§ Law in Context

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Tribunals in transition

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In Chapter 10, we introduced the topic of administrative justice, adopting a bottom-up approach. We considered ways of resolving disputes without resort to the formal machinery of tribunals and courts. The commonly held view of tribunals as court substitutes was recorded but never unpacked. It is now time to consider this view more carefully and look more closely at the evolution of tribunals. They have moved a long way from humble beginnings to the place they occupy today as the standard machinery for alternative dispute resolution in administrative law. Situated near the top of the pyramid, they now possess their own integrated tribunals service and, at appellate level, stand in near proximity to the courts. We shall see that procedures have also converged, with courts becoming more flexible after Lord Woolf's review of civil procedure and tribunals becoming more formal. The Tribunals, Courts and Enforcement Act 2007 (TCEA) sees a partial assimilation of the two adjudicative systems,

Table 11.1 Cases disposed of annually by selected Tribunal Service tribunals[1]

	2005–6	2006–7	2007–8
Social Security and Child Support Appeals (SSCSA)	262,857	254344	256,565
Mental Health Review	10,420	18,851	19,500
Commissioners Office (TCO) (income tax)	5,523	5,689	5,807
Asylum and Immigration Tribunal (AIT)	114,692	166,191	161,538
All Tribunal Service tribunals	497,485	566,461	548,592

representing, we shall argue, a final acknowledgment of the position of tribunals as court substitutes.

Without tribunals, the court system would quite simply break down and machinery for alternative dispute resolution would need to be heavily augmented. As Table 11.1 shows, some tribunals handle very large case loads. The combined total of enquiries addressed to the Parliamentary Commissioner for Administration (PCA) and Health Services Commissioner (see Chapter 12) averages 12,000 annually, of which around 1,000 are accepted for investigation. The load of the Commission for Local Administration is larger, averaging 18,000 complaints annually, of which in the region of 90 per cent are determined. County courts, perhaps the nearest comparator, registered over 2 million cases in 2007 and proceeded to 18,400 trials with 53,200 small-claims hearings. Employment tribunals (which are not strictly speaking 'administrative' tribunals) disposed of over 107,000 cases in 2006–7 alone. Over seventy separate sets of tribunals were then in operation, hearing around six times as many cases as courts.

In this chapter, we shall trace the evolution of administrative tribunals, using social security and immigration tribunals as illustrative of our main themes. We do not pretend that the two sets of tribunals are 'typical' or, indeed, that 'one size fits all' in the tribunal context. There is a wide diversity and range of tribunals, making them hard to classify or sort. We try nonetheless to answer some of the questions about the utility of tribunals for dispute resolution and the appropriateness of the traditional, adversarial model in the contemporary setting. In recent years, we shall see that oral hearings and lay members (like the traditional jury system) have come under threat from a more managerial model of dispute resolution – Mashaw's model of bureaucratic justice. This 'new public management' angle on dispute resolution is increasingly prevalent within government departments preoccupied with cost and efficiency and underlies the current interest in proportionate dispute resolution (PDR). In certain areas, a move away from judicialisation has been triggered. Thus we find the Council

[1] Table adapted from *Tribunals Service Annual Reports, 2006–7, 2007–8*.

on Tribunals, the tribunals watchdog, repackaged as the Administrative Justice and Tribunals Council (AJTC), marking its wider mandate to review the whole field of administrative justice with special emphasis on PDR. Alongside, tribunals are being bypassed by new innovative systems. Later in the chapter we look briefly at the Social Fund Inspectorate, a prototype of modern 'inspectorial justice' but harking back to the time when the dispute-resolution function was a stage in the decision-making process given, as Stebbings tells us, 'to the implementing bodies themselves' (see p. 439 above).

1. Franks and after: Establishing values

Many of the characteristics of the contemporary tribunal system can be traced to Franks. Its first and most significant legacy was the finding that 'tribunals should properly be regarded as machinery provided by Parliament for adjudication rather than as part of the machinery of administration'.[2] This conclusion, a marked chang e from the previous view of tribunals as a stage in the administrative process,[3] was by no means inevitable. As Richardson and Genn have recently noted, 'Tribunals do not have to lie within the judicial arm of government with all the necessity for independence that that involves. In Australia, they are seen as part of the executive. But in the United Kingdom the judicial model is firmly entrenched.'[4] As we shall see, the 'entrenchment' is very recent and still incomplete. Not until the Leggatt review of the tribunal system in 2001[5] was a unitary tribunals system seriously contemplated, let alone one that took the administration of tribunals away from their sponsoring central government departments, many of which (and notably the Home Office) hotly opposed change.

In practice, tribunals still occupy very different positions in decision-making chains. Some, like the Information Commissioner discussed in the previous chapter, or the Civil Aviation Authority (CAA), which has the duty of granting operating, route and air transport licences as well as air operator's certificates, possess a combination of regulatory and adjudicative functions. The CAA's licensing functions may or may not be classified as adjudicative. The procedures, set out in regulations, permit the CAA to hold hearings and provide for representation from interested parties, which points to an adjudicative function; that appeal lies to a government minister[6] points in the contrary direction. In contrast, the Independent Appeals Service (AS) (now incorporated into the Tribunal Service) is, in Ison's terms (see p. 443 above), a third-level

[2] *Report of the Committee on Tribunals and Inquiries*, Cmnd 218 (1957) (hereafter 'Franks') [40].

[3] See the discussion of Robson's *Justice and Administrative Law* at p. 440 above.

[4] G. Richardson and H. Genn, 'Tribunals in transition: Resolution or adjudication?' [2007] *PL* 116. The difference has constitutional origins and it should not be assumed that the Australian Administrative Appeals Tribunal lacks independence.

[5] Sir Andrew Leggatt, *Tribunals for Users: One system, one service* (HMSO, 2001) (hereafter Leggatt). Many years earlier, the move had been recommended in a study by J. Farmer, *Tribunals and Government* (Weidenfeld and Nicolson, 1974).

[6] See the Licensing of Air Carriers Regulations 1992, SI 2292/1992 made under the authority of the Civil Aviation Act 1982.

complaints-handling body responsible for appeals on decisions on social-security matters, including disability, child support and vaccine damage, after a second-level internal review. It stresses its *independent* status while at the same time describing itself as an 'executive agency of the Ministry of Justice'.

The primary legacy of Franks was its chosen mantra of 'openness, impartiality and fairness',[7] keywords that have dominated every subsequent major reconsideration of administrative justice. They have also helped to set in place a model of adjudication in which independence and impartiality are intertwined. Impartiality is not the same thing as independence, though the two are often in practice confused. Baroness Hale sees independence as *institutional* and related to the structural framework of the adjudicative machinery; impartiality, on the other hand, is *functional* and refers to the adjudicator's approach to his task.[8] Impartiality can (as we shall see is the case with the Social Fund Inspectorate) be achieved without institutional independence, though the latter helps 'to maintain a distance between the decision-maker and both the subject-matter of the dispute and the personalities involved, and in that sense can be seen as instrumental to achieving impartiality and hence good outcomes'.[9] The tendency to conflate the two values was already visible in Franks, which said:

> In the field of tribunals openness appears to us to require the publicity of proceedings and knowledge of the essential reasoning underlying the decision; fairness to require the adoption of a clear procedure which enables parties to know their rights, to present their case fully and to know the case which they have to meet; and impartiality to require the freedom of tribunals from the influence, real or apparent of departments concerned with the subject-matter of their decisions.[10]

In this way, Franks helped to initiate debate on structural independence for tribunals, a demand reinforced after the introduction of the Human Rights Act (HRA) by the growing impact of ECHR Art. 6(1) (see Chapter 14). The debate culminated in the Leggatt review and TCEA, which formally links tribunals for the first time to the court service. Franks failed, however, to establish any principled reason for deciding *when* a specific administrative or ministerial decision required reference to a tribunal or court or indeed whether the reference should be to a court or tribunal, commenting only that, in the absence of 'special considerations', courts, not tribunals, should adjudicate. It left the critical question wide open, focusing on the existing system. It also recommended a new 'tribunals watchdog', the Council on Tribunals, with powers to tackle questions of allocation. In fact, successive governments prevented the Council from fulfilling this

[7] Franks [41].

[8] *Gillies v Work and Pensions Secretary* [2006] UKHL 2 [38]. The question is further discussed in the context of procedural justice below.

[9] *Gillies* [121].

[10] Franks [42].

role.[11] But the Council did provide an ongoing stimulus for reform, even though never empowered to operate in the regulatory manner envisaged by Franks.

By an application of the procedural values of openness, impartiality and fairness, Franks aimed to push tribunals closer towards the common law adjudicative ideal-type. Some of the modifications it recommended (such as the duty to give reasons on request) were incorporated in the Tribunals and Inquiries Act 1958, while others (such as the opening-up of hearings to the public) required no more than secondary legislation or administrative action. Although not every recommendation was accepted, a measure of judicialisation was achieved and as tribunals were slowly remade in the image of the ordinary courts, it became more possible to view them merely as 'court substitutes' – a utility court model selected because they provided 'simpler, speedier, cheaper and more accessible justice'.[12] Only recently has this model come under fire.

Franks opened the way for a judicialisation of tribunal procedure, based on the trial-type model: in other words, the oral and adversarial procedures of the 'ordinary courts'. It envisaged legally qualified chairmen; 'orderly' procedures; public hearings; full reasons to be given for decisions; developed systems of precedent; and more. A right to legal representation and extension of the provision of legal aid was also recommended. This, however, has never been fully implemented. Legal aid remains exceptional in tribunals and an ongoing battle surrounds it.[13] There is much research to show that appellants find it hard to represent themselves, tend to take any opportunity (such as legal aid or community legal services) to secure representation, and do very much better when represented. This is especially true of immigration tribunals, whose users may speak little English and be unfamiliar not only with asylum law but also with the legal and administrative system generally. An important survey by Genn and Genn[14] found that most immigrants obtained information about their right of appeal direct from the immigration service, while a second study showed 'considerable problems with information about rights and procedures as well as difficulties with language and literacy. It is likely that some of these barriers apply equally to other types of immigration appeal.'[15] There is correspondingly little evidence to support Leggatt's view that 'the vast majority

[11] Franks [30]. See for discussion the JUSTICE–All Souls Review, *Administrative Justice: Some necessary reforms* (Clarendon Press, 1988) (hereafter JUSTICE–All Souls), Ch. 9.

[12] H.W.R. Wade and C. Forsyth, *Administrative Law* (Oxford University Press) 2004, p. 884. And see H. Genn and G. Richardson (eds.), *Administrative Law and Government Action: The courts and alternative mechanisms of review* (Clarendon Press, 1994).

[13] See JUSTICE–All Souls [9.29–38]; Legal Action Group, *Justice: Redressing the balance* (LAG, 1997) 70–4; Council on Tribunals, *Review of Tribunals: The Council's response* (September, 2000) [28–32]. Legal representation is not available in all tribunals and its extent varies considerably: see Table I in M. Adler and J. Gulland, *Tribunal Users' Experiences, Perceptions and Expectations: A literature review* (November 2003); P. Draycott and S. Hynes, *Extending Legal Aid To Tribunals*, Legal Action Special Feature (June 2007).

[14] H. Genn and Y. Genn, *The Effectiveness of Representation at Tribunals* (HMSO, 1989).

[15] Adler and Gulland, *Tribunal Users' Experiences, Perceptions and Expectations*, citing Gelsthorpe *et al.*, *Family Visitor Appeals: An evaluation of the decision to appeal and disparities in success rates by appeal type*, (Home Office Online Report 26/03, 2003).

of appellants' could be enabled by its proposed reforms (below) 'to put their cases properly themselves'. In the present era of retrenchment, however, no substantial new entitlements to legal aid are likely to be conceded.[16]

Judicialisation from within was accompanied by judicialisation from without; tribunals were for supervisory purposes to come under the rule of the 'ordinary courts'. Franks recommended one full appeal from all tribunal decisions and a statutory right of appeal on a point of law from most tribunals. Ouster clauses were to be cut back, a recommendation generally respected, and judicial review should always be available. By requiring reasoned decisions, Franks believed it would be giving the courts a record on which effective judicial review could be based. Today, these measures are generally taken for granted and judicial control of tribunals is, as we shall see, routinely asserted. To Lord Woolf indeed, tribunals were 'a third tier' in the administration of civil justice,[17] a level that has since been outstripped.

We should not be too ready, however, to accept the stereotype of tribunals as court substitutes. Some, notably employment tribunals, are genuinely so, in the sense that they offer a state-funded service for the resolution of disputes between citizens: in the case of employment tribunals, employers and employees. If we ask why these bodies remain within the tribunal system and are not simply relabelled 'Employment Courts', the answer would come back from users and their representatives that tribunals, with their lay members, are more accessible and less frightening than courts. They are, in other words, prized for qualities that *differentiate* a tribunal from a court hearing. The qualities of cheapness, speed, accessibility and informality with which we have seen tribunals credited are not, in short, simply managerial virtues; they make a positive contribution to proportionate dispute resolution.[18] Speed and cheapness are qualities in principle achievable by any good adjudication or complaints-handling system, including (in Lord Woolf's authoritative opinion) courts.[19] Tribunals have other features that help to make them user-friendly. Professor Bell, for example, emphasised the *participatory* nature of tribunal hearings. This she thought helped to 'foster civic competence, personal responsibility and active involvement rather than over-dependency on professionals and a belief that people are not able to cope'.[20] If this is so, it is partly due to the *oral* character of proceedings; equally important, however, is the presence of *lay members* on tribunals, normally 'representative' of the two parties to the

[16] The White Paper, *Transforming Public Services*, Cm. 6243 (2004) stated that the 'blanket availability of legal aid is unnecessary' [10.3] [10.14] and that current provision through the Community Legal Service 'is about right' [10.15].

