The Place of Judicial Review in the Administrative Justice System

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Introduction

The aim of this paper is to contribute to a better understanding of judicial review by considering it asa component in the administrative justice system. The common law[[1]](#footnote-1) and Rules of Court[[2]](#footnote-2) present judicial review as a remedy of last resort, in that it is not available if there is an alternative remedy. It will be argued that the framework derived from the statutory definition of the administrative justice system is more than simply a recognition of the range of remedies for resolving administrative disputes. Rather it is a staged approach to dispute resolution in which the objective of identifying the most appropriate remedy for a particular dispute is one of several aims for the administrative justice system, The argument in this paper will be that an administrative justice system approach should be adopted, that this appears to be the direction of travel and judicial review will be evaluated in the light of these claims. The genesis and development of the administrative justice system will be briefly outlined including the institutions and techniques of dispute resolution, their remits and the redress which they offer and the policy which seeks the attainment of different goals by adopting a holistic approach and paying significant attention to the perspective of the individual as both a user of public services and of the arrangements for redress when aggrieved about that service. The different route to redress in administrative justice will be evaluated including an analysis of the judicial review statistics.

The Administrative Justice System

We are familiar with the terms the criminal justice system and the civil justice system but the administrative justice system has not achieved a similar level of recognition. It is statutorily [[3]](#footnote-3)defined in the Tribunals, Courts and Enforcement Act 2007 as

‘the overall system by which decisions of an administrative or executive nature are made in relation to particular persons including:

1. the procedures for making such decisions
2. the law under which such decisions are made
3. thesystems for resolving disputes and airing grievances in relation to such decisions’.[[4]](#footnote-4)

The reasons why the term and this definition came about were that in developing reform of reserved tribunals, it was recognised that tribunals should not be considered in isolation from other remedies for disputes with public bodies, and that these remedies should be linked to the improvement of public services.[[5]](#footnote-5)Starting first with the Leggatt review of tribunals, this set out criteria for using tribunals; the need for the participation of the individual; a need for specialist expertiseand a need for administrative law expertise.[[6]](#footnote-6) There was a concern for the tribunal user, that access to tribunals andeffective participation before them should be improved by the provision of (a) better information about decisions and how they may be challenged, and (b) advice and support in making such a challenge. Users would have greater confidence in the independence of tribunals if they were administered not by the department whose decisions or action was under challenge, but by a department unconnected to the dispute. The approach which Leggatt recommended tribunals should embrace when conducting their work was an enabling one: ‘supporting the parties in ways which give them confidence in their own abilities to participate in the process, and in the tribunal’s capacity to compensate for the appellants’ lack of skills or knowledge.’[[7]](#footnote-7) Given that most tribunal users are unrepresented, Leggatt was quite clear that even with the proposed tribunals’ enabling approach, users would need information, advice and support to allow for their effective participation in a hearing.

Leggatt also considered whether or not adjudicative hearings were necessary. This followed on from the recommendation that tribunals must adopt active case management so as to ensure that cases did not continue to be dealt with in a manner which was longer than necessary. Case management by tribunals would differ from that in the civil courts and would vary between state *v* party cases and party *v* party cases, with the latter being closer to arrangements in the courts.[[8]](#footnote-8) Leggatt was clear that the length of time taken should be considered from the user’s perspective and that this meant it ran from the time of the departmental decision, not from when an appeal was lodged at the tribunal.[[9]](#footnote-9) Case management allows not only for issues to be identified, and setting timetables for submission and exchange of required materials and a hearing date, but also to identify those cases not suitable for tribunal resolution. The extent to which techniques of alternative dispute resolution (ADR) may be appropriate will depend upon what will be useful and beneficial and proportionate in each particular tribunal jurisdiction, but it is a matter which should be considered during pre-hearing procedures.[[10]](#footnote-10)

The user would also benefit from reforms designed to improve efficiency by creating a structure in which different tribunals could be brought together into divisions dealing with related areas and lawyers and specialist members could be deployed to hear cases for which their expertise was suited. The law could be developed by rationalising onward challenges and appeals so that all tribunal decisions could be appealed on a point of law to an expert specialist tribunal from which there would be no recourse to judicial review.[[11]](#footnote-11) Leggatt wanted to reform the Council on Tribunals so that it was not only a body which would champion users and keep tribunals under review, but also that its oversight role should be extended, so that it became ‘the hub of the wheel of administrative justice.’ He also wanted departments to learn from the judgments which tribunals made about their decision-making, noting that.

tribunals are well placed to pick up systemic problems in decision-making within the department, from decision letters which are confusing, through administrative systems which muddle or miss key facts, to a flawed decision-making process which leads to misconception of the law.[[12]](#footnote-12)

In the White Paper presenting the Government’s approach to tribunal reform following the Leggatt review, the first part of the title, *Transforming Public Services,* signalled the wider context of reform to which tribunals would contribute. This would be done by adopting a new strategy to deal with disputes in administrative (and civil) justice that would begin by considering the real problems which people face.

The aim is to developa range of policies and services that, so far aspossible, will help people to avoid problemsand legal disputes in the first place; andwhere they cannot, provides tailored solutionsto resolve the dispute as quickly and costeffectivelyas possible. It can be summed upas ‘Proportionate Dispute Resolution[PDR]’.[[13]](#footnote-13)

The strategy requires establishing the objectives and outcomes which the aggrieved person wants in resolving the dispute and seeking to achieve that by using the most appropriate method of resolution. Various ADR methods were outlined: adjudication; arbitration; conciliation; early neutral evaluation; mediation; negotiation and ombudsmen. Attention was then turned to what was termed the current administrative justice landscape.[[14]](#footnote-14)A summary was given of areas of central government decision-making and the methods which people could use to review those decisions. The routes to redress were outlined:

**making a complaint**: to the decision-making department or agency, to an independent complaint handler, to a MP, to the Parliamentary Ombudsman;

**bringing court proceedings**; challenging the lawfulness of the decision, seeking judicial review or some other remedy;

**tribunal appeal**: either challenging thelawfulness of the decision or, more usually,

challenging the factual basis of the decision.[[15]](#footnote-15)

The result of the White Paper’s analysis of the various routes to redress both inside and outside administrative justice, was an ambitious plan to improve tribunals and also to transform dispute resolution so that it was quicker, more cost-effective, focussed on the user’s concerns and contributing to the improvement of the delivery of public services.

