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**Judging the Judge: Boundaries, Barriers and Benefits**

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*None of the works on which this submission is based have formed part of the submission for any other degree awarded to me*

*The views expressed in this research project are those of the author and do not necessarily reflect the views of the supervisory team, Middlesex University, or the examiners of this work*

## CONTENTS

	<b>Page</b>
<b>Contents</b>	<b>1</b>
<b>Abstract</b>	<b>2</b>
<b>Introduction</b>	<b>4</b>
<b>Chapter 1</b> Becoming – and remaining – a Judge	<b>9</b>
<b>Chapter 2</b> The Welfare Benefits Landscape	<b>19</b>
<b>Chapter 3</b> Judicial decision making, what it involves and is it successful ?	<b>22</b>
<b>Chapter 4</b> Judicial techniques in an age of austerity	<b>34</b>
<b>Chapter 5</b> Pleasure and Problems in Judging	<b>40</b>
<b>Chapter 6</b> Access to Justice – a serious and continuing problem and how to address it	<b>49</b>
<b>Chapter 7</b> “If I ruled the World...”	<b>61</b>
<b>Chapter 8</b> “Have you thought about becoming a Judge ?”	<b>68</b>
<b>Chapter 9</b> Conclusion	<b>74</b>
<b>Appendix</b>	<b>79</b>
<b>References</b>	<b>84</b>
<b>Indicative Public Works decisions</b>	<b>A-Q</b>

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**Abstract for D Prof (PW)**

This work is based on my experience and the public works I have done as a tribunal judge. I explain the function and significance of tribunals in the justice system as a whole and their wider purpose in society. I attempt to lift the veil about becoming a judge, what influenced me, how I go about judicial decision making and its problems.

The motivation for the work arises from the fact that the perspective offered by retirement from the full time judiciary presented a good opportunity to reflect critically on my judicial work, the backdrop being the public works in the shape of my decisions as a Commissioner and Upper Tribunal Judge.

‘Judging the Judge’ encapsulates what this work is about. Evaluating, critically reflecting upon and extrapolating useful lessons from my time as a judge. ‘Boundaries’ are the limits imposed upon me as a judge – what I could properly do, how far I could go, the limitations of the law, rules of procedure, formality and the ambit of discretion, for example. ‘Barriers’ are in the form of obstructions to justice (or, at a more prosaic level, implementation of the law) such as lack of representation, the complexity, volume and rapidity of change in the law and problems arising from austerity measures. ‘Benefits’ has a dual meaning: First, the benefits of a judicial system in the rule of law, benefits to the individual and the wider society. Second, the benefits system itself, the bedrock of my work since without such state provision there would be nothing to appeal.

The novelty value of this work is that it offers an honest and unvarnished glimpse into the mind of a judge, subject only to the constraints imposed by professional circumspection. It tells what it is to be a judge, not just what the judge does. The reader will see the day to day pleasures and problems in judging, the thoughts of a

judge about contemporary issues, how a judge makes a decision and handles his work. In some aspects it foreshadows and illustrates some of the issues dealt with in the first ever judicial attitude survey (Thomas 2014). In a sense it shows that I have myself become a ‘public work’, being shaped and conditioned by my working environment, in every sense of that word.

I address conceptual problems about the nature and effect of justice and if it is important. As part of this I also address current societal and political problems and their impact on welfare law in general. I place the study also in the context of austerity measures and show how efficiency savings could be made.

The methodology is experientially based, from my career in various tribunals and, finally, at the highest level of tribunal justice. I provide a critical review derived from my professional experience. I draw insights and ideas from my career which have been meaningful to me and which I suggest are relevant to the wider legal and judicial profession. I offer, then, access to my professional learning.

In part I contrast formal court and informal tribunal procedures, addressing merits and drawbacks. I draw upon academic and professional sources in attempting to give a balanced overview of tribunals and reflect on these sources and how they resonate – or not – with my experience.

As appendices, and indicative of the public works I have done, I attach some of my decisions, of various kinds and with differing scenarios and results.

I conclude that tribunals have for a long time been under valued and under appreciated, not only in the machinery of justice but also in terms of their wider impact. I explain how and why this has come about and what steps ought to be taken to improve the system for tribunal users.

## Introduction

I was a Judge of the Upper Tribunal (Administrative Appeals Chamber). I decided appeals on points of law from decisions of the First – tier Social Entitlement Tribunal which, in turn, hears initial appeals from decisions by governmental decision makers on claims to a wide range of welfare benefits, such as Disability Living Allowance and Employment and Support Allowance. In the 2013 – 2014 financial year this tribunal received 401,917 cases<sup>1</sup>, more than any other tribunal.<sup>2</sup> About 1-2% of these cases go on appeal to the Upper Tribunal<sup>3</sup>. The Upper Tribunal also has a judicial review function in some cases (see Appendix L for an example) and has a UK wide jurisdiction covering 25 appellate and first – instance jurisdictions. The social entitlement work comprises 20 non-means tested benefits (some of which depend on contributions to the relevant fund and others of which are non-contributory), and 6 means-tested benefits. There are c.5,000,000 claimants on out-of-work benefits and dependent on jobseeker’s allowance and other benefits, and millions of people receive state pensions, based on contributions, with or without means-tested pension credit.

As the Chamber President says, *‘No slice of the national expenditure exceeds that laid out on social security matters, which have a high political profile and often involve sensitive matters on which strongly held and contrasting opinions are expressed in the media and elsewhere. Also, and although many social security cases relate to relatively small sums of money, [see Appendix Q] the effect of one decision on many others, especially regarding a major benefit, can result in significant expenditure of public money.’* (Charles 2013:14)

The Upper Tribunal is effectively the supervising judicial body for the First – tier Tribunal. Appeals before the Upper Tribunal are usually dealt with by a single

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<sup>1</sup> HM Courts and Tribunals Statistics 2013 – 2014

<sup>2</sup> In the same period Employment Tribunals, for example, received 218,000 cases.

<sup>3</sup> See note 1

judge but a panel of three judges may sit if there is a point of law of special difficulty or an important point of principle or practice.

The forecasted expenditure on state benefits for 2014-15 is £212.1 billion, 30% of all state expenditure. In many respects the Judges of the Upper Tribunal (Administrative Appeals Chamber) are gatekeepers for this.

The Upper Tribunal encompasses judges from a previously disparate group. The largest number of judges subsumed into the new appellate structure, created in 2007, were the Social Security Commissioners. I was a Commissioner from 1996 and from 2007 was a Judge of the Upper Tribunal until retirement in 2013. Before 1996 I was, for 5 years, a Tribunal Judge at the first instance level.

Most First - tier Tribunal decisions require permission to appeal to the Upper Tribunal. This can be given by the First – tier or, if refused, by the Upper Tribunal. Only if an arguable error of law is in issue can permission be given. <sup>4</sup>See Appendices A and C as examples of permission given in the Upper Tribunal, and appendix D for a refusal.

The decisions of the Upper Tribunal, and previously those of the Commissioners, are important because they bind the parties in an appeal. There is a right of appeal to the Court of Appeal (with permission from the Upper Tribunal or the Court of Appeal) but the cost, delay and legal complexity of Court of Appeal proceedings means that most appeals do not progress beyond the Upper Tribunal<sup>5</sup>. Of greater importance to the public at large, however, is the fact that Upper Tribunal decisions have the force of precedent, so the public (claimants) and the government (departmental decision makers, for example) are also bound by the point of law decided, and must take it into account in other cases involving the same point at issue. Thus, there are different stakeholders in the appeals process.

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<sup>4</sup> Errors of law include: Making perverse or irrational findings on material matters (in practice a high hurdle to surmount), failing to give any or adequate reasons for the decision, failing to address relevant evidence, attaching weight to immaterial matters, making a material misdirection in law or a procedural error. About 60% of applications for permission made to the Upper Tribunal are refused.

<sup>5</sup> For example in 2010 of the 1180 appeals filed in the Court of Appeal (Civil Division) only two came from the Social Security Commissioners. (Ministry of Justice statistics)

Not all cases involve an interpretation of a new point of law. Most involve consideration of the adequacy of the tribunal's decision. Some decisions are published in annual reports, others are on the Upper Tribunal web site and the majority stored on the Upper Tribunal database.<sup>6</sup> Most decisions are made by reference to the bundle of appeal documents but regularly the Upper Tribunal conducts oral hearings and, save in cases involving sensitive evidence, those hearings are open to the public.

In some courts judgments are given *ex tempore* i.e. on the spot. This is rare in the Upper Tribunal, as that tribunal must provide written reasons<sup>7</sup>, save when the parties consent. Appendix E is an example of the latter. Contrast this with P, a fully reasoned and long (but not unusually long) decision.

It is the giving of reasons that often proves problematic. In the 1860s Lord Chancellor Hatherley said he rarely delivered a written judgment because he found it '*injurious to his health*'. (Pannick1987: 6). No doubt he would have agreed with Lord Mansfield:<sup>8</sup>*'Never give your reasons, for although your judgment will almost certainly be right your reasons will almost certainly be wrong'*. (Pannick 1987: 8).

I hope to achieve the personal satisfaction of meaningful work related study by this account of my experience and critical review of it and arrive at an overview of the type of work I have undertaken and what this signifies for the public at large. I critique not just 'what is' but 'what is possible.'

I attach some examples of my decisions (anonymised as appropriate). These are simply to illustrate some of the issues involved and how they are dealt with, ranging from the relatively straightforward (Appendix M) to the complex (Appendix N). They are only general, indicative and not paradigm, examples.

Who might be interested in this work? I suggest a diverse audience, of different disciplines and stakeholders: First, judges (whether in my jurisdiction, similar jurisdictions or in the wider judiciary) may be interested in how I work and how I have adapted to changing scenarios. Second, those aspiring to or just considering

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<sup>6</sup> Members of the public are entitled to be sent copies of any decision (irrespective of whether they were a party to that appeal) on request. Additionally, departmental decision makers retain their own database of decisions and use this resource extensively.

<sup>7</sup> Rule 40(3) Upper Tribunal Procedure Rules

<sup>8</sup> Lord Chief Justice, Kings Bench, 1756-1788

the judiciary may benefit from an insight into what goes on. Third, tribunal users (including civil servants) may be interested to see what a judge does, how he operates and addresses problems.<sup>9</sup> Fourth there is the wider public, who may wish to enquire beyond tabloid headlines about the work of judges and how reality might depart significantly from perception. Fifth, law students might benefit from or be interested in an account of modern judicial work and challenges, and may like to have an insight into what goes on in a judge's mind.

Judges from time to time write articles, make speeches or give (usually very guarded) interviews, but are by nature and training reserved when it comes to any public elucidation of who they are and their working lives. Darbyshire in her book 'Sitting in Judgment - The Working Lives of Judges' set out to give '*...an unvarnished glimpse of the modern courtroom which shows a legal system under stress, lacking resources but facing an ever – increasing caseload...essential reading for anyone wishing to know about the experience of modern judging, the education, training and professional lives of judges, and the current state of the courts and judiciary in England and Wales.*' (Darbyshire 2011: Preface).As the (then) Lord Chief Justice (Igor Judge) said in the foreword, however, Dr Darbyshire confines herself to the formal courts (from the Supreme Court to Magistrates' Courts), and does not deal with Tribunals.<sup>10</sup> (Darbyshire 2011: foreword). The citizen is much more likely to be a tribunal than a court user, although it is the latter that most people have in mind when thinking of the judiciary. Although (or perhaps because) the tribunal system is the backroom Cinderella of the machinery of justice<sup>11</sup> it figures largely in the lives of many and has the potential to affect all by its decisions. It is, thus, worthy of consideration.

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<sup>9</sup> 'Users' in this sense includes appellants and respondents and therefore encompasses government decision makers, individual appellants and representatives. In a broader sense "users" would include the tribunal judiciary and, of no little importance, the executive, in the shape of the government, which makes proposals for and ensures the passage of the legislation.

<sup>10</sup> Tribunals, however, have a very much higher case load than comparable courts. The First – tier Tribunals broadly correspond to the County Court. In 2011, for example, the County Court dealt with 52,660 civil cases. In that time, however, the First – tier Social Security and Child Support Tribunal alone dealt with 380,200 appeals.

<sup>11</sup> Darbyshire quotes a district judge as saying '*Apparently, immigration adjudicators want to be called judges now – who'd want to do a job like that?*' (Darbyshire 2011: 406) That illustrates the divide between the court and the tribunal judge. The district judge evidently did not appreciate that immigration adjudicators (now immigration judges) often decide asylum appeals, in which there are real issues of threat to life and liberty if the asylum seeker were to be returned to their home country. Darbyshire also pejoratively comments, without supporting evidence or explanation, that calling immigration adjudicators judges was 'an undisguised attempt to manipulate the diversity statistics'. (Darbyshire 2011: 25).



*'Judges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government. This is crucial in sorting out the enduring values of a society... (Bickel 1962: 25).* In the real, pressured, world of a full time judge that proposition was no more than a counsel of perfection. The transition from career to fee paid (part time) judge has, however, enabled me to see things from a different perspective, that of a scholar practitioner, not just practitioner per se. That perspective has permitted a new, reflective, opportunity, enhanced by my continued sitting as a part time immigration judge, at first instance level.

## **CHAPTER 1**

### **Becoming - and remaining - a Judge**

The academic route for me into the judiciary was GCEs at a College of Further Education then a London External LLB at what is now Nottingham Trent University. Articles of Clerkship (now 'trainee solicitor'), followed in a West Midlands high street firm, and then solicitors' final examinations at the College of Law.

After a period as an assistant solicitor I became a partner in a high street firm in the East Midlands. I dealt with civil and criminal litigation, often with legally aided clients, from the same socio – economic background as many benefit claimants.

Private practice experience proved invaluable to judicial work, as it helped me understand the needs, perceptions and problems of clients, giving me an insight into their lives.

It was rare in the 1980s (I obtained my first judicial post in 1984, at the age of 35) for solicitors, and those of my age group, to achieve judicial appointment. I was 41 on my first full time appointment, and 46 on promotion to my Upper Tribunal post.

It is unlikely that I would be thought to conform to the judicial type Griffith had in mind when, speaking of the judicial conception of public policy (apt in benefit cases) he said '*It concerns first, the interest of the State, including its moral welfare and the preservation of law and order, broadly interpreted: secondly, the protection of property rights; and thirdly the promotion of certain political views normally associated with the Conservative Party*'. (Griffith 1985: 198).

He also said '*The judiciary reflects the interests of its own class ... tenderness towards private property and dislike of trade unions, strong adherence to the*

*maintenance of order, distaste for minority opinions, demonstrations and protests, support of governmental secrecy, concern for the preservation of the moral and social behaviour to which it is accustomed... judges do not stand out as protectors of liberty, or of the rights of man, of the underprivileged*'. (Griffith 1985: 205). Astonishingly, these comments were expressed as recently as 1985. They could just as easily have described a Victorian judge.

Commentators often assume all judges sit in the formal court structure so judges in the tribunal world are often overlooked and are in the shadow of the “uniformed” branch. This has an impact on morale and, arguably, on terms and conditions of appointment, which I address in a different chapter.

Appearing before a judge when I first qualified was somewhat alarming since many had a (deserved) reputation for irascibility and arrogance. That had a lasting impact on me. It does no good to make parties (or representatives) apprehensive or to erect any other sort of barrier to effective hearings. In consequence I have always sought to be user friendly. Civility and pleasantness cost nothing and are often worth their weight in gold – they make for easier hearings.

In *Towards a Theorization of Craft* (Kritzer 2007 (16) 321) H M Kritzer lists a number of factors that influenced judges in doing their job, including experiences in practice (especially working with nice and nasty role models), status awareness and socialization among their peer group, whether they were a solicitor or barrister, experiences in court and behaviour of others towards them, education and domestic circumstances. All of these, to a greater or lesser extent, were present in my case.

I was initially appointed as a part time judge. The more judging I did the more I liked it. I felt suited to it. I liked the authority and status, and the relative informality of it all, contrasted to the rigid formalism of what I had experienced as a practitioner in the court system. I also derived continuing satisfaction from successfully going through a searching and exacting selection procedure (then, as now, most applicants were unsuccessful) and knowing I was a judge, to that extent set apart from most of my contemporaries and colleagues.

In due course I was appointed full time, and after a few years appointed a deputy Social Security and Child Support Commissioner, only the second tribunal judge to obtain such an appointment. That reinforced my job satisfaction and sense of self worth. I was able to see the end to end process of appeals to the first level tribunal

and then how further appeals were dealt with by a higher judicial body.

I continued to enjoy the work but, over a few years, became increasingly aware that all was not well in 'the system.' There were a number of reasons: it was then routine for tribunal presidents to be appointed from the ranks of circuit judges, with no tribunal experience. The appointments were for a limited period, usually about three years. New presidents of tribunals often felt the need to make changes (without first gaining a feel for the jurisdiction) and, in wanting to leave a legacy, often sought to reinvent the wheel.

I had an increasing sense that tribunal judges were regarded by those who ought to have known better as tribunal hacks in the judicial world. This feeling was reinforced when, as the inaugural Chairman of the Council of Tribunal Judges, I had a meeting with one such president. He told me that increased funding had been obtained from the DSS (in those days the sponsoring body) but that the price was that tribunal judges had to be more productive. It seemed manifestly wrong to me that one of the parties in most appeals should be able to dictate terms in that way. It offended my notion of fairness, in that those in positions of power and influence (the DSS in this case) should be able to prevail over the relatively powerless (claimants). Also, it went contrary to the very notion of judicial independence and it was galling that civil servants, with no training or interest in the law or justice, should be in a position to affect my working life in that way.

