SHOULD THE CHARITY TRIBUNAL BE REFORMED?[1]

Alison McKenna[2]

Section 73 of the Charities Act 2006 provides for a report on the operation of the Act to be provided to Parliament, with the person to conduct the review expected to be appointed by November 2011. It is hoped that the report will include consideration of the Charity Tribunal created by the Act (now the First-tier Tribunal (Charity)) and that the sector will be able to contribute to a debate about whether the Tribunal should be reformed.

It is not for me to suggest any particular legislative change but I would like to offer my observations on the existing Tribunal - what works well now and what might benefit from further thought. I should stress that these are my personal views only.

In this article I will (i) recall the legislative rationale for the Charity Tribunal; (ii) describe its current architecture, because it has changed quite markedly from the judicial body originally conceived in the 2006 Act, as a result of wider tribunal reforms; (iii) say something about the nature of our work to date; and (iv) encourage the sector (by which I mean not only charities but also their professional advisers and academics) to consider whether the Tribunal's jurisdiction and powers should be included in the review of the 2006 Act and if so, what they might be looking for at the end of that process.

1. Rationale for the Creation of a Charity Tribunal

The Prime Minister's Strategy Unit, in its report on charity law and regulation in 2002, commented that '*the Charity Commission's decisions should be, in both fact and appearance, open to challenge*'. The Charity Tribunal was then conceived of as part of the revised accountability framework for the new-style Charity Commission,

1 This is an amended and updated version of the talk given at the Charity Law & Policy Unit, University of Liverpool in November 2010.

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in addition to other initiatives such as the holding of public board meetings and reporting to Parliament.

The embryonic Tribunal was presented to Parliament and debated in the run-up to the 2006 Act. There was a high degree of consensus about this area of the then Bill (unlike some other areas), however there was one discernible thread of disagreement which concerned the range of decisions which could be appealed to the Tribunal. I shall come back to that later.

In terms of the policy rationale for the Tribunal, it was argued that the creation of a specialist tribunal was necessary for two reasons. Firstly, charities had expressed the view that they could not afford to mount a challenge of their regulator the Charity Commission, as the cost of bringing either an action in the Chancery Division of the High Court or of making an application for judicial review in the Administrative Court was prohibitive. The argument went further in suggesting that it was not appropriate for a modern regulator to be in the position of knowing that it could not be challenged, so the creation of a low-cost and informal independent judicial tribunal was intended to provide not only a more accessible, cheap and user-friendly means of challenging the Commission's decisions, but also to form part of the accountability framework for it as a modern regulator.

The second policy objective arose from the concern expressed by the sector, and perhaps particularly its advisers, at the paucity of charity law issues coming before the High Court, so that charity law was said to have ossified and was unable to keep pace with the changing role of charities in society. The Tribunal created by the 2006 Act was intended to be the forum for the development of this new case law for charities, however, as it was not established as a Superior Court of Record, binding precedent could only have been established under the 2006 Act provisions by appealing a decision of the Tribunal to the High Court. This seemed to me a somewhat curious way of achieving the second objective.

So, by the time the 2006 Act was passed, having been looked at from all angles over some four years of Parliamentary time, the judicial body that had been created had assumed the dichotomous role of providing charities with swift, low-cost access to justice on the one hand, and of clarifying and developing charity law on the other. As I have said elsewhere, I am sure I was not alone in wondering how one Tribunal would be able to deliver on those twin objectives. Now that we have the benefit of three years of road-testing, and with the Parliamentary review of the Act coming up so soon, I think that now is a good time for the sector to remind itself of these policy objectives and take time to consider whether they are still felt to be the right ones and whether the Tribunal that we now have is indeed able to deliver them.

2. The Architecture of the Tribunal

Turning to my second topic, I want to look at the architecture of the Charity Tribunal as it has been reformed by the Tribunals Courts and Enforcement Act 2007 ('the TCEA'). I was aware, when I was appointed as the Charity Tribunal's first President, that the Tribunal created by the 2006 Act was about to be re-shaped fundamentally by the TCEA. The TCEA would completely re-order the tribunals landscape over the subsequent couple of years, in what the Senior President of Tribunals, Lord Justice Carnwath, has called a 'quiet revolution'. It seems to me that charity lawyers, in common with lawyers involved in many other areas of regulatory advice work, have been sent on a rather steep learning curve in order to keep pace with the impact of the tribunal reforms on their area of practice.

