achievements was the extinguishment of a large backlog of statutory appeals. During his presidential term, the statutory appeal backlog peaked at 6,035. When his term finished three years later there were 2,212 cases.

This towering achievement was matched only by the headline event of 2013/2014, namely the transfer from the Administrative Court of over 90% of immigration and asylum judicial reviews. This was the culmination of a protracted and challenging project led and driven by Sir Nicholas. I had the advantage of witnessing at close quarters the latter stages of this project. It was an enormous undertaking, involving seemingly countless committees, judicial office holders, stake holders, civil servants and many others. Forecasts, calculations, projections and, dare I say, the simple human qualities of hope, enthusiasm and trust abounded. Countless deadlines were met, seemingly insurmountable hurdles were overcome and occasional setbacks did not arrest the relentless flow.

The accomplishments which I have reduced to a mere summary above would not have



been possible without the trojan industry, co-operation and support of the management, administration and judiciary of this organisation. I salute them all.

Another great servant of UTIAC left our organisation during the year to which this report relates. Vice-President Elisabeth Arfon-Jones (“Libby” to all) executed a long standing threat of retirement, to our great regret. Happily her immense services will remain available to us in her new part-time sitting role. Libby’s experience, excellent judgment and seemingly inexhaustible fund of good sense were of tremendous benefit to me during my first presidential year and I shall continue to utilise them! In common with Sir Nicholas, Libby has moved on accompanied by the best wishes of everyone.

UTIAC Judge Paul Southern relinquished the post of Principal Resident Judge in April 2014, succeeded by UTIAC Judge Jim Latter. Judge Southern is deserving of the highest of accolades for his magnificent period of service. I salute him with a mixture of gratitude and admiration. As regards Judge Latter, to describe the transition as seamless is an understatement – the King is dead, long live the King!

### Judicial Review in UTIAC

With effect from 01 November 2013, a large proportion, estimated at 75%, of all immigration/asylum judicial review cases has fallen within the exclusive jurisdictional remit of the Upper Tribunal, Immigration and Asylum Chamber (“UTIAC”). This has given rise to the following jurisdictional dichotomy:

- (a) Judicial reviews transferred to UTIAC.
- (b) Judicial reviews in which the Administrative Court (“AC”) retains exclusive jurisdiction.

The issue is governed by the Direction made by the Lord Chief Justice on 21 August 2013 in accordance with **Part 1 of Schedule 2 to the Constitutional Reform Act 2005 and section 18 of the Tribunals, Courts and Enforcement Act 2007**.

In transitional terms, it embraces:

- (i) Any case in which an application for permission to apply for judicial review was issued in the AC on or after 09 September 2013.
- (ii) Any case in which there is an undetermined request for an oral hearing under CPR 54.12 following a paper refusal of permission on or after 09 September 2013.

- (iii) Any application issued in UTIAC on or after 01 November 2013.

Altogether nine types, or classes, of judicial review were **not** transferred from AC to UTIAC. Both transferred and non-transferred judicial cases include omissions or failures to make a decision in the various categories.

Viewed panoramically, the effect of these reforms has been as follows:

- (i) Approximately 70% of **all** judicial review cases formerly belonging to the AC would fall within the exclusive jurisdiction of UTIAC.
- (ii) Over 90% of all immigration and asylum judicial review cases now fall within the exclusive jurisdiction of UTIAC.

Manchester retains its status as the biggest AC centre outside London, followed closely by Birmingham. UTIAC JRs are listed outside London in Manchester, Birmingham, Leeds and Cardiff.

A full year has now elapsed since the historic conferral on UTIAC of jurisdiction to deal with the great majority of immigration and asylum judicial reviews. The volume of cases transferred from the Administrative Court was substantially greater than predicted. During the first six months, there were significant variations in receipts and projections. A more settled pattern has now emerged. To summarise:

- (a) The total number of judicial review cases transferred from the Administrative Court was circa 3,300.
- (b) The total number of new judicial review cases received in UTIAC during the period viz from 01 November 2013 to 30 September 2014 was 15,567.
- (c) During the past six months, new judicial review cases received in UTIAC have been averaging at just over 1,000 per month.

### Statutory Appeals

For the period April 2014 – September 2014:

- (a) UTIAC received a total of 4,814 statutory appeals.

- (b) Altogether 4,643 appeals were completed.
- (c) Immigration appeals accounted for 15% (872 appeals).
- (d) Asylum appeals accounted for 15% (705 appeals).
- (e) Deportation appeals were 6% (295 appeals).
- (f) The remainder – managed migration and visitors' visas – were 2,718 and 219 respectively.

These figures are comparable to those of the previous year. Furthermore, other data demonstrate that, as previously, asylum appeals continue to be the most cumbersome and time consuming in the system.

### Applications for Permission to Appeal

There are two species of applications for permission to appeal in UTIAC:

- (a) Applications for permission to appeal from the First-tier Tribunal (Immigration and Asylum Chamber) (the “FtT”) to UTIAC.
- (b) Applications for permission to appeal from UTIAC to the Court of Appeal (“COA”)

As regards these two categories:

- (a) UTIAC received 7,642 permissions to appeal and disposed of 6,645, of which 10% were granted, 88% refused and 2% withdrawn.
- (b) 1,165 appeals were lodged with UTIAC for onward appeal of which 10 were granted.

### Court of Appeal Decisions in Appeals from UTIAC

The Court of Appeal heard 70 appeals of which they allowed 12 and remitted 25 to UTIAC .

## Notable Developments in UTIAC Jurisprudence 2013/2014

The year 2013/2014 was marked by a rich seam of jurisprudence in UTIAC relating to both substantive and procedural law. Some of these decisions are highlighted in this section.

### **Substantive Immigration & Asylum Law**

**Kareem (proxy marriages – EU law) [2014] UKUT 24**

**SM (withdrawal of appealed decision; effect) Pakistan [2014] UKUT 64**

**Shahzad (Art 8: legitimate aim) [2014] UKUT 85**

**Ved and others (appealable decisions; permission applications; Basnet) [2014] UKUT 150**

**KV (scarring – medical evidence) Sri Lanka [2014] UKUT 230**

**Castro (removals; s 47 (as amended) [2014] UKUT 234**

**Durrani (entrepreneurs; bank letters; evidential flexibility) [2014] UKUT 295**

### **Decisions re: Procedure & Practice**

**Marghia (procedural fairness) [2014] UKUT 366**

**Budhathoki (reasons for decisions) [2014] UKUT 341**

**NA (UT rule 45; Singh v Belgium) Iran [2014] UKUT 205**

**AAN (Veil) Afghanistan [2014] UKUT 102 (IAC)**

**Kumar (acknowledgement of service; Tribunal arrangements) [2014] UKUT 104 (IAC)**

**Mahmood (continuing duty to reassess) [2014] UKUT 439 (IAC)**

**Nwaigwe {Adjournment: fairness} [2014] UKUT 418 (IAC)**

**MM (unfairness; E & R) Sudan [2014] UKUT 105 (IAC)**

**SM (withdrawal of appealed decision: effect) [2014] UKUT 64 (IAC)**

**Nixon (permission to appeal: grounds) [2014] UKUT 368 (IAC)**

**MK (duty to give reasons) [2013] UKUT 641 (IAC)**

### **Country Guidance**

**AT and others (Article 15c; risk categories) Libya CG [2014] UKUT 318**

**MOJ and others (return to Mogadishu) Somalia CG [2014] UKUT 442**

## **The Immigration Act 2014**

The shadow of a new Immigration Bill loomed large during much of 2013/2014. Just as the dust was beginning to settle on UTIAC's newly extended judicial review jurisdiction, the Bill became an increasingly dominant presence.

The Immigration Act 2014 has had an almost immediate impact on the work of UTIAC by the coming into force on 28 July 2014 of Part 5A of the Nationality, Immigration and Asylum Act 2002, in respect of Article 8 ECHR, together with relevant Immigration Rules. Other provisions of the Act, including section 15, which substitutes a new section 82 into the 2002 Act, setting out the new rights of appeal to the First-tier Tribunal, are being phased in gradually, from 20 October 2014. A significant increase in the number of applications for judicial review in UTIAC appears highly probable.

UTIAC Judges will have dedicated training on the new Act in November 2014, when its impact on both statutory appeals and judicial reviews will be considered in detail.

## Judicial Resources

From its inception, the judicial compliment of UTIAC has included High Court (or equivalent) judges from the three jurisdictions concerned, viz England and Wales, Northern Ireland and Scotland. This continues for which I thank the Lord President (Scotland), The Lord Chief Justice (Northern Ireland) and QBD Presiding Judge.

A UTIAC judicial recruitment exercise is underway at present. This should result in the appointment of six to nine new salaried, full-time Judges and up to 20 new Deputy Judges. This will not, however, increase UTIAC's judicial resource in real terms, having regard mainly to the effect of judicial retirements. Projected future judicial resource needs for UTIAC are currently being considered, not least by reason of the predicted impact of the new Immigration Act.

I consider that the workloads of UTIAC judges – hearing lists, paper lists et al – should be constantly governed by the principles of quality, fair and reasonable burden and efficiency. The first of these principles is sacrosanct. Other essential judicial duties and activities must always be taken into account. Foremost amongst these is the work of various UTIAC committees, attending necessary courses, continuing education and assisting me in a broad spectrum of Chamber tasks. These duties and activities are time consuming, demanding and labour intensive.

I will continue to monitor the fairest, most reasonable and most efficient methods of arranging and implementing the workloads of judges. This subject, which I consider to be of exalted importance, is being actively considered at present. It is directly related to the issue of morale, which is crucial in every judicial organisation.

## Miscellaneous

There has been judicial review training in September 2013 and July 2014. There was also training in December 2013 on a range of topical issues, and the annual conference, including the Deputy Judges of the Chamber, took place in March 2014. There was, for the first time, joint training of SIAC judges and lay members, in January 2014, under the auspices of Irwin J, Chairman of the Special Immigration Appeals Commission.

## Seminars & Conferences

I consider this subject to be inextricably linked with the issues of continuous training (self-evidently important), morale and the profile and reputation of the organisation both nationally and further afield. Events at which papers have been delivered by the President include the annual Administrative Court judicial training day, the Public Law Project Annual Conference,

the inaugural Garden Court Chambers Public Law Conference, the annual conference of the Immigration Lawyers Practitioners' Association, an EDAL conference in Dublin and an ECRE/EDAL conference, also in Ireland.

UTIAC Judges have also been active in the forum of certain prestigious international judicial events. Several UTIAC judges have delivered papers at these events in the course of the year. Some have been in connection with activities by the International Association of Refugee Law Judges, of which UTJ Dr Hugo Storey is the European Chapter President and UTJ Dawson the Vice President. A report on their activities with the European Asylum Support Office appears in a special international issue of the Tribunals Journal for autumn 2014.

In November 2014 a tripartite seminar took place at the Court of Justice of the EU in Luxembourg, attended by judges from the CJEU, the Strasbourg Court, senior judges from the UK and judges from other EU member states. One of the aims was to facilitate judicial dialogue on the very topical issue of international protection. Papers were presented by the President of UTIAC and Dr Hugo Storey. During the course of the year, the President and other UTIAC judges also presented papers at a major event organised by the IARLJ (European Chapter), in Gothenburg, Sweden.

### UTIAC Committees

The governance and efficient management of the Chamber is informed and enhanced by the work several committees. Most salaried judges are members of one or more of the committees and have given generously of their time in order to facilitate this. This is considered one of the real strengths of the Chamber. The President keeps the Chamber's committee structure under review, both as to the scope of their remit and the need to refresh their membership periodically. Some committees meet regularly and some are convened on an ad hoc basis as and when the need to do so arises. While the work of each is valuable the following qualify for special mention.

The Reporting Committee meets fortnightly and has the responsibility of selecting cases for reporting and drafting the headnotes of each reported case. In the last twelve months the committee has selected 66 cases for publication as reported cases, eight of which have been published as Country Guidance. The Country Guidance Committee plays an equally valuable role in this respect.

Key areas of the Chamber's activity are monitored and overseen by dedicated committees. These include the Training and Appraisals Committees, the Performance Committee, the Executive Committee and the Welfare Committee.

## Conclusion

Foreseeable issues and developments of importance in this Chamber during the forthcoming year include the appointment of significant numbers of new full-time and part-time judges, reduction of the backlog of judicial review cases flowing from the events described above, increasingly efficacious and inclusive solutions to the concerns and problems of judges and the revision and adaptation of certain practices and arrangements with a view to enhancing efficiency and expedition. Collectively, we look forward to these, and other, challenges. I commend all members of this Chamber for their admirable dedication to duty, industry, expertise and collegiality. It is a privilege to lead this organisation.

## Lands Chamber

### Chamber President: Mr Justice (Keith) Lindblom

2014 has been a year of change for the Lands Chamber, most notably in its accommodation. In October the Chamber's judiciary left Bedford Square and took possession of accommodation on the ground floor of the Royal Courts of Justice, followed shortly after by the Chamber's staff who are now to be found in the Rolls Building. The move was accomplished smoothly for which great credit is due to our administrative team and to Paul Francis FRICS who led for the Chamber's judiciary in planning the move.

The Tribunal's former premises at Bedford Square were not ideal and I now hope that the facilities of the RCJ will benefit all of our users. The Chamber's case load ranges from very large and valuable disputes to others which are much more modest; the needs of parties in all of our cases have been considered in making adaptations to the courts in which our hearings will now be held. In particular it was of concern that unrepresented individuals in smaller cases might find the surroundings of the RCJ and the traditional court layout inhospitable and intimidating; to meet these concerns the refurbished courts are configured both to allow the Tribunal to sit much closer to the parties, as befits cases conducted under our simplified procedure, and to accommodate heavier cases conducted with greater formality.

One particular challenge which has been created by the removal from Bloomsbury is that the Chamber's staff is no longer based in the same building as its judiciary and court rooms. Greater use of technology is being relied on to minimise the transportation of case files between the two sites and to ensure that the standard of service to our users is not compromised.

The jurisdiction of the Lands Chamber covers a diverse range of disputes of different types,



whose unifying feature is that they concern land. On average in the last three years the Chamber has received 590 new cases of all types annually (including approximately 135 applications a year for the registration of rights of light, which are dealt with administratively, rather than by the judiciary). In the same period about 40% of our new receipts (excluding rights of light cases) have comprised appeals in residential property cases from the Property Chamber of the First-tier Tribunal, about 32% references for the assessment of compensation for compulsory acquisition of land or rights over land, or damage to or interference with land caused by public works, and about 14% appeals from the Valuation Tribunals for England and for Wales in rating matters. The pattern this year has been consistent with this trend.

Appeals to the Chamber have increased this year as a result of the diversion to us of matters which would formerly have gone to the High Court or the County Court. By October 2014 there have been ten applications for permission to appeal to the Tribunal against decisions of the Property Chamber concerning fair rents under the Rent Act 1977 and rents for assured tenancies under sections 13 and 14, Housing Act 1988. Until 1 July 2013 these appeals went to the Administrative Court. There have also been three full appeals under the Mobile Homes Act 1983 concerning the terms of occupation of park homes (and a larger number of applications for permission) which would formerly have been determined by the County Court. It is too early to draw any firm conclusions on numbers but so far the diversion of these appeals to the Tribunal seems to have increased the number of appeals which we receive from the Property Chamber by about 10%.

The Chamber's output this year has continued to feature compensation cases arising out of major infrastructure projects including Olympic legacy and Crossrail claims. Of particular significance was the decision in *Edwards v Rhondda Cynon Taff CBC*, the first appeal to the Upper Tribunal under the amended s. 17, Land Compensation Act 1965, against a certificate of appropriate alternative development. In *Dickinson v Network Rail* the Tribunal was called upon for the first time to exercise the new cost capping powers introduced into its procedure rules in 2013. I will return to this power shortly.

In the field of rating, *Hardman v British Gas Trading* concerned the rating assessment of a gas fired power station in Peterborough (with 17 other power station assessments awaiting its outcome) and is thought to be amongst the most valuable rating appeals the Chamber or its predecessor have had to consider. On a smaller scale, an appeal from the Valuation Tribunal for Wales on the rating of self-catering holiday accommodation (*Redrose v Thomas*) is likely to have significant repercussions for small holiday letting businesses in Wales.

In the residential sector high value Central London enfranchisement claims have continued to command the Chamber's attention and to raise novel and difficult points of law and valuation practice (a notable recent example being *Kosta v Phillimore Estate*). Leasehold tenure is not confined to high value property and enfranchisement or lease extension claims for more

modest flats and houses are equally capable of throwing up complexities of their own; in *Sinclair Gardens Kensington's appeal* the Chamber ruled on the admissibility of its own previous decisions on deferment rates as evidence, an issue of considerable practical significance in low value cases.

The Chamber's judicial resources are limited, with only one full time judge and three full time members (all of whom are chartered surveyors). We rely heavily on the assistance of circuit judges assigned to the Chamber, HHJ Nicholas Huskinson, HHJ Milwyn Jarman QC, HHJ Alice Robinson and HHJ Nigel Gerald, and of the President of the Property Chamber, Siobhan McGrath. A valuable continuing contribution has also been made by Judge David Mole QC and Norman Rose FRICS following their retirement. We are grateful to them all. The Chamber has recently invited expressions of interest from serving circuit judges and we have been delighted by the positive response received. As a result three new judges have been assigned to the Chamber, HHJ John Behrens, HHJ David Hodge QC and HHJ Stuart Bridge, each of whom brings particular expertise in property law to the Chamber's work.

It is the regular experience of the Chamber that substantial disputes are resolved by agreement in the days or hours immediately before a hearing is due to commence. Late settlements are wasteful of resources for the parties and the tribunal, and for parties in other cases which might have been heard more quickly had a consensus been achieved at an earlier stage. The speed with which cases can be listed and determined depends partly on our being able to concentrate on hearing those which are truly incapable of being resolved by some other means.

It is therefore disappointing that mediation, in particular, is not used more often in claims for compensation for compulsory purchase. In many cases, it seems, claims are referred to the Lands Chamber only at or near the end of the limitation period, after years of desultory negotiation with little obvious advantage to either side. Even after the issues have crystallized, it is unusual to see much progress towards identifying what the critical points of law or valuation really are, at least until the time comes for evidence to be prepared and submitted. Case management alone cannot prevent this problem. We must try to stimulate more confidence in the use of mediation at an early stage in claims both large and small.

Most references involve public bodies which are notionally committed to mediation as a good thing in principle and individual or corporate claimants for whom an early resolution of the claim must surely be desirable. One would have thought that these were favourable circumstances for mediation. What militates against it? If a public body has been advised that a claim has a certain value it may lack the desire to explore an early compromise at a lower level. It should be encouraged to consider ADR, and should not fear that it is acting contrary to the public interest in fair compensation if it takes that course, whether with a view to settling the claim itself or merely to addressing specific issues of valuation or law. Rule 3 of the Lands Chamber Rules requires us to bring ADR to the attention of parties and to facilitate its use.

We do that, and we shall go on doing so.

A more demanding, *Jacksonian*, approach to procedural compliance and costs control in the field of compulsory purchase compensation, and also more widely, clearly also has an important role to play in dealing with cases fairly and justly. That approach is already woven into the amended Lands Chamber Rules, where it is balanced by the reminder to avoid unnecessary formality and to seek flexibility in the proceedings. It works in the interests of both claimants and compensating authorities.

Reference has already been made to the Chamber's first cost capping order. The power to make such orders was conferred on the Upper Tribunal by rule 10 and section 29 of the Tribunals, Courts and Enforcement Act 2007 for the promotion or protection of access to justice for claimants of relatively modest means. It is important to appreciate that the wide discretion to make such orders will always be very much a case-by-case exercise, but there are likely to be many references in which some sort of costs capping may be appropriate.

## Chapter Two - First-tier Tribunal

### Social Entitlement Chamber

#### Chamber President: Judge (John) Aitken

The Social Entitlement Chamber comprises three jurisdictions, namely Asylum Support (AS), Criminal Injuries Compensation (CIC) and Social Security and Child Support (SSCS). The Principal Judge of Asylum Support and Criminal Injuries Compensation is Sehba Storey. SSCS is managed by seven Regional Tribunal Judges led by the Chamber President. The jurisdiction of Asylum Support is UK-wide. SSCS and CIC are Great Britain-wide.

#### The Jurisdictional Landscape

##### Social Security And Child Support

In SSCS the most significant feature over the past year or so has been a dramatic downturn in workload. The table below shows the trend over the past few years with the workload reaching a peak of 507,131 in 2012-13 before declining to 401,896 in 2013-14, whilst clearances increased to 545,923.

##### SSCS Appeals Intake and Clearances

	<b>Intake</b>	<b>Clearances</b>
2008-09	242,825	245,500
2009-10	339,213	279,264
2010-11	418,416	379,856
2011-12	370,800	433,600
2012-13	507,131	465,172
2013-14	401,896	545,923

In the period from April to June 2014 HMCTS recorded a total of 74,400 appeals received, which represents a 71% reduction when compared to the same period in 2013. A total of 140,800 cases were cleared during that period. The dramatic reduction was initially matched by the higher level of activity on our part achieved in the expectation of a continuing upward

trend in workload, as suggested by Department of Work and Pensions forecasts.