[17] Lord Woolf, *Access to Justice* (Lord Chancellor's Department, 1996).

[18] M. Partington, 'Restructuring administrative justice? The redress of citizens' grievances' (1999) 52 *Current Legal Problems* 173. And see R Creyke, 'The special place of tribunals in the system of justice: How can tribunals make a difference?' (2004) 15 *Public Law Review* 220.

[19] Lord Woolf, *Access to Justice*.

[20] K. Bell, 'Social security tribunals: A general perspective' (1982) 33 *NILQ* 132, 147. And see J. Mashaw, 'Administrative Due Process: The Quest for a Dignitary Theory' (1981) 61 *Boston University Law Rev.* 885.

dispute. On the other hand, as the process of juridification noted in Chapters 4 and 5 makes the body of law with which tribunals have to deal steadily more complex, so professional help and advice become more necessary, at one and the same time strengthening the case for legal aid in tribunals and undercutting the case for lay members.

2. Tribunals for users

Leggatt fastened on *participation* as one of three linked principles that should govern the allocation of decisions to tribunals, the other two being *accessibility* to users and the need for special *expertise*. Accepting the popular belief (which has never been properly tested) that tribunals are more accessible than courts, Leggatt thought that 'a tribunal route, rather than redress in the courts, should be the normal option in the interests of accessibility'.[21] There must be 'strong specific arguments' if no appeal was to be provided and recourse left only to judicial review, a route that was 'expensive and difficult for the unassisted'. But Leggatt gave accessibility an unusual meaning, defining it in terms of informality and linking the three qualities of participation, accessibility and expertise:

Participation

First, the widest common theme in current tribunals is the aim that users should be able to prepare and present their own cases effectively, if helped by good-quality, imaginatively presented information, and by expert procedural help from tribunal staff and substantive assistance from advice services. We think the element of direct participation is particularly important in the field of disputes between the citizen and the state. We have found, however, that in almost all areas the decision-making processes, and the administrative support which underlies them, do not meet the peculiar challenges the overall aim imposes. We propose a programme of reform which should enable users to play their part better. The use of tribunals to decide disputes should be considered when the factual and legal issues raised by the majority of cases to be brought under proposed legislation are unlikely to be so complex as to prevent users from preparing their own cases and presenting them to the tribunal themselves, if properly helped.[22]

With the post-Leggatt emphasis on 'tribunals for users', came a greater interest in the special qualities that help to make tribunals user-friendly. Thanks to the 'bottom-up' theories of complaints-handling discussed in the previous chapter, we are beginning to have at our disposal a body of empirical research that helps to bring users into the picture.[23] Research suggests that lay members may play a

[21] Leggatt [1.13].
[22] Leggatt [1.11].
[23] The most significant recent studies are collected in a literature review by M. Partington *et al.*, *Empirical Research on Tribunals: An annotated review of research published between 1992 and 2007* (AJTC, 2007) available online. See also Adler and Gulland, *Tribunal Users' Experiences, Perceptions and Expectations*.

special role in the case of ethnic minorities and that increasing the ethnic diversity of tribunal panels (not necessarily a simple thing to do) might have a positive effect on their perceptions of fairness.[24] This is a point to bear in mind when considering the rapid legalisation of immigration tribunals (see p. 514 below).

We know that tribunal-users are concerned with speed, accessibility, anticipated cost and complexity. Their main concern is, however, with fairness. Users, about half of whom are unrepresented, really do appreciate an opportunity to participate by putting their case. They expect to be listened to, have their views considered and have a real opportunity to influence the outcome. But users are apparently more concerned with impartiality than structural independence, believing that the decision-maker should have an open mind, deal with their case in a neutral, even-handed way and treat them courteously and with respect.[25] These are, as we saw in the last chapter, qualities beginning to be expected of everyone who handles complaints or who makes individuated decisions, whether they work as administrators or adjudicators.

(a) Members and 'expertise'

Leggatt, which consulted specifically on the issue, heard from users that 'the presence of people without an obviously expert qualification helped some users cope with the stressful experience of appearing before a tribunal' and made it easier 'for at least some users to present their cases'. Leggatt concluded that tribunals permitted decisions to be reached 'by a panel of people with a range of qualifications and expertise'; tribunal members who were themselves disabled were thought, for example, to make a major contribution to disability appeals tribunals.[26] This, however, is to confuse personal experience with expertise, giving that term a perverse meaning. Admittedly personal experience is something for which tribunals may be valued, especially perhaps in social security tribunals; it is decidedly not the sort of professional expertise that one would wish for in a tribunal dealing with, for example, aviation safety. Nor is it what Wade was thinking of when he said:

> Specialised tribunals can deal both more expertly and more rapidly with special classes of cases, whereas in the High Court counsel may take a day or more to explain to the judge how some statutory scheme is designed to operate . . . Where there is a continuous flow of claims for a particular class, there is every advantage in a specialised jurisdiction.[27]

This sounds more like the Lands Tribunal, composed equally of lawyers and surveyors, which sits to hear disputes over land valuation. These 'tend to be

[24] H. Genn *et al.*, *Tribunals for Diverse Users*, DCA research series (HMSO, 2006).
[25] *Ibid*., Ch. 6.
[26] Leggatt [1.12] [7.19].
[27] Wade and Forsyth, *Administrative Law*, pp. 906–7. See also R. Sainsbury and H. Genn, 'Lessons from tribunals' in Cranston and Zuckerman (eds.), *The Woolf Report Reviewed* (Clarendon Press, 1995), p. 426.

legally and factually complex' and legal representation is the norm. The Lands Tribunal has actually received criticism because its 'comparatively formal and adversarial' proceedings have failed to take on board the Woolf changes to civil procedure.[28] Again, in Mental Health Review Tribunals, responsible for hearing applications for release from people detained under the Mental Health Act 1983, a medically qualified practitioner, in practice a psychiatrist, must be appointed in addition to one legally qualified and one lay member for each hearing. The psychiatrist makes a preliminary examination of the applicant.[29]

In the consultation paper on the new tribunal structure,[30] 'expertise' and 'experience' were again conflated. The proposal was 'to create a unified approach to tribunal composition, and better use the experience and expertise non-legal members (NLMs) bring to the tribunal, whether they be accountants, surveyors, service or disability members'. NLMs 'should be used on particular hearings where they bring to the table skills, experience or knowledge that tribunal judges cannot provide'. Some concern was expressed in the consultation that the new structural arrangements (which group tribunals and their members into 'chambers') would lead to 'dilution of skills and expertise' on the part of chairmen and diminution of the role of non-legal members. The Government tried to provide reassurance that this would not be the case: 'the aim is to make the best possible use of the experience and expertise NLMs bring to the tribunal, whilst at the same time avoid placing unnecessary burdens on those who give their time to tribunals to perform this role'. To underline that 'expertise and experience can be equally as important as qualifications in many tribunal hearings', the proposal to call all specialists and experts 'members' was adopted. This, however, can only be read as a move away from the original role of 'lay members' as articulated by Bell and Leggatt.

3. Welfare adjudication: Discretion to rules

(a) From NATs to SBATs

For much of its long history, the question whether social security adjudication was administrative or adjudicative in character was immaterial. Early welfare

[28] Following the Woolf Review, *Access to Justice*; Leggatt [155]. The current Lands Tribunal Rules 1996 (SI 1996/1022 as amended) are to be read with the Lands Tribunals Practice Direction, which states [2.1] that the Civil Procedure Rules have no application but that the Tribunal follows the same overriding objective of 'dealing with a case justly' as the CPR. Following the TCEA 2007, whose provisions are explained below, the Lands Tribunal will become part of a specialised chamber for land, property and housing.

[29] This position is not without its critics: see G. Richardson and D. Machin, 'Doctors on tribunals: A confusion of roles' (2000) 176 *British J. of Psychiatry* 110 and, for a response, H. Prins, 'Complex medical roles in mental health review tribunals' (2000) 177 *British J. of Psychiatry* 182. And see E. Perkins, *Decision Making in Mental Health Review Tribunals* (Policy Studies Institute, 2003). In November 2008, MHRTs became First-tier Tribunals in the Social Entitlement chamber in the reorganised tribunal system (below).

[30] See Ministry of Justice, *Government Response to Transforming Tribunals* (19 May 2008), available online.

tribunals were locally based and 'hearings', if they can be dignified with that name, resembled the Public Assistance Committees which preceded them. Typically, they were informal and held in private, respecting the intimate nature of the requests for assistance with which they had to deal.[31] The Franks Committee accepted the departmental view of National Assistance Tribunals (NATs) (as they had become) as 'an assessment or case committee, taking a further look at the facts and in some cases arriving at a fresh decision on the extent of need.'[32] They were thought to operate satisfactorily (perhaps this only meant that Franks received no grave complaints). The report described NATs as 'special' and exempted them from the general requirement of openness; 'if any or all of these appeals were to be held in public many applicants might be deterred from appealing or even from applying for assistance and the purpose of the legislation might thus be frustrated'.[33]

There were other signs that Franks did not regard NATs as 'machinery for adjudication'. It did not create an appeal to the High Court on a point of law and it made no recommendations about legally qualified chairmen. The only real concession was the admission that 'legal representation should be permitted to the applicant who can satisfy the chairman of the tribunal that he cannot satisfactorily present his case unless he is allowed to employ a lawyer'. It can be seen how these features might help to disguise dissatisfaction with tribunals. Claimants were not legally represented and were hardly likely to know of the prerogative-order procedure (the precursor of modern judicial review procedure) by which decisions could theoretically be challenged. Neither lawyers nor journalists were present to articulate dissatisfaction. It is tempting to see Franks as condoning amateurishness because small sums were at stake or because the concept of welfare as a 'charitable handout' still prevailed.

The Ministry of Social Security Act 1966 did not alter the tribunals system though once again they were renamed: Supplementary Benefit Appeal Tribunals, commonly known as SBATs. The Act made one important change. It introduced the idea of *entitlement* to benefit, albeit in limited areas, perhaps unintentionally setting the scene for adjudicative change. The climate, however, was not yet ready. Mashaw's 'case-committee' model, which, with the tacit approval of Franks, SBATs were supposedly operating, was slow to change. Thus in 1971, we find the Chairman of the Supplementary Benefits Commission (SBC), responsible after 1966 for administering the tribunals system, writing of his gratitude to 'all who act, in whatever capacity, as friendly counsellors to claimants' adding that 'the concept of co-operation, in the

[31] The UATs set up under the Unemployment Assistance Act 1934 became NATs after the National Assistance Act 1948: see T. Lynes, 'Unemployment Assistance Tribunals in the 1930s' in Adler and Bradley (eds.), *Justice, Discretion and Poverty* (Professional Books, 1975). M. Herman, *Administrative Justice and Supplementary Benefits* (London School of Economics, 1972) pp. 13–14 still classified SBATs (below) as administrative.

[32] Franks [180] [182–3]. And see A. Bradley, 'National Assistance Appeal Tribunals and the Franks Report', in Adler and Bradley (eds.), *Justice, Discretion and Poverty*.

[33] Franks [79].

Commission's view, goes to the heart of a successful operation of the scheme'.[34] Bradley, in sharp contrast, was describing the functions of SBATs in standard dispute-resolution terminology. They were instituted, he said:

> to decide *disputes* which the administration of social security has thrown up, disputes which break the surface because a citizen is sufficiently aggrieved by the official decision to appeal against it. It is an important function of tribunals to be able to settle such disputes in an impartial and fair manner. If their decisions are to be accepted, they must observe certain minimum standards both of procedural and of substantive justice.[35]

If Franks had favoured informality, it had also warned that informality without rules of procedure might produce 'an unordered character which makes it difficult, if not impossible, for the tribunal properly to sift the facts and weigh the evidence'.[36] This was an apt description of SBATs, where members received no training, administrative staff received minimal training and legally qualified chairmen were exceptional. Tribunals were inclined to give free rein to prejudice, and ignorance of the simplest legal tenets, such as who ought to prove what or how things should be proved, was common. In an influential study, Lewis contrasted the performance of National Insurance Local Tribunals (NILTs), which dealt with industrial injury claims, with that of SBATs; NILTs were 'usually a model of balancing informal expertise with order and legality'. Praising the 'traditions of English lawyering which can, at its best, rise to lending order to administrative processes without ever meddling', Lewis concluded that:

> criticism of supplementary benefit tribunals is not based upon comparisons with courts of law but is made within a framework of acceptance of the valuable job performed by administrative tribunals at large. Nor is the objection to underdeveloped legal technique an attempt to promote the claims of the legal profession to intellectual leadership of the 'welfare rights movement'. It is simply that the system of appeals from the SBC is vastly important, that it is not operating upon the basis of anything resembling objective standards, that such a state of affairs works to the ultimate detriment of claimants and that some of the fault is a lack of legal expertise.[37]

Researchers who, like Lewis, attended SBATs in the early 1970s, found tribunals that were heavily dependent on the clerk, a departmental employee, and the departmental presenting officer, who in many tribunals sat opposite to the clerk, emphasising his official status and suggesting a spurious objectivity. Regular appearance in tribunals and access to departmental policy gave these departmental officials a misleading appearance of expertise and the fact that many members

[34] Lord Collison, 'Introduction', *SBC Handbook for Claimants* (c.1966).