(a) Tribunal Reforms

Figure 1 is a diagram showing how the tribunal system is now structured following the TCEA reforms, which have brought together a wide range of justiciable subject areas into a two-tier structure, which is constitutionally independent of government and brings consistency of approach to the system through the adoption of common procedural rules. You will see that the charity jurisdiction sits in the General Regulatory Chamber in the First-tier Tribunal and in the Tax and Chancery Chamber in the Upper Tribunal. Of particular importance in the reformed structure was the creation of a dedicated Upper Tribunal which would hear appeals from the First-tier, and which was constituted as a Superior Court of Record by virtue section 3(5) of the TCEA.[3]

The tribunal reforms have provided an important opportunity for the development of a discrete concept of tribunals justice. There is an emerging jurisprudence about how tribunals do their work, what makes them different from courts, procedural fairness in a quasi-inquisitorial context – and so on. The significant decisions of the Upper Tribunal appear on the relevant jurisdictional websites. Charity law students, practitioners and academics will now need to start looking at the decisions of the Upper Tribunal in jurisdictional subject areas other than charity in order to see how the jurisprudence affects the charity jurisdiction. You will, for example, need to be aware that there is now a system of precedent in the Upper Tribunal so that the decision of a three Judge panel takes precedence over the decision of a single Judge.[4] The Upper Tribunal has also recently considered the extent to which it is bound by decisions of the High Court.[5] In the General Regulatory Chamber in which the charity jurisdiction sits, first-instance decisions which are thought by the

3 The meaning of 'Superior Court of Record' in this context has recently been considered by the Supreme Court in *R (on the application of Cart) v The Upper Tribunal* [2011] UKSC 28.

4 *Dorset Healthcare Trust v MH* [2009] UKUT 4 (AAC).

5 *Secretary of State for Justice v RB* [2010] UKUT 454 (AAC).

Chamber President to be significant are denoted by the allocation of a neutral citation number. Whilst these are instructive, it is important to remember that it is only decisions of the Upper Tribunal which create precedent binding the First-tier and the executive.

The TCEA reforms also presented an important opportunity for the stand-alone Charity Tribunal created by the 2006 Act to reform itself into a body that had a rather better chance of delivering its twin objectives. The establishment of the Upper Tribunal as a Superior Court of Record offered charities a dedicated forum for the consideration of complex matters of charity law by specialist judiciary and a meaningful opportunity for precedent-setting where novel points of law arose. But of equal importance in my view was the preservation of the procedural informality and quasi-inquisitorial approach characteristic of tribunals, which would be available for the majority of cases heard in the First-tier Tribunal, where appellants appearing in person could be assisted in the presentation of their case.

The TCEA reforms therefore offered charities the opportunity to take full advantage of the new two-tier system and, to this end, the charity jurisdiction eventually transferred simultaneously into both the First-tier and the Upper Tribunal, as what we in tribunal-world call a 'hybrid' jurisdiction. The somewhat esoteric provisions of the 'Transfer Order'[6] effecting the transfer of the Tribunal's powers, conferred joint first instance jurisdiction on the First-tier and the Upper Tribunal in charity cases, and so provided the structure which now allows appropriate cases to be 'fast-tracked' to a level where precedent can be set for the benefit of the sector as a whole.

We have now published on our website guidance[7] informing parties how they might go about asking for a 'fast-track' in suitable cases and our rules[8] provide a framework for the exercise of judicial discretion on the question of transfer. The rules also make it possible to separate out points of law for a preliminary ruling by the Upper Tribunal, with the ultimate determination of the factual issues being remitted back to the First-tier Tribunal. This allows for the determination of a case by Judge-only panels in the Upper Tribunal and the involvement of our specialist lay members in the evaluation of evidence in the First-tier. So, in my view, the possible 'elevation' of a suitable charity case to the Upper Tribunal is a positive addition to the Tribunal's armoury, making us rather fitter for purpose than we would have been under the 2006 Act alone.

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6 The Transfer of Functions of the Charity Tribunal Order 2009, SI 2009/1834.

7 http://www.justice.gov.uk/downloads/guidance/courts-and-tribunals/tribunals/forms/DiscretionaryTransfersofCharityAppeals.pdf

8 The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, SI 2009/1976, available at http://www.justice.gov.uk/downloads/guidance/courts-and-tribunals/tribunals/tribunals-rules-2009-at010411.pdf

The final comment I would like to make about the TCEA reforms is that applications for judicial review of decisions of the Charity Commission may now be transferred from the Administrative Court to the Upper Tribunal (Tax and Chancery Chamber) by virtue of section 31A of the Senior Courts Act 1981. In the first Reference concerning independent schools, a simultaneous judicial review application raising similar issues was transferred to the Upper Tribunal so that the two cases would be heard together.[9] As I will mention when discussing the Attorney General's References later in this article, the remedies available in a judicial review under section 31 of the Senior Courts Act 1981 make an interesting point of comparison with the lack of a defined 'remedy' in relation to a Reference.

