SENIOR PRESIDENT OF TRIBUNALS

Senior President of Tribunals' Annual Report

2017

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Introduction

By the Senior President of Tribunals,

Sir Ernest Ryder

This year's report comes a little later than those presented in previous years. As a matter of policy, I had intended to move publication from February to April, coincident with our usual business-planning cycle. The general election intervened, however, and so the report comes out in July. My intention is that next year's report will issue in April.

On 19 July this year, we celebrated the tenth anniversary of the Tribunals, Courts and Enforcement Act 2007. The milestone provides an opportunity for us to reflect on the achievements that it facilitated. The Act's modern and coherent framework continues to assure jurisdictional leadership and operational delivery of tribunal justice across the United Kingdom, requiring us to deliver our statutory hallmark of specialist, innovative and accessible justice. The Act gives us a structure that combines effectiveness, simplicity and fairness. Many happy returns!

This year's report is also a landmark for me. It is my first reflecting on a full year of activity and achievement across the tribunal system. Last year's annual report was the stuff of 'joint and several liability': a shared effort with my predecessor, given that I took over in the September of the reporting year. I shaped that report around my focus for the future as the incoming Senior President: *one system, one judiciary and quality assured outcomes*. This report is a reflection on that focus one year on and a signpost to the future.

This report summarises a wealth of progress, as well as setting our sights on the year ahead. It is both a report card and a business plan. I hope it demonstrates what we have done, and where we aim to go next; and in both respects, the immense value that underpins all that the unified tribunal system represents and which our judicial office holders provide.

One Year On

My vision of *one system, one judiciary, and quality assured outcomes*, was developed for the tribunals, with the help of the tribunals' judiciary. The vision is incapable of being realised without the full engagement and cooperation of our judicial colleagues in the courts systems across the United Kingdom. That is why I have been heartened over the last year:

- to have the strong support of the Lord Chief Justice of **England & Wales** who in his annual report, published in November, looked forward to a reformed justice system that "will open

up opportunities for judges to be deployed more flexibly and enable them to sit in more than one jurisdiction. One justice system and one judiciary will be achieved, which will result in the more efficient and effective administration of justice". In terms, the Lord Chief Justice endorsed our vision, and I look forward to working with his successor on the important work which now follows to realise our shared goals;

- to have worked closely with the Lord President in **Scotland**, as we both seek to help deliver the promise of a devolved tribunal justice system for Scotland affording users, as well as judicial office holders, opportunities to improve upon the status quo, and build upon the ethos of specialist, innovative and accessible local justice provided by judges in Scotland for our citizens who live there;

- to have collaborated successfully with the Lord Chief Justice of **Northern Ireland** in continuing the strong working relationship between our justice systems in which Northern Ireland's courts continue to provide key leadership judiciary for the reserved tribunals; and

- to welcome the Royal Assent given to the **Wales** Act 2017, among other things bringing closer the formal appointment of a President of Welsh Tribunals, who can act as the standard bearer for the devolved jurisdiction's judiciary, bringing ever stronger links for them both with the reserved tribunals and with the courts.

Although *one system* is a United Kingdom-wide quality mark, it is by no means a one size fits all process. Our vision reflects and supports the finely-tuned way that individual tribunal characteristics and governance structures are led and managed in each of the national jurisdictions of the UK. Our diversity is underscored by having at our core a recognition of the key constitutional protections afforded to our citizens by tribunals and an acceptance that tribunal justice (and the specialist judiciary which dispenses it) share a parity with our colleagues in the courts.

Throughout this report, I and my colleagues have taken the opportunity to demonstrate progress against our vision, engineered as it is in to the breadth of activity we undertake. We will also signpost the next step in the development of our vision in our use of the Courts and Tribunals Reform Programme to strengthen the accessibility of specialist and innovative justice. The rule of law and its providers, the judiciary, must be valued if the justice system is not to be weakened. Everything we do is characterised by the value that we add and the impartiality and quality with which an independent judiciary performs that vital function in society.

Engaging our judiciary

Judicial morale has been a focus of media and wider public attention, as well as a matter of significance for all those responsible for the leadership and management of the judiciary and our work. The fiscal constraints affecting judicial pay and pensions and an ever increasing workload make for a far from easy context, whether for recruitment and retention of judges and panel members of the highest calibre, or for the effective and efficient use of our jurisdictional 'sitting day' budgets.

In February this year, the Lord Chief Justice (E&W) and I welcomed the publication of the Judicial Attitudes Survey (2016), and the substantial evidence base it contains to assist the Review Body on Senior Salaries in making its recommendations in 2018.

Despite the clear challenges facing the judiciary, the past year has some significant achievements to report that are relevant to engagement and morale. In my dealings with tribunals' judicial office holders up and down the country, I have seen nothing but dedicated professionalism, commitment to providing quality access to justice, and an enthusiasm for collegiate initiatives designed to improve the way we work. Tribunal judges have a valued habit of identifying 'what works' and we have constructed around them local leadership and feedback through Networks to channel those good ideas.

Judiciary Matters

In last year's annual report, I said that I planned to be a listening Senior President. Engaging the almost five and a half thousand judicial office holders across the unified tribunals system has been a central focus for me, and will remain so. This is even more important given the context of Reform: there is little point trying to design an improved system if you do not seek input from the people most expert at knowing what the system really needs in order to deliver and thrive.

The modernisation and improvement of our courts and tribunals is long overdue. It is critical that we seize this opportunity to bring the justice system into the 21st Century. The Reform Programme has already started to deliver some significant results in targeted areas, but there is undoubtedly a huge amount that yet needs to be planned, developed, agreed and implemented. This work – funded by MoJ and the Treasury – will take between four and six years to complete, and it is essential that the judiciary is fully involved in developing and implementing the changes that are to come. As the Lord Chief Justice and I have consistently underlined, the judiciary's role is to provide leadership, not to be led by others.

Over the past year, our engagement framework has developed rigour, and the conversations across the country with holders of judicial office have gained momentum. In January this year we commissioned through the Judicial College and ran a bespoke Judicial Reform Leadership Master Class, arranged in several regional locations across the country. The course provided a forum for all leadership judges to discuss together the shape, impact and process of reform and the ways in which change will affect our collective working lives. This has laid the necessary foundations for us to disseminate more detailed information and critically to facilitate a more meaningful conversation between leadership judges and their judicial colleagues about the Reform Programme. The focus must now be on how Reform will change our ways of working. The conversation has been branded *Judiciary Matters*, and it is designed to work alongside the HMCTS conversations between their managers and staff: 'Justice Matters' and 'One Conversation'.

Leadership colleagues across tribunals and courts have now been provided with substantial briefing materials to assist in the development, feedback and, most importantly, content of the local reform

discussions they will have with the wider judiciary. This systematic and structured management of communication and engagement is still relatively new to the holders of independent judicial office (although not quite so new to the tribunals' judiciary who are used to regular briefings from my office and from the national Chamber and Tribunals structures we have in place). Although *Judiciary Matters* conversations are now well underway, we must ensure that the heads of each jurisdiction are available to have discussions with the local judiciary and that local judiciary see tangible examples of the projects as they are developed.

Jurisdictional visits

It is essential that judges and panel members are kept fully informed not only of matters relating to Reform but more generally on matters that affect their judicial roles. To that end I have travelled the length and breadth of the UK to visit the jurisdictions for which I am responsible, speaking at judicial conferences and training events, and seeing judicial colleagues in their local hearing centres. Over the course of the year, I was very pleased to visit, among other places:

2016

- 7 March: Social Entitlement Annual Conference – Highgate House, Northampton
- 16 March: Annual Tax Training event – Warwick University
- 22 March: UT IAC Annual Conference - Kensington
- 7 May: Annual Employment Judges dinner – Harrogate
- 16 May: Swearing in a new salaried FtT Judge in Health, Education and Social Care Chamber – Manchester
- 23 May: War Pensions and Armed Forces Compensation Chamber training day – London
- 13 June: Scottish Tribunals Forum and Reserved Tribunals Group – Glasgow
- 12 July: CoTMA national Association of Employment Tribunal Members AGM - London
- 26 October: Welsh Tribunals Contact Group meeting - Cardiff
- 24 November: Social Context of Judging event – Highgate House
- 28 November: Scottish Employment Judges – Glasgow

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- 18-19 January: Reform Masterclass – London
- 20 January: HESC Salaried Tribunals Judges Annual Training day – Manchester
- 24 January: Reform Masterclass (RCJ)
- 23 February: SEND Members Annual Training day – Darlington
- 13 March: SSCS Training Conference – Warwick
- 17 March: UT Lands – London
- 23 March: Land Registration Training (FtT Property) – London
- 31 March: Judicial College Senior Trainers Conference – Highgate House
- 10 April: FtT War Pensions and Armed Forces Compensation training day – London

Strategic leadership and management

I have continued with my core judicial leadership team to develop the way in which the Tribunals Judicial Executive Board (TJEB) operates. It is a valued forum that advises me and receives regular briefings on 'business as usual' and developments in the Reform Programme. The 13 chamber and tribunal presidents, as well as other invited leadership judges, come together every other month to discuss issues they wish to raise and questions which derive from the discussions in which I am involved as a judicial member of the HMCTS Board, the Change Portfolio Board, and the Lord Chief Justice's Judicial Executive Board.

We have welcomed several guests to TJEB meetings during the period of this report and I am grateful both to Paul Kernaghan CBE QPM following his appointment as the Judicial Appointments and Conduct Ombudsman and to Lord Kakkar on his appointment as Chairman of the Judicial Appointments Commission for taking the time to join us and contribute to our discussions. We have also received presentations from senior officers of HMCTS including Kevin Sadler, Deputy CEO. Our own senior judiciary are responsible for aspects of our service development and we have benefited from the advice given by Judge Judith Gleeson and Judge Robert Holdsworth on IT and appraisals, for which we are very grateful.