We can summarise the administrative justice system by first outlining its aims as

* Getting it Right First Time
* Effective Redress
* Learning from Mistakes[[16]](#footnote-16)

and show how these aims are realised in a diagram taken from a report by the Administrative Justice and Tribunals Council (AJTC).[[17]](#footnote-17)



The 4 Stage Dispute Cycle

The AJTC [[18]](#footnote-18) produced a report on PDR, in which it developed a model dispute cycle with four stages.[[19]](#footnote-19)

* Prevention of disputes
* Reduction of escalation
* Resolution of disputes
* Learning from disputes

The report prescribes actions intended to seek to achieve the objectives of each of the stages.

Disputes can be *prevented* by better legislative design, information and guidance so that people are more aware of their rights and thus better able to assert them.

Where a problem does arise its escalation can be *reduced* by better communication for corrections and queries as poor communication leaves a dissatisfied person with no alternative to taking the dispute to an independent body to resolve it.

Where a dispute requires *resolving*, this is to be done by using appropriate and proportionate techniques matched to the nature of the dispute and the characteristics of the parties.

Finally the public body must *learn* the lessons of the dispute by seeking out insight and then acting upon it.

Complaints and Ombudsmen

Having outlined the administrative justice system, its aims and approach to dispute resolution, we turn to considering the major institutions and techniques of dispute resolution. First, the ombudsman and complaints. We will consider the public services covered by ombudsmen and then the remedies which they may recommend.

The Scottish Public Services Ombudsman (SPSO) was established in 2002[[20]](#footnote-20) by merging the separate ombudsmen schemes dealing with the departments and agencies of the Scottish Government, the local authorities, the NHS and housing associations. Subsequently the range of public bodies and their activities within the SPSO’s remit has been increased with the addition of institutions of further and higher education, and water services. Recourse to the SPSO may be had after the aggrieved citizen has first raised the complaint with the body which caused the problem, unless it is not reasonable to expect the complaint to exhaust the body’s procedures.[[21]](#footnote-21) The rationale is that in most cases the resolution of the dispute should be quicker by giving the body the opportunity to respond to the complaint. If this does not resolve the matter to the complainant’s satisfaction then the case may be taken to the SPSO. The criteria for consideration by the SPSO are that the matter must involve specified activities carried out by bodies within jurisdiction, and amount to injustice caused by maladministration or hardship caused by service failure.[[22]](#footnote-22) There is a statutory bar so that if a complainant has another remedy then the SPSO cannot accept the case unless the SPSO does not think that it is reasonable to expect the complainant to have, or to have had recourse to that alternative remedy.[[23]](#footnote-23)

The SPSO can provide a range of remedies. These include an apology; the carrying out of work, for example, repairs; the reconsideration of a decision and making financial redress. Recommending that the body conduct a review or revise a policy or procedure can have a wider effect as it may improve the position of others in similar circumstances who had not complained, as well as leading to the possible prevention of recurrence of this defective administration. Following the upholding of complaints, the SPSO requires the bodies to confirm the action they have taken in relation to the recommendation for remedy. It would be open to the body not to comply with the recommendation, as it is not binding, however, if the SPSO is satisfied that injustice or hardship has not been, or will not be remedied, then a special report may be made to the complainant, the body and the Scottish Government, as well as a copy being laid before the Scottish Parliament.[[24]](#footnote-24) The idea being that the matter is placed in the political arena and this may lead to an outcome with which the ombudsman and the complainant is satisfied.[[25]](#footnote-25) To date the SPSO has not used this power to issue a special report.

Every month the SPSO lays reports on completed cases before the Scottish Parliament and publishes an accompanying commentary which highlights some of the cases. This is one of the ways in which the SPSO seeks to share the learning so as to enable bodies to improve their standards of administration. In its role as a Complaints Standards Authority,[[26]](#footnote-26) the SPSO has worked with the various sectors of public services to produce common complaints procedure and the bodies in the network for each sector are co-operating in monitoring the complaints procedures including sharing the identification and dissemination of lessons learned and good practice.

Tribunals

Legislation passed by the UK and Scottish Parliaments creates appeal rights to various tribunals. The TCEA 2007 created a two level structure in which an initial hearing is before the First-tier Tribunal from which appeals on a point of law could be made to the Upper Tribunal. The Upper Tribunal also has a jurisdiction to hear judicial reviews, and the field of immigration and asylum generates a large proportion of this work heard by the Upper Tribunal. Both the First-tier and Upper Tribunals are sub-divided into chambers.

The First-tier and Upper Tribunal Chambers which will have a Scottish caseload are shown in the table

**Table 1 Reserved Functions and the relevant chambers in the two tier tribunal structure**

|  |  |  |
| --- | --- | --- |
| Subject Matter | First-tier Chamber  | Upper Tribunal Chamber  |
| Social Security& Child Support, Criminal Injuries Compensation | Social Entitlement | Administrative Appeals |
| Immigration & Asylum | Immigration & Asylum | Immigration & Asylum |
| Direct & Indirect Taxation | Tax | Taxation & Chancery |
| Consumer Credit, Gambling, Estate Agents, Information Rights, Immigration Services | General Regulatory | Administrative Appeals |

Devolved tribunals in Scotland will be undergoing a similar structural reform[[27]](#footnote-27) with a First-tier Tribunal for Scotland and an Upper Tribunal for Scotland. The legislation provides for chambers in the First-tier Tribunal and divisions in the Upper Tribunal but it was not intended to implement that aspect of structural change immediately on the coming into force of the legislation on 1 April 2015. As in England and Wales, and Northern Ireland there is now a combined agency administering courts and tribunals, The Scottish Courts and Tribunals Service (SCTS).[[28]](#footnote-28)

A consultation paper[[29]](#footnote-29) has been produced which seeks to ensure that planned changes to the Private Rented Housing Panel and the Homeowner Housing Panel do not affect the plans to include them in the proposed new structure for the Scottish Tribunals. This proposed structure includes the Tax Tribunals for Scotland established in April 2015, one for each tier which will deal with Lands and Buildings Transaction Tax and the Scottish Landfill Tax.