Moreover, the attitude of civil servants towards judges changed. The relationship had always been a form of partnership, but many did not recognize that partnerships are not always equal. The relationship changed from civil servants being the servants of (but not servile to) the judiciary to seeing themselves as prime movers in the machinery of justice, with judges being no more than resources like any other. Resource allocation was in the hands of the civil service. That meant that nominal hearing times and, in consequence, daily lists and workload, were set by them, with no effective consultation with the judiciary. The judiciary were heavily dependent on the civil service administrators, but had no power over them. If, then, regular and frequent problems arose which directly impacted upon judicial work (inadequate premises, hearing bundles incompletely copied, bad liaison with appellants and other users and so on) all the judiciary could do was to make representations to administrators, but with no sanction for failure to comply. That was frustrating. Increasingly I felt that administrators regarded administration as an end in itself, as opposed to a service to be provided to tribunal users (including the

judiciary) in achieving the end product, a decision on an appeal.

The problem is exacerbated by the fact that different drivers are in play: judges want to judge and their salaries are unaffected by output or result. That is alien to the civil service mindset, with numbers dictating success or failure, in organizational and individual terms.

At an annual Tribunal Service judicial conference the then Chief Executive (a member of the senior civil service) herself said 'you will never persuade the civil service to understand the difference between output and outcome.' Just so. This problem has worsened over the years, with increasing emphasis on targets and key indicators in performance related pay. Little or no realistic evaluation is made by the modern Ministry of Justice official of whether these methods really do add value to the system, or whether they are in reality crude and unreliable. As one legal officer (as they then were) to the Commissioners put it, 'a moving file is a happy file.' There you have it.

So, I thought these problems might be removed by elevation to a higher judicial level. In this I was encouraged by a full time colleague, who had recently become the first full time tribunal judge to be appointed a Commissioner. The problems were lessened because the new appointment was in a smaller and more cohesive judicial organization. The higher standing of the judges was acknowledged by the administrators and day to day organizational problems could more easily be recognized and addressed, as the judiciary and administrators had a more focused and closer working relationship.

The larger the judicial organization the larger the numbers of civil servants and the greater the gap between the realities of judicial work in the field and the constraints and considerations imposed by a hierarchy of administrative functions and the concerns of the senior judiciary at the head of the judicial organization. The latter understandably have to concern themselves with some administrative matters (adjournment rates, work forecasts, judicial personnel issues and the like) and have to interact at high level with administrators. This may tend to blur the distinction between a judge and an administrator.

One of the problems with dealing with 'pure law' day in and day out, especially when many upper tribunal appeals are decided without a hearing, is tedium and repetition. I did, however, come to appreciate that there is no such thing as 'just

another appeal.’ The range of issues, the regular changes in the law and the variety of people’s lives prevent ennui. To paraphrase Mark Antony (Shakespeare Anthony and Cleopatra Act II Sc II) ‘*Age cannot wither nor custom stale their infinite variety...*’ I learned over time that what might at first blush seem yet another ‘standard’ appeal is in fact no such thing. One might think, for example, that ordinary words such as ‘provided by’ would be so straightforward in their meaning as not to permit of or require great debate or elucidation. Think again, and see what happened in Appendix N. There is always something special about each case and that served to maintain interest and keep me on my toes.

That is not to say that, at the outset of an appeal, I did not have a preliminary view. As a colleague rightly said, ‘*One approaches an appeal with an open mind, but not an empty one.*’ There is also the danger of being ground down by, for example, voluminous submissions, repetitious and tendentious arguments and in some cases the seeming inability of the parties to refrain from further written submissions as the case progresses. I learned to mitigate this by a firm hold of the reins of the appeal and not allowing the parties to seize them from my grasp and go galloping off into the distance. I have always remembered words of advice once given, to rise above and to cut through the dross and irrelevances like the captain of an icebreaker steering a course through the pack ice.

Judges cannot win: at one extreme they are as characterized by Griffith, but at the other extreme are in conflict with the government, suggestive of a much more liberal outlook. The then Home Secretary said that he was ‘*...frankly fed up with judges overturning policy...*’ (Blunkett 2003). Similarly the current Home Secretary<sup>12</sup> has often criticized judges for being soft on human rights, in the field of asylum law. The essential point, though, is that judges are concerned with the law, which is accessible and arises from the democratic process of the enactment of legislation. Policy, on the other hand, is nebulous, varies from minister to minister and from day to day, depending on which way the political wind blows.

Most people have no accurate conception of judges: ‘*I am struck by how unrealistic are the conceptions of the judge held by most people, including practising lawyers and eminent law professors...and even by some judges.*’ (Posner 2010: 2) ‘*They’re just old men,*’ ‘*fuddy old,*’ ‘*very old,*’ ‘*doddery old guy,*’ ‘*pompous old weirdos,*’ ‘*really outdated*’. (Darbyshire 2011: 19). A judge said that

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<sup>12</sup> Rt Hon Theresa May MP

most people regarded judges as *'stuffy old farts and completely out of touch...a bunch of idiots'* (Darbyshire 2011: 19). The image that most people have of judges derives from fiction or selective news reports, resulting in a negative stereotype. One remembers the Rowan Atkinson *'What is a digital watch'* judge. Darbyshire reinforces this view in that *'The media image of the judge is negative in the extreme – old, white and male, which is accurate – but also privileged, insensitive and out of touch .'* (Darbyshire 2011: 42). It is apparent from the brief resume of my background, above, that I do not sit easily with the views of Griffith or Darbyshire.

Apart from my academic background my socio economic background may have suggested a different perspective: My parents were factory workers and both of my grandfathers were miners, one dying in a mining accident. I have, then, had a certain empathy with industrial injuries claimants (Appendix J is just such a case) and those from less privileged backgrounds. That, however, does not translate into partiality, as is also apparent from Appendix J. It is easily tempting to say that this does not affect my judgments. Of course, I was not consciously partial. Empathy may be thought to be a good judicial quality, distinct from sympathy, which may suggest an identification with the situation of the claimant.

No judge, however, lives in a sterile environment, unaffected by the realities of life. Nor should they. These realities, however, may conspire to affect outlook, philosophy of life and society and economic considerations. Benjamin Cardozo, the distinguished American judge and jurist, recognized this in saying that judges could not escape from the current which shapes their lives and opinions so that *'All their lives, forces which they do not recognize and cannot name, have been tugging at them – inherited instincts, traditional beliefs, acquired convictions; and the result is an outlook on life, a conception of social needs...which, when reasons are nicely balanced, must determine where choice shall fall.'*(Cardozo 1921:2) 'Social needs' are inherent in the Welfare State. Not only the needs of its beneficiaries but also those of the contributors to the coffers. If one accepts Cardozo's precepts, then, it may be arguable that my background better equips me to do the work I did than, say, a public school Oxbridge judge. That said I remind myself that *'...a judge would err... if he were to impose upon the community as a rule of life his own idiosyncracies of conduct or belief.'* (Cardozo 1921: 34).

The European jurist E Ehrlich reflects Cardozo in that *'In the long run there is no guaranty of justice, except the personality of the judge.'*(Ehrlich 1911 (9) 45).

Personality, though, has restricted significance in tightly regulated and circumscribed welfare law. Judicial personality might, in a finely balanced case, tip the scales in an area of law which is fluid and uncertain. Welfare law though is in a different category, increasingly governed by regulation, leaving little room for the exercise of personality. That is not necessarily bad, otherwise the outcome of a case might be dictated by the personality of the judge, not the law.

There may be a distinction between judicial personality and character, the former perhaps showing a flair in working which has no material effect on outcome, the latter deriving from life experience and affecting how and what decisions are made. There is an increasing tendency for the Government to adopt mechanistic techniques for decision making. If, for example, a person scores a certain number of points they will get the benefit claimed. Purely automated decision making has not yet arrived, and in any event although a computer can make a decision it cannot exercise judgment. That is why society needs judges.

Judicial character is not determinative of outcome but, I suggest, affects process (user friendliness, phraseology in decisions and so on) and understanding. The latter in turn affects empathy and evaluation of evidence and, in this way, outcome. For example, in one appeal the appellant sought to explain loss of a large sum of money (which could have resulted in no benefit award) by saying he lost it gambling. That was outwith my life experience and I was sceptical, so I consulted a colleague, a highly experienced Old Bailey judge, who had seen that scenario many times. I changed my mind.

That shows the value of judicial 'eldership', drawing on the wisdom and experience of colleagues, and having the humility to do so. It shows also the benefit of judges being drawn from different areas of practice. My family experience of factory work, and my own vacation experience as a student, showed me what went on in the real world, so I was aware of the working conditions and social problems of claimants. Personal and family experience of mental health problems gave me an understanding of how difficult these are to assess (as distinct from physical problems) and how they act as barriers to effective communication when evidence is given. Similarly, experience of a family member as a lower tribunal judge reminded me of the importance of not being patronizing in judgments, of being aware of the real problems faced by judging at that level and



taking the lower tribunal with me in the judgment, and not alienating it by speaking from Mount Olympus.

Until recently I held the traditional view that judges have no responsibility for the making of law, only its interpretation and application. The perspective of retirement, however, has given me a different insight. It comes from a realization that *'Government is no longer a passive decision maker with limited policy goals merely focused upon the preservation of social order...much of the work of modern government now involves managing large scale administrative programmes and systems to deliver and implement an enormous number of disparate and complex policy objectives.'* (Thomas 2011: 103) As Thomas rightly goes on to say, tribunal adjudication is an institutional process by which public policy can be administered. In a real sense, then, I have been a participant in a process of implementation of policy. That makes me uncomfortable as it challenges judicial independence.

The judiciary is under threat as never before, because successive governments are unhappy when they perceive judges to be flouting policy. That in turn often leads to tabloid style condemnation of judges, who are unable to answer back. As Lord Neuberger <sup>13</sup> acknowledged, ministers attacking judges was *'not a happy situation...it's not fair as judges can't answer back...it's not sensible...'* (Neuberger 2013) because the Government could appeal or Parliament could change the law. All of this leads to some frustration on the part of judges and gives a sense that they are undervalued, at least by politicians.

As Rozenberg (2013) says *'Future historians will no doubt date the steady decline in legal services from the legal aid cuts that [started in April 2013]. Perhaps April 2013 will also mark the beginning of a steady decline in the quality of the judiciary.'* No one in today's climate will feel sorry for the judges. Whether members of the public may have cause to feel sorry for themselves time will tell. It may also be that the quality of judges will decline, given recruitment problems likely to arise from new judicial pension arrangements, leading to cuts in judicial pensions between 34% - 46%. Lord Judge, giving evidence to the Senior Salaries Review Body, <sup>14</sup> expressed concern that *'...by making it harder to recruit the best*

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<sup>13</sup> President of the Supreme Court

<sup>14</sup> The public body charged with making independent recommendations about salaries in the senior civil service, the armed forces and the judiciary. The latest report stated that the SSRB was more concerned about the impact of the Government's pay policies on the judiciary than on senior civil

*judges, the changes could affect the quality of the justice system...*' (Judge 2013)  
The average citizen could, understandably, probably not care less about judges' salaries or pensions, but he or she would no doubt want good quality judges and it is this that may be under threat. In a speech marking his retirement the Lord Chief Justice expressed concerns about judicial recruitment, saying that *'..the expansion of the responsibilities now placed on the judiciary, allied to the less attractive terms and conditions and pension arrangements as the Senior Salaries Review Body has made clear, has resulted in reduced morale.'* (Judge 2013).

Quite apart from ministerial attacks on the judiciary there is a backdrop of a threat to judicial independence. The previous Lord Chief Justice has warned that the constitutional changes of the last government could pose future threats to judicial independence. Referring to the Constitutional Reform Act 2005, <sup>15</sup> when *'spectacular changes to our constitutional arrangements were made,'* he warned of the need for vigilance against *'totally unintended little steps, which might, in the long term, serve to undermine the principle of judicial independence...we must be cautious, meticulous in our scrutiny'*. (Judge 2013). For a Lord Chief Justice those words have a resonance and significance far greater than may be suggested by their civilized, measured, tone.

His views are reflected in more robust terms by the former Director of 'Justice'<sup>16</sup>: *'You do not need to be a conspiracy theorist to identify the wider picture of what ministers are up to. They are deploying a four fold strategy to get the genie of judicial scrutiny back in the bottle. First, they wanted secret courts to suppress embarrassing evidence. Second, they want to reduce legal aid. Third, they are attacking the Human Rights Act. Eventually they even talk of taking the UK out of the European Convention on Human Rights. The current set of legal aid proposals will not just save money; they are intended to strengthen the state against the individual.'* (Smith 2013). Although s.3 of the Constitutional Reform Act 2005 requires the Lord Chancellor, and other ministers, to *'uphold the continued independence of the judiciary'* this may be a matter more of form than of

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servants and the armed forces. In like vein Lord Neuberger warns that *'As the gap between the earnings of successful lawyers and the judicial pay increases, maintaining high standards may prove hard'*. (Neuberger 2013).

<sup>15</sup> Which, amongst other things, reformed the role of the Lord Chancellor, the post of Secretary of State for Justice being created in 2007

<sup>16</sup> Roger Smith

substance, given tabloid headlines about judgments not to the liking of the government.

Profound changes have also been wrought not only in resource allocation in the machinery of justice, but in the very basis of the constitution, as Lord Judge indicated. Over many centuries the Lord Chancellor had evolved into a uniquely valuable feature of the constitution, as being not only the country's most senior judge but also part of our constitution for hundreds of years. As Lord Neuberger put it the '*old style Lord Chancellor was the country's top judge, the Judiciary's representative in the Cabinet, and the speaker of the House of Lords - a Grand Panjandrum or Lord High Everything Else.*' (Neuberger 2013). In some ways, then, he was able to act as an interface between the Judiciary and the Executive, being a judicial representative in the Cabinet and being familiar with the workings and concerns of the Judiciary. No longer.

The place of the Judiciary in our unwritten constitution should not be underestimated. Lord Neuberger holds that the Judiciary comes second only to the Legislature (Parliament) in the branches of State, in that the Judiciary holds the third branch, the Executive (the Government) to account.

Judges are in a unique position in society. Becoming a judge is difficult and increasing general and specific job pressures make judging challenging, rewarding, irritating and a source of pride. No other job in the world offers these opportunities.

## **CHAPTER 2**

### **The Welfare Benefits Landscape**

The foundations of the modern welfare state were laid by the Beveridge Report. (Beveridge 1942).<sup>17</sup> Beveridge identified a number of evils, which are still present albeit in different form, such as mental health conditions and a continuing focus on ‘ignorance’ and unemployment (‘idleness’).

Welfare benefits touch us all: ‘...*the more fortunate, whether they like it or not, provide help as contributions or tax payments (or both) for those entitled to benefits or allowances...nobody can just ‘pass by on the other side’* says a former Chief Social Security Commissioner (Micklethwait 1974:4). The law applicable to welfare benefits is particularly dense, because of its sheer volume, the arcane and highly technical language used, as well as the increasing interdependence of primary and secondary legislation.

The current Secretary of State for Work and Pensions<sup>18</sup> perceptively notes that 2012 marked the 70<sup>th</sup> anniversary of the Beveridge Report, and says it is his aim to reform the benefit system to bring it back to Beveridge’s principles, although he does not say what he understands these to be. He acknowledges that ‘*over the last 70 years countless Acts of Parliament and many thousands of pieces of subordinate legislation have been added*’ with the result that ‘*we now have a mess of a benefits system that is incomprehensible*.’ (Duncan Smith 2014). Indeed, even those in the Executive who are responsible for the legislation are confused by it. Writing in The

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<sup>17</sup> 1942 Report of the Inter-Departmental Committee on Social Insurance and Allied Services Cmd 6464 HMSO

<sup>18</sup> Rt Hon Iain Duncan Smith MP

Daily Telegraph on 7 August 2013 the (then) Minister for Disabled People<sup>19</sup> appeared not to know the (material) difference between disability living allowance and employment and support allowance, two of the more common forms of benefit. What hope, then, for Joe Public?

Not for nothing did a former Lord Chancellor refer to the '*impenetrable jungle of social security benefits*'. (Hailsham 1992: 103). Perhaps we could learn much from the continental system of codification of law in certain areas and the comparative brevity of many continental statutes.<sup>20</sup>

*'The legislation's the usual bugger's muddle.'* (Deed 2007).

It is not open to me or other judges simply to throw up my hands in despair and declare I cannot make head or tail of a piece of legislation, however badly drafted, obscure, ambiguous or byzantine in its convolutions.

There are obvious difficulties in seeking to extrapolate principles and practices from Beveridge's day without some recognition of, and allowances for, changing societal and economic factors.

The profound divisions in views on welfare benefits in modern society create problems for the judge in welfare law. Deep differences of view abound between individuals, organisations and governments in this area of law. Any proposed change to benefit law is likely to be met with fierce debate and criticism.

Whilst I, as a judge, was not concerned with government policy, only the application of the law, since I live in the real world I am not immune to concerns of users of the benefit system on the one hand and those (individuals and society at large) who have diametrically opposed views. Indeed, in very many cases appellants are keen to make it plain that they do not fall into the category of 'scrounger' and often cite nonspecific cases of those, known to them, whom they think are.

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<sup>19</sup> Rt Hon Esther McVey MP

<sup>20</sup> In *Legislative Drafting: A New Approach* (1997, London, Butterworths) Sir William Dale looked at various areas of law in the UK and continental countries and established that continental statutes were between a fifth and a third as long as ours.

