CHAPTER 1

Introduction to the tribunal system

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Introduction

1.1 This book is about tribunals, what they are and how they work. It covers all aspects, except for the substantive law applied by tribunals.

1.2 Tribunals are exclusively judicial bodies that operate in a way which distinguishes them from other courts. As a word, tribunal has a long history, but only as a synonym for a court. It is still used in that sense, for example in article 6. However, tribunal as a distinct form of judicial body and as a word to convey that concept is a twentieth century innovation. The oldest citation of the modern use of the word in the Oxford English Dictionary, 2nd edn, 1989, is from the Military Service Act 1916.

1.3 There have long been bodies that were similar in many ways to what we now call a tribunal; their use proliferated in the nineteenth century. But they were not exclusively judicial, as this role was secondary to their administrative functions. They went by a variety of names, often Commission or Commissioner. They may still not be extinct. The housing benefit review boards were too closely linked, both in structure and practice, to their local authorities to be independent judicial bodies, but were only replaced by an appeal to a judicial tribunal in 2001.

1.4 Tribunals emerged as exclusively judicial bodies in the twentieth century with the local pension committee under the Old Age Pensions Act 1908 and the umpire under the National Insurance Act 1911. Since then there has been increasing recognition of their judicial status, that status has been enhanced, and tribunals have developed their own distinctive identity. Their development and the attitude of successive Governments to them can be traced in the reports of the three general public enquiries that have considered tribunals.

1.5 The first inquiry was by the Donoughmore Committee, which reported in 1932. It was set up in part to consider the safeguards that were required on judicial and quasi-judicial decisions in order to secure the constitutional principle of the supremacy of the law. The committee considered tribunals in this context, distinguishing between tribunals that were independent of Ministerial influence, which it called Specialised Courts of Law, and those that were not, although it admitted that the difference was one of degree not kind. The committee recognised the value of tribunals, but with the focus set by its terms of reference, it was concerned not with the internal working of tribunals but with the circumstances in which they were established and the safeguards on their use. As to the former, the Committee recommended that judicial decisions should be left to the ordinary

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2 R (Bewry) v Norwich City Council [2002] HRLR 2, a decision of the Administrative Court, and Tsfayo v United Kingdom (application no: 60860/00) November 1, 2006, ECtHR.
3 There have been numerous committees with more limited terms of reference.
4 The Report of the Committee on Ministers’ Powers Cmd. 4060 (1932).
6 The Report of the Committee on Ministers’ Powers Cmd. 4060 (1932), Section III, para 10.
courts of law. Tribunals should be established only on special grounds and if their advantages over the ordinary courts were beyond question.7 And when they were used, the Committee recommended that the rules of natural justice be observed and the courts be given power to ensure that they acted only within their powers.8 The concerns that led to the Committee being established, its discussion and its recommendations all show a concern, at the level of constitutional theory, about the developing use of tribunals.

A quarter of a century later either these concerns had been allayed or tribunals were accepted as an inevitable feature regardless of them. The focus now turned to their status and the details of their operation rather than their constitutional position. The Franks Committee, which reported in 1957,9 was set up in part to consider the constitution and working of statutory tribunals. This Committee endorsed the value of tribunals but was not concerned to limit their use. Rather the focus was on their judicial nature, the standards they must attain and the supervision they required. It based its recommendations around three principles of openness, fairness and impartiality:

In the field of tribunals openness appears to us to require the publicity of proceedings and knowledge of the essential reasoning underlying the decisions; fairness to require the adoption of a clear procedure which enables the 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 decision.10

Consistently with the requirement of impartiality, the Committee rejected the official evidence that ‘tribunals should properly be regarded as part of the machinery of administration, for which the Government must retain a close and continuing responsibility’ in favour of the view that ‘tribunals should be properly regarded as machinery provided by Parliament for adjudication rather than as part of the machinery of administration.’11 The committee made a series of recommendations on the constitution of tribunals, their procedure and control over particular decisions by appeal and judicial review. It also recommended more general supervision through two Councils on Tribunals (one for England and Wales, the other for Scotland) in order to keep under review the constitution and procedures of tribunals. This proposal led to the Tribunals and Inquiries Act 1958 under which the Council on Tribunals was given powers in respect of many, but not all, tribunals. This Act was replaced by the Tribunals and Inquiries Act 1992.

7 The Report of the Committee on Ministers’ Powers Cmd. 4060 (1932), Section III, paras 9 and 10.
8 The Report of the Committee on Ministers’ Powers Cmd. 4060 (1932), Section III, para 11.
10 The Report of the Committee on Administrative Tribunals and Enquiries Cmd. 218 (1957), para 42.
By the end of the century the focus had changed again. The terms of reference to the inquiry led by Sir Andrew Leggatt, which reported in 2001, accepted statutory tribunals as judicial bodies and directed attention to issues of efficiency and effectiveness. Leggatt’s key recommendation was that tribunals should be freed from their relationship with a sponsoring department and be brought within a single coherent structure with uniform powers for tribunals and rights of appeal for the parties.

The idea of systematic reform was not new. It had been proposed without success by Professor Robson to the Donoughmore Committee, picked up by Professor Wade and repeated by Professor Robson to the Franks Committee, which rejected his proposal that would have brought system to appeals against administrative decisions.

Sir Andrew Leggatt’s report was followed in 2001 by a consultation paper and then, in 2004, by a White Paper on Transforming Public Services: Complaints, Redress and Tribunals. This proposed a co-ordinated approach to administrative justice. There followed administrative action and legislation, but the vision of the White Paper has only been partly realised. Administratively, a Tribunals Service was established, as a companion to the Courts Service. Beginning in April 2006, tribunals began to be moved from their sponsoring departments into the Department for Constitutional Affairs, now the Ministry of Justice. And their administrations, although they remained separate, were co-ordinated under the new Tribunals Service. In terms of legislation, the Tribunals, Courts and Enforcement Act (TCEA) was passed in 2007. This established a First-tier Tribunal and an Upper Tribunal and made common provision for the powers of, and appeal rights to and from, those tribunals. Finally, the Council on Tribunals was replaced by the Administrative Justice and Tribunals Council, which was itself abolished in 2013.

In April 2011, the Tribunals Service merged with Her Majesty’s Courts Service to form Her Majesty’s Courts and Tribunals Service. This administrative merger has in turn led to greater judicial integration and assimilation between the courts and tribunals through the Lord Chief Justice’s power of deployment under the Courts and Crime Act 2013 s21.

The current priority is to find ways of reconciling the political aspiration for devolution and the practical problems of operating jurisdictions that apply across national boundaries within the United Kingdom.
Nature of a tribunal

What a tribunal is

1.13 Tribunal is used in a general sense and in a specific sense. In its general sense, it covers all bodies, including courts, that determine the legal position of the parties before them. In its specific sense, it is used to distinguish one particular class of judicial body from the rest.

1.14 Lord Dilhorne captured this distinction in Attorney-General v BBC\(^{17}\) when he said ‘While every court is a tribunal, the converse is not true’.\(^{18}\)

1.15 There is no general definition of what constitutes a tribunal in this specific sense and of its distinctive features. Referring to that sense in Royal Aquarium and Summer and Winter Garden Society Ltd v Parkinson,\(^{19}\) Fry LJ expressed the opinion that ‘... that word has not, like the word “court”, an ascertainable meaning in English law’.\(^{20}\)

1.16 The reason for this is simply that there is no need for a general definition. The proper classification of a body as a tribunal always arises in a particular legal context. That context may affect the answer, so that a body may be a court for one purpose and a tribunal for another. For example, a particular body may be a tribunal for the purposes of article 6, but a court for the purposes of the Contempt of Court Act 1981.

1.17 The tribunals with which this book is concerned may be defined by a combination of characteristics relating to their method of creation, their purpose, the scope of their jurisdiction and powers, their membership, their procedures, and their relationship with the parties to proceedings before them. A tribunal in this sense is a body created by statute.\(^{21}\) Its purpose is to determine a person’s legal position in respect of a private law dispute or a public law entitlement, whether initially, on appeal or on judicial review.\(^{22}\) It is given only a narrow and limited jurisdiction. But that jurisdiction is conferred generally and is not limited to an individual case. The members are likely to be expert in the jurisdiction; they are not limited to lawyers and may include others with relevant knowledge and experience. The procedures are likely to be relatively simple and user-friendly. Finally, it is independent of the parties to the proceedings. In other words, the tribunal is an expert, independent standing statutory body, available to deal with all those cases within its jurisdiction and easily accessible by users.

1.18 This does not mean that these features are unique to tribunals. Court judges may, for example, be just as expert in their jurisdiction as tribunal judges. Nor does it mean that all tribunals exhibit these features. The

\(^{17}\) [1981] AC 303.
\(^{19}\) [1892] 1 QB 431.
\(^{20}\) [1892] 1 QB 431 at 446.
\(^{22}\) A tribunal may have an original jurisdiction, an appellate jurisdiction, a judicial review jurisdiction or a combination. The Upper Tribunal has appellate jurisdiction under, for example, TCEA s11, a judicial review jurisdiction under TCEA s15, and an original jurisdiction in the case of forfeiture under the Forfeiture Act 1982.
Competition Appeal Tribunal, for example, does not operate procedures that are designed to make it readily accessible by those without legal assistance. What it does mean is that tribunals are bodies in which these features are likely to occur in combination.

In the past, a tribunal’s powers were always subject to the one limitation identified by Hale LJ in *R v Secretary of State for the Home Department ex p Saleem*: Their determinations are no less binding than those of the ordinary courts: the only difference is that tribunals have no direct powers of enforcement and, in the rare cases where this is needed, their decisions are enforced in the ordinary courts.

However, the Upper Tribunal has the powers of the High Court (TCEA s25).

The label given to a body is not decisive. Some bodies are called tribunals and are tribunals for the purposes of this book. Other bodies bear different names, but are nonetheless tribunals within the above definition. A body that is called a court may even be within the definition. The former National Industrial Relations Court would have been a tribunal for this purpose.

A tribunal may be made a superior court of record by statute. The Upper Tribunal is so designated by TCEA s3(5), as is the Employment Appeal Tribunal by section 20(3) of the Employment Tribunals Act 1996.

This does not mean that the principles covered in this book are unique to tribunals as here defined. They are derived from principles that apply to all judicial bodies and many of the cases cited relate to the courts. The principles also apply to the occasional inquiries that are set up by the government outside the authority of any particular statute, whether or not the Tribunals of Inquiry (Evidence) Act 1921 applies. And they may be appropriate to domestic tribunals, which owe their existence to contract.

How a tribunal operates

If the issue of definition were all that distinguished tribunals from courts, it would scarcely be worth making. However, there are features that characterise tribunals apart from definitional factors. Tribunals may be distinguished from courts by their membership and their procedures. These characteristics are not unique to tribunals, but to the particular features that are likely to be present in relation to tribunals. The same features may also be present in court proceedings. If they are, it is likely that the courts will adopt similar approaches.

Some of the features that distinguish a tribunal from a court are recognised in TCEA. Section 2(3) imposes on the Senior President a duty to

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23 At least in England and Wales. The employment tribunal in Scotland has power to enforce its own decisions.
have regard to particular features in carrying out the functions of that office:
- tribunals should be accessible;
- their proceedings should be fair and handled quickly and efficiently;
- their members should be expert in the subject-matter or law with which the tribunal is concerned; and
- innovative methods of resolving disputes should be developed.

The requirements of accessibility, fairness and efficiency mirror the same requirements for the civil justice system under section 1(3) of the Civil Procedure Act 1997.

1.25 And section 22(4) of TCEA sets the objectives for the rules of procedure:
- that justice is done;
- that the tribunal system is accessible and fair;
- that proceedings are handled quickly and efficiently;
- that the rules are both simple and simply expressed; and
- that the rules where appropriate confer on members responsibility for ensuring that proceedings before the tribunal are handled quickly and efficiently.

1.26 Before dealing with individual features of the operation of tribunals, there is a general point to make about the language that is sometimes used in relation to tribunals. The language in which the distinctive features of tribunal procedure are described can give an inaccurate impression. The procedure before tribunals may be said to be informal and inquisitorial, but these statements must not be taken too literally. It is also said that the strict rules of evidence do not apply, but this gives no indication of how tribunals approach fact-finding. Language such as this is not descriptive of how tribunals operate. It conveys something of what tribunals are not rather than what they are. It is used to differentiate tribunals from courts, to distance tribunals from the procedures appropriate to court proceedings.

Accessibility

1.27 Ease and convenience of use is an important feature of tribunals. As Lord Reading CJ said of the Income Tax Commissioners in *R v Bloomsbury Income Tax Commissioners*:

> The exigencies of the State require that there should be a tribunal to deal expeditiously and at comparatively little expense with all such questions and to decide them finally, reserving always to the individual the right to have the Commissioners’ decisions on points of law reviewed by the Courts.

1.28 This was repeated by the Donoughmore Committee on *Ministers’ Powers*:

Accessibility for disabled people was addressed by the former Council on Tribunals in its *Making Tribunals Accessible to Disabled People* (2002).