One anomaly arising from this reform, however, impacts upon cases where there is no right of appeal to the Tribunal under the provisions of the table in Schedule 1C to the 1993 Act, but there is a basis for applying for judicial review of the Charity Commission's decision. For the reasons I have explained, such an application is now likely to be heard in the Upper Tribunal, however each case must be transferred from the Administrative Court rather than commenced in the Tribunal. I tend to think that it would be more consistent with the legislative intentions behind the creation of the Tribunal for such matters to be amenable to review in the First-tier Tribunal so that the Appellant concerned does not have to go round in a circle. In one case so far, we have exercised a case management power to transfer a case to the Administrative Court. This was at the Appellant's request and was in order not to leave him without a remedy, because he would otherwise have been struck-out for want of jurisdiction. It is useful to have the power to transfer a case to another Court or Tribunal, however I am generally reluctant to transfer an Appellant from the Tribunal's costs-neutral environment into one where there are court fees to pay, a different and more complex procedure to follow and a risk of costs being awarded against an unsuccessful litigant.

(b) The Reformed Charity Tribunal

Despite the far-reaching nature of the TCEA reforms, it is important to emphasise that the fundamental jurisdiction of the Charity Tribunal was unchanged by its transmogrification into the First-tier Tribunal (Charity).

The architecture of the charity jurisdiction is provided by section 2A(4) of the Charities Act 1993. In summary, there are three distinct types of application which may be made to the Tribunal. These are: firstly, appeals, which involve substantive re-hearings of the decisions, directions or orders of the Charity Commission, as set out in a table in Schedule 1C to the 1993 Act (as amended by the 2006 Act). The table in Schedule 1C tells you in column one what decisions can be appealed, in column two, who can appeal them, and in column three, what the Tribunal can do if

9 Sales J ruling on the transfer of the ISC's judical review application to the Upper Tribunal is reported at [2010] EWHC 2604 (Admin).

the appeal is upheld. (I will come back to the issue of the table in Schedule 1C. It goes on for eight pages, includes 50 categories of decision which might be challenged in some way, and yet it has distinguished itself so far in providing a better foundation for strike-outs, transfers and elevations than for substantive hearings by the Tribunal. I would also comment that as both the category of persons with standing to apply to the Tribunal, and the powers which the Tribunal may exercise if allowing an appeal or a review application, vary according to each original decision, direction or order engaged, it is essential to find the relevant Schedule 1C entry and read across the columns to confirm the applicable regime in each and every case. This is understandably very confusing for litigants in person who often do not know the provenance of the legal power the Commission has or has not exercised in any event.)

The second type of case we can hear is a Review, which refers to a category of decisions made by the regulator which are not capable of a substantive re-hearing by way of appeal, but in respect of which there is a right to review by the Tribunal, applying the principles that the High Court would apply on an application for judicial review – so including issues of procedural fairness, human rights, proportionality and so forth. (One has to look elsewhere in the Act for the list of reviewable matters,[10] so the table is not exactly user-friendly in this regard either). The Tribunal has published an annotated table on its website, making the appeal and review rights clear for users.

The appeal or review rights engaged by the relevant actions of the Charity Commission are arranged in column one of the table in the same numerical order as the sections of the 1993 Act, so it is esoteric if not entirely impenetrable. However, I do spend a lot of time explaining how the table works and I cannot help feeling there could be a simpler arrangement. I note that the table is capable of amendment by order[11] so there would not need to be primary legislation to sort it out. It would be possible, for example, to identify the appeal rights with reference to the subject-matter of the jurisdiction being exercised by the Commission rather than the relevant statutory provision only – Hubert Picarda has recently produced an excellent thematic table of the appeal rights in his latest text book.

The third type of case we can hear is a Reference, which is a matter referred to the Tribunal by the Attorney General (or, with his consent, the Charity Commission) to clarify charity law. This is effectively a declaratory jurisdiction, perhaps most closely analogous to the availability of an 'advisory opinion' in judicial review proceedings.[12]

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10 For reviewable matters, see Charities Act 1993, Schedule 1C, paras 3 and 4.

11 It is likely to be amended shortly to insert new appeal rights in respect of Charitable Incorporated Organisations.

12 For an academic discussion of 'advisory opinions' see Sir John Laws, 'Judicial Remedies and the Constitution' (1994) 57 MLR 2123 and also Daniel Kolinsky, 'Advisory Declarations: Recent Developments' [1999] JR 225.