All of this leads to pressure on myself and other judges, insidious and difficult to quantify but nonetheless real. As Pannick observed, '*Judges are subject to the same ambitions, passions, prejudices and fears as their contemporaries. If you prick them they bleed*'. (Pannick 1987; 17). The consequence of this is an ever present need, which needs reinforcing from time to time, to be vigilant about avoiding stereotypes, judging each case entirely on its own merits and focusing on the relevant legislative provisions and evidence. This effectively provides a reassuringly protective cordon sanitaire type of environment in which to fulfil my judicial duties.

That does not mean, however, a monolithically cold and distanced judicial loftiness. Judges are humans, not automatons. One may have empathy with an appellant without judgment being compromised. One may also have personal knowledge or experience of the benefits system without being partial. I remembered that both of my grandfathers were miners and that both of my parents were factory workers. I have had vacation jobs in factories. This experience of the real world, so far from being an obstacle to the judicial function, in my view enhanced and facilitated it. Why? I think the answer lies partly in the words of Lord Mansfield, an 18<sup>th</sup> century judge: '*Judges need humour, humanity and humility, together with fairness, formality and firmness..*' Humanity often springs from an awareness of the personal, and one's own experience. This, and some of these other qualities, can temper a decision dismissing an appeal, by the use of suitable language, or lead to probing and relevant questioning in an oral hearing. The Judicial Appointments Commission website lists among judicial qualities intellectual capacity, efficiency, integrity, objectiveness, decisiveness and so on but in my view being a good judge requires more than the sum total of these qualities. In the area of social security law in particular a human awareness is needed. That is easier said than done.

Judging in the field of welfare law is challenging, demanding and may profoundly affect people's lives. These factors present difficulties and rewards in judicial work in this area.

## **CHAPTER 3**

### **Judicial decision making, what it involves and is it successful?**

There are a number of elements of a good judicial decision, and a number of techniques and methodologies available to make one.

#### **Social awareness**

Lady Justice Arden believes judges need social awareness.<sup>21</sup> Judges in the past have been criticized for being remote from society in terms of education and social background. A distinction may, however, be drawn between general and case specific awareness.

*Arden: 'Judges must be able to demonstrate that they understand the context in which their decisions are being made...the judiciary needs to understand people in different walks of life and in different cultures [and] an awareness of social concerns so that their judgments can respond to them.'* (Arden 2011). So, she argues, social awareness avoids the perception that the best decisions are not made *'...so long as the judiciary appear to be drawn from one group in society and so long as it appears that diversity is welcomed in principle but is often not found in practice.'*

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<sup>21</sup> 'Magna Carta and the Judges – realizing the Vision' Lecture given at Royal Holloway, University of London, June 2011. The Report of the Advisory Panel on Judicial Diversity, 2010, also proposed that there should be a requirement in the selection criteria of judges to show that they have social awareness.

Arden suggests that social awareness can be demonstrated by judges being able to *'explain their decisions in accessible language so that the important parts can be read and understood by laypeople, and not just by other lawyers. Judges have to balance their technical and theoretical reasoning with the practical so that the law can be applied without difficulty.'* (Arden 2011). All that is easier to state than to achieve in practice, especially in the highly technical and arcane jurisdiction of the Upper Tribunal.

So, how could I as a judge of the Upper Tribunal, demonstrate social awareness? I could not, for example, tell claimants to look at my Who's Who entry, to see what sort of education I had, I could not properly tell them about my family background and it was no good simply assuring them that I did possess social awareness. This can only be demonstrated by what I did as a judge and how I did it.

### **Good judgment**

This should be distinguished from a good decision. Even if a judge possesses good judgment he can write a bad decision if the exercise of that judgment is not explained or is technically incorrect. It is also distinguishable from experience (although in many cases the two go hand in hand) and, although judges need it, it is difficult to show since it involves and is influenced by so many diverse factors. It is *'an elusive faculty best understood as a compound of empathy, modesty, maturity, a sense of proportion, balance, a recognition of human limitations, sanity, prudence, a sense of reality, and common sense.'* (Posner 2010; 117). (Appendix G may be thought an example of a humane judgment, embodying and applying some of these factors). That is a frightening (but non exhaustive) list, because if it is true, as it must be, that *'as much as any human being a judge is merely a choosing organism of limited knowledge and ability'* (Simon 1955: (69) 119) it would be a counsel of perfection to expect all judges always to measure up to Posner's criteria.

Although the presence of the above qualities cannot be measured their absence is observable. In other words in large part those qualities may be shown to the outside world by the way in which parties are treated and in simple ways such as an acknowledgment, however brief, in the judgment of any difficulties faced by either party, even if not strictly relevant. Similarly, irrespective of the outcome of an appeal, the type of language, syntax and construction of a judgment can play a part.



**“I will do right to all manner of people...”**

So runs part of the judicial oath. ‘Right’ may be seen as an inseparable part of justice. The law should be interpreted and applied to reflect what is ‘right’, but ‘right’ equated with morality is subject to societal change and re-evaluation from

time to time. This should not in theory give rise to difficulties since the judge, as Devlin says, is not *‘required to make any judgment about what is good and what is bad. The morals which he enforces are those ideas about right and wrong which are already accepted by...society’* so long as, in this scenario, the judge (or legislator) has regard to what is *‘acceptable to the ordinary man, who might also be called the reasonable man or the right-minded man.’* (Devlin 1965: 196). This reflects the principle that law mirrors society, and should be enacted and applied accordingly.

The difficulty, though, is that in matters of welfare law society does not speak uniformly. Any ‘mirror’ reflecting the views of society in this area of law would present such a distorted picture that it could not clearly be seen.<sup>22</sup> Thus, in decision making in welfare law matters resort cannot be had, as an aid to construction or application of the law, to any *‘cohesive sentiment’*<sup>23</sup> felt by society, since there is none. Indeed, although social theorists like Durkheim<sup>24</sup> and Habermas<sup>25</sup> agree that law serves the function of integrating society it is arguable that in today’s pluralism and societal pressures welfare law may have the opposite effect, as being perceived by many to act pejoratively against the interests of claimants on the one hand or, on the other, tax payers who do not claim benefits.

In my view, the ‘mirror’ theory of law has no place in modern welfare law. That may be no bad thing, since the ability to decide by reference to some generalized national mores or norms would be subjective. Even though Tamanaha suggests that *‘since the legal actors themselves are members of that society, presumably to some degree their decisions and actions will reflect...prevailing social values’* (Tamanaha 2001: 75) judges may take as representative of the views of society what those in the judicial community take as representative, by reference to their

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<sup>22</sup> Law acting as a mirror of society was a metaphor used by the American jurist Oliver Wendell Holmes

<sup>23</sup> Frankfurter J in *Minserville School District v Gobitis* 310 US 586

<sup>24</sup> Durkheim, E 1893 *The Division of Labour in Society* Paris, Presses Universitaires de France

<sup>25</sup> Habermas, J 1996 *Between Facts and Norms* Massachusetts, MIT Press

own experience and values, which may not be representative at all. It must surely be right that *'a judge has to decide a case in accordance with the law and nothing else...a judge is not entitled to impose his or her subjective views of what is morally right or wrong on society'*. (Singh 2013).

This effectively deprives me of a judicial tool for the interpretation of the law. I overcome this by resorting to 'black letter' interpretation, by simply looking at the words used in the statute, without the superimposition of extra judicial constraints such as societal norms and contemporary mores. This is what Devlin calls *'positive law,'* (Devlin 1965: 67) (or legal positivism) and which Tamanaha describes as *"the 'imperative' or 'will' theory' of law.*(Tamanaha 2001: 4). In an appeal before the Upper Tribunal the starting point has to be whether the lower tribunal has, first, identified the relevant law and, if so, second, whether it has been correctly applied.

I take comfort from the fact that the 'legalist' or 'positivist' theory of judging is described as the judiciary's "official" theory of judicial behaviour by Posner, so that *'judicial decisions are determined by 'the law,' conceived of as a body of pre-existing rules, found stated in canonical legal materials, such as statutory texts and previous decisions of the same or higher court, or derivable from those materials by logical operations'*. (Posner 2010: 41). To my mind that description is a good 'fit' with what I did and how I did it, although no judge consciously decides that he or she will be an adherent of any particular theory of judging. That is something that has only become apparent to me from taking a long view, away from the pressures of day to day judging.

Although some decisions in the Upper Tribunal are made by a panel of (usually three) judges most are made by judges sitting alone. This has the positive effect of removing any influence on judicial making by, for example, group think.<sup>26</sup> The downside is that it is often reassuring to have other judges on the panel agree with me. True, a sounding board may be other judges with whom I discussed a case which I had to decide alone but that did not altogether mitigate the consequences of this 'isolationist' type of judging. It did, however, free me from unwanted extraneous factors of the type I have indicated.

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<sup>26</sup> *'Dissenting judgments often do more harm than good: they detract from collegiality, they may lead to selective and unrepresentative extracts being cited in other cases and they may engender further appeals'* (Posner 2010: 32).

## Contents of the Judicial Toolkit

A workman needs a variety of tools, and so did I have judicial tools as an aid to decision making. There is nothing telling me which ‘tool’ is best suited for the job in hand. Despite various techniques of interpretation often a high degree of intuition is involved.

One such technique is reasoning by analogy. This is no more than a judicialised version of something we all do regularly. As Weinreb<sup>27</sup> points out, however, there is a material difference between analogical reasoning in daily life – either the problem is solved or it is not – and in the law, in which the analogy cannot be tested experimentally. There is nothing novel in this form of reasoning which, in effect, is but an aspect of the doctrine of precedent, in which decisions of higher judicial authorities bind lower ones. Appendix O shows the application of precedent, and that interpretations used in earlier, replaced, legislation can still be valid.

Although welfare law, as other law, requires methods of intellectual practice (the assembly of evidence, arguing a case, citing precedents and so on) these are matters more of form than of intellectual disciplinarity since, as Cotterell says, there are no ‘*controlling master theories, distinctive methods of intellectual debate, established paradigms of research practice, familiar epistemological and ontological positions or controversies.*’ (Cotterell 2006). This does not mean, though, that in decision making I was lost at sea without a chart or compass. Those aids to navigation are present in the nature and form of welfare law itself. It is not dependent on legitimation by reference to external factors and is a stand alone creation, to be analysed and interpreted as such. That is in the very nature of positive law.

Welfare law is heavily circumscribed and prescriptive. Its plasticity lies not just in its byzantine complexity and impenetrable language (although these are fruitful sources of litigation) but in its rapidity of change. In many instances little room is left for individual judicial influence. If, for example, Parliament decides that the mobility component of disability living allowance is not available to those over the age of 65, or if Parliament sets time limits for claims, it was not for me to decide

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<sup>27</sup> Weinreb, L 2005 *Legal Reason* Cambridge, Cambridge University Press

otherwise, irrespective of personal feelings. In any event even if I were empowered to reflect what Cardozo calls '*the spirit of the age*' that would be problematic, since that is '*too often only the spirit of the group in which the accidents of birth or education or occupation or fellowship have given us a place. No effort or revolution of mind will overthrow utterly and at all times the empire of these subconscious loyalties.*'(Cardozo 1921: 34).

That welfare law is a paradigm of positive law is, I believe, a strength of the system, since the law should be certain. It assists me: if every appeal involved novel points of law judicial life would be unacceptably stressful and complex – judges need a diet of the (relatively) straightforward blended with the more complex. Additionally prescriptive law means I do not have to agonise about subjective personal influences. Posner describes these as '*Priors*', and they include things like '*experience, temperament, ideology or other personal, nonlegalist factors...*[which are] *...ubiquitous and uneliminable.*'(Posner 2010: 69). That does not mean, though, that I had to think in a vacuum and in any event the positivist approach I have indicated has what are effectively built in safeguards against '*Priors.*'

What, though, about appeals in which I strongly felt that justice had not been done? Did this pose a dilemma and if so how did I address it?

It was satisfying when I was able to make a decision curing the 'injustice', in the incorrect application of the law or in some procedural unfairness. In other cases 'justice' or the lack of it is more problematic: an appellant may feel a result is 'unjust' if it does not give him what he wants or if a claim fails on some arcane technicality. Absent any overriding human rights issues, however, my job begins and ends with the law. It was not for me to second guess Parliament or to substitute my own all too fallible and subjective concepts of right and wrong.

So, in general, subjective opinion or that which may be thought to reflect standards in society, have no place in welfare law. The concepts of moral reprehensibility, blameworthiness and the like are, in general, irrelevant. For example, entitlement to Disability Living Allowance and Employment and Support Allowance takes no account of the cause of entitlement. If, say, the effects of drug or alcohol dependency mean that a person needs 'attention in connection with bodily

functions' steps that they could reasonably have taken to avoid or mitigate the consequences of their actions are immaterial.

What, though, about a case in which the lower tribunal has made an award of benefit which, by any standards, may not in reality be for the good of the claimant? A claimant dependent on alcohol may well use the money awarded to buy alcohol. Thus, the award fuels the very dependency which resulted in entitlement. In such cases, I was powerless. That may seem counterintuitive but it may be just as well, otherwise I would be a judge in a court of morals, not law. The furthest I could go in an appropriate case would be to make a time limited award (as opposed to an indefinite award) but only if the evidence reasonably suggested the possibility of material improvement in the underlying condition.

All of this is not to say that I was no more than an automaton, because although I had no power to change the law I did have power to ensure its correct interpretation and application. I had no discretion about changing the law but I have a form of discretion in the way it is applied. 'A form of discretion' only because judicial interpretation is a type of discretion, albeit fettered by rules of interpretation. As Martin<sup>28</sup> puts it, in making a decision a judge has both freedom and constraint: freedom in the sense that to make a judgment involves some form of choice, and constraint because judgment is a matter of deliberation, of weighing alternatives within the parameters of the law.

Was I chained by the ever increasing prescriptive terms of welfare law? After all one definition of 'judge' is 'form an opinion or conclusion about.' Arguably, the greater the prescription the less scope for judgment. In fact, in my view, the contrary is true. That is because the concomitant of greater prescription is greater volume. Both conspire to produce questions of interpretation, ambiguity and uncertainty.

In one area, though, my discretion had a wider writ: if I was asked for an adjournment of a case, or when giving case management directions, I had to consider "the interests of justice," although in general, as Singh says, '*a black letter lawyer would search in vain for a definition of the interests of justice...*'(Singh 2013). That is because it cannot be circumscribed except in

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<sup>28</sup> Martin, W 2008 *Theories of Judgment, Psychology, Logic, Phenomenology* Cambridge, Cambridge University Press

specific instances. In this I had freedom to move within what Posner describes as a 'Zone of reasonableness.' (Posner 2010: 87). It is in the very nature of 'reasonableness' that it is variable according to circumstance. It is not absolute, fixed or determined by forensic criteria.

Greater experience leads to greater confidence in what is in large part an intuitive process of consideration of '*the interests of justice.*' This, however, conceals an inherent danger, since intuition derives from the unconscious, not conscious, mind, and if '*the unconscious mind has greater capacity than the conscious mind...*[so that]...*the knowledge accessible to intuition is likely to be vast*' (Posner 2010: 108) it follows that the exercise of intuition is not readily susceptible to examination and may be flawed, even though outwardly sustainable. It is relatively easy to guard against conscious factors but, as most judges '*but slenderly know [themselves]*' (Shakespeare King Lear Act 1 Sc 1) more difficult to guard against unconscious influences. That, though, is an inevitable consequence of decision making by humans. It is particularly present in judicial decisions, since those decisions do not depend upon any algorithmic, sequential or formulaic deliberative procedure, and are in consequence a form of telescoped, not step - by - step decision making.

Is it odd that the judicial toolkit does not contain a 'justice' tool? Judges strive to achieve justice in the broad sense of a fair hearing, proper application of the law and procedures and so on. In a philosophical sense, however, the 'justice' in an individual case is impossible to discern, absent the application of general principles. In a pluralistic society, and in the area of welfare benefits, it may be that no sense of justice pervades the community, since the community is fractured into many different and often irreconcilable communities, with the result that 'justice' is unknowable.

### **But what about Policy?**

The Legislature and Executive make legislation in furtherance of the policy of the government of the day, so behind every legislative provision there is a purpose, reflecting policy. The distinction between purpose and policy is fine, but crucial, since I could properly take account of the latter, but not the former. Why?

Policy is nebulous, changing from minister to minister and from one day to the next. Interpretation by reference to policy would be inimical to legal certainty and transparency: *'...adherence to the rule of law and a proper respect for the difference between legislation and adjudication dictate that the reasons be sought within the fabric of the law and not in the open spaces of policy and its efficient implementation.'* (Weinerb 2005: 36). Similarly, Posner says that *'judges start with the words of the statute and usually end there, thus avoiding the treacherous shoals of purpose and policy...'* (Posner 2010: 72). The purpose of a provision, however, can be ascertained by its wording and a purposive construction, seeking to discern what the provision is designed to accomplish, is a permissible tool. Posner is right in that purpose cannot be derived from policy, but in my view it can be a stand alone technique, since a purposive approach is not dependent on an understanding or analysis of policy.

