Justice Committee

Tribunals (Scotland) Bill

Written submission from Douglas J May QC and Allan J Gamble

1. We are salaried judges of the Upper Tribunal, Administrative Appeals Chamber, sitting in Scotland. Our Chamber is presided over by Mr Justice Charles. There are salaried judges in England and Wales and Northern Ireland as well as ourselves. We hold permanent Crown appointments. In both Scotland and England and Wales there are a number of fee paid judges who hold tenure on five year appointments. The Chamber hears appeals from the following First-tier Chambers namely Social Entitlement, Health Education and Social Care, General Regulatory, Armed Forces Pensions and also from the Pensions Appeal Tribunal in Scotland, which is devolved, but appeals are heard by our Chamber of the Upper Tribunal. In addition we hear appeals from the Traffic Commissioners. We have accepted the invitation for one of us to present oral evidence to the Committee. However, we are presenting this written evidence setting out the principal issues we would wish to bring to the attention of the Committee.

2. We consider that the proposed new system for devolved tribunals in Scotland to be an improvement on the existing arrangements. We are fortified in that view by our own experience of the implementation of the Tribunals, Courts and Enforcement Act 2007 which has brought consistency and coherence to administrative justice on both reserved jurisdictions and those relating exclusively to England and Wales such as the Health Education and Social Care jurisdictions. We do however note that the scope and extent of the devolved jurisdictions to be transferred in is more restrictive than originally contemplated. Thus at the present time the extent of the reform is quite limited and accordingly may be thought not to achieve the objectives of carrying out the reform.

We are further not satisfied that the Bill takes properly into account the distinctive nature of the Lands tribunal which does not fit in happily with the structure provided for in the Bill, both in relation to their jurisdiction and the current arrangements for the appointment and payment of their members. It is however for them to make their own case about that. We also note that this tribunal performs certain reserved functions and clearly there will have to be a resolution with the UK Government as to how these functions are to be dealt with.

3. In our view the Bill is correct when it makes provision for appeals to the Upper Tribunal on points of law only with permission. The advantage of such appeals is that it enables an expert Upper Tribunal to set out coherent bodies of law on the subject matter of the divisions that will be created and provides a readily available and accessible method of seeking redress on a point of law from decisions of First-tier Tribunals. Such appeals are both cheaper and quicker than taking proceedings in the Court of Session or the Sheriff Court. It also means that the Court of Session will only be used where there is an important point of principle or practice to be determined and will not be burdened with more simple points of law such as whether or not the facts and reasons stated by the First-tier Tribunal are adequate. The right of appeal is rightly restricted as an Upper Tribunal is not geared to hear evidence as
to fact and engage in a rehearing of all the issues in a particular case. That is both time-consuming and as experience shows, through the work of the Administrative Appeals Chamber in the reserved jurisdictions, unnecessary.

4. We would however point out that whilst we agree with paragraph 88 of the Policy Memorandum it is to some extent unrealistic to imagine that the volume of appeals in devolved tribunals to the Upper Tribunal will remain as low as is currently the case where appeal goes to the courts. This is due to the fact that appeal to the Upper Tribunal is, and will be, more accessible and cheaper. Experience in England and Wales suggests that there will be more appeals to the Upper Tribunal than to the Courts in the case of Mental Health. The mental health and special educational needs jurisdictions which will be brought in to the new system by the Bill are covered for England and Wales by the Health Education and Social Care Chamber of the First-tier. The experience of the Administrative Appeals Chamber on appeals from that Chamber has demonstrated that these cases are more time-consuming than appeals from the other First-tier Chambers which provide the work of our Chamber.

5. It is noted that the proposed membership of the Upper Tribunal is not to consist of salaried judges. Indeed it seems to be contemplated that principally the membership will consist of Court of Session Judges and Sheriffs. The disadvantage of that is that the specific expertise of tribunal judges will be missing, though an increasing number of Court of Session Judges are gaining experience of the work of the Upper Tribunal in the reserved jurisdictions by sitting in the Administrative Appeals Chamber, the Immigration Chamber and the Tax Chambers of the Upper Tribunal. We consider that clause 17(2)(b) of the Bill is useful in that it will provide, subject to the consent of the Senior President of Tribunals, for the opportunity of Upper Tribunal Judges such as ourselves to sit in the devolved jurisdictions and will enable us to bring our expertise particularly in respect of areas which our colleagues in England and Wales already hear appeals on the same subject matters there. We will suggest that clause 17(8)(a) be slightly amended to cover Upper Tribunal Judges as well as retired Court of Session Judges.