[35] A. Bradley, 'Reform of Supplementary Benefit Tribunals: The key issues' (1976) 27 *NILQ* 96, 101.

[36] Franks [64].

[37] N. Lewis, 'Supplementary Benefits Appeal Tribunals' [1973] *PL* 257, 258–9.

and chairmen were also magistrates may have reinforced their tendency to turn for advice to the clerk. But unlike the clerk in a magistrate's court, neither clerks nor presenting officers were legally qualified or trained. Their advice on the meaning of statute and regulations and their knowledge of High Court decisions were imperfect and the presenting officer, who had normally worked in a social security office actually deciding claims, was likely to feel a sense of loyalty to the department, share its ethos and accept its understanding of 'the rules'.

Since 1958, chairmen had been appointed by the minister from a panel approved by the Lord Chancellor but they did not need legal qualifications. Of the two members, one was selected by the minister from a panel nominated by trade unions and other representative organisations, the other was appointed by the minister from a list of people 'with knowledge or local experience of people living on low incomes'. In practice, members were often drawn from local citizens' advice bureaux or chambers of commerce in an effort to make them representative of the community. They were strikingly unrepresentative of the population at large, with women, ethnic minorities and young people seriously under-represented, and even less representative of claimants, whose difficulties they often failed to recognise or accept. Lack of training reinforced latent prejudice and bias.[38]

This was a system riddled at every level with unstructured discretion. The first-instance decision-making was left to junior benefit officers, though their discretion was in practice structured by departmental guidance. SBATs were meant to examine the discretionary decisions of benefit officers on their merits and, according to s 15(1)(c) of the 1976 Act, could 'substitute for any decision appealed against any determination which a benefit officer could have made'. Departmental policy was not supposed to bind the 'independent' tribunals but unqualified tribunal members and chairmen did not always understand the status of this 'soft law' nor did they appreciate that SBC directives and codes of practice could not 'bind' either the benefit officer or the tribunal. They tended either to accept SBC policy unquestioningly or to give free rein to personal prejudices. The 'strong' discretion of the three-person tribunal panel was, in other words, not properly 'structured'. Observers were concerned by the way the power of choice was exercised and by the indeterminate nature of the 'rules'.

(b) The Bell Report and after: Orderliness

A mounting tide of pressure from welfare lawyers, academics and action groups led the overseeing department (then the DHSS) to commission a survey of SBATs in which Professor Bell pointed to some of the disadvantages of adversarial procedure in tribunals.[39] Bell concluded that presenting officers did

[38] R. Lister, *Justice for the Claimant: A study of Supplementary Benefit Appeal Tribunals* (Child Poverty Action Group, 1974).

[39] K. Bell, *Research Study on Supplementary Benefit Appeal Tribunals: Review of main findings: Conclusions: Recommendations* (HMSO, 1975).

not understand their role; some could more aptly be described as prosecuting officers. They needed to be of high calibre and properly trained if they were to balance their conflicting duties of 'adviser' and 'presenter'. Without legal qualifications clerks could not be relied on to redress the balance. Clerks, unlike presenting officers, remained with the tribunal while it was deliberating and after the appellant and his representative had left. Some clerks intervened of their own accord in proceedings where they felt the tribunal was going wrong.

The Bell Report was an important stage in the move to orderliness and ultimately to judicialisation of tribunals. It recommended a three-stage programme:

- Stage 1: strengthen existing tribunals, e.g. by appointing legal practitioners as 'Senior Chairmen' to supervise tribunals and institute training schemes.
- Stage 2: improve on existing tribunals by a planned programme of judicialisation. Bell recommended legally qualified chairmen, better provision for representation and a higher calibre of member with strong commitment to the work.
- Stage 3: integrate SBATs with NILTs (not achieved in practice until 1983).

Bell had complained that no right of appeal existed from SBATs to a second-tier appeal body and of the deliberate decision to exclude them from the right to appeal on a point of law to the High Court.[40] As a halfway measure, the appeals system would be restructured to allow a second appeal on a point of law to National Insurance Commissioners, who would be given jurisdiction in both sets of tribunals and rechristened 'Social Security Commissioners'. This was an important step forward.

The majority of Bell's proposals could be implemented administratively. There were immediate moves to introduce training schemes and appoint more legally trained chairmen. Five senior chairmen (legally qualified) were appointed on a regional basis to monitor tribunals and to supervise training who, by 1982, had assumed a 'watchdog' function. The new appeals structure was provided by legislation.[41] Fulfilling an important criterion for tribunals, the Commissioners were specialists, well versed in welfare law, who understood the operation of the welfare system. A substantial volume of precedent was thus built up, which helped to regularise procedure as well as to rule on the interpretation of the complex statutes and regulations.[42] To underpin the new appeals structure, the rules provided for the tribunal to record its reasons and findings of material questions of fact, together with any dissenting opinions.[43]

[40] Under s. 13 of the Tribunals and Inquiries Act 1971.
[41] Ss. 14 and 15 of the Social Security Act 1980.
[42] See T. Buck, 'Precedent in tribunals and the development of principles' (2006) 25 *CJQ* 458.
[43] Supplementary Benefit and Family Income Supplements (Appeals) Rules, SI 1980/1605. The duty is reinforced by s. 10 of the Tribunals and Inquiries Act 1992, which provides statutory authority for a statement of reasons to form part of the record: see J. Tinnion, 'Principles in practice: The statement of reasons' (1995) 2 *Tribunals* 9.

Only a handful of cases reached the Court of Appeal, with a further trickle of applications for judicial review, the normal remedy of last resort.

After Bell, the claimant entering a SBAT would see facing her across a table a lawyer chairman seated between two members. The clerk sat on one side. The claimant and her representative sat opposite with the departmental presenting officer beside her, emphasising their equal status and removing any impression that he was an officer of the tribunal. Every member had the procedural guide. A copy of all relevant statutes, regulations and guidance should be in the room, together with the collected summaries of relevant High Court precedents and Commissioners' decisions to which the presenting officer might want to make reference. The first procedural guide was issued in 1977; revised by the senior chairmen, it was reissued regularly (and is now available online). This, and the extension of training, did much to standardise procedures.

The guide laid particular emphasis on the importance of reasoned decisions, warning against 'boiler-plate reasons'. The tribunal, having considered all the evidence was to decide which facts were established and, where there was a conflict of evidence, indicate clearly which version it accepted:

> It is not sufficient merely to record: 'The facts put forward by the Adjudication Officer (or the claimant) were agreed' or 'Facts as stated'. The space labelled 'Tribunal's unanimous/majority decision' is not simply for a 'rubber stamp decision' . . . The Tribunal's decision should be fully, intelligibly and accurately set out in it. To use expressions such as 'Decision revised' or 'Appeal dismissed' or 'Case adjourned' is not sufficient. The dissenting member's reasons should also be recorded. The wording should be such that neither the claimant nor the AO is left in any doubt as to what the Tribunal has decided. A proper recording of decisions by the chairman is essential; it is his duty to see that this is done.[44]

(c) A presidential system

A further move towards a court model came with the Health and Social Services and Social Security Adjudications Act 1983 (HASSASSA), which provided for benefit decisions to be taken by an adjudication officer with appeal to a SSAT and further appeal to the Social Security Commissioners and Court of Appeal.[45] More important, HASSASSA empowered the Lord Chancellor to appoint a president with regional and full-time chairmen for the tribunals and for these appointments to be held by barristers or solicitors of not less than ten, seven and five years' standing respectively. Appointments of tribunal members would be made by the president and the greater independence of the tribunals was recognised by the fact that staffing, including the post of clerk, was also to be the

[44] *Social Security Appeal Tribunals: A guide to procedure* (HMSO, 1985) [73]. And see Commissioner's Decision (R(SB) 8/84).

[45] See N. Harris, 'The reform of the Supplementary Benefits Appeals System' (1983) *J. of Social Welfare Law* 212. HASSASSA also provided for NILTs and SBATs to be amalgamated.

responsibility of the president.[46] The presidential system and the personality of Judge Byrt, the first president, provided the motor for reform. Judge Byrt used to the full his powers to appoint and train chairmen, making tribunals conform more closely to Mashaw's 'due process' model. Training was steadily upgraded and increased. There was proper access to the regulations and precedent from the Social Security Commissioners. Much was done in addition to make the panels more 'representative', at least in regard to age and gender.

Were these changes solely an instance of 'capture' by a powerful Lord Chancellor and the legal profession? Perhaps they were necessitated by a steady process of juridification. Benefits were no longer a charitable handout to the 'deserving poor'. The welfare system had been transformed, with a sharp move from discretion to rules visible in the governing legislation. It had become a mass service, dealing annually with millions of payments and with a budget of many millions. A complex network of statute and regulations, notable for their textual density, now governed entitlements. The new regime had, in the words of one commentator, 'swept away many of the old (and potentially broad) discretionary powers and replaced them with a much firmer and narrower basis of legal entitlement'.[47] This was a fundamental change of style that demanded to be matched by a corresponding transformation of tribunals. Tribunal work now called for greater technical ability in dealing with arguments based on entitlement under the regulations and a considerable degree of legal expertise was now necessary to interpret them. Hearings had become more formal; proceedings had to be adequately recorded; the papers, decision and record had become more legalistic. Legally qualified chairmen were pushed into a dominant position, often forming a view on the papers submitted without much further exploration of facts. Some observers felt that the changes had gone too far; lay members, whose remit was to play an active and enabling role in proceedings by showing sympathetic understanding of the problem, listening, asking relevant questions, drawing claimants out and generally helping to sort out the case, were being sidelined. The known preference of appellants for informality, for participatory proceedings and for non-legal representation, usually by social workers, whose preference for the 'case-worker model' allowed appellants to participate in presenting their own case, was being undercut.[48]

A study had shown a high correlation between success rates, attendance and representation; only about 7 per cent of appellants who neither attended nor were represented succeeded in their appeal. The authors thought the apparent informality of tribunal proceedings positively misleading; legally relevant factual information and evidence of those facts was necessary for claimants to

[46] HASSASSA, Sch. 4 [8]. Ministerial and Treasury consent was required.

[47] J. Baldwin, N. Wikeley and R. Young, *Judging Social Security: The adjudication of claims* (Clarendon Press, 1992), p. 155.

[48] C. Mesher, 'The 1980 social security legislation: The great welfare state chainsaw massacre?' (1981) 8 *JLS* 119.

make their case and the framework was increasingly that of common law, trial-type procedure.[49] The obvious answer of more representation had, however, never really been on the agenda. The pragmatic solution of an investigatory role for the tribunal was suggested by the Social Security Commissioners: 'its investigatory function has as its object the ascertainment of the facts and the determination of the truth'.[50] Judge Byrt also recognised that chairmen would have to modify their traditional stance of adjudicators in an adversarial system, who should not actively intervene to assist one of the parties to proceedings:

> If the appellant is unrepresented, it makes a mockery of the tribunal system to leave him totally to his own devices to argue his appeal as best he may. The law is so complex that the majority of appellants would not know where to begin, and justice would seldom be done. Keeping its independent judicial role in mind, the tribunal must seek clarification and if necessary the elaboration of all relevant facts . . . the tribunal must create the atmosphere in which such an inquiry might effectively take place. It must do what it can to offset the appellant's feeling of bewilderment and intimidation at attending a court of law . . . The underlying principle is that the tribunal should in all things conduct itself so as to enable the appellant to maximise his performance and himself to feel that he has done so.[51]

This was the 'enabling' role, to be taken up later by Leggatt, which also emphasised chairmen's 'considerable responsibility to ensure that . . . the parties to be heard have the appropriate chance to say what they have to say, to ask the questions that they wish to ask, and to make the submissions that relate to their case'.[52] But chairmen trained in an adversarial system were in practice uneasy in abandoning their traditional impartial and listening role. An alternative way forward was to transform the role of the presenting officer from departmental advocate to a 'friend of the court' function. But this is a difficult balancing act even for a skilled advocate and the presenting officer remained a departmental official. Something nearer to true inquisitorial procedure might be necessary.

To summarise the position as it stood in the late 1980s, judicialisation had, on the surface, won the day. There was a cadre of full- and part-time professional social-security adjudicators and the list of lay members, if not entirely representative, had been pruned. Behind the scenes, however, a very different managerial mentality prevailed. The system was being streamlined. Paper decisions were substituted for oral hearings, which became the exception, and short cuts in the recording of decisions and reasons were authorised. To Lynes, a 'simple and informal' procedure was being deliberately bureaucratised.[53]

[49] Genn and Genn, *The Effectiveness of Representation at Tribunal*. See similarly A. Frost and C. Howard, *Representation and Administrative Tribunals* (Routledge, 1977).

[50] Decision 4 R(S)1/87 (Commissioner Hallett).

[51] In evidence to the Social Services Select Committee, *Social Security: Changes Implemented in April 1988*, HC 437-ii (1988/9) [36–7].