[28] [1915] 3 KB 768.
[29] [1915] 3 KB 768 at 784.
We recognise that such Ministerial Tribunals have much to recommend them. In cases where justice can only be done if it is done at a minimum cost, such Tribunals, which are likely to be cheaper to the parties, may on this ground be preferred to the ordinary Courts of Law. In addition they may be more readily accessible, freer from technicality, and – where relief must be given quickly – more expeditious. They possess the requisite expert knowledge of their subject – a specialised Court may often be better for the exercise of a special jurisdiction. Such Tribunals may also be better able at least than the inferior Courts of Law to establish uniformity of practice.\(^3\)

1.29 This description was in turn endorsed by the Franks Committee on *Administrative Tribunals and Enquiries*:\(^2\)

38. We agree with the Donoughmore Committee that tribunals have certain characteristics which often give them advantages over the courts. These are cheapness, accessibility, freedom from technicality, expedition and expert knowledge of their particular subject.

1.30 The same view underpins the entire approach of Sir Andrew Leggatt in his *Review of Tribunals*:\(^3\)

It should never be forgotten that tribunals exist for users, not the other way round. No matter how good tribunals may be, they do not fulfil their function unless they are accessible by the people who want to use them, and unless the users receive the help they need to prepare and present their cases.\(^4\)

1.31 And the Council on Tribunals\(^5\) identified accessibility as one of its standards for tribunals.\(^6\)

1.32 The courts and tribunals have been sensitive to the difficulties of parties who are either unrepresented or who lack legal representation. This has been necessary in order to render effective the proceedings that statute has made available. It has also, given the tribunal context, been necessary in order to ensure that the proceedings are fair under the principles of natural justice and article 6.

1.33 Accessibility has in part been attributable to, or found its expression in, the features considered below. These approaches now have to be applied and developed under TCEA. The first duty of the Senior President is to have regard to the need for tribunals to be accessible (TCEA s2(3)(a)). This feature of the tribunal system is given more concrete expression in the requirement for the rules of procedure to ensure that the tribunal is accessible and that the rules are simple and simply expressed (TCEA s22(4)(b) and (d)). And individual tribunals are required to apply the overriding objective in determining and operating their procedure.\(^7\) UTR r2(2) is illustrative.\(^8\)

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\(^3\) Section III, para 10.

\(^2\) Cmnd. 218 (1957).

\(^3\) *Tribunals for Users – One System, One Service* (2001).


\(^5\) Replaced by the Administrative Justice and Tribunals Council.


\(^7\) See para 3.22.

\(^8\) See also: GRC Rules r2(2); HESC Rules r2(2); IAC Rules r2(2); Lands Rules r2(2); PC Rules r3(2); SEC Rules r2(2); Tax Rules r2(2); WPAFC Rules r2(2).
(2) Dealing with a case fairly and justly includes—

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;
(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
(d) using any special expertise of the Upper Tribunal effectively; . . .

1.34 Fees can also inhibit access to a tribunal. A fee for initiating proceedings may be imposed. But it must be imposed directly by statute or under an appropriate statutory enabling power. And it must not operate to abrogate the right of access to justice. As Laws LJ explained in giving the judgment of the Court of Appeal in R v Lord Chancellor ex p Witham: ‘Access to the courts is a constitutional right; it can only be denied by the government if it persuades Parliament to pass legislation which specifically – in effect by express provision – permits the executive to turn people away from the court door’. This reasoning is equally applicable to tribunals as it is to courts.

Speed

1.35 This is part of accessibility. It is embodied in the Senior President’s duty under TCEA s2(3)(b)(ii) to have regard to the need for proceedings to be handled quickly. However, as Sir Andrew Leggatt noted ‘Speed should not be an end in itself. It should follow from obedience to the watchwords which should inform every tribunal: informality, simplicity, efficiency, and proportionality.’

1.36 Speed has to be balanced, or reconciled, with the Senior President’s duty in section 2(3)(b)(i) to ensure that proceedings are fair. It must not be attained at the cost of failing to provide a fair hearing. That would render the decision liable to be set aside, which would length the total time taken.

1.37 The duty to ensure that proceedings are handled quickly does not apply directly to individual cases. It is imposed on the Senior President and not on the tribunal hearing a case. And it operates through general policy and through practice directions rather than decisions in particular cases.

1.38 TCEA s22(4) is more significant in individual cases. It requires the rules of procedure to secure specified objectives. Two are relevant to the speed of proceedings:

(c) that proceedings before the First-tier Tribunal or Upper Tribunal are handled quickly and efficiently,

(e) that the rules where appropriate confer on members of the First-tier Tribunal, or Upper Tribunal, responsibility for ensuring that proceedings before the tribunal are handled quickly and efficiently.

1.39 Resources will always have an impact on speed. The more hearings that can be held, the more quickly cases can be heard. To some extent, speed can

39 TCEA s42 contains an appropriate power.
be achieved through general procedures. For example: the absence of formal pleading and discovery stages reduces the time that a case would take compared to a court. And to some extent speed can be achieved through efficiency measures. For example, effective listing can ensure that time is not wasted and cases are heard as quickly as possible. However, there is a limit to the effect that these measures can have. The rules of procedure and practice directions must have an impact in individual cases if the duty is to prove effective in practice.

The law of evidence

1.40 Tribunals are generally not bound by the strict rules of evidence. This allows greater flexibility in the evidence that they receive. For example: expert evidence before a court must at least conform to a minority but respected body of opinion within the profession. That limitation does not apply in a tribunal.\(^2\)

The bridging function

1.41 In all forms of legal proceedings, there is a bridge to be crossed between the lay parties and the court or tribunal. The lay parties know the facts, but do not know the law or, therefore, which facts are relevant. The court or tribunal knows the law, but not the facts within the parties’ knowledge. If the parties are represented competently (but not necessarily by a lawyer), this bridge is crossed in the pre-hearing work undertaken by the representatives. They obtain the relevant facts by inquiry of the parties and present only those that are relevant. In the case of tribunals, it is less likely than in a court that this work will be done by representatives before the hearing. It therefore devolves, in whole or in part, to the tribunal itself.

1.42 This leads tribunals\(^4\) to adopt two approaches to help them in this task: the enabling approach and the inquisitorial approach. They are complementary. The enabling approach is concerned with the attitude to the parties. The inquisitorial approach is concerned with the evidence and issues. These approaches may require a greater degree of intervention by, and assistance from, the tribunal than is usual in the courts.\(^4\)

1.43 The proper approach is a matter of duty for the tribunal, not a matter of choice. Originally, it was based in the requirement of natural justice and of article 6. Under TCEA, it is also based in the overriding objective. Every party before a tribunal has a right to be heard and the tribunal must ensure that that right is effective. As the Commissioner explained in \(R(I) 6/69\):\(^4\)

\[\text{But the broad general principle is that a claimant has a right to be heard and that a tribunal has a corresponding duty not only to ensure that he is aware}\]

\(^2\) See further chapter 10 below.
\(^3\) And courts in which the bridging function has not been performed by representatives. This is increasingly so even in the High Court.
\(^4\) On which see Jones v National Coal Board [1957] 2 QB 55.
\(^4\) \(R(I) 6/69\) at [7].
of this right but also to assist him, by such means as may be appropriate in any particular case, to exercise it.

Enabling approach

Tribunals are expected to take an enabling approach. There is no express legal requirement that they do so, but it is an aspect of accessibility (TCEA ss2(3)(a) and 24(2)(b)). And the overriding objective requires that, as far as practicable, the parties must be able to participate fully in the proceedings: see for example UTR r2(2)(c).

This approach requires the tribunal to try to create a framework for proceedings that allows parties who are inexperienced with the procedures involved to give of their best in an unfamiliar setting. This is achieved through appropriate application of the tribunal's powers under its rules of procedure, the explanations given to the parties, the manner in which the hearing is conducted and the atmosphere that is created. Members are selected who have an aptitude for this approach and it is reinforced by training.

Professor Kathleen Bell found that this was the approach that the appellants wanted in the former Supplementary Benefit Appeal Tribunals:

. . . members should play an active and enabling role towards the appellant by showing sympathetic understanding of his problem, by listening, asking relevant questions, drawing him out and generally helping him sort out his case. They were able to distinguish this enabling role from that of an advocate.6

She recommended that tribunal members should be made aware of:

. . . appellants' expectations of the tribunal and their concept of it as a body which will play an active and enabling role towards them through the medium of a rather informal but thorough exploration of the case.7

Sir Andrew Leggatt recommended8 that the enabling approach should be taken, especially in those tribunals that involved public law entitlement:

. . . tribunals have developed different ways of assisting unrepresented parties, in particular when the encounter is between citizen and state,9 and departments are represented by an official or an advocate who is familiar with the law, the tribunal and its procedures. In these circumstances, tribunal chairmen may find it necessary to intervene in the proceedings more than might be thought proper in the courts in order to hold the balance between the parties, and enable citizens to present their cases. All the members of a tribunal must do all they can to understand the point of view, as well as the case, of the citizen. They must be alert for factual or legal aspects of the case which appellants may not bring out, adequately or at all, but which have a bearing on the possible outcomes. It may also be necessary on occasion to intervene to protect a witness or party, to avoid proceedings becoming too confrontational. The balance is a delicate one,

9 The reasoning also applies if someone is involved who is not a citizen, as for example in an immigration or asylum case.
and must not go so far on any side that the tribunal’s impartiality appears to be endangered.

We are convinced that the tribunal approach must be an enabling one: supporting the parties in ways which give them confidence in their own abilities to participate in the process, and in the tribunal’s capacity to compensate for the appellants’ lack of skills or knowledge . . .

As these quotations make clear, the enabling approach is particularly appropriate for an unrepresented party.

As part of the enabling approach, tribunals adopt processes and procedures that are less complicated and more informal than those that are typically associated with courts. This is part of the overriding objective. This is not to say that courts cannot operate relatively simple processes and procedures or that they are inevitably formal. The point is that there is a range of simplicity and formality and that tribunals are typically at the more user-friendly end of the spectrum.

The expectations of the parties and their ability to use the forms and procedures also reflects the difficulties they may experience without assistance. In Burns International Security Services (UK) Ltd v Butt, the Employment Appeal Tribunal decided that:

It seems to us that in the field of industrial relations where application forms are frequently completed by individual employees without professional assistance a technical approach is particularly inappropriate . . .

It was pointed out in Cocking v Sandhurst (Stationers) Ltd [1974] ICR 650 that the rules did not require that the complaint as presented should be free of all defects and should be in the form in which it finally came before the tribunal for adjudication. The purpose of the rules is to ensure that the parties know the nature of the respective cases which are made against them.

This approach is not limited to the employment tribunal and the Employment Appeal Tribunal. The courts also took the same approach in cases involving planning law and the Rent Act 1968. The Commissioners took the same approach. This approach may be inherent in the rules of procedure (especially rr2 and 5–7). There is a limited express power in respect of some forms of application, but the approach has been applied more widely.

However, in the war pensions case of R (Clancy) v Secretary of State for Defence, Davis J decided that it was too late to rely on the substance of an application, if the appropriate form has not been used and the proceedings had been disposed of in accordance with that form.
The enabling approach in action is exemplified by R(I) 6/69. The Commissioner set out the proper approach for a tribunal to take:

It is the tribunal’s duty to afford every claimant a reasonable opportunity of addressing them, of calling or adducing evidence, and of calling attention to any points or matters which he thinks should be taken into consideration. He must also be afforded a reasonable opportunity to reply to any submissions or arguments adverse to his case made on behalf of the Secretary of State. This means something more than a mere passive willingness to accede to a request, should one be made to address the tribunal; it involves a degree of active assistance and encouragement. How much assistance and encouragement is required will necessarily vary from case to case and from claimant to claimant. Some unrepresented claimants are unable to express themselves clearly or unable to distinguish between what is relevant and what is irrelevant. In many such cases the tribunal can do little more than invite answers to questions.60

But this simplicity and informality is not uncontrolled. There are limits to which it is permissible or appropriate.

For some purposes, formal attention to the correct procedures is necessary. So in Sivanandan v Enfield LBC,61 the Court of Appeal decided that an employment tribunal is required formally to dismiss a claim if it is withdrawn in order to pursue a remedy elsewhere. Wall LJ emphasised the need in such circumstances for ‘a clear procedural discipline’.62

Even if a lesser degree of formality than that used in courts is appropriate, the proceedings must not be so informal that all aspects of a case are not considered. The purpose of the enabling approach is to enhance the quality of the decision-making; it must not be used to impede it. As Pill LJ explained in the context of a planning appeal in Dyason v Secretary of State for the Environment:63

A relaxed hearing is not necessarily a fair hearing. The hearing must not become so relaxed that the rigorous examination essential to the determination of difficulty questions may be diluted.64

Informality of approach should not deprive a party of a right, such as the right to question witnesses.65

Nor should it be allowed to prejudice or embarrass a party’s presentation of a case. The recalling of witnesses in an employment tribunal was considered by the Employment Appeal Tribunal in Aberdeen Steak Houses Group plc v Ibrahim.66 Wood J said:

It is possible for informality to go too far and it is important for parties appearing before any judicial body, and for their legal advisers in preparing for trial, to know the rules normally to be applied during that hearing. It is important that there should be consistency. It is also important that any

60 R(I) 6/69 at [7].
62 [2005] EWCA Civ 10 at [122].
64 (1998) 75 P&CR 506 at 512.
65 R(I) 13/74 at [9].
sudden change from that norm should not present a party with an embarrassing situation from which a feeling of unfairness may arise.  

Inquisitorial approach

1.58 In many jurisdictions, the tribunal will take an inquisitorial approach. There is no express legal requirement that they do so, but it is an aspect of accessibility (TCEA ss2(3)(a) and 24(2)(b)). And the overriding objective requires that, as far as practicable, the parties must be able to participate fully in the proceedings: see for example UTR r2(2)(c).