3. The Role of the Attorney General

It is important to acknowledge the breadth of the Attorney General's potential role in the cases coming before the Tribunal. In addition to References, the Attorney General may himself initiate appeals and reviews of the decisions, directions or orders in the Schedule 1C table; he may also be joined as a party to any onward appeal from the First-tier Tribunal to the Upper Tribunal, whether or not he was a party to the original proceedings; and he can be asked to 'assist' the Tribunal with any question arising in proceedings, without necessarily participating in the whole case.

In the cases that we have heard so far, the Attorney General has intervened (at the instigation of the Tribunal) in one case, offered assistance to the Tribunal in another and has so far made two References to the Tribunal. The involvement of the Attorney General has proved extremely useful to the Tribunal thus far, but it is, of course, difficult to predict how frequently his powers will be exercised in future. It seems to me that in view of the non-availability of public legal funding for applications to the Tribunal, (which seems even less likely in the current financial climate) the Attorney General might consider publishing a policy statement describing in broad terms the situations in which he might make References to the Tribunal on matters of general concern for the charity sector and providing charities with information about how to petition him to do so.

4. The Cases so Far

The Tribunal has received 21 applications over the past three years.[13] In the first couple of operating years, the number of cases was so low as to be similar to the number of charity appeals to the High Court in preceding years. This inevitably raised questions about whether the policy rationales for the creation of the Tribunal had been achieved. However, in its third year of operation, the number of applications increased significantly, albeit that many of them proved to fall outside of our jurisdiction. This in turn raises some interesting policy questions about the Tribunal's jurisdictional remit.[14]

The cases have varied greatly in complexity and subject matter, ranging from disputes about recreation grounds, to the impact of equality legislation on charitable

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13 2008 – 2009 - 3 applications
2009 – 2010 - 3 applications
2010 - 2011 - 12 applications
2011 – 2012 - 3 applications to date (April – August).

14 For details of cases before the Tribunal see:
http://www.justice.gov.uk/downloads/guidance/courts-and-tribunals/tribunals/charities/charity-register-cases.pdf

adoption agencies, and the human rights issues involved in the removal from office of a charity trustee. Some of these cases have involved detailed and complicated matters of law, argued by leading counsel. In this sort of case, it does feel largely as though the Chancery Division has simply decamped into the Tribunal hearing room. The inevitable consequence of a room full of lawyers is that the cost to the parties is raised.

By contrast, in the cases which have involved litigants in person, such as the Kidd Legacy case, the Tribunal has been able to take a more proactive approach to assisting the Appellants to make out their case. We have adopted a flexible approach to our work, for example ruling on the relevant issues in advance of the hearing, and asking the Charity Commission to present its case first, so that the Appellants get the best chance to present a focussed case in reply. The overriding objective contained within our procedural rules encourages such an approach and I sincerely hope that we will have more hearings with litigants in person or in-house lawyers or with charities represented by the free advice agencies, so that we can be seen to be doing more of what we were set up to do in the First-tier and perhaps save the barristers for the Upper Tribunal cases. Our procedural rules are straight-forward and common-sensical, they are used by litigants in person in the other jurisdictions in which I sit, and in my view it should be the exception not the rule for parties to instruct counsel in a First-tier case.

(a) The Number of Cases

It is worth considering why the number of appeals to the Tribunal is so much lower than predicted. It seems to me that a number of factors may be at play here.

Firstly, charities are understandably (and appropriately) litigation averse, so that it is only as a last resort that they bring cases to the Tribunal. This makes it all the more important for them to know that it is not necessary to be legally represented in the Tribunal (although there is a pro bono scheme available should charities wish to take advantage of it) and to make them aware that the Tribunal is an overwhelmingly costs-neutral environment, so that there is no risk of costs being awarded against a charity simply because it loses its appeal. The risk of costs arises only where a party has behaved unreasonably in conducting their case. It is also important for charities to know that it is possible under our procedural rules to opt for their case to be determined by the Tribunal on the papers and without an oral hearing so that in these circumstances the charity might limit its expenditure on lawyers to the preparation of the papers only. It may well be that charities wish to see the first few cases go through the Tribunal with lawyers involved before they feel brave enough to try the Tribunal for themselves and yet I constantly come across charities representing appellants in other parts of the Tribunal system, so the sector already has important knowledge and experience to share.