Three main sub-committees underpin TJEB, on which various of my Presidents sit:

- the **Tribunals Judicial Activity Group** (TJAG) focuses on 'business as usual' issues such as

1 Visits beyond mid-April will be for the 2018 annual report, scheduled to be published next year.

judicial capacity and its implications for jurisdictional performance. It is a forum that considers assignment and appointment possibilities, oversees performance and alerts TJEB (and any other necessary governance structures) where action appears to be required. TJAG meetings are timed to be around a fortnight in advance of TJEB meetings, allowing TJEB members the chance to raise issues for further discussion that might affect other jurisdictions. Most recently, TJAG has considered the issue of workload forecasting and the particular consequences that has for the management of business cases for recruitment and cross-assignment. Obtaining accurate data, and then using it to predict implications for judicial resources is important, not least to prevent delay in recruitment and assignment decisions. HMCTS is making progress with other Government departments in shaping the data and analysis packs that are available to the judiciary for this purpose. I will be looking to HMCTS to lead this work still further: the data and analysis needs of the tribunals are not yet serviced as they need to be, and we will fail to deliver a flexible, effective and efficient operation without more analytical support;

- as its name suggests, the focus of the **Tribunals Judicial Strategy Group** is the Reform issues which occupy our leadership judges. Agendas tend to be fixed around particular themes and have included judicial governance, the detail of estates re-provision, IT and process change across the tribunals system. I value the insight and reflection from this forum, allowing me to shape my advice and input to the various other Boards and Committees on which I sit;

- whereas the other two sub-committees are focused mainly on the 'volume' jurisdictions (which are all at the First-tier), the **Upper Tribunal Presidents' Forum** meets termly and covers all matters relating to the appellate-level tribunals' judiciary – the four Chambers of the Upper Tribunal and the Employment Appeal Tribunal. Alongside the five Presidents, Mr Justice Peter Roth (as Chairman of the Tribunals Procedure Committee and President of the Competition Appeal Tribunal) and Mr Justice Brian Langstaff (as the lead on Scottish devolution and the chair of the online procedure rules working group) have a standing invitation.

The exchange of information in each of those groups helps inform the views that I reflect to others about my judiciary's attitudes, as well as helping me to cascade important communications. Together with written briefings and bulletins, a regular column I publish through the *Tribunals Journal*, and speeches which are reported to the tribunals' judiciary, I hope that our communications are as effective as they have ever been. Over the coming year, I intend to focus specifically on engaging the majority of fee-paid colleagues, aiming to ensure that their views and expertise are fed into the Reform Programme.

Regional leadership and Local Leadership Groups

The tribunals' jurisdictions are delivered through national Chambers and Tribunals. This is in contrast both to the Circuit-based organisation of judicial leadership in the courts, and to the way the HMCTS Regions operate under Delivery Directors. The integrity of our Chamber structure provides a distinct advantage. It facilitates jurisdictional leadership (in a context where specialism and jurisdictional expertise is central to our brand) as well as providing clear and simple channels for communication.

In February 2015, against the backdrop of Reform (and in particular the focus on Civil, Family and Tribunals estate utilisation opportunities), TJEB established the role of Regional Tribunals Liaison Judges (RTLJs). The RTLJs were appointed from among our cadre of regional leadership judges across existing national jurisdictions. They were each given an area of responsibility coincident with the seven HMCTS Regions in England & Wales. The RTLJs were designed to be a single point of contact with the tribunals judiciary for local cross jurisdictional issues in their respective Regions. They have been the conduits who manage and marshal engagement between HMCTS and senior court judges on the one hand and tribunal colleagues on the other.

Eighteen months after this innovation, TJEB reviewed the effectiveness of the new arrangements. We considered the increasing burdens placed upon the sole regional representatives, which had been added to by the invention of Local Leadership Groups (designed to help steer the implementation of Reform initiatives across all courts and tribunals, especially concerning estates reorganisations).

Following those discussions, we resolved to do three things:

First, we agreed to strengthen the concept of regional (cross-jurisdictional) leadership in the tribunals. While the integrity of our national Chambers structure is central to the way we operate, the Reform context demands we continue to provide for locally focused ('horizontal') leadership in addition to the ('vertical') jurisdictional structures we already have in place.

Second, the role of RTLJ seemed to us to have bedded-down well, and so we agreed that it should remain. The seven judges who were the first to be appointed as RTLJs were all appointed with either two or three-year terms. The two-year terms expired in December, and TJEB accordingly agreed on the appointment of their successors.

Third, to reflect (a) the need to ensure that national and regional leadership and strategy dovetail as effectively as possible in the tribunals, (b) the increasing burden of work at regional and local level falling on the current complement of RTLJs, and (c) the relative seniority of court and tribunal judicial leads in the Regions/Circuits, we decided to establish a new role of 'Regional President' with the consequence that one of our existing national Chamber Presidents is assigned to one of the Regions and Wales to lead the necessary regional work alongside the RTLJ.

Accordingly, the Regional Presidents appointed in the Autumn are Chamber or Tribunal Presidents, who already lead a national jurisdiction and have a seat on TJEB. In addition, they now work in their assigned Regions, in tandem with the nominated RTLJ. As a team, they will operate in similar manner to the senior and junior Presiding Judges on each Circuit. The status of national jurisdictional Presidents will help in local discussions with HMCTS teams; as well as bringing to bear invaluable contextual knowledge from TJEB discussions around overarching strategy.

I am hugely grateful to the Presidents who have taken on these new roles and am encouraged by the cooperative and collegiate way their appointment has been met by leadership colleagues in the courts. I am also very grateful to the RTLJs, including the judges whose terms concluded or commenced at the turn of this year. They have all worked incredibly hard on what has been an important leadership challenge.

Those serving in regional leadership capacities are, as of January 2017:

Region	Regional President	RTLJ
London	Judge Siobhan McGrath	Judge David Zucker
South East	Judge Colin Bishopp	Judge Richard Byrne
South West	Judge Peter Lane	Judge Jonathan Parkin*
Midlands	Judge Michael Clements	Judge Adrian Rhead
Wales	Judge Brian Doyle	Judge Anne Curran
North East	Judge John Aitken	Judge Jacqui Findlay
North West	HHJ Phillip Sycamore	Judge Christine Martin

** Judge Parkin will relocate to the North West Region and at that time stand down as RTLJ. His successor will be announced in due course.*

Local Leadership Groups (LLGs) are responsible for managing, co-ordinating, and communicating changes on the ground. At a time when multi-jurisdictional court and tribunal centres are increasingly the norm, such groups are necessary to ensure that local judicial decision-making is taken into account. Consolidating the work of these groups will be a priority for the coming year. I will be looking to my Regional Presidents and RTLJs, as well as to the other tribunals' judicial members of LLGs around the country, to feedback on their effectiveness and to make suggestions on how to improve ways of working. I will work with my judicial colleagues in the courts and with HMCTS in order to secure those improvements.

Judicial Associations

Alongside my visits and regular meetings with leadership colleagues, I have regularly engaged with representatives of the various judicial associations that represent the interests of the tribunals' judiciary. These meet termly under their umbrella body, the Forum of Tribunal Organisations, and it has been a privilege to attend their meetings. Most recently, I have initiated regular meetings a fortnight before each meeting of the Tribunals Judicial Executive Board (TJEB) to update members of the Forum on the discussions that are due to take place at the subsequent TJEB and on Reform matters more generally. I have also been invited to attend the annual meetings of several of the judicial associations including the Council of Employment Judges and the Mental Health Tribunal Members Association. I said in my first report last year that Reform will not be 'done to' the judiciary and it is vital that the voices of the 'judges on the ground' are heard; judges and panel members must be engaged at every stage of Reform if it is to be successful.

Critical Friend

We are working continuously to improve the way that we engage judicial colleagues across the tribunals. The structures and mechanisms we have in place work but at times the leadership judges are stretched so thinly that we cannot do justice to all of the engagement work which we would like to undertake. I had for some while been thinking about the benefit which a critical friend could provide. As I envisaged it, the role would be carried out by a judge who would be able to ask

provocative but constructive questions about current issues: looking through the lens of the judicial office holders up and down the country, across our various jurisdictions and associations.

After valued service as one of our Regional Tribunal Liaison Judges, I asked Hugh Howard (Regional Tribunal Judge in FtT SEC) to take on and help shape the role for me. I am delighted that Hugh accepted, taking-up the role in February.

The role of critical friend is novel, but I hope will prove to be of benefit to us in our discussions. It is not a role that provides for participation in the decision making that is for Chamber Presidents. Rather, it is a background role, focussing on advice and challenge. I look forward to working with Hugh and to developing a role that could add real value.

Notable successes

Appraisal

Appraising individual holders of judicial office can be seen as a sensitive issue. Judges, of course, are independent. In this context, who appraises whom; against what criteria; for what purpose; and how do we safeguard the integrity of judicial independence that is integral to safeguarding the rule of law?

Tribunals have been answering these questions for many years without too many problems. Appraisals are an accepted part of the way we operate, bringing benefits for the individuals appraised (as part of a wider focus on career development and advancement) and to the system including our users.

Our inaugural Senior President, Sir Robert Carnwath (as he then was), sought to bring a consistency of approach to appraisal by adopting a model scheme: the 'Core Document' was launched in 2009 and has been the basis for the framework we have used ever since. I am hugely grateful to Judge Robert Holdsworth, and to the members of the Tribunals Judicial Appraisal Network, for taking on the task of reviewing the Core Document and updating the model scheme. Robert and the Network have produced a refreshed scheme that is pragmatic and benchmarked against empirically validated good practice. Importantly, it also deals with the contextual reality of ever-increasing cross-assignment: judicial office holders (and particularly judges) sitting across different jurisdictions. For the first time, and after a successful pilot, our model scheme is premised upon the ability of different Chambers to share appraisals between each other, helping to decrease the burden on appraisers and appraisees, but nonetheless ensuring that the valuable benefits of appraisal are embedded.

I pay particular tribute to the Network for the collaborative way in which they pooled their experience and expertise in order to develop and refine the way we work. I consider this way of working, utilising networks of interested and experienced experts, to be a template, and will be looking to explore how we can make the most of it in other areas in the coming year.

Assignment/Deployment: Flexible cross-utilisation

The judicial recruitment principles, developed by the last-but-two Lord Chancellor, dictate that we

must have regard to internal cross-assignment/deployment opportunities before proceeding to a request for recruitment through the Judicial Appointments Commission. This makes good sense. It is right that we should utilise our judiciary as effectively and as efficiently as possible, aligning resources with workload pressures and matching judicial experience and expertise to the demands of our jurisdictions.

Through expressions of interest exercises we have been able to match under-utilised judges to those jurisdictions that have experienced significant workload increases, most notably the First-tier Tribunal (FtT), Immigration and Asylum Chamber (IAC). As reported last year, in 2014, 198 judges from the Employment Tribunals and the Social Entitlement Chamber were assigned for a period of two years. Of these, last summer 139 successfully sought extensions in a process overseen by the FtT IAC President. Following a more recent expressions of interest exercise, I have assigned another 37 judges from the Employment Tribunals (England & Wales) to the Immigration and Asylum Chamber.

Similar exercises were held during the period of this report in the Special Education Needs jurisdiction of the Health, Education and Social Care Chamber (HESC) which held an expression of interest exercise for fee-paid judges and special members. Over 200 applications from fee-paid judges were received for the 10 posts and 140 applications from specialist members from which 12 were appointed. The standard of applications was high.