As mentioned by my predecessor in last years report the initial rise in workload was attributable to the recession and the implementation of the Government's welfare reform programme. The Welfare to Work Strategy involved:

- the reassessment of 1.5 million recipients of Incapacity Benefit in the three year period from October 2010 as Incapacity Benefit was to be replaced by Employment and Support Allowance;
- the replacement of the Disability Living Allowance from April 2013 by the Personal Independence Payment (PIP), with the reassessment of 1.7 million recipients;
- from April 2013 the launch of a new integrated benefit (Universal Credit) to replace a number of means tested benefits, with an expectation that up to 12 million claimants would move onto Universal Credit by 2017.

Initial forecasts from DWP indicated that annual workload would peak around 2015-16 falling away as the reforms became embedded. For a number of reasons rehearsed by amongst others the House of Commons Work and Pensions Committee, Committee of Public Accounts, and the National Audit Office, the workload began to fall away during 2013. In essence the number of assessments has fallen. To date it has not recovered and the latest information to hand suggests that the lower rate of appeals is likely to continue with any peak now not expected until 2017-18, although the position regarding Universal Credit remains unclear.

The DWP have in addition suggested that the reduction in appeals can be accounted for by improved decision making, the introduction of mandatory reconsideration and changes in claimant behaviour. In the coming year we are hoping to have further data available that will shed more light on this. Whatever the reason we appear to have entered a transitional period which may take us in an unexpected direction.

Due to problems encountered with Atos Healthcare, the DWP's contractor, the number of Employment Support Allowance (ESA) claimants waiting for assessments amounted to over 700,000 by July 2014<sup>2</sup>. This followed a decision in January by the then Minister Mike Penning to defer referral of repeat work capability assessments to the provider Atos, with the aim of reducing delays for new claimants and those already referred. In March we heard that the Government had decided to end the contract for providing assessments that it held with Atos early. In October 2014 the new Minister for Disabled People, Mark Harper, announced that

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<sup>2</sup> Oral Evidence: Employment and Support Allowance and Work Capability Assessments, HC 302 Wednesday 11 June 2014 Q451. Mike Penning.

MAXIMUS Health and Human Services Ltd had been awarded the contract to run from March 2015 for an initial period of 3 years<sup>3</sup>.

At the same time similar difficulties have been encountered with the implementation of PIP, the contractors providing the assessments being Atos and Capita.

In September 2013 the Universal Credit (UC) project was reset. The project would now be delivered in incremental stages. In October 2014 the Government published its latest document on UC, setting out a revised rollout plan<sup>4</sup>. Expansion nationwide would take place in early 2015 with legacy benefits closed to new applicants during 2016 and during 2017 all legacy benefits closed to new applicants<sup>5</sup>. No targets for numbers in receipt of UC have been set, but of the target 7.7 million recipients the caseload as at 11th September 2014 was 14,170<sup>6</sup>. As a consequence we have been struggling with changing forecasts of work, in terms of both volumes and timescales for implementation, with the concomitant disruption to our forward planning.

In the past year we have continued to pursue improvements in the standard of DWP decisions. The system of producing annual reports has been replaced with a scheme to provide direct feedback from Tribunals on individual overturned cases with a pilot scheme introduced from July 2012 using a drop down menu and from June 2013 a scheme generating “summary reasons”. Initially applying to ESA appeals and then extending this across an increasing range of cases, our ultimate aim is to provide feedback on all categories of overturned cases at all venues. We are awaiting figures from DWP illustrating how the information is being used by individual decision makers. At the same time we continue to work with HMCTS to ensure the appropriate technology is available to enable us to provide this feedback at all SSCS venues.

Mandatory Reconsideration also seems to have had an impact on workloads but again we have no published figures available at this stage to fully gauge the impact. We await more substantive empirical evidence before we will be able to reach any firm judgements about the cause and length of the downturn in workload.

In terms of the work outstanding, the live load was 49,987 at June 2014. This is at an historically low level. For the work available we have adopted a dual strategy of focussing on reducing waiting times for new appeals at the same time making inroads into the number of older cases. When an upturn in workload does materialise we will be in a good position to increase capacity to the levels previously achieved and maintain any reduction in end to end waiting times.

3 <http://www.parliament.uk/documents/commons-vote-office/2014-October/30th%20October/8.DWP-ESA.pdf>

4 Universal Credit at Work, Produced by DWP October 2014, published 22 October 2014, [www.gov.uk/dwp](http://www.gov.uk/dwp).

5 Ibid. p27

6 [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/363825/universal-credit-statistics-first-release-sep-2014.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/363825/universal-credit-statistics-first-release-sep-2014.pdf)

I have also taken the opportunity to align the boundaries across SSCS and aim to have coterminous boundaries with HMCTS regions from April 2015, in an effort to assist the administration to achieve efficiencies. I am grateful for the enthusiasm and commitment with which those involved have approached this.

### Onward appeal and Judicial Review SSCS

In SSCS cases, there is a right of appeal to the Upper Tribunal on an error of law. In 2013–14, the Upper Tribunal received some 5,041, SSCS appeals. Of these 4,709 were on application and 332 with leave from the Tribunal.

### Significant cases

Following on from the *Reilly & Wilson* litigation referred to in last year's annual report, in *R (on the application of Reilly (No. 2) and Hewstone) v Secretary of State for Work and Pensions*<sup>7</sup> the High Court issued a declaration that the Jobseekers (Back to Work Schemes) Act 2013 (which had been introduced to validate retrospectively the Jobseekers Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011) was incompatible with the claimants' rights under Article 6(1) of the European Convention on Human Rights, as given effect by section 1 of the Human Rights Act 1988. Under section 4(6) of the 1988 Act such a declaration does not have any direct effect on other appeals; rather, its effect is to put the Government on notice of the incompatibility. The Secretary of State is appealing against the High Court's decision and there is a window for the appeal to be heard between 2 January 2015 and March 2015. In addition, there are three lead cases due to be heard by the Upper Tribunal in November 2014 which concern (i) the retrospective effect of the 2013 Act and (ii) the information that the Secretary of State should make available to claimants before referring them to work programmes. The judgment in these cases is not yet available. The argument that the Jobseekers Allowance (Mandatory Work Activity Scheme) Regulations 2011 were *ultra vires* for the same reasons as the Jobseekers Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011 was rejected in *R (on the application of Smith) v Secretary of State for Work and Pensions*<sup>8</sup>.

Another fertile area for SSCS appeals is the "right to reside test", which applies to income-related benefits, child benefit and child tax credit. Workers, and those who have retained worker status, have a right to reside (among others). One issue that has caused difficulty is the status of women who have left the labour market temporarily due to pregnancy. On a reference from the Supreme Court, the Court of Justice of the European Union ruled in *Saint Prix v Secretary of State for Work and Pensions*<sup>9</sup> that a woman who gives up work, or seeking

7 [2014] EWHC 2182 (Admin) (High Court, 4.7.14)

8 [2014] EWHC 843 (Admin) (High Court, 27.3.14)

9 Case C-507/12 (CJEU, 19.6.14)

work, because of the physical constraints of the late stages of pregnancy and the aftermath of child birth retains the status of “worker”, provided that she returns to work or finds another job within a reasonable period after the birth of her child. The judgment marks a significant development in this area, in that the Court rejected the argument that Article 7(3) of Directive 2004/38/ EC contains an exhaustive list of the circumstances in which a migrant worker who is no longer in an employment relationship may nevertheless continue to retain worker status.

The introduction in April 2013 of the under occupation penalty (colloquially referred to as “the bedroom tax”) for the purposes of housing benefit claims in the social rented sector has been the subject of challenge in a number of cases, so far unsuccessfully. In *R (on the application of MA & Ors) v Secretary of State for Work and Pensions and Equality and Human Rights Commission*<sup>10</sup> the Court of Appeal accepted that the under occupancy penalty discriminated against disabled people (who might need extra room(s), for example, for the storage of equipment or separate sleeping accommodation) contrary to Article 14, read with Article 1, Protocol 1, ECHR. However, the Court concluded that the discrimination was justified, emphasising that the question was whether the scheme as a whole, including the increased budget for discretionary housing payments, discriminated against disabled people. The Court also held that the process leading to the decision to introduce the under occupation penalty did not breach the Secretary of State’s public sector equality duty under section 149 of the Equality Act 2010. The claimants were granted permission to appeal to the Supreme Court on 22 December 2014.

A similar emphasis on the role of discretionary hardship payments as part of the scheme as a whole led to the dismissal of the application for judicial review in *Rutherford & Ors v Secretary of State for Work and Pensions*<sup>11</sup>. This case concerned the application of the under occupation penalty where an extra bedroom was required because a severely disabled child needed respite night time care from carers in his own home. In reaching his conclusion that any discrimination was not “manifestly without reasonable foundation”, Stuart-Smith J relied heavily on the fact that discretionary housing payments were fully plugging the gap and that so far the claimants had not suffered any financial detriment. An application for permission to appeal to the Court of Appeal has been made. It is worth noting that under regulation 13B of the Housing Benefit Regulations 2006 a claimant is entitled to an additional bedroom for an adult who requires overnight care, and to an additional bedroom for a “child who cannot share a bedroom” (as defined in regulation 2(1) of the 2006 Regulations). In both these judgments, however, the courts have taken the view that disabled adults who require an extra bedroom and disabled children who need an extra bedroom can be treated differently.

A related reform – the benefit cap, which limits the amount of welfare benefits a family with

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10 [2014] EWCA Civ 13 (Court of Appeal, 21.2.14)

11 [2014] EWHC 1631 (Admin) (High Court, 30.5.14)



children can receive to £500 a week (£350 for those without children) – has been challenged on the ground that it unjustifiably discriminates against lone parents and victims of domestic violence, who are predominantly women, and fails to have regard to the best interests of the child (*R (on the application of SG and Ors) (previously JS and Ors) v Secretary of State for Work and Pensions*). The claimants' appeal was heard by the Supreme Court on 29–30 April 2014<sup>12</sup>. The date that was scheduled for the delivery of the Court's judgment has been postponed to allow the court to consider further written submissions from the parties.

## Asylum Support

### Appeal volumes

In the 2013 – 2014 period, the Asylum Support jurisdiction expects to receive in the region of 1,600 appeals. There was, however, a marginal increase in the number of appeals received in the first eight months of the period November 2013 to October 2014. This year, 60% of substantive appeals were determined at an oral hearing (a reduction of 10% from the previous year) and 10% were decided on the papers (no change from the previous year). The remaining 30% are made up of a combination of appeals withdrawn by the Home Office (only a small number are withdrawn by appellants) and appeals struck out under rule 8 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008.

### Proposed Changes in the Law

Last year reference was made to Clause 40 of the Government's Draft Deregulation Bill. The intended effect of Clause 40 was to remove the power under section 4(1)(a) and 4(1)(b) of the Immigration and Asylum Act 1999, to provide accommodation to persons temporarily admitted to the UK under paragraph 21 of Schedule 2 to the Immigration Act 1971 and persons released from detention under paragraph 21 of Schedule 2 to that Act. A Joint Committee of the House of Lords and House of Commons (the Committee) examined the Draft Deregulation Bill in December 2013 and published their report on 19 December 2013 (the Report). The Committee heard evidence from a number of interested parties, including Refugee Action and the Immigration Law Practitioners Association, on the inadequacies of the consultation process. The Committee recommended that a "fuller consultation" be carried out, in particular with local government and devolved governments on whom the burden of supporting the individuals affected was likely to fall. The Government response to the Report, published in January 2014, stated that the Government intends, on the Committee's advice to remove Clause 40 from the Deregulation Bill pending further consultation.

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12 Case ID: UKSC 2014/0079

## Practice and Procedure

Notwithstanding the absence of any change in the volume of appeals received, the complexity and length of appeal hearings has continued to increase. This is largely due to Home Office reviews of the continuing support of persons who have resided in the UK for many years and the increasing number of appellants who are routinely represented by solicitors. The availability of pro bono representation from the Asylum Support Appeals Project, now based at Anchorage House, results in greater numbers of appellants taking advantage of the duty solicitor scheme.

The number of decisions withdrawn by the Home Office prior to hearing remains high, averaging over 25%. Whilst we welcome scrutiny by the Home Office of its first-stage decision-making process and the evidence submitted in response to case management directions, the late withdrawal of decisions under appeal can result in a waste of Tribunal and indeed no doubt of Home Office resources. It is worth noting, however, that the Tribunal and the parties to the appeal are required to complete the appeal process from receipt of the notice of appeal to promulgation of the Tribunal decision, within a maximum of eleven days. Thus, an appeal withdrawn prior to hearing is usually received within 8 days of receipt of an appeal being lodged with the Tribunal. By that stage however, much of the case-management work and judicial preparation is already complete.

## Judicial Review

Since November 2013, we have received six new judicial reviews and disposed of six. This represents an appeal rate of less than 0.5% of Asylum Support's total annual receipts. Five of the six judicial reviews were disposed of by consent with two cases remitted to the tribunal to be heard de novo; the Home Office granted two applicants section 4 Support; and one applicant withdrew his application on the respondents undertaking to reconsider his further representations as a fresh claim. The final application was refused as the argument had become academic once he was granted leave to remain.

## Significant cases

The Home Office practice of reviewing the circumstances of those who have been on long-term support has given rise to some interesting appeals. In the context of support under Section 4(2) of the Immigration and Asylum Act 1999 and Regulation 3(2) of the Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005, the evidence required to demonstrate the taking of all reasonable steps to leave the U.K or an inability to leave for medical reasons, continues to exercise judges. This is particularly complex for appellants required to return to Palestine, Somalia or Iran.

In addition, the tribunal received a number of appeals from persons who were awarded compensation by the Home Office, but whose support was somewhat belatedly discontinued, up to two years later. In addition to the complexity of examining the appellants' present financial position and whether there had been an intentional disposal of assets, many of the supported persons had been granted support under Section 4(1)(c) of the Immigration and Asylum Act 1999 because they were subject to immigration bail. An examination of the respondent's published policy on Section 4(1)(c) support suggested the absence of a power to discontinue support on the grounds that a supported person was no longer destitute. It is not known whether the Home Office intend to revise the Section 4(1)(c) policy guidance but a high percentage of such cases have been withdrawn.

The tribunal has also observed an increase in the number of appeals involving discontinuance of support for an alleged breach of conditions – usually involving concealed financial resources or anti-social behaviour. These cases can require lengthy hearings and detailed case-management. One such case was Qador AS/13/08/30300, which was remitted to the Tribunal for hearing de novo by the Administrative Court. The fresh hearing took place over 2 days and concerned an alleged breach of conditions under Regulation 6(2)(a) of the Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005. The appellant was alleged to have committed multiple incidents of antisocial or violent behaviour, including damage to property; assaults on a fellow resident; threatening behaviour and permitting unauthorised guests to reside in his Home Office accommodation.

## Criminal Injuries Compensation Jurisdiction

### The Jurisdictional Landscape

#### Appeal Volumes

The 2012 Criminal Injuries Compensation Scheme continues to have an impact on the Criminal Injuries Compensation with the current live caseload of 1900 appeals already 20% less than the numbers received in the previous year and 11% below the figure forecasted for the current period. There is an increasing emphasis on clearing the older cases, especially the pre-tariff appeals, which are particularly time and resource consuming. To date, we have only six pre-tariff appeals remaining.

## Changes in the Law

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 made a number of changes to the Rehabilitation of Offenders Act 1974 (ROA), the effect of which is to reduce the time it takes for a conviction to become spent and enabling the rehabilitation of some offenders who previously could never have had their convictions spent. Section 141 applies to all convictions or cautions before the commencement date and amendments and repeals made to the ROA apply as if they had always had effect. However, these amendments only apply in England and Wales and not Scotland.

The Criminal Injuries Compensation Schemes apply to injuries sustained in Great Britain whereas the Legal Aid, Sentencing and Punishment of Offenders Act has no application in Scotland, where the question of whether a conviction is spent is determined by reference to the Rehabilitation of Offenders Act.

Thus, two identical appellants, one in Scotland and one in England or Wales may receive very different awards – or none at all – if the more generous provisions on the Legal Aid, Sentencing and Punishment of Offenders Act do not apply to their case purely by reasons of geography.

## Significant cases

In **CICA v FTT&CP (Criminal Injuries Compensation) [2013] UKUT 0638 (AAC)**, the Criminal Injuries Compensation Authority (CICA) applied for Judicial Review to the Upper Tribunal Administrative Appeals Chamber (UTAAC) against the decision of the First-tier Tribunal (FTT).

The issue raised in the appeal concerned the ability of a child, (CP), to claim compensation from CICA, as a result of being born with Foetal Alcohol Spectrum Disorder (FASD), as a direct consequence of her mother's excessive drinking while pregnant. On behalf of the appellant (aged seven), it was asserted that the mother was aware of the danger of harm to her baby being caused by drinking to excess.

The FTT allowed the appeal. The UT disagreed and held that whilst there had been an administration of poison or other destructive and noxious substance capable of inflicting grievous bodily harm, the statute requires that administration is to "another person" and that a foetus was not "another person" within the meaning of s23 of the Offences Against the Person Act 1861 (the 1861 Act). The Appellant appealed to the Court of Appeal.

In a judgment handed down on 4 December 2014, their Lordships (Master of the Rolls, Treacy LJ and King LJ) dismissed the appeal on behalf of CP against the decision of the UTAAC and upheld the judgment and reasoning of UT Judge Levenson. In so doing, they

agreed that the task for the Court concerned the interpretation of section 23 of the 1861 Act. Giving the lead judgment, Lord Justice Treacy held that the essential ingredient for a crime to have been committed is the “infliction of grievous bodily harm on a person” and that grievous bodily harm on a foetus was not sufficient for the purposes of s23. The Court agreed that the time at which the grievous bodily harm occurred was whilst CP was in the womb and that at that stage the child did not have legal personality so as to constitute “any other person”. Thus, there was no link between the administration of the alcohol and the born child for the purposes of s23.

The Master of Rolls recognised, in the course of his judgment, that this is a matter of considerable public interest and importance.

On 31 December 2014, CP’s solicitors applied to the Supreme Court for permission to appeal the Judgment of the Court of Appeal. The solicitors no longer seek to argue the s23 point. Permission is now sought on the basis that the underlying criminal offence committed by the mother was an offence contrary to s20 of the 1861 Act as opposed to s23 because the former does not require proof of an offence against ‘another person’. A decision is awaited.

In **JMJ**, the Upper Tribunal Administrative Appeals Chamber considered the proper meaning and application of the two-year time limit under paragraph 18 of the 2008 Criminal Injuries Compensation Scheme, and the possibility of its waiver where a claim is made outside the statutory time limit. All Criminal Injuries Compensation Schemes include a requirement that the victim of any criminal injury make a timely application for compensation. The rule in paragraph 18 has been the subject of three conflicting interpretations by different Judges of the Upper Tribunal Administrative Appeals Chamber, which is why a three-judge panel (including Charles J the Chamber President UTAAC) was convened to hear the case. There is no binding decision of the Supreme Court (previously the House of Lords) or the Court of Appeal on the proper approach to be taken to the interpretation of paragraph 18 of the 2008 Scheme. There is a decision of the Outer House Court of Session, namely *JM v Advocate General for Scotland* [2013] CSOH 169; 2014 SLT 475, which was referred to by the Upper Tribunal Administrative Appeals Chamber.

An application for compensation under the Criminal Injuries Compensation Schemes in respect of a criminal injury must be made as soon as possible after the incident giving rise to the injury and must be received by the Criminal Injuries Compensation Authority within two years of the date of the incident. A claims officer may waive this time limit only where he or she considers that:

- (a) it is practicable for the application to be considered; and

(b) in the particular circumstances of the case, it would not have been reasonable to expect the applicant to have made the application within the two-year period.

The Upper Tribunal Administrative Appeals Chamber held that if both conditions (a) and (b) are satisfied, then the claims officer (and, on appeal the Tribunal) must consider whether to exercise the discretion to admit the late claim. In their judgment, where conditions (a) and (b) are both satisfied, there would have to be good reasons to justify not exercising the discretion in the applicant's favour. The Upper Tribunal Administrative Appeals Chamber accepted, however, that it would be "administratively disproportionate" to admit a very late claim in the absence of good reason for the delay, if it was bound to be rejected for other reasons.

## People And Places

### Overall numbers of judges/members

Historically, the Principal Judge has been the only salaried judicial office holder in the Criminal Injuries Compensation jurisdiction. In January 2014, Tony Summers retired as the Criminal Injuries Compensation Principal Judge. The Chamber President wishes to express his gratitude to Tony Summers for his excellent leadership of the jurisdiction. Tony will remain with the Criminal Injuries Compensation on a fee paid basis until November 2015. Sehba Storey, who has 14 years experience as Principal Judge of Asylum Support, has taken over responsibility as Principal Judge - Criminal Injuries Compensation with effect from April 2014.

Since 2009, Criminal Injuries Compensation has lost 15 legally qualified Judges through promotions and retirements resulting in a substantial loss of expertise. Whilst existing legally qualified Judges and Ticketed to Preside Members have coped admirably with the demands upon their time, this has only been possible by restricting the panel membership to one person qualified to preside. This has presented practical difficulties to Chairmen leading a heavy week of sittings.