The second reason I have been given for the low number of cases is that some charity lawyers still prefer to use the Commission's informal internal review process rather than to come to the Tribunal and they advise their clients accordingly. I must confess to some bewilderment at this approach. It has been suggested to me that it may be due to the fact that so few charity lawyers are in the litigation departments of their firms and they don't want to pass the file over to a litigation lawyer. I do not know if that is correct. Nevertheless, no matter which type of lawyer manages the process, if a charity has a limited resource to spend on challenging a decision of the Commission, it seems to me that it will get more bang for its buck if an application is lodged with the Tribunal (which charities can do by e mail and for free), resulting in disclosure of the Commission's papers and allowing the case to be heard by an independent Tribunal in possession of all the relevant information. If lawyers advise their clients to stay in the Commission's internal system, they do not thereby secure for them a formal system of disclosure or adjudication by an independent body and the client may use up its limited resource for legal advice before it even gets to the Tribunal.

There are other factors to consider regarding the Charity Commission's internal review process, which was introduced to coincide with the Tribunal's commencement of work. Under the pre-TCEA Charity Tribunal Rules, the Commission took the view that it was only its 'final decision' (by which it meant one that had been internally reviewed) which engaged the statutory appeal rights in column one of the table in Schedule 1C. This approach suggested that there was an obligation on appellants to go through the Commission's internal review procedure before accessing the Tribunal. When we had an opportunity to adopt new rules under the TCEA reforms, the words 'final decision' were excised. The Commission's website now makes it plain to charities that a legally effective decision, i.e. one that can be relied upon by the recipient to take some action and which decision has been made by an officer with the authority to take it, engages the appeal rights conferred by Parliament. The website also makes it clear that there is therefore no obligation to go through the internal review process before accessing the Tribunal (although charities can obviously choose to do so if they wish). It may be that an erroneous understanding of the relationship between the internal process and the Tribunal persists in the sector.

It is also the case that, whilst local settlement of disputes is generally encouraged as good practice by public authorities, there is a particular tension in the charity jurisdiction between local settlement on the particular facts of a case (where the issues in dispute never make it into the public domain) and the legislative intention that the Tribunal would be the means by which new case law would evolve for the charity sector. The wider sector obviously cannot have its say on points of principle if the disputes are not made transparent, and so the settlement of most disputes through the internal process has, I feel, meant that it is effectively the Commission rather than the sector which chooses the cases to come forward to set a precedent. I do not suggest that there are sinister motives on the part of the Commission, but this

approach does seem to me to be at odds with the intention of Parliament in establishing a Tribunal designed to stimulate the evolution of charity law. By contrast, the Tribunal must publish details of its cases so that charities might join in or otherwise contribute where the issues touch upon their areas of interest.

Another important factor to mention here is the relationship between the charity as the putative Appellant and the Charity Commission as the putative Respondent. I cannot think of any other situation where a Respondent to legal proceedings has a supervisory or regulatory role in relation to how the Appellant spends its money. However in the charity jurisdiction there is this real conflict of interest for the Charity Commission in its dual role as regulator and Respondent in the same proceedings which it seems to me could and should be addressed. Charities often cite their concern about their future relationship with the Commission as a reason for not wishing to litigate against it. One way to approach this problem would be to confer on the Tribunal the power to authorise the expenditure of charity funds on bringing a meritorious case, in a procedure analogous to a *Re Beddoe* application in the High Court. It seems to me that the absence of such a power may have served to discourage some charity trustees from using the Tribunal for fear that the Commission would deem the expenditure of charity funds on the case to have been inappropriate and that they might be directed to reimburse the charity. A clear power for the Tribunal to authorise expenditure on proceedings would provide a safeguard against such concerns on the part of the sector.

The final factor which I suggest may have affected the number of cases coming to the Tribunal is the discernible trend arising from the recent shift in the Commission's regulatory approach, so that in the past couple of years it has made far fewer formal decisions, directions and orders as it prefers to take a 'lighter touch' approach to regulation. One can of course sympathise with the Commission (which has in the past been criticised for being heavy handed) for adopting what it intends to be a more consensual approach to regulation. And one can see why the charity sector has not, on the whole, been arguing against this shift in the Commission's regulatory approach. However, in the relationship of inter-dependence that I have described, whereby the Tribunal's jurisdiction is inextricably linked to the making of a formal decision, direction or order, this changed approach on the part of the regulator clearly has the effect of rendering its decisions incapable of challenge in the Tribunal. To give you an example, in 2010, I attended the Commission's event launching its Annual Report, and its speakers mentioned that the vast majority of its investigatory work is now conducted without the opening of a statutory inquiry. This was presented in a positive light, and yet the right to apply to the Tribunal in this context arises only where a formal inquiry under section 8 of the Charities Act 1993 is opened, so presumably much of the Charity Commission's investigatory activity is now conducted without being amenable to challenge by the charity concerned. It seems to me that, even with the best of intentions, this new set of arrangements has had the effect of diluting the Commission's accountability systems and that we have now drifted a long way from the legislative thrust of the 2006 Act

in creating the Tribunal. I wonder whether the sector and its spokespersons have ceased to feel so strongly in favour of the systemic safeguard which the Tribunal was intended to provide now that the Commission has softened its culture and approach in individual cases?