It is proposed to place the Scottish Land Tribunal not in the First-tier Tribunal but the Upper Tribunal due to the complexity and monetary value of some of its cases.

**Table 2 Proposed Structure for the Scottish Tribunals**

|  |  |  |
| --- | --- | --- |
| Subject Matter | First-tier Chamber  | Upper Tribunal Division  |
| Mental Health | Mental Health | Composite |
| Private Rented Housing Panel; Homeowner Housing Panel; PRS; Letting Agents;The Crofting Commission | Housing & Property | Composite |
| Additional Support Needs; Educational Appeals; NHS National Appeal Panel for Entry to Pharmaceutical Lists; NHS Tribunal for Scotland | Health & Education | Composite |
| Charity Appeals; Parking Adjudicators; Police Appeals | General Regulatory | Composite |
| Lands Tribunal for Scotland |  | Lands |
| Lands & Buildings Transaction Tax, Scottish Landfill Tax, Valuation Appeals | Tax | Tax |

The Pensions Appeal Panel for Scotland is not part of either the UK First–tier Tribunal or the First-tier Tribunal for Scotland, although it is administered by the SCTS. Appeals from it are heard by the UK body, the Administrative Appeals Chamber of the Upper Tribunal.

Following the report of the Smith Commission, its recommendation on tribunals was accepted

‘All powers over the management and operation of all reserved tribunals(which includes administrative, judicial and legislative powers) will be devolved to the Scottish Parliament other than the Special Immigration Appeals Commissionand the Proscribed Organisations Appeals Commission.’[[30]](#footnote-30)

The Scotland Bill introduced at the start of the term of the House of Commons elected in 2015 would provide for the transfer from a reserved to devolved tribunal to be carried out by an Order in Council. This is following up the Command Paper and the Draft Scotland Bill produced the last months of the 2010-15 Parliament. There is some commentary on the possible implications of such tribunal transfers which includes the cost, capacity and policy differences between the Scottish and UK governments.[[31]](#footnote-31)

Fitting the Forum to the Fuss

Now that the alternative dispute resolution institutions and methods have been outlined, attention is turned to the key aspect of the administrative justice system, identifying the appropriate remedy for the dispute and the parties, or ‘fitting the forum to the fuss’.[[32]](#footnote-32)

Attention will also be given to the AJTC report which, in its discussion of the third stage in the dispute cycle, considered the spectrum of resolution institutions and techniques and

suggested criteria to assist policy-makers in designing, and users in navigating the system.

*The complainant’s objectives*

Such a process begins with ascertaining the objectives of the complainant. The Law Commission for England and Wales considered the research literature.[[33]](#footnote-33) This shows that the motivations for complaining are diverse and vary according to the particular service sector. A desire for compensation is an important factor in welfare benefits, consumer issues, personal injury, money and debt claims as compared with clinical negligence, discrimination, children, immigration and unfair police treatment.[[34]](#footnote-34) Where financial redress is sought, there can also be a concern that a person’s case has been given appropriate consideration and that the law has been applied correctly and fairly.[[35]](#footnote-35)

In addition to, or instead of, seeking a different outcome, complainants often seek acknowledgment that they have been mistreated. Research in clinical negligence litigation indicates that people want an inquiry into the treatment of their case and an explanation and apology, as appropriate.[[36]](#footnote-36) These studies also show that in the majority of cases, what the complainants wanted was the chance to air their grievance rather than seeking a specific outcome.

Another concern which complainants have is a desire to improve administration and stop recurrence of errors.

None of the currently available remedies is by itself capable of satisfying the full range of complainants’ objectives, especially when one adds the strongly held motivation found in a minority of cases, to ‘make an example of someone’. The options in these circumstances would include the criminal law and professional disciplinary procedures.

Here despite the normative role of law, it can be suggested that the courts, whether in public or private law, offer a much reduced opportunity of realising that objective than extra-judicial routes to redress. Judgments are limited to the particular facts, they may not offer the opportunity for a full consideration of professional practices and judges are not providing administrative advice to organisations but rather giving judgement on a legal dispute.[[37]](#footnote-37)

*Indicative factors*

The AJTC discussed the following institutions and techniques of dispute resolution which are used or have been piloted in administrative justice: third party review, mediation, early neutral evaluation, ombudsmen, resolving without a hearing, tribunals, tribunal-like courts (eg. small claims) and courts. From this some general principles were developed and then some guidance which suggested that if disputes had certain characteristics then these would favour particular resolution techniques.[[38]](#footnote-38) The general principles proceeded from the premise that any dispute was potentially suitable for disposal without a hearing. Next some general factors which should be taken into account in deciding which route for redress should be used:

* capacity of parties to participate effectively
* whether and how the parties are represented
* case context, including history of past disputes
* any indentified need for urgency
* nature, complexity & importance of issues in dispute
* likelihood of an agreed outcome
* cost to parties and taxpayer.

Guidance was then suggested for particular techniques[[39]](#footnote-39) including traditional hearings and mediation. Factors favouring traditional hearings were:

* fundamental rights cases, such as asylum and mental health review adjudications where the liberty, life or safety of individuals may be at stake;
* cases where there are allegations of fraud etc or where the credibility of an individual is directly at stake;
* cases, especially those turning on medical considerations, where the presence of the individual is essential;
* cases (e.g. many employment disputes) where there are allegations or counter-allegations about conduct.