In order to ease the pressure on Judges and Members authorised to preside, the Chamber President agreed to ticket fourteen salaried Judges to the Criminal Injuries Compensation jurisdiction. The appointments followed an Expressions of Interest exercise limited to salaried Judges of the SEC. Ten of the fourteen judges have received jurisdiction specific training and have commenced sitting. The remaining four judges will be trained in the current financial year and will sit from April 2015.

The jurisdiction also relies heavily on its medically qualified members (MQM) and specialist

members (SM). Since 2009, the Criminal Injuries Compensation jurisdiction has lost eight highly experienced members some of whom were also ticketed to Preside Members. This has created a shortage of talent within the jurisdiction. In the current year, we have ticketed 10 medically qualified members from within the Social Entitlement Chamber. These members have been fully trained and are actively sitting within the jurisdiction.

### Operational Innovations

Criminal Injuries Compensation sittings take place throughout Great Britain at various venues. Whilst this results in the Tribunal often having to use premises not suited to the less formal setting preferred for Tribunal hearings, we are working towards identifying additional venues and improving the quality of all venues available to us. One venue likely to be used more frequently for hearings and interlocutory work is the multi-jurisdictional centre at Anchorage House in East London.

We are particularly pleased to have been able to offer more video linked hearings to appellants who are living/working overseas as well as to those unable by reason of their health to attend an oral hearing at one of the designated venues.

### People and Places SEC

As at 15th October 2014, the Chamber had a complement of 2,418 posts. This comprised:

Judges (salaried)	108
Judges (fee-paid)	796
Medical members (salaried)	8
Medical members (fee-paid)	970
Disability members	490
Victim support members	21
Accountant members	25

This year we said farewell to HH Judge Robert Martin who retired in June 2014. Robert had been President of Appeal Tribunals since 2007 and Chamber President from 2008. Robert took up his first fee-paid appointment in 1985 followed by a salaried appointment as District Chairman in 1995 and Regional Chairman for the Midlands in 1997. We are greatly indebted

to Robert for all the work he has done over the years to promote access to justice for all tribunal users, and particularly for his tireless work during his last year in office to introduce a new system of direct feedback to decision makers and, in the face of an unprecedented increase in workload, to increase the capacity of the SSCS jurisdiction.

## **Health, Education & Social Care Chamber**

### **President: His Honour Judge Phillip Sycamore**

#### **The Jurisdictional Landscape**

The Chamber is made up of four jurisdictions, mental health which covers the whole of England; special educational needs and disability, which also covers the whole of England; care standards, which covers the whole of England and Wales, and primary health lists which also covers the whole of England and Wales.

The main purpose of the mental health jurisdiction is to review the cases of patients detained under the Mental Health Act and to direct the discharge of any patients where the statutory criteria for detention are not met. There are two main parts to the special educational needs and disability jurisdiction. One is to hear appeals brought by parents against decisions made by local authorities about the educational provision to meet their child's special educational needs; the other deals with claims of disability discrimination in schools under the Equality Act 2010. The care standards jurisdiction covers a breadth of regulatory appeals in the care industry, including registration, suspension and cancellation decisions by the Care Quality Commission and Ofsted. The primary health lists jurisdiction hears appeals against the decisions of the NHS National Commissioning Board involving the listing of doctors, dentists and pharmacists as service providers.

#### **Mental Health jurisdiction**

In 2013/14, mental health saw an 8% increase in cases received on the previous year. This includes both applications by patients and their nearest relatives, and referrals by hospital managers and the Secretaries of State. Last year the jurisdiction reported that Section 2 cases (detention in hospital for assessment) accounted for 27% of all receipts. This has risen to 29% in the current financial year. Given that many of these patients are well-known to mental health services the jurisdiction continues to have concerns that many patients are being detained under Section 2 for reasons other than to undertake a full psychiatric assessment<sup>13</sup>.

13 See also Cases of interest



In May 2013 the jurisdiction changed the way that cases are listed. These changes have depended upon the cooperation of hospitals and legal representatives, and they have proved to be very successful. This, in turn, has enabled cases to be allocated a hearing date much earlier in the process, to the benefit of patients and their families. As a consequence, there has been a significant increase in the number of non restricted cases that have been completed within 9 weeks of receipt and the number of restricted cases that have been completed within 17 weeks of receipt.

This year the jurisdiction set up a joint Judicial Case Management Board, with members of the judiciary and administration working together to identify areas that will benefit from direct judicial intervention by a salaried judge or Registrar. This more focussed approach to judicial case management is intended to ensure that valuable judicial time is allocated to more complex cases, or those that may otherwise encounter avoidable delays.

Last year the mental health jurisdiction introduced 'paper reviews' for certain categories of case if the patient or their legal representatives ask for the case to be determined without an oral hearing. This has worked well, with panel members conferring by teleconference having read the papers. Such panels retain the discretion to direct an oral hearing if necessary.

On 6th April 2014 the amended HESC Chamber Rules came into effect. In relation to the mental health jurisdiction, these changes follow the decision of the Tribunal Procedure Committee to remove the requirement for a pre-hearing examination by the tribunal doctor in every mental health case and, instead, to put patient choice and preference at the heart of the new system — whilst ensuring that the tribunal retains the pre-hearing medical examination in particular circumstances.

The new rule requires the tribunal doctor to examine the patient in advance of the hearing in order to form an opinion of the patient's mental condition in all cases where the patient is detained for assessment under section 2 of the Mental Health Act 1983 (MHA) (where the evidence from the parties is necessarily limited due to the tight timescales) and in certain other cases – most notably where the patient asks for a pre-hearing examination in good time before the hearing.

Whilst it is too early to fully assess the impact of this change, initial figures reveal that, overall, the 'discharge' rate of panels remains the same, regardless of whether there is a pre-hearing examination of the patient by the tribunal doctor. This suggests that, where there is no pre-hearing examination, judicial panels are neither more nor less willing to discharge a patient – once all the evidence has been heard by the full panel. Moreover, many judges report that hearings without a pre-hearing examination go very smoothly, often with the full panel (rather than just the tribunal doctor) having an opportunity to hear from the patient at the start of the case, as well as later on.

The new rule is further supported by the Senior President of Tribunals' Practice Direction on the Content of Reports in mental health cases which is gradually making its mark in securing improvements to the quality of reports presented to the tribunal.

In June 2014, the Senior President approved further delegations of judicial functions to properly authorised staff, including to registrars who provide a great deal of support to the jurisdiction's salaried judges in dealing with a wide range of interlocutory and case-management issues.

New powers for authorised staff members include the issue of an order to any person to answer questions or produce any documents in that person's control which relate to any issue in the proceedings, and the issue of an order for two or more sets of proceedings in relation to the same patient and involving identical parties to be heard together. New powers for Registrars include the power to hold a hearing (generally by telephone) to consider any case-management issue.

The jurisdiction continues to discourage unnecessary postponements and adjournments, and a new approach to listing cases is helping to ensure that cases are listed much more quickly and efficiently. Over the past five years the jurisdiction has more than halved the adjournment rate, and this improvement has continued this year.

In January 2014, I wrote to salaried tribunal judges and registrars in the mental health jurisdiction to provide guidance in accordance with paragraph 7 of Schedule 4 of the Tribunals, Courts and Enforcement Act 2007 on handling applications for postponements and adjournments. The guidance does not seek to interfere with judicial independence and decision-making but sets out factors salaried judges and registrars may wish to take into account when considering requests to postpone and adjourn a hearing. Factors to consider included the importance of the parties offering us reasonable availability, and making their availability known at an early stage. I also took the view that where a legal representative is appointed after the case has been listed they should also accept the listed hearing date, subject to any exceptional circumstances. Moreover if, following a refusal to grant a postponement or adjournment, the application is renewed or repeated, compelling new grounds should be put forward together with an explanation for not including the new grounds in the original application. Repeated applications for the same order, based upon the same grounds, are to be discouraged.

### Special Educational Needs and Disability jurisdiction

It has been a busy and eventful year for the Tribunal, with special educational needs work increasing significantly and ongoing work to prepare for the implementation of legislative changes.

The conclusion of the first Senior President's Composition Pilot at the end of March 2014

led to amendment of the Practice Direction on Composition so that the panel now consists of a tribunal judge and one specialist member in appeals against a refusal to assess the special educational needs of a child.

A second Senior President's Composition Pilot is now planned, extending to all types of appeals and claims heard by SEND subject to judicial discretion, enabling a more flexible use of the Tribunal's resources to reflect the complexity of the cases heard.

On the 1 September 2014, the implementation of the Children and Families Act 2014 brought about major changes to the legislative framework of SEND work, representing the biggest change in the field for a generation. The impact of the change on disability discrimination claims is that young people over the statutory school age of 16 and up to the age of 25 can now exercise their own right of appeal and claim where previously, the right rested with their parents and ceased at the age of 19. The legislation is being phased in over a period of three years ending in March 2018 and its intention is to effect a significant change of culture in the pre-appeal process, requiring the full involvement of parents and young people from the outset in the decision making about special educational needs and provision.

Such a significant change of culture has provided SEND with the opportunity to explore the merits of reducing the appeals timetable from its current 22 weeks to 7, with both the administration and the judiciary keen to implement the reduction to enable swift conclusions to disputes about children and young people's educational provision. If the appellants are fully involved from the outset, then they will be fully aware of the nature of the dispute at an earlier stage and will be able to make their appeals in full much more quickly than previously.

The legislation will introduce further changes, which include a right of appeal for detained children and young people from April 2015 and further pilot programmes from September 2015.

### Care Standards

Several new rights of appeal are introduced into the Care Standards jurisdiction. From 1 September 2014, a right of appeal will lie to the Tribunal both by Childminder Agencies against Ofsted decisions and against Childminder Agency decisions by individual childminders. For the first time, it is possible that the same entity can be both an appellant and a respondent in appeals within the jurisdiction, albeit in different types of appeals.

There are new rights of appeal contained within Part 4 of the Education and Skills Act 2008 which is implemented in stages during the autumn of 2014 and applies to independent schools.

Continuing changes in the regulation arrangements for NHS providers is likely to lead to

additional rights of appeal against CQC decisions in the near future, but the date for the changes has not yet been finalised.

### Primary Health Lists

The transitional changes are now well established as are the consolidated Performers Regulations for Doctors and Pharmacists.

### Cases of Interest

#### Mental Health

There have not been many Upper Tribunal decisions of note in the mental health jurisdiction this year, but there was an interesting decision from the Court of Protection which focussed upon the use of Sections 2 and 3 of the MHA, and looked at the relationship of the MHA, and the Mental Capacity Act 2005 (MCA).

In *Northamptonshire Healthcare NHS Foundation Trust v ML & Otrs* 2014 EWCOP 2, Mr Justice Hayden considered the case of a young man of 25, with severe learning disability, developmental disorder, autism, epilepsy and diabetes who lived at home with his parents. The application was for him to be removed for treatment to hospital, against his parents' wishes. If this was to be done, questions arose as to whether it should be under the MHA or MCA, and if under the MHA, whether under section 2 or section 3 of the MHA. The judge said that there was a pressing need for clarity and predictability at the interface of the MHA and MCA regimes, and he decided that the rationale of the legislation drives one to the MHA where that legislation is being considered by those who could make an application, predicated on the relevant recommendations under section 2 or section 3. They, like the decision maker under the MCA should assume that the treatment referred to in the MHA cannot be provided under the MCA.

As for the choice between section 2 and section 3 of the MHA, the judge noted that the hospital:

“... had requested an admission initially under section 2. To my mind the evidence that I have heard plainly indicates that what is contemplated is an extensive course of treatment rather than an assessment. As I have said the projection of 18 -24 months has been given. Accordingly an application pursuant to section 3 seems both apposite and honest.”

This judgment would seem to support the view that the MCA Deprivation of Liberty provisions

were enacted by Parliament to fill a statutory gap (often referred to as the 'Bournewood Gap' after the preceding case-law) rather than to provide a duplication of provision already enacted in the MHA. It also confirms the views expressed in this report last year that section 2 should only be used if:

- the full extent of the nature and degree of a patient's mental condition is unclear, or
- there is a need to carry out an initial in-patient assessment in order to formulate a treatment plan or to reach a judgment about whether or not the patient will accept treatment on a voluntary basis, or
- there is a renewed need to carry out a full in-patient assessment in order to re-formulate a treatment plan, or good reason to require a new judgment about whether or not the patient will accept treatment on a voluntary basis.

However, section 2 should not be used if these matters are already sufficiently established to make it unnecessary to undertake a new and full assessment.

Guidance has also been given on the question of deprivation of liberty in the Supreme Court judgment of P (by his litigation friend the Official Solicitor) *v Cheshire West and Chester Council* and another, P and Q (by their litigation friend the Official Solicitor) *v Surrey County Council* [2014] UKSC 19. This judgment is highly relevant to this jurisdiction when questions as to restriction and deprivation of liberty arise. In particular, the court determined that:

- deprivation of liberty means the same for everyone, whether or not they have physical or mental disabilities, and is predominately an objective state;
- the starting point in deciding if someone is deprived of their liberty is the specific or 'concrete' situation of the person involved;
- the key feature of that 'concrete situation' is whether the individual is under continuous supervision and control and is not free to leave;
- the individual's compliance or lack of objection, the relative normality of the placement, and the reason or purpose behind the placement, are not relevant or determinative. Baroness Hale said that the comfort provided to the person detained made no difference – "A gilded cage is still a cage"

This decision means that efficient and expert judicial oversight in relation to a large number of cases involving detained persons with a disorder or disability of the mind, and which were

previously dealt with informally, will now be needed. This jurisdiction stands ready to offer such assistance as may be required.

## SEND

### Haining v Warrington [2014] EWCA Civ 398

The Master of the Rolls in the Court of Appeal provided a definitive judgment, resolving uncertainty and providing clarity in the interpretation of the term “public expenditure” which is relevant to an overarching principle under section 9 of the Education Act 1996, and which will continue to apply despite the legislative changes. The issue was the definition of the term, and whether it should have a wide interpretation of including all public expenditure on a child, or a narrow interpretation applying only the cost of to the education budget of a local authority. The judgment concluded that it should be widely defined as expenditure incurred by a public body as opposed to “private expenditure” by a private body, and not being confined to the education budget of the local authority alone. Highlighting the contrast in the terminology used in different parts of the Act referring to “public expenditure” and “resources”, the latter was confirmed as a reference to the resources of the education authority alone. The judgment has brought clarity to what has been a recurring issue for the Tribunal and has enabled the Tribunal to approach issues about the comparative cost of placements with certainty for the first time in many months.

### People and places

The senior judicial management group in the chamber, which supports me in my role and provides day to day judicial leadership to the salaried and fee-paid judicial office holders who sit in its jurisdictions consisted of Judge Mark Hinchliffe, Deputy Chamber President (Mental Health), Judge John Aitken, Deputy Chamber President (SEND, CS, PHL), Principal Judge John Wright (Mental Health) and Chief Medical Member Dr Joan Rutherford (Mental Health). Their work has been and continues to be invaluable in running, leading and innovating in the jurisdictions. This year, there have however been several significant changes to the group.

In April, John Wright, retired as a salaried judge although I am delighted that he is able to continue as a fee-paid judge. John's contribution to the jurisdiction has been enormous, both as a former Regional Chairman and, since 2009, as Principal Judge. His famous Bench Book continues as the template for all updated versions, and his experience and wisdom as a salaried member of the team will be greatly missed.

I was delighted that Judge John Aitken was appointed on promotion as Chamber President of the Social Entitlement Chamber on the 1 June 2014. The impact of his work across the three jurisdictions is reflected in the high standard of work and their effective running despite

the challenges presented and his innovative contribution to the work of the tribunals is much appreciated.

I was equally delighted that on 20 October following a Judicial Appointments Commission competition, Judge Meleri Tudur who has been lead salaried judge for SEND and a salaried judge in the Chamber for 5 years, was successfully appointed as Deputy Chamber President (SEND,CS,PHL).

The other appointment to the Chamber's salaried judicial complement was that of Judge Melanie Plimmer in May 2014. Melanie was appointed a full time salaried judge of the First-tier Tribunal and judicial lead of CS and PHL. She has retained her other jurisdiction duties as UT judge in IAC and has been warmly welcomed into the Chamber.

HESC continues to make best use of judicial resources by cross ticketing fee paid judges from MH to SEND and vice versa during the year. Ten members of the judiciary were cross-ticketed in each direction to enable greater flexibility in listing and sitting and ensuring a more consistent flow of work for those judicial office holders. With workload increasing, mental health has this year recruited more fee-paid judges and more tribunal doctors to sit on panels, and 10 new fee-paid judges were recruited by the JAC using an innovative process intended to open up the possibility of recruitment to lawyers with a much wider range of experience. I have also authorised a number of Circuit Judges to sit with us, principally on our restricted patient cases. I am very grateful to the Senior Presiding Judge for supporting this important contribution to our work from the circuit bench.

The Chamber's jurisdictional judicial training leads continue to work closely with the Judicial College. In Mental Health for example, judicial office holders are offered a prospectus of 12 one-day courses from which to choose, as well as a triennial residential core course. This year's prospectus includes new courses on risk, restricted cases and specific patient groups. We also provide an update on the law about the relationship between the MHA and MCA with reference to recent case law and practice, and we are continuing with our very successful course looking at the experience of patients in the system. Additionally, we have led the way at the Judicial College on internet-based eLearning for tribunal members, particularly in relation to safety at hearings, questioning skills, and decision-making. The latter two modules are accompanied by a quiz with a challenging pass threshold which was used to good effect on new member induction training.

## Administrative staff

For the SEND, CS and PHL administration, the long period of uncertainty regarding the relocation of the office following the closure of its long-term home at Mowden Hall in Darlington was resolved by the move to the upper floor of Darlington Magistrates' Court in August 2014. The move was managed in such a way as to have been concluded prior to the introduction of the legislative changes, and with minimal disruption to the Tribunal's work. The location provides many advantages over the Mowden Hall site, including the potential use of the youth/family court room for SEND hearings at a town centre location which is close to public transport links, with the added long term benefit of enabling a closer working relationship to develop between judicial office holders and administrative staff.

The mental health administrative support team based in Leicester continues to work hard on improving the service it provides, and routinely registers applications / references, sends reports to parties, deals with adjournments, and issues decisions within 24 hours of receipt.

## War Pensions & Armed Forces Compensation Chamber

### **President: Alison McKenna**

The Chamber has had a challenging year, following the sad death of Chamber President Judge Hugh Stubbs in January. I took up my post as his successor on the 8th September 2014.

It is very much to the credit of Judge Clare Horrocks as Acting Chamber President, working with the administration team and other colleagues that the Chamber has continued to function efficiently over the year, including absorbing an 18% increase in appeals, disposed of within a timescale very close to target.

There have been no significant legislative changes in the year, but our 'new' legislation, the Armed Forces Compensation Scheme, is due for its five year Review next year. The Chamber made a submission to the Ministry of Defence, suggesting issues that the Review might usefully cover. As with the 2010 Review, further legislative change can be expected following the 2015 Review.

Following the identification of the need to bolster the number of judges in the Chamber, we held a cross-Chamber assignment exercise, as a result of which eight salaried judges from the Social Entitlement Chamber have been assigned to the Chamber. They have now been inducted and started their sittings for this Chamber in September.



The Chamber held one day training events in the Spring. Legal and medical members shared some joint training whilst the Service members spent a day at the Defence Academy at Shrivenham, learning more about the Reserve Forces which are making up an increasing proportion of the total Force mix. Our autumn residential training conference included sessions on minor traumatic brain injuries and non-freezing cold injuries, a contribution from staff from Veterans UK, and a review of decisions from the Upper Tribunal.

Finally, we continue our work on cross-border issues through the Advisory Group consisting of the Chamber Presidents of the three appeal tribunals and other key interested parties. This work includes considering the harmonisation of the effects of the different Rules of Procedure which exist in England and Wales, and in Scotland and Northern Ireland.

## **Immigration & Asylum Chamber**

### **President: Michael Clements**

The Immigration and Asylum jurisdiction has always been, and remains, subject to fluctuations in workloads due to factors such as humanitarian or economic crises in parts of the world; the rate at which Home Office officials process migrants' applications, and therefore the rate at which appeals against their decisions are instituted and changes in legislation and government policy bearing upon the appeals process. Working together with HMCTS and in consultation with the Ministry of Justice and the Home Office, I try to stabilise such fluctuations. However from time to time there are wide variations in the requirement for Judges to conduct hearings.

Other areas of difficulty encountered this year include the difficulties faced when detained litigants are produced for the hearing late or fail to attend their hearings (usually bail applications or deportation appeals). This is a serious deficiency in the system which wastes a great deal of court time, and as a result, can lead to adjournment of cases which would otherwise have been concluded. I am working closely with the administration to resolve this issue. It is hoped this situation may improve with the establishment of a secure immigration facility for the hearing of deportation cases.

Resident Judges and administration in some of our hearing centres continue to experience a lack of judicial capacity to cover all the work which we are asked to undertake. This has resulted in parties being offered hearing days some months ahead and impacted on other centres.

In accordance with the principle of encouraging cross-ticketing and assignment within the judicial family and to cover the shortfall in judicial resources mentioned earlier, 197 fee-paid judges of the Social Entitlement Chamber and Employment Tribunal (both England and Wales, Scotland and Northern Ireland) have recently been assigned, following an “Expression of Interest” exercise, into First-tier Tribunal, Immigration and Asylum Chamber (F-tTIAC) for a period of two years whilst continuing to be available to sit in their own jurisdictions.