### **Have my judgments been successful?**

Over 17 years as a judge of the Upper Tribunal I made about 3,000 decisions on appeals and determined about 7,000 applications for permission to appeal.<sup>29</sup> Judges do not compare outputs with each other and the Ministry of Justice did not measure individual judicial performance in terms of statistics, and in any event it is easier to do a bad judgment quickly than a good judgment slowly. In crude terms I was successful in terms of output: I did what was placed in front of me, I did not ask other judges to do appeals which I found challenging and my cases did not linger on the back burner. So, by these measures I performed satisfactorily.

What about outcome, though? Can judicial performance be evaluated by looking at indicators other than simple case disposal?

If a scientist develops a new drug which successfully treats a medical condition, or makes a new discovery they will be thought to be successful, like Crick and Watson or Pasteur. Similarly, the discovery of the Tomb of Tutankhamun by Howard Carter was considered a successful result of his search. In legal judgments, though, there is no hidden truth, no secret, a judgment may ultimately be no more than an educated opinion and my opinion may not be shared by other judges, at

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<sup>29</sup> Assuming about 4 decisions a week and about 10 applications a week, adjusted for holidays.

whatever judicial level.<sup>30</sup> As Posner says, *'many of the decisions that constitute the output of a court system cannot be shown to be either 'good' or 'bad,' whether in terms of consequences or other criteria...computing an overall judicial error rate, correlating judicial errors with particular methods of judicial making and determining whether the error rate is too high (compared with what?) and would be lower if algorithmic decision making (with all its limitations) were substituted for intuitive decision making are impossible in the present state of our knowledge.'* (Posner 2010: 3). How, then, can a body of work be evaluated?

One measure would be whether my judgments had been appealed, to the Court of Appeal. Only one was. The Court of Appeal decided differently from me. So, I have a 100% failure rate in the Court of Appeal, but set against that is the fact that out of the thousands of appeals I decided only one went that far. This, then, is no entirely reliable measure, particularly when it is remembered that a losing appellant may not be able to afford an appeal to a higher judicial authority. Still, it is *a* measure and in broad terms shows I was doing my job right. Others, though, may say that the lack of challenge to my judgments to the Court of Appeal shows that those judgments have not been forward thinking or at the cutting edge of legal thought. That view, however, suggests that I decided most appeals in favour of the relevant Government department and that is just not the case. It could, however, be argued that in the absence of a judgment on a point of law of widespread importance the costs of an appeal to the Court of Appeal in an individual case would not be cost effective to that department.

It is also, I suggest, legitimate in evaluating success, to look at the way people behaved in hearings. I was never attacked or verbally abused, no one ever stormed out of a hearing or waylaid me later. Given that these things have happened to other judges I may take some satisfaction from their absence. Also, dissatisfied appellants can always write in later and complain. Few have done, and I have never had a judicial complaint upheld against me. On the other side of the coin, however, very few successful appellants have written expressing gratitude.

So, if *'The quality of a judge's performance is reflected, if only dimly, by such observables as backlog, reversal rate (the monitoring of which limits a judge's ability to minimize his backlog by excessive haste in deciding cases), judicial*

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<sup>30</sup> *'What is involved in an appellate review is, at bottom, simply confidence or lack thereof in another person's decision.'* (Posner 2010: 114).



*demeanor, and complaints by litigants and lawyers'* (Posner 2010: 131) I suppose I have achieved a level of success. There is, though, no formal system of appraisal in the higher judiciary. Given the complexity of the jurisdiction it is not easy to see who could undertake any appraisal and in any event although appraisal has its uses I know from personal experience (as an appraiser and appraisee) that there is the danger of 'reactivity,' or what Espeland and Sauder described as the propensity of '*individuals [to] alter their behavior in reaction to being evaluated, observed or measured.*' (Espeland and Sauder 2007: (113) 1-40).

Apart from appealing to the Court of Appeal a dissatisfied appellant can seek judicial review (which costs money) or apply for a setting aside on the basis of a procedural error (which does not). Only a handful of judicial review applications were made and only one was successful, and even then because the DWP did not argue the case, probably on costs grounds, and most setting aside applications fail, because they are in reality attempts to re-argue the merits of a case.

The upshot of this is that in reality there is no reliable judicial indicator of success – or failure. I derive some comfort from this. That is because, although no standards exist by which I may be considered a success, the corollary is that I cannot be adjudged a failure. That may be thought unsatisfactory but in my view it simply is a consequence of the very nature of judgment and, indeed, may be a strength of the system: if 'good' or 'bad' or 'strict' or 'sympathetic' judges could easily be identified that could lead to judge shopping by the parties.

Additionally I see the fact that judgments are in some ways matters of opinion as a strength of the system. That does not mean that judgments, by myself or any judge, are simply matters of judicial whimsy, toss of a coin or arbitrariness. Any judgment has to identify and explain the law and set out how and why that decision has been reached. The judgment, then, has to be transparent and conform to known standards of judicial reasoning. If it were otherwise there would be no point in, or need for, a judicial system since the law would be so clear that its meaning and application would be unarguable. No legal system in the world has ever, or could ever, attain that goal. Also, the possibility of a higher appeal is comforting to me: no judgment – of mine or any judge – can be perfect. It is always open to some form of criticism and in appeals in which I could have justified and written a decision either way (and this happens regularly) the availability of a higher challenge guards against judicial fallibility.

Fortunately, judges in the United Kingdom have tenure for life, being subject to removal only for serious professional or legal breaches. It happens very rarely. That is a comfort, since I did not have to worry about the consequences of my decisions on reappointment but I wonder if it also *'invites abuse because it eliminates any penalty for shirking?'* (Posner 2010: 158). Here I part company with Posner. In a small jurisdiction like mine, in the Upper Tribunal, all judges know pretty well what their colleagues do in terms of output and quality of work, so peer pressure is an effective built in safeguard, obviating Posner's doubts.

The humdrum of daily work did not permit considered reflection or evaluation of my decision making. Stepping back from 'the daily round, the common task' has given me a new perspective.

## **CHAPTER 4**

### **Judicial techniques in an age of austerity**

*'There is a fundamental public duty on the Government, and also on the legal profession and the Judiciary to work constructively together with a view to best maintaining access to justice in the face of the harsh realities of Government finances.'* (Neuberger 2013).

No one could reasonably object to that statement by Lord Neuberger<sup>31</sup>, but it begs the crucial question of how judges like me can reasonably adapt the judicial process to suit resource exigencies.

One way would be to restrict the flow of work to suit the budget, by restricting appeal rights and making the law more prescriptive so as to reduce the possibility of appeals. This, though, would not work.

First, the European Convention on Human Rights provides for a right to a hearing before an independent judicial body.

Second, experience taught me that ever more prescriptive laws are like an attempt to remove an air bubble in wallpaper – you may shift it but not eradicate it altogether. That is because new legislative provisions in the general field of welfare benefits have proved to be a fruitful area of litigation. Not only are there inevitable

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<sup>31</sup> Neuberger, Lord 'Judges and Policy: A Delicate Balance' June 2013 Speech at Institute for Government

attempts to challenge new legislation but there are usually transitional provisions, designed to protect those already in receipt of benefits against prejudicial effects, which are also usually complex and often result in litigation.

It has been suggested that more use be made of summary decisions, as in Appendix E. However, although in some cases in the Upper Tribunal the issues are clear cut and simple enough to permit of a summary decision that would not be the case in oral hearings, which by their very nature are usually held only in cases of complexity, not being susceptible to summary, unreasoned, determination, see, for example, Appendices N and P.

The procedure rules<sup>32</sup> do however allow for a decision to be given orally, at a hearing, but that is rare, for the reason given above. The rules also provide that written reasons must be given save where the parties agree otherwise or where there is a consent decision. In times of case pressure the flexibility allowed by the rules is welcome. That has, however, to be balanced against the need for the First – tier tribunal, on any rehearing, to know why (if it be the case) a decision has been set aside and what pitfalls they must avoid. How is this tension addressed?

The starting point is when permission to appeal is given. Time was when reasons for giving or refusing an application were often not given. Things have changed with the emphasis on transparency in modern administrative law. That is recognized by rule 22, in that reasons have to be given. In this way the parties are able to address those reasons in any submissions later made. Not only this but, in exercise of the case management powers contained in rule 5, the parties are often directed to say whether they agree to a decision on the basis of any potential error of law identified in the permission. In many cases they do agree, and this results in a shortened end to end decision making process. Appendix A shows what typical case management directions look like and Appendix B shows the fruit these directions bore in the form of a reasoned and helpful submission from the Secretary of State's representative, facilitating an expedited decision by myself. Similarly, Appendix F shows how a supportive submission on behalf of the Secretary of State can be incorporated into a decision. This is a more convenient and user friendly use of a Secretary of State's submission than directing that submission to be provided separately to the tribunal, as in Appendix E.

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<sup>32</sup> Rules 39 and 40, Tribunal Procedure (Upper Tribunal) Rules 2008

I learned that time invested in carefully dealing with an application pays dividends. A quick ill considered permission means time taken later on an unmeritorious appeal. Longer time taken at an early stage on a meritorious application means shorter time for dealing with the later substantive appeal.

In addition, the interventionist (inquisitorial) role of the Upper Tribunal means that a judge is often able to suggest appropriate case disposal solutions.

There seems an increasing tendency to look to dispute resolution methods outside court or tribunal procedures. As a one time Industrial Tribunal judge I know the benefits of ACAS<sup>33</sup>. ADR (Alternative Dispute Resolution) is a form of problem solving and, as such, not amenable for use in the Upper Tribunal. Many appeals to the Upper Tribunal arise because of uncertainties in the proper interpretation and application of the law. Such cases require an authoritative statement by the Upper Tribunal on what the law is and how it should be applied.

In my experience, attitudes of appellants in citizen v citizen disputes were very different from those in citizen v state disputes. In the latter attitudes tend to become entrenched at an early stage, and many appellants want their day in court – and have an unshaken conviction in the merits of their case.

The government has made it clear that the courts should be self - funding. Those making an application have to pay for it. At present there are no fees prescribed in welfare benefits appeals. A small fee would effectively act as a measure of good faith and might tend to discourage unmeritorious applications. Set against that, however, those on benefits – or seeking them – usually lack financial resources and a fee might just as easily discourage a genuine claimant as a non genuine one. Additionally, any fee regime would need to provide for fee exemption or remission, the former, for example, in cases of legally aided claimants, the latter if they win their appeals. This would interpose an additional layer of administration and judicial resource, and so increase costs.

Apart from this there is no room for a negotiated settlement by the time an appeal reaches the Upper Tribunal. By definition, by then there will already have been a

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<sup>33</sup> The Advisory, Conciliation and Arbitration Service

winner and a loser at First – tier level. The parties in the course of an appeal before the Upper Tribunal might reasonably be thought to wish to take account of, and respect, the views of the higher judicial authority, especially when those views might reflect the way in which the appeal might be decided. Often, in my experience, the parties were only too grateful for a judicial “steer”:(as in Appendix C) the relevant government department’s representative usually welcomed the opportunity to close a case without further time and trouble and the appellant (if an individual) often preferred a quick end to achieve closure.

Is there, though, any inherent danger in the Upper Tribunal suggesting a decision to the parties? Could such a technique relieve the judge of making a time consuming, lengthy and complex decision, possibly exposing him to the risk of an appeal? Is there also the danger that it might be thought that the judge, in expressing a view, has pre judged the issue, with the result that any subsequent decision might be tainted by some form of bias or other breach of natural justice? In my experience, the answer to this is ‘No’. Why?

First, I learned by cautious experience that one had to pick a case that might reasonably be susceptible to some form of agreed decision. For example, if the parties are agreed that an error of law exists that alone forms a good starting point, with only the remedy remaining. There would be no point in suggesting a decision if the parties are combative and determined on their day in court.

Second, the way in which a decision is proposed, or even mooted, is vital. The phraseology has to be such that it is transparent that no firm view has been expressed or final conclusion reached.

Third, the reasons for a proposed decision have clearly to be spelled out, so that the parties are aware of my thinking and are in an informed position to assess what they might gain by an agreement, balanced against the risks of litigation.

Fourth, if either party objected to a suggestion or to my continued involvement in the appeal I could have recused myself.

Fifth, it may be apparent from the tenor of representations that both sides are amenable to an agreed decision. This makes it important for the case to be dealt with throughout by the same judge (absent any compelling reason to the contrary)

so that he maintains some continuity of thought as the case progresses and is alive to the attitudes of the parties and the manner in which they conduct their case.

*'There is a tendency for an appellate judge to lose touch with aspects of the world of legal advice and litigation,'*(Neuberger 2013) says the President of the Supreme Court. It seemed to me that, when I became an Upper Tribunal judge, I would need to somehow anchor myself in order to avoid the heady air and judicial altitude sickness of the ivory tower. This, I acknowledge, is not a discrete judicial tool but I found the solution I adopted served me well: I sit as a part time immigration judge, at First-tier level.

New laws present new problems. The development of human rights principles is fraught with difficulty for judges. That the Human Rights Act would cause problems for judges was seen by at least one senior judge, Lord McCluskey, who wrote that the legislation would *'...provide a field day for crackpots, a pain in the neck for judges and a gold mine for lawyers.* (McCluskey 2000). See Appendix P as an illustration of the complexities of human rights issues.

What did all this mean for me, as a judge?

First, human rights imposed a further layer of judicial consideration of the merits of a case. In an adversarial system the judge can usually safely focus only upon issues raised by the parties. Not so in an inquisitorial system, because of its very nature.

This, in turn, leads to a second problem, how to identify and raise human rights issues, and ensure they are properly addressed.

A third problem is that of time, since each appeal carries on its coat tails a potential human rights issue, meaning it takes longer to consider and determine than would otherwise be the case.

I developed tactical devices and strategies to address human rights issues; some were designed to save time and ensure that cases were dealt with expeditiously, but never at the expense of justice, and some designed to ensure full participation in the appellate process. Both factors are in effect part of the "mission statement" enshrined in the Upper Tribunal Procedure rules:

I maintained a mental ‘tick box’ in every case to ensure that, even if not expressly raised, I had considered human rights aspects, even if I concluded that none arose.

If in doubt I issued case management directions, either seeking further details from the party raising the issue or requiring the views of the respondent on any issue raised.

I increasingly took the views of the registrars of the Upper Tribunal, legally qualified civil servants who have some delegated judicial and administrative functions. Some have particular areas of expertise. They were often able to analyse and distil human rights (and other) points. That saved me time and has the advantage of making the registrars feel a valued part of the appellate process, as indeed they are. Even if I did not accept their advice it acted as a sounding board and platform for future action.

As in every appeal, I was able to discuss live issues and problems with other judicial colleagues. Whilst the final decision remained mine a distillation of comments and advice from colleagues is very often useful.

There is never likely to come a time of fruitful judicial resources, despite the burgeoning tide of appeals. The trick is to balance the need for expeditious case disposal against the interests of justice. Some of the above tactical measures may help in that aim.



## **CHAPTER 5**

### **Pleasures and Problems in Judging**

Being a judge is a privilege. Set against that, however, the Upper Tribunal tends to be seen as an ivory tower, removed from the reality of the real world of tribunal justice and one needs to guard against lofty detachment from the realities of the administration of justice, the problems faced by decision makers and those of individual claimants.

I recall, for example, an experienced tribunal judge commenting that he would like the salary of a Social Security Commissioner and be able to live their apparently relaxed and remote lifestyle, untroubled by difficult claimants, the pressure of dealing with a list of cases and impenetrable decisions under appeal. I was that judge. I see things differently now, having seen the strengths and weaknesses of both appellate levels. Not all judges in my chamber had previous First – tier experience but some have. In my view this is good: amongst other things, it demonstrates to those in the First – tier that I and others like me were not armchair generals, with no experience in the field.

These shadows of tribunals past did not alter my view of the law and the ultimate question of whether the tribunal erred in law but, whilst my judgment was unaffected, my style of expression was not. I was writing a judgment for an audience – the parties – and one consequence of this is that the writing style had to be accessible, transparent and free from archaic language. This was not easy, since we all have means of expression which we use easily so as to become second nature to us but which may be lost on others.

Over a period of time I developed a number of strategies to address the above problems.

When new I wrote draft judgments by hand. That was time consuming. After I had been in post for a while greater confidence, and time pressures, led me to dictate, but always in draft. The delay between dictation and the return of the transcript gave a breathing space, which meant I came afresh to the case. The volume of work was such that it was difficult to remember a case even after only a few days.

Often I showed the draft to a colleague for comment, and obtained comments from a registrar. There are a number of deputy judges of the Upper Tribunal and some of these are salaried First –tier tribunal judges. Regular and frequent contact with them kept me abreast of issues and developments at First – tier level and their comments on draft decisions are invaluable.

Parties to an appeal often comment on relevant judgments written by others. Sometimes those comments highlight problems of expression.

Because I found it difficult to spot typing or other similar errors in my judgments I had them proof read by another and this often brought to light other errors.

As part of my continuing education I had to read judgments of others in my chamber and in the wider judicial system. This exposed me to different styles of writing and expression and I had no qualms in adopting these, if they fit the bill.

All of this, however, does not alone prevent a somewhat isolationist judicial style. How did I guard against this? Sitting part time as a judge in the First-tier Immigration and Asylum Tribunal honed my judgecraft since oral hearings in the Upper Tribunal are relatively few<sup>34</sup>, whereas most initial appeals in the immigration tribunal are dealt with by oral hearings. This experience also reminded me of what First –tier tribunals have to deal with in terms of list management, and fostered what I hope was an enabling, user friendly approach. Additionally there was a spin off because of the interface between welfare benefits and immigration/asylum cases.