The factors favouring mediation were:

* there will be an on-going relationship and future disputes could be limited by an exploration of the issues or explanation of the system;
* concession or explanation could assist resolution;
* flexible options need to be explored;
* the matter is complex or likely to be lengthy;
* the matter involves more than two parties;
* legitimate desire of parties to keep the dispute confidential.

Access to Judicial Review

*Alternative remedy*

Drawing upon this guidance one can suggest that judicial review would not be an appropriate remedy if any of the complainant’s objectives were, seeking the moral vindication of one’s rights, a desire to make an example of or punish someone; financial redress for ‘botheration’ or distress, maintaining a relationship with the public body and seeking to bring about an improvement in the body’s administrative practice. On the other hand, judicial review would be likely to be an appropriate remedy if there is a legal issue, or speed is desirable or a need for interim relief.

Rule of Court 58.3(2) stipulates that ‘an application for judicial review may not be made under paragraph (2) if that application is made, or could be made under or by virtue of any enactment’ . The dictum of the Lord Ordinary (Lord Jones)in *McCue* expands this

‘…I hold that it is not competent to seek judicial review when an alternative remedy, whether statutory or non-statutory, is available to the applicant and has not been resorted to or exhausted.’ [[40]](#footnote-40)

This case concerned the assessment by Glasgow City Council of the community care needs of the petitioner’s son, which the petitioner, as her son’s guardian, sought to challenge by judicial review. The Lord Ordinary held that the council’s complaints procedure was statutory, rejecting the argument that this procedure was an enabling one and not a compulsory one. The Lord Ordinary alsoheld that the procedure was intended as the primary route for resolving disputes including those in this case.

Lord Jones considered the argument that the SPSO was, under the 2002 Act, an alternative remedy to which there had been no resort by the petitioner. Counsel for the respondent council argued that the SPSO was eminently suitable for this dispute. The statute makes it clear that the SPSO has power to investigate through s5(1)(a) that actions carried out by or on behalf of the council related to its administrative functions were investigable by the SPSO and that s.5(1)(c) authorised the SPSO to investigate any service failure by a council. The counter-argument was that the statute was inconsistent with an intention to exclude judicial review. Under s.7(8)(c) the SPSO could not accept a case if there was an alternative remedy including court proceedings. Lord Jones referred to the SPSO’s discretion in s.7(10) to override the statutory bar to accepting a case if the SPSO thought it was not reasonable to expect the complainant to have recourse to it. He accepted the council’s position that since the petitioner should have used the council’s complains procedure, the SPSO was not at this stage an alternative remedy barring resort to judicial review.

There might seem to be a flavour of Catch 22 about both judicial review and the SPSO statute stipulating that each is a remedy of last resort, The SPSO does have the discretion to override the statutory bar and the Court of Appeal*R* v *Local Commissioner for Administration in N and NE England ex p Liverpool CC[[41]](#footnote-41)* in gives broad discretion to an ombudsman in deciding if it is unreasonable to expect recourse to an alternative to the ombudsman by allowing reference both to cost, ie the Ombudsmen is a free service and a more general assessment as to what is the more appropriate remedy in the circumstances.

In its report on Public Services Ombudsmen, the Law Commission for England and Wales had proposed the modification of the statutory bar so that a complainant who had an alternative remedy was within jurisdiction but that the ombudsman had discretion to decline to take the case and that the availability of an alternative remedy which it was thought to be preferable, would be an appropriate basis for making such a decision. This recommendation has not been acted upon.[[42]](#footnote-42)

Lord Jones has gone further in extending to non statutory remedies the refusal of judicial review where an alternative remedy has not been resorted to, or exhausted. The case is being appealed and that extension will be challenged. While there is logic in the extension, there is a constitutional argument that it should be statute which removes judicial review. The Lord Ordinary, in dealing with the argument made by counsel for the council, recorded these contentions; that the complaints procedure could have some advantages over judicial review as (i) those making the determination had specialist expertise in the delivery of public services; (ii) that expertise is particularly apposite in this case where the essence of Mrs McCue's complaint is that the services currently proposed for her son are inadequate and that certain criteria applied by the Council are not soundly based; (iii) the merits of the council’s decision could be considered under the complaints procedure but could not be in a judicial review and (iv) it would be a more proportionate use of public funds to use the complaints procedure as opposed to judicial review and determination by judicial review would result in diversion of funds away from front line services.

*Proportionality*

These arguments were not expressly endorsed by Lord Jones but are consistent with the approach in the administrative justice system of appropriate and proportionate redress of disputes. This approach would seem to have been broadly accepted by the Supreme Court in the *Cart* and *Eba* judgments.[[43]](#footnote-43) The issue before the court was what were the criteria to be used in deciding whether judicial review was available to challenge an un-appealable decision by the Upper Tribunal? In particular, a decision by the Upper Tribunal not to allow an appeal to it from the decision of the First-tier Tribunal.[[44]](#footnote-44) There had been a difference in the interpretation of the law by the First Division of the Court of Session in Scotland and the Court of Appeal in England and Wales. The First Division held that the usual full scope of judicial review would be available in relation to the Upper Tribunal, whereas the Court of Appeal had decided that the Upper Tribunal would only be amenable to judicial review (1) for outright excess of jurisdiction (in the sense understood prior to the *Anisminic[[45]](#footnote-45)* decision and (2) denial by it of fundamental justice, such as where it conducted a hearing so unfairly it was a nullity. The tests adopted by the Supreme Court for both jurisdictions were ‘Does it raise (a) some important point of principle or practice or (b) some other compelling reason? These ‘second–tier appeal’ criteria were significantly narrower than the judgment of the Inner House in *Eba* but not as restrictive as judgment of the Court of Appeal in *Cart*.