[52] M. Partington, 'Principles in practice: Adjudication' (1994) 1 *Tribunals* 12, 13.

[53] T. Lynes, 'Social security tribunals: New procedures', (June 1997) *Legal Action* 24.

(d) Burying Bell?

By the late 1990s, delay had become a problem: an average time of ten weeks in 1983 had mounted to twenty-six weeks in 1996. With the avowed aim of streamlining the system, the Social Security Act (SSA) 1998 merged all existing appeal tribunals, creating a unified Appeals Tribunal and downloading administration to an executive agency. The tribunal was still under the control of a legally qualified president with members selected from a panel appointed by the Lord Chancellor[54] but a radical change had been made in its actual composition. Section 7 of the SSA provided that a tribunal could be composed of one, two or three members, of whom one should be legally qualified. In cases involving 'a question of fact of special difficulty', the tribunal could call on one or more experts to assist it, 'experts' being narrowly defined in the section as members of the panel with 'knowledge or experience which would be relevant in determining the question of fact of special difficulty'. Regulations provided for revision of decisions and for the allocation of cases by the president. A one-person tribunal had to consist of a lawyer; a two-person tribunal handled incapacity benefit, industrial injury or severe disablement and had to consist of a legally and a medically qualified person; in exacting financial cases, such as those involving child support, the two-person panel consisted of a lawyer and person with financial qualifications; where both medical and financial expertise were necessary, a three-person tribunal could be convened. [55] Almost unnoticed, Adler remarked with some sadness, 'the long tradition of lay involvement' in social security appeals had been brought to an abrupt end in favour of a single, legally qualified person sitting alone; in addition, many of the so called 'hearings' would in fact be paper decisions.[56]

The new managerial arrangements allowed some of the backlog and delays to be cleared: the average waiting time dropped; the clear-up rate improved; costs remained low.[57] There have, however, been other costs. With hindsight, Wikeley sees the move to legally qualified single-person tribunals as completing a transition initiated by the post-Bell reforms of HASSASSA, which 'sig-

[54] Ss. 4–7 of the SSA 1998 noted N. Wikeley, 'Decision making and appeals under the Social Security Act 1998' (1998) 5 *J. of Social SecurityLaw* 104. The amalgamated tribunals were: SSATs, Child Support Appeal Tribunals, Disability, Medical Appeal Tribunals and Vaccine Damage Tribunals. In practice the president is a county court judge. The Appeals Service Agency, an executive agency, has since 2007 been part of the Tribunals Service. From 2009 the tribunals have been amalgamated into the Social Entitlement chamber of the new TCEA structure.

[55] S. 6 of the Social Security and Child Support (Decisions and Appeals) Regulations, SI 1999/91.

[56] M. Adler, 'Lay tribunal members and administrative justice' [1999] *PL* 616, 619.

[57] The average time for an appeal to be heard was 10.4 weeks and the number over 20 weeks old was reduced to 3,421. 262, 816 cases had been cleared (compared with 257,888 in the previous year). Average cost was £260 (well below the NAO's average of £455 and 5% below the agency's target of £273): see Appeals Service, *Annual Report and Accounts 2005/6*, HC 1542 (2006/7).

nalled the beginning of the end for lay members in social security tribunals'. By 1998, managerial professionalism was replacing the due process model of HASSASSA, which had in turn superseded Bell's ideal of participation in social-security adjudication. The TCEA completed the process, winding up appeal tribunals and transferring their jurisdiction to the 'First-tier Tribunal'. Once again we would stress that this move is not unique to social security but 'reflects a wider tendency on the part of governments to seek to increase managerial efficiency in the judicial process, as measured by the throughput of cases'.[58] As indicated earlier, the attitude to 'lay' members has been steadily less positive. Leggatt, for example, recommended that the decision whether or not to ask a lay member to sit should rest with presidents or regional/district chairmen, 'on the basis that they should only do so if they [the members] have a particular function to fulfil'.[59]

(e) Internal review: The Social Fund Inspectorate

As a matter of administrative convenience, social security legislation has long made provision for reviewing and changing decisions without the necessity for appeal or a fresh claim but always on strictly limited grounds. In respect of the 'social fund', which largely replaced with discretionary loans the single, lump-sum payments available under previous legislation,[60] the Social Security Act 1986 went much further. Not only did the Act provide a flexible power for social fund officers (SFOs) to review any decision at any time but it also added two further reviews at the claimant's request: (i) of the officer's initial decision by the same or another SFO; and (ii) a further review by the Social Fund Inspectorate (now known as the Independent Review Service or IRS). The IRS is headed by the Social Fund Commissioner (SFC), appointed by the Secretary of State for Work and Pensions, to whom he is accountable. The SFC appoints the inspectorate, usually, to ensure their familiarity with the system, from within the department (DSS) and is responsible for training. An inspector (SFI) has authority to reopen a decision on the grounds that information was missed or incorrectly recorded or that there is new evidence or that the rules have been wrongly applied. The SFI's decision ends the internal review process.

When the SFI was first mooted in the discretionary area of social fund payments as an alternative to the well-established tradition of tribunal adjudication, the Council on Tribunals objected strongly:

[58] N. Wikeley, 'The judicialisation of Social Security Tribunals' (2000) 63 *MLR* 475, 487, 492. And see N. Wikeley and R. Young, 'The marginalisation of lay members in Social Security Appeal Tribunals' (1992) *JSWFL* 127; S. Vernon, 'Principles in practice: The role of lay members in the tribunal system' (1995) 2 *Tribunals* 5.

[59] Leggatt, Recommendation 147 and [7.25].

[60] The Social Fund introduced a new type of social assistance whereby many benefits took the form of loans: see T. Mullen, 'The Social Fund: Cash-limiting social security' (1989) 52 *MLR* 64.

> The only separate review which a dissatisfied claimant could have would be by another official; apparently he would even be in the same local office as the person who made the original decision. This is not the way to gain the confidence of the public, still less of claimants, in these decisions and reviews.[61]

The Council's concern was lack of independence; it saw the move as 'probably the most substantial abolition of a right of appeal to an independent tribunal since 1958'. What then happened reminds us that we should not be too ready to equate independence and impartiality. The first SFC, a lawyer by training, took a 'top-down view' of internal review. She analysed it as a 'two-stage process' in which the first stage had the characteristics of a review or reassessment, while the second resembled appeal. Correctness of initial decisions was of the first importance and decisions were regularly monitored by the SFC to ensure their quality. Equally important, however, was impartiality:

> When the Inspector reviews, he addresses the same matters as does a court in Judicial Review. At the next stage the Inspector is asking himself whether the decision is the right one in all the circumstances of the case. There is no appeal against the Inspector's decision on the merits of the case. The only further recourse the citizen has, if he is not satisfied, is to apply for judicial review on procedural grounds. The aggrieved citizen has a right to expect that the Inspector will act in a fair and impartial manner, consistent with natural justice, and that the decision will be of a high standard. I place emphasis above all on the quality of the review and the standard of service provided by the IRS . . . By the time a case arrives at the IRS, all the facts of the case should have been established. The original application provides the basis for the first decision. As part of the review process, the applicant has the opportunity to attend an interview at which time further evidence may be provided. When the facts have not been established by the decision maker, or they are not recorded, or disputes of fact remain unresolved Inspectors will, if they are unable to resolve the issues, refer the case back to the [Benefits Agency].[62]

Annual reports, many highly critical of the department, give some idea of the scale of work. In 2007–8, for example, SFIs delivered 19,221 decisions and changed around 50 per cent of the decisions they reviewed. Case readers, who check SFI decisions, found that 89 per cent of a sample met SFI standards; of seventy-five complaints about the SFI service, only thirty-five were upheld. The cost per decision of around £160 compares favourably with the cost of a tribunal hearing.

The Commissioner recognised:

[61] Council on Tribunals, *Social Security: Abolition of independent appeals under the proposed Social Fund*, Cmnd. 9722 (1986) [5] [6] [12].

[62] *Annual Report of the Social Fund Commissioner for 1993/4 on the standards of review by Social Fund Inspectors* (HMSO, 1994).

> the need to complete reviews as quickly as possible, since the people who use our service are generally in urgent need and have already had two decisions on their application at Jobcentre Plus. Nevertheless, the Inspector has a duty to ensure natural justice is served. In order to do this, before he makes a decision, he sends the applicant a copy of the key papers, sets out the facts and issues to be decided, invites the applicant to comment and asks any relevant questions.[63]

Over 90 per cent of straightforward enquiries were completed within twelve working days and within thirty days of receipt for complex enquiries; only in respect of urgent cases did the IRS at 87 per cent fall below its 90 per cent target.

A review by independent researchers shortly after the system became operative[64] concluded that it did have an impact: the quality of initial decision-making had been improved by the flow of substituted and returned decisions from the IRS. Not only had the inspectorate emerged as a scrupulous team of reviewers, laying a sound base for any external appeal, but it was itself 'a centre of excellence' in decision-making. The scrutiny function has been taken very seriously.[65] Closer to the department (now Benefits Agency), the Inspectorate is clearly a better mechanism for feedback and change than reports from a tribunal hearing or the annual report of the president, through which SBATs attempt to instigate change. This function will in any event be lost now social security tribunals have joined the new First-tier chamber.

So should this inspectorial model of adjudication be considered as a way to deliver PDR? The present SFC, Sir Richard Tilt, has said that the SFI model has 'gained much respect in many quarters for its independence, accessibility and high standards'. It is 'a proportionate remedy in the context of the Social Fund, and one which could have application in other jurisdictions'. He hopes that 'the processes at the IRS may have wider applicability'.[66] On the debit side, this is one less opportunity for participation – but perhaps participation, implying a need for attendance at an oral hearing, is not what claimants want.

4. Tribunals watchdog?

The idea of a specialised administrative appeals tribunal, recommended by Robson to the Franks Committee, has never been accepted in Britain (though it did have some influence on the Leggatt proposals for a two-tier tribunal system). Instead, Franks opted for the limited solution of a 'Council on

[63] IRS, Annual Report for 2006/7, p. 28.

[64] G. Dalley and R. Berthoud, *Challenging Discretion: The Social Fund review procedure* (Policy Studies Institute, 1992).

[65] Thus in 2007 the Commissioner gave detailed evidence which influenced the Select Committee on Work and Pensions in its review of the Social Fund: see SCWP, *The Social Fund*, HC 941 (2007/8) [50–7].

[66] SFC, *Annual Report for 2006/7*, available online.

Tribunals' or permanent supervisory body to provide a 'focal point from which knowledgeable advice and guidance could be maintained'. The main function of the Council on Tribunals should be:

> to suggest how the general principles of constitution, organisation and procedure enunciated in the Report should be applied in detail to the various tribunals. In discharging this function they should first decide the application of these principles to all existing tribunals; thereafter they should keep tribunals under review and advise on the constitution, organisation and procedure of any proposed new type of tribunal. We recommend that any proposal to establish a new tribunal should be referred to the Councils for their advice before steps are taken to establish the tribunal. The Councils should have power to take evidence from witnesses both inside and outside the public service, and their reports should be published.[67]

While accepting that the Council's recommendations would be purely advisory, Franks hoped that its influence would be considerable. It envisaged that the Council would have important executive powers, including the appointment of tribunal members (as distinct from chairmen), the formulation of procedural rules and the review of remuneration for tribunal appointees.[68] It would have operated, in short, along the lines of a modern regulatory agency, though without either rule-making or enforcement functions.

These ambitious proposals, not fully implemented, were further undercut by an important structural defect. Unlike a modern regulator, the Council would remain small, with a part-time chairman, not necessarily legally qualified, and no more than ten part-time members, a majority being non-lawyers. While it was to be through the Council that tribunals, after the initial reforms anticipated by Franks, were to be moved towards the adjudicative ideal-type, and future 'tribunals' brought within the ethos, the Council's role was seen as essentially reactive: to report on particular proposals, not to initiate their own proposals. Whether or not a tribunal was to be set up remained a policy matter for departments drafting legislation.

As finally set up, the Council had four major functions: (i) a supervisory role; (ii) a consultative role, laid down by statute, concerning proposed rules for procedure; (iii) an informal consultative role in relation to draft legislation; and (iv) a promotional and propagandist role. It was (as it has remained) a 'shoestring operation', with a staff of six, two part-time chairmen for the Council and its Scottish Committee and part-time lay members, chosen in principle from 'as broad a section of the community as possible' but in practice predominantly

[67] Cmnd 218 [133]. Franks actually wanted two separate councils, one for England and Wales and for Scotland, to keep the constitution and workings of tribunals under continuous review: Cmnd 218 [43]. Instead, s. 1 of the Tribunals and Inquiries Act 1958 created a Council on Tribunals with a Scottish Committee. Ss. 44 and Sch. 7 of the TCEA 2007 replace the Council on Tribunals by the Administrative Justice and Tribunals Council. This too has Scottish and Welsh committees.

[68] Franks [134].

male, white and middle-aged or elderly.[69] A striking omission was any research capacity whatsoever, making the Council dependent on the good nature of legal academics. This is not the way that the Law Commission has to work.