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<sup>34</sup>About 95% of appeals are decided without an oral hearing

My sitting in immigration worked for me, and it helped to refresh me by removing some of the tedium of an unremitting diet of Upper Tribunal work. It also provided a salutary reminder to me of the problems faced by First – tier tribunals and of the difficulties of providing, within the constraints of efficiency and justice, a judgment properly supported by a process of fact finding and reasoning.

There is a fundamental problem, in my view, in judging in this area of law: Cardozo speaks of the judge being informed by the ‘...*customary morality of right – minded men and women by which he is to enforce his decree*’ and says that ‘*A jurisprudence that is not constantly brought into relation to objective or external standards incurs the risk of degenerating into jurisprudence of mere sentiment or feeling*’. (Cardozo 1921: 34).

Irrespective of decision making in the particular case, though, what was the backdrop against which I view this area of law? It has not changed over the years. It has always seemed to me that in any civilized society provision would be made by the state for those who need help, whether by reason of, for example, ill health or financial hardship, the ‘need’, however, being identified by the state in the law to be applied, as with the ‘help.’ In general resource allocation by the Government of the day was not a matter for me<sup>35</sup>. Similarly, without being icily indifferent to the plight of those to whom the law applies, it was not for me to form a view as to its fairness.

Many claimants relied on a generalized but nonetheless sincere resort to ‘justice’, as if it were some form of ‘*unseen justice, independent of human agency, which we are straining to believe in and discover.*’(Goldsmith 2013). I confess that my heart sank when faced with such a plea to such an undefined and almost other worldly notion, as experience told me that most of those resorting to such a plea were disappointed with the outcome. And yet that was to my mind no excuse for not striving to do justice, even though it cannot be defined, explained or rationalised.

However one conceives ‘Justice’ it is manifestly important, not as a conceptual philosophical ideal but as a working principle, since ‘*Without justice there is no rule of law*’ and because ‘...*it is so fundamental to our lives, every citizen should*

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<sup>35</sup> It may, though, be a consideration that can properly be reflected in issues of discrimination and human rights

*be concerned with the rule of law*' it follows that every citizen, and certainly those who hold judicial office, should be concerned with justice. (Neuberger 2013).

The power to innovate in an area of law heavily circumscribed by detailed legislative provisions is very limited. Was I, though, ever tempted to be 'generous' in a 'deserving' case, which would otherwise fail, to allow an appeal? No, never. Why? There are several reasons:

It was not what I was paid to do. It would have been unprofessional. Judges like me only took the judicial oath<sup>36</sup> after the Tribunals, Courts and Enforcement Act 2007, but that only confirmed the position, it did not bring it into being.

What I thought might have been the 'right' thing to do might not have been correct. Subjectivity is dangerous in this regard.

Whilst the successful claimant in a case that ought, on a correct application of the law, to fail may be delighted, initially, that delight might soon turn to despair (not to mention inconvenience and cost) if the other party launched an appeal, which they might very well do if I twisted the law.

Even if the losing party did not appeal my decision that decision would be unfair to others in the system, who might not be faced with a judge or decision maker willing to bend the rules.

It would set a bad precedent and lead others astray. It would also bring discredit upon the Upper Tribunal and diminish its standing, to the detriment of its place in the machinery of justice.

In a democratic society Parliament, (unlike judges, accountable to the electorate) is charged with the task of law making.

It was still satisfying when I felt able to rectify an injustice. It was not always easy to evaluate this: In the formal court structure judgment has, *ex hypothesi*, to be

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<sup>36</sup> 'I, ..... , do swear by Almighty God that I will well and truly serve our Sovereign Lady Queen Elizabeth the Second in the office of Judge of the Upper Tribunal , and I will do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill will.'

given for one party or the other. Thus, ‘winners’ and ‘losers’ can be identified. In my appellate jurisdiction, however, it was only infrequently that a final decision could be given on the merits of the underlying appeal. If, say, a claimant loses before the First – tier Tribunal it may be that the decision of that tribunal is found to be erroneous in law, to use the statutory language. Under s12(1)(b) of the 2007 Act<sup>37</sup> in such a case the Upper Tribunal must either send back (‘remit’) the case to the First - tier Tribunal for rehearing or ‘re – make’ the decision of the tribunal.<sup>38</sup> It is only in the latter contingency that the substantive appeal will be determined. If the decision of the tribunal is erroneous for lack of fact finding, for example, I would not have been in a position to substitute my own findings. That is because the First –tier Tribunal often has the benefit of ‘wing’ members whose specialized knowledge and experience are invaluable, quite apart from the fact that a fresh tribunal would have the benefit of seeing and hearing the claimant, so as to be better able to evaluate his or her evidence. Such an appeal is illustrated by Appendix F.

In some cases, however, I was able to decide matters by my own decision on the merits, as exemplified in Appendices G and H. I increasingly sought to do this. It served no useful purpose to send back a manifestly hopeless case. Resources of all kinds are in increasingly short supply. Similarly it might have been that the Secretary of State’s representative would not only support the appeal before me but would also suggest whether, and if so to what effect, I should substitute my own decision. I could have suggested in case management directions that the Secretary of State’s representative should address any strange or unusual adjudication history and I might have commented on the strength of the evidence, perhaps suggestive of an award. This reflected my greater use of the interventionist approach which is brought into being by case management directions. It is also, I suggest, an approach which comes with increasing confidence and experience, and an awareness of how the other party to the appeal may react.

In the type of case referred to above ‘closing the book’ on an appeal is not only satisfying but an effective use of resources.

One of the qualities expected of a judge is authority, the ability to control proceedings effectively, whilst ensuring full participation by the parties without

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<sup>37</sup> Tribunals, Courts and Enforcement Act 2007

<sup>38</sup> This happens in no more than about 25% of cases

being authoritarian. It is not too difficult to avoid pomposity. Sometimes, however, the relatively informal nature of hearings in the Upper Tribunal may be taken by users as a signal for familiarity, an anything goes system in which users are free to say and do what they like. This in no small part stems from a change in attitude towards judges by court/tribunal users as a whole. We live in a society in which authority is regularly challenged and a rights based culture encourages this. In itself this may be thought to be a sign of a healthy democracy. Set against that, however, the fact that people in general are more challenging of and less deferential to people, like judges, in 'authority' has implications: it may induce a lack of willingness to participate in the appellate process, it may result in unnecessary appeals, it may lead to obstructive and awkward behaviour in court, which may be difficult to control, it may result in protracted correspondence after an unsuccessful appeal and it may obscure good points in an appeal. All of this needs to be avoided, or addressed if it arises. How did I go about this?

Training and experience taught me a number of strategic and tactical devices to ensure that the parties were best able to present the case and so that I am best able to do my job.

A good starting point in oral hearings was always to explain to the unrepresented what my job was, how I went about it and that I was independent of the tribunal below and of the body whose initial decision was appealed. This proved to be a useful scene setting procedure, and gave a possibly nervous appellant a chance to settle down.

It usually avoided any antagonism by the appellant to any government representative if I explained that he or she was not the person who made the decision under appeal, and that it was (in that jurisdiction) not the job of that representative to act as prosecutor, or to seek to have the appeal dismissed.

In order to ensure that '*...justice should not only be done but should manifestly and undoubtedly be seen to be done*' (Hewart 1924: 246) I always found that unflinching courtesy and patience, even or especially in the face of obstructive and uncooperative appellants, were rewarded in a smooth hearing. Similarly, being continually alert to possible misunderstandings, confusion or lack of clarity by either party facilitates a proper hearing, as does intervention to ensure technical legal points are understood by the appellant.

It was tempting to deal quickly with an application for permission, to get it off the desk. That short term expedient came home to roost later, possibly in the form of a time consuming and unmeritorious appeal. A simple ‘Permission to appeal is granted’ leaves much work to be done later. I learned that time invested in the application stage saves more time later. In Appendix C case management directions<sup>39</sup> were given, to facilitate expeditious disposal of the ensuing appeal. This is a technique I used increasingly. I learned that simply to give ‘open ended’ permission to appeal lacked focus and often resulted in submissions from the parties, which did not address relevant matters. Giving detailed reasons required a greater investment of time at the initial stage but paid off, in most cases, by putting matters ‘in the frame’ so as to enable the parties to focus on issues that concerned me. In this way I came to appreciate that the end to end decision making process was significantly shortened.

Getting the parties to do their bit also saved precious time. That only came with the confidence born of experience and an awareness of the extent of my powers. If I was not sure about the merits of an application I asked for the views of the other party. See Appendix A and what that resulted in in Appendix B. Often, as in this case, an otherwise lengthy and time consuming process (for me, at any rate) was obviated.

Contrast also the quick and easy procedure for a setting aside by consent, Appendix E, (which obviates the need for a detailed critique of the tribunal’s decision but leaving the next tribunal wondering how to proceed) with the more satisfying and substantive procedure reflected in Appendix F. In appropriate cases, like F, I directed the submission provided on behalf of the Secretary of State to be before the next tribunal, as some indication of where the first tribunal went wrong and what not to do.

Morale is important in any sphere of work. Judges are no exception. We can all ‘go the extra mile’ as and when we feel moved so to do. Anecdotal evidence suggests that poor morale is endemic throughout the judiciary, especially at levels below the high court. There is a particular problem in relation to tribunals judiciary. They – we – are often perceived as the poor judicial relation of the judicial system, inferior

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<sup>39</sup> Legally binding written instructions to the parties to an appeal

in some way to those in the uniformed branch. No less a figure than the Deputy President of the Supreme Court, in a speech on judicial equality and diversity, said that *'The judiciary are divided into four: the 'officers', the High Court and above, the 'non-commissioned officers', the Circuit Bench and some equivalents, and the 'other ranks', the district judges and their equivalents and the 'unranked', the salaried tribunal judges.'* (Hale 2013).<sup>40</sup> So, the view from the very top, and from one who has been involved in many appeals emanating from tribunals, is that tribunal judges are a class apart from their colleagues in the uniformed branch.

Feeling undervalued does not affect the way tribunal judges work or their professionalism.. The way in which I and other tribunal judges were regarded by the Powers That Be does, however, have great significance. That is because of the perception of those Powers of what we do and our status impacts upon what is expected of us. For example, case loads for tribunals are set by negotiations between the Presidents of each jurisdiction and senior civil servants. It is, I suggest, a natural corollary of a false perception of our place in the judicial system and the complexity of the work we do that tribunal judges are faced with hearings lists that would not be tolerated elsewhere, in the uniformed branch. In *'Judging Civil Justice'* (Genn 2009: 176) Professor Dame Hazel Genn QC quotes a QC as saying that district judges grapple with issues that would be worthy of three days of argument in the High Court Chancery Division. (Appendix I exemplifies the breadth and depth of issues involved, appeals like this being of greater complexity than run of the mill Crown or County Court cases). The same is true in the tribunal world. A typical session's case list (a session being a half day) in the First-tier Tribunal (Social Entitlement Chamber) would consist of three disability allowance appeals, with 'float' cases as back ups in case of non attendance.

Although members of the judiciary are independent office holders, the justice system as a whole is administered by the Executive (the Government). Ministers have the benefit of advice from civil servants in relation to, for example, changes in the machinery of justice and the impact of proposed new legislation. There is, however, no continuum of knowledge in the civil servants in the Ministry of Justice, because civil servants regularly and frequently change jobs. In consequence, there is no lasting fund of knowledge. Ultimately, of course, policy

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<sup>40</sup> Lady Hale also clearly wishes to see more women judges and, indeed, it may be the logical consequence of her oft repeated views that there should be positive discrimination in favour of women in judicial appointments. That sets an entirely new hare running.



and its implementation is entirely a matter for ministers and the Government of the day. One of the functions of the civil service, however, is to provide advice and suggestions to ministers. A continuing body of knowledge within the civil service might well, I suggest, result in better informed advice and implementation.

*'In Anglo – Saxon countries, the judge ...is not, at least primarily, an inquisitor, and the system is called adversarial.'* So wrote Lord Hailsham, in *'On The Constitution.'*(Hailsham 1992:56). Not so in the tribunal jurisdiction. The judge here cannot rely on the parties or their representatives (if any) to correctly identify the relevant law or the probative value of the evidence. The judge in the inquisitorial tribunal jurisdiction has, arguably, to know more about the law and its application, and be better prepared for the hearing, than either of the parties or their representatives. He or she cannot just sit back listening to the evidence and arguments and say which are preferred. This judge has to be proactive, raising relevant issues not addressed by either side and cannot rely on the representatives to draw relevant matters to his or her attention.

The problems are ever changing but the essential pleasures tend to remain constant. Sometimes addressing the challenges arising from the problems is itself a new source of satisfaction.

## **CHAPTER 6**

### **Access to Justice – a serious and continuing problem and how to address it**

*‘Access to justice is the constitutional right of every citizen.’*(Ministry of Justice 2013).

#### **Does Justice Matter?**

Most people would say yes. If people do not have access to, or fail to obtain, ‘justice’, they may feel aggrieved and perhaps bitter. Many appellants applying to the Upper Tribunal for permission to appeal from the First-tier level make such comments. ‘Justice’ is the yardstick by which society measures and reacts to the law. Professor Dame Hazel Genn QC explains that it is important because the *‘...machinery of civil justice sustains social stability and economic growth...by protecting private and personal rights...’* (Genn 2008: 143).

If it is a given that *‘the phrase itself, ‘access to justice’, is a profound and powerful expression of a social need which is imperative, urgent and more widespread than is generally acknowledged’* (Jacob 1987:4) it must reasonably follow that consequences will ensue from lack of access to justice, even though, as Genn says, *‘The social benefit of the civil justice system is difficult to quantify in terms comprehensible to the Treasury.’* (Genn 2008: 47).

I suggest that access to ‘justice’, however conceived, is important for a number of reasons: First, justice is effectively synonymous with the rule of law, itself a

hallmark of a civilized society. Second, citizens, especially the most underprivileged and vulnerable, should have effective access to the courts or tribunals to protect and enforce their fundamental rights. Third, a stable society needs effective justice. If *'the right of ultimate recourse to the courts ... is necessary for the health and harmonious functioning of a civilized society'* (Thomas 2005: 42) it follows that lack of that recourse will affect society.

Access to justice is very important, not just to the individual but to society as a whole, as underpinning social order and stability. So how does this relate to welfare appeals?

### **Changes in access to justice**

The Legal Services Commission has announced its intention to end all community legal advice and network contracts, so affecting advice centres, designed to offer a one stop shop for people with social welfare and family legal problems. Such centres existed throughout the country,<sup>41</sup> mainly in areas of social deprivation. Many people used them and centres like them,<sup>42</sup> since many solicitors have no specialist welfare rights experience and advice agencies like these are invaluable in helping their clients to understand the issue, what the decision from the DWP means in real terms and whether to pursue an appeal. Many claimants are represented by experienced welfare rights advisors at tribunals. This greatly assists the tribunal in identifying the issues<sup>43</sup> and in the obtaining and presentation of evidence,<sup>44</sup> all of which ensures effective use of time in a busy day. Litigants in person have always been common in my jurisdiction, to a much greater extent than in the courts. This imposes an additional strain. As was said by the Judges' Council (chaired by the Lord Chief Justice) in responding to the proposed cuts in legal aid: *'The proposals would lead to a huge increase in the incidence of unrepresented litigants, with serious implications for the quality of justice...at a time when courts*

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<sup>41</sup> Manchester, Gateshead, Leicester, Derby, Hull, East Riding of Yorkshire, West Sussex, Wakefield and Barking and Dagenham for example

<sup>42</sup> For example local authority welfare rights organisations, Citizens Advice Bureaux and the like

<sup>43</sup> For example, in disability living allowance cases by making clear which component at which rate of benefit is argued for

<sup>44</sup> *'... judges like me are spending more and more of our time having to deal with litigants who simply do not know the law, have never heard of the Civil Procedure Rules...and have breached most of the case management directions.'* District Judge R Chapman, President of the Association of HM District Judges, quoted in *Law Society Gazette*, 10 May 2012. Whilst his comment is made in relation to court proceedings it is equally apposite to tribunal proceedings.

*are having to cope in any event with closures, budgetary cut – backs and reductions in staff numbers.*'(Judges' Council 2011).

The guiding principle ought to be that *'No matter how good tribunals may be, they do not fulfill 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.'* (Leggatt 2001: foreword)

Lord Carnwath recognizes problems in his comment that *'Ministry of Justice ministers and senior officials are beginning to get used to my constant refrain to 'think tribunals' whenever court or justice reform is on the agenda. If anything perhaps the danger is they may be too ready to see tribunals as a cheap and cheerful answer for all the problems of access to justice in cold times. That would be a fundamental mistake. Courts and tribunals are distinctive, complementary and essential parts of an effective justice system'* (Carnwath 2010).

Lord Carnwath, as (then) senior President of Tribunals was the country's most senior judge in the field of tribunals. As such he ought reasonably to have known about the value – added nature of the work undertaken by voluntary agencies, and what might result from its absence. He put it like this: *'I am very concerned as to the consequences of turning off the majority of civil legal aid, including particularly legal help, without plans for the development of alternatives. For example, Citizens Advice Bureaux play an essential role in explaining benefit decisions, helping appellants decide whether to appeal, and helping them to prepare. Without these actions the work of the tribunals may increase rather than decrease – both in terms of the numbers of cases and the length of hearings.'* (Carnwath 2010).

By the time the true cost has emerged it may be difficult if not impossible to remedy the defect. Similarly, although many lawyers offer *pro bono* services it should be borne in mind that *'...The expectation that pro bono, one of the more impressive parts of the 'Big Society', can pick up where £300m of civil legal aid cuts left off is fanciful.'*(Law Society Gazette 2013).