(b) Teething Problems?

Many of our decisions to date have involved the clarification of procedural points, such as the nature of a re-hearing; the scope to admit evidence that was not before the Commission; whether there is a right of appeal to the Tribunal when the Commission rescinds the order concerned prior to a hearing; whether an order can be impliedly requested and/or impliedly refused; and the question of who is 'a person affected' so as to have the legal standing to make an application to the Tribunal. It would be an interesting subject for academic study to consider whether the creation of a new jurisdiction inevitably leads to a high degree of procedural and jurisdictional issues in its early case load, or whether it is the architecture of the charity jurisdiction in particular that gives rise to the preponderance of this type of issue. I now sit across quite a wide range of tribunal jurisdictions and can make some interesting comparisons. It seems to me that the complicated arrangements for the engagement of the Tribunal's jurisdiction in charity cases are markedly at odds with the far simpler provisions describing the jurisdiction of some other tribunals in which I now sit, for example the regime for appeals against decisions of the Information Commissioner whereby the Commissioner issues a 'Decision Notice' which may be appealed on the basis that it is wrong in law or involves an inappropriate exercise of discretion.[15]

(c) The Table in Schedule 1C

Some of the applications made to the Tribunal have been struck out for want of jurisdiction. I would suggest that these cases should be looked at carefully by the sector in considering whether the Tribunal's remit is sufficiently wide. There are instances in the Schedule 1C table, for example, where there is a right of appeal or review against a decision not to make a particular order but not against a positive decision to make the same order.[16] Appellants understandably find it frustrating to be on the wrong side of the argument and to have no right of redress as a result. The strike-out is a specific process under rule 8 of our rules, and involves the consideration of the case by a Judge and the engagement of the Appellant in a process of making representations on the proposed strike-out. My own practice is to send the Appellant a copy of my draft strike-out ruling for comment so that, in some small way, the Appellant does get his or her 'day in court'. The strike-out decisions are published on our website.[17]

15 See Freedom of Information Act 2000, ss 57-58.

16 See, for example, the provisions in respect of orders under Charities Act 1993, ss 26 and 36.

17 See http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/charity/decisions.htm

I have already mentioned that the table of challengeable decisions in Schedule 1C to the 1993 Act is esoteric, and that the one area of dissent about the creation of the Charity Tribunal in the 2006 Act was whether there should be a list of decisions which were appealable, or whether, as the Parliamentary Committee recommended, the Tribunal should have power to hear appeals against any decision of the Charity Commission (including 'non-decisions') on any point of law on any basis. The Government of the day went for the 'list of decisions' approach, but in the light of the strike-outs that we have made, it seems appropriate for the sector to re-visit this debate.

(d) References

No description of our work to date would be complete without mentioning the Attorney General's References. I would like to highlight (in order to contrast our procedure with that of the High Court) that there has been as transparent as possible a procedure adopted to date so that the terms of each Reference have been published on the Charity Tribunal's website along with guidance as to how persons who are or might be affected might become involved[18] and indeed quite a lot of the evidence and submissions have also been published on the website so that the wider sector can keep abreast of the arguments.[19]

Both the References made by the Attorney General so far have been accompanied by a request that the First-tier Tribunal (Charity) should transfer the case to be heard in the Upper Tribunal (Tax and Chancery Chamber), so you can see our flexible system of moving cases to the appropriate level for precedent to be set in operation. Charity cases in the Upper Tribunal are heard in the Tax and Chancery Chamber by an Upper Tribunal Judge, who may be a High Court (Chancery Division) Judge and/or other designated Judges of the Upper Tribunal, of which I am one. The hearing of References is in public with the date and venue published on the Upper Tribunal's website.