The Supreme Court decided *Cart* before determining *Eba.* In*Cart* argument for not restricting the scope of judicial review of these un-appealable decisions of the Upper Tribunal rested on the rule of law. There was a risk that in the two tier tribunal structure in which the Upper Tribunal is setting precedent for the First-tier Tribunal that the tribunal judiciary may be either bound by precedent or confident in its correctness, and so refuse permission to appeal to the Court of Appeal. If judicial review is also restricted then the courts are excluded and the Upper Tribunal could become the ultimate arbiter of the law which it was not thought to be the intention of Parliament. This could also be said to amount to the production of local law which enshrined an erroneous view.[[46]](#footnote-46) The argument for restricting the scope of judicial review drew on proportionality, and the idea that there must be some limit in the legal system to the resources used in trying to reach the correct decision in an individual case.[[47]](#footnote-47) In particular, attention was drawn to fact that the senior courts in London were overwhelmed by the number of unmeritorious judicial review claims in immigration and asylum cases.[[48]](#footnote-48) This floodgates argument was not decisive but it played a role in the proportionality calculation. The predecessors of the Upper Tribunal, such as the Social Security (and Child Support) Commissioners, had their decisions treated with respect and restraint when they were subjected to judicial review.[[49]](#footnote-49) The Upper Tribunal was proposed by Leggatt as a an expert which ought to be able clarify and develop the law and it is headed by an appeal court judge and has High Court judges as some of its Presidents of Chambers, and with the consent of the UK’s three heads of judiciary, High Court and Court of Session can be drafted in. These factors seems to weigh more heavily with Lords Phillips, Clarke and Dyson[[50]](#footnote-50) than Lady Hale.[[51]](#footnote-51) Finally when the second-tier appeal criteria were added this would result in rational and proportionate approach. Lord Clarke referred to his experience when Master of the Rolls in using the second-tier appeal criteria was that it worked well for second appeals ‘ On the one hand it limited the number of appeals and thus the expenditure of excessive resources while, on the other hand, it enabled the court tohear cases raising an important point and cases where there was some othercompelling reason to do so. In that way the court has been able to deal with caseswhere something has gone seriously wrong.’

He thought this would also be true if applied to reviewing unappealable decisions of the Upper Tribunal.[[52]](#footnote-52)

Lord Hope gave the Supreme Court’s judgement in*Eba*. He took the opportunity in surveying the slightly inconsistent authorities to hold that there was no difference between English law and Scots law on the grounds on which judicial review may be open declaring that the dictum of the Lord President in *Watt* v*Lord Advocate* 1979 SC 102, 131 should not be followed due to its incompatibility with *Anisminic* which rendered obsolete the distinction between jurisdictional and non-jurisdictional errors of law. He reported but did not offer a view on the arguments as to whether there was or was not a problem for the courts in coping with judicial reviews in immigration and asylum cases advanced on behalf of the Advocate General for Scotland and the Lord Advocate respectively.[[53]](#footnote-53)

In deciding that Scots law would follow *Cart* on the extent of judicial review of unappealable decisions of the Upper Tribunal, Lord Hope found two factors to be important. First the established position in Scots law that courts should be slow to interfere with decisions that lie within the expertise of a specialist tribunal. Secondly, s.13(6) of the 2007 Act which allows the Lord Chancellor to make an order using these second-tier appeal criteria for decisions on granting leave to appeal to the Court of Appeal a decision of the Upper Tribunal on an appeal from the First-tier Tribunal. The Lord Chancellor had made such an order.[[54]](#footnote-54)While the 2007 Act did not confer an equivalent power on the Lord President, r.49.51 of the Rules of the Court of Session has broadly the same effect. Therefore ‘[i]twould not be consistent with that intention, to which the amendment to the Ruleshas given effect, for the court to provide a wider opportunity for the decisions of the Upper Tribunal to refuse permission to appeal to itself to be reconsidered byway of judicial review’.[[55]](#footnote-55)

This position has been carried over to the new Upper Tribunal for Scotland by the insertion of a new s.27B of the Court of Session Act 1988 by the Courts Reform Scotland Act 2015.

The significance of the *Cart* and *Eba*decisions in relation to judicial review and the rule of law and proportionality may be understood by considering a dictum of Lord Brown in *Cart*

 ‘..The rule of law is weakened, not strengthened, if a disproportionate part of the courts’ resources is devoted to finding a very occasional grain of wheat on a threshing floor full of chaff.’ [[56]](#footnote-56)

As Elliott and Thomas comment there are many circumstances in which the rule of law would require the level of judicial vigilance which Lord Brown appears to deprecate’. They suggest that this statement is more in keeping with the rule of law when one considers the institutional context, that the ‘prospective target of judicial review’ is the Upper Tribunal a judicial body with a significant constitutional stature and institutional expertise. They argue that ‘Properly understood, the question in *Cart* was not about the appropriatereach of judicial intervention in relation to another branch, butwas rather about the respective spheres of influence of cognate parts ofthe judicature.[[57]](#footnote-57) It is suggested that the analysis by Elliott and Thomas which says that courts and tribunals are both upholding the legal accountability of public bodies and that the focus is on ‘ resolving cases at the most appropriate level of the judicial hierarchy[[58]](#footnote-58) may be expressed according to the this paper’s argument. In the administrative justice system disputes are to be resolved by the most appropriate institution or method of redress.

*Statistics*

Finally in this section on access to judicial review reference will be made to some statistics on judicial review.[[59]](#footnote-59).