This problem looks set to worsen in future: In what has been described by one former Lord Chancellor<sup>45</sup> as a ‘Delphic’ statement the current Lord Chancellor<sup>46</sup> has said he wants to ‘...ensure that those who litigate in our courts pay their fair share, and that it is possible to raise the revenue and investment necessary to modernize the infrastructure and deliver a better and more flexible service to court users’. (Grayling 2013). It may be wishful thinking to suppose that in his reference to ‘courts’ the Lord Chancellor had in mind formal courts, as opposed to tribunals. Fees have, for example, been introduced in immigration appeals, dealt with in the tribunal system<sup>47</sup>.

That proper advice and representation is a ‘good thing’ is demonstrated by some statistics: The Disability Law Service, a registered charity which provides free legal advice and representation to disabled people, says that the success rates at tribunals where neither the claimant nor representative attend is about 20%, 51% where only the claimant attends and rising to 66% where both attend. These figures relate to First – tier tribunals but they have a knock on effect on appeals before the Upper Tribunal in that unsuccessful First –tier claimants may be spurred to challenge the decision on appeal. Since an appeal to the Upper Tribunal lies only on a point of law<sup>48</sup> the problems manifested before the First – tier tribunal are all the more to the fore before the Upper Tribunal.

The difficulties caused by lack of representation are getting worse. This is because of the increasing complexities of the legislative provisions and the regularity and frequency of change<sup>49</sup>. ‘There’s a lot of talk about *pro bono* and volunteers, but it must be understood that volunteers cannot replace the services provided for casework and specialist advice’ (Law Society Gazette 2013) so said the Chief Executive of a well respected advice agency, the Free Representation Unit.

What impact did all this have on my work? The answer is a serious one:

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<sup>45</sup> Falconer Lord C, 16 May 2013, The Times

<sup>46</sup> Rt Hon Chris Grayling MP, written statement. The rest of this statement was considered by many judges to be indicative of impending privatization of court resources, given the unusually high number of adverse judicial comments on the Ministry of Justice Judicial Intranet, a sort of judicial chatroom

<sup>47</sup> The fee in an oral immigration appeal is £140, a sum which, it is suggested, would be entirely beyond the means of many on benefits

<sup>48</sup> Section 11(1) Tribunals, Courts and Enforcement Act 2007

<sup>49</sup> A commissioner in CP/5257/99 described one legislative provision as ‘a masterpiece of obscurity’ and the Court of Appeal (not noted for overstatement) in *Concannon v Secretary of State for Social Security* spoke of some provisions as being of ‘*monumental complexity*.’

First, unsuccessful claimants are more likely to appeal. Proper representation at an early stage could enable more people to succeed, obviating any need for a further appeal and with a consequent saving of time and money. Even a losing claimant, however, would benefit from advice before embarking on an appeal. Not all cases are worth pursuing and even if they are, properly focused grounds of appeal, and marshalled arguments in support, made it easier for me to do my job and ensure that the interests of justice are served.

Second, the Upper Tribunal has to deal with cases ‘fairly and justly’. This ‘mission statement’ is to be found in the Upper Tribunal Rules<sup>50</sup>, and was not present in their predecessor. Nonetheless, it does no more than encapsulate in form what all courts and tribunals must surely have always striven for. This rule mirrors its counterpart in the First-tier Tribunal Rules<sup>51</sup> and is identical to a rule found in another major tribunal jurisdiction<sup>52</sup>. It is however difficult to achieve when one party is at a disadvantage in lacking knowledge of the law and tribunal procedure, which might otherwise be made good by representation.

Third, perception is a significant factor. That is because claimants, whether successful or not, like to feel that they have had a fair deal from the judge (if not from the legislation he or she applies) and it is important that no – one goes away from a hearing with a sense of grievance. That is part and parcel of the administration of justice. That means, in turn, that unrepresented claimants may well need longer to explain and develop their case. This may mean that an oral hearing is longer than it ought to be or, in cases dealt with by papers alone, it may necessitate more frequent and detailed case management directions<sup>53</sup> to ensure that the relevant issues are teased out and properly addressed.

Fourth, cases with unrepresented claimants often take longer to determine than those with the benefit of representation. This has implications in the effective use of resources, both judicial and administrative, not only for the particular claimant but for others in the system. This is compounded by budgetary restraints in the age

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<sup>50</sup> Tribunal Procedure (Upper Tribunal) Rules 2008, rule 2(1), under the heading “Overriding Objective.”

<sup>51</sup> Tribunal Procedure (First-tier Tribunal)(Social Entitlement Chamber) Rules 2008, rule2(1)

<sup>52</sup> Rule 2 of the Tribunal Procedure (First-tier Tribunal)(Immigration and Asylum Chamber) Rules 2014

<sup>53</sup> The Upper Tribunal is empowered to issue case management directions by rule 5 of the Procedure Rules 2008

of austerity. These usually mean that fewer administrative staff have to do the same amount of work as before. It may also mean restrictions on the numbers of Deputy (ie part time, remunerated on a daily fee basis) Upper Tribunal judges, and the frequency with which they sit.

Fifth, an extra judicial layer is imposed, in addition to the essential task of identifying the relevant law, interpreting and applying it, which alone is demanding. This is because in my jurisdiction I cannot be confident that the interests of the parties will be looked after by their representatives, because there often are none. Even in represented cases lawyers are rare. Some welfare rights workers are very experienced and are competent but other volunteers, from a variety of agencies, not only lack legal knowledge but have only a hazy understanding of the tribunal system and the law, which adversely affects the conduct of the case. As is recognized by the Judicial Working Group on Litigants in Person, over recent years many people are represented by lay advocates, with no training or qualification in the law, who act on payment of a fee (as distinct from voluntary representation by advice agency workers). Some are competent and responsible, others not. Since they are not professionally qualified they owe no duty to the tribunal and sometimes behave in a manner that would not be tolerated or expected of a qualified representative. My job was to be ever vigilant, at all stages in the proceedings, to ensure these problems are minimized.

In responding to an academic research project a circuit judge said that *'If you are an advocate you have lived with the case...you are in command of it...but as a judge you come to it much colder...'*(Darbyshire 2011: 79). Therein lies the essential difference between the adversarial and the inquisitorial procedure. In contrast to proceedings in the formal courts I, like other judges in the inquisitorial system, could not be assured that a case will be properly presented. That means that I, unlike a circuit judge, could not just sit back and listen to argument. To do my job properly I had to be in command of the case as least as well as any advocate would be. In another response to Darbyshire one chancery judge was shocked by cases where he was the only lawyer in court. That was, for me, commonplace.

Sixth, I could not tell beforehand what is the extent of a litigant in person's readiness, procedural and legal knowledge, confidence and aptitude for the

proceedings. These are largely unknown factors and so contingency planning is problematic.

Seventh, litigants in person are more likely to lodge misconceived applications and appeals and are more prone to making judicial complaints when, in reality, what they are really complaining about is the fact that they have lost their appeal. All this makes for a sense of unease and apprehension on my part.

Eighth, a case involving a litigant in person may require more proactive handling than one with representatives, in the form of case management directions, preliminary hearings to identify the issues and logistical matters, for example, and these factors impact on the time taken to determine that appeal, as well as on other appeals in the system, waiting longer to be heard. These factors are compounded if English is not the litigant's first language.<sup>54</sup>

Ninth, the relative scarcity of good advice means that those whose claims have little prospect of success are not dissuaded from pursuing bad cases, those whose grievances are more properly directed elsewhere (eg to ombudsmen) cannot be steered accordingly and those with meritorious claims lack an experienced voice to assist in the resolution of the dispute before litigation. All this increases the volume of work.

Given, then, that lack of representation causes problems – for the parties and myself, as a judge, how did I learn to mitigate it? There are a number of ways

First, tribunal proceedings (both at First-tier and Upper level) are inquisitorial<sup>55</sup>. The tribunal has an interventionist role. In other words an enabling role, designed to pick out salient issues, ensure the parties are aware of and address them and thereby spot points that may be of key relevance but previously overlooked. This is accomplished by not simply relying on the parties to set out their case but, for example, by oral questioning or case management directions, flagging up issues. It also means that the case papers have to be carefully scrutinised at all stages to

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<sup>54</sup> The Personal Support Unit, a voluntary nationwide advice and representation organization, estimates that 25% of its clients across England speak English as a second language. (Source: Access to Justice for Litigants in Person, Civil Justice Council)

<sup>55</sup> In contrast, proceedings in the courts are adversarial in nature, a sort of legal trial by combat in which the role of the judge is often restricted to ensuring fair play, assimilating the evidence and then ruling to whatever effect.



ensure the case progresses as expeditiously as possible and that relevant points are not lost sight of. My having had experience at First-tier tribunal level meant I was familiar with the inquisitorial system and comfortable with it. That said it has long been received wisdom that the enabling role must not translate into the judge descending into the arena. To do so would compromise judicial independence.

Second, although no party can be forced to seek, let alone obtain, representation (even if otherwise available) they can at least be made aware of its existence and how it might benefit them. This can and should be done at an early stage, since a late request for an adjournment or other time extension for representation may be met with a refusal. The benefits of representation can be seen by the complexities of the issues that had to be addressed in Appendix P. Without representation the Appellant would have been floundering.

All cases begin with permission to appeal. This is done either at First-tier or Upper Tribunal level. There is no appeal to the Upper Tribunal as of right.<sup>56</sup> Permission to appeal when given by the Upper Tribunal is expressed in writing and with reasons, highlighting the issues to the parties. At this stage a few lines in the determination of the application for permission, alerting the unrepresented claimant to the possibility of representation, and where advice may be had, may be opportune. Even if permission is refused this is still often a good idea. It may be, for example, that although there is no point of law in the application, the claimant might wish to think about a new claim or, possibly, a claim for maladministration. Also, this may be seen as an example of the judge directly engaging with the claimant, as opposed to ruling with lofty aloofness.

A consequence of the above approach may be an adjournment request to obtain that advice. An unintended consequence may be that an appellant, not having been able to find advice, may feel all the more vulnerable and exposed. That was in my view a risk worth the effort. Additionally it may be that an appellant, faced with what he or she perceives to be a ‘user friendly’ judge, may come to expect a similarly user orientated attitude throughout the proceedings. It may come as a shock if the judge is perceived to do a volte face and, perhaps, rule against the appellant at some stage. The answer to this problem is that at all stages I had to make it clear what I was doing and why, clearly and transparently, to avoid one

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<sup>56</sup> See, respectively, rule 38 of the First-tier Procedure Rules, rule 21 of the Upper Tribunal Procedure Rules and s11(1) Tribunals, Courts and Enforcement Act 2007

party extrapolating from an enabling approach an unwarranted partiality or sympathy.

Third, there are always two parties to an appeal, usually the unsuccessful appellant and the relevant Government Department. The latter has involvement throughout the case, unless permission to appeal is refused by the Upper Tribunal. An application to the Upper Tribunal is on an *ex parte* basis, that is to say without notice to the other side. That said I increasingly involved the Secretary of State's representative at the application stage: If, for example, the grounds as set out by the appellant were unclear, or if there was a complex point of law or voluminous documentation (as there often was) it seemed to me to be right to get the representative of the Government Department to comment.

Directing comment from the Government representative achieves several objectives: First, it is an effective time management strategy since what might otherwise take me a long time to get to grips with an application can be avoided by having the party do their bit in the appellate process. The time saved can be devoted to other cases. Second, the issues can be clarified and focused. This often saves time later, since if the application for permission is supported on behalf of the Secretary of State it usually makes for a speedier appeal, as the submission provided on the merits of the application can also serve as the submission on the appeal.

Fourth, I had cases in which the application seemed without merit but in which I thought it right to obtain an explanation from the other party of the decision under appeal, how and why it came to be made. This often demonstrated to an appellant a more personalized approach in the appellate process, since the submission provided on behalf of the Secretary of State will usually be more case specific than the often generalized and anodyne submission to the First – tier Tribunal. All this may add to the end to end time between receipt of an application for permission and disposal of the appeal. There is force in the maxim '*justice delayed is justice denied*'<sup>57</sup> but better delayed justice than expediency to its detriment – '*It is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done.*' (Hewart 1924: 246)

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<sup>57</sup> Whose origin is thought by some to lie in the Magna Carta – '*The Great Charter of the Liberties of England*' 1215 – '*To no one will we sell, to no one will we refuse or delay, right or justice*' Clause 40

Fifth, there is power under the rules<sup>58</sup> to direct an oral hearing, of an application for permission or a substantive appeal. This may follow a request from one or both of the parties, or of my own volition. It is a popular conception that court cases are dealt with by oral hearing. This is the image portrayed in television fiction, for example. The reality is very different. Many people in the tribunal jurisdiction have no wish to attend a hearing, and instead are content for matters to be decided ‘on the papers’. This is particularly the case in the jurisdiction of the Upper Tribunal, when a party may already have had an oral hearing at First – tier level and has no wish to travel to London when a point of law is at issue. An oral hearing before the Upper Tribunal is not an opportunity to re litigate the case as heard before the first – tier tribunal: the focus is materially different.

An oral hearing is resource heavy. It takes time to arrange and for the hearing to take place. For that reason experience taught me that it was a device to be used with care. A party wishing such a hearing will no doubt be pleased to have one but that may be at the expense of others in the system, who will have to wait longer for their appeal to be determined.

There are a number of factors I came to bear in mind in oral hearing cases: First, I always pointed out to the parties that such a hearing would not be a re-match of the original appeal. Its purpose is made clear in case management directions. That way the parties are prepared to deal with the issues and know what is expected of them.

Second, in general there is no point in such a hearing when the case can just as easily be decided on the papers. The only caveat is that refusing a hearing may leave a party with a lingering sense of injustice. The remedy lies in the explanation I gave in dealing with the request for an oral hearing.

Third, a complicated case will probably not lend itself to determination on the papers, since although the parties can set out their arguments in writing such cases inevitably, bearing in mind the inquisitorial function, raise issues that can be better dealt with orally, with the ebb and flow of oral argument. The benefits of such a hearing, in which lengthy and complex issues can be argued, is shown by Appendix N.

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<sup>58</sup> Tribunal Procedure (Upper Tribunal) Rules 2008, rule 5(3)

Fourth, notwithstanding that an oral hearing is not an opportunity for a losing party to have a hearing when they did not opt for one at First –tier level, there may be cases in which the interests of justice dictate a hearing. For example, it may be apparent from the grounds of appeal that a party is confused about the issues or has difficulty in expressing themselves in writing. This is increasingly common in an age of e-mails and texting. It often follows that in such cases that party would not fully grasp a written determination, no matter how user friendly in style and substance. It is better to take time at an oral hearing than to leave a party with a grievance, which may poison their view about the machinery of justice. That is all the more to the fore in cases involving the most vulnerable and disadvantaged in society.

Although the Upper Tribunal is based in London cases are often heard in the provinces. This is desirable in that it demonstrates taking justice to the people, quite apart from the fact that people usually feel more comfortable on their own territory and are thereby better able to participate in the appellate process.

What of video hearings? At face value these sound a good idea – there is no need for the parties to travel long distances, they have the opportunity of a real time hearing and the time and expense of a conventional oral hearing is avoided. Sadly, experience has shown video hearings are not as good as one might expect. They lack the human touch, as a hearing by technology distances the parties from each other and the judge.

*‘The law courts of England are open to all men, like the doors of Ritz Hotel.’<sup>59</sup>*  
Yes, well, that never was and never is likely to be the case, particularly since austerity measures increasingly bite hard in this area and seem set to continue. Lateral judicial thinking can go some way towards mitigating problems arising. In this regard tribunal judges are better placed than their uniformed branch colleagues, as they are used to an enabling, inquisitorial approach, enhanced by some of the techniques and measures I have indicated.

The mitigating measures I have referred to, however, are not a complete solution to modern problems of access to justice. They relieve symptoms but do not tackle the

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<sup>59</sup> Attributed to Mr Justice Darling

root cause. They often come at a price, for example lengthening one stage of the proceedings, as when the Respondent has to make a submission on the merits of an application, as in Appendix B. Although the end to end decision making process may be shortened by some of the measures I have identified increased time at one stage impacts adversely on statistics, since each stage of the appellate process has its own targets and statistical measures. So, taking longer to determine an application for permission, for example, would be reflected in permission statistics. This could add to the tension between judiciary and administrators, another factor arguing for a more balanced attitude by administrators to bare statistics and what judges do and why.

At the heart of these problems seems to be a lack of awareness of, or care about their effect, by the Executive. There are no votes in the Rule of Law, unless, of course, you feel let down by the system. People may not appreciate that *'The system of civil justice is of transcendent importance'* (Jacob 1986: 1) unless and until they are adversely and directly affected. True, access to justice is not synonymous with access to a court or tribunal but the only formal structure in our society to attain the former lies in access to the latter.

All this matters because of the importance of a healthy society. If law *'...is, in a fundamental sense constitutive of society...'* (Singh 2013: 8) it is a logical corollary that *'we must enable legal disputes, conflicts and complaints which inevitably arise in society to be resolved in an orderly way according to the justice of the case, so as to promote harmony and peace in society, lest they fester and breed discontent and disturbance.'* (Jacob 1978: 417):

So, in addition to a balance sheet approach to cost saving measures there needs, I suggest, to be some account taken of the potential for *'discontent and disturbance'* in order to form a balanced and properly informed view of the effect of those measures, in other words the wider costs of the reforms. Such a view is lacking at present, and no-one knows what the real costs are. This was written before gratifying endorsement of my views by the National Audit Office: *'The Ministry [of Justice] did not estimate the scale of most of the wider costs of the reforms...because it did not have a good understanding of how people would respond to the changes or what costs or benefits may arise.'* (National Audit Office 2014).