Other examples of assignment include Social Entitlement Chamber salaried judges bringing their skills and expertise to War Pensions, a significant number of High Court judges who are assigned to sit in the Upper Tribunal Immigration and Asylum Chamber and a strong cadre of Circuit Judges who are deployed into the Mental Health jurisdiction of HESC. I am particularly pleased to be able to report that a number of Employment Judges continue to sit in the County Court, and an assessment of this pilot exercise is now underway. This has the potential to demonstrate the case for true flexible deployment across court and tribunal jurisdictions. The success stories involving expert Employment Judges sitting on cases concerning equality and discrimination claims in the County Court sit well with the excellent 'one-stop-shop' pilot in the property jurisdictions, where judges are able to sit across both tribunal and court jurisdictions to deal with cases which would otherwise have to be heard separately, in jurisdictional silos, in front of differently constituted benches.

In the background, throughout the course of the year, I have been considering the framework within which cross-assignment is managed. My predecessors settled the current SPT Policy on Assignments. It is a policy that, by and large, has stood the test of time. In certain aspects, however, not least the ever-increasing use of cross-assignment exercises which had not previously been contemplated, there is a need to review and revise that policy. In the coming year, working closely with my TJEB colleagues, as well as with the Lord Chief Justice who is seeking to review his deployment policy for the courts judiciary, I will settle a new policy. The revised assignment and deployment policies should operate seamlessly to create an environment where cross-utilisation of expert resource can be facilitated, bringing benefits for the system and the judiciary who operate across it.

This work will be a central focus for this next year. It will be of particular interest to the court and tribunal judiciaries, and fosters more clearly than perhaps anywhere else the concept of *One Judiciary*

to which the Lord Chief Justice and I are committed.

On a related theme, in the past year, I have met key leadership colleagues from the cadre of non-legal members in the tribunals, to discuss the concept of a faculty of members. The faculty would (a) provide a mechanism to help engagement with a diverse cohort, the vast majority of which are fee-paid office holders and so less easy to communicate with than salaried colleagues; and (b) facilitate a discussion about how we can provide opportunities for flexible cross-utilisation of members. To date, flexible deployment work has focused on judges. There is no reason in principle why this needs to be so. Given the large number of high quality tribunal members across our different jurisdictions, opportunities for cross-sitting should be available.

Appointments and Recruitment

Over the course of the last year, we have appointed two new Resident Judges in FtT IAC from the salaried judges of that Chamber. My congratulations go to Resident Judges Julian Phillips and David Zucker, with whom I have already worked closely in their new roles.

Encouragingly, we have also seen the appointment of seven of our tribunals colleagues as judges authorised under s9(1) of the Senior Courts Act 1981 to sit as High Court Judges, with authorisations in each of the three Divisions of that Court. This is a significant achievement for the individuals concerned, and testament to the expertise we have across the tribunals' judiciary, both at first-instance and appellate levels.

The pool of available judiciary always needs to be refreshed and we cannot rely on cross-utilisation alone. Given the forecasted pressures on the immigration and social entitlement jurisdictions, I am pleased that the Lord Chancellor has approved an exercise to recruit a significant number of new salaried judges. Successful candidates will be assigned to sit initially in the First-tier Tribunal, Immigration and Asylum, and Social Entitlement Chambers; as well as in the War Pensions and Armed Forces Compensation Chamber. The Judicial Appointments Commission (JAC) is now engaged in a competition for these judges. The competition is a first in that it is intended to be a 'generic' exercise in which judges are recruited for their judicial skills and for their ability to learn a new area of law rather than necessarily for their existing specialist expertise. Although they will be assigned to a particular jurisdiction, this will be for a two-year period after which they (or indeed any longer serving judges in the relevant jurisdiction) may be assigned to any other Chamber where there is a need for additional judicial resources. This is a significant move forward which will be monitored with interest and is intended to improve the diversity of our talent pool.

Finally on appointments generally, I was pleased to meet Lord Kakkar earlier this year following his appointment as the Chairman of the JAC. Lord Kakkar succeeded Christopher Stevens, who had served in the role of Chair since February 2011. I pay tribute to Chris, for the care with which he led the Commission.

In discussions with Lord Kakkar, we have agreed that there is a significant agenda around appointments driven both by efficacy and diversity; and that the professions need to work with the JAC to respond to changes in the way the Justice system will evolve over the next four to six

years. Lord Kakkar has been keen to learn more about the role of tribunals' judges and members, and we discussed the possibility of a non-legal member joining the Commission. Lord Kakkar very kindly accepted an invitation to attend a meeting of TJEB and to talk to and field questions from the Chamber Presidents. I have likewise attended a meeting of the JAC Commissioners this July.

Judicial Diversity[2]

I recently also met David Lammy MP, who has been appointed by Government to lead a review on BAME representation in the justice system.

In the tribunals, our published data relates a relatively favourable story when compared to others, but it must be remembered that the larger cohort of fee-paid colleagues in the tribunals and the very wide range of expert and specialist members means that caution needs to be applied before arriving at firm conclusions. That said, we should certainly not ignore the positives: indeed we should try very much to embrace and learn from them –

- the gender balance across the tribunals' judiciary has remained stable, with 47% of our office holders (and 45% of our judges) being women. This compares with 28% in the courts overall, and 36% across the salaried and fee-paid District Bench in the courts – the level of judge comparable with the majority of tribunal judges;

- two-thirds of our judges come from non-barrister backgrounds (compared to one-third in the courts). However, over 70% of the courts' District Bench comes from non-barrister backgrounds, so given the structure of our respective judiciaries, that is not surprising;

- the data records that, of those judges who declared their background, 6% of court judges and 10% of tribunal judges declared their background as Black, Asian or Minority Ethnic (BAME);

- for tribunal judges, a higher percentage identify as BAME in the younger age bands – 16% aged under 40 and 15% aged 40-49. By comparison, 6% of tribunal judges aged over 60 identify as BAME and the percentage of tribunal judges that are BAME on 1 April in each of the last five years has remained relatively constant at between 9 and 10%; and

- when adding in NLMs, the BAME proportion for tribunal Judicial Office Holders overall is 14% (with 16% of NLMs declaring an ethnicity identifying as BAME).

Judge Alison McKenna and Judge Paula Gray jointly represent me on the important committees and groups focused on improving diversity. They continue to press for career development strategies, recognising that while many recruits may well be found outside the judiciary, there will be some candidates for senior judicial office who have already joined the junior judiciary, for example via the tribunals, and who deserve opportunities for advancement. I strongly agree. Alison and Paula also help to pass on the learning and experience in tribunals to others in the hope that the system might

2 The statistics in this section are taken from the 2016 report on Judicial Diversity. The figures for 2017 were published on 20th July and can be found at: https://www.judiciary.gov.uk/publications/judicial-statistics-2017/

benefit from our insights, with the aim of improving the diversity across the judiciary.

Reform innovations

This report is not the place to try and summarise the enormous work that our judges are contributing to the Courts and Tribunals Reform Programme. Nothing less than a virtual encyclopaedia of references to projects, programmes and changes to our ways of working is regularly summarised on the judiciary website and in regular briefings to colleagues. At every level of decision making, design and strategic thinking tribunal and court judges are working together with HMCTS officials in the business of change. I am enormously grateful to them for sharing their skills and expertise and for giving so much of their own time to the Programme. The senior judiciary have published our Reform Vision statement and the *Judiciary Matters* briefing pack. It is my intention to develop our judicial strategy and publish that later this year with an 'end state' so that judges can know what Reform means for each of them.

There are notable successes in the development of digital products for the Social Security and Child Support tribunal which is to pilot a continuous messaging online system; immigration which has piloted new ways of working and will soon experience the virtual hearing pilot and electronic evidence exchange; and digital case management which will be introduced to a number of tribunals this coming year. The tribunals have played a leading role in the development of delegated case officers to assist judges and I am very grateful to the HESC Deputy President, Judge Meleri Tudor, for her role in leading this project.

A comprehensive review of Reform will be available later in the year alongside the strategic and end state documents that we intend to publish.

Wider updates

Government Consultations

The Government's responses to several consultations affecting tribunals have been published during the period of this report.

Following the proposals on panel composition as part of the 'Transforming our Justice System' consultation, the Government decided not to introduce single member panels as the default. Instead the Panel Composition Order 2008 will be amended to provide the Senior President with the power to decide that a panel may consist of one, two or three members. The conclusion of the consultation is consistent with the specialist, innovative and accessible forms of justice developed across tribunals, and demanded by the principles established under our primary legislative governance framework. We retain a clear mandate to utilise the significant specialist expertise and experience brought by judicial panels over and above that which a sole judge can bring. When the revised Order is introduced, it will be for each Chamber President to recommend any revisions they think they need in order to enhance their effectiveness in accordance with the principles set out in section 2(3) of the Tribunals, Courts and Enforcement Act 2007:

- accessibility;
- fairness;
- expedition and efficiency;
- specialist expertise; and
- innovation and informality.

Two consultation responses were published affecting the employment tribunals during the period of this report.

The first outlined the case for restructuring the primary legislative architecture (to be found in the Employment Tribunals Act 1996) in order to allow employment tribunals to be part of the wider Reform Programme. The proposals reflected the fact that the 1996 framework for ETs is significantly older than the 2007 framework that governs the unified tribunals.

Fees in the Employment Tribunal have also been the subject of a further review and the Government's review conclusions have been published. The Government does not propose to abolish or amend the fees regime. Instead it proposes to raise awareness of remission of and exemption from fees and to make some changes to the income threshold below which fees are not payable. I am grateful to the judges and judicial associations who submitted comments to the review which recorded the strong concerns of our users about the impact of fees on access to justice.

Finally, the consultation on Modernising Judicial Terms of Conditions was close to the heart of many judges. The Government has decided not to proceed for the time being with proposals to introduce a new five-year fixed term for the fee-paid judiciary.

Conclusion

2017/18 promises to be a very busy and, I hope, productive year. Workload volatility across our jurisdictions will need to be monitored and managed. We will need to work with the Ministry of Justice, other Government departments and HMCTS to ensure the appropriate allocation of resources for business as usual and Reform in order to maintain or improve performance, including timeliness. As ever, our prime focus must be on the cases and appeals which come before us. Our users are entitled to expect and deserve a fair, just, and proportionate process.

