PAPER 2.5.1- ADMINISTRATIVE JUSTICE SUMMARY

1 Definition

The term ‘administrative justice’ should be defined broadly to include:

- initial decision-making by public bodies affecting citizens rights and interests including the substantive rules under which decisions are made and the procedures followed in making decisions;
- systems for resolving disputes relating to such decisions and for considering citizens’ grievances.

This broad definition is useful because it delimits a coherent field of inquiry and enables discussion of administrative justice to respond to the full range of citizens’ concerns about their interaction with public services. It covers the full range of public services and activities that take decisions affecting citizens. It covers both procedural and substantive justice, i.e. the concern is not limited to questions of the appropriate procedures for taking and re-considering decisions, but extends to the correctness of decisions, and even, to some extent, the merits of the rules and policies according to which decisions are made. It also covers both grievances which consist of believing that a specific decision is wrong and grievances which arise from other administrative failings such as undue delay and insensitive treatment.

The above describes the subject the committee will be dealing with. However, the phrase ‘administrative justice’ may also be used in a prescriptive sense to state how arrangements for making and re-considering decisions *ought* to work.

2 A Summary of the Landscape

The landscape consists of both the public bodies which make decisions affecting citizens’ rights and interests and the arrangements for redress of grievances, i.e. how do citizens challenge decisions they believe are wrong or complain about the way they are treated by public bodies.

Decision-makers

Numerous public bodies make decisions that directly affect citizens. They may be classified as follows:

- central government departments (UK);
- devolved government departments, i.e. departments of the Scottish Government, The Northern Ireland Executive and the Welsh Assembly Government;
- local authorities;
- quangos, i.e. non-departmental bodies operating on a UK or Great Britain basis, for example, the Office of Fair Trading;

- devolved quangos, i.e. non-departmental bodies operating in policy areas within the remit of devolved government, for example, the Scottish Environmental Protection Agency.

Such bodies cover the full range of policy areas. The kinds of decisions they make about citizen's rights and interests include decisions to award or withhold benefits, decisions to impose penalties and decisions on regulation of activities such as licensing decisions. They concern, amongst others:

- tax liability
- entitlement to social security benefits (e.g. Jobseekers Allowance, Employment and Support Allowance)
- entitlement to social housing
- the rights of homeless persons
- medical treatment in the NHS
- primary and secondary education (e.g. placing requests, exclusion from school and assistance with special educational needs)
- tertiary education (e.g. payment of university tuition fees and grants)
- community care (e.g. provision of home helps, meal delivery, nursing care at home).
- Licensing and/or registration of many types of business including taxis, private hire cares, places of entertainment, pubs and restaurants, scrap metal dealers, and private sector landlords)
- Building control and development control
- Control of water, air and other pollution.
- Health and Safety at work.

Redress of grievances

The main existing institutions and processes considering citizens' challenges to decision and other grievances against public bodies are as follows:

- internal complaints procedures
- ombudsmen and other independent complaints handlers
- internal and external reviews
- tribunals
- the courts
  - judicial review
  - statutory appeals
  - 'private law' actions
- elected representatives
- public inquiries

These citizen remedies have different roles and characteristics but these often overlap and sometimes a citizen has a choice of remedies. Here is a brief description of each.

Internal complaints procedures

The subject matter of a complaint may be either a specific decision which is believed to be wrong or other administrative failings such as undue delay and insensitive treatment. All public bodies are expected to have set up their own in-house complaints procedures. Most such procedures are set up on a voluntary basis in that there is no legal requirement to review decisions once taken or to have a complaints procedure. However, it has been clear government policy at least since the 1991 Citizens' charter that effective complaints procedures should exist in all public sector bureaucracies.

In some cases, statute requires that a complaints procedure be set up for a particular function, for example, there is a statutory scheme for complaints about local authority social work.[1] Subject to any constraints in the relevant legislation, a public body will generally have power to change a decision it has made previously, and to uphold a complaint of service failure. Therefore, many public bodies will have the freedom to consider and 'put right' most grievances whatever their nature.

Where the in-house complaints procedure is non-statutory, it is for the public body itself to decide. It is likely to be an investigative procedure than an adjudicative procedure. Such complaints will, in practice, often be considered by someone other than the person who made the decision complained of. However, this is not independence in the legal senses as the decision on the grievance is being taken by the public body who took the decision or action complained of.

