

JUDICIAL INDEPENDENCE AND THE THE TRIBUNALS SYSTEM

Note of Seminar held at Queen Mary, University of London

18th April 2013

1. Introduction

This is a note of a seminar on on 'Judicial Independence and the Tribunals System' that took place at Queen Mary, University of London on 18th April 2013. The seminar was the seventh in a series run under the auspices of a 3-year AHRC-funded project on *The Politics of Judicial Independence in Britain's Changing Constitution* by the Constitution Unit at UCL, Queen Mary University of London and the University of Birmingham. Those participating in the seminar had a professional interest in the issue, with contributions from senior and former judges, civil servants, journalists and others. The event was run under the Chatham House Rule and this short note reflects that. It is intended to give a general impression of some of the themes discussed.

2. Relations between the Tribunals system and the Courts system

Initial fears that the merger between courts and tribunals would damage the distinctive features of tribunals – their accessibility, speed, specialisation and informal approach – and lead to domination by a judicial ethos have not been realised. The courts have already learned from the management processes of tribunals. Whereas tribunals have become a little more generalist, increasingly courts are moving towards specialisation. Tribunals' courses in judge-craft were picked up by the 'uniform branch'. There are also processes for appraisal and mentoring and more case management than was historically the case. However, for judicial independence to be maintained these systems must be led by judges.

One participant felt that the idea of a 'judicial family', which is now used to describe the merged courts and tribunals judiciary, is problematic because it conceals the fact that the distinct philosophies of the two groups cannot be maintained at the same time that greater convergence is encouraged. Judicial independence is likely to mean quite different things for different parts of the judiciary.

Participants took different views on the independence of individual judges. Some argued that it was no longer acceptable for every judge to be 'an island', isolated from others. There is a requirement of consistency in judicial decision-making, particularly in tribunals where frequently there will be a single departmental respondent and a large number of appeals. Applicants will think it unjust if like cases are not treated in the same way. However, others were concerned about potential pressure on judges to impress their superiors. Pressure to conform may lead to bad decisions.

3. Relations between Tribunals and Government Departments

The main enhancement in the independence of tribunals came not with the merger of Courts Service and Tribunals Service in 2011 (with the creation of HMCTS) but with the earlier creation of the Tribunals Service in 2006, which unified tribunals under a single administration that was independent from the government departments. Approaches to administration varied significantly prior to that point, depending on the attitude of the government department that a tribunal served, and in some cases tribunals were treated as an irritating addendum to the work of departmental administrators. For those working in the

new independent service, administration of tribunals was their core purpose. Under the Tribunals Service, and subsequently under HMCTS, organisational performance has significantly improved.

However, an unintended consequence of the change has been a loss of interest by government departments in the process. It is now rare in some tribunals to see presenting officers from departments turning up, and the success rates for applicants can be very high. Where presenting officers do attend hearings they are often poorly prepared. Most of the budget for tribunals now comes from the Ministry of Justice (departments contribute a block grant) and the financial incentive for departments to resolve cases before they go to a tribunal has been diminished. Tribunal judges find themselves explaining the department's case to applicants who frequently cannot understand the documents they have been sent, and coaching government departments to improve their performance and reduce administrative problems. Tribunals are also asked by departments for privileged feedback to improve their decision-making processes but such information is not provided to the ordinary citizen. There is a risk that a perception of lack of independence is created as a result.

Independence from government is a key issue for tribunals in Wales. The Welsh system inherited a patchwork of tribunals without any overarching policy or concept of tribunal independence. Gradually, however, the system is being reformed. A new Administrative Justice and Tribunals Unit (AJTU) has been established and tribunals are gradually being transferred to the AJTU and leaving their sponsoring departments. Improvements are happening, but the process is slow because of a lack of resources.

4. Should judges be permitted to return to private practice?

A surprising feature of the discussion was that the majority of participants felt that judges should be permitted to return to private practice after retirement; but some senior judges feel strongly that the current prohibition on return to practice should be maintained. Participants pointed to the fact that many fee-paid judges effectively work longer hours than their salaried colleagues, yet fee-paid judges may remain in private practice even alongside their judicial work. It is difficult to draw a principled distinction between these two categories of judge in this context. Some participants suggested that the rule could be modified to permit former judges to practise in roles that did not directly engage them in litigation.

One participant noted that it will become increasingly difficult to resist those judges who wish to return to private practice as provisions enabling part-time salaried work come into effect. If a judge has been working at 60% whilst raising children, why should they not do something other than judging for the remaining 40% of their time once their children have left school?