**Table 3Judicial review petitions initiated and disposed in the Petition Department of the Court of Session**

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Initiated** |   | **2008-09** | **2009-10** | **2010-11** | **2011-12** | **2012-13** |
|   | **Judicial review (all)** | **232** | **378** | **342** | **243** | **293** |
|   | *Environmental* | *0* | *0* | *2* | *2* | *1* |
|   | *Housing* | *2* | *1* | *4* | *1* | *0* |
|   | *Immigrants* | *177* | *210* | *266* | *195* | *224* |
|   | *Licensing Board* | *0* | *1* | *1* | *0* | *1* |
|   | *Planning Permission* | *5* | *10* | *8* | *11* | *8* |
|   | *Prison Authorities* | *18* | *107* | *7* | *3* | *10* |
|   | *Social Security Benefits* | *0* | *0* | *0* | *0* | *1* |
|   | *Other* | *30* | *49* | *54* | *31* | *48* |
|  |  |  |  |  |  |  |
|  |  |  |  |  |  |  |
| **Disposed** |   | **2008-09** | **2009-10** | **2010-11** | **2011-12** | **2012-13** |
|   | **Judicial review (all)** | **212** | **227** | **242** | **412** | **370** |
|   | *Environmental* | *0* | *0* | *1* | *2* | *1* |
|   | *Housing* | *5* | *1* | *3* | *1* | *0* |
|   | *Immigrants* | *153* | *168* | *182* | *267* | *229* |
|   | *Licensing Board* | *1* | *1* | *0* | *2* | *0* |
|   | *Planning Permission* | *4* | *7* | *5* | *11* | *12* |
|   | *Prison Authorities* | *15* | *18* | *12* | *95* | *101* |
|   | *Social Security Benefits* | *0* | *0* | *0* | *0* | *1* |
|   | *Other* | *34* | *32* | *39* | *34* | *26* |
|  |  |  |  |  |  |  |

Unsurprisingly immigration and asylum cases are the largest single area for judicial reviews.

There is a strong incentive to challenge decisions even if the prospects of success are not high. This may also be the case in some planning cases where the potential benefit of securing planning permission make it worthwhile to challenge an unsuccessful appeal against refusal of permission.

It is also to be expected that prisons would also constitute a significant proportion of judicial reviews although the relationship between the cases initiated and those disposed of seems odd and might be explained by a stream of cases which leads to them being stayed for an authoritative determination which when made allows for a surge in disposals with perhaps the failure to end slopping out in Peterhead Prison accounting for recent surge.

In social security the low level challenges may reflect reluctant acceptance of the decisions by tribunals or inability to secure funding to go to court.

It would be interesting to have more detail the catch-all *Other* category and the proportion of one-off cases as opposed to topics/services with recurring challenges.

It is suggested thatthese statistics show support for the argument judicial review as being a remedy which is used where it is appropriate and proportionate. We can see that in social security the two levels of tribunal proceedings will probably resolve most challenges. Although it may be campaigners concerned about the sharp decline in social security appeals which is being attributed to mandatory consideration and the lack of a time limit for this reconsideration, will consider possible challenge to an ombudsman and or judicial review.[[60]](#footnote-60) The new requirement of permission for judicial review in immigration cases will result in most challenges being refused permission as they fail to meet the *Eba* criteria. In relation to prisoners seeking judicial review, recourse to the complaints procedure and the SPSO may well resolve many disputes but in the absence of tribunal making binding determinations then it is to be expected that there will be some legal issues which can only be dealt with by the courts.

**Conclusion**

It has been the argument in this paper that the idea of system, and holistic approaches will contribute to a better understanding of judicial review’s place in administrative justice. This is so even though it may be said that the administrative justice system is more of an aspiration than a description as it was not deliberately conceived as. Rather it is a set of arrangements and their underlying logic has been exposed and applied in more purposeful coherent manner which it is hoped makes it efficient and effective through the key ideas of appropriate and proportionate.

The institutions and methods of redress deal with different problems and disputes and have different remedies. There are gaps and overlaps which are more easily observed when considered together and from the user’s perspective. Mostly those involved in the different institutions and techniques will not have good overall appreciation of their relationship to the others. They may be aware of some gaps or overlaps. Thus the ombudsman may know more because the legislation removes complaints for which there are alternative remedies but then allows for those cases to be accepted if the ombudsman feels it is not reasonable to expect the person to have or to have had resort to that other remedy. Thus the idea of redress can expand laterally to seek to match the nature of the dispute and the attitudes of the disputants with the institution and method of redress which is most appropriate –fitting the forum to the fuss. The four stage dispute model recognises that this is the third stage and it is better if there can be early resolution, reducing the escalation of a grumble or a grievance into a full blown dispute and, better still if such disputes can be prevented. This stage can be informed by the fourth and final stage in which insight from disputes is gathered and acted upon so as to improve shortcomings and systemic problems and thus preventing their recurrence. While there is some learning to be derived form a judicial review, ombudsman reports and specialist tribunal judgment offer greater scope to promoting getting it right first time.

The courts like the other institutions and methods of redress are appropriate for certain disputes and only as a last resort but their role not only extends to a dispute between users and the pubic an governmental bodies they deal with but also with disputes that users have with the bodies resolving the dispute. As we saw in the discussion of the scope of judicial review in dealing with unappealable decisions of the Upper Tribunal, appropriateness was also informed by proportionality. Elliott and Thomas’ insight that what was involved was deciding which was the more appropriate level of the judicial hierarchy to resolve a dispute may also be considered as a partnership. I have touched on the idea elsewhere that the relationship between the courts and the ombudsman can be regarded not only as a supervisory one by the court but also as one of partnership between them.[[61]](#footnote-61)It may seem odd as partnership seems to imply equals and a supervisor implies hierarchy. While the supervisor may overrule the supervisee, it may also vindicated. As *Cart*showed the courts do exercise respect and restraint, and the limited scope of judicial review of the Upper Tribunal in *Cart* and *Eba* was based on the tribunal’s expertise. The courts and the tribunals are both engaged in determining legal disputes and legal accountability. The ombudsman is also an institution enforcing accountability as well as resolving disputes. The Lord Chief Justice of Northern Ireland observed in a speech ‘The Ombudsman and the Judge: Redressing Grievance and Holding to Account’ celebrating the 40th anniversary of the Northern Ireland Ombudsman, that the courts and the ombudsman were complementary, like the emergency services ‘Each is absolutelyvital – but not necessarily in the same situation’.[[62]](#footnote-62) I would suggest then the institutions of administrative justice are not so much pillar as the Law Commission suggested, but partners in administrative justice, each making their own particular contribution.