Necessarily, the Council's work was incomplete and its style non-conflictual. Take the statutory power to 'keep under review the constitution and working' of tribunals listed in the Tribunals and Inquiries Acts. This, Professor Street, himself a member, acknowledged, would require 'unannounced and frequent visits', assessment of the quality of the chairman's paperwork and random examination of decision files: all the resources that Judge Byrt had at his disposal to implement HASSASSA or that the Audit Commission possesses. All that the Council could manage was around one hundred visits annually, which were never unannounced. Street was driven to conclude that the Council was 'playing no effective part in ensuring that the personnel are discharging their duties competently . . . Its supervision of tribunals is so slight as to be ineffective.'[70] Equally, its complaints-handling procedure was rudimentary. A promotional leaflet warned the citizen that 'the Council has no power to change a tribunal decision or to provide any other redress', adding vaguely that the PCA (whose services are free) may be able to 'look into allegations of maladministration by the administrative staff of certain tribunals'. The Council itself had no ombudsman function.

The weaknesses of this non-statutory framework were to emerge very clearly during the reorganisation. The Council, which might have expected after forty years of work and experience (including a special report on the organisation and independence of tribunals)[71] to have been at the very least represented *ex officio* on the Leggatt Committee, was reduced to giving evidence to it. Similarly, in 1991, after ten years' work, the Council on Tribunals published an important compilation of model tribunal rules intended for the use of departmental draftsmen.[72] True that, in the absence of rule-making powers, implementation was purely a voluntary matter, reflected in the presentation as 'no more than a store from which Departments and tribunals may select and adopt what they need'. It is nonetheless disappointing to find that the AJTC has only one nominee on the new Tribunals Procedure Committee, which has now taken on the function of drafting model procedural rules.[73] The Committee has a majority of judicial members.

[69] J. Garner, 'The Council on Tribunals' [1965] *PL* 321. For comparison with the more influential Australian Administrative Review Council, see A. Robertson, 'Monitoring developments in administrative law: The role of the Australian Administrative Review Council' in Harris and Partington, (eds.) *Administrative Justice in the 21st Century* (Hart Publishing, 1999).

[70] H. Street, *Justice in the Welfare State*, 2nd edn (Stevens, 1975), p. 63.

[71] Council on Tribunals, *Review of Tribunals: The Council's response* (2000), incorporating Special Report, *Tribunals: Their organisation and independence*, Cm. 3744 (1997).

[72] Council on Tribunals, *Model Rules of Procedure for Tribunals*, Cm. 1434 (1991). The current version is *Guide to Drafting Tribunal Rules* (2003), available on the archived Council website.

[73] See the Tribunal Procedure (Upper Tribunal) Rules 2008, SI 2698/2008. Three sets of procedural rules for First-tier Tribunals were published in 2008: SI 2699/2008, SI 2685/2008, SI 2686/2008. In practice, these were closely based on the Council's model rules.

Barely mentioned by Leggatt, the Council was abolished in the subsequent reorganisation to be replaced by an Administrative Justice and Tribunals Council (AJTC) heralded by the Government as 'a new body and a new remit'.[74] This new remit is very much wider than the old. Not only is the AJTC to keep under review and report on the constitution and working of listed tribunals and statutory inquiries but it must also keep under review *the whole of the administrative justice system*. In its first Annual Report, the AJRC indicated how it understood this gargantuan task:

PURPOSE

Our purpose is to help make administrative justice and tribunals increasingly accessible, fair and effective by:

- playing a pivotal role in the development of coherent principles and good practice;
- promoting understanding, learning and continuous improvement;
- ensuring that the needs of users are central.

VISION

Our vision for administrative justice and tribunals is a system where:

- those taking administrative decisions do so on soundly-based evidence and with regard to the needs of those affected;
- people are helped to understand how they can best challenge decisions or seek redress at least cost and inconvenience to themselves;
- grievances are resolved in a way which is fair, timely, open and proportionate;
- there is a continuous search for improvement at every stage in the process.

VALUES

The values we seek to promote in administrative justice and tribunals are:

- openness and transparency
- fairness and proportionality
- impartiality and independence
- equality of access to justice.[75]

The new Senior President of Tribunals (Sir Robert Carnwath) has spoken of the AJTC as 'a powerful ally in the reform programme, and an independent guardian of the objectives of the service'.[76] These are fine words but built

[74] See *Transforming Public Services*, Cm. 6243 (2004); Sch. 7 of the TCEA 2007; and Ministry of Justice, *Transforming Tribunals, Implementing Part 1 of the Tribunals, Courts and Enforcement Act 2007* CP 30/07 (28 November 2007) [117–28] (hereafter *Transforming Tribunals*).

[75] AJRC, *Annual Report for 2007/8*.

[76] Sir Robert Carnwath, 'Administrative Justice and Tribunals Council: Getting there at last!' (Speech to first conference of the AJTC, 20 Nov 2007) [24], available online.

into the new regime are the old limitations, accentuated by the fact that the tribunals system is itself now more complex and professional; it has gained a professional Tribunals Service and acquired some of the Council's previous functions. Including its Scottish Committee, the AJTC has fourteen members, most of whom have full-time jobs, with a part-time chairman and total budget of just over £1.25 million. Its only realistic strategy is to act as a co-ordinator of networks, fostering co-operation. Without a sizeable research budget, all it can hope to do is to publicise rather than commission research, as it has already started to do. It can 'offer advice and assistance' on policy issues; comment from time to time on Tribunals Service priorities, standards and performance measures; and monitor so far as it is able the progress and performance of tribunals against common standards and performance measures. Once again, it must 'seek to build up influence' over forthcoming legislation and 'raise awareness' of the different approaches within the UK legal systems. There is at long last a co-ordinated tribunals system - but significantly without a tribunals regulatory body.

5. Courts, tribunals and accountability

It seems proper for those tribunals that exercise judicial functions to be accountable to courts. For centuries the prerogative writs of prohibition and certiorari issued from the royal courts to any body carrying out a 'judicial' act, the former to prevent an inferior tribunal from exceeding its jurisdiction, the latter to quash any order made by a tribunal in excess of jurisdiction.[77] In the interwar period, however, when tribunals were still seen as exercising administrative functions, not every tribunal would come within this jurisdiction,[78] and judicial review could be excluded not only by 'ouster' or 'preclusive' clauses but by 'no certiorari' clauses or statutory limitation periods, such as the traditional six-week period for challenging planning decisions.

In the post-war period, the jurisdiction of the courts in respect of tribunals has steadily been extended by statutory rights of appeal.[79] These followed the Franks idea for a two-tier system: appeal on the merits to a specialised tribunal, appeal on a point of law to the High Court and above.[80] In future this structure will be modified by ss 11-13 of the TCEA: there will be appeal from

[77] See for the history, S. A. de Smith, *Judicial Review of Administrative Action*, 4th edn (Stevens, 1980), pp. 25–6 and App. 1. For the modern law, see S. A. de Smith, Lord Woolf and J. Jowell, *Judicial Review of Administrative Action*, 6th edn (Sweet & Maxwell, 2007) Ch. 4.

[78] de Smith, Woolf, and Jowell, *Judicial Review of Administrative Action* [4-053–4]. The position was ameliorated by *R v Electricity Commissioners* [1924] KB 171, where the term 'judicial act' was widely defined by Atkin LJ.

[79] Introduced for the most part by the Tribunals and Inquiries Act 1958; consolidated by the Tribunals and Inquiries Act 1971; and s. 11 of the Tribunals and Inquiries Act 1992. And see Law Commission, *Administrative Law: Judicial review and statutory appeals*, Law Com. No. 226 (HMSO, 1994).

[80] Franks [105–7].

the First-Tier to the Upper (second-tier) Tribunal and, on a point of law with leave, to the Court of Appeal.

The purpose of statutory appeal rights is generally to confer power to reverse the tribunal's decision, something which cannot be achieved by the quashing order (certiorari), which operates merely to quash the decision, remitting it to the tribunal or decision-maker for reconsideration. The TCEA specifically confers the power to remake a decision on both the Upper Tribunal and the Court of Appeal.[81] There are, however, various forms of appeal: some involve a rehearing; others, such as statutory appeal under the Tribunals and Inquiries Act, which is by way of a case stated by the tribunal chairman, or the general appeal on a point of law from an inferior court or tribunal, do not.[82] As we shall see, appeal in immigration cases does not involve rehearing and is a very attenuated form of appeal.

The underlying premise of judicial review has always been that a tribunal (or other administrative body) is entitled to decide wrongly but is not entitled to exceed its statutory jurisdiction or *vires*. From this it followed that judicial review was at first limited to errors in excess of jurisdiction or (later) that were visible 'on the face of the record'.[83] By 1973, however, de Smith was able to report that:

> the English courts have now emphatically repudiated the doctrine that whenever an inferior tribunal has jurisdiction to inquire into a matter for the purpose of giving a decision, its findings thereon, whether they be right or wrong, are conclusive. The proposition that an inferior tribunal has freedom to err within the ambit of its jurisdiction has been eroded rather than repudiated.[84]

The reference was to a complex and subtle case law that had grown up distinguishing jurisdictional from non-jurisdictional errors – and errors of fact, which could usually not be reviewed, from errors of law, which could.[85] Fortunately, this esoteric area of law was rendered largely obsolete by the *Anisminic* case, where Lord Reid used the concept of nullity to extend the courts' supervisory jurisdiction, defining nullity so widely as to cover virtually every imaginable error of law (see p. 21 above). This momentous decision had the effect, according to Lord Diplock, of:

[81] Ss. 12 and 14 of the TCEA. On an application for judicial review, a quashed tribunal decision can now be replaced by the court: see RSC, Order 54, see p. 670 below.

[82] See for a useful summary, Law Commission, *Administrative Law: Judicial review and statutory appeals*, Law Com No. 226 (HMSO, 1994).

[83] *R v Northumberland Compensation Appeal Tribunal, ex p. Shaw* [1952] 1 KB 338.

[84] S. A. de Smith, *Judicial Review of Administrative Action*, 3rd edn (Sweet & Maxwell, 1973), p. 105.

[85] See on the correspondence of error of law and jurisdictional error, *Pearlman v Keepers and Governors of Harrow School* [1979] QB 56 (Lord Denning MR); *S.E. Asia Fire Bricks v Non-Metallic Mineral Products Manufacturing Employees Union* [1981] AC 363 (PC); *Re Racal Communications Ltd* [1981] AC 374.

> liberat[ing] English public law from the fetters that the courts had theretofore imposed on themselves so far as determinations of inferior courts and statutory tribunals were concerned, by drawing esoteric distinctions between errors of law committed by such tribunals that went to their jurisdiction, and errors of law committed by them within their jurisdiction.[86]

The issues since then have, according to Woolf, Jowell and Le Sueur, changed dramatically so that traditional distinctions and labels, if they cannot yet be declared obsolete, are largely of historical interest.[87] In short, judicial oversight of tribunals has since *Anisminic* followed an expansive path and, as the grounds for review have enlarged and been extended by the HRA, so too has judicial supervision of tribunals.

(a) Review of fact

Anisminic has not, however, disposed of every problem. Once the competence of the courts covered most errors of law and the grounds for review had expanded, it was natural that courts should begin to question the 'no go area' of errors of fact. But as explained by Kirby J in a leading Australian case, judicial review stopped at errors of law:

> The grounds of judicial review ought not be used as a basis for a complete re-evaluation of the findings of fact, a reconsideration of the merits of the case or a re-litigation of the arguments that have been ventilated, and that failed, before the person designated as the repository of the decision-making power.[88]

There are a number of sensible reasons for this restrictive rule, not the least being the need to save time, cost and judicial energy. But leaving these logistical factors aside, review of fact is problematic. An appellate court's ability to detect factual error is much less than its ability to correct errors of law. Unless appeals are to consist of a total re-hearing, it will not see the witnesses nor is it certain that witnesses will give the same evidence or make the same impression on the second court. Assessment of witnesses and credibility is necessarily fairly subjective so that review inevitably means substituting one person or tribunal's subjective view of the facts for that of another. Rule 52.11.1 of the present rules of the Supreme Court for England and Wales does, however, grant a limited discretion to admit new evidence where (i) the fresh evidence

[86] *O'Reilly v Mackman* [1982] 2 AC 237, 278.

[87] de Smith, Woolf and Jowell, *Judicial Review of Administative Action* [4-001–6] The doctrine of jurisdiction and non-jurisdictional errors of law is still of importance in Australia, particularly in immigration cases, where jurisdictional error remains a prerequisite to review: see M. Aronson, B. Dyer and M. Groves, *Judicial Review of Administrative Action*, 4th edn (Lawbook Co, 2008), Ch. 4.

[88] *Re Minister for Immigration and Multicultural Affairs, ex p. Applicant S20/2002* (2003) 198 ALR 59 [114].

could not have been obtained with reasonable diligence for use at the trial; (ii) it probably would have had an important influence on the result; and (iii) it is apparently credible although not necessarily incontrovertible. Moreover, courts have been flirting for some time with the idea that some errors of fact may be reviewable as an error of law.[89] In an appeal from the Lands Tribunal, the Court of Appeal explained how a tribunal could make an error of law in considering facts:

> Judicial review (and therefore an appeal on law) may in appropriate cases be available where the decision is reached 'upon an incorrect basis of fact', due to misunderstanding or ignorance . . . A failure of reasoning may not in itself establish an error of law, but it may 'indicate that the tribunal had never properly considered the matter . . . and that the proper thought processes have not been gone through'.[90]

What has pushed courts towards this changed position is their experience with asylum and immigration cases, which in recent years make up the bulk of the judicial review case-load and feature high on the list of human rights challenges. Home Office handling of appeals has been the subject of constant criticism from courts, adjudicators and immigration tribunals. In one case, Collins J, then President of the Immigration Appeals Tribunal (IAT), said that the Home Office seemed wholly incapable of dealing appropriately with appeals: 'files are not provided, documents are not available, they do not put in evidence that they ought to put in, they fail totally to produce any skeleton arguments, the list goes on and on'.[91] There is widespread criticism too that 'the quality of the reasons given for refusal is often extremely poor' and 'frequently involve legal mistakes, reliance on defective country information taken from the Home Office's own country assessments and inadequate treatment of medical evidence'.[92] Similarly, the IAT has referred to the 'lack of skilled and professional care in reaching the initial decision' as necessarily placing extra burdens on adjudicators.[93] This left tribunals and judiciary in a dilemma.