This has been possible because of a corresponding fall in the current workload of the Social Entitlement and the Employment Tribunals whose workloads are, in turn, expected to increase within the next couple of years. This may, in due course, require assignment in the opposite direction.

One hundred and twenty-two of these newly assigned judges attended a training week in October at which a number of salaried judges acted as facilitators. The remainder are due to attend training in February. The training has been designed and organised by Designated Judge Julian Phillips, who was appointed Training Judge of FtTIAC at the beginning of 2014, following the re-assignment of Judge John McCarthy who has my thanks for successfully leading our judicial training in the past. The newly trained judges will, before sitting in a “solo” capacity, sit and work together with experienced salaried judges for hearing and writing-up cases. They will also have, as do all salaried and fee-paid judges, the benefit of our judicial mentoring scheme which ensures regular contact with Designated and Resident Judges at the hearing centres.

I continue to have a close relationship with the Upper Tribunal Immigration and Asylum Chamber (UTIAC) and its President, Mr Justice McCloskey. A valuable contribution to the work of the UTIAC is made by those judges of the FtTIAC who sit there as Deputy Upper Tribunal Judges in a fee-paid capacity. I encourage cross-ticketing. It not only enhances individual judges’ legal skills, FtTIAC also benefits greatly from cross-fertilisation with the UTIAC and other jurisdictions.

The Judicial Appointments Commission is at present running a competition for both fee-paid and salaried UTIAC appointments. It is my hope that FtTIAC judges seeking enhance their judicial skills and experience will apply and hopefully succeed having learned much from FtTIAC’s close relationship with UTIAC.

Since the implementation of the Information Sharing Protocol, in part drafted by Resident Judge Martin along with colleagues from UTIAC and the Family Court, judges in the immigration jurisdiction now have day-to-day contact with Circuit Judges, District Judges and Magistrates in the family jurisdiction. This can produce very constructive exchanges of ideas benefitting both jurisdictions, which have an important degree of overlap when international family issues arise.

Some of the benefits of cross-jurisdictional contact have flowed from the relocation of the West London Family Court, under the leadership of Her Honour Judge Rowe QC, to FtTIAC's hearing centre at Hatton Cross. Similar arrangements are in place in North Shields. The County Court also regularly sits in the immigration hearing centre in Newport, Gwent.

In North Shields judges who hold "tickets" as deputy District Judges and in immigration regularly take lists in both jurisdictions in the course of one day. One of the Family Judges at Hatton Cross already has an immigration "ticket" and a number of judges in the immigration jurisdiction sit part-time as judges of County Courts.

It is hoped to develop these links further so as to advance the concept of a multi-disciplinary hearing centres. Ultimately, the aim must be maximum flexibility in the deployment of existing judicial resources among the Tribunals and Courts, a concept I have always strongly supported.

In July 2014 I published an internal consultation paper seeking views on the proposal to amend the appointment of Resident Judges in FtTIAC and also to introduce the appointment of Assistant Resident Judges to hearing centres that required further judicial leadership and management.

The proposal is in part aimed to separate FtTIAC from UTIAC in respect of judicial, leadership and management roles. I will continue to encourage close working between the two chambers, and I hope that in the future many judges of FtTIAC will continue to sit in UTIAC by way of competition rather than by way of their judicial position in FtTIAC.

It also aims to strike a balance by using judicial resources more flexibly and giving a clear leadership path to the appointment of a Resident Judge within FtTIAC rather than appointing by way of expressions of interest from UTIAC. Where there is a need as identified by the Resident Judge of the hearing centre and with the concurrence of myself, it will also enable the appointment of Assistant Resident Judges into leadership and management roles from salaried judiciary of FtTIAC.

Significant changes in the law relating to immigration are contained in the Immigration Act 2014, which is accompanied by new Procedure Rules for FtTIAC which came into force on 20th October 2014. It remains to be seen how these changes will work out in practice, but it is clear that, in the coming months, the process of change will make considerable demands on an already hard pressed judiciary, Training Judges and administration.

On an international basis, the Manchester hearing centre, headed by Resident Judge Christine Martin, recently hosted a conference of European Administrative Judges organised by the President of the Upper Tribunal. Designated Judge Jonathan Lewis has attended the European

Court of Justice, and has visited Poland on two occasions in connection with the Polish Court Modernisation Project. Designated Judges John Manuel and Julian Phillips have attended the Strasbourg Court and Designated Judge Edward Woodcraft was formally invited by the European Asylum Support Office to take part in a needs assessment and training in respect of Bulgarian judiciary. Again I see these visits as positive judicial development which can only enhance the reputation of the chamber and shows how much our judicial system is admired and copied in other countries.

Regarding my colleagues in FtTIAC, it is my sad duty to record the deaths in the past year of Graham Davies, Robert Bailey-King, Linda Brown, Francoise Snape, Gail Elliman and Nick Bowen all of whom will be sadly missed by their colleagues.

For the good news, I extend our best wishes for their future to all our colleagues who left us this year either in retirement or to go to pastures new, many to higher courts.

This has been another challenging year for the First-tier Tribunal Immigration and Asylum Chamber and the report would not be complete without my thanking both the judiciary and administration for their help and support during these difficult and challenging times and to hope they will, with me, look forward to meeting new challenges in the future.

## **Tax Chamber**

### **President: Colin Bishopp**

In my report last year I described a fairly uneventful twelve months. This year began in a similar fashion: we made some inroads into our backlog, following the determination of various procedural and jurisdictional disputes by the Upper Tribunal. But we still have a great many stayed cases: we had, for example, hoped that a recent judgment of the European Court would clear the hundreds of appeals by golf clubs seeking repayment of VAT charged on green fees but, contrary to that expectation, the judgment has given rise to a great many other issues, and these appeals seem destined to remain with us for some time to come. Our stock of Missing Trader Intra-Community (MTIC) appeals, too, is only slowly diminishing, and they continue to be demanding of our resources of judiciary and courtroom space.

I predicted last year that we would by now have begun to see appeals generated by the then recently-enacted the General Anti-Abuse Rules (GAAR) provisions, but in fact we have seen none, and the signs now are that such cases will be rare. Appeals in which tax avoidance, or alleged tax avoidance, is in issue nevertheless retain a prominent role in our work, and we are

forecast to receive large volumes of additional work of this kind as a result of the measures included in the Finance Act 2014, enabling HMRC to serve accelerated payment notices on taxpayers who, they believe, have entered into tax avoidance schemes (in essence, a “pay now argue later” measure), and follower notices, by which they assert that there is a decision of a court or tribunal, including the First-tier Tribunal, which shows that a particular scheme does not work. A follower notice requires the taxpayer to amend his return, so as to eliminate a claim for relief based upon that scheme, and imposes penalties if he fails to comply. No follower notices have, so far, been issued; but there is a programme for the issue of many thousands of accelerated payment notices, which has recently begun, and we are expecting significant numbers of additional appeals generated by these measures to reach us, starting in early 2015.

I mentioned last year that the expiry of our lease at Bedford Square in London would require us to move. As I write that move, to the Royal Courts of Justice, is imminent. The First-tier Tribunal judges are moving, with the Upper Tribunal judiciary, to what will for a short time be rather overcrowded accommodation, though fortunately the First-tier Tribunal will be moving again in the latter part of 2015 to other central London premises, when they have been identified and re-configured.

These moves, and the forecast increase in workload, have led to a change in our administrative arrangements. The “point of entry” for tax appeals has been in Birmingham ever since the Chamber came into existence, but much of the case handling thereafter moved to London, Manchester or Edinburgh. In the future, all the case handling, including the listing of hearings, will take place in Birmingham, but there will be electronic communication with the salaried judges whenever judicial input is required. Different arrangements will be made for Scotland, because of the devolution of certain taxes to the Scottish Parliament and the creation of a Scottish tax tribunal. Much of the detail remains to be decided; but it is clear that we have major changes in store in Edinburgh.

Several of the judges and members assigned to the Chamber have retired during the course of the year, and I hope the others who have retired will forgive me if I mention only one, Judge David Demack. Mr Justice Warren has recorded David’s retirement in his report, but I must add a few words of my own, since he has been a stalwart of the First-tier Tribunal and its predecessors ever since he began his judicial career, as long ago as 1986, as a lay member of what was then the Value Added Tax Tribunal. He became a fee-paid chairman in 1990, and full time in 1993, later becoming a Special Commissioner in addition. For 22 years he has been one of the two resident judges (as they now are) in Manchester, and he has rendered what can only be described as sterling service during that time. He will be very much missed.

We have also said farewell to Judge Alison McKenna. Alison has been assigned to several Chambers, both of the First-tier and Upper Tribunals, but her base was with us in Bedford Square, where she sat as a Tax Chamber judge, until she was appointed to the Presidency of the

War Pensions and Armed Forces Compensation Chamber. She has now moved to Fox Court. I wish her well in her new role.

When I wrote my report last year I was unaware of the forthcoming increase in our work, and mentioned only a modest recruitment exercise. The legislative changes I have mentioned led to a significant reconsideration of that exercise, which has very recently ended, and the numbers of new judges, both salaried and fee-paid, we are expecting to add to our existing judicial resource is several times greater than I had anticipated.

These are interesting times for us, and there are several challenges ahead as entirely novel work reaches us. But I am confident that our staff, and the judges and members, both established and newly recruited, will meet the challenge.

## **General Regulatory Chamber**

### **President: Nicholas Warren**

An Annual Report allows for a review of the calendar; it is also an opportunity to take stock.

This has been a year of consolidation for the GRC as our role in the tribunal system becomes clearer. Before the Tribunal and Courts Enforcement Act 2007, new legislation often required a new tribunal to be set up. Frequently, out of caution, far more judges and members were recruited than were justified by the resulting workload. These small tribunals also became remote from national developments in tribunal justice. The role of the GRC is to provide a home for myriad small jurisdictions, recruiting only if necessary. This requires a strong adept judiciary. Once a jurisdiction is within the Chamber the GRC must then be able to keep it within mainstream judicial policy and, for example, give access to the best of the training being developed by the Tribunals Committee of the Judicial College.

This year we have received three new jurisdictions as well as a number of additional rights of appeal within existing ones. The first of these relates to the labelling of food in which it is likely that we will need to provide a speedy remedy consistent with the developing EU law on this topic. The other two both involve new civil penalties. It is government policy that every employer should offer a pension scheme. An employer who fails to do so may be punished by the pensions regulator by a monetary penalty. Similarly, a change in electoral registration means that individuals named on a householder's electoral return who cannot be identified from existing government records must make their own application to be included on the register of voters. A failure to do so, after laborious persuasion, may result in a monetary

penalty of £80.

These last two new jurisdictions present a challenge to the Chamber's policy of holding local hearings. We have been able to develop this by using other Courts and tribunal premises up and down the country but it is one thing to send a judge to a town for a hearing lasting a day or two days; quite another if the hearing is not expected to last more than about half an hour. Again, however, cooperation under the 2007 Act supplies an answer and I am grateful to my colleague, John Aitken, President of the Social Entitlement Chamber which has the widest coverage of hearing rooms, for agreeing in principle that we might solve this problem by having these cases heard by a salaried Judge in his Chamber, assigned for these purposes to the GRC.

The established jurisdictions have, for the most part, continued their work as normal.

In charities, the tribunal considered the case of the Human Dignity Trust. This raised for the first time questions relating to the promotion of human rights, which was introduced as a charitable purpose by the Charities Act 2006.

In gambling, the few cases have been dominated by questions of law concerning the Gambling Commission enforcement of its policies concerning gambling machines in betting shops.

In information rights, the Senior President issued a consultation paper on the composition of the tribunal. As a result some cases turning on questions like whether the public authority holds the information at all or whether it would be too expensive to meet the request will be decided by a judge alone. The vast majority of cases will continue before a three person panel.

As part of the abolition of the Office of Fair Trading and the transfer of its functions to the Financial Conduct Authority, a statutory instrument transferred the consumer credit jurisdiction to the Upper Tribunal and the money laundering part of the estate agents jurisdiction to the Tax Chamber of the First Tier Tribunal. I regret that this was done without consultation with the Senior President or any of the Chamber Presidents concerned. At no stage in relation to consumer credit does it appear that consideration was given as to which tier of the tribunal system was appropriate for these cases. I am pleased that assurances have been given that this oversight will not be repeated.

In Immigration Services, the tribunal has acquired a new power to suspend advisors who have been charged with certain criminal offences, including all indictable offences. Applications will be heard by a single judge. There may be an expectation that these will be heard quickly but this will have to be balanced against the requirement for judges to have proper information available to them when exercising their discretion.

So much for the calendar; what then of taking stock? For jurisdictions old and new, how should the GRC operate? The starting point of course must be the Leggatt report, especially paras 7.4 and 7.5. The approach must be an enabling one; supporting the parties in ways which gives them confidence in their own abilities to participate in the process and in the tribunal's capacity to compensate for lack of skills or knowledge on either side.

The GRC accepts an obligation to reduce the emotional and financial wear and tear of litigation. On one side it might be the harassed citizen or a busy firm. On the other it may be a hard pressed public authority. The GRC must not adopt the luxurious approach of setting its own standards and expecting everyone else to jump. It must enter into a relationship with the parties. This is exactly what the overriding objective in the Tribunal Procedural Rules encourages to do. We need to follow that objective imaginatively; to undo ingrained ideas; and to transform what for most people is an ordeal into a welcome and effective human right.

Some policy work is necessary before a notice of appeal even lands at the tribunal office. Usually in the GRC the respondent is a public authority. We should be alive to the real world in which it operates. Our conversations with public authorities should be on the basis that once they have taken an important decision, on the whole, the sort of material which they have gathered together for that decision should then be made available to the citizen and the tribunal with the minimum of embellishment required. We don't routinely need orders for disclosure. We don't need to make extra work creating a bespoke bundle or by demanding unnecessary witness statements.

The public authority's response must explain to the appellant the case against him or her. The language should be simple and clear and should tell the citizen about the law which applies to the case. The response should assist the tribunal to reach the correct decision and will therefore contain any necessary procedural information and all the relevant evidence. Of course, the response should also argue the respondents case.

For the appellant we need plenty of guidance on websites so that people know what they have to do. Judges and members must be aware of the guidance so that users can be confident that the website accurately describes how the judges and members will deal with their case.

An approach such as this very much reduces the amount of "case management" in which courts traditionally indulge. If the ground work has been done properly, case management in simple appeals may not be necessary at all.

Where case management is needed the GRC tribunal registrar adopts a new user friendly approach. Tribunals have traditionally spoken to the citizen in terms of "orders" and "directions", borrowing, it seems to me, unthinkingly from the courts. This language is foreign to the ordinary person of the 21st Century. Even where parties are legally represented it can have



unfortunate effects. Instead of encouraging the spirit of cooperation enshrined in the Rules, orders and directions risk causing great excitement amongst solicitors if a party is a couple of days late. They prompt requests for strike outs; or somewhat enthusiastically, for orders that the other side pay the costs of the solicitors letter writing to tell the tribunal about the misdemeanour.

Instead the Registrar's case management notes talk generally in terms of requesting the parties to do something and also take care to help anyone, represented or not, struggling with the procedures.

Further developments rest with Judge Peter Lane who succeeds me as President of the Chamber upon my retirement in February 2015.

## **Property Chamber**

### **President: Siobhan McGrath**

The Property Chamber was established in July 2013 and has now been in business for more than a year. That time has been spent in successfully bedding down the new rules and procedures and in establishing a corporate identity for the three constituent Tribunals brought together into the new Chamber structure. At the same time we have maintained business as usual in the Chamber's varied and challenging jurisdictions.

Altogether the Chamber deals with about 160 different property, landlord and tenant and housing jurisdictions which are divided between Residential Property, Land Registration and Agricultural Land and Drainage cases. The overall caseload is annually in the region of 11,000 applications and referrals.

### **Membership**

As well as being Chamber President, I am the Principal Judge for the Residential Property division of the Chamber. The Principal Judge for Agricultural Land and Drainage was Judge Nigel Thomas and until he retired in October this year, the Principal Judge for Land Registration was Judge Edward Cousins. Prior to the Chamber being created Ed had been the Adjudicator to the Land Registry. He had established the jurisdiction following the 2002 Land Registration Act and was instrumental in bringing the Chamber together. His leadership and skill will be missed but I am pleased to say that he will continue to sit as a fee-paid judge in the First-tier and Upper Tribunals. A new Principal Judge will be appointed in the Spring of 2015.

Residential Property has sixteen salaried judges and valuers and Land Registration has three salaried judges. Each of the Residential Property areas has a Regional Judge and one or more Deputies. Otherwise the work of the Chamber is carried out by fee-paid judges and members (about 300 in total). The membership includes those with expertise in valuation, in housing conditions and in agricultural matters. Both the Residential Property and Agricultural Land and Drainage jurisdictions also have a cohort of lay members.

At the end of last year we ran a successful exercise for judges within the Chamber to be cross ticketed to Residential Property and Agricultural Land and Drainage jurisdictions. Further such cross-ticketing is planned for the future.

### Administration

Residential Property cases are administered by case officers who are located in five regional offices: London, Midlands (Birmingham), Eastern (Cambridge), Southern (Chichester) and Northern (Manchester). The Land Registration staff are co-located with Residential Property staff in London. and Agricultural Land and Drainage cases are administered from the Residential Property Northern office. During the past year the Midland and Southern offices have moved premises and it is planned that the Northern office will move to the IAC building in Manchester in January 2015. All of the staff in the Property Chamber have worked extremely hard to ensure the smooth administration of the Tribunal during a time of significant change and disruption. I am very grateful to them for their dedication and their application to a challenging task. It is a significant achievement that our ambitious performance indicators have been met over the past year.

### Cross Chamber initiatives

The three divisions of the Chamber have a great deal in common. The work requires knowledge and skill in property and landlord and tenant law. Furthermore most of the cases of each of the three divisions are inter partes. We therefore consider that it is important to try and align procedure and approach across the Chamber where appropriate and to share good practice where possible.

### Governance and Property Chamber Review

Governance of the Chamber is undertaken by a Chamber Management Board which has sub-committees for training and appraisal, for members and for procedures. We also have the benefit of a Jurisdictional Board which brings together the interests of judiciary, HMCTS and the Ministry of Justice. For Residential Property we maintain links with the Department for Communities and Local Government who sponsor the underlying legislation for the jurisdictions; for Land Registration we have regular stakeholder meetings with representatives

of the Land Registry and for AL&D we seek the input of DEFRA on issues of principal and importance.

On appointment I was asked, within the first year, to carry out a review of the leadership and management structure of the salaried judiciary in the Chamber. The review was considered and signed-off by the Senior President in the summer. I had recommended little change and was able to provide reassurance that the system in place was both proportionate and practical. Going forward, I will continue to monitor the structure of the Chamber with the assistance of senior Tribunal judiciary.

### Training and Appraisal

The Chamber Training Committee is chaired by our Training Director. A composite bid for our training budget is made to the Judicial College. Over the past year in addition to bespoke training in each of the Chamber's jurisdictions, we have held a number of cross-jurisdiction training events. These have included a day's training on the 2013 Property Chamber rules and recently three one-day training events on costs which was offered to all Property Chamber judges.

Coming into the Chamber all three divisions had their own well established appraisal systems which had been in place for some time and had worked successfully. However, it was decided that it would be beneficial to have a single system applicable across the Chamber. The new scheme has now been agreed and will be used from 1st January 2015.

### Alternative Dispute Resolution

Both Residential Property and Land Registration have established procedures for judicial mediation. There is a real need for ADR in property and landlord and tenant cases. The parties will often have a continuing relationship and finding ways of resolving disputes which fall short of a full Tribunal hearing is sensible and proportionate. Over the next year we plan to expand the judicial mediation that we offer and with the assistance of colleagues in the MoJ and HMCTS to explore other dispute resolution techniques.

### Pro-bono advice and assistance

Over a number of years Residential Property has established relationships with the college of law and BPP law school who have been able to provide advice and some representation to Tribunal users. This year the Bar Pro Bono Unit has agreed to accept referrals in suitable cases from Property Chamber tribunals. For leasehold and mobile home cases we are greatly assisted by LEASE who as a government funded organisation is able to provide independent and impartial advice to users.

## The Jurisdictions

**Residential Property** has the highest caseload intake of the three jurisdictions. Its core work is made up of leasehold applications both in enfranchisement and leasehold management matters. Over the past fifteen years the work of the division has changed and developed. Significant new jurisdictions were added to Residential Property work by the Commonhold and Leasehold Reform Act 2002 and by the Housing Act 2004. More recently, disputes under the Mobile Homes Act 1983 were transferred to the Tribunal from the Courts and earlier this year new mobile homes jurisdictions relating to site rules and licensing under the Caravan Sites and Control of Development Act 1961 were also added to the portfolio of work. Training for judges, expert members, lay members and judges in this new work was delivered in the Spring and Autumn.