   This approach requires a tribunal to be actively involved in identifying the issues and obtaining relevant evidence at the hearing. This may be done by identifying the issues that arise, by explaining what is relevant to the parties, by questioning them or by a mixture of these techniques. However it is done, it has two aspects. First, the issues aspect: it ensures that relevant issues are identified. Second, the investigative aspect: it ensures that those issues are properly investigated and considered. Both aspects blend with the enabling approach.

1.59 What is required in a particular case is dictated by a combination of the nature of the parties, of the proceedings and of the issues. It arises in part from the non-contentious role of public parties to the proceedings, who are concerned only with the correct application of the law, from the need to protect the public interest, and from the enabling approach, which recognises that lay parties may not be and need not be represented. Such factors can apply even if the tribunal is deciding a dispute between the parties or to vindicate a right claimed by a party. Individually and collectively, they make it inappropriate to follow an adversarial approach.

1.60 This in turn makes it inappropriate for there to be cross-examination as practised in courts. The courts see this as essential to the fact-finding process. As Viscount Sankey LC explained in Mechanical and General Inventions Co Ltd and Lehwess v Austin and the Austin Motor Co Ltd: Cross-examination is a powerful and valuable weapon for the purpose of testing the veracity of a witness and the accuracy and completeness of his story.

1.61 By taking an inquisitorial approach, a tribunal compensates for this lack of a rigorous challenge by each party of the other’s case, thereby ensuring a fair hearing for all the parties to the proceedings. As Pill LJ explained in

68 This is not universal, as circumstances differ between jurisdictions: Secretary of State for the Home Department v MN and KY [2014] UKSC 30 at [25].
70 R (Starling) v Child Support Commissioners [2008] EWHC 1319 (Admin) at [31]–[33].
71 As explained by Diplock LJ in R v Deputy Industrial Injuries Commissioner ex p Moore [1965] 1 QB 456 at 486.
72 Browning v Information Commissioner and DBIS [2013] UKUT 236 (AAC) at [60] and [65].
74 [1935] AC 346 at 359, quoting the Master of the Rolls in the Court of Appeal.
Dyason v Secretary of State for the Environment\textsuperscript{75} in the context of a planning appeal:

If cross-examination disappears, the need to examine propositions in that way does not disappear with it. . . . The absence of an accusatorial procedure places an inquisitorial burden upon an Inspector.\textsuperscript{76}

The need for an inquisitorial approach may also arise from the nature of the proceedings. If a court is under a duty to make a decision on the basis of all the facts and circumstances of the case, the judge has a duty to obtain the necessary evidence regardless of the wishes of the parties. Miller v Miller\textsuperscript{77} concerned relief proceedings ancillary to a divorce. In the Court of Appeal, Thorpe LJ referred\textsuperscript{78} to the ‘trial judge’s obligation to investigate whatever he conceives relevant and necessary to enable him to discharge his statutory duty’ in those proceedings and explained that as a consequence ‘Ancillary relief proceedings are quasi-inquisitorial and the judge is never confined by what the parties elect to put in evidence or by whatever they may agree to exclude from evidence.’ An inquisitorial approach is likewise required if the tribunal is under a duty to consider whether to make a particular order.\textsuperscript{79}

The nature of the issues will determine the extent to which the public interest may require a tribunal to investigate a case. In \textit{R (Starling) v Child Support Commissioners},\textsuperscript{80} the court was concerned with an appeal in a child support case. Collins J identified a public interest in: (i) the possibility that the person with care would have to depend on social security benefits if the correct amount of maintenance was not identified; and (ii) the welfare of the children.\textsuperscript{81}

To the extent that the approach is based on the abilities of the parties and their representatives to present a case, it is flexible. Its operation depends on the extent to which the parties are informed participants in the proceedings, whether they are represented and, if so, the quality of that representation. Either or both of the aspects of the inquisitorial approach (the issues aspect and the investigative aspect) may be required, depending on the circumstances. And the extent to which they have to be applied may differ.

In \textit{R(I) 6/69}, the Commissioner related the inquisitorial approach to the need to make the right to be heard effective:

How much assistance and encouragement is required will necessarily vary from case to case and from claimant to claimant . . . But the broad general principle is that the claimant has a right to be heard and that a Tribunal has a corresponding duty not only to ensure that he is aware of this right but also to assist him, by such means as may be appropriate in any particular  

\textsuperscript{75} (1998) 75 P&CR 506.  
\textsuperscript{76} (1998) 75 P&CR 506 at 512.  
\textsuperscript{77} [2006] 1 FLR 151.  
\textsuperscript{78} [2006] 1 FLR 151 at [24].  
\textsuperscript{79} See also Tameside & Glossop Acute Services NHS Trust v Thompstone [2008] 2 All ER 553 at [52].  
\textsuperscript{80} [2008] EWHC 1319 (Admin).  
\textsuperscript{81} [2008] EWHC 1319 (Admin) at [32].
case, to exercise it. The fact that a tribunal is master of its own procedure makes it the more urgent that this principle should be observed.\(^8\)

Accordingly, for an inarticulate, unrepresented and uninformed claimant, both aspects may apply.

If the claimant is represented by solicitors and counsel before both the First-tier Tribunal and the Upper Tribunal, neither aspect may apply. As Mummery LJ said in *Jeleniewicz v Secretary of State for Work and Pensions*,\(^8\)

In this case the Claimant was represented by solicitors and counsel both before the Appeal Tribunal and the Commissioner. It was proper and reasonable for the Commissioner to proceed on the basis that the claimant’s legal representatives had supplied him with all the information relevant to questions that he had to decide and that the submissions made to him by counsel were based on the available information and were directed to the relevant provisions of the Directive and the 2000 Regulations.

And in *Chandra v Care Standards Tribunal*,\(^8\) the deputy judge held that, as both parties were represented before the tribunal by counsel, it was their responsibility, and not that of the tribunal, to call the authors of a report that was in evidence.\(^8\)

If a party’s representative is not professional, experienced or even competent, the investigative aspect but not the issues aspect may apply. In *Kumchyk v Derby City Council*,\(^8\) the Employment Appeal Tribunal dealt with this issue in the course of discussing the circumstances in which a point could be taken for the first time before the Appeal Tribunal:

> It is well established in these tribunals [industrial tribunals, now employment tribunals], and we hope in this appeal tribunal, that where the representation is a non-professional representation, or possibly even where it is an inexperienced professional representation (if such a thing can be conceived), in listening to an argument put forward by an advocate or evaluating a point of law put forward by an advocate, the tribunal will be as helpful as possible, perhaps by itself refining and improving the argument, perhaps by suggesting to the advocate that the argument might be put in a different or more favourable fashion, something of that sort. But we think it is very far from the duty or indeed the practice of the chairman of industrial tribunals that they should be expected to introduce into the case issues that do not figure in the presentation on the one side or the other side, at any rate in normal circumstances . . .\(^8\)

However, the inquisitorial approach is not completely excluded for parties who have access to expert legal advice. In *Krasniqi v Secretary of State for the Home Department*,\(^8\) the appellant to the Asylum and Immigration Tribunal was the Secretary of State. The Court of Appeal decided that the Tribunal, whose jurisdiction depended on there being a point of law, was entitled ‘to extract a point of law from nebulously expressed grounds of

\(^{82}\) R(I) 6/69 at [7].

appeal, or in exceptional cases to identify for itself an obvious issue of law which the appellant had missed.\textsuperscript{89} Sedley LJ described this as ‘a potentially benign power’ and remarked that the Secretary of State ought to be less in need of this kind of assistance than a good many applicants who lacked expert legal advice.\textsuperscript{90}

1.71 Even in a case in which the inquisitorial approach applies to its fullest extent, there are limits to it. There may be statutory limits on the extent to which the tribunal may or must take the initiative.\textsuperscript{91} And this approach does not relieve the parties of their responsibilities of obtaining and presenting evidence; nor can it be used to relieve them of the cost involved in doing so.\textsuperscript{92}

**Tribunal membership**

1.72 The Senior President is under a duty to have regard to the needs for members of a tribunal to be expert in the subject matter or law of the cases they decide (s2(3)(c)). And the overriding objective requires that any special expertise of the tribunal must be used effectively: see for example UTR r2(2)(d).

1.73 Not being a court allows those with appropriate non-legal skills to participate directly in the decision-making as members of the tribunal rather than as assessors or witnesses.\textsuperscript{93} This helps to make tribunals more accessible to the parties by reducing the need to rely on legal representation and making it easier to allow representation by other specialists.

1.74 A tribunal with a narrow jurisdiction is by definition specialist. Tribunals with wider jurisdiction achieve the same effect through assigning panel members to particular jurisdictions and ticketing them for particular areas of work. This specialisation of the members enhances the quality of their decisions and the potential speed of clearance.

1.75 Members may be appointed to a tribunal for their expertise or they may acquire or enhance it as a result of their membership. A tribunal that appoints members with particular knowledge, experience or expert may be an expert tribunal or a specialist tribunal.\textsuperscript{94} An expert tribunal is one that is entitled to rely on its own expertise to reach conclusions independently of and, in appropriate cases, in contradiction of the evidence. In *R v Medical Appeal Tribunal (North Midland Region) ex p Hubble*, Diplock J described the function of a medical appeal tribunal as being ‘to use their own expertise to reach their own expert conclusions upon the matters of medical fact and opinion involved’.\textsuperscript{95} A specialist tribunal is one that is not

\textsuperscript{89} [2006] EWCA Civ 391 at [19].
\textsuperscript{90} [2006] EWCA Civ 391 at [19].
\textsuperscript{91} See chapter 4.
\textsuperscript{92} Although there may be a statutory power to do so. See Social Security Act 1998 s20.
\textsuperscript{93} Lord Hope and Baroness Hale in *Gillies v Secretary of State for Work and Pensions* [2006] 1 WLR 781 at [22] and [36].
\textsuperscript{94} ‘Expert tribunal’ is an established expression; ‘specialist tribunal’ is not.
\textsuperscript{95} [1958] 2 QB 228.
\textsuperscript{96} [1958] 2 QB 228 at 241.
so entitled, but is entitled to use its knowledge and experience in questioning the witnesses and assessing the evidence. 97

1.76 Specialisation is not without its dangers. A tribunal can become isolated from the mainstream of jurisprudence, applying principles in a way that is out of step with other comparable areas of law. For example: the Commissioners were much more likely to find that a tribunal’s facts and reasons were inadequate than the Employment Appeal Tribunal, while the latter was far more likely than the Commissioners to find that a tribunal was biased. One potential advantage of the Upper Tribunal is that these differences can be eliminated.

Rights of audience

1.77 It is consistent with ease of access to tribunals that they do not have limited rights of audience. In other words, a party may be represented by anyone regardless of qualifications. This allows representation by professionals from disciplines other than law, such as accountants or social workers. It allows representation by specialists in the relevant area of law who do not hold legal practitioner qualifications. And it allows representation by anyone else selected by the party as suitable to present, or help to present, a case to a tribunal.

1.78 There is no control over those who may represent except in immigration, which is subject to control because of the perceived abuse by representatives.

Non-contentious public parties

1.79 If the tribunal has jurisdiction over statutory decisions by public bodies, the public body itself is unlikely to be a contentious party to the proceedings. Its only concerns are to ensure that the facts are correctly found and that the law is properly interpreted and applied.

1.80 In *R v Lancashire County Council ex p Huddleston*, 98 the Court of Appeal was concerned with a local authority’s decision on a student grant. Sir John Donaldson MR put the status of the local authority in the proceedings in the context of public law which had:

. . . created a new relationship between the courts and those who derive their authority from the public law, one of partnership based on a common aim, namely the maintenance of the highest standards of public administration. 99

The result was this:

The analogy is not exact, but just as the judges of the inferior courts when challenged on the exercise of their jurisdiction traditionally explain fully what they have done and why they have done it, but are not partisan in their own defence, so should be the public authorities. 100

97 R(M) 1/93 at [9].
98 [1986] 2 All ER 941.
99 [1986] 2 All ER 941 at 945.
100 [1986] 2 All ER 941 at 945.
1.81 In *R v Deputy Industrial Injuries Commissioner ex p Moore*[^101] Diplock LJ said of the position of the decision-maker dealing with entitlement to a social security benefit:

... a claim by an insured person to benefit is not strictly analogous to a *lis inter partes*. Insurance tribunals form part of the statutory machinery for investigating claims, that is, for ascertaining whether the claimant has satisfied the statutory requirements which entitle him to be paid benefit out of the fund. In such an investigation, neither the insurance officer nor the Minister (both of whom are entitled to be represented before the insurance tribunal) is a party adverse to the claimant.[^100]

1.82 In *Commissioners of Inland Revenue v Sneath*,[^103] Lord Hanworth MR said of the position of a surveyor on an appeal against an income tax assessment:

There is no interest in the surveyor, except to bring before the Court all facts relevant to the assessment. The decision does not enure in his favour unless he is to be treated as representing the taxpayers at large, exclusive of the one upon whom the assessment in question is made.[^104]

1.83 Similarly a rating valuation officer was described by Lord Radcliffe in *Society of Medical Officers of Health v Hope*[^105] as:

... a neutral official charged with the statutory and recurring duty of bringing into existence a valuation list and maintaining its contents in correct and legal form.[^106]

1.84 And in *R (JF) v London Borough of Croydon and the Special Educational Needs Tribunal*,[^107] Sullivan J said of the tribunal:

Although the proceedings are in part adversarial because the Authority will be responding to the parents’ appeal, the role of an education authority as a public body at such a hearing is to assist the Tribunal by making all relevant information available. Its role is not to provide only so much information as will assist its own case. At the hearing, the Local Education Authority should be placing all of its cards on the table, including those which might assist the parents’ case.[^108]

### Co-operative decision-making

1.85 The rules of procedure require the parties to co-operate. UTR r2(4) is illustrative:[^109]

1. Parties must—
   (a) help the Upper Tribunal to further the overriding objective; and
   (b) co-operate with the Upper Tribunal generally.