In-house complaints procedures were not in the past standardised but the FCSAG report recommended that there be a common set of principles for devolved public administration based on the existing SPSO guidance which should form the basis of all public service complaints handling processes, and that there should be a standardised complaints handling process for each public service sector based on these principles. The SPSO has issued a number of model complaints handling procedures. There is also substantial guidance on complaints-handling available for devolved public services.

Ombudsmen and other independent complaints handlers

When ombudsmen were first introduced they represented a new type of machinery for handling complaints which were not considered suitable either for the courts or tribunals. This was primarily because they were complaints of deficiencies in administration ('maladministration') rather than of illegality or denial of legal entitlements. In practice, however, ombudsmen receive both complaints which amount to challenges to decision and complaints of other administrative failings such as delay and insensitive treatment. Before the advent of ombudsmen, such complaints were not in most cases covered by statutory grievance machinery, but could be pursued by elected representatives using parliamentary and local government procedures. Ombudsmen differ from courts in two key respects: procedure and remedies. As to procedure, they follow an investigative approach rather than

[1] Social Work (Scotland) Act 1968 Section 5B.

the adversarial adjudicative approach employed by the courts. As to remedies, they have the power to recommend remedies for citizens, but no powers to enforce them.

The most important public sector ombudsmen operating in Scotland are the Scottish Public Services Ombudsman (SPSO) and the Parliamentary Commissioner for Administration (PCA). Between them, their remit covers the vast majority of public services in Scotland.

Internal and external reviews

The term review does not have a fixed meaning. However, if defined as procedure which allows for reconsidering the correctness of decision but which is not used as a remedy for other administrative failings such as delay and insensitive treatment, then it can be seen as a distinct model for resolving grievances. Internal reviews are those carried out within the organisation that made the original decision. External reviews are carried out by a separate organisation.

In some contexts, there is a statutory right to review of a decision, for example, a person applying for assistance under the homelessness legislation may apply for a review of the local authority's decision within 21 days.[2] The review must be carried out by a person senior to the person who made the decision and who had no involvement in the making of the decision. If the authority decides to confirm the original decision on any issue against the interests of the applicant it must give reasons. This is, therefore, an internal review. In other contexts, organisations voluntarily review decisions when they are questioned.

Reviews have been widely used in the field of social security but in two distinct ways. In the 1980s statutory review procedures were adopted in relation to housing benefit, certain disability benefits and the Social Fund. The first way in which reviews were used was to postpone access to appeals to tribunals, and the second to replace appeals. In relation to certain disability benefits, for example, claimants who wished to challenge an adverse decision relating to their benefits had first to seek a review of the decision. Only after the review was complete could the case go to an appeal tribunal. In the case of the Social Fund, reviews replaced appeals against discretionary decisions.

There was no right to appeal a decision about a payment under the discretionary social fund to a tribunal. Instead, the claimant had the right to seek a review. There were two stages of review. The first took place in the local office. The second was carried out by Social Fund inspectors employed by the Independent Review Service for the Social Fund (IRS). This was, therefore, an external review. It differed from a right of appeal to an independent tribunal in that procedure investigative and paper-based rather than oral involving hearings. It differed from internal review and complaints procedures in that it was independent of the body making the original decision. The methods were, therefore, more like those of ombudsmen than those of tribunals. The discretionary social fund and this form of review were abolished with effect from April 2013.

[2] See Housing (Scotland) Act 1987, section 35A & 35B. A person dissatisfied with a decision under the homelessness legislation could also seek judicial review whether or not s/he had first asked for a statutory review or complained to the SPSO.

Tribunals

Tribunals are machinery for adjudication and resemble the ordinary courts in many ways. They are designed to be independent of the agencies whose decisions are appealed to them, and indeed of the appellants. They have the power, to make binding decisions and procedure usually includes an oral hearing at which parties are able to present proofs and argument. Where they are different from courts is that most tribunals take a more inquisitorial approach at the hearing, although this varies from context to context. Some tribunals, are however, relatively more adversarial, notably, employment tribunals and immigration tribunals. Tribunals have been perceived by policy-makers as having a number of advantages over courts, notably that they are assumed to be quicker, cheaper, more expert, more informal in tone and more accessible to the citizen. The extent to which these advantages are actually realised in practice varies.

Tribunals deal with a wide range of disputes including those concerning criminal injuries compensation, asylum and immigration control, child support, social security and taxation. Although most deal with citizen v state disputes, some deal with party v party disputes, e.g. the PHRP. There are both reserved and devolved tribunals. The devolved tribunals include the Mental Health Tribunal for Scotland, Children's hearings and the PHRP.