1. See the discussion and authorities cited in Lord Clyde and D Edwards, *Judicial Review*, (2000) at, 12.01. [↑](#footnote-ref-1)
2. 8.3 (2), Act of Sederunt (Rules of the Court of Session) SI 1994, No.1443. [↑](#footnote-ref-2)
3. [↑](#footnote-ref-3)
4. Tribunals, Courts and Enforcement Act 2007 (TCEA 2007),Schedule 7, para.13(1),. [↑](#footnote-ref-4)
5. See both the report on the review of tribunals chaired by Sir Andrew Leggatt, *Tribunals for Users: One System; One Service*, ( 2001) and the White Paper which followed the review and presaged the 2007 statute, *Transforming Public Services, Complaints, Redress and Tribunals*, Cm 6243, (2004). [↑](#footnote-ref-5)
6. Leggatt, n. 4, paras. 1.10-1.13. [↑](#footnote-ref-6)
7. Leggatt, n.4, para. 7.5. [↑](#footnote-ref-7)
8. Leggatt, n.4, paras. 8.6, 8.9-14. [↑](#footnote-ref-8)
9. Leggatt, n.4, para.8.4. [↑](#footnote-ref-9)
10. Leggatt, n.4, para..8.20. [↑](#footnote-ref-10)
11. Legggatt, n.4 para. 6.30 [↑](#footnote-ref-11)
12. Leggatt, n.4, para, 9.11. [↑](#footnote-ref-12)
13. Cm 6243, n.4, para. 2.2. [↑](#footnote-ref-13)
14. It was explained that a summary was being given and that local government and health services were excluded, but it was acknowledged that these services have an important impact upon people and do give rise to disputes. See Cm 6243, n. 4 para..3.1 [↑](#footnote-ref-14)
15. In a consultation paper the Law Commission for England and Wales identified the redress mechanisms which it called ‘ the four pillars of administrative justice’: internal complaints schemes; tribunals and inquires; public sector ombudsmen, and the courts. See The Law Commission, *Administrative Redress: Public Bodies and the Citizen, Consultation Paper No 187*, (2008), p.6. [↑](#footnote-ref-15)
16. Administrative Justice Steering Group, *Administrative Justice in Scotland - The Way Forward* (2009). [↑](#footnote-ref-16)
17. *The Developing Administrative Justice Landscape*, 2009, available at http://ajtc.justice.gov.uk/docs/landscape\_paper.pdf. [↑](#footnote-ref-17)
18. The AJTC had been created in 2007 to keep under review the administrative justice system (hence the need for a definition of the system), with a view to making proposals to ministers for reform and research to make the system accessible, fair and efficient, TCEA 2007, Schedule 7, para.. 13(1). As part of the Conservative –Liberal Democrat Coalition Government’s policy to reduce public bodies, the AJTC was abolished in 2013. See C. Skelcher ‘Reforming the oversight of administrative justice 2010-2014: does the UK need a new Leggatt report? [2015] *Public Law* 215. [↑](#footnote-ref-18)
19. *Putting It Right – A Strategic Approach to Resolving Administrative Disputes* 2012, available at http://ajtc.justice.gov.uk/docs/putting-it-right.pdf [↑](#footnote-ref-19)
20. See the Scottish Public Services Ombudsman Act 2002 and B. Thompson ‘The Scottish Public Services Ombudsman: Revolution or Evolution?” in A. McHarg & T. Mullen (eds) *Public Law In Scotland* (Avizandum, 2006), 281-304. [↑](#footnote-ref-20)
21. SPSOA 2002, s.7(8), (9). [↑](#footnote-ref-21)
22. SPSOA 2002, s.5, Sched. 2,3,4. [↑](#footnote-ref-22)
23. SPSOA 2002,s.7(7). [↑](#footnote-ref-23)
24. SPSOA 2002, s.16. [↑](#footnote-ref-24)
25. For examination of the arrangements for compliance with UK ombudsmen’s recommendations for remedy and in particular the arrangements in relation to the Parliamentary Commissioner for Administration who can make a report to the Westminster Parliament see R.Kirkham. B. Thompson and T. Buck. ‘When Putting Things Right GoesWrong: Enforcing the Recommendations of the Ombudsman’ [2008] *Public Law*, 510 and T. Buck, R. Kirkham and B. Thompson. *The Ombudsman Enterprise and Administrative Justice*. (2011). [↑](#footnote-ref-25)
26. SPSOA 2002, ss16A-G inserted by Public Services Reform (Scotland) Act 2010, s.119. [↑](#footnote-ref-26)
27. Tribunals (Scotland) Act 2014. [↑](#footnote-ref-27)
28. Scottish Courts and Tribunals Service, see s.130, sched. 4 of the Courts Reform (Scotland) Act 2014 [↑](#footnote-ref-28)
29. **Consultation on proposals to amend Schedule 1 to the Tribunals (Scotland) Act 2014, Schedule 4 to the Court Reform (Scotland) Act 2014 and for the organisation of the First-tier Tribunal for Scotland into Chambers** [↑](#footnote-ref-29)
30. *Report of the Smith Commission for further devolution of powers to the Scottish Parliament*, (2015), para. 63. [↑](#footnote-ref-30)
31. See C.Gill and T. Mullen ‘Analysis: Scottish Tribunals: Smith Commission Proposes Major Transfer of Jurisdiction to Scotland available at <http://ukaji.org/2015/02/18/analysis-scottish-tribunals-smith-commission-proposes-major-transfer-of-jurisdiction-to-scotland/>**; and***Scotland in the United Kingdom: An enduring settlement Comments by the Scottish Tribunals and Administrative Justice Advisory Committee*, available at <http://www.adminjusticescotland.com/documents/Scotland%20in%20the%20UK%20-%20An%20enduring%20settlement.pdf> [↑](#footnote-ref-31)