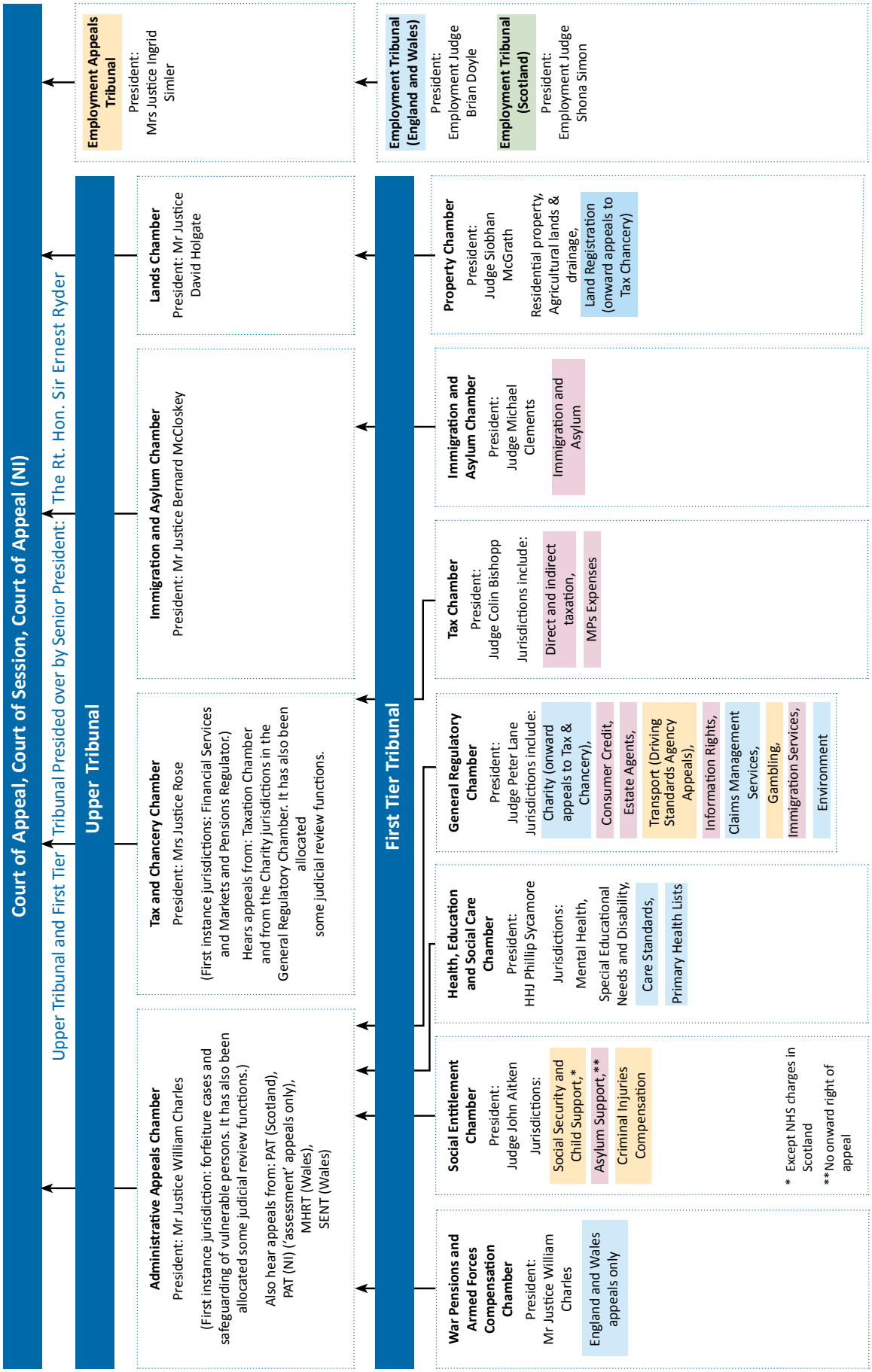
As we shape the future, our strategic focus on *one system, one judiciary, and quality assured outcomes* is now embedded. Building on the hugely encouraging start made, I am going to focus on the opportunities which Reform presents for our judicial office holders across the tribunals' system: judges and panel members, salaried and fee-paid; first-instance and appellate; accommodated in a permanent centre, or peripatetic; providing quality local access to justice for our users. The importance of engagement cannot be overstated. I look forward to working with you all over the

coming year to make real progress and demonstrate the value you provide to the justice system.

Finally, some words of thanks. This year has seen the final meeting of the Administrative Justice Forum, chaired skilfully and effectively by Jodi Berg. I am grateful to Jodi for her tireless efforts to engage users, Government Departments, and decision makers across administrative justice. I wish her well now that she relinquishes her responsibilities. I am also grateful to the former Justice Minister, Sir Oliver Heald QC MP, and to JUSTICE, for together agreeing a new council that will provide continued oversight of the administrative justice system. I am personally grateful to Sir Oliver for his significant engagement with the tribunals' judiciary during his term of office.

Appended to this report are individual contributions from my Chamber and Tribunal Presidents, and other designated leads, covering the detail in their respective areas over the 2016 year. I am grateful to each of them for the stewardship they provide.

Sir Ernest Ryder
Senior President of Tribunals


Court of Appeal, Court of Session, Court of Appeal (NI)
Upper Tribunal and First Tier Tribunal Presided over by Senior President: The Rt. Hon. Sir Ernest Ryder
Upper Tribunal
Administrative Appeals Chamber
President: Mr Justice William Charles
(First instance jurisdiction: forfeiture cases and safeguarding of vulnerable persons. It has also been allocated some judicial review functions.)
Also hear appeals from: PAT (Scotland), PAT (NI) ('assessment' appeals only), MHRT (Wales), SENT (Wales)
Tax and Chancery Chamber
President: Mrs Justice Rose
(First instance jurisdictions: Financial Services and Markets and Pensions Regulator.)
Hears appeals from: Taxation Chamber and from the Charity jurisdictions in the General Regulatory Chamber. It has also been allocated some judicial review functions.
Immigration and Asylum Chamber
President: Mr Justice Bernard McCloskey
Lands Chamber
President: Mr Justice David Holgate
First Tier Tribunal
War Pensions and Armed Forces Compensation Chamber
President: Mr Justice William Charles
England and Wales appeals only
Social Entitlement Chamber
President: Judge John Aitken
Jurisdictions:
Social Security and Child Support,*
Asylum Support,**
Criminal Injuries Compensation
Health, Education and Social Care Chamber
President: HHJ Phillip Sycamore
Jurisdictions:
Mental Health,
Special Educational Needs and Disability,
Care Standards,
Primary Health Lists
General Regulatory Chamber
President: Judge Peter Lane
Jurisdictions include:
Charity (onward appeals to Tax & Chancery),
Consumer Credit,
Estate Agents,
Transport (Driving Standards Agency Appeals),
Information Rights,
Claims Management Services,
Gambling,
Immigration Services,
Environment
Tax Chamber
President: Judge Colin Bishopp
Jurisdictions include:
Direct and indirect taxation,
MPs Expenses
Immigration and Asylum Chamber
President: Judge Michael Clements
Immigration and Asylum
Property Chamber
President: Judge Siobhan McGrath
Residential property, Agricultural lands & drainage,
Land Registration (onward appeals to Tax Chancery)
* Except NHS charges in Scotland
** No onward right of appeal
Employment Appeals Tribunal
President: Mrs Justice Ingrid Simler
Employment Tribunal (England and Wales)
President: Employment Judge Brian Doyle
Employment Tribunal (Scotland)
President: Employment Judge Shona Simon
Key: United Kingdom Great Britain England and Wales England only Scotland only

Annex A
Upper Tribunal

Administrative Appeals Chamber

Chamber President: Mr Justice (William) Charles

The Jurisdictional Landscape

The number of cases received this year was slightly higher than the previous year and social security and child support appeals from the Social Entitlement Chamber of the First-tier Tribunal have continued to make up over 90% of the total by number. Over a third of the social security and child support cases received were concerned with personal independence payment (including *CW v SSWP* (PIP) [2016] UKUT 197 (AAC); [2016] AACR 44, in which it was decided that an "aid" need not be an item designed and manufactured for the purpose of overcoming a limitation of function but may be an ordinary item used for such a purpose) and over a quarter were concerned with employment and support allowance (including *SD* v *SSWP (ESA)* [2016] UKUT 100 (AAC) in which the relevance of substance dependence was considered). Relatively rare now are industrial injuries cases, although the Chamber decided its first case under the Social Security (Recovery of Benefits) (Lump Sum Payment) Regulations 2008, which involved consideration of the Pneumoconiosis (Worker's Compensation) Act 1979 (*Aviva Insurance Ltd v SSWP (CR)* [2015] UKUT 613 (AAC)).

There were three three-judge panel decisions on social security issues during the year, two in Scotland. They considered the relevance of reports of previous medical examinations in employment and support allowance cases (*FN v SSWP (ESA)* [[2015] UKUT 670 (AAC); [2016] AACR 24), whether the Housing Benefit (Habitual Residence) Amendment Regulations 2014 were unlawful due to a failure to consult the Social Security Advisory Committee (*IC v Glasgow City Council (HB)* [2015] UKUT 321 (AAC)) and whether the First-tier Tribunal had a power to admit late tax credit appeals, which involved consideration of the powers of the Tribunal Procedure Committee to make rules enabling the First-tier Tribunal to extend time limits in primary legislation (*VK v HMRC* (TC) [2016] UKUT 331 (AAC)).

European Union law continues the throw up interesting points of law, as in *SSWP v SS (IS)* [2016] UKUT 110 (AAC), concerned with whether a family member of a jobseeker had a right of residence for the purpose of claiming income support, *MM v SSWP (DLA)* [2016] UKUT 149 (AAC); [2016] AACR 38, concerned with the lawfulness of applying the past presence test to refugees, *IG v SSWP (AA)* [2016] UKUT 176 (AAC); [2016] AACR 41, concerned with whether a claim for attendance allowance can be successful when the United Kingdom is not the competent state for sickness benefit purposes, *SSWP v MB (JSA)* [2016] UKUT 372 (AAC), concerned with the compelling evidence

test when considering whether a claimant has a genuine prospect of work, *SSWP v GS (SPC)* [2016] UKUT 394 (AAC), concerned with whether the claimant had comprehensive sickness insurance for the purpose of a right of residency based on self-sufficiency, and *RP v SSWP (ESA)* [2016] UKUT 422 (AAC), in which it was held that the UN Convention on the Rights of Persons with Disabilities did not assist in determining whether a person had EU rights as a worker but a reference was made to the Court of Justice of the European Union on the lawfulness of the derogation from Article 7(3)(a) and (b) of Directive 2004/38/EC made by regulation 5(3) of the now repealed Accession (Immigration and Worker Registration) Regulations 2004.

Procedural issues also arise in a large number of cases. For example, in *LO v SSWP (ESA)* [2016] UKUT 10; (AAC); [2016] AACR 30, guidance was given to the First-tier Tribunal on the need to consider telephone hearings where a party states that he or she does not wish to attend a hearing due to disability. A similar issue arose in *WA v SSWP (CSM)* [2016] UKUT 86 (AAC), where a woman did not wish to attend a child support hearing due to a fear of her ex-partner and a whole range of ways of avoiding intimidation was considered.

Criminal injury compensation cases, which anomalously come to the Upper Tribunal as applications for judicial review of decisions of the Social Entitlement Chamber of the First-tier Tribunal, have included *R.(Y) v First-tier Tribunal (CIC)* [2016] UKUT 202 (AAC) in which it was held that severe congenital abnormalities in a baby boy born as the result of his mother being raped by her father were an injury for the purposes of the Criminal Injuries Compensation Scheme 2008.