The courts

Disputes between citizens and public bodies get into court in one of three ways: judicial review; statutory appeals; and 'private law' actions such as delictual or contractual claims. Judicial review is a general purpose remedy for unlawful acts by public bodies. It may be used to challenge a wide range of administrative decisions. To be successful, a petition for judicial review must show that one of the grounds for judicial review applies. These may be summarised by saying that the decision maker must not exceed its legal powers or fail to perform its statutory duties; must not abuse its discretion or fail to exercise its discretion; and must not make decisions by an unfair procedure.

Courts are independent of the public bodies whose decisions are challenged and have the power to make binding decisions. Court procedure includes both written and oral elements and oral hearings can be lengthy. Court proceedings tend to be relatively formal and adversarial.

Public inquiries

Public inquiries differ from the other institutions and processes described above in that they cannot be classified as exclusively machinery for redress of grievances. In fact, they are used for a variety of functions and may be classified into four groups: (i) processes for large scale planning of certain activities; (ii) the 'post-mortem' or 'scandal' inquiry; (iii) initial decision-making inquiries; and (iv) appeal inquiries. An example of the first type is where public

inquiries have been used as part of the process for developing structure plans and local plans. In that context they are a stage in a process for making a type of policy decision. The second type is the *ex post facto* inquiry triggered by an untoward event or events such as the shootings at Dunblane in 1996, or on 'Bloody Sunday' in 1972 (Saville Inquiry), or the death of Dr David Kelly in 2003 which led to the Hutton inquiry. The only automatic outcome of such inquiries is a report (often very lengthy) on the inquiry. They often make recommendations for the future but those to whom they report (often Ministers) are under no obligation to act on the recommendations.

It is the third and fourth type that can be regarded as administrative justice mechanisms. These are used to a significant extent in the context of land use planning. The calling in of a planning application is an example of the third type as the inquiry takes place before any decision is made. Inquiries held for the purposes of appeals against refusal of planning permission provide an example of the fourth type. It is, therefore, only this final category that should be regarded as a process for challenging decisions. In fact, the great majority of initial planning decisions and planning appeals are decided on the basis of written submissions without any public inquiry. There have also been significant changes over time in the role of inquiries feature in the decision process. The 'classic' model of the land use inquiry under was a two stage decision-making process, the first being a public inquiry to receive evidence which resulted in the preparation of a report from the person presiding over it, and the second being a decision on the matter by the Minister. For many years now, most planning appeals have been disposed without a public inquiry, because, as noted above, most cases are disposed of by written submissions. The other important change is that for most cases the power to decide has been delegated to persons appointed by Ministers (known as Reporters in Scotland and Inspectors in England and Wales). Public inquiries are now reserved for the most complex and controversial cases.

Where the appeal is a delegated appeal i.e. decided by the reporter rather than the Minister, it resembles a court or tribunal process in that the case is decided by an independent person applying published criteria, and results in a binding decision (subject to the right to apply to the courts on limited grounds within 6 weeks). It differs from the typical court or tribunal in that the decision criteria are primarily policies rather than legal rules, and that often there is no oral hearing. The arrangements for securing independence are also different from those for courts and tribunals. Where the appeal is decided by a minister it is a hybrid process.

Summary and comparison

It is useful to be able to compare and contrast the different citizens' remedies. The AJSG final report suggested that it was useful to compare them in terms of the following key characteristics:

- independence;
- whether decisions are binding;
- criteria by which decisions on appeals/grievances are made;
- methods and procedures employed.

The following table provides such a summary. summarises the points made in the preceding section. For simplicity, the only variant of the public inquiry included is that in which the power to decide appeals is delegated to the reporter. The column relating to procedure classifies methods according to whether they are (a) predominantly adversarial or inquisitorial, and (b) primarily oral or written.