As might be expected in a Tribunal with such diverse jurisdictions, there have been a number of important Upper Tribunal, High Court and Court of Appeal decisions affecting our work. Examples of interesting enfranchisement decisions include that of the High Court in *Westbrook Dolphin Square Ltd v Friends Life Ltd* [2014] EWHC 2433 and *Kosta v Trustees of the Phillimore Estate* [2014] UKUT 0319 (LC) which examines the application of hedonic regression analysis for relativity calculations. In leasehold management the Court of Appeal decision in *Francis v Phillips* [2014] EWCA Civ 1395 has resolved the important debate on whether qualifying works are any work to a building or whether, for the purposes of section 20 of the Landlord and Tenant Act 1985, they should be considered as aggregated sets of work. There have also been a number of Upper Tribunal decisions on the Right to Manage (RTM). All are important but of particular note is *No 1 Deansgate (Residential) Ltd v No 1 Deansgate RTM Company Ltd* [2013] UKUT 580 where the meaning of “structurally detached” is explored and also *Ninety Broomfield Road RTM company Ltd v Triplerose Ltd* [2013] UKUT 606 which together with *Fencott Ltd v Lyttleton Court 14034a RTM Company* [2014] UKUT 027 decides that a single RTM company can exercise the RTM in respect of more than one set of premises. The issue is due to be considered by the Court of Appeal before the end of the year.

**Land Registration** work continues apace. I am very grateful to the judges of the jurisdictions who have gently eased me into a new area of fascinating law and practice. The work of the division is intellectually challenging and the cases diverse. Although there is a good level of representative in the jurisdiction there are quite a number of unrepresented parties. Again, there have been a number of cases of interest but to mention just two: *Walker v Burton* [2013] EWCA Civ 1228 related to manorial waste and the lordship of a manor. The Court of Appeal upheld the Tribunal’s exercise of the discretion to rectify the register, conferred by paragraph 6 of schedule 4 to the LRA 2002, with Mummery LJ paying tribute to the Judge’s learning and skilful handling of the extensive historical documents (dating back to the 13th Century). In *Gold Harp Properties Ltd v McLeod* [2014] EWCA Civ 1084, the Court of Appeal has resolved

the highly contentious issue concerning the power in schedule 4 to the Land Registration Act 2002, to correct mistakes in the land register, in effect applying two earlier decisions of the Tribunal.

**Agricultural Land and Drainage** applications continue to be received in similar numbers to previous years although it is inevitable that the case load will decline over time. Many of the cases relate to succession questions which may involve complex negotiations resulting in some justifiable delay in the cases reaching a conclusion. The division sits for between 30 and 50 hearing days each year. Around 10 of these are full hearings which can last several days. This does not reflect the total case load which is made up of approximately 150-170 succession cases and 30 drainage and good husbandry applications

### Caseload

The number of applications received and cases disposed by each jurisdiction in the Property Chamber for the financial year 2013-14 is set out below.

	<b>Cases received</b>	<b>Cases Disposed</b>
RP	9627	9633
LR	1203	1223
AL & D	194	211

### Conclusion

We look forward in the coming year to further consolidation of our procedures and working practice. The work of the Chamber is complex and challenging and the quality of the adjudication is high. I am very grateful to the judges, members and staff for their work in these interesting jurisdictions.

## Chapter Three - Employment

### Employment Appeal Tribunal

#### President: Mr Justice (Brian) Langstaff

The work of the Employment Appeal Tribunal (“EAT”) is to hear appeals on points of law arising from decisions of Employment Tribunals (“ETs”). Though it may sit in any location in Great Britain, it has two offices – one in Edinburgh and one in London. Though comment is sometimes made that during the past four years the EAT has not sat in Cardiff, it remains the case that if sufficient demand existed from amongst litigants and legal professionals to do so, this would be organised: but there has been no evidence of any such demand in practice throughout 2014.

2014 was the first full year in which the impact of the introduction of fees was felt, later coupled with the introduction of early conciliation through ACAS. ETs report a reduction in the number of applications received to some 20% of the level in the most recent years prior to fees being payable. This has translated into a reduction at the EAT, but to a lesser extent: the London office show a reduction in the number of applications received, to some 55% of the level in the last full year before fees became payable (at the end of July 2013), and the office in Scotland one of around 40 – 45%. Though considerably less than those in the ET these reductions are nonetheless startling and, if they continue, have implications for planning to meet future workload. The rate of receipt of fresh applications to appeal however shows no sign of declining further: it has remained steady throughout the year, at an annual rate of around 1250 applications across Great Britain, of which around 60 – 70 are appeals from Scottish ETs.

The future workload remains unpredictable, however. Much may depend on the policies of the Government in power after the May election in respect of ETs and the EAT; but putting both that and any effect from the devolution of the EAT in Scotland to Scottish Government control (see below) aside, the underlying trend in the number of applications being received prior to fees being chargeable was upwards, cases were becoming more complex by the year, and the underlying jurisdiction continued to expand as Parliament added to or adjusted employment rights. This argues for a slowly increasing workload over the next five years. Since over the past 5 years the proportion of all parties (whether employers or employees) being represented has also shown a significant change – from some 60% being represented to some 40% – and our statistics show that court hearings with unrepresented parties take longer, the work to be done remains substantial, and given the scale of funding cuts generally

is likely to become more so for each judge or member of staff: had it remained as it did before free charging began it would have been very difficult to sustain without further judicial and administrative resources being provided. It remains entirely possible that once Parliamentary intention has clarified, following the so far unsuccessful challenges to fees by way of juridical review, alternative sources of funding or representation may arise and further moderate the effects of charging, leading itself to some possible increase in the number of appeals from present levels.

Procedurally, the revised rules of the EAT and new Practice Direction both had their first full chronological year in operation, and worked smoothly. A handful of appeals were ruled “totally without merit” at “sift” stage, in accordance with those rules, and there has been no suggestion from any higher court that this has been inappropriate in any one of them. The revision to the overriding objective in the CPR which was highlighted in decisions such as *Mitchell* does not apply with the same force to the different rules of the ET and EAT, but the principle has been recognised judicially that it is an important aspect of justice that each case should have its fair share of the resources of the court, and to allocate too much time to one may deprive another of its rightful proportion.

Substantively, cases remain both varied and many of particular importance – ranging from a decision by Sir David Keene, as a temporary judge of the EAT, in the judicial pensions case of *O'Brien*; to the much discussed decision in *Bear Scotland* as to the amount of holiday pay due to workers. The latter showed an advantage of the jurisdiction being exercised on a truly national basis – it combined appeals from a Scottish ET with appeals from ETs in England in one hearing, in London. (The parties had the option of it being heard in Edinburgh). The EAT has reaped the considerable benefit of Lady Stacey, a judge of the Court of Session, sitting in London, as I believe it has by the President sitting in Edinburgh, in each case for 4 (separate) weeks of the year.

This brings me to another issue in the headlights this year: that of devolution. The EAT remains for the present a reserved Tribunal in Scotland. The Smith Commission recommended to Parliament in November that whereas the substantive law administered in Scotland and England should remain the same, administratively and judicially control should now be exercised by the Scottish Government. This has occupied some time in discussions as to the possible impact on the EAT in both principal locations, but no detail of proposed legislative changes will emerge for some time and it would be unhelpful to speculate.

Lady Stacey, those High Court judges from England and Wales authorised to sit at the EAT, temporary judges such as Sir David Keene, the resident Senior Circuit judges (HHJ Clark and Eady), a small cadre of circuit judges with particular experience in employment law, and the President make up what is a collegiate bench. Judges' meetings continue to be held, usefully, every month during term-time. A user group is consulted about possible changes in procedure.

The lay members group remains an important body, which makes useful contributions to the life of the EAT. Discussions occur on a regular basis with the Presidents of the ETs in both England (Brian Doyle) and Scotland (Shona Simon); judges of the EAT contribute to the training of Employment Judges (“EJs”), and EJs who are interested to do so attend the EAT on a rota basis to observe proceedings. All judges learn from these contacts, as they do from assisting the groups of international visiting judges (Hungary; China; Trinidad most recently) and students who come to marshal or observe.

The use of lay members as part of the panel to hear appeals has reduced significantly. A case-specific reason is required before a panel of three (or five) is constituted: but in those cases where the statutory discretion has been exercised to permit this, comment has often been made in the ensuing judgment about the particular advantages in those cases of having an input from those with high-level practical experience of the workplace.

Training of judges and lay members is organised by HHJ Eady and will be developed further in the coming year.

The free representation schemes (EARS and ELAAS) which have operated so successfully for some years in London has now been echoed by a similar scheme (“SEALAS”) in Scotland, with many thanks to Lady Stacey, Mungo Bovey and Brian Napier QC for organising this. Amongst courts dealing with party and party disputes, the EAT has very considerable – if indeed, not pre-eminent – experience in assisting litigants in person, and those professionals who give their time so freely and reliably to assist them where it is desired deserve praise.

I am particularly grateful to the staff at the EAT, who have had to endure both the difficulties of a growing workload which threatened to become unmanageable within current resource until mid-2013, and then threats to existing resources posed by the danger of too quick a reaction to the drop-off in the number of applications received, for their continued effective and cheerful service. The staff, though fully reflecting all the many different strands of the society they serve, are a cohesive group, to whose patience and hard work the EAT is indebted.

In summary, 2014 has been a year in which many changes have come to fruition. 2015 is likely to be every bit as eventful. I am confident, however, that with a settled team of staff and judges – my own term of office is confirmed until the end of December 2015 – the EAT is in good shape to manage those changes.



## Employment Tribunals (England & Wales)

**President: Brian Doyle**

### The jurisdictional landscape

As reported in the Annual Report 2014, fees were introduced for bringing claims in the Employment Tribunal on 29 July 2013. HMCTS made a number of changes to the fee remissions system from 30 June 2014. The changes are intended to simplify the remissions application process.

A challenge to the fees regime was launched by way of judicial review by the Unison trade union. The High Court regarded the challenge as premature until there was further evidence of the effect of fees upon claims: *R (on the application of Unison) v Lord Chancellor (EHRC intervening)* [2014] EWHC 218 (Admin) (7 February 2014). On appeal to the Court of Appeal (18 September 2014), it was agreed that the matter should be returned for hearing in the High Court on the basis that such further evidence was now available. The judicial review was heard on 21–22 October 2014 and the application was dismissed on 17 December 2014: *R (on the application of Unison) v Lord Chancellor (No. 2) (EHRC intervening)* [2014] EWHC 4198 (Admin).

With effect from 6 April 2014 (on a voluntary basis) and then from 6 May 2014 (on a mandatory basis) an ACAS early conciliation scheme was introduced. The legislative framework is derived from the Enterprise and Regulatory Reform Act 2013 and the new or amended provisions of sections 18–18C of the Employment Tribunals Act 1996. The details of the scheme are to be found in the Early Conciliation Rules of Procedure contained in the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014. The Employment Tribunal Rules of Procedure 2013 are amended accordingly. In essence nearly all claims in the Employment Tribunal are now subject to a requirement that the prospective claimant must first contact ACAS under the early conciliation scheme before an actual claim can be presented to the Employment Tribunal. Provision is made for “stopping the clock” of time limitation while the early conciliation process is in train for up to one month (with the possibility of a further extension of two weeks).

### Trends

For a more sophisticated understanding of the trends in Employment Tribunal claims reference should be made to the quarterly and annual reports (and the supporting data files) provided online by the Justice Statistics Analytical Services Division of the Ministry of Justice.

In 2003/04 the Employment Tribunal in Great Britain received c 130,000 total claims. That had risen to c 236,000 in 2009/10, but fell back to c 192,000 in 2012/13, before the introduction of fees. In 2013/14 (of which 8 months are after the introduction of fees) the Employment Tribunal received a total of c 106,000 claims. Single claims represented c 78,000 in 2003/04, c 71,000 in 2009/10, c 55,000 in 2012/13 and c 34,000 in 2013/14.

A useful comparison might be made between Q2 2013 (April-June 2013) – before fees were introduced, but not including the spike of claims in July 2013 that anticipated the start of fees – and Q2 2014 (April-June 2014). What is seen is a fall of 81% in all claims, being a fall of 70% in single claims and 85% in multiple claims.

The first effects of Acas early conciliation can also be seen by comparing Q1 2014 (January-March 2014) with Q2 2014 (April-June 2014). This comparison points to a fall of 22% in all claims, 33% in singles and 11% in multiples. It is very early for firm conclusions, but that appears to be in line with the impact that might have been anticipated of early conciliation without the combined effect of fees.

An explanation in part for the sharp fall in claims represented by multiple claims is due to the continuing settlement of the local government equal pay claims and the airline holiday pay litigation. As these claims settled during 2013 they have fallen out of the quarterly data (and the live caseload), thus emphasising the difference in the caseload when compared with the same quarter 12 months earlier. However, this is insufficient to explain the full dramatic effect of the fall.

The single claims that have experienced the most noticeable fall are the fast track cases (unpaid wages, notice pay, holiday pay and redundancy pay) and the standard track cases (unfair dismissal complaints in the main). The position with open track cases (discrimination claims) is more complex, with some types of discrimination claims showing a steep decline in new presentations, while the decline in some others is less marked. On the limited amount of information available, however, more of these cases than other types are standing up for hearing.

### Major jurisdictional changes

One of the more complex jurisdictions of the Employment Tribunal concerns the various employment rights issues that arise from a transfer of an undertaking. The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2013 came into force on 31 January 2014 with the intention of simplifying the law and aligning it more closely with the EU Acquired Rights Directive. New sections 198A and 198B of the Trade Union and Labour Relations (Consolidation) Act 1992 also enable a transferee to engage in pre-transfer consultation over collective redundancies.

On 6 April 2014 section 66 of the Enterprise and Regulatory Reform Act 2013 came into force. This had the effect of repealing the statutory questionnaire procedure available in employment discrimination cases under section 138 of the Equality Act 2010. This has been replaced by informal procedures for raising written questions in discrimination and equal pay cases. ACAS has published non-statutory guidance on how employees and employers should raise and respond to such questions.

Measures have been introduced from 6 April 2014 to permit the Employment Tribunal to exact penalties on employers in breach of employment rights where the breach has one or more aggravating features. These provisions are the result of section 16 of and Schedule 3 to the Enterprise and Regulatory Reform Act 2013. See the new section 12A of the Employment Tribunals Act 1996. The penalty may be fixed at half the amount of the total award, subject to a minimum of £100 and a maximum of £5,000.

The Children and Families Act 2014 extended the right to request flexible working to all employees after 26 weeks' service. The changes came into force on 30 June 2014. They are supported by the Flexible Working Regulations 2014, as well as by an ACAS Code of Practice and non-statutory guidance.

Since 1 October 2014 Employment Tribunals have now been provided with the power to order equal pay audits where an employer is found liable in respect of gender pay discrimination. The provision is to be found in section 139A of the Equality Act 2010 (as amended by the Enterprise and Regulatory Reform Act 2013) and in the Equality Act 2010 (Equal Pay Audits) Regulations 2014.

From 1 October 2014 a new right for employees and certain agency workers was introduced in the Children and Families Act 2014. The right is to take unpaid time off work to attend up to two ante-natal appointments with a pregnant woman with whom they have a qualifying relationship.

Also with effect from 1 October 2014, section 48 of the Defence Reform Act 2014 amended section 108 of the Employment Rights Act 1996 so far as armed forces reservists are concerned. The statutory qualifying period for unfair dismissal (two years) will not apply where a reservist is dismissed from their civilian employment for a reason connected with their membership of a reserve force.

1 October 2014 also saw a further change to the public interest disclosure (whistleblowing) provisions. Section 43F of the 1996 Act now provides that qualifying disclosures to a prescribed person will be protected. This is backed by a new list of prescribed persons in the Public Interest Disclosure (Prescribed Persons) Order 2014.

## Interesting cases

In *Crystal Palace FC Ltd v Kavanagh* [2013] EWCA Civ 1410 the Court of Appeal held that dismissals by an administrator in order to reduce the wages bill so as to keep an insolvent business afloat were for an economic, technical or organisational reason entailing changes in the workforce. Although the administrator had a longer-term objective of securing the sale of this business, that was a separate reason from the administrator's shorter term objective. As a result the dismissals were not automatically unfair and liability did not pass to the new owner of the business.

*Bull v Hall* [2013] UKSC 73 is a non-employment case of significance for how Employment Tribunals should interpret the Equality Act's provisions on direct and indirect discrimination. A majority of the Supreme Court held that a hotel's policy of only letting married heterosexual couples share a double-bedded room amounted to direct discrimination against a homosexual couple in a civil partnership. The minority of the Supreme Court considered that the hotel's room policy was unjustified indirect discrimination on the ground of sexual orientation.

In *Mba v Merton LBC* [2013] EWCA Civ 1662 the Court of Appeal found that an employer was justified in requiring a Christian to work on Sundays. The majority considered that the right to religious freedom under article 9 of the European Convention on Human Rights was engaged. It was thus an error, when assessing justification, to take into account the suggestion that any group impact was limited because the belief that Sunday should be a day of rest was said not to be a core Christian belief. In judging proportionality it was not necessary to establish whether an employee was disadvantaged with others sharing his or her beliefs, provided there had been interference with a personal right.

In *Gallop v Newport City Council* [2013] EWCA Civ 1583 the question for the Court of Appeal was whether an employer could not reasonably have been expected to know that an employee with stress-related symptoms was disabled. The employer had been informed by occupational health advisers that the employee was not disabled. However, the statutory test for knowledge of disability does not permit an employer simply to adopt an occupational health adviser's opinion. The question is whether the employer had actual or constructive knowledge of the facts constituting the claimant's disability.

In *USDAW v Ethel Austin Ltd* [2014] EWCA Civ 142 the Court of Appeal referred a question to the Court of Justice of the European Union as to the meaning of an establishment. This is relevant to the interpretation of the provisions on consultation in collective redundancies in section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992. The reference is of considerable significance for a number of claims for protective awards in the Employment Tribunal.

The Court of Appeal has resolved a troubling conflict in earlier case precedents as to whether post-termination victimisation is unlawful under section 108 of the Equality Act 2010. *Jessemey v Rowstock Ltd* [2014] EWCA Civ 185 is authority for saying that the failure to make express provision proscribing post-employment victimisation in the Act was a drafting error capable of being corrected by judicial construction.

In *Jafri v Lincoln College* [2014] EWCA Civ 449 the Court of Appeal determined when it would be appropriate for an appellate tribunal to remit a case to the Employment Tribunal on appeal. Where there is a legal error in an Employment Tribunal decision, the case must be remitted unless the error cannot have affected the result, or it is possible to determine what the result must have been but for the error, or the issue can be decided with the parties' agreement. See also *Burrell v Micheldever Tyre Services Ltd* [2014] EWCA Civ 716 to like effect.

The Court of Justice of the European Union has determined that there is an infringement of a worker's right to paid annual leave under the EU Working Time Directive where future remuneration does not take account of the worker's inability to earn commission while on annual leave. See *Lock v British Gas Trading Ltd* (C-539/12). Such a worker would be entitled to receive additional sums in respect of annual leave representing commission that would have been earned but for the annual leave. The matter has returned to the Employment Tribunal to assess the method of calculation. Further cases awaiting a decision of the Employment Appeal Tribunal (*Fulton v Bear Scotland Ltd and Wood v Hertel (UK) Ltd*) will determine what account must be taken of overtime that might otherwise have been worked during a period of annual leave. The Employment Tribunals anticipate a large volume of new claims as a result of these developments.

In *CD v ST; Z v A Government department* (C-167/12 and C-363/12), which was in part a reference from an Employment Tribunal in England & Wales, the Court of Justice of the European Union held that the denial of maternity or adoption leave and pay to a mother who has a baby through a surrogacy arrangement is not a breach of the EU Pregnant Workers Directive or the EU Equal Treatment Directive.

The Supreme Court in *Clyde & Co LLP v Bates van Winkelhof* [2014] UKSC 32 has ruled that a female equity partner in a limited liability partnership fell within the definition of a worker for the purpose of being enabled to pursue a public interest disclosure claim (whistleblowing) under the Employment Rights Act 1996.

In *Peninsula Business Services Ltd v Information Commissioner* [2014] UKUT 0284 the Upper Tribunal (Administrative Appeals Chamber) has determined that HMCTS is not obliged to disclose the names and addresses of respondents to Employment Tribunal claims to an employment law advice business. The information was held to be subject to an exemption for court records in the Freedom of Information Act 2000.

In *Hounga v Allen* [2014] UKSC 47 the Supreme Court permitted a domestic worker to pursue a claim for race discrimination in the Employment Tribunal. The claim was concerned with discriminatory treatment during her employment and her subsequent dismissal. Her right to bring the claim had been challenged because it was said that she had been working illegally. The connection between the illegality and unlawful race discrimination was held to be insufficiently close to prevent the claim from being pursued. In addition, the majority view was that public policy against forced labour outweighed the defence of illegality.

### Other developments

Rule 7 of the Employment Tribunal Rules of Procedure 2013 provides that the President may publish guidance for England and Wales as to matters of practice and as to how the powers conferred by the Rules may be exercised. Any such guidance shall be published by the President in an appropriate manner to bring it to the attention of claimants, respondents and their advisers. Tribunals must have regard to any such guidance, but they shall not be bound by it. Presidential Guidance in England & Wales has been published on rule 21 judgments; on seeking a postponement of a hearing; on case management; and on making a statutory appeal falling within the jurisdiction of the Employment Tribunal.

Research for the Department of Business Innovation & Skills (*Payment of Tribunal Awards, 2013 Study*) has found that only 49 per cent of successful Employment Tribunal claimants received their awards in full. A further 16 per cent were paid in part, while 35 per cent received no part of the award.