6. We do, however, have reservations about a number of the proposals contained in the Bill. These are set out below.

(a) Rules

One the reasons why the 2007 Act has been so successful has been because of the setting up of the Tribunal Procedure Committee which has drafted a generic set of rules with the necessary adaptions to the needs of specific Chambers in both the Upper Tier and the First-tier. Having a consistent set of rules from the outset gives coherence to the whole system and is obviously beneficial both to the Judiciary and those who use the tribunal because there is a consistency in relation to the way in which appeals are to be conducted both before the First-tier and the Upper Tier. We do recognise that the extent of the tribunals which are to be incorporated under this Bill are much more limited in size and scope than those covered by the 2007 Act and can understand why a separate Tribunals Procedure Committee could be thought to be unnecessary. However, simply by allowing the existing rules of each tribunal to operate under the new structure until such time as the Scottish Civil Justice Council can make rules for the tribunals rather defeats the objectives of the Bill. In addition
there is no Upper Tribunal at present and rules will have to be made for the Upper Tribunal. That becomes a much more difficult exercise when the Upper Tribunal rules that are created will require to dovetail in with the various existing rules of the different tribunals which are transferred in. We do not endeavour to offer a solution to this but it is a problem which we consider the Justice Committee ought to be made aware of.

(b) Review of decisions of the Upper Tribunal

Clause 38 of the Bill allows the Upper Tribunal to review a decision made by it on any matter in a case before it. Clause 38(3) allows the tribunal rules to make provision for restricting the availability of a review. That is not something which should be left to tribunal rules. The important point of principle involved in respect of review of the Upper Tribunal is that as the appeal to the Upper Tribunal is an error of law only it would be wrong for another Upper Tribunal Judge to review a decision of the judge who made it because a different view of the law is taken by the reviewing judge. That subverts the whole purpose of an appeal on a point of law with a further right of appeal on permission to the Court of Session. Exclusion of such a review should be set out in the primary legislation as should the scope of any review of the Upper Tribunal of its decisions.

(c) Actions on Review

Clause 39[2][b] and [3] makes provision for a reference by the First-tier Tribunal to the Upper Tribunal for decision when carrying out a review of its decisions. That is a position which is effectively lifted from the 2007 Act. In practice this is rarely used and it is not an effective remedy, the Upper Tribunal as we have indicated not being geared to hearing cases at first instance.

Appeal to the Upper Tribunal against the decision is a better approach.

(d) Practice Directions

We are concerned by the provisions contained in clause 68(5) which makes provision for the President of Tribunals and the Vice-President of the Upper Tribunal to issue instructions for guidance on the application or interpretation of the law. Whether or not a First-tier Tribunal errs in law is a matter for the judicial determination of the Upper Tribunal having heard argument. It subverts the whole process of appeal on a point of law if a judge who is not engaged in hearing the case can give general directions as to what the law is or how it should be applied. The law should be determined by the Upper Tribunal Judge having regard to the relevant statutory provisions and judicial precedent not by instruction or guidance by another judge acting in a non-judicial capacity however senior.

(e) Judicial Reviews

Under the 2007 Act the Upper Tribunal is constituted a superior court of record. This has advantage both in relation to the conduct of judicial reviews and also from the point of view of enforcing Orders. We understand that there is some objection to constituting the Upper Tribunal in court in Scotland in respect of the devolved
jurisdictions but in our mind we cannot see the reason why. We do note that there is provision to give the Upper Tribunal powers to act as if a court both in relation to judicial review and enforcement of orders and that may be sufficient.

(f) **Appointments**

The Bill in respect of the security of tenure proposes a five year tenure. As it is not intended to appoint salaried judges, as we understand it, in either the Upper Tribunal or First-tier Tribunal this is broadly acceptable. However it would no proper basis for the appointment of salaried judges who in our view require a proper security of tenure such as that enjoyed by salaried judges under the 2007 Act and by Court of Session Judges and Sheriffs. It would be difficult to recruit suitable appointees on such a limited basis if salaried judges were to be introduced.

(g) **Re-appointment**

We are somewhat concerned about the proposal contained in schedule 7, paragraph 6 (b)(i) and (ii).

This provision introduces the concept of judicial redundancy and in respect of sub-clause (b)(ii) involves a process of selection as to which members will be reappointed and which will not. We can see the attraction from a financial point of view of being able to dispose of the services of judges where the business is insufficient. It is however important to appreciate that security of tenure and the expectation of reappointment, where the duties have been performed properly and the requirements of office have been adhered to, is an important ingredient in maintaining public confidence in the independence and impartiality of the judiciary. This involves the protection from removal and from not being reappointed on an arbitrary or selective basis.

7. One of our concerns about the Bill was that if the work of the reserved tribunals was devolved by the UK Government at some future date its provisions particularly in relation to appointments remuneration and tenure would not be suitable for the members of such tribunals sitting in Scotland having regard to the current arrangements for them. However this would appear no longer to be an issue as the Lord Chancellor has stated on 19 June 2013 that such devolution of the work of the reserved tribunals is not to take place, at least for a period of some years. We are strongly of the view that the best interests of users in Scotland is that the reserved tribunals should remain intact and there should be no devolution of their functions. The 2007 Act works well. As they are concerned with the application of British Statutes applying throughout the United Kingdom (with certain exceptions in relation to Northern Ireland) it is better to have the coherence that is created by a unified judicial structure than by splitting it.

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