Leggatt took note that 'complex factual issues are a regular feature of immigration and asylum cases, ranging from the circumstances of an alleged marriage or the obligations within an extended family abroad to the political situation in a country from which asylum is sought'.[94] To the Court of Appeal,

[89] An important step was Lord Slynn's speech in *R v Criminal Injuries Compensation Board, ex p. A* [1999] 2 AC 33. See also *R v Home Secretary, ex p. Launder* [1997] 1 WLR 839; *R v Home Secretary, ex p. Simms* [2000] 2 AC 115. And see Craig, *Administrative Law,* 6th edn (Oxford University Press, 2008) [15.002–4].

[90] *Railtrack Plc v Guinness Ltd* [2003] EWCA Civ 188 on appeal from [2003] RVR 280. The citation is from *R (Alconbury Ltd) v Environment Secretary* [2001] 2 WLR 1389 [53] (Lord Slynn).

[91] *SSHD v Tatar* [2000] 00TH01914 [3] [4], cited in R. Thomas, 'Evaluating tribunal adjudication: Administrative justice and asylum appeals' (2005) 26 *Legal Studies* 462, 481.

[92] JCWI, *Immigration, Nationality and Refugee Law Handbook* (2006), pp. 184, 198, 214.

[93] *Horvath v SSHD* [199] Imm. AR 121.

[94] Leggatt, 152 [23].

'the practice of asylum law is complicated by the fact that it is all about future risk, and on many occasions there are relevant changes of circumstances between the time of the original refusal of asylum and the time of the IAT's decision'.[95] And as the Home Office instructions tell junior staff, 'the case-worker will seldom be able to say with certainty whether or not an applicant will be persecuted if returned to their country'.[96] The position is made more difficult by statutory provisions allowing new facts and changing circumstances to be taken into account by adjudicators at every level of the process (see p. 519 below). Mistakes of fact, poor evidence-handling, opinion and prejudice and Home Office policy are blended in worrying decisions that tempt the courts to expand their supervisory jurisdiction.

In *E v Home Secretary*,[97] the applicant, who had been refused asylum status on the ground that he was not at risk of persecution, sought leave to appeal on the strength of new reports of the real state of affairs in his home country. Permission was refused by the IAT, which viewed the appeal as a disagreement about the factual evidence and therefore said: 'The Tribunal can only determine an appeal on the objective evidence before it at the time of the hearing and those reports were not before the Tribunal.' This left the Court of Appeal to consider whether a decision reached on an incorrect basis of fact could be challenged on an appeal limited to points of law? Their answer was to subsume review of fact under unfairness as a ground of review of law:

> In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result. Asylum law is undoubtedly such an area. Without seeking to lay down a precise code, the ordinary requirements for a finding of unfairness are . . . First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been 'established', in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not been have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning.[98]

The Court went on to allow the appeal on the ground that the IAT had made an error of law in wrongly failing to consider new evidence in the context of its discretion to direct a rehearing, and remitted the case to the IAT for reconsideration.

Perhaps aware that a can of worms was being opened, later cases seem to have drawn back. In *Subesh*, Laws LJ laid down guidelines for the IAT:

[95] *R (Iran) v Home Secretary* [2005] EWCA Civ 982 [41] (Brooke LJ).

[96] UK Borders Agency, Asylum Policy Instructions, available on Home Office website.

[97] *E v Home Secretary* [2004] QB 1044. The criteria are modified from *R v Criminal Injuries Compensation Board, ex p. A* [1999] 2 AC 33.

[98] Ibid [66] (Laws LJ).

i) It would only very rarely be able to overturn a finding of fact based on oral evidence and the assessment of credibility;
ii) It could more readily overturn a finding of fact based on documentary evidence specific to the individual case (because the IAT was in just as good a position to assess such evidence), but great caution would be required in those cases where there might be an important relationship between the assessment of the person involved and the assessment of those documents;
iii) The IAT would be at least as well placed as the adjudicator to assess findings as to the general conditions, or the backdrop, in the country concerned which would be based on the objective country evidence; the more so if the adjudicator had departed without solid justification from a relevant IAT country guidance decision;
iv) The IAT would be entitled to draw its own inferences as to the application of those general country conditions to the facts of the particular case.[99]

The escalation and intensification of judicial review, the impetus of the HRA and the modern tendency of English courts to invoke what Groves has called vague 'motherhood' concepts such as fairness, legitimate expectation or abuse of power in the interest of combating perceived injustice,[100] have all contributed to greater accountability of tribunals. When coupled with their self-imposed duty of 'anxious scrutiny' in human rights cases, these developments have led the courts to go somewhat further in exercising their supervisory function than they might otherwise have done. The case of immigration tribunals is nevertheless, we would argue, somewhat special. As we shall see in the following section, the intensely difficult task of immigration tribunals has been made more so in recent years by a torrent of asylum appeals and a flood of reforming legislation that has left the tribunals in a constant state of flux.

6. Regularising asylum appeals

Immigration control as we understand it today starts effectively with the Aliens Act 1905. This Act was generous to intending immigrants, severely restricting Home Office powers of exclusion. Under threat of world war, however, these generous provisions were soon replaced by draconian powers to regulate, exclude and deport aliens, with correspondingly minimal powers of review.[101] In the post-war years, immigration continued to be regulated by the Home

[99] *Subesh v SSHD* [2004] EWCA Civ 56. And see *Shaheen v SSHD* [2005] EWCA Civ 1294; *Kaydanyuk v SSHD* [2006] EWCA Civ 368.

[100] M. Groves, 'The Surrogacy Principle and Motherhood Statements in Administrative Law' in Pearson, Harlow and Taggart, *Law in a Changing State* (Hart Publishing, 2008) pp. 88-92.

[101] By the Aliens Restriction Act 1914. On review of wartime powers generally, see *R v Halliday* [1917] AC 260; *Liversidge v Anderson* [1942] AC 206. The executive powers of deportation were unsuccessfully challenged on procedural grounds in *R v Home Secretary, ex p. Hosenball* [1977] 1 WLR 766. The informal advisory procedures (familiarly known as 'Three Wise Monkeys' procedure) were finally outlawed by the ECtHR in *Chahal v UK* (1993) 23 EHRR 413, to which the SIAC procedures discussed in Ch. 3 were a response.

Office and immigration decisions were taken by immigration officers exercising a statutory discretion in accordance with informal Home Office instructions. It was during this period that the UK signed the Refugee Convention, still the governing international legal instrument,[102] and the ECHR, which contains no specific provisions on the subject but provides 'subsidiary protection', especially through Art. 3 (torture and inhumane treatment) (*Chahal*, see p. 132 above).

The genesis of the modern immigration appeals system is the Wilson Committee on Immigration Appeals, which for the first time provided the framework for a statutory appeals system. Although, as we shall see, this has become increasingly complex and convoluted, the framework remains largely in place.[103] Why at a time when the state was considering wider and tougher immigration controls on British subjects was it thought appropriate to introduce appeals to tribunals for intending immigrants refused entry to Britain? On one view, appeals seemed the perfect legal buffer, 'enabling the State to maintain a liberal image while pursuing essentially illiberal policies'.[104] In Wilson itself, however, we find a mix of instrumentalist and non-instrumentalist reasons for procedural protection (see further Chapter 14). It was thought 'fundamentally wrong and inconsistent with the rule of law that power to take decisions affecting a man's whole future should be vested in officers of the executive, from whose findings there is no appeal'. More pragmatically, the system was insufficiently transparent; when the main safeguard was through hierarchical responsibility to the minister and ministerial responsibility to Parliament, it was not clear to potential migrants that what was being done was fair. In a passage that merits comparison with contemporary arguments over 'special advocate procedure' (see p. 129), the Committee pronounced:

> In this situation it is understandable that an immigrant and his relatives or friends should feel themselves from the outset to be under a disadvantage, and so should be less willing than they might otherwise be to accept the eventual decision . . . Complaints quite often express the feeling that the person concerned never had a chance to confront his interrogators on equal terms. Allegations of this kind are hard to counter when the whole process has taken place in private. They reflect unfairly on the officials concerned, and cumulatively they give rise to a general disquiet in the public mind. The evidence we have received strongly suggests that among the communities of Commonwealth immigrants in this country, and among people specially concerned with their welfare, there is a widespread belief that the Immigration Service deals with the claims of Commonwealth citizens seeking

[102] *UN Convention relating to the Status of Refugees of 28 July 1951 and Protocol of 1967* (known as the Refugee or Geneva Convention). In contrast to the ECHR, this Convention has never been 'domesticated'.

[103] *Report of the Committee on Immigration Appeals*, Cmnd 3387 (1967). The very limited appeal rights to the earlier Immigration Boards established under the Aliens Acts 1905 are dealt with in App. II.

[104] L. Bridges, 'Legality and immigration control' (1975) 2 *JLS* 221, 224.

> admission in an arbitrary and prejudiced way. We doubt whether it will be possible to dispel this belief so long as there is no ready way of having decisions in such cases subjected to an impartial review.[105]

Such was the background to the Immigration Appeals Act 1969 and Immigration Act 1971, which institutionalised immigration control and installed the modern system of immigration tribunals.[106] Adopting Wilson's two-tier model, the Act provided that appeals should lie first to adjudicators sitting alone in regional tribunals; secondly, with leave, to the IAT. These were, of course, general *immigration* tribunals and not dedicated tribunals for hearing *asylum* appeals. Provision for asylum appeals was not at that time considered necessary, since Home Office figures show that there were only a couple of hundred applications for asylum each year.[107] This was a system for immigration appeals that incidentally handled asylum cases.

Provision for appeals in asylum cases was grafted onto the tribunal system in 1993[108] when the number of asylum claims threatened to overwhelm the system. Claims, which numbered 3,900 in 1995, peaked in 2002 at around 84,000, when new legislation was introduced to stem the flow. From a structural standpoint, however, the system stayed relatively stable, retaining the two-tier model (adjudicator and IAT) installed by Wilson until 2004. By 2003, there were some 600 adjudicators, sitting individually at twenty-four main hearing centres around the country, many with full-time posts. In that year, they determined some 82,000 cases; the number had almost doubled in just two years. The IAT had also to be expanded and there had been an infusion of lawyers at senior level. No wonder that the Home Office was looking for savings. From modest beginnings as a sub-set of the immigration appeals jurisdiction in the early 1990s, asylum appeals had emerged in the course of a decade as one of the most considerable elements in the UK system of administrative tribunals.

From the early 1990s there was an unremitting flow of immigration legislation, all bringing change. But change remained substantive rather than structural: for example, appeals seen as frivolous and time-wasting could be filtered out of the system by ministerial certification that a claim to asylum was 'manifestly unfounded', in which case the appeal rights stopped at the adjudicator.[109]

[105] Wilson [83–5].

[106] See further, R. Moore and T. Wallace, *Slamming the Door: The administration of immigration control* (Martin Robertson, 1975); M. Travers, *The British Immigration Courts: A study of law and politics* (Policy Press, 1999). The Immigration Appeals Act was re-enacted in Part II of the 1971 Act.

[107] See generally D. Stevens, *UK Asylum Law and Policy: Historical and contemporary perspectives* (Sweet & Maxwell, 2004).

[108] Asylum and Immigration Appeals Act 1993. And see JUSTICE, *Providing Protection : Towards fair and effective asylum procedures* (JUSTICE, 1997).

[109] Sch. 2 of the Asylum and Immigration Appeals Act 1993 as re-enacted in s.1 of the Asylum and Immigration Act 1996 and the Immigration and Asylum and Act 1999. See Thomas, 'Evaluating tribunal adjudication', 466-9 and see *ZT (Kosovo) v Home Secretary* [2009] UKHL 6.