[^102]: [1965] 1 QB 6 at 86. The courts took the same approach to the position of the insurance officer at the stage of the claim: see *R v Medical Appeal Tribunal (North Midland Region) ex p Hubble* [1958] 2 QB 228 at 240.
[^103]: [1932] 2 KB 326.
[^104]: [1932] 2 KB 362 at 382.
[^109]: See also: GRC Rules r2(4); HESC Rules r2(4); IAC Rules r2(4); Lands Rules r2(4); PC Rules r3(4); SEC Rules r2(4); Tax Rules r2(4); WPAFC Rules r2(4).
These rules give legislative form to a principle of co-operation that was developed by the courts and tribunals. The authorities remain relevant to the interpretation and application of this duty in the rules of procedure.

**Between the parties**

Co-operation is a characteristic of decision-making by some public bodies. However, its significance is not confined to those bodies. It also affects appellate decision-making in tribunals in two ways. First, it affects the allocation between the parties of responsibility for producing evidence. Second, it affects the way that the tribunal approaches the burden of proof on the evidence produced.

In *Kerr v Department for Social Development*, Baroness Hale emphasised the responsibility on both parties to co-operate in providing the information necessary for a decision. She set out the adjudication procedures on a claim for a social security benefit and noted that it was common ground that the decision-maker had power to make inquiries. She continued:

> What emerges from all this is a co-operative process of investigation in which both the claimant and the department play their part. The department is the one which knows what questions it needs to ask and what information it needs to have in order to determine whether the conditions of entitlement have been met. The claimant is the one who generally speaking can and must supply that information. But where the information is available to the department rather than the claimant, then the department must take the necessary steps to enable it to be traced.

This approach has, as yet, been little developed. In *Kerr*, the information required for the claimant’s case either could not be obtained by the claimant or was not so readily available. It is not clear how far Baroness Hale’s reasoning extends beyond this. Nor is it clear to what extent her reasoning depends on the statutory provisions. The statutory provisions considered in that case have now been supplemented by more detailed provisions that put a greater responsibility on claimants for benefit. In *Secretary of State for the Home Department v MN and KY*, an asylum case, Lord Carnwath identified an obligation on the Secretary of State to produce evidence to show that expert evidence was reliable. His reasoning is consistent with *Kerr*, although he did not cite that decision on this issue.

The principle in *Kerr* is not limited to imposing a duty on public bodies. Nor is it limited to the initial stage of establishing entitlement. In *Jeleniewicz v Secretary of State for Work and Pensions*, the Court of Appeal held:

First, as to the process adopted by the Commissioner on the hearing of the appeal, there was no error of law. As Baroness Hale observed in *Kerr* at paragraph 62 the claimant is the person who, generally speaking, can and...
must supply the information needed to determine whether the conditions of entitlement have been met. A similar point was made by Lord Hope in his speech (paragraph 16) when he said that facts which may be reasonably within the claimant’s knowledge are for the claimant to supply at each stage of the inquiry. In my judgment, this is as true in determining whether the conditions of entitlement have ceased to be satisfied as it is when determining whether the conditions have been satisfied.

**Between the parties and the tribunal**

1.91 A duty of co-operation derives from the public status of a party and the nature of the proceedings. In *R v Lancashire County Council ex p Huddleston*, the Court of Appeal was concerned with judicial review of a local authority’s decision on a student grant. Sir John Donaldson MR described those proceedings as being:

\[\ldots\text{ a process which falls to be conducted with all the cards face upwards on the table and the vast majority of the cards will start in the authority’s hands.}\]

Although this case concerned judicial review, the reasoning applies equally to an appeal. The Privy Council considered the *Huddleston* case in *Marshall v Deputy Governor of Bermuda*. It analysed the so-called duty of candour, but noted its limits. Lord Phillips explained:

> Each of the cases in which Lord Donaldson made these statements involved a decision taken by a public authority that related to and adversely affected an individual. Care must be taken when applying Lord Donaldson’s statements to judicial review proceedings in relation to acts of public authorities that do not involve any exercise of discretion. Furthermore those statements apply to the situation where it is not possible for the court to assess the merits of an issue that has been raised unless the public authority against whom the claim is brought furnishes the court with information which it alone is in a position to provide. They should not be relied upon to transfer to the respondent the onus of proving matters which a claimant is under a duty and in a position to prove.

1.92 Co-operation may also derive from the nature of the rule or principle that the tribunal has to apply. If a tribunal is required to take account of all the circumstances of a case relevant to an issue, the parties are under a duty to provide the tribunal with the information that is required. In *Jenkins v Livesey*, the House of Lords was concerned with the ancillary relief provisions of the Matrimonial Causes Act 1973. The relevant provisions required the court to have regard to all the circumstances of the case in making financial orders consequent upon a divorce. Lord Brandon explained that:

\[\ldots\text{ in proceedings in which parties invoke the exercise of the court’s powers under sections 23 and 24, they must provide the court with the information about all the circumstances of the case, including, inter alia, the particular matters so specified. Unless they do so, directly or indirectly, and ensure...}\]
that the information provided is correct, complete and up-to-date, the court is not equipped to exercise, and therefore lawfully and properly exercise, its discretion in the manner ordained by section 25(1).\textsuperscript{120}

1.93 The case management approach to proceedings may also require the parties to co-operate procedurally.\textsuperscript{121}

Pressures for change

1.94 The nature of tribunals and their procedure is not constant. It has changed over time. From the 1980s, tribunals became more independent and their members were better trained. From the 1990s, the increase in the number of salaried judges allowed for more, and more effective, case management. From around 2000, there was, anecdotally, a more legalistic approach in some tribunals. This increasingly professional approach collided with greater professionalism among non-lawyer representatives. They proliferated and sought a greater role in the hearing, although they have not always accepted the correlative responsibility.

1.95 The increased case management and legalism among the judiciary and the demand for greater involvement by representatives have yet to be reconciled, in theory and practice, with the traditional enabling and inquisitorial approaches of some tribunals. Under TCEA, these pressures for change will have to be released under the constraints imposed by the duties of expert decision-making and accessibility that are imposed on the Senior President and, thereby, ultimately on tribunals.

Judicial nature of a tribunal

Judicial

1.96 This word is ambiguous, as pointed out by Lopes LJ in *Royal Aquarium and Summer and Winter Garden Society Ltd v Parkinson*:\textsuperscript{122}

\[\text{The word ‘judicial’ has two meanings. It may refer to the discharge of duties exercisable by a judge or by justices in court, or to administrative duties which need not be performed in court, but in respect of which it is necessary to bring to bear a judicial mind – that is, a mind to determine what is fair and just in respect of the matters under consideration.}\textsuperscript{123}\]

This section is concerned with ‘judicial’ in the former sense.

1.97 Judicial independence is a constitutional principle that derives from the wider principles of the rule of law and the separation of powers. As an instance of the rule of law, it means that the judiciary make their decisions independent from any influence or control. As an instance of the separation of powers, it focuses on freedom from influence or control by the State. Such influence or control might be systemic and directed at the legal system generally or individual and directed at a particular judge.

\textsuperscript{120} [1985] AC 424 at 436–437.
\textsuperscript{121} See chapter 7 below.
\textsuperscript{122} [1892] 1 QB 1.
\textsuperscript{123} [1892] 1 QB 431.
The importance of judicial independence in a modern democracy has been given international recognition.\(^{124}\) At a national level, section 3 of the Constitutional Reform Act 2005 contains a statutory guarantee of continued independence for the judiciary. Section 3(5) and (6) contains specific duties in furtherance of that independence:

3(5) The Lord Chancellor and other Ministers of the Crown must not seek to influence particular judicial decisions through any special access to the judiciary.

(6) The Lord Chancellor must have regard to—
(a) the need to defend that independence;
(b) the need for the judiciary to have the support necessary to enable them to exercise their functions;
(c) the need for the public interest in regard to matters relating to the judiciary or otherwise to the administration of justice to be properly represented in decisions affecting those matters.

The duties in subsection (6) are reflected in the Lord Chancellor’s oath under section 6A of the Promissory Oaths Act 1868, inserted by section 17 of the 200 Act.

There is a limited, but not exhaustive, definition of ‘judiciary’ in the 2005 Act. TCEA s1 extends that statutory definition, and paragraph 66 of Schedule 8 amends the 2005 Act to include members appointed to the Upper Tribunal and First-tier Tribunal. The amendment does not include transferred-in judges. This omission may not matter, as all tribunal judiciary may come within the general meaning of judiciary.

Of more significance to the parties before a tribunal is article 6, which provides that the tribunal must be independent. This may be enforced under the Human Rights Act 1998 by a party to proceedings who alleges a violation of the Convention right. If the State is a party to the proceedings, the other party is also protected by the requirement, also embodied in article 6, that the tribunal must be impartial between the parties.

The appointments system could allow the State to influence judges through selection and promotion. This was largely removed from political control by the creation of the Judicial Appointments Commission under the 2005 Act. This protection does not operate within the tribunal system under TCEA. The initial appointment to a tribunal is made by the Commission, but allocation to particular chambers or to jurisdictions or areas of work within chambers is not handled by the Commission. Instead, it is dealt with by assignment, ticketing and judicial assistance.

Pressure can be put on the judiciary through their salaries. It has been recommended that there should be specific legal provision to ensure that judicial salaries increase at least by the cost of living\(^{125}\) and that judicial salaries and benefits should be set by an independent body and their value

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maintained.\textsuperscript{126} Parliament has not gone so far. It has provided a statutory guarantee not to reduce salaries of court judiciary by amendment under Schedule 3 to the 2005 Act. This provides no protection against pay freezes or erosion by inflation. It has not been extended to tribunal judiciary, although clause 20 of the draft Constitutional Renewal Bill contained a provision that would have remedied this. The Senior Salaries Review Body makes annual recommendations on judicial salaries, but the Government need not accept them.

1.103 The relationship between a tribunal and its sponsoring Department can create the appearance that the tribunal is not independent. And if the sponsoring Department has the power to make rules of procedure for the tribunal, it may create rules that favour the Department. TCEA deals with both. Section 35 allows the Lord Chancellor to assume, solely or jointly, responsibility for a tribunal. It also prevents any exercise of this power being revoked. Section 36 gives the Lord Chancellor control over the power to make rules of procedure. This may be transferred to the Lord Chancellor or to the Tribunal Procedure Committee. This section only applies to scheduled tribunals, which do not include employment tribunals.

1.104 TCEA creates one potential interference with individual judicial independence. Section 23(1) gives the Senior President power to issue practice directions and section 23(6) envisages that they may include guidance on the application or interpretation of the law. This will have to be reconciled with the independence of the tribunal judiciary and the tribunal’s duty to interpret and apply the law.

Is a tribunal judicial?

1.105 This question can only be answered in a particular context, because the question only arises in a particular context. The enquiry is related to the questions of what a tribunal is and what distinguishes it from a court.

1.106 The question has arisen in a number of contexts. The following analysis is based on those contexts. It sets out the general tests that have been applied by the courts and the different factors that the courts have considered in applying those tests. The significance of each of those factors can only be determined in the context of the other factors in the case and of the general test that the court applied. The factors and their interrelation can be analysed, but ultimately, the decision in each case is, as Lord Edmund-Davies said in \textit{Attorney-General v BBC},\textsuperscript{127} ‘largely a matter of impression’.\textsuperscript{128}

\begin{flushleft}
\textsuperscript{127} [1981] AC 303.
\textsuperscript{128} [1981] AC 303 at 351.
\end{flushleft}
Do statements made by a tribunal attract absolute privilege in defamation?

1.107 This issue arose in *Copartnership Farms v Harvey-Smith*. The court had to decide whether comments made by a member of a Military Local Tribunal were protected by absolute privilege for the purposes of an action in defamation. The function of the tribunal was to consider exemptions from military service. Sankey J held that the statements were protected. He described the issue as 'whether the tribunal on the occasion is a tribunal which acts in a manner similar to that in which Courts of justice act.'

He did not consider it decisive that:

- the members were appointed by a non-judicial authority;
- the tribunal could not administer an oath, especially as its decisions affected a party’s status and penalties attached to false statements made to the tribunal;
- the tribunal had power to hear all or part of a case in private;
- only those members present throughout the proceedings were entitled to vote;
- the chairman had a casting vote; and
- a Government Department could intervene in the proceedings.

The judge concluded that the legislation had provided 'the tribunal with certain powers which possibly Courts of justice have not.'

1.108 The issue was the same in *Addis v Crocker*, which concerned a Disciplinary Committee under the Solicitors Act 1957. The Court of Appeal held that statements made were protected by absolute privilege. It was not decisive that:

- (a) the hearings were held in private, with only the findings and decision announced publicly; and
- (b) that there might also be a criminal liability.