Among appeals from the Health, Education and Social Care Chamber of the First-tier Tribunal have been the first significant cases at Upper Tribunal level probing some of the key issues in relation to the Children and Families Act 2014, which among other things extends the coverage of the SEN system to young people up to the age of 25. This has raised questions concerning, for instance, the types of provision for them to which the system extends and the extent and role of the more person-centred planning to which the reforms aspired. In the face of public spending constraints, it is perhaps unsurprising that the more complex planning process under the Act has led to a number of cases exploring whether the duty to make a plan is triggered at all. With the reforms has come the question of how appeals to the tribunal by young people themselves, who depending on their needs may or may not have capacity for this purpose, should be handled (*London Borough of Hillingdon v WW (SEN)* [2016] UKUT 253 (AAC), *Buckinghamshire County Council v SJ (SEN)* [2016] UKUT 254 (AAC)). In the mental health arena, consideration has been given to the vexed question whether a restricted patient with the capacity to do so may give valid consent to the deprivation of his liberty caused by conditions of his conditional discharge (*MM v WL Clinic* [2015] UKUT 644 (AAC)).

The information rights jurisdiction continues to provide a caseload which, while modest in comparison with volumes in the Chamber overall, remains resource-intensive in terms of judicial time (e.g. a very high proportion of refusals of permission applications on the papers are renewed at oral hearings, although few ultimately succeed). Cases of note include *Cross v IC* [2016] UKUT 153 (AAC); [2016] AACR 39, deciding that the Sovereign is not a public authority for the purposes of the Environmental Information Regulations, and *DECC v IC and Henney* [2015] UKUT 671 (AAC), concerned with the boundary between those Regulations and the Freedom of Information Act.

Other appeals from the General Regulatory Chamber of the First-tier Tribunal have included the Upper Tribunal's second appeal in a transport case (*AC v Registrar of Approved Driving Instructors* [2016] UKUT 305 (AAC), considering the extent to which an applicant for registration as a driving instructor may seek to go behind a conviction for driving a motor vehicle for excess alcohol) and its first appeals in a gambling case (*Gambling Commission v Greene King plc* [2016] UKUT 50 (AAC), concerned with the relationship of the Gambling Commission's licensing functions to those of local licensing authorities), and a case concerning the listing of land as an asset of community value under the Localism Act 2011 (*Banner Homes Ltd v St Albans City and District Council* [2016] UKUT 232 (AAC)).

Judicial Training

Since the last report, the Chamber has continued its training on specific issues in relation to our broad spectrum of statutory appeals, and Judicial Review.

We have had a First-tier Tribunal perspective from the criminal injuries compensation jurisdiction, and, in that context, a first class lecture from Professor Ryszard Piotrowicz of the University of Aberystwyth on people trafficking and the particular problems that it produces, not just for those who are subject to it, but in relation to evidential matters for those dealing with, for example, criminal injuries claims in respect of it.

A talk from an official from HMRC gave us a useful insight into their decision-making processes.

In November 2016, we embarked upon some initial training in Universal Credit, an overarching welfare benefit scheme which will ultimately replace much of the current diverse and interlocking benefits. We have already had our first few universal credit appeals but the numbers will grow as the benefit is "rolled out".

We continue to collaborate with the Immigration and Asylum Chamber by organising joint training on topics of common interest. In early October we were delighted to welcome Lord Sumption to the Rolls Building, and to invite colleagues from the High Court to hear him speak to us about "The Historian as Judge", a fascinating lecture which now appears on the Supreme Court website.

People and places

In April UT Judge Alan Gamble, who is based in George House Edinburgh, retired from salaried judicial office. Fortunately Alan's expertise and experience are retained because he continues to sit in the chamber as a fee paid Deputy Upper Tribunal Judge.

Tanya Parker retired fully from judicial office in June having sat as a fee paid Deputy Upper Tribunal judge since 2008. In July Michael Brodrick also fully retired as a Deputy Upper Tribunal Judge having stood down as the chamber's lead judge for Traffic Commissioner appeals last year. And in November Ann Ramsay, who became a Deputy Commissioner in 1997 (latterly a Deputy Upper Tribunal Judge), retired from her appointment in this chamber though she will continue to sit as a salaried judge of the First-tier Tribunal.

In June, Ailsa Carmichael QC, a fee paid Deputy Upper Tribunal judge in the chamber was appointed a Senator of the College of Justice which is a salaried judge in the Court of Session in Scotland.

The chamber's judges are taking advantage of the increased flexible and cross deployment opportunities across courts and tribunals. Gwynneth Knowles QC and Kate Markus QC both full time salaried AAC judges were successful in the most recent s9(1) Deputy High Court judge JAC competition. Judge Markus QC will sit in the Queens Bench Division in the Midlands Circuit and Judge Knowles QC in the Family Division in London.

Six full time salaried judges (Judges Ward, Wikeley, Gray, Markus QC, Hemingway and Knowles QC) were re-assigned to the Upper Tribunal Immigration and Asylum Chamber for a further 12 months which will be extended for a further 12 months at the end of 2016.

Three full time salaried judges (Judges Wikeley, Mitchell and Gray) were appointed as Deputy Social Security Commissioners and Deputy Child Support Commissioners for Northern Ireland in addition to the current Deputies who are also salaried UT (AAC) judges (Judges Ward and Lloyd-Davies) and one UT (AAC) DUTJ (Judge Gamble).

Christopher Smith, Registrar for the AAC in Scotland, retired at the end of 2016. I am grateful to Christopher for his work and support to the AAC judges in Scotland.

Lastly, it was with great sadness that we learnt of the death of David Williams on 1 September 2016. David only recently fully retired from judicial office having retired as a salaried judge in April 2014 but continuing to sit in the AAC as a Deputy Upper Tribunal Judge until his statutory retirement in February this year. David became a full time salaried Social Security and Child Support Commissioner in 1998. In 2008 he became an Upper Tribunal judge. He will be greatly missed by his colleagues.

Scotland

Since April 2016 when Judge Gamble retired from salaried office, there have been no salaried Upper Tribunal Judges based wholly in Scotland. Judge Knowles QC and Judge Markus QC have been appointed as lead and deputy lead judges for Scotland. Both sit in Scotland regularly. In addition, a group of fee paid Judges (including Judges May QC and Gamble) maintain a judicial presence in George Street so that appeals and applications are determined in a timely fashion. Lady Carmichael, who as mentioned above was appointed to the Court of Session in June 2016 also remains a Deputy AAC judge. Lady Carmichael will continue to sit in the AAC from time to time to hear more complex appeals. Despite the uncertainties caused by the proposed devolution to the Scottish Government of the reserved administrative justice jurisdictions, a competition to recruit both fee paid judges and a salaried judge able to sit in Scotland has been agreed in principle.

Presently, the timescale for the transfer of the AAC into the devolved Scottish Tribunals system is unknown. Alongside the administrative and judicial challenges inherent in this process, the work of the AAC is also likely to be affected by the devolution to Scottish Government of certain social security benefits, including those concerning payments to the disabled, the sick and their carers. The

AAC submitted a response to Scottish Government's consultation on the future for devolved social security benefits which was focussed on the adjudication of appeals relating to such benefits.

Northern Ireland

The AAC currently has jurisdiction in Northern Ireland to deal with appeals from the First-tier Tribunal in relation to freedom of information and data protection, certain environmental matters, certain transport matters, the regulation of estate agents, consumer credit providers and immigration service providers, and appeals in Vaccine Damage cases. It also hears appeals from the Pensions Appeal Tribunal for Northern Ireland in assessment cases. There is a small but significant on-going caseload in freedom of information and data protection, transport and war pension assessment cases.

Judge Mullan and Judge Stockman combine their Upper Tribunal functions with their roles as Chief Social Security and Child Support Commissioner for Northern Ireland and Commissioner respectively.

As noted elsewhere, there have been changes in the complement of AAC Judges who serve as Deputy Social Security and Child Support Commissioners in Northern Ireland. The late Judge David Williams retired from office on 3 February 2016 and Judge May QC on 7 May 2016. The appointments of Judge Lloyd-Davies, Judge Ward and Judge Gamble were renewed from 1 June 2016. Judge Wikeley, Judge Gray and Judge Mitchell were sworn in as new Deputy Commissioners for Northern Ireland on 17 May 2016.

As noted elsewhere in this report, following a lengthy impasse, the Northern Ireland Assembly consented on 18 November 2015 to the stalled Northern Ireland (Welfare Reform) Bill 2015 being taken forward by the Westminster Parliament. The subsequent enactment of the Northern Ireland (Welfare Reform) Act 2015 and the Welfare Reform (Northern Ireland) Order 2015 has allowed for the implementation of substantive welfare reform which will lead to an alignment of the social security schemes in Northern Ireland with those in Great Britain. This will eventually result in a renewed convergence of the social security and child support jurisdictions of the Commissioners in Northern Ireland with those of the Upper Tribunal.

Wales

Judge Mitchell continues to be based in the Cardiff Civil Justice Centre for one week every month. Along with judicial work, he liaises with court staff about processing of applications and appeals lodged in Wales and listing arrangements.

Appeals against decision of traffic commissioners for the Welsh Traffic Area are now normally heard in Cardiff. There were four such hearings this year. In Re Tacsis Gwynedd [2015] UKUT 668 (AAC), the Upper Tribunal gave guidance about the treatment of Welsh language documentary evidence at a commissioner's public inquiry. Subsequently, the Senior Traffic Commissioner amended her statutory guidance to reflect the requirements imposed on tribunals by the Senior President of Tribunals' practice direction First-tier and Upper Tribunals – Use of the Welsh language in Tribunals in Wales.

The Senior Traffic Commissioner has also secured funding from the Welsh and UK Governments to establish a separate administrative office in Wales for the Welsh Traffic Area.

Appeals, and applications for permission to appeal, against decisions of Welsh devolved tribunals remain rare. There was one appeal against a decision of the Special Educational Needs Tribunal for Wales and fewer than five applications for permission to appeal against decisions of the Mental Health Review Tribunal for Wales.

In January 2016, the National Assembly for Wales passed the Regulation and Inspection of Social Care (Wales) Act 2016. Planned to come into force from April 2018, the Act reforms regulation of social care provision and the social care workforce in Wales. The Act provides for a right of appeal to the First-tier Tribunal with an onward right of appeal to the Upper Tribunal on a point of law.

In December 2016, the Additional Learning Needs and Education Tribunal (Wales) Bill was introduced in the National Assembly for Wales. As introduced, the Bill would re-name the Special Educational Needs Tribunal for Wales, the Education Tribunal for Wales. The Bill provides for a right of appeal, on a point of law, to the Upper Tribunal thus maintaining current arrangements for appeals against decisions of the SEN Tribunal for Wales. The Bill is expected to complete its passage through the National Assembly in late 2017.