## **CHAPTER 7**

### **‘If I ruled the World...’**

How might the problems I have spoken of be improved, without greater financial resources?

First, codify the masses of legislation in straightforward and accessible language.

A former Lord Chief Justice (Bingham 2011: 37) takes it as axiomatic that the law should be accessible and so far as possible intelligible, and predictable. Law that is publicly available but of byzantine complexity must surely be a bad thing.

Legislative hyperactivity has become a permanent feature of our governance, Lord Neuberger says: *‘Partly because there are so many perceived problems in society, there is a welter of ill-conceived legislation – poor in quality and voluminous in quantity’*. As this can lead only to an illusion of action with no real achievement this is *‘...not conducive to justice and...it brings the legislature, even the rule of law, into disrepute’*(Neuberger 2013).

Much of modern legislation is in the form of statutory instruments, (SIs), in the main in the area of welfare law drafted ‘in-house’ by civil servants and lawyers who work under great pressure, to very short deadlines. The quality of SI drafting is worlds apart from the drafting of an act. The relative ease of passing SIs, the relative lack of parliamentary scrutiny and their ever increasing use have the cumulative effect of making the law complex and difficult to understand, let alone

apply. If, for example, the secondary legislation the subject of dispute in Appendix N had been more clearly drafted, and with a comprehensive definition section, such an issue may never have arisen.

There is just not enough time for all the welter of new legislation, primary and secondary, to be properly considered by those responsible for its drafting and enactment: Lord Neuberger correctly said that *'We need more legislation which is more critically and expertly considered and which is significantly less in quantity. Less and better legislation will not only mean better justice, as the law will be clearer and simpler. Because such a change will involve fewer statutes and SIs, it will also reduce costs – an important factor in an age of austerity.'*(Neuberger 2013).

As a corollary of reduced direct costs in producing legislation there would be a saving in indirect terms, since better legislation means less change, itself expensive.

Second, make better use of administrative resources

The tribunal process is *'...inquisitorial rather than adversarial...a co-operative process of investigation in which both the claimant and the department play their part'*(Hale 2004). See Appendices A, B and F as examples of the collaborative approach facilitated by case management.

One solution would be to make tribunals less paper dependent, by substituting electronic forms of communication. The tribunal system is heavily paper dependent, with typically a bundle of 80 or more pages at first tier level, copied to all involved then copied again for the Upper Tribunal together with all the documents relating to the appeal to the Upper Tribunal, a cumbersome and expensive total of hundreds of pages. More needs to be done to develop effective on-line systems which would minimize the need for expensive office space for judges, as much work could be home based.

Video hearings (despite their failings) could be used more frequently, too. These can result in savings, as the travelling costs of the claimant (borne by public funds) are reduced and, in theory, such hearings would not need formal court or tribunal premises. There is a price to be paid for such hearings, though: the technology and

cyber time have to be paid for and the lack of personal contact and the (albeit short) gap between speech transmission and reception, in my experience<sup>60</sup>, make it difficult fully to evaluate oral evidence. In the Upper Tribunal, however, in most cases there is no need for evidence to be taken.

Experience has shown me that short - term budgetary savings carry a hidden but nonetheless real cost, by, for example, a lack of presenting officers at tribunals. In contrast to First – tier hearings in the majority of appeal hearings before the Upper Tribunal the DWP (or other appropriate respondent) is represented. This, I suggest, is to place the balance of the decision making process at the wrong end. The tendency seems to be to regard the various stages of the appellate procedure as discrete, without considering the totality of end - to - end decision making and appeals. If better quality decisions were made by decision makers there would be fewer appeals.

Likewise, if better quality decisions were made by First-tier Tribunals there would be fewer onward appeals to the Upper Tribunal. This was recognized by The White Paper “Transforming Public Services: Complaints, Redress and Tribunals”.<sup>61</sup> The adequacy of the entire decision making and appellate process has to be viewed in totality. There are different players in the system – departmental decision makers, tribunals at First and Upper Tier levels, then the Court of Appeal, the Supreme Court and the European Court of Justice as well as the European Court of Human Rights. As the Senior President observed *‘No doubt each of these actors has an important role, but most of them are symbols of failure. And the higher up you get the greater the failure. The ideal play has only one act – the original decision.’* (Carnwath 2006).

A better quality of decision, with appropriate time taken, at lower stages would in many cases obviate the need for onward appeals. If First-tier Tribunals were not under such time pressure I suggest their decisions would be more sustainable on scrutiny by higher judicial authorities and may even result in fewer onward appeals. In contrast, an appeal before the Upper Tribunal has no discrete time constraints. The decision in Appendix K would have taken me several hours, quite

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<sup>60</sup> I have conducted video hearings in the Upper Tribunal and, sitting as an immigration judge, have conducted case management conferences and bail hearings by this means.

<sup>61</sup> July 2004 Cmnd 6243 HMSO



possibly a day, to write. The tribunal in that case would have had probably no more than 40 minutes allocated for the appeal.

So, better quality decisions at lower level would, I suggest, save time and money by reducing the need for an appeal in an individual case. True, the “unit cost” of each decision, whether by government decision maker or tribunal, would be higher but there would be an overall saving in the adjudication budget, if viewed as a coherent whole.

Key to better quality initial decision would be some form of review procedure, to ensure the decision is sustainable and defensible. The difficulty at present is that, in a civil service world ruled by statistics, performance indicators inhibit thorough consideration of a claim, at both the initial and review stage. Although such indicators may be a useful management tool they should be subsumed to be a servant of the system, not its master or *raison d’etre*.

Tribunal premises – in civil service speak ‘The Estate’ – are an administrative resource. They have an important role to play in the machinery of justice. They are part of the iconography of justice. Shoddy buildings, rushed staff and judges wandering along the corridor to collect their next case, because there is no one else to do it for them, reflect poorly on the justice system and in my experience engender resentment on the part of users, often resulting in further appeals. This has costs consequences which could be offset by proper maintenance of ‘The Estate’.

Public confidence in the tribunal system is, I suggest, necessary to avoid a corrosive and jaundiced attitude, prejudicial to a healthy society, and, as Genn says, *‘If corrosion of public confidence is a genuine threat...it would assist in shoring up those areas of activity that would best halt decline in confidence or promote renewed confidence.’* (Genn 2010: 178).

So, resource constraints may save money in the short term but they have real if not immediately apparent or quantifiable consequences for users.

Judges are themselves resources. As in any other profession time and the pressure of work take their toll. There is also a danger of case weariness and cynicism. These things arise from the judicial battery having a low charge, just enough to run

the judge machine but not at optimum level. Holidays provide a quick but unsustainable charge. In the current climate sabbaticals would not find favour but thinking the unthinkable might result in better motivated judges, increased and better quality output and longer judicial service before retirement, thus reducing the call on the judicial pension fund. In America sabbaticals can be taken by senior judges. They might prove beneficial here.

The Administrative Appeals Chamber is a collective judicial resource. The workload is ever increasing. There seems a tendency on the part of the Government to assign new rights of appeal to this Chamber so long as they appear to fit, albeit loosely, in this jurisdiction. That is fine but the corollary is that the Chamber needs proper resourcing, and in turn that is dependent upon work forecasting.

Forecasting the size and type of workload increase is an inexact science, dependent to some extent on Departmental predictions. In the past these have invariably proved largely inaccurate. A better and more reliable system of forecasting needs to be thought about, and the appointments system improved.

Third, better relations between judiciary and administration.

Although judges and administrators are said to work in partnership their aims are different. Most partnerships are directed to a common aim, but the working lives of civil servants are ruled by statistics, performance targets and budgets. Not so with judges. Common goals are more in the form of conceptual mission statements about the delivery of justice, as opposed to mechanisms for its attainment.

Judges and their administrators need to recognize that each has a very different job to do and that there is in reality little interface between them. Being under no delusions about this might help to dispel any resentment arising from the fact that it is the administrators who hold the departmental purse strings, and who will, even in the same department as the judges, not be receptive to judicial suggestions unless and until they can be quantified in cost benefit terms, and a business case shown. The corollary is that complaints by judges, about for example sharing clerks, poor premises and administrative errors, are invariably met with a blanket justification of budgetary resources, irrespective of the reality of the situation.

The tensions arising between judges and administrators are real, and perhaps replicate those in other areas in which there is an interface between the professional function and the administration in the organization in which that function is delivered, such as the NHS. Judges often bear the consequences of actions by administrators but there is no correlation between effect and responsibility, since judges have no real power over administrators. With continued austerity measures these problems are set to continue and probably worsen. What is needed is an awareness of and recognition by administrators that it is judges, not they, who are at the sharp end of the justice system and so due heed must be paid to the views of judges, even though their concerns cannot always be justified in simple accounting terms.

Fourth, more robust judgments.

No judgment can be perfect. It will always be susceptible to some form of criticism, whether justified or not. I agree with Lord Neuberger that *'many of us judges should be more self confident, more ruthless, when we write our judgments.'*(Neuberger 2013). That is particularly apposite in judgments of the Upper Tribunal, since they are binding on lower tribunals, decision makers and representatives when points of law are in issue. The longer a judgment the greater likelihood that the central issue, and the crux of what is decided and why, will be obscured and it may also be that the distinction between core reasoning and by the way comment<sup>62</sup> is blurred.

Today, in my view, there are too many judgments<sup>63</sup>. If the law is unclear an authoritative judgment is needed for clarification. Too often, however, judgments appear to conflict with each other and result in further judgments at higher judicial level. The result is, as Cover puts it, that sometimes the problem that requires a court or tribunal to make an authoritative ruling is not that the law is unclear but that there is too much law, so that courts (especially appellate courts) exist to *'suppress law, to choose between two or more laws, to impose upon law a hierarchy.'*(Cover 1983: foreword).

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<sup>62</sup> In legal terminology ratio decidendi and obiter dicta, respectively

<sup>63</sup> Interestingly, I wrote this before publication of an article in The Times legal section, 23 October 2013: *'Teamwork in the Supreme Court is bringing the clarity of more single judgments...partly the dramatic rise in single judgments is down to the ever rising workload of the court, partly it is due to a desire to offer greater guidance to hard pressed judges in the lower courts.'*

That there are too many, and too long judgments, is a direct function of the proliferation of badly drafted law.

Fifth, rational and courteous political debate.

I have commented on the trend to demonization of benefit claimants, of problems of access to justice and the societal impact of this. Better quality political debate, calm reflection and measured legislative change, as appropriate, would benefit all in society.

## **CHAPTER 8**

### **‘Have you thought about becoming a Judge ?’**

So reads a leaflet now appearing in courts and tribunals. As part of the new process of transparency and diversity people are for the first time encouraged to think about becoming judges. Arguably, there are now more incentives than ever to do so. Private practice is under threat as never before. Set against that a judicial life has its attractions: a fixed salary, a pensions scheme, a more settled way of life, freedom from partners’ fee income chivvying and status. Added to that are factors such as public service, a chance to make a difference and so on.

In ‘Becoming a Judge’<sup>64</sup> the Law Society lists, as the reasons people seek to join the judiciary, as including the chance to make decisions that affect people’s lives, a desire to contribute to public service, the opportunity to add value to a firm or employer, a new personal and professional challenge, a wish to gain new legal skills, and personal pride and social standing. From a survey in August 2013 the Judicial Appointments Commission learned that 97% of applicants were motivated because they thought the work interesting, 93% wanted to make a difference to the law and 89% felt a sense of public service.

Experience has taught me that those aspiring to the judiciary, whether on a fee paid or salaried basis, need to have certain qualities, and be aware of some things which will not be revealed by official sources.

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<sup>64</sup> Law Society, 2010

A judge clearly must be a competent lawyer, though not necessarily have prior experience in the relevant jurisdiction, as training will be given. A colleague once said that of all in court the judge is the one who needs to know the least about the law, since that will be explained to the judge and argued about by the advocates. That is no longer the case, especially in an inquisitorial system, and especially with the increase in litigants in person.

The Judicial Executive Board reports<sup>65</sup> that the sharp rise in litigants in person is putting significant pressure on civil courts and tribunals, creating delays, security problems and forcing a change in the ways judges work. As the Times legal correspondent says, this means that ‘Judges will increasingly hold the ring, doing the work of lawyers,’(Gibb 2014) a markedly different role from judges in the past. These problems are likely to worsen, given that the Justice Minister<sup>66</sup> tells the Times that he wants lawyers out of the process as much as possible. Although his comments were made by reference to mediation some may think that they indicate a wider view of lawyers in the justice system. DIY justice seems set to become the norm, meaning more and more difficult work for judges.

A judge must know when to bring proceedings back on track. It is no good just sitting back and letting the parties and their advocates (if any) battle it out. So, as a judge you must have the ability to direct and retain control, but not in an authoritarian way, with the risk of alienating the representatives and erecting a barrier to justice, not to mention a potential appeal. The trick is to do this as pleasantly and politely as possible – a smile as appropriate, a ‘will you forgive me Mr X if I ask you to move on...’, putting your pen down as an indicator that what is being said has no relevance, stopping repetitive questions by ‘Thank you Mr X, I see the point you are making’ and above all unfailing courtesy and patience, even in the face of an impossible witness or an awkward advocate. Techniques like these will get the parties eating out of your hand, and make your life easier.

Obviously judges must lack bias and have good listening skills. That does not mean no prior knowledge or views on the case. An open mind does not mean an empty one. Preparation is worth its weight in gold. It saves time, enabling a judge to home in on the issues, demonstrates to the parties and representatives that the

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<sup>65</sup> Report, May 2014

<sup>66</sup> Simon Hughes MP

judge has a grasp of the case and thereby fosters the view that he is interested in and engages with the case.

Aspiring judges need to be aware that they will live in a legislative framework of continual change. This can be stimulating and avoids the tedium inherent in stagnation but it comes at a cost – that of continual training, discarding former legislative regimes and the comfort of the familiar and the challenge of the new and untested. New judges need the resilience to withstand this and the increasing volumes of work and fewer resources. Austerity measures will continue for years to come and will effectively increase pressure on judges in terms of workload and administrative back up.

In addition to resilience a new judge will need a thick skin, as an insulation against attacks by politicians and actual or perceived criticism from higher judicial authorities. Politicians not infrequently nowadays attack judgments (especially in human rights) but judges have no right of reply. That must be accepted with the territory. Also, no judgment is appeal proof, nor should judges seek to make it so. It is inherent in judicial work that one's decisions will sometimes be overturned on appeal.

Sometimes it needs a real effort not to take this as a reflection on one's abilities. I have both been overturned and have been the overturner, so to speak. I know full well how it feels. New judges need to regard being overturned as a positive learning experience, not a negative criticism. Remember that the higher judicial authorities themselves are vulnerable to onward appeals. (In Appendix M the House of Lords Judicial Committee, as it then was, said that the Court of Appeal had got it wrong). This goes hand in hand with obscure legislation, a fertile area for appeals.

New judges may like to remember the salutary comments of the Supreme Court about a Court of Appeal case<sup>67</sup>: *'The problem lies in the drafting of the relevant provisions, which defies conventional analysis. It is not only obscure in places and lacking in detail, but contains pointers in both directions.'* Take comfort, then, from the fact that, on the same legislative provisions, three experienced Court of Appeal judges reached three different conclusions.

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<sup>67</sup> AS v Secretary of State for the Home Department [2009] EWCA Civ 1076

Given that no judgment can be a model of perfection new judges should be ready to take risks, recognizing that no judge at any level can in every case say with absolute certainty what the result should be. Knowing what will be acceptable in risk taking will come with experience.

For example, a new, timorous judge may be loath to depart from the stricture of procedural requirements in, say, the order of written submissions. Generally, though, that which is done can always be undone and if a party raises a valid objection rulings and even judgments can be set aside without the need for a formal appeal.

Similarly, although unfailing courtesy is essential that does not mean that a new judge should fear expressing robust views where appropriate. Balanced against that is the need not to develop 'judgitis', not very common nowadays but seen in the past when some judges used language of a bygone age and body or verbal language which conflated their judicial position with that of a higher entity. Humility is the key in this, and maybe an inscription facing the judge, like that of the apocryphal 'shut up you fool' would be useful.

In order to survive, or hopefully thrive, as a judge all these things need to be borne in mind. They are not esoteric or conceptually intellectual but they have been tried and tested by my experience and they work, at least to some degree.

Without being cynical or defeatist aspiring judges should realize that they cannot please everyone and may indeed please neither of the parties in a case. Not all wrongs can be resolved by the law, since disputes involve human beings whose feelings can be put at risk in the context of a dispute. That may be also true of the judge, whose own views cannot be superimposed (at least not consciously) on the law.

Realise too that despite any deficiencies in the law or 'the system' order and the Rule of Law is better than disorder and anarchy. Nothing designed or implemented by humans attains perfection. All states and systems of governance (including that aspect of governance represented by the law and the justice system) are flawed. The rational and ethical response to that is the need for the judgment and wisdom of people in making any system function in an orderly way. Despite current trends



for decision making by computers (for example in benefit claims dependent upon points scoring) judgment and wisdom are different from quantitative analysis and the mere application of a process to a situation. A computer lacks understanding. Although judges cannot alter the raw material with which they work - the law – they can apply it in a way no machine could, by understanding its concepts and aims and applying them by well established principles. We are still, in the law at any rate, many years away from the ‘intelligent machine’ written about by Alan Turing in 1947.