The Small Business, Enterprise and Employment Bill, currently before Parliament in the 2014–15 session, if enacted, would impose a financial penalty upon respondents who fail to pay sums awarded by an Employment Tribunal or due under Acas-conciliated settlement agreements. The Bill would also provide for changes to the Employment Tribunal rules of procedure so as to place limitations on applications for postponements and to deal with the costs implications of such postponements. The Bill had concluded all stages in the House of Commons and had reached the Committee stage in the House of Lords by late January 2015.

If enacted, the Deregulation Bill 2014–15 will repeal the Employment Tribunal power to make wider recommendations in discrimination cases. The Bill had concluded all stages in the House of Commons and was due to reach its Report stage in the House of Lords in early February 2015.

### Innovations

During the course of the year the Employment Tribunal in England & Wales introduced a change to the way in which case management hearings are listed in discrimination and other

complex cases. Previously, the need for a case management hearing would be identified when the claim and response were considered by an Employment Judge after receipt of the ET3 response. That often meant that it would take some weeks for the matter to come to the case management hearing and in turn that would delay the listing of the final hearing. As a result, many discrimination and other complex or multi-day cases were not being heard or commenced within 26 weeks of the ET1 claim, which is a key measure of performance. Now a case management hearing in such cases is automatically listed at the same time as notice of the ET1 claim is served upon the respondent. A case management hearing will typically be set about 8 weeks later (that is, usually 4 weeks after the ET3 response is due). At the rule 26 initial consideration of the claim and response a judge will consider whether the case management hearing remains necessary and, if not, standard case management orders and listing instructions can be issued.

### People and places

Judge David Latham retired as President of the Employment Tribunals (England & Wales) on 31 March 2014.

Judge Brian Doyle became President in England & Wales with effect from 1 April 2014. Judge Doyle was previously the Regional Employment Judge for the North West region. The Judicial Appointments Commission launched an exercise in October 2014 to fill the resulting vacancy, Employment Judge Peter Russell has been Acting Regional Employment Judge in the interim. Employment Judge Stuart Robertson was appointed as Regional Employment Judge with effect from 2 February 2015.

Two salaried Employment Judges were appointed as Circuit Judges during the year – Mary Stacey and Katherine Tucker. A fee-paid Employment Judge, Kate Markus QC, was appointed as a salaried Judge of the Upper Tribunal (Administrative Appeals Chamber).

John van Gelder retired as a salaried Employment Judge.

The following former salaried Employment Judges, who had sat in retirement as fee-paid Employment Judges, ceased sitting during the year of report: Ralph Barton, Jeremy Cole, Douglas Crump, Christopher Goodchild, Russell Hardwick, Michael Malone, David Milton and Charles Twiss.

The following fee-paid Employment Judges also ceased sitting during the year of report: Anthony Druce, Gordon Etherington, Susan Evans, Linda Goldman, John Goodman, Tessa Green, Lawrence Guyer, Hugh Parker, James Simpson, David Skinner, Raymond Trickey, John Vinecombe, John Walker and Noah Weiniger.

There was no recruitment of fee-paid or salaried Employment Judges or non-legal members of the Employment Tribunal during the period covered by this report.

As at 31 October 2014 in England & Wales there is one President, 11 Regional Employment Judges (with one vacancy), 134 salaried Employment Judges (118.5 full-time equivalents), 230 fee-paid Employment Judges and 1,114 non-legal members.

In October 2014 fee-paid Employment Judges were successful in an expressions of interest exercise to be assigned temporarily to the Immigration and Asylum Chamber of the First-tier Tribunal to assist with an anticipated increase in caseload in that jurisdiction. They remain available to sit in the Employment Tribunal.

Ten of the 12 Employment Tribunal regions have now completed the centralisation of their administrative support. The remaining two regions (the South West region and the London North & West region) are expected to complete this process during 2015. Two regions (the South West and the East Midlands) will also be affected by relocation projects during 2015 (affecting the Employment Tribunal premises in Bristol, Nottingham and Leicester).

## **Employment Tribunal (Scotland)**

### **President: Shona Simon**

#### The Jurisdictional Landscape

#### [Further significant change may be on its way](#)

Last year I stated that the Employment Tribunal system continued to be the focus of significant change, given the introduction of fee charging and new rules of procedure on 29 July 2013. While the introduction of fees has undoubtedly had a major impact on the Employment Tribunal system in Scotland, little did I realise that I would be reporting this year on a potential change which might be regarded as equally significant.

It may be recollected that a few years ago active consideration was being given to devolving the administrative and judicial arms of Employment Tribunals (Scotland) so that Employment Judges and Members of the tribunal would come under the judicial leadership of the Lord President, with the administrative support service being provided through what is now known as the Scottish Tribunals Service (soon to be the Scottish Courts and Tribunals Service). Consideration was also being given at that time to the devolution of the other reserved



tribunals (i.e. those tribunals which make judicial decisions in Scotland about matters of law reserved to the UK government/parliament, which are currently provided with administrative support from Her Majesty's Courts and Tribunals Service and which come under the judicial leadership of the Senior President of Tribunals). That plan was put on the back burner for various reasons. It would be fair to say that it now appears to have moved on to the front burner, following the views expressed by various political parties in Command Paper 8946 (published 13 October 2014) and the recommendations of the Smith Commission, which were set out in the report of the Commission, published on 27 November 2014. While further detail is given in the Scottish cross border report about the general picture it does appear as if there is strong political support from various quarters for the devolution of Employment Tribunals (Scotland).

Some flesh was put on the bones of the Smith Commission recommendations in **Scotland in the United Kingdom: An enduring settlement** (Command Paper 8990) which was published on 15 January 2015. The Scottish cross border report has further detail on what is proposed.

Assuming legislation is passed (it being confidently asserted by the current UK government, that it will be) to devolve Employment Tribunals (Scotland), a significant amount of work will be required to ensure that the transition is as smooth as possible and the interests of users are protected. It will be of the utmost importance that everything that can be done is done to ensure that users of the system continue to receive the level of service which they are entitled to expect without interruption. It will also be of critical importance, given it is now clear that substantive employment law is to remain reserved to the UK parliament, that the various links which currently exist between Employment Tribunals north and south of the border, and with the Department for Business, Innovation and Skills (as the UK department responsible for the substantive law) are maintained.

There will also be technical, legal issues to be resolved. For example, where would Employment Tribunals (Scotland) sit within the judicial structure in Scotland? Those with a keen interest in the constitutional set up which applies to tribunals will be aware that at the moment Employment Tribunals (Scotland), together with Employment Tribunals (England and Wales) and the Employment Appeal Tribunal (EAT), make up what is known as the "separate pillar", that being outside of the First Tier Tribunal/Upper Tribunal structure created by the Tribunals, Courts and Enforcement Act 2007. The creation of the separate pillar in 2007 reflected the desire in various quarters to ensure that the distinctive nature of Employment Tribunals, and the EAT, as party-party fora (rather than administrative tribunals), and their particular expertise, were recognised and protected. The Tribunals (Scotland) Act 2014 simply creates a First Tier Tribunal and an Upper Tribunal for Scotland. The issue thus arises of whether that structure would have to be changed to any extent, on devolution of Employment Tribunals (Scotland),

to introduce something akin to the current separate pillar under the 2007 Act.

Indeed, it might be argued by some that devolution could present an opportunity to do some “blue sky thinking” about where the body which adjudicates on employment and most equality disputes should sit within the judicial structure in Scotland. In that regard it is interesting to note that there have been various suggestions made recently (see, for example, the Law Society of Scotland’s reports on Employment Tribunal Fees, issued in July 2014 and “Scotland’s Constitutional Future 2”, the latter being a contribution to the debate which occurred in Scotland prior to the independence referendum in September 2014) to the effect that consideration might be given to the creation of an Employment and Equality Court. Similar suggestions have emanated from various quarters in England and Wales. While I will keep my own counsel so far as that particular suggestion is concerned, it is worthy of note that others appear to be of the view that the time might be right to consider constitutional/structural issues of this type. That having been said, Cmnd 8990 refers specifically to the draft legislation providing a mechanism “for the transfer of functions from reserved tribunals to Scottish tribunals” (para. 6.3.1) and draft clause 25, found in appendix A of that document, refers to transfer of functions from a reserved tribunal “to a specified Scottish tribunal”.

It seems clear that tribunal rule making powers are also to be devolved to Scotland (see para. 6.3.1 Cmnd 8990). Currently there is a single set of Employment Tribunal Rules, for which BIS has policy responsibility, which apply in England and Wales and in Scotland. While there are currently some differences in Employment Tribunal procedure north and south of the border, generally tribunal users (many of whom are involved in cases in both jurisdictions) find there is much procedural similarity. Issues will no doubt arise about whether it would be beneficial for users for that to continue and, if so, the extent to which it may be possible. The range of matters to be considered will also be affected by whether fees policy is to be devolved. In para. 6.3.1 of Cmnd 8990 it is stated that powers in connection with “funding” of tribunals are to be devolved. Since the key policy justification for the introduction of fees has been stated to be the need to ensure that those who use the system fund it, at least in part, some might speculate that the intention is to devolve control over fees policy but nowhere is that stated expressly. This is a very significant matter so far as the operation of Employment Tribunals (Scotland) is concerned. Indeed, the introduction of fees in July 2013 has had a dramatic impact both sides of the border.

### The impact of fee charging

It is now possible, using the publicly issued MoJ statistics, to compare the case load of Employment Tribunals (Scotland) for the first six months of 2013 (prior to the introduction of fees) with the first six months of 2014. The number of single claims (i.e. from a single claimant rather than claims coming in from claimants acting as part of a group – known as a

multiple) received in Scotland in the period from January to June 2013 was 2,116, whereas the number of single claims in the same period in 2014 was 880. That marks a reduction of 58.4% in single claims in Scotland. The extent of the reduction varies, depending on the type of claim being made. For example, a comparison of the periods specified above, shows that unfair dismissal claims declined by 57.5% (down from 1533 to 651), disability discrimination claims reduced by 53% (down from 254 to 120), unlawful deduction of wages claims reduced by 71.5% (down from 1185 to 337) and sex discrimination claims declined by 83% (down from 337 to 57). It would not be appropriate for me to comment on the implications of those figures except to say in general terms that it appears difficult to resist the conclusion that access to justice has been curtailed. Certainly, there is plenty of comment from others including broadcast and print media. In 2014 fee charging in the employment tribunal has given rise both to television coverage as well as headline and newspaper editorial comment in Scotland, in addition to being discussed at various conferences and in the Scottish Parliament. Indeed it is difficult to recollect any time in the past in which the Employment Tribunal system has been under such close scrutiny by society at large.

### Enforcement of Employment Tribunal Awards

Concerns raised about fees have undoubtedly been exacerbated by the findings of a report released on 1 November 2013 by the Department for Business, Innovation and Skills concerning the enforcement of employment tribunal awards. The research study covered Scotland for the first time. Previously there had been research done by the MoJ in 2008 but it was restricted to England and Wales. The study, which was conducted prior to the introduction of fees, makes depressing reading. It involved telephone interviews with 1200 claimants. In essence what it showed was that the majority of successful claims are brought against small employers (those with under 50 staff) in the private sector. Overall, about half (49%) of claimants had received their award in full and a further 16% had been paid in part. That left 35% of claimants who had not received any money at all after the final date for payment. Ultimately, just over half of the claimants (53%) received full or part payment without having to resort to enforcement action.

The proportion of unpaid claimants who pursued enforcement in Scotland was significantly lower than in England and Wales. Just 26% of those who had not been paid pursued the sum owed by engaging a Sheriff Officer (although 39% had actually applied for an Extract from the tribunal, which in Scotland has the force of a decree arbitral). In England and Wales 46% of those who had not been paid took enforcement action. Interestingly more claimants in Scotland were aware of what to do to enforce their award than in England and Wales (61% of those surveyed in Scotland compared to 54% of claimants in England and Wales).

In trying to understand the reasons why fewer people in Scotland pursued enforcement, the

most common issues raised were the expense of the process and concerns about how effective it would be but sample sizes were very small so that makes it difficult to draw any definite conclusions. In this regard it is worth noting that it is more expensive to use the enforcement process in Scotland than it is in England and Wales. In Scotland the cost of using a Sheriff Officer depends on the value of the claim being enforced as well as other factors and ranges between £58 and £125 (compared with £60 for the fast track scheme and £40 for the County Court in England and Wales). According to the researchers this may explain why the cost of enforcement appears to be more of a consideration for claimants in Scotland than it is in England and Wales.

If one looks at this issue in conjunction with fee charging one possible explanation is that some claimants are simply making a decision on economic grounds to the effect that the high chance of non payment of the award means that it is not worthwhile to proceed with a claim, given the amount that would have to be paid out by way of fees. That may be particularly so where the only mechanism for reimbursement of the fee is through payment by the employer: An employer who is not willing or not able to pay the tribunal award is equally unlikely, one imagines, to comply with a tribunal order to reimburse fees to a successful claimant.

The Lord Chancellor has, of course, indicated an intention to review the operation of the ET/EAT fee charging system. At the time of writing, the nature and scope of the review are not yet known. The fee charging system is also subject to judicial review applications, north and south of the border, with the Scottish case sisted pending the outcome of an application brought by Unison (Equality and Human Rights Commission intervening) which is currently the subject of an appeal.

### Cases/trends

Having noted the significant fall in the number of single claims it is of interest to note that the position with regard to multiple claims lodged in Scotland is not an exact mirror image. In the period from January to June 2013 we received 2,358 claims which were categorised as forming part of multiples. In the same period in 2014 we received 1,732 claims categorised as multiples. In May 2014 alone we received 901 claims of this type. The fact that multiple claim numbers have held up in Scotland rather better than single claims is wholly due to mass litigation currently being pursued concerning the proper quantification of a “week’s pay” for the purpose of calculating holiday pay due to workers who regularly work overtime, or who receive commission and bonus type payments or other “top up” payments such as responsibility allowances. By the end of January 2015 we had received around seventeen thousand claims of this type in Scotland (a disproportionately large number at this stage compared to England and Wales). The litigation stems from the decision of the CJEU in *Lock v British Gas Trading Ltd* (Case C-539/12, judgment issued 22 May 2014) in which it was held that the Working

Time Directive (2003/88/EC) precludes national legislation which restricts the calculation of holiday pay due to basic pay when that worker's normal salary is made up of basic pay and commission. Following upon *Lock*, a Scottish Employment Tribunal decided in *Fulton and Anr v Bear Scotland Ltd* that overtime pay and shift allowances should be included in the calculation of holiday pay, that decision being upheld by the EAT (UKEATS/47/13/BI and others).

Still on the topic of multiple claims, the equal pay litigation in Scotland, consisting of 49,500 outstanding claims, continues to raise complex legal issues requiring lengthy hearings. This is particularly so where claimants are challenging the validity of job evaluations undertaken by local authority employers. In the past year, following a 56 day hearing, an Employment Tribunal ruled that the bespoke job evaluation scheme used by a large local authority (Glasgow City Council) could be relied upon for the purposes of the Equal Pay Act. (This decision is now the subject of an appeal.) In addition, another tribunal sitting in Glasgow has been hearing a challenge over 50 days to date brought by claimants challenging the implementation of the Joint Scottish Council Job Evaluation Scheme (North Lanarkshire Council) and 1,300 new claims have been presented following a tribunal's decision that a bespoke scheme used by another large local authority (South Lanarkshire) was not a valid one for the purposes of defending claims of equal value. Similar issues will be considered by Scottish Employment Tribunals in the coming year in relation to claims against a number of East of Scotland local authorities. While some may query why these cases take so long to hear, the volume and complexity of the detailed evidence which has to be painstakingly considered by tribunals hearing claims of this type cannot be overestimated. Furthermore, if the past is any indicator of what the future may hold, appeals will be likely which means that these claims will be with us for some time yet.

So far as individual cases of interest are concerned, in *Conroy v The Scottish Football Association Ltd (SFA)*(UKEATS/0024/13/JW) the EAT upheld the decision of a Scottish Employment Tribunal to the effect that a Category 1 football referee (Category 1 referees are at the highest level and can officiate at matches in the Scottish Premier League and Scottish Football League, which are the top leagues in Scotland) was not an employee of the SFA for the purposes of section 230 of the Employment Rights Act 1996 but was an employee for the purposes of the Equality Act 2010 and a worker for the purposes of the Working Time Regulations 1998.

The interaction of the Scots law of contract (which differs in certain respects from that which applies in England and Wales) with employment law was highlighted in the Court of Session (CS) decision in *Tom McNeill v Aberdeen City Council (No.2)* [2013] CSIH102 in which the CS restored the decision of an ET which had been overturned by the EAT. The case, which was a claim of constructive dismissal, involved consideration of the Scots law doctrine of mutuality of contractual obligation. It makes absorbing reading for those with an interest in the history of contract law and its development north and south of the border, it being held

that “in a case where the contract is governed by Scots law the Scottish principle of mutuality of contractual obligations applies” (para. 16). The fact that consistency of approach north and south of the border was more likely to be achieved in constructive dismissal cases by excluding the doctrine was not found to be “a sufficient justification for a major inroad upon the Scots law of contract in a case that is otherwise governed by Scots law” (para. 18).

### Judicial Mediation

The introduction of a fee of £600 (to be paid by the respondent) for judicial mediation has led to a reduction in applications for this service. That said, in the year from September 2013, 17 cases were the subject of judicial mediation hearings with 14 leading to a successful outcome, thereby saving a total of 130 hearing days when one compares the time taken to conduct the judicial mediation hearings with the number of days allocated for the merits hearings of those cases had a judicial determination been required. Feedback from users of the scheme continues to be extremely positive.

### Innovations

For some years we had been running a service on two evenings a week which allowed small money claims (unpaid wages and the like) to be heard at short hearings taking place between 17.30 and 19.30. This service proved very popular with users, particularly since it meant parties did not need to take time away from the workplace during the working day. However, as a result of the significant fall in claims of this type this service has now been reduced to one or two evenings per month (depending on cases available to be listed in this way).

On a more positive note, the President of Employment Tribunals (England and Wales) and I have agreed to collaborate in the production of a protocol to ensure best use is made of the video conferencing (VC) equipment which is now available at a variety of locations in G.B. where the interests of justice would be served by such cross border cooperation. Thus, for example, we hope that this will make it easier for an Employment Tribunal in England or Wales which considers it necessary to hear from a witness based in Scotland (and vice versa) who has difficulty in travelling to the other jurisdiction for some reason to give their evidence through a VC link. Obviously, there would be consultation with all parties involved before decisions of this type are made.

### People and Places

2014 has seen a good deal of change in the HMCTS administrative management team in Scotland. The offer of voluntary severance terms to management level staff resulted in the loss of a considerable amount of jurisdiction specific knowledge. A number of those now involved at management level in supporting the work of Employment Tribunals in Scotland had no

previous experience of working in the employment jurisdiction. However, a good deal of work is being done judicially and administratively to ensure that the steep learning curves involved in acquiring jurisdiction specific knowledge are being scaled as quickly and efficiently as possible. In addition, a number of other able staff members have also departed, a decision having been made on the administrative side not to renew any fixed term contracts, given the decline in workload. The administration has, however, assured me of its determination to ensure that Employment Tribunal users in Scotland continue to receive a high standard of service.

On the judicial front, the salaried Employment Judge bench has remained stable, with no resignations or retirements in the last year. However, the salaried judges are undoubtedly being expected to travel more than they have done in the past between hearing venues as the caseload has fallen away in some offices to a greater extent than in others. This of course adds to the length of their working day but they have all borne the additional burden with equanimity.

So far as fee paid Employment Judges are concerned, some highly experienced and talented individuals have retired in the last year. Their expertise and commitment will be sorely missed. The number of fee paid Employment Judges in Scotland is now at its lowest level in living memory. The last intake of fee paid judges was around five years ago. Normally, we would have recruited new judges every two to three years but I did not put forward a business case to do this at the relevant time because it was clear by then that fees were to be introduced and it was impossible to predict what impact they might have on case load. There appeared to be little point in appointing new judges if there would be no cases for them to hear. (Those currently in post are sitting less frequently than they used to, despite the decline in judge numbers.) I am, however, acutely aware of how important it is to bring new judicial talent into the system and as soon as that appears to be feasible I will do all I can to secure that goal.

## Conclusion

The past year has proved to be another challenging one for Employment Tribunals (Scotland), with the impact of fees on case load becoming increasingly clear. Along with our colleagues in the south we have been the subject of comment and speculation about our future which can be somewhat disconcerting. The Employment Judges in Scotland, however, remain completely focussed on delivering justice in Scotland in each case that they do hear. Whatever the future may hold that is the one constant on which I, and those who appear before them, can depend.

## Chapter Four - Cross Border Issues

### Northern Ireland

#### Dr Kenneth Mullan

As was reported in the Senior President's Annual Report for 2014, on 25 January 2013, the Civil Policy and Legislation Division of the Department for Justice for Northern Ireland (DOJ) published a document entitled '**Future Administration and Structure of Tribunals in Northern Ireland – Consultative Document**<sup>14</sup>'. The proposals in the Consultative Document were developed following responses to the '**Discussion Paper on the Future Administration and Structure of Tribunals in Northern Ireland**'<sup>15</sup>. The background to that Discussion Paper has also been described in previous Annual Reports of the Senior President. **A Summary of Responses**<sup>16</sup> to the Consultative Document was published by Civil Justice Policy and Legislation Division in late 2013. Responses were received from a range of stakeholders with varying backgrounds including the judiciary, legal profession, academics, local government, voluntary organisations and medical profession.