Both courts took account of the fact that the decisions of the tribunals affected the status of one of the parties.

1.110 In *Collins v Henry Whiteway and Co Ltd* Horridge J refused to extend this privilege to the Court of Referees under the Unemployment Insurance Act 1920. This body decided issues on referral by an insurance officer. If the officer did not agree with the Court’s recommendation, the issue could be referred to an umpire. The judge said:

> It is not a body deciding between the parties, nor does its decision affect criminally or otherwise the status of an individual ...

The Court of Referees is merely discharging administrative duties which need not be performed in Court, but in respect of which it is necessary to bring to bear a judicial mind.
Does the tribunal exercise the judicial power of the state?

1.111 This issue is particularly relevant in those jurisdictions that apply a strict separation of powers between the legislature, the executive and the judiciary.

1.112 In *Shell Company of Australia v Federal Commissioner of Taxation*,\(^{137}\) the Privy Council had to decide whether an Australian Board of Review for income tax purposes was exercising the judicial power of the State. This issue determined whether its members had to be appointed for life. The Council decided that the Board was not exercising judicial power. It adopted a definition of ‘judicial power’ given by Griffith CJ:

> ... the words ‘judicial power’ as used in s71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.\(^{138}\)

The Council then listed five factors which were not sufficient to show that a tribunal was a court:\(^{139}\) (a) the tribunal gives a final decision; (b) it hears witnesses on oath; (c) two or more contending parties appear before it; (d) it gives decisions that affect the rights of subjects; and (e) matters are referred to it by another body.

1.113 The minority of the Privy Council in *United Engineering Workers’ Union v Devanayagam*\(^{140}\) analysed the position of a president of a Ceylonese Labour Tribunal in terms of judicial power. The issue was whether a president of a Labour Tribunal was a judicial officer. This depended on whether the president’s chief function was to exercise the judicial power of the State.\(^{141}\) The status of the president determined whether appointments were made by the Judicial Service Commission or the Public Service Commission. The minority decided that the president was a judicial officer. They emphasised these features:\(^{142}\)

(a) the Tribunal could only act when there was a controversy;
(b) it gave a binding and authoritative decision;
(c) its powers came from the State, not the parties;
(d) it acted in conformity with principle;
(e) which was reinforced by a right of appeal on questions of law;
(f) the Tribunal would establish a set of principles that would develop from its discretionary power to make orders that were just and equitable; and
(g) it dealt with existing rights, rather than conferring new rights for the future.

In contrast the majority commented that:

> The holder of a judicial office exercises judicial power, but the fact that some judicial power is exercised does not establish that the office is judicial.\(^{143}\)

\(^{137}\) [1931] AC 275.
\(^{139}\) [1931] AC 275 at 297.
\(^{140}\) [1968] AC 356.
\(^{142}\) [1968] AC 356 at 382–388.
\(^{143}\) [1968] AC 356 at 368.
Does the member hold judicial office?

1.114 In *United Engineering Workers’ Union v Devanayagam*,144 the majority decided that the president of a Labour Tribunal was not a judicial officer. They defined the test as being whether the issues that the Tribunal had to decide made it desirable for the presidents to have the same qualifications as those in other courts. The majority based its decision on a combination of factors. Two that seem to have been particularly significant were that: (a) the tribunal was not limited to determining legal rights; and (b) it was empowered to make any decision that was just and equitable. The fact that there was a right of appeal to a court on questions of law was not decisive.145

1.115 In a pair of cases, the Privy Council considered the same issue in respect of a Ceylonese commissioner and the members of the Board of Review for the purposes of imposing a penalty for late disclosure of income tax. It decided that they were not judicial officers. In *Ranaweera v Wickramasinghe*,146 in respect of a commissioner, the Council set out this test:

> . . . where the resolution of disputes by some executive officer can be properly regarded as being part of the execution of some wider administrative function entrusted to him, then he should be regarded as still acting in an administrative capacity, and not as performing some different and judicial function.147

In *Ranaweera v Ramachandran*,148 it decided that the same was true of the Board of Review, although Lord Diplock dissented.

Does the tribunal have power to enforce its decisions?

1.116 This is not essential in order for a tribunal to be a court.149

Does the law of contempt apply to proceedings?

1.117 *Attorney-General v BBC*150 illustrates the variety of ways in which the status of a body can be analysed and the impossibility of isolating the court’s analysis of the judicial character of a tribunal from the context of the particular issue. The issue for the House of Lords was whether a local valuation court was an inferior tribunal for the purposes of contempt. Vis-count Dilhorne decided that the local valuation court was a court, but one that discharged administrative functions.151 Lord Salmon decided that the local valuation court was not a type of body that needed the protection of the law of contempt.152 Lord Edmund-Davies made a detailed analysis of

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149 R (H) v Secretary of State for the Home Department [2004] 2 AC 253 at [26].
the various factors suggested as determinative, finding that some were against the local valuation court being an inferior court: (a) the fact that it was not bound by the rules of evidence; (b) it had no power to summon the attendance of witnesses or to order the production or inspection of documents; and (c) the members could rely on their own knowledge. But, in the end, he admitted that the test was largely one of impression. Lord Fraser decided that the court had administrative functions, while emphasising the importance of convenience, certainty and freedom of expression in defining the scope of contempt. Lord Scarman concentrated on the purpose of the court, which was essentially administrative, and decided that it was not appropriate to extend the protection of contempt to such a body.

1.118 In *Peach Grey & Co v Sommers*, the issue was whether the Divisional Court of Queen’s Bench had jurisdiction to punish for contempt in proceedings before an industrial tribunal. This depended on whether the tribunal was an inferior court. The Court decided that it was. Rose LJ set out factors that were not decisive:

a) the tribunal was not a court of record;
b) its awards were enforced in the county court and its costs were taxed there;
c) it was not bound to observe the strict rules of evidence, although it did so in practice;
d) conciliation proceedings were available; and
e) the rights of audience were not limited to lawyers.

He then set out factors suggestive that the tribunal was a court:

f) (it was established by Parliament;
g) it had a legally qualified chairman appointed by the Lord Chancellor and panel members appointed by the Secretary of State for Employment;
h) it sat in public;
i) it decided cases that affected the rights of subjects;
j) it had power to compel witnesses to attend, to administer the oath, strike out pleadings, allow amendments and order discovery;
k) the parties could be legally represented;
l) it had rules of procedure for giving evidence and making submissions;
m) it could award costs;
n) it had a duty to give reasons for decision;
o) an appeal on law lay to the Employment Appeal Tribunal and then to the Court of Appeal.

157 Now an employment tribunal.
In *Pickering v Liverpool Daily Post and Echo Newspapers plc*, the House of Lords decided that the law of contempt applied to a mental health review tribunal. Lord Bridge gave two reasons. The first was that the tribunal was expressly mentioned in section 12(1)(b) of the Administration of Justice Act 1960, which dealt with contempt. The other was that the tribunal exercised the power of the State. The latter point relied on the reasoning of Lord Donaldson MR, which noted that since 1983 the tribunal no longer made recommendations that could be accepted or rejected but decisions that were binding as to the patient’s liberty.

Peter Gibson LJ in *Bache v Essex County Council* accepted that a representative’s conduct could in an extreme case amount to contempt before an employment tribunal.

**Does the law of perjury apply to proceedings?**

Perjury can be committed by swearing falsely before a tribunal. In *R v Tomlinson*, the Court of Crown Cases Reserved held that perjury could be committed by giving false evidence to a local marine board. Cockburn CJ explained why:

The inquiry was before a tribunal invested with judicial powers, and enabled to inquire on oath, and pass a sentence affecting the status of the person accused. It would be highly inconvenient if false swearing upon such an inquiry did not amount to perjury. It would be fatal to the person accused, if he were not to have protection against witnesses who came to swear falsely.

**Is the tribunal administrative rather than judicial?**

A tribunal that applies policy as well as law is administrative rather than judicial. As is a tribunal that allows members to vote despite not being present throughout the whole of the proceedings.

**Is the tribunal quasi-judicial?**

According to Lords Guest and Devlin in *United Engineering Workers’ Union v Devanayagam*, a person who is not a judicial officer but who has to exercise judicial power of the State is acting quasi-judicially.

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161 [1991] 2 AC 70 at 17.
163 [2000] 2 All ER 847.
164 [2000] 2 All ER 847 at 853.
165 (1866) LR 1 CCR 49.
166 (1866) LR 1 CCR 49 at 53–54.
167 Lord Simonds in *Labour Relations Board of Saskatchewan v John East Ironworks* [1949] AC 134 at 149.
168 Sankey J in *Copartnership Farms v Harvey-Smith* [1918] 2 KB 405 at 413.
Administrative and judicial decision-making

1.124 The courts have distinguished between judicial and administrative decision-making. In *Karanakaran v Secretary of State for the Home Department*,171 the Court of Appeal drew this distinction in deciding that a decision-maker dealing with an asylum claim was not constrained by the rules of evidence.

Superior court of record

1.125 TCEA s(5) provides that the Upper Tribunal is a superior court of record. And section 25 confers on the Upper Tribunal the same powers, rights, privileges and authority as the High Court in relation to the attendance and examination of witnesses, the production and inspection of documents, and all other matters incidental to the Upper Tribunal’s functions. Equivalent provision is made for the Employment Appeal Tribunal by sections 20(3) and 29(2) of the Employment Tribunals Act 1996.

1.126 A superior court of record has three characteristics.172 First, it is presumed to act within its powers unless the contrary is shown. In practice, this is unlikely to be of significance, as the Upper Tribunal’s jurisdiction is entirely statutory. Second, its decisions have effect as precedents for lower tribunals. Third, it has power to punish for contempt.173

1.127 The Upper Tribunal has decided that it has power to punish for contempt in Scotland, although there is no Scottish concept equivalent to a superior court of record.174

1.128 The Upper Tribunal has disciplinary power over solicitors, but not over non-legal representatives.175

Specialism

1.129 Tribunals are inevitably specialised. The Senior President has the duty under TCEA s2(3)(c) to have regard to the need for members to be expert in the subject matter of, or the law to be applied in, their tribunal. This may be because the members are appointed to the tribunal on account of their knowledge, experience or expertise relevant to the tribunal’s jurisdiction. Or it may be because the members acquire, through training and experience, familiarity with the particular legal and factual issues that arise before the tribunal. Or a combination of both. Ultimately, the specialism derives from the tribunal’s limited jurisdiction or the assigning and ticketing within its jurisdiction. The specialism will inevitably relate to the relevant law. But it may also involve other relevant areas, such as medical or financial.

171 [2000] 3 All ER 449.
172 *R (Cart) v Upper Tribunal* [2010] 1 All ER 908 at [75].
173 See also *CB v Suffolk County Council* [2010] UKUT 413 (AAC) at [22].
174 *MR v CMEC and DM* [2009] UKUT 283 (AAC) at [14]–[15].
175 *B v Home Office* [2012] 4 All ER 276 at [146]–[147].
Specialisation exposes the judges and members to a greater number and variety of cases than would be possible in the general courts. They are thereby able to develop case-law more quickly than the courts could and to base their decisions on a range of experience (of evidence, circumstances and argument) that would not be available in isolated or individual cases.

The courts respect this specialism, but have also controlled the use that can be made of it.

Respect for specialism

The Court of Appeal and the Supreme Court may have to consider the degree of respect that should be given to a tribunal’s specialism at two stages: at the permission stage or on an appeal. The two stages are not separate in practice, as the respect to be shown on an appeal will be relevant to whether permission should be given.

Deference at the permission stage

An appeal to the Court of Appeal in second appeals from the county court and High Court is governed by section 55(1) of the Access to Justice Act 1999. An appeal only lies if the appeal would raise an important point of principle or practice or there is some other compelling reason. These criteria did not apply to tribunals, but they were applied as a matter of practice following the judgment of Hale LJ in Cooke v Secretary of State for Social Security to appeals from second-tier appellate tribunals. TCEA s13(6) and (6A) provides for the same additional criteria to be applied to the Upper Tribunal. This is narrower than the test which applies to other appeals, which is whether there is a real prospect of success or some other compelling reason. The effect is to treat the tribunals who are covered by those provisions equally with the courts rather than afford particular respect to tribunals on account of their specialism.

Deference on an appeal

The courts and higher tribunals may be required to respect the decisions of a tribunal simply because the legal structure requires it. As Lord Radcliffe explained in Edwards v Bairstow, referring to the General Commissioners:

As I see it, the reason why the courts do not interfere with commissioners’ findings or determinations when they really do involve nothing but questions of fact is not any supposed advantage in the commissioners of greater experience in matters of business or any other matters. The reason is simply that by the system that has been set up the commissioners are the first

176 See for example the comments of Lords Hope and Walker (both dissenting) in Autologic Holdings plc v Inland Revenue Commissioners [2005] 1 WLR 52 at [60] and [78] respectively.
177 [2002] 3 All ER 279 at [14]–[18].
178 The Social Security and Child Support Commissioners, the Employment Appeal Tribunal, the Immigration Appeal Tribunal and the Lands Tribunal.
179 For the cases in which these additional criteria do not apply, see chapter 4.
tribunal to try an appeal, and in the interests of the efficient administration of justice their decisions can only be upset on appeal if they have been positively wrong in law.\textsuperscript{181}

To do otherwise would risk turning an appeal on law into an appeal on fact.\textsuperscript{182}

The courts also make realistic assumptions that a tribunal is familiar with and applies basic legal concepts, like the burden and standard of proof.\textsuperscript{183} They are also not easily satisfied that a tribunal failed to take account of a matter that was not expressly mentioned\textsuperscript{184} or that a tribunal has failed to apply correctly its self-direction on the law.\textsuperscript{185}

The respect with which this section is concerned is additional to these considerations and is based on the special knowledge, experience or expertise of a tribunal in its particular jurisdiction. It applies both on judicial review and on appeal and both to issues of substantive law and to discretionary decisions on procedural matters.\textsuperscript{186} It applies both to an established legislative scheme\textsuperscript{187} and, where the tribunal is appropriately constituted, to a newly established scheme.\textsuperscript{188} It is, though, doubtful whether this professed respect for specialism is always reflected in the courts’ decisions.