Again, 'fast-tracking' in the form of accelerated appeal procedures meant that, from the outset, the appeals process doubled as a single-tier and two-tier system in asylum. The Asylum and Immigration Act 1996 reduced the appeal rights of asylum-seekers, introducing the bizarre idea of 'non-suspensive appeals' or appeals made by appellants from *outside* the UK, in which – in sharp contrast to the tradition of oral proceedings – the appellant could not physically participate. In the face of continuing criticism of the quality and speed of the adjudication from many quarters, however, attention began to turn to the basic architecture of the system.[110] The fact that around 20 per cent of appeals from adjudicators succeeded was open to two interpretations: on the one hand, it was a not insubstantial proportion – enough to show that the IAT was not a rubber stamp and to demonstrate its credentials in Franks's terms as independent and autonomous 'machinery for adjudication'; on the other, from a managerial standpoint, that *only* 20 per cent of appeals succeeded could be presented as an invitation to do away with 'waste'.[111] Ministers vexed by high numbers of applications for leave to appeal hit at the source of delay by limiting second-tier appeals more closely to a point of law.[112]

Leggatt nonetheless observed how the general trend to judicialisation was being replicated in immigration tribunals.[113] The Nationality, Immigration and Asylum Act 2002 (NIAA), for example, provided for appointments to the IAT to be made by the Lord Chancellor. He also appointed a president, who must hold or have held high judicial office (Sch. 5), a chief adjudicator, and regional adjudicators with administrative responsibilities (Sch. 4). Leggatt also reported that, whatever the IAA's problems in the past:

> great efforts were being made to achieve more consistent decision-making, more effective administration, and much closer working between the Home Office and the Lord Chancellor's Department (LCD). The organisation has taken the opportunity to centralise much of the routine administration . . . allowing the hearing centres to focus on providing a high quality service to users and members.[114]

There was a push for greater consistency through the familiar techniques of 'starred' or binding IAT decisions; authoritative IAT statements on major points of law and principle; and latterly through 'country guideline determinations', or authoritative factual guidance from the IAT on conditions in specific countries.[115] To one of the authors, 'the IAT in its last few years was

110 Select Committee on the LCD, *Asylum and Immigration Appeals: Written evidence*, HC 777-ii (2002/3).

111 See R. Thomas, 'Asylum appeals: The challenge of asylum to the British legal system' in Shah (ed.), *The Challenge of Asylum to Legal Systems* (Cavendish, 2005).

112 S. 101(1) of the Nationality, Immigration and Asylum Act 2002.

113 Leggatt [149–54].

114 *Ibid*., p. 149 [6].

115 See for practical illustrations, *Hamza v Home Secretary* [2002] UKIAT 05185 and *K (Croatia) v Home Secretary* [2003] UKIAT 00153.

developing a hierarchy and status more appropriate to the importance of its jurisdiction'.[116]

Contemplating incorporation of the IAA into the unified, two-tier structure it was proposing, Leggatt highlighted a 'significant structural anomaly' in the existing two-tier immigration arrangements:

> At present, cases are heard at first instance by legally qualified Adjudicators sitting alone. There is then a general appeal on both fact and law to the Tribunal, comprising a legally qualified chairman and two lay members. This brings in the expert contribution of non-lawyers too late in the process, and creates serious problems for the IAA and for the courts . . . We therefore wish to see the general model applied to immigration and asylum work in the Tribunal System. There should be a first-tier immigration and asylum tribunal, within a separate Division, which should be the sole judge of issues of fact . . . There should be a second-tier tribunal, consisting of a lawyer sitting alone, to hear appeals on a point of law only.[117]

But draconian changes in the provision for welfare and other restrictive policies indicated earlier were gradually bringing asylum claims down from the 2002 peak of 84,130; by 2008, they had fallen to 23,430, the lowest number since 1993. There were also improvements in the rate of primary determinations: by 2007, 40 per cent of new asylum cases were concluded within six months. The backlog of adjudicator decisions was being cleared, with a stable success rate of around 20 per cent.[118] Precisely why a new single-tier appeal system was urgently needed in 2003 was not entirely clear.

The Government's main argument was that judicial review was distorting the work of the specialised immigration tribunals while at the same time overloading the Administrative Court.[119] It is certainly true that both government and judiciary had expressed concern at the level of judicial review applications in immigration. They felt also that 'unmeritorious' claimants could use the multi-tier appeals system (in particular the widespread practice of seeking judicial review of IAT decisions to refuse permission to appeal) to prolong their stay in the country, making it harder to remove them. In response to that specific problem, the NIAA had initiated a streamlined form of statutory review – strict time limits, written submissions and no onward appeal (s. 101(2)).[120] Before this had time to bite, the Government embarked on drastic curtailment of appeal rights, culminating in the dramatic affair of the ouster clause, described in Chapter 1.

[116] R. Rawlings, 'Review, revenge and retreat' (2005) 68 MLR 378, 396.
[117] Leggatt, pp. 152–3 [21] [23].
[118] HO, Asylum Statistics UK for 2003 and 2004, HOSB 13/05, HOSB 11/04.
[119] A. Le Sueur, 'Three strikes and it's out? The UK government's strategy to oust judicial review from immigration and asylum decision-making' [2004] *PL* 225.
[120] The changes may help to explain the diminished use of standard judicial review process in asylum-related cases visible in 2003: see p. 740 below.

As finally passed by Parliament, the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 represented both a capitulation by government and a break with the past. Not only did it introduce for the first time a single-tier system by rolling up the adjudicator system and IAT in a novel Asylum and Immigration Tribunal (AIT) that hears appeals on the merits, but it also attenuated the rights of appeal.[121] Onward appeal is by means of a streamlined, interactive and decidedly limited form of statutory review. Decisions made by single members in the AIT are subject to review by a High Court judge for error of law. Only one application, resulting in an order that the tribunal should 'reconsider' the appeal, can be made in respect of each appeal.[122] The grounds for appeal permit an 'appropriate court' to make a review order 'only if it thinks that the Tribunal may have made an error of law' (ss.103A(2) and (5)). The review is conducted solely on the papers without an oral hearing. Procedural rules further limit reconsideration to cases where there is a 'real possibility' that the appeal would be decided differently on reconsideration.[123] Appeal lies with leave on a point of law to the Court of Appeal and House of Lords. These provisions, making substantial changes in the role and functions of the appellate tribunals, raise concerns about the autonomy, independence and legitimacy of the one-tier tribunal.

This may be why the House of Lords took the opportunity in *Huang and Kashmiri*[124] to give authoritative advice on the function of tribunals in deciding a human rights application in immigration cases. In the human rights claim, the Law Lords saw the tribunal *not* as exercising a secondary, reviewing function but called on it to make its own, independent decision. The first task should be to establish the facts: 'It is important that the facts are explored, and summarised in the decision, with care, since they will always be important and often decisive'. The tribunal should then go on, applying tests of proportionality:

[121] S. 26 of the Act amends s. 81 and repeals ss. 101–3 of the NIAA. It inserts a new s.103 (A–E) before s.104 of the NIAA to cover the new appeals system: see R. Thomas, 'Immigration appeals overhauled again' [2003] *PL* 260.

[122] By Sch. 2 [30], the AIT was empowered for an interim period to review the need for reconsideration of its own decisions. In the event of the review application being unsuccessful, judicial review would usually be blocked out by analogy with *R (G) v Immigration Appeal Tribunal* [2004] 1 WLR 2953. The terms 'error of law' and 'reconsideration' have now been judicially defined: see R. Thomas, 'After the ouster: review and reconsideration in a single-tier tribunal' [2006] *PL* 674, 677–9.

[123] Asylum and Immigration Tribunal (Procedure) Rules 2005, SI 2005/230 as amended by the Asylum and Immigration Tribunal (Procedure)(Amendment) Rules 2008, SI 2008/1088. These authorise the extension of paper reviews and give the senior AIT judges power to remit appeals for further reconsideration by the tribunal. In *DK(Serbia) v Home Secretary* [2006] EWCA 1246, the Court of Appeal gave extensive guidance to the AIT on how these rules should be interpreted.

[124] *Huang and Kashmiri v Home Secretary* [2007] 2 AC 167. The case was decided under the Immigration and Asylum Act 1999 but was stated *obiter* to be applicable to the new, one-tier IAT.

> to consider and weigh all that tells in favour of the refusal of leave which is challenged, with particular reference to justification under [ECHR Art. 8(2), family life]. There will, in almost any case, be certain general considerations to bear in mind: the general administrative desirability of applying known rules if a system of immigration control is to be workable, predictable, consistent and fair as between one applicant and another; the damage to good administration and effective control if a system is perceived by applicants internationally to be unduly porous, unpredictable or perfunctory; the need to discourage non-nationals admitted to the country temporarily from believing that they can commit serious crimes and yet be allowed to remain; the need to discourage fraud, deception and deliberate breaches of the law; and so on . . . The giving of weight to factors such as these is not, in our opinion, aptly described as deference: it is performance of the ordinary judicial task of weighing up the competing considerations on each side and according appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice.[125]

Once again, the reconstructed system had hardly bedded down when a new consultation paper signalled a sharp change of heart by the Government: it would after all be appropriate for the immigration appeals system to be taken within the two-tier TCEA structure, probably in a separate chamber. More significantly, to relieve the over-burdened judicial review system, the only way to appeal from a decision of the first-tier immigration tribunal would be by application to the Upper Tribunal, which would have exclusive jurisdiction in appeals. Remittal to the First-tier Tribunal would be exceptional, with the Upper Tribunal determining most appeals.[126] Finally, the TCEA would be amended to facilitate transfer of individual judicial review applications into the Upper Tribunal for decision.[127] Insofar as it would bring immigration tribunals inside the new system, the consultation paper is welcome; the suspicion must be, however, that asylum appeals will always be treated as exceptional.

7. Tribunals reformatted

(a) Restructuring[128]

The TCEA established tribunals as 'a vital but distinct part of the independent civil justice system' and their adjudicators as 'full members of the independent judiciary', with full guarantees of independence.[129] It set up a new Tribunals

[125] [2007] 2 AC 167 [15–16].

[126] UK Border Agency, *Consultation: Immigration Appeals, Fair Decisions; Faster Justice* (August, 2008) [28–36].

[127] *Ibid.* [37]. There would be similar provisions for the Scottish Court of Session.

[128] For an overview of the Act's main provisions, see House of Commons Library, *The Tribunals, Courts and Enforcement Bill*, Research Paper 07/22 (2007).

[129] Sir Robert Carnwath, 'Administrative Justice and Tribunals Council: Getting there at last!' [4]. S. 1 of the TCEA applies s. 3 of the Constitutional Reform Act 2005 to office-holding tribunal members: the senior president, commissioners, adjudicators, panellists.

Service as an executive agency of the Ministry of Justice, which provides common administrative support to the larger tribunals.

The TCEA creates a senior president, appointed by a panel headed by the Lord Chief Justice, with overall responsibility for the new two-tier system of tribunals. Amongst his more important functions are: allocation of tribunals between 'chambers' and judges between tribunals; the provision of training (currently undertaken by the Judicial Studies Board); and chairing the Tribunal Procedure Committee, which takes over the function of preparing procedural rules. Section 2(3) of the TCEA prescribes the senior president's objectives: the need for tribunals to be accessible, fair, quick and efficient and for members to be expert. Significantly, the section adds 'the need to develop innovative methods of resolving disputes that are of a type that may be brought before tribunals' (s. 2(3)(d).

The TCEA creates two new tribunals, each divided into chambers headed by chamber presidents into which it is hoped that most existing jurisdictions will be transferred. The First-tier Tribunal is to comprise six 'generic' chambers to take in the major existing tribunal systems with a combined annual caseload of around 300,000 cases, approximately 190 judges and 3,600 odd members. These will broadly speaking continue to carry out their existing functions.[130] The Upper Tribunal, comprising three chambers, is seen by the Government as 'probably the most significant innovation in the tribunal system' and an opportunity 'to establish a strong and dedicated appellate body at the head of the new system'.[131]

The new structure is seen by Sir Robert Carnwath, its senior president, as an exciting opportunity 'to build a new coherent appellate structure':

> [The Upper Tribunal] will be a superior court of record, presided over by the Senior President. Its powers in relation to tribunal decisions will be as wide as those of the Administrative Court, including judicial review powers under arrangements to be agreed with the Lord Chief Justice. I hope that the Lord Chief Justice will also agree to High Court judges being available to sit on appropriate cases in the Upper Tribunal . . . I see no reason why the Upper Tribunal should not acquire a status and authority in tribunal matters equivalent to that of the Administrative Court in relation to public law generally.[132]

[130] The term 'generic' indicates that the chamber is not specialised (e.g. in tax) but groups together tribunals in the same area. The groupings are not yet finalised. In the first phase, the first-tier chambers seem likely to be: social entitlement; health, education and social care; war pensions and armed forces compensation. In 2009, a tax and duties chamber and general regulatory chamber will join the first tier and, by 2012, an immigration chamber. Employment tribunals will form a separate 'pillar'. Judges and members will be 'ticketed' to sit in particular jurisdictions or 'assigned' to different chambers: see *Transforming Tribunals* [160–4] and Ch. 7 generally.

[131] *Ibid*. [177]. The chambers are: administrative appeals; finance and tax; land. Again, an immigration chamber is contemplated. The first president of the administrative appeals chamber is a High Court judge, Sir Gary Hickinbottom, previously Chief Social Service Commissioner

[132] Carnwath, 'Administrative Justice and Tribunals Council: Getting there at last!'; and Sir Robert Carnwath, 'Tribunal Justice: A new start' [2009] *PL* 48.

The word 'court' is significant. Leggatt's proposals were premised on the model of the Australian Administrative Appeals Tribunal. The TCEA departs radically from the Australian precedent on which it was supposedly modelled.[133]

Tribunals at both levels are given power to 'review' their own decisions for purposes specified in the Tribunal Procedure Rules and may use this power to correct incidental errors, amend reasons or (under s. 9(4)(c)) set the decision aside. Where the First-tier Tribunal does this, it must either re-decide the matter or refer it to the Upper Tribunal (s. 9(5)); the Upper Tribunal's review powers are specified in the Tribunal Procedure Rules (s. 10). Appeal to the Upper Tribunal is on a point of law (s. 11).