On 24 January 2014 the Minister of Justice wrote to those who had responded to his 2013 consultation paper. After acknowledging those responses, the Minister then indicated that:

'... Recent interventions have, however, increased pressure on my Department's legislative business and this, as well as other unforeseen essential business (such as the reform of judicial pensions) has meant that I have had to revisit the priorities that the Department can deliver during this mandate. This has led me to the view that reform in this area will be progressed in a more staged manner.

I can, however, assure you that reform in this area remains an important part of my vision for reshaping our Justice System. Subject to legislative and resource constraints, current planning assumptions are that the legislative reform will now take place during the next Assembly mandate which will begin in 2016.'

In other correspondence which has been sent by the Minister to additional 'stakeholders' he

14 The Consultative Document can be found at <http://www.dojni.gov.uk/index/public-consultations/archive-consultations/tribunal-reform-in-northern-ireland-consultation.pdf>

15 <http://www.dojni.gov.uk/index/public-consultations/archive-consultations/tribunal-reform-consultation-on-the-future-administration-and-structure-of-tribunals-in-northern-ireland.htm>

16 A copy of that Summary may be found at <http://www.dojni.gov.uk/index/public-consultations/archive-consultations/summary-of-responses-future-administration-and-structure-of-tribunals.pdf>



has indicated that he envisages '... that the second stage, involving legislation to reform tribunal structures, will not be possible until the second half of the next mandate in 2018/19.'

The Chairman of the Tribunal Presidents' Group in Northern Ireland, Lord Justice Coghlin, has responded to the announcement by the Minister, on behalf of the Group. He concluded by stating that:

'... Tribunals are a key part of the justice system and deserve to be higher up the reform agenda. Those who bring cases to tribunals are often the most vulnerable in society with issues relating to welfare benefits, mental illness, and discrimination or as victims of crime. A significant number of them will be unrepresented. These are the people whose lives may be significantly affected by tribunal decisions every year. The Tribunal President's Group understands that there may be other pressures on your Department and sensitivities within the Executive but we would be anxious that these should not prevent or postpone the effective implementation of the public's right to seek redress before wholly independent bodies.'

## Scotland

### Shona Simon

In the Employment Tribunals (Scotland) jurisdiction report I made reference to the fact that on 13 October 2014 the United Kingdom government published Command Paper 8946, entitled "The parties' published proposals on devolution for Scotland". This document set out the devolution proposals of the three main UK political parties. Around the same time the Scottish Government issued its own proposals. From that point on it was clear that there was a degree of political will to devolve decision making power in connection with the currently reserved tribunals operating in Scotland. Thereafter, the Smith Commission, which included representation from all five main political parties which have MSPs in the Scottish Parliament, produced its report on further devolution of powers to the Scottish Parliament on 27 November 2014.

Paragraphs 63 and 64 of that report are in the following terms:

*63. All powers over the management and operation of all reserved tribunals (which includes administrative, judicial and legislative powers) will be devolved to the Scottish Parliament other than the Special Immigration Appeals Commission and the Proscribed Organisations Appeals Commission.*

*64. Despite paragraph 63, the law providing for the underlying reserved substantive rights and duties will*

*continue to remain reserved (although they may be applied by the newly devolved tribunals).*

On 22 January 2015 the United Kingdom government published Command Paper 8990, entitled "Scotland in the United Kingdom: an enduring settlement (hereafter the "Settlement Paper"). This contains draft clauses for a new Scotland Bill which, it is indicated in the paper, are designed to take forward the Smith Commission agreement. Section 6.3 of the Settlement Paper, together with draft clause 25 in Appendix A, focuses on the issue of tribunal devolution. In essence clause 25 allows for specified functions of reserved tribunals to be transferred to specified Scottish tribunals, based on a timetable which is yet to be agreed between the United Kingdom and Scottish Governments. In the case of each tribunal this is to be done by an Order in Council which can make any provision considered necessary or expedient for the purposes of the transfer of the function in question and its exercise. Each Order will require the consent of both governments before the powers will be transferred. Unsurprisingly, the two tribunals mentioned in paragraph 63 of the Smith Commission report are excluded from the devolution proposal but two more are identified in the Settlement Paper as falling into the same category, those being the Pathogens Access Appeals Commission and the Investigatory Powers Tribunal, the stated rationale in all four cases for this reservation being that these are tribunals that decide on national security matters relevant to the United Kingdom as a whole. Furthermore, to the extent that national security matters are handled by any other tribunals, whether generally or in a specific case, these are to continue to remain reserved. What this will mean in practical terms remains unclear.

The Settlement Paper makes it clear that the intention is to allow the Scottish Parliament to make decisions in connection with rules of procedure, tribunal membership, administration and funding. However it goes on to say that, in order to ensure the continuing effective delivery of national policy, which remains reserved to Westminster, the powers transferred may be subject to "specific constraints and requirements". Para. 6.3.3 states that "Matters critical to the delivery of reserved policy will continue to be reserved to Westminster to the extent that the relevant Order in Council so provides. These matters are likely to differ between tribunals depending on the reserved policy area and will be set out in the relevant Order in Council". This, of course, means that the extent of the powers transferred may vary as between one reserved tribunal and another. One of the most contentious areas of reserved tribunal policy in recent years has been the introduction of fee charging in the Employment Tribunal (ET). However, nothing is said expressly in the paper about which government will have responsibility for that matter upon devolution of the ET, although it is possible that the reference to responsibility for "funding" being devolved may be relevant in this context.

The terms of each Order in Council will be highly significant as it is there that one will find the detail about "the precise nature of the matters that will be able to be heard, the specific tribunal within the devolved system that will be responsible for hearing those matters and

also any limits, constraints and requirements on the exercise of the powers transferred that are necessary to ensure the continuing effective delivery of the overarching national policy” (para. 6.3.4) This section of the paper also goes on to make it clear that, in this context, the “UK Government will have the ability to ensure that appropriate procedural provisions are made to ensure that devolved tribunals maintain consistency with certain features of the reserved tribunals system that are required to support the enforcement of policy.” Consistency of tribunal practice and procedure is to be maintained by including provisions in each Order in Council designed to promote cross border judicial cooperation. It is also made clear in the Settlement Paper that it is intended that there will be “extensive engagement” with the judiciary in Scotland and in England and Wales when it comes to discussing the detail of what is proposed and that there will be a need for both governments “to discuss the application of this clause [25] to relevant tribunals that sit in Scotland” (para. 6.3.7).

Although it is beyond doubt that there is still much to be decided, the devil being in the detail of the various Orders in Council, what is proposed cannot be viewed as anything other than a very significant development in the tribunals’ world, which will have a notable impact north and south of the border. It will certainly lead to a dramatic expansion of the Scottish Tribunals system, albeit the timetable for this is as yet unclear.

Last year I mentioned that the Tribunals (Scotland) Bill was making its way through the Scottish Parliament. The legislation received Royal Assent on 15 April 2014 and some of the provisions of the Tribunals (Scotland) Act 2014 are already in force. The first Commencement Order for the 2014 Act was published on 14 July 2014, bringing into force Section 4(1), (2), (3) and (5) of the Act, thereby enabling the Lord President to appoint the Right Honourable Lady Smith as the first President of Scottish Tribunals.

Whatever the extent of the devolution which occurs, so far as the reserved tribunals are concerned, it is certainly the case that the path will be smoother now than it might have been in years gone by. Last year I made reference to the fact that links have been developed between the reserved and devolved tribunals’ judiciary in Scotland through the Scottish Tribunals Forum, which is chaired by Lady Smith. Senior judiciary from the reserved tribunals (at first instance and appellate levels) and from the larger devolved tribunals continue to attend this group, together with senior Scottish Government civil servants and Scottish Judicial Office staff. There is also representation from the Scottish Administrative Justice and Tribunals Advisory Committee, which was established early in 2014 with support from the Scottish Government, in the wake of the abolition of the Scottish Committee of the Administrative Justice and Tribunals Council.

Membership of the Scottish Tribunals Forum enables the reserved judicial leaders to keep in touch with the development of the Scottish tribunal system and wider issues affecting users of the tribunal system (both reserved and devolved) in Scotland. It is a useful forum for

exchanging ideas and knowledge relevant to the process of change which is ongoing in the Scottish tribunal system and is also a helpful mechanism in ensuring that the reserved tribunals are seen as part of the civil justice system in Scotland, albeit with strong connections to the larger GB (or as the case may be UK) wide systems within which reserved tribunals generally operate. The fact that the reserved tribunals are also represented on the Judicial Council for Scotland, as are the devolved tribunals, is also of significance in providing a very useful linkage between tribunals and courts dispensing justice in Scotland.

On the judicial training front, I have had the privilege in the past year, for the first time, of making two presentations at Judicial Institute training courses. The Institute is the body which provides training for judges in the civil and criminal courts in Scotland. I have also recently been asked to sit on the Judicial Institute Advisory Council and its Equality and Diversity Forum. It is to be hoped that these developments may herald a closer engagement between tribunals' and courts' judiciary in Scotland on the training front than there has been in the past.

The utility of these connections between courts' and tribunals' judiciary is self evident when one notes that the Scottish Government has made a decision to merge the Scottish Tribunals Service with the Scottish Courts Service; that merger is due to take place in April 2015. In a press release issued in November 2013 it stated that: "As with the current SCS structure, the new body would be fully independent of Government with a board chaired by the Lord President as head of courts and tribunals judiciary". Importantly, from the perspective of users in particular, it went on to state that "It is envisaged that the front-line operational delivery of courts and tribunals business will not be affected as the current specialist staff and venues for tribunals and courts will remain."

Irrespective of what happens with regard to the devolution of the reserved tribunals, there can be little doubt that the closer working relationships which now exist between the reserved and devolved tribunals' judicial leaders will lead to a productive exchange about the experiences of, and lessons learned by, the reserved judiciary in connection with the merger of the courts and tribunal systems in England and Wales.

## **Wales**

### **Libby Arfon-Jones**

It has been a significant year for the devolved tribunals in Wales with continued challenges alongside real, notable progress.

It is encouraging to note that the Welsh Government (WG) has focussed on the needs of devolved tribunals in Wales, setting up a Review undertaken by Andrew Felton. The Report was distributed to stakeholders for consultation, and the WG is now considering responses from, inter alia the Lord Chief Justice, the Senior President of Tribunals, the Welsh Tribunals Contact Group (WTTCG).

A Justice Policy team has been established in the WG, led by Andrew Felton, covering amongst other areas administrative justice policy. Margaret McCabe will continue to have responsibility for the operational aspects of devolved tribunals. She and her team will in effect be responsible for a “Welsh Tribunals Service”.

Issues around the appointment processes were addressed during the recruitment of the President of the new Welsh Language Tribunal (WLT). Chaired by HHJ Milwyn Jarman, Professor Noel Lloyd, a Judicial Appointments Commissioner and I were panel members. I am happy to say that Keith Bush QC was appointed. Keith, Noel and I are now employed in the launch of the selection exercise for the legal and non-legal members of the WLT. Concerns around discipline and removal of judicial office holders of the WLT are being addressed.

Although the AJTC and its Welsh Committee were abolished, a new Committee for Administrative Justice and Tribunals, Wales has been set up to advise on administrative justice and the tribunal reform agenda. Its membership is the same as its predecessor and remains under the chairmanship of Professor Sir Adrian Webb.

Whilst many areas such as complaints handling, training and appointment processes remain areas of concern, the WG is opening up discussions with relevant teams in each of the arm's length judicial bodies to tap in to their resources and expertise and ensure the same standards are applied across England and Wales in the devolved and non-devolved tribunals. The situation is best described as work in hand, with progress being made.

## Chapter Five - Committees, Working Groups and Training

### **Tribunal Procedure Committee**

#### **Mr Justice (Brian) Langstaff**

The Tribunal Procedure Committee (TPC) yet again had an extensive (and exhausting!) programme of work this year. In addition to keeping nine sets of Tribunal Procedure Rules under constant review, it made five sets of amendment rules; ran two detailed public consultation exercises; and in October 2014 brought to a successful conclusion work which had lasted almost two years on a new set of rules that for the First-tier Immigration and Asylum Chamber

Yet again its members have worked tirelessly. I was delighted that both Michael Reed and Simon Cox followed Philip Brook-Smith in gaining renewed appointments at the nomination of the Lord Chancellor onto the Committee. Similarly Judges Mark Rowland and Simon Ennals were re-appointed as appointments of the Lord Chief Justice, and we have been joined this year by Jayam Dalal, a tribunal member in the Property Chamber, who is a most welcome addition in succession to Lesley Clare. I would like to take this opportunity to thank Lesley for her valuable contributions, grounded wisdom and hard work since the Committee's inception in 2008. The TPC wishes her the best of luck for the future.

The major piece of work for the TPC this year was the introduction of a new set of rules for the First-tier Immigration and Asylum Chamber on 20 October; the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. The Rules replaced the previous sets of rules which pre-dated the Tribunals Courts and Enforcement Act 2007, namely The Asylum and Immigration (Procedure) Rules 2005 and The Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005, and harmonised them with rules applying in other Chambers of the First-tier Tribunal. Their introduction followed consultation in May 2013 on proposals for new procedure rules. Careful consideration of the points raised by consultation responses led to several areas in which tentative rules were re-drafted and re-considered taking significant time to do so.

The new rules do not alter the substantive law relating to immigration and asylum. They deal only the procedures by which appeals against decisions of the Home Office are determined. The changes have been informed by principle, in line with the statutory duties imposed upon

the TPC by the 2007 Act, and in the light of practical experience of the way in which the former rules (which had become quite out of date) had operated.

To assist with this work the TPC sought and received specialist input from Immigration and Asylum Chamber Liaison Judges Peter Lane (Upper Tribunal Immigration) and Mungo Deans (First-tier Tribunal), as well as engaging more generally with interested parties. I was particularly glad to have their help.

Another significant piece of work was undertaken at the beginning of the year, when changes were made to the First-tier Tribunal rules in the Health, Education and Social Care Chamber to make the requirement of preliminary examinations in mental health cases discretionary. This followed consultation during the summer of 2013 seeking views on changes to ensure that Mental Health Tribunals have the power to review and commission medical evidence in the most appropriate way for each case; sparing vulnerable people going through unnecessary assessments, and ensuring greater flexibility in the system. Examinations often took place on the same day as the hearing, which caused additional distress for patients on top of any anxieties they already had about the hearing, and also put more time pressure on the Tribunal. Consequently there is now discretion on whether and when such an examination should take place: however there will always be an examination when a patient requests one, or where a patient is admitted for assessment under section 2 of the Mental Health Act.

Several amendments to make improvements or technical changes to both First-tier Tribunal and Upper Tribunal rules were made during the year. These included consequential amendments in the Upper Tribunal following the new First-tier Tribunal Immigration and Asylum Chamber Rules. These included limiting the ambit of a rule which had provided that all decisions in asylum cases would be served first on the Home Office (i.e. before the immigrant or asylum seeker was served) so that the Home Office could then itself serve the individual itself. In future it will apply only to decisions which finally dispose of the possibility of any further appeal – namely, where the Upper Tribunal has refused, or refused to admit, an application for permission to appeal to the Upper Tribunal.

Changes were also made to the First-tier Tribunal (General Regulatory Chamber) to allow new applications from the Immigration Services Commissioner; to the rules governing procedure in the Health Education and Social Care Chamber, to give effect to appeal rights under the Special Educational Needs and Disability Regulations 2014, and to include cases under section 129 of the Education and Skills Act 2008. Changes made to the Social Entitlement Chamber and the related Upper Tribunal Rules provide confidentiality in social security and child support cases, if requested, in relation to former joint claimants of jobseeker's allowance and tax credits who are no longer living together; or in any other case in which two parties are former partners who might not wish their respective addresses, or that of any child of theirs, to be known to each other. Some amendments were made to the First-tier Property Chamber

to allow new appeal rights relating to mobile homes.

A key part of the ongoing work of the TPC is to consider proposals from various ministries to introduce new appeal rights, so that they can be accommodated appropriately within the unified tribunals system, and to review existing procedural rules to ensure that any necessary amendments are accommodated, such as technical amendments to nomenclature brought about by legislative changes.

The list of new appeal rights which have crossed the desks of members of the TPC this year may seem both eclectic and somewhat esoteric, as well as essential. The sheer range has demanded a broad perspective from its members, seeking always to ensure that whatever the proportion of the populace likely to be affected each new appeal right or change has appropriate consideration. Thus, this year the Committee has considered over thirty new appeal rights. These have included rights in respect of Single Use Plastic Carrier Bags in England, Species Control Orders, Micro-chipping of dogs, Copyright Material in “Orphan Works”, and a Redress Scheme in respect of letting agents, as well as less trumpeted rights such as those arising in respect of the labelling of olive oil, and jam and similar products. For each new appeal right, the Committee considers whether to include questions or issues in government consultation papers, reviews the draft regulations which give rise to appeal rights, and ultimately decides if any rules or rule changes are needed. If so, it makes them.

The TPC has been concerned with issues of important general principle too, including questions about the way in which procedural rules should address the costs consequences of taking appeals, and the extent to which special provision needs to be made procedurally for children or vulnerable adults.

It will be obvious that this volume and range of work is very substantial. It imposes considerable pressure of time on the members of the TPC, all of whom are fully employed in their regular fields of work. Not only are there frequent meetings of the full Committee – usually monthly, though on occasion more often – but such is the workload that sub-groups meet in-between times to give detailed consideration to proposals, to obtain information from (for example) Government departments, or specialist judges, and to give issues debate prior to their consideration by the full Committee. This is demanding work. The members of the Committee are, as such, unremunerated, making it all the more remarkable and praiseworthy in this day and age that they give their time so unstintingly. I am proud of their unwavering commitment and energy, professionalism, independence of mind, and expertise. The public is well served.

I am also grateful to all the other judges who helped the TPC during the year, and to those supporting lawyers and civil servants who have also given much of their time. In particular, I would single out the Secretary to the committee, Julie McCallen, and her team.



In the coming months the TPC will continue considering the vexed question of rules relating to the award of costs in Tribunals through considering, consulting and introducing appropriate rule amendments in both the First-tier and the Upper Tribunals. Some of the changes have already formed part of an amending statutory instrument this year.

The work of the TPC for the period 1 January 2014 to 31 December 2014 will be described in more detail in its forthcoming Annual Report 2013/14 due to be published in January 2015. Previous reports can be found on the Justice website:

<http://www.justice.gov.uk/about/tribunal-procedure-committee>.

I am proud to have chaired such an impressive, hard-working and effective committee of those committed to the interests of all those who use Tribunals.

### **Tribunals Judicial Executive Board**

The Tribunals Judicial Executive Board is the Senior President's discussion and decision making forum although final decisions on matters relating to his statutory and delegated responsibilities rest with him. The Board takes collegiate responsibility for the leadership, organisation and management of those tribunals judiciary who come under the remit of the Senior President as set out in the Tribunals, Courts and Enforcement Act 2007.

Membership comprises the Chamber Presidents and the Presidents of both the Employment Tribunals in England & Wales and Scotland and the Employment Appeals Tribunal. Lady Anne Smith attends as the Lord President's nominee for tribunals issues in Scotland and Libby Arfon-Jones attends as the Senior President's advisor on tribunal issues in Wales and on welfare matters pertaining to tribunal judicial office holders.

During the period of this report, TJEB met four times, the cycle now established following the Senior President's review of governance. The Board continued to consider and discuss a range of policy and practical issues including judicial security and a number of Judicial HR initiatives. Judicial HR has continued as a standing item on the agenda for each meeting. Officials from the Government Digital Service attended to provide an update on the transition of tribunal web content to Gov.uk.

## **Tribunals Judicial Activity Group**

### **His Honour Judge Phillip Sycamore**

The Tribunals Judicial Activity Group (TJAG) met four times during the period of this report, the pattern determined following the Senior President's review of governance towards the end of 2012. The Group had previously met on a mainly ad hoc basis. Meetings are scheduled to take place roughly two weeks in advance of the meetings of the Tribunals Judicial Executive Board, allowing discussion of any matters arising from the preceding meeting of TJAG.

The core judicial membership remains as the Chamber Presidents of the three largest jurisdictions of the First-tier Tribunal and the Employment Tribunal (England & Wales). Brian Doyle of the Employment Tribunal (England & Wales) and John Aitken of the Social Entitlement Chamber have replaced David Latham and Robert Martin respectively following their retirements. Michael Clements represents the Immigration and Asylum Chamber. The administration is represented by the Director and Deputy Director HMCTS Civil, Family and Tribunals. HMCTS officials attend regularly to provide updates on appointments and performance. Meetings are chaired jointly by myself and the Director of HMCTS Civil, Family and Tribunals.

Discussions this year continued to focus on the core business of the resource allocation, judicial recruitment and performance. A particular focus this year was on the expanding use of assignment to meet business needs affected by fluctuating workloads across the jurisdictions. Kerry Broomfield of HMCTS Workforce Planning attended to provide progress updates on current competitions and to discuss forecasting for 2014-15. Over the year the reports provided on performance were refined taking into account the views of the Chamber Presidents and the needs of individual jurisdictions.