The senior courts have said that they should respect: the way in which a tribunal acting as a specialist fact-finder conducted its business within the area of its expertise;\textsuperscript{189} findings of fact made by an expert and specialist tribunal in an area where court judges have no expertise;\textsuperscript{190} findings of mixed fact and law made by specialist judges;\textsuperscript{191} the Upper Tribunal’s assessment of proportionality;\textsuperscript{192} the Upper Tribunal’s assessment of the adequacy of reasons given by the First-tier Tribunal;\textsuperscript{193} consistent lines of authority at Upper Tribunal level.\textsuperscript{194}

\textsuperscript{181} [1956] AC 14 at 38.
\textsuperscript{183} Wilson J in \textit{Re P (Witness Summons)} [1997] 2 FLR 447 at 455 and the Commissioner in \textit{R(SB) 5/81} at [7].
\textsuperscript{184} \textit{MA (Somalia) v Secretary of State for the Home Department} [2010] UKSC 49 at [45].
\textsuperscript{185} \textit{MA (Somalia) v Secretary of State for the Home Department} [2010] UKSC 49 at [46].
\textsuperscript{186} Robert Walker LJ in \textit{Jones v Governing Body of Burdett Coutts School} [1999] ICR 38 at 47.
\textsuperscript{187} \textit{AH (Sudan) v Secretary of State for the Home Department} [2008] AC 678 at [30].
\textsuperscript{188} \textit{Secretary of State for Defence v Duncan and McWilliams} [2009] EWCA Civ 1043 at [119]–[120].
\textsuperscript{189} \textit{Secretary of State for Work and Pensions v Cattrell} [2011] EWCA Civ 572 at [23].
\textsuperscript{190} \textit{Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading} [2002] 4 All ER 376 at [34].
\textsuperscript{191} \textit{Secretary of State for Work and Pensions v R (MM and DM)} [2013] EWCA Civ 1565 at [65].
\textsuperscript{192} \textit{Obrey, Snodgrass and Shadforth v Secretary of State for Work and Pensions} [2013] EWCA Civ 1584 at [13]–[18].
\textsuperscript{193} \textit{PK (Congo) v Secretary of State for the Home Department} [2013] EWCA Civ 1500 at [22] and [25].
The basis for deference

1.138 This approach has been justified on a variety of reasoning. In *R v Preston Supplementary Benefits Appeal Tribunal ex p Moore*, Lord Denning MR reasoned from the lack of a right of appeal:

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

In short, the court should be ready to lay down the broad guidelines for tribunals. But no further. The courts should not be used as if there was an appeal to them. Individual cases of particular application must be left to the tribunals.

1.139 In *Bromley LBC v Special Educational Needs Tribunal*, Sedley LJ derived the same approach from the intention behind the legislation:

Until the welcome setting up of the special educational needs tribunals by the Education Act 1993, challenges to LEAs’ statements [of special educational needs] could be made only on questions of law by way of judicial review. ... Unlike the High Court, it is a specialist tribunal with a lawyer chairman and lay members chosen for their knowledge and experience (see s 334(2) [of the Education Act 1996] and the Special Educational Needs Tribunal Regulations 1995, SI 1995/3113, reg 3). In my view this restructuring has jurisprudential implications. Where previously the parent’s only resort from the local education authority was to the court, which had therefore to do its best to construe the statutory language in so far as construction was an appropriate exercise, there is now interposed a specialist tribunal whose remit is not necessarily the same. In particular, where a court has to limit itself to the interpretation of terms of legal art and the setting of outer limits to the meaning of ordinary words in their statutory context, the tribunal is empowered to take a much closer look at the content of the LEA’s statement. Indeed for many purposes it stands in the LEA’s shoes, re-evaluating the available information in order if necessary to recast the statement. But in carrying out this function it also has a supervisory role – to interpret and apply the relevant law. Where the law is expressed in words which, while not terms of legal art, have a purpose dictated by – and therefore a meaning coloured by – their context, it is clearly Parliament’s intention that particular respect should be paid to the tribunal’s conclusions. By virtue of s 11 of the Tribunals and Inquiries Act 1992 the High Court retains an appellate jurisdiction which undoubtedly requires it to intervene where an error of

196 The decisions of the tribunal could only be challenged by way of what is now known as judicial review.
198 [1999] 1 All ER 587.
law or jurisdiction or due process can be shown; but the area of expert judgment bounded by the High Court’s jurisdiction is large. This is so both because the nature of the subject matter of appeals to and from SENT makes it appropriate and because the statutory scheme requires it.199

1.140 In *R v National Insurance Commissioner ex p Stratton*,200 Lord Denning MR derived his approach from the expertise of the judges:

These commissioners are judges . . . They give hundreds of decisions on points of law regarding the interpretation of the regulations. They know just how they work.201

I venture to suggest that we should proceed on this principle: if a decision of the commissioners has remained undisturbed for a long time, not amended by regulation, nor challenged by certiorari [judicial review], and has been acted upon by all concerned, it should normally be regarded as binding. The High Court should not interfere with it save in exceptional circumstances, such as where there is a difference of opinion between commissioners: see *R v National Insurance Commissioner ex p Michael* [1977] 1 WLR 109. A recent decision may be less binding. It may be brought before the High Court with the very object of getting a ruling on a difficult point. The Department itself should do it, if need be. Then the High Court can and should do whatever the justice of the case requires.202

Bridge LJ was more limited in his statement of the authority of the decisions which the court was considering. His reasoning was based on longevity linked with implied legislative approval. He said:

In view of the time for which those decisions have stood unchallenged and of the terms of the new regulation as amended in 1971 which appear to give them legislative approbation it would no doubt be wrong to say that the decision should now be overruled, nor were we invited to take this course by either counsel in argument.203

1.141 This approach was confirmed by the House of Lords (now replaced by the Supreme Court). In *Presho v Insurance Officer*,204 Lord Brandon cited the comments of Lord Denning and Bridge LJ with approval and said that it was one of the ‘important considerations’ in support of his reasoning in that case that it:

. . . accords with that which has been adopted since 1926 by a substantial number of social security commissioners (or their earlier equivalents) after the expression concerned had first appeared in this class of legislation in 1911.205

1.142 In *Cooke v Secretary of State for Social Security*,206 Hale LJ emphasised that the courts would not know the wider statutory context in which a tribunal made its decision:

199 [1999] 3 All ER 587 at 594.
201 [1979] QB 361 at 368.
202 [1979] QB 361 at 369. The references to the High Court are explained by the fact that, at the time, there was no appeal from a Commissioner’s decision and the only recourse was to apply to the High Court for what is now known as judicial review.
204 [1984] AC 310.
206 [2002] 3 All ER 279.
It is also important that such appeal structures have a link to the ordinary court system, to maintain both their independence of government and the sponsoring department and their fidelity to the relevant general principles of law. But the ordinary courts should approach such cases with an appropriate degree of caution. It is quite probable that on a technical issue of understanding and applying the complex legislation the social security commissioner will have got it right. The commissioners will know how that particular issue fits into the broader picture of social security principles as a whole. They will be less likely to introduce distortion into those principles. They may be better placed, where it is appropriate, to apply those principles in a purposive construction of the legislation in question. They will also know the realities of tribunal life. All this should be taken into account by an appellate court when considering whether an appeal will have a real prospect of success.207

1.143 In Obrey, Snodgrass and Shadforth v Secretary of State for Work and Pensions,208 the Court of Appeal based its reasoning in part on its power to decide where the line between issues of fact and law should be drawn, relying on the decision of the Supreme Court in R (Jones) v First-tier Tribunal (Social Entitlement Chamber).209

The limits to deference

1.144 This approach is flexible enough to allow a court to intervene when a tribunal has made a material error of law.210 In Cockburn v Chief Adjudication Officer and Secretary of State for Social Security v Fairey (aka Halliday),211 Lord Slynn said:

> It is obviously sensible that the rulings of the commissioners and the practice of administering the scheme which they have laid down and which have been followed over many years should not lightly be interfered with. But if the Court of Appeal, and even more so if your Lordships’ House, is satisfied that wrong distinctions have been drawn as a matter of principle which ought not to be followed they are entitled to say so.212

And in Hinchy v Secretary of State for Work and Pensions,213 Baroness Hale said:

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

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207 [2002] 3 All ER 279 at [16]. See also AH (Sudan) v Secretary of State for the Home Department [2008] AC 768 at [30].
208 [2013] EWCA Civ 1584 at [14] and [30].
210 BBC v Sugar (No 2) [2010] 1 WLR 2278 at [27].
213 [2005] 1 WLR 967 at [49]. See also Lord Hoffmann at [30].
There is no basis for respect if: there are divergent views, whether at the same level\textsuperscript{214} or between tiers,\textsuperscript{215} the senior courts are as able as the Upper Tribunal to identify an error of law;\textsuperscript{216} the issue is one of general law or general principle;\textsuperscript{217} the issue is a hard-edged point of statutory interpretation that has caused difficulty to the Upper Tribunal.\textsuperscript{218}

\section*{The role of the Upper Tribunal}

The deference due to a specialist tribunal does not affect the role of the Upper Tribunal in providing specialist guidance on issues of law arising in the First-tier Tribunal.\textsuperscript{219}

\section*{Use of specialist knowledge or expertise}

If a tribunal makes use of the specialist knowledge or expertise of a panel member in a way that is decisive, it may have to make that known to the parties. In \textit{Butterfield and Creasy v Secretary of State for Defence},\textsuperscript{220} Park J said:

\begin{quote}
There is a potential problem if a medical member of a tribunal is the only person present with specialist medical knowledge, and he perceives a possible medical objection to the appellant’s case, particularly an objection which has not been taken in advance by the Secretary of State and of which the appellant has not had prior notice. If the medical member believes that there is such an objection, plainly he must say so. He is a member of the Tribunal because of his medical expertise, and if he thinks that his medical expertise is relevant in some specific way which has not otherwise been pointed out, he must draw on it in the course of the hearing and the tribunal’s deliberations. I do not for a moment suggest that the medical member of the tribunal should in some way suppress his personal expertise and reactions to medical issues which arise. However, if the point which concerns him is a new one and might in itself be decisive, it does seem to me that fairness requires that it be explained to the appellant or to the appellant’s representative, and that the appellant should be given a realistic opportunity to consider it. In some cases, though I hope not many, this may require the offer of an adjournment, however inconvenient and irksome that may be.
\end{quote}


\textsuperscript{215} \textit{AP (Trinidad and Tobago) v Secretary of State for the Home Department} [2011] EWCA Civ 551 at [25] and [50]. In \textit{OH (Serbia) v Secretary of State for the Home Department} [2008] EWCA Civ 694 at [19], Wilson LJ said that deference only applies at the interface between a non-specialist court and a specialist tribunal. That case concerned the internal reconsideration within the single Asylum and Immigration Tribunal, but the reasoning is equally applicable between tiers of the present tribunal system and is consistent with the approach in AP.

\textsuperscript{216} \textit{AP (Trinidad and Tobago) v Secretary of State for the Home Department} [2011] EWCA Civ 551 at [25] and [50].


\textsuperscript{218} \textit{R (Mahmoudi) v London Borough of Lewisham} [2014] EWCA Civ 284 at [14].

\textsuperscript{219} \textit{AP (Trinidad and Tobago) v Secretary of State for the Home Department} [2011] EWCA Civ 551 at [46] and [50].

\textsuperscript{220} [2002] EWHC 2247 (Admin) at [14].
Powers of judicial review

1.148 The courts do not allow specialist tribunals that have judicial review powers to operate those powers differently from the courts on account of their specialism. In *IBA Healthcare Ltd v Office of Fair Trading*, the Court of Appeal considered the scope of judicial review as applied under statute by the Competition Appeal Tribunal. The tribunal had decided that the principles were different on the ground that, unlike the Administrative Court, it was not a non-specialist court considering the decision of a specialist decision-maker, but a tribunal specialist in the area of decision-making. The Court of Appeal held that the ordinary principles of judicial review applied regardless of the specialism of the reviewing tribunal.

Tribunal system and judiciary

1.149 Under TCEA it is possible, for the first time, to talk of a tribunal system. Before TCEA, there were numerous individual tribunals for particular jurisdictions. In some jurisdictions, there was a dedicated appeal structure of tribunals. And the Council on Tribunals had oversight of most tribunals. But there was no overall system.

1.150 As a result of TCEA, that has changed. There is now a system, albeit not a comprehensive one. In effect, TCEA provides a constitutional settlement for tribunals and their judiciary. Responsibility is divided between the Lord Chief Justice and the Senior President of Tribunals.