Tax and Chancery Chamber

President: Mrs Justice (Vivien) Rose

Judiciary

My first full year as President of the Upper Tribunal (Tax and Chancery Chamber) has been an interesting and enjoyable one. As often happens, the challenges that arose during the year were not the ones that we expected when looking forward this time last year. The increase in work as a result of new statutory provisions aimed at challenging the benefits for tax payers of joining marketed tax-avoidance schemes has not (yet) materialised and the case load of the Chamber has remained relatively steady. However, more work has been generated to tackle administrative changes, in particular the proposed introduction of fees for appellants lodging and pursuing appeals from the First-tier Tribunal (Tax Chamber). The introduction of fees in other First-tier and Upper Tribunals has led to great changes in the volume of appeals. It remains to be seen what effect the new fees have on the work of the Upper Tribunal if they are introduced in 2017.

The past year has seen some additions and retirements to the judges and members of the Chamber. I am delighted that two High Court Judges from the Queen's Bench Division have been assigned to the Chamber; Mrs Justice Philippa Whipple and Mrs Justice Ingrid Simler. Although the Tax and Chancery Chamber has traditionally been the preserve of the Chancery Division judges, there is undoubtedly a great advantage for the Chamber in having the expertise of judges from other Divisions of the High Court whose previous professional work included tax advisory or litigation

work. We have also had some notable retirements over the year. Howard Nowlan retired from his role as deputy Upper Tribunal judge and Peter Burdon has also retired as a financial services member. HHJ David Mackie who had sat on financial services cases also retired on his retirement from the Circuit Bench. I am very grateful to them for their work for the Tribunal over their period in office. In the land registration jurisdiction, Edward Cousins has now fully retired from his role in the Upper Tribunal. Judge Cousins has been a key member of the Upper Tribunal bench from the very beginning when he moved from his role as Adjudicator to HM Land Registry to being a tribunal judge in both the First-tier Land Chamber and the Upper Tribunal (Tax and Chancery Chamber). He has been a dedicated and conscientious member of the team and will be greatly missed. HHJ John Behrens, formerly a Specialist Circuit Judge assigned to the Chamber has kindly agreed to continue hearing appeals on land registration matters as part of his future fee-paid duties following his retirement from the Circuit Bench. We continue to benefit from the assignment of Scottish judges in the Court of Session Outer House. Lord Glennie has left the Tribunal on his promotion to the Inner House this summer and Lord Jones passed away earlier this year. On 1 January 2017 Lord Bannatyne, Lord Ericht and Lady Wolffe joined the Chamber to handle cases in Scotland.

The training of judges and non-legal members of the of the Upper Tribunal (Tax and Chancery) continues to be a priority to ensure we remain up to date with fast moving developments in legislation and practice. The Tribunal held its annual two-day residential conference for all Upper Tribunal and First-tier Tribunal judges in the tax jurisdiction at Walton Hall, Warwickshire in March 2016. This was attended by all the salaried and fee paid judges (some 65 people). Some of the salaried and fee-paid judges gave lectures on a variety of procedural and substantive topics, including the meaning of 'special circumstances' in tax penalty appeals, applications to reinstate appeals after strike outs and withdrawals, evidence and burden of proof, as well as updates on recent legislation and case law in the areas of direct tax, indirect tax and restoration. A major (and popular) part of the training conference was the case study exercises, which are undertaken in small groups, on the appropriate test (objective/subjective) for fraud/neglect/carelessness/ deliberate behaviour; applications for closure notices; planning permission and VAT on construction; and postponement applications and hearings in the absence of a party. There were also talks delivered by external speakers: HHJ John Phillips CBE, then Director of Training for Courts, gave a presentation on the assessment of credibility; and Kevin Prosser QC gave his views on the newly introduced follower notices and accelerated payment notices. A huge thank you goes to those who took part and to Judge Sinfield for putting together such a varied and enjoyable programme.

Tax Appeals

The bulk of the Chamber's work continues to comprise tax appeals. There have been some important decisions over the past year at Court of Appeal level as well as in the Upper Tribunal. Important decisions include *BPP Holdings v HMRC* [2016] EWCA Civ 121 where the Court of Appeal held that the stricter approach to compliance with procedural orders and directions recently adopted in the High Court also applies to Tribunal proceedings and *Longridge v HMRC* [2016] EWCA Civ 930 where the Court of Appeal revisited the question of when a service provided for payment amounts to an economic activity for the purposes of VAT legislation.

One element that has come into greater focus over the course of the year has been the allocation to the Chamber of new appeal rights arising from the enactment of various Government measures. The Finance Act 2016 provided for appeals to be brought to the tribunal in respect of a number of additional topics. Some of these can be regarded as an extension of our existing work. For example, Part 6 of the Act imposes the apprenticeship levy on large companies and provides for an appeal to the First-tier Tribunal with an onward appeal to the Upper Tribunal against an assessment of the levy. Other provisions of the Finance Act 2016 may raise issues for the tribunal of a novel kind. For example, section 161 and Schedule 19 of the Act impose new duties on large UK companies and groups to publish their tax strategy covering amongst other things the approach of the group to risk management and governance arrangements in relation to UK taxation, the attitude of the group towards tax planning (so far as affecting UK taxation) and the approach of the company towards its dealings with HMRC. I am very grateful to my colleagues in the Upper Tribunal for their analysis and comment on the proposals for new jurisdiction that are put forward to the Chamber for consideration.

Land Registration

The appellate jurisdiction continues to be exercised by a number of specialist Chancery Circuit judges who have been assigned to the Chamber for the purpose. The more complex appeals may be allocated to a Chancery Division judge. Our experience is that most applications for permission to appeal which are refused on paper proceed to a renewed application at a hearing. As usual, the Chamber decided a small handful of appeals from the Land Registration Division of the First-tier Tribunal. Of particular note were *Murdoch v Amesbury* [2016] UKUT 3 (TCC) and *Bean v Katz* [2016] UKUT 168 (TCC); taken together the two decisions provide some clarification on the extent of the Division's jurisdiction in determined boundary cases.

Financial services

There have been thirteen new references of decisions of the Financial Conduct Authority (FCA) and two references from decisions of the Pensions Regulator this year.

A number of the FCA references have concerned the effect of the transitional provisions that were put in place to deal with the transfer of responsibility for the regulation of consumer credit from the OFT to the Authority that took place in 2014. Under those provisions, a firm formerly regulated by the OFT had an interim permission to continue those activities until its application for authorisation to the FCA had been determined. In *PDHL Limited v FCA* [2016] UKUT 0018 (TCC) the Tribunal had to consider whether the interim permission ceased on the giving of a Decision Notice by the FCA refusing the firm's authorisation or, in a case where the firm referred the refusal to the Tribunal, whether it continued until the Tribunal had determined the reference. The latter has been the position in relation to references to the Tribunal of decisions to refuse authorisation in other cases where firms were brought within the scope of FCA authorisation for the first time, such as when mortgage and general insurance regulation were brought within the scope of regulation by the FCA's predecessor. The Tribunal decided on analysing the wording of the relevant provisions that the interim permission did cease on the giving of the Decision Notice. Therefore, in order for the firm

to continue to carry on its business pending the determination of the reference, it was necessary for it to apply to the Tribunal for a direction to suspend the effect of the Decision Notice. According to the terms of the relevant Tribunal Rule, a suspension order could only be granted if the Tribunal was satisfied that to do so would not prejudice the interests of consumers. In PDHL's case the Tribunal bore in mind its admitted previous poor practices in the debt management market and was not so satisfied. Accordingly PDHL had to stop carry on its business, notwithstanding its reference to the Tribunal. The Tribunal's decision on the effect of the transitional provisions was not appealed and has been followed in a number of other cases where applications for suspension orders have been made, none of which have so far been successful.

Charity appeals

Cases in the Charity jurisdiction remain few and far between. In *The Charity Commission v Stephen Hunt* [2016] UKUT 0210 (TCC), Mr Justice Warren ruled on the questions of who is the "subject of a decision" by the Charity Commission and when that decision is "published" so as to engage the time limit for making an appeal to the First-tier Tribunal. In *John Nicholson v The Charity Commission* [2016] UKUT 0198 (TCC), Mrs Justice Asplin ruled on the question of who "is or may be affected" by a decision of the Charity Commission, so as to give them standing to bring an appeal to the First-tier Tribunal.

Consumer Credit cases

Regulatory matters are now the concern of the Financial Conduct Authority. Decisions of the FCA in this field are subject to the same sort of review as its decisions in the financial services field with a similar right for an affected person to refer a decision to the tribunal.

Administration of the Chamber

In November 2015 the UT Tax Team conducted a four days Value Stream Mapping Exercise to establish flow, add value, identify and ultimately tighten up our processes for handling the case load through the entire process from receipt of an appeal to disposal. The aim was to identify steps within the flow that created unnecessary delays. The findings were presented to the UT Tax judges and through discussions with the team agreements were reached as to the steps that added no value to the process and could be eliminated. From this an Action Plan was put together for changes which included listing PTA hearings within 1 month of receipt giving 14 days' notice only. This has resulted in a significant increase in our disposal rate as regards our key performance indicator (KPI). As at January 2016 the Tribunal staff we have consistently performed above the required 75% timeliness KPI. Other changes to the process involved amending bespoke letters, all of which has been beneficial in reducing time in the end to end process. Further, on 1 February 2016 I issued a practice statement authorising Tribunal clerks to issue standard directions in appeals from the First-tier Tribunal (Tax Chamber). At the same time we revised and updated the standard directions directing the creation of an electronic core bundle and clarifying the practice on delivery of hard copy bundles. I hope that these measures will ensure the smooth running of cases and keep the amount of paper used within reasonable bounds.

In last year's report I referred to the development and implementation of the GLiMR database for case management in June 2015. Work was underway to set up a new fees portal within GLiMR in preparation for receiving and accommodating the new fees process. The original timing of an implementation of Fees by the end of February is no longer possible owing to a decision to pause the Policy time line and include Tax fees in the wider MOJ fees review. At time of writing no decision has been taken as to whether the fee proposals for tax appeals will be adopted.

Immigration & Asylum Chamber

President: Mr Justice (Bernard) McCloskey

Our Work Streams

The Upper Tribunal Immigration and Asylum Chamber's (UTIAC) work streams remain unchanged. We continue to deal with:

(a) Immigration and asylum error of law appeals from the First-tier Tribunal (FtTIAC) in which permission to appeal has been granted.

(b) Immigration and asylum judicial reviews falling within our jurisdictional remit. This Chamber handles approximately 95% of all such cases, while the Administrative Court retains jurisdiction in the residual category.

In addition, age assessment judicial reviews, representing a small fraction of the whole, continue to be transacted in this Chamber.