With two new Presidents joining the Group, the opportunity was taken to review the Terms of Reference. As a result of the review, the objective on recruitment was expanded to include assignment and ticketing.

## **Diversity Committee of the Judges Council**

### **Alison McKenna**

As Head of the Judiciary in England & Wales, the Lord Chief Justice has a statutory duty

to encourage judicial diversity. Together with the Senior President of Tribunals, whose jurisdiction also covers UK-wide tribunals, he believes that, whilst merit remains the basis for all judicial appointments, public confidence in the judiciary will be enhanced as it becomes more representative of society as a whole. The Lord Chief Justice and the Senior President of Tribunals are supported by officials in the Judicial Office.

At the end of 2013 the Judges' Council endorsed the creation of a Judicial Diversity Committee to support the Lord Chief Justice in fulfilling his statutory duty to encourage judicial diversity. The creation of a single Committee is seen as a means of bringing together all the different aspects of diversity work and ensuring that everything that is being done contributes to the LCJ's statutory duty. To ensure the committee is effective in achieving its aims, membership of the committee is comprised of those who are responsible for and committed to diversity and are currently active in diversity work. The Committee is responsible for formulating a strategy for encouraging judicial diversity, approving an annual delivery plan and monitoring and evaluating progress and success. Each member of the Committee is expected to take a personal and collective responsibility for the delivery of the plan.

The Senior President of Tribunals is represented by Judge Alison McKenna, President of the War, Pensions and Armed Forces Compensation Chamber and Principal Judge of the Charity Tribunal, and Tribunal Member, Jude Lancaster. An Expressions of Interest exercise will be held soon to identify a representative from the First-tier Tribunal.

The Committee has approved its plan for the coming year and has made progress on the delivery of a number of its initiatives. For example, a judicial role models scheme was launched on September 2014, to identify role models to support future outreach events (as speakers and networking judges) and act as mentors for a new mentoring scheme due to launch in January 2015. The scheme has, so far, received interest from over 80 judges, of which 36 are tribunal judges.

Throughout the past 12 months Diversity and Community Relations Judges (DCRJ) across England and Wales (of which 20 are tribunal judges) have taken part in numerous outreach events to schools, colleges and local communities. Highlights have included a meeting with a group of senior Imams to explore the best ways of engagement within the Muslim community, marshalling opportunity for a Zimbabwean refugee currently studying in the UK and speaking to Asian police officers at their BME Positive Action Day. These initiatives help to strengthen relationships between the judiciary and the wider community and to dispel myths about the justice system as a whole and more specifically about the role of a judge and the kind of person who is eligible to become a judge.

The Lord Chief Justice, the Senior President of Tribunals and Lady Justice Hallett with the DCRJs and other members of the judiciary have separately supported four outreach events

since November 2013. The events, targeted at under-represented groups, including legal academics, women and government lawyers, have provided encouragement and an opportunity to network with serving judges and get first-hand advice on the application process and nature of the work.

Many courts and tribunals judges, including DCRJs, have continued to contribute to the popular and highly effective Judicial Work-Shadowing Scheme which gives eligible lawyers the opportunity to see judicial life at close quarters before they prepare their own application for a judicial post.

### Tribunal data (derived from published annual statistics 2013/14)

#### Gender

- The number of all women in post in the tribunals has increased from 2429 to 2715.
- The percentage of Tribunals judges who are women has increased slightly by 2.2% to 45%.
- 88% of female tribunal judges are fee-paid office holders

#### Ethnicity

- 13.2% of all tribunals' officeholders and 9.3% of tribunal judges' have declared that they are from an ethnic minority background
- Out of 181 Tribunals judges who have declared that they are from an ethnic minority background, 24% are salaried and 76% are fee-paid.

#### Profession

- 68% (1335) of tribunal judges are solicitors, of which 45% (609) are women
- 31% (648) of tribunal judges are barristers, of which 36% (238) are women

## **Tribunals Judicial IT Board**

### **Upper Tribunal Judge Judith Gleeson**

As IT lead judge, I have been involved with the further development of the proposal for eJudiciary, the rollout of the new network telephony, and a pilot for eBooks. The FITS project for replacement of our IT equipment has been running in the background but I have not been directly involved with it. It is running late: the continued delay is disappointing and it is to be hoped that any political changes in the summer of next year do not further delay this vital update to our equipment.

The Tribunals Judicial IT Board (TJIT) has met a number of times this year, both physically and by telephone over the network phones. There have been difficulties with the administrative support which MoJ ICT offered to provide: all administrative resources are very stretched at present. I would like to record my thanks to Leueen Fox for all her help on TJIT before her retirement earlier this year, and to wish her very well indeed.

I am grateful to the Board members for their assistance in making sure I have properly representative information to inform my input to the various Boards on which I represent Tribunals judiciary, and to the Senior President's Office for agreeing to provide logistical support from December 2014, including organising future meetings and minutes.

It is my understanding that there will be another overarching restructure of IT consultation for judges, which will impact on TJIT's terms of reference for 2015. I continue to consider that the best use of this Board is as a focus for information about the needs and use of technology in Tribunals, both for the senior judiciary and for MoJ admin when commissioning or replacing equipment or software.

### **New computers / tablets: the FITS project**

FITS will not result in our being issued with any new equipment until approximately July 2015, but MoJ ICT still hopes to complete the equipment refresh by the end of 2015. FITS will provide us with a range of computing equipment, still not fully specified, which will operate on Windows 8.1 or 8.2 (we are currently on Windows XP Professional, which is no longer supported by Microsoft).

### **eJudiciary**

The eJudiciary Implementation Board was established this year and under the chairmanship of Mr Justice Mann has oversight of the implementation of this new judicial tool. Some security

issues remain outstanding on eJudiciary but should be resolved shortly.

I had hoped to have been reporting that eJudiciary would be replacing the Portal early in the New Year, with a pilot on the new FITS equipment next month. Unfortunately, the FITS project is not as advanced as expected last year and will hold back the eJudiciary pilot now until the beginning of 2015. It is necessary to wait for the new equipment because important features of eJudiciary, in particular the document storage OneDrive, cannot operate on Windows XP, the software on our present machines.

eJudiciary will bring with it a version of Microsoft Office 10 years more modern than that which is currently provided on the GSi network (updating the version from Office 2003 to Office 2013). The relevant Office products will then be maintained by Microsoft in the background and rolled out as appropriate, without purchase orders needing to be raised, as I understand it. The reason is that the SharePoint product is a web-based service, and we are not buying a particular version of the software, but using that service. There are substantial savings involved, but the data migration costs are not small and the support model and costs are not yet satisfactorily settled.

### EBooks and eReaders

The eReader pilot is now complete. The book products were a bit more complicated to download than expected and the flexible working element did not really take off. The idea works, but even those judges who volunteered used it less than they expected, in part because of the lack of modern kit and in some places WiFi to make it properly useful.

### WiFi in courts

It is disappointing that when planning to rectify the absence of WiFi in courts, without which eJudiciary will not be usable, the project team made a list of courts which overlooked many Tribunal hearing centres. That is being rectified but it remains a challenge to ensure that Tribunals needs and, indeed, the sheer scale of the Tribunals, are properly borne in mind.

### Network problems

The need to remove judges from the GSi becomes ever more acute, as the existing network creaks and groans under the weight of the existing number of users. Computers across the system are suffering from slow working and the failure to upgrade from the 2006 version of Internet Explorer (IE7) meant that Firefox had to be added to enable some sites to function properly. Firefox is profile-hungry and there have been reports of profile sizes being exceeded by many judges, which is frustrating and, of course, costs us money each time a judge has to ring Atos to get the profile cleared. The situation remains unsatisfactory and new equipment

with modern software is a priority.

## Conclusions

This is a less optimistic report than last year. Progress is significantly slower than I had expected, but that should improve towards the end of next year. It remains my firm view that judges should be assisted by technology, rather than the other way round, and that the technology provided should assist them in working in the way which best suits them.

Judicial time is one of the greatest expenses in the preparation of any final decision and judicial work practices should not have to adapt to the kit available; that being said, the younger judges now being appointed have IT skills and expect, and should receive, modern technological support at least as good as that available to Counsel appearing in front of them.

## The Judicial College

### Professor Jeremy Cooper

#### General Background and Statistics

The College provides training in 34 separate jurisdictions across the United Kingdom.

In the financial year 2013–14, the College delivered 299 residential and non-residential courses (including 71 evening training events in SSCS) to 11,013 judicial office holders in tribunals (823 of which were judicial office holders attending SSCS evening training events).

The vast majority of training provided for tribunal judges and members is delivered within individual jurisdictions, in line with the requirements of Chamber Presidents. Training for judicial office holders in tribunals is generally arranged through invitation to attend courses, with the exception of some training provided in the Mental Health Tribunal.

#### Tribunals Committee of the Judicial College

The Committee with formal oversight of the training of all tribunal judicial office holders is the Tribunals' Committee. The Committee oversees tribunals' judicial training for those tribunals for which the Senior President has statutory responsibility and where appropriate takes account of the interests of devolved tribunals and those tribunals transferring into HMCTS. The tribunals where training is provided by the Judicial College are: Employment (England and Wales), Employment (Scotland), Employment Appeal Tribunal, Tax First Tier and Upper

Tribunal, Lands Chamber, Administrative Appeals Chamber, General Regulatory Chamber, Mental Health, Care Standards, Special Educational Needs and Disability, Primary Health Lists, Social Security and Child Support (SSCS), Asylum Support, Criminal Injuries Compensation, Adjudicator to the Land Registry, War Pensions and Armed Forces Compensation, Immigration and Asylum and Property Chamber.

Tribunal jurisdictions all tend to have their own training groups or committees that meet occasionally to plan their jurisdictional training programmes. These then feed into the College's Tribunal Committee via their training leads. As College Director of Tribunals Training I have established a programme of continuing visits to discuss College developments in the various jurisdictional committees, which this year have included visits to the mental health, tax, social security and property chamber training committees. More will follow in the coming few months.

Secretariat support for the Tribunals' Committee and administrative and secretariat support for training in the Mental Health, Immigration and Asylum, Social Security and Child Support and the Property Chamber are provided by College staff in London, Glasgow and Loughborough. Administrative support for the remaining tribunals is provided by staff in HMCTS.

### Evaluation of Tribunal Training Programmes

Feedback forms are completed at the end of training courses and these are now completed on line via the College's Learning Management System (LMS). Those judges and members who are responsible for designing and delivering training have easy access to feedback and evaluation data via the LMS and there are also summary reports provided by staff in the College based on an analysis of the quantitative and qualitative data provided by respondents. These assist the trainers in the design of future courses.

We aim to refocus evaluation forwards rather than backwards in the future. To this end the College's Education and Development Advisers (EDAs) regularly offer advice and support to course directors/training leads to help them implement any recommendations made in the feedback reports. A review of the on line feedback and evaluation to date has led us to conclude that detailed evaluation is not necessary for every course, particularly those that have run successfully in the past. Thus, since April 2014 no evaluation report is provided in addition to the feedback unless one or more of the following applies:

- New or pilot course
- Substantial changes to course content



- Course director/training lead requests full evaluation
- Course is high profile/high risk
- Previous evaluations show recurring aspects of course in need of development.

### Whole Programme Evaluation

In the course of 2014 the Mental Health Tribunal completed a Whole Programme Evaluation (WPE), which now informs their planning process when developing programmes to meet the changing needs of their jurisdiction. This is a College 'first', and is aimed at a broader evaluation of what the College is doing, all with a view to making best use of resources. In designing the WPE it was recognised that the routine event-focussed evaluation, although an essential element of quality assurance and an important means of facilitating feedback to a training committee, provided little information about how successful the overall programme was in meeting members' needs, or what changes, if any, were needed to address any shortfalls in style and substance of the current programme? An online questionnaire was devised to elicit members' views on the overall training programme. 57% of the membership completed the questionnaire, with approximately similar numbers of each category of member responding.

The results? 82% of respondents wholly or substantially agreed with the statement 'Overall, the training programme addresses the training needs of tribunal members well'. The survey asked whether the programme achieved a balance between knowledge and skill acquisition, and 86% wholly or substantially agreed that it did. 83% of respondents agreed that 'The pace and level of courses was about right'. Similar results were elicited by the statement 'Most training events cover about the right amount of material', with which 86% either wholly or substantially agreed. The MHT Training Committee is currently considering the 12 recommendations made as a result of the evaluation.

### The Learning Management System (LMS)

A project group has been established to roll out the Moodle based LMS across tribunals. Registration of tribunal judicial office holders on the LMS is steadily increasing. A working group has been established to accelerate further the increase of tribunal registrations. This working group meets monthly, and works closely with training leads and administrators to increase registrations incrementally. The aim is to target jurisdictions that are about to place materials onto the LMS prior to their training courses on a regulated but sensible time scale rather than to encourage mass registration on an unmanaged basis.

## Developing e-Learning Programmes

Tribunal jurisdictions continue to work with the College's Professional and Technical Team on the production of new eLearning programmes. The College has to date produced 11 separate pieces of e-Learning for use in tribunals' training (a combination of video and PowerPoint) for example video footage of interviews which are integrated into a course, voiceovers and module-based learning including the use of quizzes. Demand for these packages is steadily increasing. e-Learning modules have also been developed on the Disability Living Allowance, on questioning skills and decision-making at hearings, on the Child and Adolescent Mental Health Services and on risk assessment.

## Leadership and Management Development

The College delivered its first Leadership and Management Development Programme for those tribunals' and courts' judges holding leadership roles, between March and June 2014. It consisted of three modules covering four priority areas:

- Understanding the organisation
- Communicating and working with others
- People management
- Managing yourself as a leader

The post course evaluations suggest that the programme was largely successful in achieving its aim. The programmes are now co-delivered by the EDA team working with senior leadership judges.

## New Training in Response to New Legislation

The need to train large numbers of judicial office holders in the substance and consequences of new legislation is one of the most challenging aspects of College work. In early 2014, in response to new legislation the SSCS training committee successfully completed a 26 one-day event programme for Personal Independent Payment (PIP) conversion training for all current 03 (DLA-Disability Living Allowance) fee-paid members, with a mop-up event scheduled at the end of March, to capture all remaining judicial office holders. In addition newly recruited tribunal judges attended three separate PIP/DLA Induction training events over January, February and March 2014.

Another training challenge arises when a judicial office holder is 'cross-ticketed' from one jurisdiction to another. Five judges from the tax chamber were assigned to SSCS and underwent induction training in February 2014 and also attended subsequent Child Support training events delivered over January, February and March 2014. Others have followed a similar pattern as the numbers of judges seeking further tickets continues to grow.

### Training Judicial Office Holders with Disabilities

The SSCS recently trained 151 newly appointed disability members for their jurisdiction. A significant number of these new appointments had a range of disabilities. The concentration of such numbers in a single training programme led to a number of challenges to the training team to ensure compliance with the Equalities Act. As a consequence of this event, a working group has been established within the College with a view to establishing the guidelines for the preparation and delivery of future training where one or more participants may have a disability. The College will seek to use the recently established Panel of Experts (see below) to assist in this work.

### Using the Equal Treatment Benchbook

The Equal Treatment Benchbook is an important tool available to all judicial office holders. The College has produced a special on line module introducing judges and members to using the Equal Treatment Benchbook in its new electronic format. Several training leads have tested the module and are adopting a common approach both to its use and further development. The module can be delivered in line or face to face. It is designed specifically to assist judicial office holders in searching the Benchbook for rapid assistance. The module can be adapted for use also by courts, magistrates and coroners.

### The College's Panel of Experts

The College has established a Panel of Experts to enhance our training in equality, diversity and social context. The experts have been recruited entirely from the pool of judicial office holders within the courts, tribunals, magistrates and coroners, courts. They all have a high level of experience in dealing with equal treatment and diversity issues. Some have had, or still have, a practice area in equality law. This means they all have experience of sitting in a judicial capacity and many also have identified training experience and skills. The experts assist course directors and others in the College in advising on social context awareness and demonstrating fairness to those attending hearings; on updating the Equal Treatment Bench Book (ETBB); writing scenarios (or providing a critical review) in order to include social context issues within jurisdictional training; they also provide very specific assistance for tribunals and courts where cases require a specialist perspective on a particular discriminating factor.

## Guide to Reason Writing

In 2014 the College published a comprehensive Guide to Reason Writing which was made electronically available to all tribunal judges via the LMS

## The College Academic Programme

The College's Academic Programme in 2013-14 consisted of a series of six lectures entitled 'Being a Judge in the Modern World'. The lectures were open to all judicial office holders and proved highly successful. A large number of tribunal office holders attended. The lectures were delivered by Lord Carnwath (London), Lord Judge (Cardiff), Shami Chakrabati (Manchester), Joshua Rozenberg (Oxford), Madame Justice Desiree Bernard (London) and Lord Thomas (Birmingham) in March 2014. Consideration is now being given to the publication of all six lectures as a single volume and also to the next phase of the Academic Programme. The first two speakers in 2015 will be Alan Rusbridger, Editor in Chief of the Guardian and Lord Justice Laws.

## International Activity

### 1. EJTN

I attended the European Judicial Training Network (EJTN) General Assembly in Thessaloniki in June 2014 on behalf of the Judicial College. The Judicial College played a major role at the General Assembly (GA). EDA Dr Kay Evans conducted a 'snowball' session whereby all 65 delegates took part in a group discussion on the future direction of the EJTN, the groups becoming larger and larger as the session progressed. After the 'snowball' was concluded I chaired the plenary feedback session designed to distil the views of the GA into an overall package of ideas.

The Judicial College is an elected member of a new EJTN Working Group on Judicial Training Methods.

### 2. European Asylum Support Office (EASO)

As the UK liaison judge working with EASO I have the task of monitoring any training programmes proposed by EASO for immigration and asylum judges. EASO is an agency of the European Union that plays a key role in the concrete development of the Common European Asylum System. It was established with the aim of enhancing practical co-operation on asylum matters and helping Member States fulfill their European and international obligations to give protection to people in need of it. EASO acts as a centre of expertise on asylum. It also provides support to Member States whose asylum and reception systems are under particular

pressure. The June EASO mission to Bulgaria (which included British Immigration Judge Edward Woodcraft) has assessed the training needs of Bulgarian judges who hear asylum claims. The mission recommended a 2 day seminar in September 2014 to be attended by all 35 or so Bulgarian administrative court Judges who hear such appeals with further seminars to be arranged subject to funding. The September seminar featured presentations and syndicate groups on the subject of country guidance with particular regard to UK case law experience as the UK is an established leader in this area of legal development.

### EC Study of the Best Practices in the Training of Judges and Prosecutors in EU Member States

The European Commission has now published its 250 page Report on Best Practices in the Training of Judges and Prosecutors in the EU. The Report showcases 65 best, good and promising practices over a range of training methodologies, many of which could be easily transferable to the UK. The training institution in the EU with the highest number of 'best practices' was our College! The tribunal courses that warranted special mention in this category were the joint training of and by doctors and judges in the social security tribunal and the residential property chamber residential course that works through a complex case study in plenary with a range of role plays and other novel forms of interaction. In addition the Mental Health Tribunal's recent Whole Programme Evaluation (see above) was identified as a example of a promising practice. The Business of Judging Course was identified as the third College example of a best practice course. In addition, to courses some of our training methodologies, our training needs assessments, and the College's policies on social context training were also praised in the Report. Delegates from across Europe attended a 2-day workshop on 26th and 27th June 2014 in Brussels to launch the Report. The conference keynote speech was given by Madame de Weil, Head of DG Justice. I presented the Best Practice Report to the conference on behalf of the authors. EDA Michelle Austin and Judge Paula Gray also represented the Judicial College at the event, and gave presentations in breakout sessions.

### Training in the Western Balkans

Training has been delivered this year by the Judicial College on several occasions in a number of locations in the Western Balkans. In June 2014 three trainers from the Judicial College (Judge Andrew Hatton, Judge Phil Rostant and District Judge Debbie O'Regan) visited Kosovo, to provide training in judgecraft, judicial ethics and training of trainers at the request of a German NGO working on International Co-operation in Law and Human Rights, Earlier that month Judge Phil Rostant and District Judge Debbie O'Regan accompanied by Judge Gordon Ashton provided training to groups of Albanian judges on similar topics funded on this occasion by the Slynn Foundation. Three tribunal judges from the Judicial College (Judge Christa Christensen, Judge Martha Street, and Judge Hugh Howard) visited Skopje,

capital of the Former Yugoslav Republic of Macedonia in September 2014, to provide training to their judges in judgement writing. The training was sponsored (and fully funded) by the OCSE (Organisation for Co-operation and Security in Europe).

### Future Plans

In January 2015 the College held its biannual conference for our senior trainers on the theme 2015 - 2017: Towards a College Faculty. This is one of the very few occasions on which all the major players in the Judicial College can meet together. Those attending included the senior trainers in the College, together with judicial trainers from Belgium, Bulgaria, the Netherlands, Scotland and Northern Ireland, and academics from Lancaster University and the University of Law. The conference discussed inter alia the integration of social context issues into judicial training, how to train judges to manage litigants in person, expanding the College's cross-jurisdictional programme, and the further development of e-Learning as an important element of judicial training. Lady Justice Anne Rafferty, the new Chairman of the College, was present throughout the conference.