1.151 The tribunal system created by TCEA consists of three structures. Section 3 created two new tribunals: a First-tier Tribunal and an Upper Tribunal. Although they are separate, they may sit together. This allows, for example, an appeal to the First-tier Tribunal and judicial review proceedings in the Upper Tribunal to be heard by the same panel. Each tribunal is divided into chambers, each of which must have one or two Chamber Presidents (s7). The members and functions of some tribunals were immediately transferred into the Upper Tribunal or the First-tier Tribunal, as appropriate. Other tribunals were brought into the structure later. The rest remain outside the structure. TCEA also provided for the transfer of ministerial functions for particular tribunals to the Lord Chancellor and for rule making powers to be transferred to the Lord Chancellor (s35) or the Tribunal Procedure Committee (s36).

1.152 Alongside the First-tier Tribunal and the Upper Tribunal, the structure for employment remains as before.

221 [2004] ICR 1364.
222 [2004] ICR 1364 at [51]–[53].
223 As in *Reed Employment plc v the Commissioners for Her Majesty’s Revenue and Customs* [2010] UKFFT 596 (TC).
224 Under TCEA s30 and Sch 6.
These three structures are united under a Senior President (s2(1)). Section 2(3) is a key provision, setting out the factors to which the Senior President must have regard in performing the office:

(3) A holder of the office of Senior President of Tribunals must, in carrying out the functions of that office, have regard to—
(a) the need for tribunals to be accessible,
(b) the need for proceedings before tribunals—
   (i) to be fair, and
   (ii) to be handled quickly and efficiently,
(c) the need for members of tribunals to be experts in the subject-matter of, or the law to be applied in, cases in which they decide matters, and
(d) the need to develop innovative methods of resolving disputes that are of a type that may be brought before tribunals.

The First-tier Tribunal

The First-tier Tribunal is organised into seven Chambers:

- the General Regulatory Chamber
- the Health, Education and Social Care Chamber;
- the Immigration and Asylum Chamber;
- the Property Chamber;
- the Social Entitlement Chamber;
- the Tax Chamber; and
- the War Pensions and Armed Forces Compensation Chamber.

The General Regulatory Chamber

The functions of this Chamber are allocated by article 3 of the First-tier Tribunal and Upper Tribunal (Chambers) Order 2010. It has jurisdiction over all functions relating to:

(a) proceedings in respect of the decisions and actions of regulatory bodies which are not allocated to the Health, Education and Social Care Chamber or to the Tax Chamber;
(b) matters referred to the First-tier Tribunal under Schedule 1D to the Charities Act 1993; and
(c) the determination of remuneration for carrying mail-bags in a ship or aircraft.

The Health, Education and Social Care Chamber

The functions of this Chamber are allocated by article 4 of the First-tier Tribunal and Upper Tribunal (Chambers) Order 2010. It has jurisdiction over all functions relating to:

(a) an appeal against a decision related to children with special educational needs;
(b) a claim of disability discrimination in the education of a child;
(c) an application or an appeal against a decision or determination related to work with children or vulnerable adults;
(d) an appeal against a decision related to registration in respect of the provision of health or social care;
(e) an application in respect of, or an appeal against a decision related to, the provision of health care or health services;
(f) an appeal against a decision related to registration in respect of social workers and social care workers;
(g) an appeal against a decision related to the provision of childcare;
(h) an appeal against a decision related to an independent school or other independent educational institution;
(i) applications and references by and in respect of patients under the provisions of the Mental Health Act 1983 or paragraph 5(2) of the Schedule to the Repatriation of Prisoners Act 1984.

The Immigration and Asylum Chamber

1.157 The functions of this Chamber are allocated by article 5 of the First-tier Tribunal and Upper Tribunal (Chambers) Order 2010. It has jurisdiction over all functions related to immigration and asylum matters, except those allocated to the General Regulatory and Social Entitlement Chambers.

The Property Chamber

1.158 The functions of this Chamber are allocated by article 5A of the First-tier Tribunal and Upper Tribunal (Chambers) Order 2010. It has jurisdiction over all functions relating to:

(a) a reference by the Chief Land Registrar and any other application, matter or appeal under the Land Registration Act 2002;
(b) proceedings under any of the enactments referred to in section 6A(2) of the Agriculture (Miscellaneous Provisions) Act 1954 or the Hill Farming Act 1946;
(c) housing etc, under the Housing Act 2004;
(d) leasehold property;
(e) residential property;
(f) rents;
(g) the right to buy;
(h) applications and appeals under the Mobile Homes Act 1983.

The Social Entitlement Chamber

1.159 The functions of this Chamber are allocated by article 6 of the First-tier Tribunal and Upper Tribunal (Chambers) Order 2010. It has jurisdiction over all functions in relation to appeals:

(a) in cases regarding support for asylum seekers, failed asylum seekers, persons designated under section 130 of the Criminal Justice and Immigration Act 2008, or the dependants of any such persons;
(b) in criminal injuries compensation cases;
(c) regarding entitlement to, payments of, or recovery or recoupment of payments of, social security benefits, child support, vaccine damage payments, health in pregnancy grant and tax credits, with the exception of–
(i) appeals under section 11 of the Social Security Contributions (Transfer of Functions, etc.) Act 1999 (appeals against decisions of Her Majesty’s Revenue and Customs);

226 By limiting the allocation to appeals, the Order fails to cover references of applications for a departure direction or a variation under the Child Support Act 1991.
(ii) appeals in respect of employer penalties or employer information penalties (as defined in section 63(11) and (12) of the Tax Credits Act 2002);
(iii) appeals under regulation 28(3) of the Child Trust Funds Regulations 2004;
(d) regarding saving gateway accounts with the exception of appeals against requirements to account for an amount under regulations made under section 14 of the Saving Gateway Accounts Act 2009;
(e) regarding child trust funds with the exception of appeals against requirements to account for an amount under regulations made under section 22(4) of the Child Trust Funds Act 2004 in relation to section 13 of that Act;
(f) regarding payments in consequence of diffuse mesothelioma;
(g) regarding a certificate or waiver decision in relation to NHS charges;
(h) regarding entitlement to be credited with earnings or contributions;
(i) against a decision as to whether an accident was an industrial accident.

The Tax Chamber

1.160 The functions of this Chamber are allocated by article 7 of the First-tier Tribunal and Upper Tribunal (Chambers) Order 2010. It has jurisdiction over all functions, except those functions allocated to the Social Entitlement Chamber or to the Tax and Chancery Chamber of the Upper Tribunal, related to an appeal, application, reference or other proceeding in respect of:

(a) a function of the Commissioners for Her Majesty’s Revenue and Customs or an officer of Revenue and Customs;
(b) the exercise by the Serious Organised Crime Agency of general Revenue functions or Revenue inheritance tax functions (as defined in section 323 of the Proceeds of Crime Act 2002);
(c) the exercise by the Director of Border Revenue of functions under section 7 of the Borders, Citizenship and Immigration Act 2009;
(d) a function of the Compliance Officer for the Independent Parliamentary Standards Authority.

The War Pensions and Armed Forces Compensation Chamber

1.161 The functions of this Chamber are allocated by article 8 of the First-tier Tribunal and Upper Tribunal (Chambers) Order 2010. It has jurisdiction over all functions relating to appeals under the War Pensions (Administrative Provisions) Act 1919 and the Pensions Appeal Tribunals Act 1943.

The Upper Tribunal

1.162 TCEA s3(5) confers on the Upper Tribunal the status of a superior court of record.
1.163 TCEA s25 gives the Upper Tribunal the same powers, rights, privileges and authority as the High Court in respect of the attendance and examination of witnesses, the production and inspection of documents, and all other matters incidental to the Upper Tribunal’s functions. The same powers are conferred on the Employment Appeal Tribunal (by section 29(2) of the Employment Tribunals Act 1996) and the Crown Court (by section 45 of the Senior Courts Act 1981). This does not include the power to give a
vexatious litigant permission to commence or defend proceedings. That power can only be exercised by the High Court itself.\textsuperscript{227}

In \textit{Trinity Mirror plc},\textsuperscript{228} the Court of Appeal decided that a matter was incidental to the jurisdiction of the Crown Court ‘only when the powers to be exercised relate to the proper despatch of the business before it’.\textsuperscript{229}

The Upper Tribunal is organised into four Chambers:\textsuperscript{230}

- the Administrative Appeals Chamber;
- the Immigration and Asylum Chamber of the Upper Tribunal;
- the Tax and Chancery Chamber;
- the Lands Chamber.

The Lord Chancellor has power under TCEA ss32, 33 and 34 to provide for appeals to the Upper Tribunal against decisions of tribunals whose functions in relation to Wales, Scotland and Northern Ireland are otherwise outside the structure created by TCEA. This power is exercised by amendments to the relevant legislation in the Transfer of Tribunal Functions Order (for statutes) and the Consequential Provisions Order (for secondary legislation) that effect the transfer of jurisdictions into the TCEA structure.

If there is a doubt or dispute as to which chamber has jurisdiction in a particular matter, the Senior President may allocate the matter to the most appropriate chamber.\textsuperscript{231}

\textbf{The Administrative Appeals Chamber}

The functions of this Chamber fall into three categories: appellate, judicial review and referral.

The appellate function is allocated by article 10(a) of the First-tier Tribunal and Upper Tribunal (Chambers) Order 2010. It has jurisdiction over all functions relating to an appeal:

\begin{enumerate}
  \item against a decision made by the First-tier Tribunal, except an appeal assigned to the Tax and Chancery Chamber or the Immigration and Asylum Chamber of the Upper Tribunal;
  \item under section 5 of the Pensions Appeal Tribunals Act 1943 (assessment decision) against a decision of the Pensions Appeal Tribunal in Northern Ireland established under paragraph 1(2) of Schedule 1 to the Pensions Appeal Tribunals Act 1943;\textsuperscript{232}
  \item against a decision of the Pensions Appeal Tribunal in Scotland established under paragraph 1(2) of Schedule 1 to the Pensions Appeal Tribunals Act 1943;\textsuperscript{233}
  \item against a decision of the Mental Health Review Tribunal for Wales established under section 65 of the Mental Health Act 1983;
  \item against a decision of the Special Educational Needs Tribunal for Wales;
\end{enumerate}

\textsuperscript{228} [2008] 2 All ER 1159.
\textsuperscript{229} [2008] 2 All ER 1159 at [30].
\textsuperscript{230} Article 9 of the First-tier Tribunal and Upper Tribunal (Chambers) Order 2010.
\textsuperscript{231} Article 14 of the First-tier Tribunal and Upper Tribunal (Chambers) Order 2010.
\textsuperscript{232} In Northern Ireland, entitlement appeals are heard by the Social Security Commissioners, while assessment appeals are heard by the Upper Tribunal.
\textsuperscript{233} This covers both entitlement and assessment decisions.
(vi) under section 4 of the Safeguarding Vulnerable Groups Act 2006 (appeals);
(vii) transferred to the Upper Tribunal from the First-tier Tribunal under Tribunal Procedure Rules, except an appeal allocated to the Tax and Chancery Chamber by article 13(1)(e);
(viii) against a decision in a road transport case.234

1.170 The judicial review function is allocated by article 10(b) of the First-tier Tribunal and Upper Tribunal (Chambers) Order 2010. It has jurisdiction over all functions relating to an application, except one allocated to another chamber by article 11(c), (d) or (e), 12(c) or 13(g), for the Upper Tribunal:
(i) to grant the relief mentioned in section 15(1) of the Tribunal, Courts and Enforcement Act 2007 (Upper Tribunal’s ‘judicial review’ jurisdiction);
(ii) to exercise the powers of review under section 21(2) of that Act (Upper Tribunal’s ‘judicial review’ jurisdiction: Scotland).

1.171 The referral jurisdiction is allocated by article 10(c), (d) and (e) of the First-tier Tribunal and Upper Tribunal (Chambers) Order 2010. It has jurisdiction over all functions relating to:
(c) a matter referred to the Upper Tribunal by the First-tier Tribunal—
(i) under section 9(5)(b) of the Tribunals, Courts and Enforcement Act 2007 (review of decision of First-tier Tribunal), or
(ii) under Tribunal Procedure Rules relating to non-compliance with a requirement of the First-tier Tribunal, except where the reference is allocated to another chamber by article 11(b) or 13(1)(f);
(d) a determination or decision under section 4 of the Forfeiture Act 1982;
(e) proceedings, or a preliminary issue, transferred under Tribunal Procedure Rules to the Upper Tribunal from the First-tier Tribunal, except those allocated to the Lands Chamber by article 12(cc) or to the Tax and Chancery Chamber by article 13(1)(e).