Do not look for the perfect or ‘right’ answer. There isn’t one. *Judges can do no more than harness and manage their intelligence and capabilities so as to provide the best answer possible in the circumstances of the case.*’ (Thomas 2010: 184).

Aim for clarity and brevity. Self evident, but not always just for the reasons one might think. An additional reason is not making yourself – or your fellow judges – a hostage to fortune. Focused, relevant and material judgments make it harder for parties (especially litigants in person) to cite selective and unrepresentative extracts in other cases. In the digital age there is a plethora of on – line authorities and litigants in person lack the skills or, indeed, duty to the tribunal owed by lawyers, to sort the wheat from the chaff.

Be stoical. No judge can escape comment or criticism. Criticism comes with the turf. So should stoicism.<sup>68</sup> I know this full well. As an Upper Tribunal judge I often overturned decisions of other judges. Now, as a first tier immigration judge I in turn am sometimes overturned by the Upper Tribunal, a salutary reminder of the judicial facts of life.

Realize that your own expectations of yourself and those of others will change and be moulded by the judicial organization of which you are part. As Thomas says *‘Judges become a member of an institution with a role to play and that role attracts a broad perception which subverts the idiosyncratic to the institution.’*(Thomas 2010: 246).

As John Donne said, no man is an island, entire unto himself, neither is any judge. Irrespective of the background of the judge he or she will consciously or

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<sup>68</sup> *‘In the present era the spotlight on the judiciary is more acute than ever before.’* McCloskey J, Nwaighe [2014]UKUT 00418 (IAT)

unconsciously adjust and respond to the expectations of a raft, so that a greater or lesser measure of conformity is inevitable.

Judicial life does not suit all lawyers. Some may miss the camaraderie and rivalry of a practising lawyer, some may find judicial life isolated and exposed and some may miss trying to persuade others of the merits of the case. I have, though, never come across a judge who has resigned because he did not like judging. I have, similarly, come across many lawyers who would jump at the chance of a judicial appointment. All I can say is that if I were able to write my own job description I could hardly do better than write that of a judge.

## **CHAPTER 9**

### **Conclusion**

When I began this work I had no clear road map of where I wanted to go or the final destination. As the work progressed my thinking developed, partly as a result of reading the views of other commentators, which resonated with mine. In doing so I guarded against ‘data mining’, the sifting of evidence until it supports a desired outcome.

There is a medical analogy: a patient may have disparate symptoms, of no significance to him, but a doctor may connect all in arriving at a diagnosis and, in particular, treatment. The ‘diagnosis’ here is the identification of current judicial problems, the ‘treatment’ being how to solve or at least mitigate their effect.

The learning outcome for me has been, in part, that resilience in the face of rapidly changing and hastily thought out legislation comes from a realisation that such challenges offer an opportunity to develop the law, with the job satisfaction that brings. Additionally, I have come to appreciate the collegiate atmosphere of my jurisdiction in which, unlike most judges in the ‘uniformed’ branch, almost all of us worked in the same building. That offers the benefits of a collective, in which thoughts – and complaints – may readily be interchanged. At the very least that provides a release mechanism from tedium, irritation and frustration, for example.

Decisions of the upper tribunal have the force of precedent. Not all involve new points of law but in those in which a precedential decision is called for I have learned to be selective, and focused. Unless the case in question raises fairly and

squarely the issue needing to be decided any views expressed on that point will not be crucial to the reasoning. Different views of different judges on any such issue, but not essential to the individual case, mean that once a clear cut case has to be decided there is a fog of peripheral views in other cases, and this tends to obscure the essential issue and leads to longer, more complex, decisions, as those other views have to be taken into account. I have, then, learned to resist beachcombing for a new point.

Austerity measures often translate into significant time pressure, an aspect of resource allocation. I have come to appreciate the value of lateral judicial thinking, the 'smarter' if not 'harder' working techniques of active case management, facilitating a collaborative approach to decision making. In this another medical analogy arises: a doctor will deal with diagnosis, prognosis and treatment but the patient also has an essential role to play, by co-operating in the treatment regime, and others (nurses, medical administrators and so on) also have their part to play.

The overview I have taken brings the uncomfortable awareness that the ever prescriptive nature of welfare law (like immigration and asylum law) means that judges are more than ever inescapably involved in the implementation of policy, reflected in prescriptive law. The result is less room for the traditional judicial function.

Prescription does not unavoidably remove any 'reasonableness' concept or application but it does significantly reduce its ambit. Room to manoeuvre, however, still lies in the discretion arising in, for example, adjournments, time limits in case management, compliance with directions and so on. All these involve consideration of 'the interests of justice', another way, I suggest, of expressing reasonableness. My internal code of reasonableness has been framed by my education, upbringing and the people I came into contact with in private practice and as appellants. It is informed by the fact that my jurisdiction involves 'people law', the law that applies to the most vulnerable and disadvantaged in our society. As such it must be transparent, accessible and clear, and in my view humane in its application. I see this area of law as an aspect of a civilized society, part of the normative structure of our society.

In so far as I am able to be 'reasonable' there are no controlling master theories or standards against which reasonableness may be tested. It is so case dependent. Like

the elephant test, we may find it difficult accurately to describe but we all know it when we see it. That is tempered by the fact that what may seem eminently reasonable to a Guardian reader may seem manifestly unreasonable to a Daily Mail reader. Moreover, although I have to give reasons for any judgment those reasons do not have to be reasonable, save that they must address the issues, law and evidence.

In other words a 'reasonable' judgment does not depend on one's view of the merits or moral value of the law to be applied. Interestingly, one definition of 'reasonable' is 'having sound judgment'. (Oxford 2001). In the same vein, if justice is found in 'the disposition to fairness, to give each their due' (Salum 2003: 196) I have administered 'justice' in ensuring that each receives their 'due', in the sense of legal entitlement. It may be that 'reasonable' in this sense equates with rationality, in that my decisions are supported by known judicial techniques, precedent, interpretation and so on, and thereby are 'justified' to the parties. Reasonableness may also lie not so much in what is done but in the manner in which it is done, if 'a disposition to fairness is constituted in part by having the right sort of emotional equipment for sympathy, an appropriate, even handed concern for the interests of others.' (Salum 2003: 196). Perhaps in this sense only my judgments have been 'reasonable' given the lack of further appeals from me. I recognize, however, that this may be due to 'appeal fatigue' on the part of an appellant, who might find the prospect of the Court of Appeal daunting. It might also suggest a conservative approach in my judgments but, that said, one of the benefits of working in the Upper Tribunal is the absence of a daily case list to clear. Within reason, then, I could take time to make what I considered to be the 'right' (perhaps 'correct' would be a better word) decision.

Once a decision has been 'put to bed' it becomes history but even so I cannot ever recall agonizing that I had made the 'wrong' decision and even when I was reversed by the Court of Appeal that decision turned on interpretation of an arcane point of law, not whether I had acted 'unreasonably'. I have come to recognize that there may be an element of self protection in this, since judges'...feel a psychological compulsion to think they are making the right decision...No one likes to be tormented, so judges do not look back and worry about how many of their thousands [of judgments] may have been mistaken. As the years pass they become increasingly confident because they have behind them an ever – longer train of decisions that they doubt not are sound.' (Posner 2010:289).

What Posner calls legalism is an apt description of prescriptive law, with the result that I cannot in many cases have resort to ‘nonlegalist’ factors such as what is ‘just’ or ‘fair’. (Posner 2010: 77). Indeed, ‘No law can be unjust’ (Hobbes 1996: 230) for what is just is determined by positive law. So, then, my own views on the law I apply have no relevance: in the same way that it serves no purpose if a doctor rails against a particularly awful medical condition – he just has to treat it – I just have to apply the law before me in the particular case. As Tamanaha asserts ‘...the rule of law is compatible with, and may be instituted by, a system that contains the most immoral of laws’ (Tamanaha 2001: 98).

The ‘boundaries, barriers and benefits’ remain. The boundaries are ever more shrinking, circumscribing by extensively prescriptive law what many would regard as the full and proper ambit of the judicial function, and thereby drawing judges into the policy implementation collective. The barriers are particularly to the fore, given the continuing focus on austerity measures and all that this implies. The measures I have indicated go some way to addressing consequential problems, but those measures are in the form of symptomatic, not curative, treatment. The benefits system, and individuals within it, is often in the eye of the public and the government and the ability by the citizen to challenge authority, by use of the appellate system, is a valuable part of democracy in action. Arguably the government now more than ever before involves itself in many aspects of ordinary life, so that the benefits of an independent, motivated and properly resourced judiciary continue undiminished, even enhanced, as the hallmark of the rule of law, itself a source of protection for you – and for me.

As a part time judge I will continue to utilize judgecraft techniques I have learned and developed over the years, and will continue to be an ardent disciple of active case management and the collaborative approach. In a sense the narrative I have provided illustrates how and why I have come to adapt to contemporary issues in judging and in that sense, then, it is a theory of practice. I am fortified in a key part of this theory - the case management/collaborative approach - by the fact that this is strongly advocated in a recent JUSTICE report (JUSTICE 2015) and, as an authoritative commentator says ‘The path ahead is clear...it requires more proactive case management by judges to identify what is in dispute and what is the best way of proceeding quickly and efficiently to a conclusion...’ (Pannick 2015).

My theory of and practice of judgecraft has been based on the traditional judicial virtues of independence, lack of partiality, open mindedness, integrity and the like and I have been trained in effective communication techniques, how to assimilate and deal with rapidly changing law, how to work with others and, for example, issues to do with race and discrimination. All this equips me to deal with what Tamanaha calls 'law in the books' but what of 'the gap between the written law and the practices of lawyers and judges'? (Tamanaha 2001). 'The difficulties of...interpretation arise when the legislature has no meaning at all; when the question which is raised on the statute never occurred to it' (Gray 1909: 165.) Modern legislatures are very different from those Gray had in mind in 1909. They leave little room for the exercise of what Hart calls 'interstitial powers' (Hart 1994: 273).The 'gap' spoken of by Tamanaha, and inherent in the words of Gray, is in reality very narrow in welfare law. That is because the legislation increasingly aims to address every contingency, so that 'unresolvable gaps' (Thomas 2005: 326) are few and far between. Such gaps cannot be filled on a hunch, the sort of thing that arises from the 'God Syndrome...which settles on some judges shortly after their appointment to the Bench' (Thomas 2005: 326). My antidote to that is continually to be aware that being a judge is a unique privilege, and to be reminded every day of the problems of the most vulnerable in our society. That fosters humility.

Also, decisions of the upper tribunal are in effect working tools for use not only by the parties to an appeal but by other stakeholders – departmental decision makers, representatives and so on. As such, and remembering that 'the rules by which the citizen is to be bound should be ascertainable by him' (Diplock 1981: 279), my aim has been to make decisions as short and clear as reasonably possible. Long decisions which are little more than a discourse on the area of law involved make for difficult reading and application, as their salient point(s) may be elusive, they lend themselves to unrepresentative selective citation in other cases and 'length, prolixity and elaboration [lead] to inaccessibility' (Bingham 2011: 43). The 'ability to understand the interests and passion of those who appear before [me]' (Salum 2003: 186) forms part of the backdrop to my work, illuminated by the fact that this is law for people in the real world, affecting real lives.

When full retirement beckons I hope to give something back, perhaps in training or writing for a wider audience. That is a challenge yet to be met.

*Word count (excluding footnotes, appendix and references) 26860*

## **APPENDIX**

This appendix includes a range of decisions, indicative of the work I have done in the Upper Tribunal and redacted where appropriate to preserve anonymity.

Below is a brief commentary on the issue in each case.

### **A**

Case management directions, saving time by requiring the respondent to say what they made of the merits of an application for permission to appeal.

### **B**

The submission which followed from A. The end to end decision making process was shortened as the detailed submission on the merits, from the respondent, formed the basis of my decision in the appeal.

### **C**

A determination of an application for permission to appeal to the Upper Tribunal. Time spent on a fairly detailed determination meant that the parties would then be able to focus on the issues and would be better able to engage in the appellate process than they would have been by a simple, quick but uncritical “permission to appeal is granted.”

### **D**



An example of a determination of an unsuccessful application for permission. These required equally, if not more, detailed reasons as successful applications, so that parties would not be left in the dark about why their application had failed. Inadequate shorter reasons, although perhaps quicker, may have led to judicial review or complaint, requiring more time and costs to deal with.

#### **E**

A decision setting aside a decision of the lower tribunal, where both parties agreed the tribunal's decision was erroneous in law. Quick and easy but having the disadvantage of lacking substance.

#### **F**

This is the sort of decision on appeal which follows the kind of case management directions referred to above. Such directions put the appeal on the right track and the parties are free to agree or disagree with the issues identified in the permission. Usually they agree and, if they do, the subsequent decision just needs to encapsulate what was said earlier at the permission stage, with, as appropriate, any useful comment by either of the parties. A particularly useful case management technique when time is scarce, because of pressure of work.

#### **G**

An unusual case. Not an appeal as such, but a matter referred up to the commissioner by the Secretary of State for determination. Welfare law is so heavily circumscribed that empathy, humanity and compassion can rarely play a part. In this case, however, the law was much more fluid, and so I felt I was able to act in a humane - but still legally permissible - way because of the degree of discretion allowed by the law. In consequence I found this a refreshing change.

#### **H**

An example of a case showing some of the problems encountered by foreign widows, claiming widow's benefit. Such appeals are common and pose particular evidential difficulties, since the claimant is never able to give direct evidence to the tribunal. This shows the importance of the active and objective participation in the appeal by the respondent, the Secretary of State. Without that I may have missed salient points, the appeal would have taken longer and possibly with a very different result. Pressure of resources may mean that such participation will be

lacking in future, to the detriment of justice.

## **I**

The rate of income support paid to couples was less than that for two individuals. This often raised issues about whether people were “living together as a married or unmarried couple.” If benefit was wrongly paid there was usually an overpayment decision. In this appeal also there were human rights issues raised and arguments about the legality of evidence given under caution at interview. These complications illustrate the breadth and depth of issues often involved, so much so that such a case is of greater complexity than the run of the mill Crown or County Court case, a factor disappointingly not recognized by those who disparage tribunal work.

## **J**

An industrial injuries case, involving consideration of whether the claimant still had any disability attributable to the relevant accident. There was no dispute that the claimant had medical problems, but I was required to separate my feelings as a human being from the rigid requirements of the law. That did not cause me any anxiety or conflict, since it is perfectly permissible for the law to regulate claims in this way, and in any event the claim was to industrial injuries benefit. Clearly, the nexus had to be present.

## **K**

This appeal involved incapacity benefit, now replaced by employment and support allowance, which is more extensively set out in the complex legislation. This appeal shows some of the problems involved in even a relatively straightforward predecessor of the current benefit. The decision also says something about the standards of decision making expected of tribunals. I have no record of how long I spent on this (or any other) appeal, but I estimate I would have taken several hours, in reading the papers, considering the law and simply deliberating. The lower tribunal would have had about 30 minutes to determine the appeal. The disparity is striking, and may indicate that if lower tribunals were allowed more time better quality decisions would result. I recognize that the corollary may be that different time constraints in the Upper Tribunal may result in an excessively picky poring over of the decision under appeal.

## **L**

In some categories the Upper Tribunal has the same judicial review jurisdiction as the High Court. This case is a judicial review decision, which followed detailed reasons given for permission to apply for judicial review. It revolves around an issue of procedural fairness.

## **M**

An example of problems sometimes faced by asylum seekers who claim income support. This case shows that even the Court of Appeal does not always get the “right” answer, since the interpretation of the relevant phrase adopted by the Court of Appeal was shown to be wrong, by the House of Lords. I was able to give a substantive decision on the merits of the original application, instead of sending the case back for rehearing before the lower tribunal.

## **N**

An example of an appeal in which seemingly innocuous words (“provided by”) can give rise to problems of interpretation and application. A difficult case, with both parties represented by experienced advocates. This case illustrates some of the sources that may be used as an aid to interpretation. It also serves to illustrate the problems caused by seemingly innocuous legislation, which could have been avoided if the legislation were clearer. Also, this case was difficult enough even with the aid of skilled counsel. Without proper, or any, representation determination of the appeal would have taken much longer and without the crucial benefit of my hearing all that could reasonably be said on behalf of the parties. In such cases the gap between what might be revealed by the inquisitorial approach and proper representation is often so wide that it materially affects the appeal.

## **O**

A disability living allowance claim. This shows that interpretations used in earlier, replaced, legislation can still be valid. It shows the complexity of the law in question and how this causes difficulties in interpretation and application. Although I held the decision of the tribunal to be in error of law I was not able to give my own decision on the underlying appeal as matters arose which were best dealt with by a fresh tribunal, to whom I gave directions.

## **P**

An appeal involving a claim to jobseeker’s allowance. A complex case, requiring consideration of the substantive domestic law, human rights law and European

Union law, discrimination issues and in which both sides were represented by counsel well versed in the field. It was conceded that the lower tribunal's decision had to be set aside but this was not a case in which it was appropriate to remit for rehearing below, because matters of legal interpretation and application were in issue and the lower tribunal would have been no better placed than I to address these. The points it illustrates are the same as those in A12.

## **Q**

An appeal relating to a question of benefit entitlement and recovery. The amount involved was relatively small but the decision illustrates the complexities of the legislation, which applies irrespective of the amounts involved.

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