32. F. Sander and S. Goldberg, ‘Fitting the Forum to the Fuss’ (1994) 10 *Negotiation Journal* 49. [↑](#footnote-ref-32)
33. N3, pp.7- [↑](#footnote-ref-33)
34. P..Pleasance, A Buck, N. Balmer, R. O’Grady, H. Genn, M. Smith, *Causes of Action: Civil Law and Social Justice* (2004). [↑](#footnote-ref-34)
35. R. Berthoud and A. Bryson, ‘Social security appeals: what do the claimants want?’(1997) 4, *Journal of Social Security Law* 17, at 38. [↑](#footnote-ref-35)
36. See J Allsop, ‘Two Sides to Every Story: Complainants’ and Doctors’ Perspectives inDisputes about Medical Care in a General Practice Setting’ (1994) 16 *Law and Policy* 165;RKyffin, G Cook and M Jones*, Complaints Handling and Monitoring in the NHS: A Studyof 12 Trusts in the North West Region* (University of Liverpool Institute of Medicine, Lawand Bioethics 1997); C. Vincent, M. Young and A. Phillips, ‘Why Do People Sue Doctors? AStudy of Patients and Relatives Taking Legal Action’ (1994) 343 *The Lancet* 1609, 1612. [↑](#footnote-ref-36)
37. N 3, p.8. [↑](#footnote-ref-37)
38. AJTC. n.19, pp36-37. [↑](#footnote-ref-38)
39. The AJTC acknowledged that they drew upon similar guidance produced by the Australian Administrative Appeals Tribunal.. [↑](#footnote-ref-39)
40. [2014] CSOH 124 at para. [60]. [↑](#footnote-ref-40)
41. [2000] EWCA Civ 54,[2001] 1 All ER 462. [↑](#footnote-ref-41)
42. The Lord Chancellor is under a statutory obligation to report on the implementation of Law Commission reports, Law Commission Act 1965, s.3A, as amended by Law Commission Act 2009, s.1..The latest report on implementation published in March 2015 notes that the Government is considering the 2011 report on Public Services Ombudsmen and will respond shortly, *Report on the implementation of Law Commission proposals*, HC1062 of 2014-15, parss.94-96. One aspects of the Law Commission’s report is being taken forward by Government, such as the proposal to enhance the accessibility of the ombudsmen. , A people’s Ombudsman o. See Cabinet Office, *A Public Service Ombudsman, A Consultation* (2015). This would seem to imply abolishing the requirement of a complaint to be referred by an MP to the Parliamentary Ombudsman ,the MP filter, which was expressly proposed by a Commons Select Committee. See Public Administration Select Committee, *Time for a People’s Ombudsman Service,*HC655 of 2012-14, paras. 47-56.+ [↑](#footnote-ref-42)
43. *R (Cart) v The Upper Tribunal* [2011] UKSC 28, *Eba v Advocate General for Scotland* [2011] UKSC 29. [↑](#footnote-ref-43)
44. TCEA 2007 s [↑](#footnote-ref-44)
45. *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147. [↑](#footnote-ref-45)
46. *Cart*, Lady Hale at para.[43]. [↑](#footnote-ref-46)
47. *Cart*, Lady Hale at para. [41]. [↑](#footnote-ref-47)
48. *.Car*t, Lord Dyson at para. [126]. See also. Lady Hale at para [47] who did not characterise these cases in the large case load of both the High Court and the Court of Appeal as unmeritorious. [↑](#footnote-ref-48)
49. *Cooke*v *Secretary of State for Social Security* [2001]EWCA Civ 734,*R (Wiles) v SocialSecurityCommissioner* [2010] EWCA Civ 258. [↑](#footnote-ref-49)
50. *Cart*, see paras. [91]-[92]; [103] and [115]-[127] respectively.. [↑](#footnote-ref-50)
51. *Cart*, para. [54].. [↑](#footnote-ref-51)
52. *Cart*, paras.[104]-[105]. [↑](#footnote-ref-52)
53. *Eba*, paras [38] ,[40]. [↑](#footnote-ref-53)
54. The Appealsfrom the Upper Tribunal to the Court of Appeal Order 2008 (SI 2008 No. 2834), [↑](#footnote-ref-54)
55. *Eba*, para.[47]. [↑](#footnote-ref-55)
56. *Cart*, para.[100].. [↑](#footnote-ref-56)
57. M. Elliott & R Thomas, ‘Tribunal Justice and Proportionate Dispute Resolution’ (2012) *Cambridge Law Journal* , 71, p.297 at.323. [↑](#footnote-ref-57)
58. See n, 52 at 324. [↑](#footnote-ref-58)
59. See also the analysis in the article in this issue, A.C. Page ‘Thirty Years of Judicial Review in Scotland: The Judicial Review Caseload .’ [↑](#footnote-ref-59)
60. See L. Wood *Opinion Journal of the Law Society Scotland*, 20 October 2014. [↑](#footnote-ref-60)
61. B. Thompson ‘The courts’ relationship to ombudsmen- supervisor *and* partner?’ (2015) 37 *Journal of Social Welfare and Family Law* 137-152 [↑](#footnote-ref-61)
62. Morgan, D. (2010). The ombudsman and the judge: Redressing grievance and holding to account.In Northern Ireland Ombudsman, Reflections in Time: 40 Years of the Office of the NorthernIreland Ombudsman (pp. 8–13). Belfast: Northern Ireland Ombudsman. [↑](#footnote-ref-62)