Where the Upper Tribunal finds that an error of law infects the decision, it may either remit the decision to the First-tier Tribunal or 're-make the decision' itself (s. 12(2)(b)). Some of the problems mentioned in the immigration context are avoided, however, by giving each tribunal power in exercising its review functions 'to make such findings of fact as it considers appropriate' (ss. 9(8), 10(6), 12(4)(b)). Appeal lies to the Court of Appeal (or an alternative designated court), which is specifically given power to make any decision which the Upper Tribunal or other tribunal or person re-making the decision could make and to 'make such findings of fact as it considers appropriate' (s. 14(4)(a)–(b)). Thus the first English attempt at an administrative appeals tribunal takes the appeal process a little way towards 'merits review' in that tribunals as well as appeal courts are empowered to 're-make' the decision (in other words, substitute their decision for that of the decision-maker). It does not, however, authorise merits review in the full sense of that term, whereby 'the facts, law and policy aspects of the original decision are all reconsidered and a new decision – affirming, varying or setting aside the original decision – is made'.[134] Judicial review of tribunal decisions is intended to become a rarity. In 'highly specialised' areas, such as social security law, which are 'rarely encountered by lawyers', this 'new dedicated judicial institution will bring benefits that the Administrative Court cannot give . . . of supervision by judges who are specialists in the particular law and practice under review'.[135]

How this restructuring will work out in practice is far from clear, since the system is not yet fully operative. Clearly, however, it will, as was intended , push tribunals into the ambit of courts; in future they are likely to be less court substitutes and more quasi-courts. The appointment of tribunal adjudicators by the Judicial Appointments Committee, the 'transfer-in' of High Court judges

[133] See P. Cane, 'Understanding administrative adjudication' in Pearson, Harlow and Taggart (eds.), *Administrative Law in a Changing State* (Hart Publishing, 2008), p. 287, fn. 51.

[134] Australian Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report No. 39 (1995) [2.2].

[135] Carnwath, 'Tribunal Justice: A new start', p. 57, citing *Cooke v Social Security Secretary* [2001] EWCA Civ 734 (Hale LJ).

to the Upper Tribunal (s. 31(2), training by the judicial studies board , are all factors likely to lead to judicialisation. More significant still is the appointment of a senior Lord Justice of Appeal as first president: this not only enhances the status of the new system but forms an important link, through the regional chief justices, with the 'court judiciary'. The senior president has described the TCEA as both 'a quiet revolution' and an 'evolution'. There can be little doubt as to where he wants the evolution to lead. Cane, however, thinks:

> it is unlikely, in the foreseeable future, that the distinction between courts and tribunals will be abolished in the UK. The more likely result is effective recognition of a branch of government the prime function of which is adjudication . . . consisting of two separate adjudicatory hierarchies. . .running in parallel but converging at the appellate level and sharing the two highest appellate bodies . . . In this dispensation, it will be possible to describe tribunals as a type of court and courts as a type of tribunal; or, more accurately, courts and tribunals as species of adjudicative institution.[136]

(b) Proportionate justice

Leggatt's brief was 'to review the delivery of justice through tribunals other than ordinary courts of law'; he was not asked to consider radical alternatives. Nor was *Transforming Public Services*, the subsequent White Paper[137] particularly innovatory; accepting Leggatt's case for systemic reform as 'convincing', it followed where Leggatt had led. Putting the question whether the changes could happen within the existing institutional structure, the White Paper opined that they could not:

> One option would be to create a new institution of some kind with the job of improving decision-making and resolving disputes informally. But even with such a new institution there would be a need for an authoritative body, with the powers of the court, to have the final word on rights and obligations. We believe the field is too cluttered already with administrative justice institutions. **What we need to do is to create the unified tribunal system recommended by Sir Andrew Leggatt but transform it into a new type of organisation which will not only provide formal hearings and authoritative rulings where these are needed but will have as well a mission to resolve disputes fairly and informally either by itself or in partnership with the decision-making department, other institutions and the advice sector.** [138]

This key passage sets out dual roles for tribunals. From a top-down perspective, tribunals operate as court substitutes, to provide 'authoritative rulings' imbued with the legitimacy of the judicial system. This objective, which suggests the use of trial-type procedures, the new dispensation amply supplies. From a

[136] Cane, 'Understanding administrative adjudication', p. 287.
[137] DCA, *Transforming Public Service: Complaints, redress and tribunals*, Cm. 6243, (July 2004).
[138] *Ibid.* [4. 21].

bottom-up perspective, the tribunal function of informal dispute resolution is endorsed in the last, highlighted sentence, which hints at exploration of novel methods of dispute-resolution. Despite the fact that the White Paper felt that, for the £280 million spent annually on tribunals, a better system could be created, the PDR theme was not developed.[139] It was left to the Council on Tribunals unerringly to pinpoint the omission in a letter accompanying its response to *Transforming Tribunals* and gently reproach the Tribunals Service with them:

> It is understandable that the consultation, like the Act itself, should have a structural focus with an attention to matters of detail. However, the paper sometimes seems to lose sight of the fact that rationalisation and standardisation are not ends in themselves but are part of a wider reform with the needs of users at its heart. There is little about the impact of the proposed changes on users . . . It is disappointing that the Enhanced Advice Project outlined in the 2004 White Paper appears to have been abandoned and that the paper gives no clear indication of how the need for advice will be met . . . The paper has little new to say about the broader administrative justice landscape and proportionate dispute resolution. While there is reference to early dispute resolution projects that have been under way for some time, there is no real sense of strategic direction in taking forward the wider vision of the 2004 White Paper. In the Council's view, this indicates a need for a dedicated policy team within the MoJ but outside the Tribunals Service to look at administrative justice issues in a more holistic way . . . So far as the present consultation is concerned, a subject of special interest to the Council is the proposed mapping of existing non-legal members into the new roles in a way that maximises the opportunity for their flexible use in appeals . . .

In its formal response, the Council expressed its warm support for the development of alternative dispute resolution, though only 'as a means of avoiding tribunals having to decide cases that can be resolved in other ways.'[140] Perhaps ironically, its informal letter had ended:

> The Council was pleased to see the attention paid in the paper to research in the administrative justice field, most of it funded independently of the Ministry of Justice and its predecessors. The Council is looking forward to its new statutory function of making proposals for research into the administrative justice system. An empirical base is essential in order for the Council and government to consider where improvements can be made.

Inside the framework of tribunals, five topics in particular cry out for further examination. The first is the question of merits review. Here we cannot do more than cite the tentative predictions of Sir Robert Carnwath published early in 2009, though once again there are clearly lessons to be learned from

[139] *Ibid*. [5.29] [5.30].

[140] Council on Tribunals, *Review of Tribunals: The Council's Response* (September 2000) [38].

Australia.[141] Carnwath believes that the Upper Tribunal is less likely to embark widely on merits review than to exercise its 'guidance' function constructively to influence appellate tribunals themselves to 'look at the matter in a more flexible way than the traditional approach'. He also predicted that a pragmatic attitude and tests of expediency were likely to develop in the characterisation of issues of fact and law; determinations were likely to depend on whether 'as a matter of policy' the court felt the matter to be one which 'an appellate body with jurisdiction limited to errors of law should be able to review'.[142]

As indicated earlier, review of faulty fact-finding is a source of particular difficulty in immigration appeals and the exceptional difficulties with fact-finding and evaluation of facts was the basis of a special case made by Leggatt for lay (or 'expert') members in immigration tribunals:

> Many cases would not be suitable for hearing by a chairman, even legally qualified, sitting alone and expert members should be used when appropriate at this level. In setting the qualifications for appointment to the tribunal, and to sit in particular cases, we believe that special care should be taken to ensure that those selected bring relevant experience and skills to the decisions to be taken, such as knowledge of conditions in particular countries concerned, or of refugees.[143]

There is no sign that particular attention has been paid to this need in the post-Leggatt reforms; rather the current terminology of 'expert members' marks a rapid slide into professionalism and judicialisation.[144] It follows that the second outstanding issue on the tribunals agenda must, as the AJTC has already suggested, be a proper investigation of the functions of lay members.

The last three questions are clearly linked: the third is the desirability of oral hearings; the fourth is representation; and the fifth inquisitorial procedure. These questions arise whenever the public is consulted, only to disappear from legislation or be shamefully side-lined by government departments.

Whether users really have a preference, as common lawyers like to think, for their 'day in court' is a moot point. Lawyers tend to see adversarial procedure as the best way to produce and test evidence. This is, however, only the case if the applicant and/or a departmental representative attend the hearing, which we have seen is by no means always the case. Sainsbury saw the move to

[141] See Administrative Review Council, *Better Decisions: Review of the Commonwealth Merits Review Tribunals* (Canberra, 1993); P. Cane, 'Merits review and judicial review: The AAT as a Trojan horse' (2000) 28 *Federal Law Review* 213; E. Fisher, 'Administrative law, pluralism, and the legal construction of merits review in Australian environmental courts and tribunals' and L. Pearson, 'Fact-finding in Administrative Tribunals', both in Pearson, Harlow and Taggart (eds)., *Administrative Law in a Changing State* .

[142] Sir Robert Carnwath, 'Tribunal Justice', pp 58–64. The citation is from *Serco v Lawson* [2006] UKHL 3 [34] (Lord Hoffmann). And see similarly *Moyna v Work and Pensions Secretary* [2003] UKHL 44.

[143] Leggatt p. 152

[144] D. Pearl, 'Immigration and asylum appeals and administrative justice', in Harris and Partington (eds.), *Administrative Justice in the 21st Century*.

internal review and investigatory procedure in social-security decision-making as a watering-down of applicants' appeal rights;[145] other users find oral hearings confrontational and oppressive:

> For many appellants an oral hearing may be a daunting thing and it is probably a factor explaining why some appellants fail to appear at their hearings . . . The nature of an oral hearing depends upon where the proceeding is on the spectrum of adversarial – inquisitorial. If the users are responding to questions posed by the tribunal this is very much easier to cope with compared to the preparation and making of representations.[146]

Parking Adjudicators, the only tribunal to move into the age of e-governance by conducting proceedings largely electronically, receive only a minority of requests for oral hearings. This suggests that, at least in the area of 'small claims', oral hearings are only a last resort for the public.[147]

Oral, adversarial proceedings inevitably raise the issue of representation, which we have seen is a matter of controversy. We know that with representation applicants do better and might tentatively deduce that they are probably disadvantaged without it (see p. 490 above). The 'enabling approach' eventually taken by Leggatt put to one side the difficult question of true inquisitorial procedure, in which proceedings become the responsibility of the adjudicator, who accumulates and produces the evidence, calls witnesses and conducts the questioning. Thomas has, however, suggested that inquisitorial procedure, on which he believes the system was originally predicated, might (for obvious reasons) be better suited to immigration cases.[148] Walter Merricks, the Financial Services Ombudsman, has put the case rather more strongly:

> The inquisitorial process is . . . suddenly being discovered as more effective and economical than the traditional adversarial model for arriving at the resolution of disputes. The court model of requiring both parties to assemble all their evidence (the relevant, the marginally relevant and the probably irrelevant) at a hearing for them to be explained orally to a tribunal is being seen as cumbersome, expensive and wildly uneconomic for many disputes.

[145] R. Sainsbury, 'Internal reviews and the weakening of social security claimants' rights of appeal' in Richardson and Genn (eds.), *Administrative Law and Government Action*. But see N. Wikeley, 'Burying Bell: Managing the judicialisation of social security tribunals' (2000) 63 *MLR* 475.

[146] Brian Thompson, evidence to the Leggatt consultation. See also G. Richardson, 'Listening to a range of views' (Spring 2006) *Tribunals* 18–20, an interim account of a Council on Tribunals consultation, *The Use and Value of Oral Hearings in the Administrative Justice System* (2005).

[147] J. Raine, 'Modernising tribunals through ICTS' in Partington (ed), *The Leggatt Review of Tribunals: Academic papers* (Bristol Centre for the Study of Administrative Justice, 2001); C. Sheppard and J. Raine, 'Parking adjudications: The impact of new technology' in Partington and Harris (eds.), *Administrative Justice in the 21st Century*.

[148] Thomas, 'Evaluating tribunal procedure', 477. And see S. Kneebone, 'The Refugee Review Tribunal and the assessment of credibility: An inquisitorial role?' (1998) 5 *Australian Journal of Administrative Law* 78.

> Ombudsmen on the whole don't need hearings. They do not need parties to be represented by lawyers. Their authority entitles them to go straight to the evidence we know to be relevant.[149]

This is a complex topic deserving of more meaningful research to which – as Australian public lawyers have started to do – the AJTC should devote its attention and some of its limited funds.[150]

This chapter ends where the next chapter starts: with inquisitorial procedure as an alternative to tribunals. It also ends where the previous chapter started: with the search for proportionate dispute resolution. Over the course of a century, it has been largely left to tribunals to deliver this. In the era of ICT and e-governance, however, alternative strategies might look better.

[149] In an address to the British and Irish Ombudsman Association, available on the BIOA website.

[150] N. Bedford and R. Creyke, *Inquisitorial Processes in Australian Tribunals* (Australian Institute of Judicial Administration, 2006).