The Tribunal's jurisdiction in relation to the References which have been made derives from section 2A(4)(b) and Schedule 1D to the 1993 Act, however there are no specific statutory provisions as to the 'remedy' available in Reference proceedings, or any description of the powers exercisable by the Tribunal on determining a Reference. The Act merely empowers the Tribunal to 'hear and determine' the Reference. When Mr Justice Sales gave the ISC permission to bring judicial review proceedings against the Charity Commission and transferred the case to the Upper Tribunal (Tax and Chancery Chamber) so that the judicial review and

18 The Tribunal Procedure Committee has recently consulted on a rule change intended to make the procedural framework for charities becoming involved in a Reference clearer. See http://www.justice.gov.uk/about/moj/advisory-groups/ts-committee-open-consultations.htm

19 http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/charity/references.htm

the Attorney General's Reference could be heard together, he commented on this as follows:

> …the judicial review claim…offers to the Tribunal the potential for focusing upon a concrete form of relief which may crystallise the debate on the law in a manner different from the focus offered by the Attorney General's questions…[20]

And later:

> It may be that if the Attorney General's reference proceeded on its own and the Commission lost on the relevant arguments, it would take steps to rectify its guidance, …But a great deal might depend upon what exactly the Upper Tribunal said and how exactly the Commission interpreted what was said. The best way to ensure that there will be a degree of certainty about the status of the guidance at the end of any hearing…is to allow the ISC to proceed with the claim that the guidance or part of it should be quashed, and for the Upper Tribunal to rule on that claim, 'yes' or 'no'.[21]

It may be that the lack of a concrete form of 'remedy' derives from the inherently hypothetical nature of Reference proceedings and that all the Tribunal should be asked to do is answer the questions put to it. This suggests that References ought to be made prospectively and not retrospectively in relation to any areas of charity law requiring clarification. Yet the absence from the statutory provisions of a concrete remedy in a form that lawyers would recognise as such may in turn raise questions about who is bound by the Tribunal's decision on a Reference and what discretion is afforded to the Commission in giving effect to the Tribunal's decision. It seems likely that the sector will wish to reconsider what exactly is the nature of the Reference procedure that was created for it by the 2006 Act, and what the parties (and the wider sector) can expect from this *sui generis* jurisdiction.

5. The Review of the 2006 Act

These questions bring me neatly to my final topic which is the review of the Charities Act 2006. This is required by section 73 of that Act, which provides for a mandatory review of certain provisions and a discretionary power to include in the review any other matter the Minister directs.

I am hopeful that the review will include a re-consideration of the role, remit and powers of the First-tier Tribunal (Charity) and I hope that there will be a good

20 [2010] EWHC 2604 (Admin) para 24.

21 Ibid, para 25.

debate within the sector about what sort of appeal, review and reference rights it would want to see in place to take account of its current circumstances.

There are a number of reasons why I suggest that the operation of the Tribunal should be included in the review. I have alluded to some of these already. The first is the difference between the Tribunal originally created by the 2006 Act and that Tribunal as it has been reformed by the TCEA. It seems to me that despite being a force for good in most respects, the TCEA has also produced some procedural mazes, for example, as I have said where the Applicant has a basis for applying for judicial review and the case is likely to be heard in the Upper Tribunal, but the application must be made in the Administrative Court then transferred over, so that the Applicant concerned goes round in a circle.

It also seems to me that the number of cases coming to the Tribunal is an issue that should be explored in the review, because it is at odds with the original estimate of 50 cases a year. Admittedly this was not a very scientific estimate - more of a finger in the wind approach - but I would suggest that the number of cases coming to the Tribunal is so low that it really should be considered in the review. I should explain that the Tribunal shares its administration with other jurisdictions in the General Regulatory Chamber and that as a salaried Tribunal Judge I am required to sit across a range of jurisdictions, so this is not a case of needing to justify the continued existence of the Tribunal by drumming up work for it! Believe it or not, there are a number of jurisdictions which sit less frequently than we do. The issue is really whether the low number of cases coming to the Tribunal raises the same questions about the regulatory health of the sector as it did when there were said to be too few cases going to the High Court.

I note that the Government of the day also promised to review the question of a suitor's fund for the charity jurisdiction, although our collective financial health is so different now that I doubt the idea of a compulsory contribution to such a fund by the sector would be welcome in the present climate. The extension of public funding to the Tribunal seems an even more forlorn hope.