	Independent	**Decisions Binding**	**Decision Criteria**	**Method/Procedure**
Internal Complaints	No	Yes	Legality, merits and maladministration	Inquisitorial Written (usually)
Ombudsmen	Yes	No	Maladministration	Inquisitorial Written
Internal Reviews	No	Yes	Legality & Merits	Inquisitorial Written
External Reviews	Yes	Yes	Legality & merits	Inquisitorial Written
Tribunals	Yes	Yes	Legality & merits	Mixed adversarial/ inquisitorial Oral
Courts	Yes	Yes	Legality	Adversarial/ Oral
Inquiries (delegated decisions)	Yes	Yes	policy/merits	Mixed adversarial/ inquisitorial Oral or written

3 Recent Developments in Administrative Justice

There have been a number of changes to the landscape in recent years:

- Rationalisation of tribunals at UK level and in England and Wales;
- Rationalisation of public sector ombudsmen (rationalisation has already occurred in Scotland and Wales in relation to devolved functions and is under consideration for England);
- Review of complaints handling by public bodies in Scotland (the Crerar review and the work of the Fit-for-purpose Complaints System Action Group);
- Review of Civil Courts in Scotland (the Gill review);
- Creation and then abolition of the Administrative Justice and Tribunals Council;
- The adoption by the UK government of a holistic, 'bottom-up' approach to administrative justice followed by its abandonment.

Here are additional comments on some of these developments.

Tribunals

Most tribunals operating across Great Britain or for England and Wales only (and some England only have been gathered together into a unified tribunal system consisting of a First-tier tribunal and an Upper Tribunal. Both the First-tier tribunal and the Upper Tribunal are divided into chambers based on subject matter. The Upper tribunal hears appeals on a point of law from decisions of the First-tier Tribunal. Originally, administrative support was provided by a unified Tribunal Service which was an executive agency of the Ministry of Justice. This has since been merged with HM Court Service. The devolved tribunals in Scotland, Wales and Northern Ireland remain separate. The Scottish Government plans to unify the devolved tribunals on the same pattern of a First-tier tribunal and an Upper Tribunal.

The Courts

In November 2005, the Scottish Consumer Council published the Report of its Civil Justice Advisory Group, *The Civil Justice System in Scotland – A Case for Review?* ('the Coulsfield Report', Scottish Consumer Council, 2005). That report concluded that several important aspects of the civil justice system were in need of review and called on the Executive to establish such a review. The Scottish Executive then established the Scottish Civil Courts Review chaired by the Lord Justice Clerk, the Rt Hon Lord Gill which reported in 2009. It made a number of proposals for reorganisation of the civil courts – including proposals re. judicial review - but none directly relating to tribunals. The Scottish Government has broadly accepted the proposals of the review but for the most part they have not yet been implemented. The Scottish Government proposes to introduce a Courts Bill in the near future which will implement some of the review's proposals.

Ombudsmen

The office of Scottish Public Services Ombudsman (SPSO) was created by The Scottish Public Services Ombudsman Act 2002 and became operational in October 2002. It assumed responsibility for complaints relating to the exercise of the functions of the Scottish Government and its agencies and departments, local authorities, the National Health Service in Scotland, housing associations, universities and colleges and most other Scottish Public bodies. The SPSO took over the complaints handling functions formerly exercised by the Parliamentary and Health Services Ombudsman (within devolved areas), the Commissioner for Local Administration and the Housing Association Ombudsman for Scotland. The Parliamentary and Health Services Ombudsman (PHSO) continues to deal with complaints relating to UK departments and other UK bodies operating in Scotland.

The 2002 Act, therefore, created a 'one-stop-shop' for complaints of maladministration in devolved public services in Scotland. With limited exceptions (for example, complaints against the police are subject to review by the Police Complaints Commissioner for Scotland and complaints from prisoners by the Scottish Prisons Complaints Commissioner) all complaints relating to devolved matters come within the SPSO's remit. A similar rationalisation has occurred in Wales where the Public Services Ombudsman for Wales was set up in April 2006 under the Public Services Ombudsman (Wales) Act 2005. In Northern Ireland, the notionally separate offices of the Northern Ireland Commissioner for Complaints and the Assembly Ombudsman for Northern Ireland operate as a single complaints service under the title 'Northern Ireland Ombudsman.' This leaves England as the only one of the UK's constituent nations which has not had its ombudsmen rationalised. The Collcut Review (Collcut and Hourihan, 2000) suggested that the one-stop-shop approach should be applied to England but its proposals have not been accepted and, although the Regulatory Reform (Collaboration etc. between ombudsmen) Order 2007 (SI 1889/2007) provides for closer collaboration between ombudsmen, it does not appear as if further rationalisation is likely in the near future.

The SPSO's role may be further modified in the light of recent developments re. complaints (see above) and the Scottish Government's review of public sector bodies.