The basic profile of the work of the Chamber also remains unchanged, being constituted by written judicial decision of various kinds and decisions given orally at the conclusion of a hearing.

Between 01 November 2015 and 31 October 2016 the total intake of new statutory appeals was 7,055 and new judicial reviews totalled 16,195. All permission to appeal applications, inward and outward, totalled 11,362.

Judicial Personnel

The most notable feature of the past year was the loss of several senior judicial colleagues through retirement. Upper Tribunal Judges Chalkley, Eshun, Goldstein, Storey, Taylor and Warr all succumbed to the alluring pastures of retirement. They have, however, done so with more than a whimper. All have become fee-paid judges of the Chamber. This has softened the blow somewhat and, via this conversion, the continued benefits of their unrivalled combined experience, wisdom and expertise are available. This benefit is not merely enjoyed by the Chamber internally. Rather, it enures to the advantage of all users

and stakeholders.

Flexible working and judicial diversity continue to feature in our Chamber and work patterns. Many salaried judges of the Chamber are based at home approximately two days per month, making paper decisions. Interestingly, the home output is approximately 20% greater. This, evidently, is attributable to the convenience and comfort of the home working environment and the absence of interruptions and distractions. The flip side is that home working weakens the Chamber's ability to deal fairly and equitably with rapid onset business needs which, by definition, are volatile and unpredictable. The second downside is the impact on judicial morale and collegiality.

Another striking trend of recent times is that of less than full-time working. Of the 36 salaried judges in the Chamber, the working hours of 18 are less than 100%, while one judge is the President of another Chamber and devotes 20% of his time to the Chamber. This flexibility means, amongst other things, that working parents can be accommodated as far as reasonably and fairly possible and experienced judges who might otherwise have opted for career breaks or early retirement remain in active employment. In this way both diversity and expertise are promoted. On the other hand, arrangements of this kind can sometimes have a disproportionate impact on judges who work 100%, particularly at times of acute unpredictable stresses.

There is also the phenomenon that certain judges of the Chamber hold more than one judicial appointment.

The above arrangements mean, in principle, that fee-paid judges who may become candidates for future appointment to salaried posts gain increased experience. Striking the necessary balances in matters of this kind is never straightforward. Much depends upon goodwill, morale and collegiality.

The judicial members of this Chamber consist of 36 salaried judges and 52 fee -paid judges. I also owe thanks to judges from other courts and chambers who volunteer to sit in UTIAC on a regular basis. These include Scottish Court of Session judges; judges from the High Court and Administrative Appeal Chamber (AAC) judges. Thanks are also due to the Lord President of Scotland, the Queens Bench Division Presiding Judge for facilitating these arrangements and to the Senior President of Tribunals for authorising their assignments.

The Chamber's Committees

One of the trends in our Chamber during recent times has been a reduction in judicial committees. This has occurred gradually, in a context of frequent consultation with judges and reviews of arrangements. The policy here is intrinsically flexible. New committees can be established or discontinued committees revived at any time if the need is demonstrated. This is illustrated by the way the Presidential Country Guidance Advisory Group of judges lead by the Vice President operates.

The most important feature of the Chamber's main committees is that they are judicially led. Properly analysed, this serves to promote one of the multi-layered strands of judicial independence, namely judicial control over the listing of cases.

Administrators, of course, play an important role in this, providing indispensable support. I consider that the keys to successful interaction between judges and administrators are mutual trust and confidence, communication, mutual respect and flexibility. It is appropriate to commend all members of the administration in our Chamber in their constant endeavours to promote these values and, in doing so, to provide the best possible service to judges, users and stakeholders.

Meantime, judges continue to willingly and selflessly give of their time in serving on committees. The most active of the Chamber's committees are (in no particular order) the Executive Committee, the Reporting Committee, the Judges and Practitioners Committee (of which more below) and the Country Guidance Committee. The Chamber continues to benefit also from the work of the Judicial Welfare Committee and the Research and Information Committee.

In an era of significant change, judges of this Chamber continue to discharge important roles in organisations such as EJTN (the European Judiciary Training Network) and the IARLJ (the International Association of Refugee Law Judges). The importance of this external profile and, in particular, the learning benefits which it involves, must not be underestimated.

I thank all judges of the Chamber for their continuing commitment to the important portfolios noted above.

Continuous Learning

I continue to attach elevated importance to the continuous education of judges. This is a matter of greater importance than ever before, particularly in the sphere of immigration and asylum law which is characterised by rapid change, high volumes and complexity.

Fortunately, in this Chamber we have an excellent lead training judge, Upper Tribunal Judge (UTJ) David Allen, duly supported by other regular and reliable contributors We have one dedicated weekly session which is supplemented almost daily by the latest developments. The number of willing judicial contributors is a reflection of the professionalism, commitment and collegiality of the judges of this Chamber.

I envisage that we are likely to rely increasingly on e-learning. Furthermore, I am pleased to report that we are one step closer to a dedicated Chamber homepage which will contain all kinds of useful learning tools and resources.

Users and Stakeholders

I attach substantial importance to the relationship and interface between the judiciary (on the one hand) and the legal profession, users and stakeholders (on the other). The link which unites all of us is our unqualified commitment to the rule of law. A cordial, cohesive and mutually respectful relationship between the judiciary and others is of benefit to everyone and, fundamentally, promotes the rule of law.

In furtherance of the foregoing this Chamber has established, in addition to the bi-annual joint First-tier Tribunal (F-tTIAC) and UTIAC stakeholder meeting, a Judges and Practitioners Group. We meet in open forum at quarterly intervals. These are structured events, preceded by an agreed agenda and followed by the minutes of our discussions.

I am delighted to report that the group is highly representative and there are clear signs of developing a forum in which informed, productive and frank deliberations predominate. We do not, of course, discuss the merits of judicial decisions. Rather matters of practice, procedure and administration are the main focus of discussions.

A related, significant event during the past twelve months was a lecture on Practice and Procedure ("Judicial Review Dos and Don'ts") which I delivered at Law Society headquarters in May 2016. This attracted an encouraging attendance (of well over 100 practitioners) and, happily, was well received.

The success of this forum illustrates how close interaction between the judiciary and the profession can serve to further the rule of law without any compromise of judicial independence.

The Engine Room

We, the judges, are supported daily by an administrative structure. There are, inevitably, periodic stresses and strains, duly infused with highs and lows. A determination to provide an ever more efficient service to users and stakeholders, coupled with a readiness to acknowledge and learn from occasional errors, are two of the main features of this Chamber's administration. All concerned are unfailingly courteous to judges and consistently keen to enhance the Chamber's reputation and image. I commend all members of our administration and the Presidents' Office accordingly.

The judicial team at the daily coalface, consisting of our Principal Resident Judge, UTJ Dawson and his two assistants, UTJJ Gleeson and O'Connor continue to provide an indispensable service to the Chamber. They qualify for a particular tribute.

Our hard pressed and under resourced in-house lawyers and Legal & Research Unit, under the leadership of Rebeccah Sheen, continue to provide the judges with a magnificent service.

Some Notable Successes

I should highlight particular successes this year which include:

- The formation of the Judges and Practitioner Group mentioned above.
- We have reduced our backlog of outstanding cases. Input and demand no longer outstrip output and our overdue determinations list is at an all time low. This has been achieved without any real increase in resources, human or financial, and is a tribute to the commitment and professionalism of judiciary and administration alike.
- We have undertaken judicial review training in the regional centres with a view to supporting our judicial colleagues and enhancing consistency of approach nationwide.
- The periodic assignment of judges from other Chambers has developed and all are invited to our training exercises. This brought about a lecture delivered to this Chamber and the AAC by Lord Sumption in September 2016.
- In September 2016 this Chamber hosted a tripartite conference involving the IARLJ (International Association of Refugee Law Judges), AEAJ (Association of European Administrative Judges) and EASO (European Asylum Support Office). We welcomed not only the lectures and training provided at this event but also the interaction of our judges and those of countries across Europe, involving much sharing of experiences and hot topics
- The Chamber has completed timeously all the appraisals of all our Deputy Judges. This was seen as a constructive experience by those concerned.
- The joint training with the First-tier Chamber was positive and promoted collegiality.
- Our judges have all been converted to e-judiciary and with some hiccups have embraced the change.

Our Jurisprudence

Such were the breadth, range and quality of our reported cases during the past twelve months that the exercise of identifying the most important presented a major challenge. Fortunately, I received the assistance of willing judicial colleagues and the staff of the Library and Research Unit in this task. The outcome is contained in schedule annexed to the Senior President's Annual Report. I trust that readers will benefit from the categorisation adopted.

Lands Chamber

President: Mr Justice (David) Holgate

2016 has been a year of relatively little change before the reforms planned for Courts and Tribunals. At the end of 2015 we congratulated my predecessor, Sir Keith Lindblom, on his appointment to the Court of Appeal. We are grateful for the many valuable contributions he made to the organisation, case law and work of the Chamber. I became Chamber President in January 2016. We also thank Edward Cousins who retired as a deputy judge of the Upper Tribunal and welcome Sharon Sober who arrived to replace Kim Webb as our delivery director. She has already led a valuable review of our procedures in compensation and rating cases in anticipation of a more streamlined, paperless approach to dispute resolution. We particularly appreciate the enthusiastic engagement of the Tribunal's staff in undertaking this exercise and implementing the lessons learned.

The breadth of the Lands Chamber's jurisdiction and the variety of disputes determined by its judges and chartered surveyor members has been well illustrated in each of our main fields this year.

About 20% of the new cases received by the Chamber are claims for compensation for compulsory acquisition of land or disturbance caused by public works. Most of these cases are eventually resolved by agreement and contested hearings involving professionally represented parties on both sides are rather less common. Those which do result in a Tribunal decision generally raise legally complex or novel issues, or involve claims where the supporting evidence is unclear or incomplete. In the former category *Robert Lindley Ltd v East Riding of Yorkshire Council* [20UKUT 0006 (LC) established important principles concerning the liability of local authorities, the Environment Agency and the Fire Service for damage caused by emergency flood prevention works.

One example of the latter type, *Mohammed v Newcastle City Council* [2016] UKUT 0415 (LC) concerned a city centre fish and chip shop, and illustrates the difficulty small businesses sometimes experience in evidencing losses sustained in the course of compulsory acquisition. Credible accounting and reliable record keeping are critical and often make the difference between a claim which proceeds smoothly to a negotiated conclusion and one which has to be resolved by the Tribunal after many months, or even years, of dispute. With cases of this sort in mind, the Tribunal has continued to encourage the Compulsory Purchase Association in its development of a pre-reference protocol for compensation cases. Acquiring authorities will be expected to become engaged in assisting landowners at an early stage and claimants will be expected to prepare and provide contemporaneous and comprehensive information. The aims are to promote agreement of compensation at an earlier stage in the process and, where litigation cannot be avoided, to reduce the number of issues as far as possible and the cost of the proceedings before the Tribunal.