The Immigration and Asylum Chamber of the Upper Tribunal

1.172 The jurisdiction of this Chamber is allocated by article 11 of the First-tier Tribunal and Upper Tribunal (Chambers) Order 2010. It has jurisdiction over all functions related to:
(a) an appeal against a decision of the First-tier Tribunal made in the Immigration and Asylum Chamber of the First-tier Tribunal;
(b) a matter referred to the Upper Tribunal under section 9(5)(b) of the Tribunals, Courts and Enforcement Act 2007 or under Tribunal Procedure Rules by the Immigration and Asylum Chamber of the First-tier Tribunal;
(c) an application for the Upper Tribunal to grant relief mentioned in section 15(1) of the Tribunals, Courts and Enforcement Act 2007 (Upper Tribunal’s ‘judicial review’ jurisdiction), or to exercise the power of review under section 21(2) of that Act (Upper Tribunal’s ‘judicial review’ jurisdiction: Scotland), which is made by a person who claims to be

234 This expression is not defined. According to the explanatory note to the First-tier Tribunal and Upper Tribunal (Chambers) (Amendment) Order 2012, it is intended to cover appeals against decisions of the traffic commissioners and appeals against decisions made by the Department of the Environment in Northern Ireland. This is how the expression is defined by UTR r1(3).
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a minor from outside the United Kingdom challenging a defendant’s assessment of that person’s age;

(d) an application for the Upper Tribunal to exercise the powers of review under section 21(2) of the Tribunals, Court and Enforcement Act (Upper Tribunal’s ‘judicial review’ jurisdiction: Scotland), which relates to a decision of the First-tier Tribunal mentioned in paragraph (a);

(e) an application for the Upper Tribunal to grant relief mentioned in section 15(1) of the Tribunals, Courts and Enforcement Act 2007 (Upper Tribunal’s ‘judicial review’ jurisdiction), which is designated as an immigration matter–

(i) in a direction made in accordance with Part 1 of Schedule 2 to the Constitutional Reform Act 2005 specifying a class of case for the purposes of section 18(6) of the Tribunals, Courts and Enforcement Act 2007; or

(ii) in an order of the High Court in England and Wales made under section 31A(3) of the Senior Courts Act 1981, transferring to the Upper Tribunal an application of a kind described in section 31A(1) of that Act.

The Lands Chamber

1.173 The jurisdiction of this Chamber is allocated by article 12 of the First-tier Tribunal and Upper Tribunal (Chambers) Order 2010. It has:

(a) all functions related to–

(i) compensation and other remedies for measures taken which affect the ownership, value, enjoyment or use of land or water, or of rights over or property in land or water;

(ii) appeals from decisions of–

(aa) the First-tier Tribunal made in the Property Chamber other than appeals allocated to the Tax and Chancery Chamber by article 13(h);

(ab) leasehold valuation tribunals in Wales, residential property tribunals in Wales, rent assessment committees in Wales, the Agricultural Land Tribunal in Wales or the Valuation Tribunal for Wales;

(ac) the Valuation Tribunal for England;

(iii) the determination of questions of the value of land or an interest in land arising in tax proceedings;

(iv) proceedings in respect of restrictive covenants, blight notices or the obstruction of light;

(b) the Upper Tribunal’s function as arbitrator under section 1(5) of the Lands Tribunal Act 1949;

(c) an application for the Upper Tribunal to grant the relief mentioned in section 15(1) of the Tribunals, Courts and Enforcement Act 2007 (Upper Tribunal’s ‘judicial review’ jurisdiction) which relates to a decision of a tribunal mentioned in sub-paragraph (a)(ii);

(cc) any case which may be transferred under Tribunal Procedure Rules to the Upper Tribunal from the Property Chamber of the First-tier Tribunal in relation to functions listed in article 5A(c) to (h);

(d) any other functions transferred to the Upper Tribunal by the Transfer of Tribunal Functions (Lands Tribunal and Miscellaneous Amendments) Order 2009.
The Tax and Chancery Chamber

1.174 The functions of this Chamber fall into three categories: appellate, judicial review and referral.

1.175 The jurisdiction of this Chamber is allocated by article 13 of the First-tier Tribunal and Upper Tribunal (Chambers) Order 2010. It has jurisdiction over all functions relating to:

(a) an appeal against a decision of the First-tier Tribunal made—
   (i) in the Tax Chamber;
   (ii) in the General Regulatory Chamber in a charities case;
(b) a reference or appeal in respect of—
   (i) a decision of the Financial Services Authority;
   (ii) a decision of the Bank of England;
   (iii) a decision of a person related to the assessment of any compensation or consideration under the Banking (Special Provisions) Act 2008;
   (iv) a determination or dispute within the meaning of regulation 14(5) or 15 of the Financial Services and Markets Act 2000 (Contribution to Costs of Special Resolution Regime) Regulations 2010;
(c) a reference in respect of a decision of the Pensions Regulator;
(d) an application under paragraph 50(1)(d) of Schedule 36 to the Finance Act 2008;
(e) proceedings, or a preliminary issue, transferred to the Upper Tribunal under Tribunal Procedure Rules—
   (i) from the Tax Chamber of the First-tier Tribunal;
   (ii) from the General Regulatory Chamber of the First-tier Tribunal in a charities case;
(f) a matter referred to the Upper Tribunal under section 9(5)(b) of the Tribunals, Courts and Enforcement Act 2007 or under Tribunal Procedure Rules relating to non-compliance with a requirement of the First-tier Tribunal—
   (i) by the Tax Chamber of the First-tier Tribunal;
   (ii) by the General Regulatory Chamber of the First-tier Tribunal in a charities case;
(g) an application for the Upper Tribunal to grant the relief mentioned in section 15(1) of the Tribunals, Courts and Enforcement Act 2007 (Upper Tribunal’s ‘judicial review’ jurisdiction), or to exercise the powers of review under section 21(2) of that Act (Upper Tribunal’s ‘judicial review’ jurisdiction: Scotland), which relates to—
   (i) a decision of the First-tier Tribunal mentioned in paragraph (1)(a)(i) or (ii);
   (ii) a function of the Commissioners for Her Majesty’s Revenue and Customs or an officer of Revenue and Customs, with the exception of any function in respect of which an appeal would be allocated to the Social Entitlement Chamber;
   (iii) the exercise by the Serious Organised Crime Agency of general Revenue functions or Revenue inheritance tax functions (as defined in section 323 of the Proceeds of Crime Act 2002), with the exception of any function in relation to which an appeal would be allocated to the Social Entitlement Chamber;
   (iv) a function of the Charity Commission, or one of the bodies mentioned in sub-paragraph (b) or (c);
(h) an appeal against a decision of the First-tier Tribunal made in the Property Chamber in a case mentioned in article 5A(a).
Article 13(2) provides:

(2) In this article ‘a charities case’ means an appeal or application in respect of a decision, order or direction of the Charity Commission, or a reference under Schedule 1D of the Charities Act 1993.

Judicial review in the Upper Tribunal

For England and Wales, the Lord Chief Justice has issued two practice directions. *Practice Direction (Upper Tribunal: Judicial Review Jurisdiction)* \(^\text{235}\) orders:

1. The following direction takes effect in relation to an application made to the High Court or Upper Tribunal on or after 3 November 2008 that seeks relief of a kind mentioned in section 15(1) of the Tribunals, Courts and Enforcement Act 2007 (‘the 2007 Act’).
2. The Lord Chief Justice hereby directs that the following classes of case are specified for the purposes of section 18(6) of the 2007 Act—
   a. Any decision of the First-tier Tribunal on an appeal made in the exercise of a right conferred by the Criminal Injuries Compensation Scheme in compliance with section 5(1) of the Criminal Injuries Compensation Act 1995 (appeals against decisions on review); and
   b. Any decision of the First-tier Tribunal made under Tribunal Procedure Rules or section 9 of the 2007 Act where there is no right of appeal to the Upper Tribunal and that decision is not an excluded decision within paragraph (b), (c), or (f) of section 11(5) of the 2007 Act.
3. This Direction does not have effect where an application seeks (whether or not alone) a declaration of incompatibility under section 4 of the Human Rights Act 1998.
4. This Direction is made by the Lord Chief Justice with the agreement of the Lord Chancellor. It is made in the exercise of powers conferred by section 18(6) of the 2007 Act and in accordance with Part 1 of Schedule 2 to the Constitutional Reform Act 2005.

*Practice Direction (Upper Tribunal: Judicial Review Jurisdiction) (No 2)* \(^\text{236}\) orders:

1. The Lord Chief Justice hereby specifies the following class of case for the purposes of section 18(6) of the Tribunals, Courts and Enforcement Act 2007: applications calling into question a decision of the Secretary of State not to treat submissions as an asylum claim or a human rights claim within the meaning of Part 5 of the Nationality, Immigration and Asylum Act 2002 wholly or partly on the basis that they are not significantly different from material that has previously been considered.
2. An application also falls within the class specified in para 1 if, in addition to calling into question a decision of the sort there described, it challenges (i) a decision or decisions to remove (or direct the removal of) the applicant from the United Kingdom; or (ii) a failure or failures by the Secretary of State to make a decision on submissions said to support an asylum or human rights claim; or both (i) and (ii); but not if it challenges any other decision.
3. This direction takes effect on 17 October 2011 in relation to applications made on or after that date to the High Court or Upper Tribunal for

\(^{235}\) [2009] 1 WLR 327.
\(^{236}\) [2012] 1 WLR 16.
judicial review or for permission to apply for judicial review that seek relief of a kind mentioned in section 15(1) of the 2007 Act.

4. For the avoidance of doubt, (i) a case which has been transferred under this direction continues to fall within the specified class of case and the Upper Tribunal has the function of deciding the application, where, after transfer, additional material is submitted to the Secretary of State for decision but no decision has been made upon that material; (ii) this direction does not have effect where an application seeks a declaration of incompatibility under section 4 of the Human Rights Act 1998, or where the applicant seeks to challenge detention.

5. This direction is made by the Lord Chief Justice with the agreement of the Lord Chancellor. It is made in the exercise of powers conferred by section 18(6)(7) of the 2007 Act and in accordance with Part 1 of Schedule 2 to the Constitutional Reform Act 2005.

1.178 In addition, cases may be transferred from the Administrative Court to the Upper Tribunal on an individual basis.

Judges

1.179 Judges become judges of the Upper Tribunal or First-tier Tribunal in three ways: (i) by transfer-in; (ii) by appointment; and (iii) by virtue of holding another office. There is equivalent provision for other members. Transfer-in is appropriate when the function of a tribunal is transferred into the Upper Tribunal or First-tier Tribunal. Appointments are governed by Schedule 3 to TCEA; selection is made through the Judicial Appointments Commission. Other officeholders are specified in TCEA ss4–6.

1.180 A judge is authorised to decide matters within a jurisdiction by assignment, ticketing and judicial assistance. Within the Upper Tribunal and First-tier Tribunal, judges are assigned to a chamber and ticketed for jurisdictions within that chamber. They may provide judicial assistance to other tribunals.27

1.181 Decisions are occasionally made by judges who are not authorised to do so. Their decisions are valid, provided that they believed that they held an appropriate appointment to hear the case and were sitting in the appropriate tribunal in order to do so.28

1.182 Judges may be salaried or fee-paid. Salaried judges are not allowed to engage in practice. They may work full-time or part-time. The latter are paid the appropriate proportion of the full-time salary. Fee-paid judges are allowed to engage in practice and are paid a fee for each session.

237 For example: Employment Tribunals Act 1996 s5D, inserted by TCEA Sch 8 para 8.
Death of judge

1.183 A judge may die before the hearing is complete or while the decision is still in discussion.

1.184 If a judge dies before the hearing is complete, another judge may take over and read the evidence already given.\(^{29}\) This is so even if the judge was sitting with assessors or colleagues,\(^ {240}\) or if the facts are in dispute.\(^ {241}\) In one case, the new judge even read the previous judge’s notes on the demeanour of witnesses, albeit with the agreement of the parties.\(^ {242}\)

In Coleshill v Lord Mayor, Aldermen and Citizens of the City of Manchester, Scrutton LJ doubted whether a different judge could take over a case that was part heard.\(^ {243}\) That case involved a jury. His comments have been distinguished on that basis\(^ {244}\) and never applied to cases that do not involve a jury.

1.185 If one member of a panel dies while the decision is still in discussion, the position depends on whether the members were agreed on the outcome. If they were, the decision stands as that of the majority,\(^ {245}\) provided that a majority decision is possible. If they were not, the decision does not stand, at least where the dissenting and deceased member was the presiding judge.\(^ {246}\)

1.186 The death of a judge after the decision has been announced does not affect the decision, at least in criminal cases.\(^ {247}\)

Titles

1.188 The Senior President has specified the title by which judges and other members of the First-tier Tribunal and the Upper Tribunal are known.

1.189 All judges of the Upper Tribunal are known as Upper Tribunal Judges.

1.190 Salaried judges of the First-tier Tribunal are known as Tribunal Judges. If they have district or regional responsibilities, they are known as District Tribunal Judges or Regional Tribunal Judges. The lead judge in a jurisdiction is known as Principal Judge followed by the jurisdiction in brackets. Fee-paid judges of the First-tier Tribunal are known as Deputy Tribunal Judges.

1.191 The Senior President, Chamber Presidents and Deputy Chamber Presidents use their title followed by SP, CP or DCP.

1.192 When a judge is referred to in a decision, the first reference uses the full title. Thereafter, only Judge is used.

1.193 Non-legal members use their usual style.

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240 Re British Reinforced Concrete Engineering Co Ltd’s Application (1929) 45 TLR 186 at 187.
242 The Hopemount (1943) 71 LJ LR 94 at 96.
243 [1928] 1 KB 776 at 786.
244 MacKinnon J in In re British Reinforced Concrete Engineering Co Ltd’s Application (1929) 45 TLR 186 at 187.
The future

1.194 The basic structure of the tribunals is now complete. A number of smaller jurisdictions have yet to be brought within the structure. It is likely that the Employment Appeal Tribunal and the employment tribunal will remain outside the Upper Tribunal and First-tier Tribunal structure for the time being.