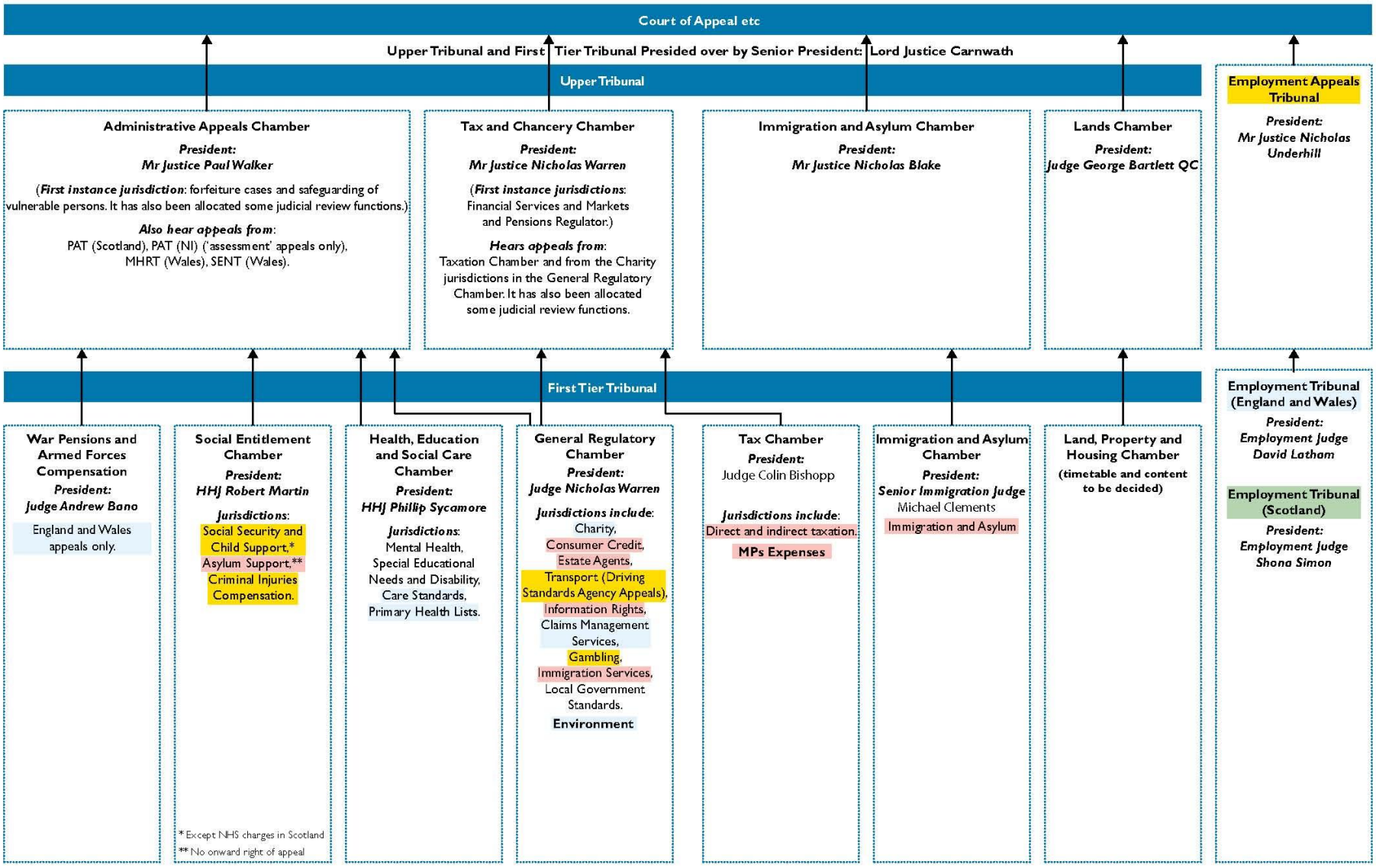
Other factors which I would hope the review would cover are the operation of the Commission's internal review system; the impact on the Tribunal of the changed regulatory practice of the Charity Commission; the anomalies in the construction of the Schedule 1C table that I have mentioned, and last but not least, the absence of a *Re Beddoe*-type jurisdiction for the Tribunal, which would allow it to give charity trustees authority to expend charity funds on the proposed litigation.

So, in conclusion, should the Charity Tribunal be reformed? Overall, I would say that we have made slow but steady progress in establishing our jurisdictional boundaries and developing our approach to the resolution of the disputes that come before us. We have also demonstrated our ability to take a flexible approach to our work and to deliver swift, low-cost access to justice. I can see definite advantages in

the procedural flexibility provided by the TCEA reforms and in particular our ability to elevate cases to the Upper Tribunal where precedent can be set. These powers make us more fit for purpose than the Tribunal created by the 2006 Act.

But I can also see definite fault lines in the architecture of the Tribunal at times and it seems to me that the regulatory environment which existed at the time of its creation has now shifted so perceptibly so that there may now in fact be a dysfunctional relationship between the regulator's dealings with the sector and the appeal rights which, in theory, should arise from those dealings. Whilst the approach of the Commission to its case handling has altered (and most would say for the better) it does not seem to me that the original arguments about regulatory accountability should so quickly be discarded by the sector.

As I mentioned at the beginning of this article, I am relieved to say that it is not my job to devise the solutions to these problems! Legislative change is a matter for Parliament, the sector, its advisers and academic experts. But I sincerely hope that there will be a wide-ranging debate about the Tribunal as the review of the 2006 Act commences.



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