Administrative justice policy

The abolition of the AJTC has left a gap. For England and Wales its functions have been taken into the Ministry of Justice. In Scotland, our committee has been created.

4 The Aims and Principles of a System of Administrative Justice

The AJSG stated three general aims of a system of administrative justice in its final report (2009):

- ensuring public bodies get it right first time when making decisions;

- ensuring that, where decisions are incorrect or treatment of citizens is otherwise defective, there are effective redress mechanisms;
- ensuring that public bodies learn from their mistakes increasing the likelihood of getting it right first time.

These aims flow from the general idea that the administrative justice system should be focussed on the needs of users. Citizens are entitled to expect high quality public services, and getting it right first time, providing effective redress and learning from mistakes are integral to providing high quality services.

There have been several attempts to state more detailed principles of good administration, e.g. the three sets of principles developed by the PHSO (good administration, good complaint handling, principles of remedy). The AJTC formulated principles in *Principles for Administrative Justice* (2010). According to the AJTC a good administrative justice system should:

- make users and their needs central, treating them with fairness and respect at all times;
- enable people to challenge decisions and seek redress using procedures that are independent, open and appropriate for the matter involved;
- keep people fully informed and empower them to resolve their problems as quickly and comprehensively as possible;
- lead to well-reasoned, lawful and timely outcomes;
- be coherent and consistent;
- work proportionately and efficiently;
- adopt the highest standards of behaviour, seek to learn from experience and continuously improve.

It should be clear that these principles flow from the basic aims stated by the AJSG. Two slightly fuller statements of the principle and what they require aimed at users of public services is given in the annex 1 to the document. Annex 2 provides a self-assessment tool for those working in public bodies.

Right First Time

The AJTC also produced guidance on how to improve initial decision-making in its document *Right First Time* (2011). It identified these problems: (i) that volumes of appeals and complaints across the public sector were worryingly high; (ii) too few public bodies have in place feedback mechanisms to ensure that the outcomes of appeals and complaints are understood throughout the organisation; (iii) there is little evidence that the financial costs of not getting it right first time are fully understood and quantified by public bodies.

It suggested that ‘right first time’ means:

- making a decision or delivering a service to the user fairly, quickly, accurately and effectively;
- taking into account the relevant and sufficient evidence and circumstances of a particular case;
- involving the user and keeping the user updated and informed during the process;
- communicating and explaining the decision or action to the user in a clear and understandable way, and informing them about their rights in relation to complaints, reviews, appeals or alternative dispute resolution;
- learning from feedback or complaints about the service or appeals against decisions;
- empowering and supporting staff through providing high quality guidance, training and mentoring.

The report identified the fundamentals of right first time as Leadership, Culture, Responsiveness, Resolution, and Learning and highlighted practical steps that should be adapted and followed by leaders of public bodies when reviewing their services and attempting to establish a right first time approach. These steps related to undertaking analysis, deciding on action and encouraging monitoring and learning.

Amongst other things, the report argued that public bodies with responsibility for making original decisions must take the lead in improving the quality of the service they offer and all such bodies should carry out a review of their systems, procedures and decision-making structures to ensure that they are doing all they can to get decisions right first time. They also argued that it was time to adopt a ‘polluter pays’ approach to help promote a right first time culture under which original decision-making organisations contribute to the cost of running tribunals and other remedial system by reference to the volume of successful appeals etc. they generate.

Bibliography

Principles for administrative Justice (2010); http://ajtc.justice.gov.uk/docs/principles_web.pdf

The Developing Administrative Justice Landscape executive (summary)

http://ajtc.justice.gov.uk/docs/landscape_paper.pdf

The Developing Administrative Justice Landscape executive (Full)

http://ajtc.justice.gov.uk/docs/landscape_paper.pdf

Developing principles for administrative justice

http://ajtc.justice.gov.uk/docs/principles22_10.pdf

Right First Time (2011) http://ajtc.justice.gov.uk/docs/AJTC_Right_first_time_web(7).pdf

Putting it Right (2012). http://ajtc.justice.gov.uk/docs/putting-it-right.pdf

Administrative Justice in Scotland - the Way forward (Summary)

http://www.consumerfocus.org.uk/scotland/files/2010/10/Administrative-Justice-in-Scotland-Summary.pdf

Administrative Justice in Scotland - the Way forward (full)

http://www.consumerfocus.org.uk/scotland/files/2010/10/Administrative-Justice-in-Scotland-The-Way-Forward-Full-Report.pdf