There can have been few, if any, more substantial references to the Tribunal for the determination of compensation than the claim brought by the owners of Wentworth

Woodhouse, the largest private house in Europe, which was said to have sustained damage valued in excess of £100 million as a result of mining subsidence. In *Newbold v The Coal Authority* [2016] UKUT 0432 (LC) the Tribunal considered the complex history of the South Yorkshire coalfield and the condition of the grade 1 listed Georgian mansion before concluding that the structure is now stable and that recent evidence of damage is unrelated to mining.

Parties are gradually gaining a better appreciation of the width and flexibility of the Tribunal's procedural powers. In *William Hill Organization Ltd v Crossrail Ltd* [2016] UKUT 0275 (LC) the Tribunal exercised the powers of the High Court conferred on it by section 25 of the Tribunals, Courts and Enforcement Act 2007 in ordering the substitution of a respondent after the expiry of a limitation period. On the other hand, the additional powers given to the Tribunal in 2013 to make orders limiting costs recovery, for example in cases of modest value or involving groups of similar claims, remain largely unexplored. Formal cost budgeting has not arrived in the Tribunal, but its day may come.

Disputes over costs have also been prominent in appeals from the Property Chamber of the First-tier Tribunal, which comprise a little over half of all new cases received by the Tribunal. In *Willow Court v Alexander* [2016] UKUT 290 (LC) the Tribunal gave guidance on the proper approach to the making of orders for costs under rule 13 of the Property Chamber's rules where a party has behaved unreasonably in the conduct of proceedings. The former limit of £500 on such orders was removed in 2013 and the threat of costs had the potential to affect access to tribunals in which costs shifting is intended very much to be the exception.

The importance of the Tribunal's appellate function has been well illustrated in a number of areas. The Tribunal's role in establishing consistent approaches to valuation was recently confirmed by the Court of Appeal in *Sinclair Gardens Investments (Kensington) v Ray* [2015] EWCA Civ 1247. It was again evident in the area of leasehold enfranchisement in *Sloane Stanley Estate v Mundy* [2016] UKUT 0223 (LC). The Tribunal explored the problems encountered in valuing the lease of a flat without enfranchisement rights and the relative value of leases of different lengths. It rejected a novel statistical model as unreliable but gave guidance for future cases on the approach to be taken. Further difficult points of principle concerning collective enfranchisement were determined in *4-6 Trinity Church Square Freehold Ltd v Trinity House* [2016] UKUT 0484 (LC) and *Portman Estate Nominees Ltd v Starlight Headlease Ltd* [2016] UKUT 0467 (LC). This important sector of the residential property market operates within a complex legislative framework and relies upon clear guidance from specialist tribunals in both tiers to enable it to function efficiently

Many appeals from the Property Chamber concern the rights and obligations of leaseholders of flats. The Tribunal's most significant decision of the year in this field was *Nemkova v Fairfield Rents* [2016] UKUT 303 (LC), which determined that repeated short term letting through an internet agency was a breach of a covenant to use a flat as a private residence only. The extensive press coverage which the decision received reflected the importance

of this increasingly popular style of property letting and the adverse effect it can sometimes have on permanent residents.

Through its appellate role the Tribunal is also able to clarify the interpretation of procedural codes set out in legislation. For example, appeals concerning procedural errors by RTM companies seeking to acquire the right to manage blocks of flats were previously commonplace, but a series of decisions on points of principle ending with *Triplerose v Mill House RTM Co Ltd* [2016] UKUT 0080 (LC) appears to have settled this area of the law and made such appeals largely unnecessary.

This year we have seen more activity in applications made under section 84 of the Law of Property Act 1925 to discharge or modify restrictive covenants, which represent about 10% of the Tribunal's case load. In *Millgate Developments Ltd v Smith* [2016] UKUT 0515 (LC) the Tribunal suggested that it may be appropriate to re-consider the proper approach to the public interest ground under s.84(1)(aa) which has traditionally been construed restrictively

Appeals on non-domestic rating from the Valuation Tribunals for England and Wales (which are not part of the unified tribunal system and have their own procedural rules) make up about 20% of our new cases. Dispute resolution at levels below the Tribunal is about to undergo substantial procedural changes. We anticipate that those changes, as well as the 2017 revaluation, will generate a number of appeals to the Upper Tribunal. In T*urnbull v Goodwyn School* [2016] UKUT 0068 (LC) the appropriate method of valuing independent primary schools in London was considered, whilst difficult issues raised by the rating of self-catering holiday cottages arose again in *Beaconside Country House & Cottages v Gidman* [2016] UKUT 0497 (LC). The Tribunal has suggested that a more thorough consideration of conventional assumptions used in profits based valuations may be required.

The members of the Tribunal have spoken at a number of tribunal training events and professional conferences. On these occasions, and in a number of decisions this year, the Tribunal has expressed disquiet at the quality of the evidence received from some expert witnesses. Every expert who provides a report for the Tribunal is required to acknowledge that their primary duty is to the Tribunal, with all the obligations of candour that entails. Unfortunately, it occasionally becomes apparent that an expert has treated his or her declaration as a mere formality. It is not so regarded by the Tribunal or by the professional bodies whose members give evidence. The provision of expert evidence which fully complies with that duty is essential if proper use is to be made of the Tribunal's resources and the costs of litigation are to be well-managed.

Although the Tribunal has acquired some important new jurisdictions under the Riot Compensation Act 2016 and the Housing and Planning Act 2016, they have yet to produce additional work. It is to be hoped that claims arising from rioting will be infrequent. But a significant volume of additional work is forecast from the new regime to control "rogue landlords", which will come into effect in 2017 and will generate additional appeals from the Property Chamber. Subject to legislation, the Government proposes that the Tribunal

will also become responsible for dealing with compensation claims under the new Electronic Communications Code.

In the summer of 2017 the Judicial Appointments Commission will be launching a competition for the appointment of a surveyor member to the Tribunal. We wish to encourage a wide range of applications from the surveying profession and would recommend potential candidates to consult the JAC website for a better understanding as to how the application process works.

Annex B
The First-tier Tribunal

Social Entitlement Chamber

President: Judge John Aitken

The Social Entitlement Chamber comprises three jurisdictions, namely Asylum Support (AS), Criminal Injuries Compensation (CIC) and Social Security and Child Support (SSCS). The Principal Judge of Asylum Support and Criminal Injuries Compensation is Sehba Storey. SSCS is managed by seven Regional Tribunal Judges led by the Chamber President. The jurisdiction of Asylum Support is UK-wide. SSCS and CIC are Great Britain-wide.

Social Security And Child Support

The dramatic downturn in workload which we experienced in 2014-15 in SSCS seems to have ended and in the year to the end of March 2016 we saw our intake rise to 157,145. The table below shows the trend over the past few years with the workload reaching a peak of 507,131 in 2012-13.

SSCS Appeals Intake and Clearances

	Intake	Clearances
2008-09	242,825	245,500
2009-10	339,213	279,264
2010-11	418,416	379,856
2011-12	370,800	433,600
2012-13	507,131	465,172
2013-14	401,896	543,609
2014-15	112, 082	150, 978
2015-16	157,145	156,535

For the quarter April to June 2016 our intake was 46,832 which represents a 21% increase on the same period in 2015. The profile of cases coming before SSCS tribunals is also changing. The Personal Independence Payment (PIP), introduced in April 2013, intended to replace Disability Living Allowance (DLA), now accounts for 41% of the intake from April to June 2016 and is increasing as existing claimants of DLA are moved onto PIP. One beneficial effect of the reduction in intake has been our ability to reduce and maintain a lower level of outstanding cases, at the end of June the outstanding caseload was 55,318, up just 15 on the same period last year. When surveyed,

our users are often frustrated by waiting times, this year our waiting times for an appeal to be heard are, at 16 weeks, much lower than they have been for a number of years.

We continue to mitigate any detrimental effects from the dramatic downturn in intake by encouraging judges in particular to take on work in other jurisdictions by seeking assignments and other deployments. However, there are limits to how far we can continue to do this without experiencing a detrimental effect on our own deployment and listings and we have therefore proposed recruitment via assignment in the first instance, from other Chambers, where we need additional capacity. At the same time however Judicial Office Holders, continue to work flexibly across Chambers and jurisdictions in order to fully utilise their talents and develop their careers.

We are all aware, of course, that our work takes place in the wider context of government reform and this year we have played our part by successfully re-aligning our boundaries in SSCS to match the wider HMCTS boundaries for England and Wales. We have also looked to the future by engaging with internal and external stakeholders to explore what a transformed SSCS Tribunal might look like in terms of engaging with our appellants and re-aligning processes to the MoJ's own reform agenda. Where necessary taking the lead in advocating new ways of working on new platforms.

Reform

We are now in the second year of the Ministry of Justice's Reform Programme. SSCS has been identified as a lead Chamber in transforming how we deliver justice. Last year we focussed on designing a new way of working which might enable us to combine a different means of engaging with appellants to deal with their cases more effectively. The vision we set out has come to be known as the 'continuous on-line hearing', because at the heart of it is the idea that the increasing use of digital technology will enable us to bring the judge and the parties together at a much earlier stage to resolve their case in the most appropriate way, whether via a hearing, or some form of online exchange and decision. Progress taking this forward is inevitably slow given that we are determined to ensure that no appellant feels or is disadvantaged, but we hope to run a further pilot to test the concept shortly.

Criminal Injuries Compensation

The steady decrease in receipt of applications for compensation under the 2012 Compensation Scheme has continued with a corresponding reduction in the number of appeals received by the First tier Tribunal - Criminal Injuries Compensation jurisdiction (FtT - CIC). During the period covered by this report, receipts fell by 26% against profile. We have continued to focus on clearing our backlog of cases, particularly the cases that have been outstanding for over eight months. In the last twelve months, we have worked successfully with the Criminal Injuries Compensation Authority (CICA) to clear 40% of our oldest and often complex cases under the 2001 and 2008 Schemes. In the coming year we hope to target the remainder of our outstanding caseload which currently stand at 622 cases.

We have virtually completed the outstanding pre-tariff cases. Last year, we reported seven outstanding pre-tariff cases of which two have now been finalised and awards made and accepted. We hope to

conclude the remaining five cases in the next twelve months. This number may increase in the event of additional medical re-openings. This year we have received requests to re-open three cases of which one was refused, none allowed and the remainder are outstanding. The two successful cases are both pre-tariff.

In Harris - 77/14245/3 our decision to re-open the application was quashed by the Administrative Court on the basis that there was inadequate reasoning on whether the application could be considered "without the need for extensive enquiries". The Court raised, but did not answer the question whether permission might be given to re-open only some heads of claim (e.g. the tariff award) where extensive enquiries were unnecessary but not others (e.g. loss of earnings which might require information gathering in respect of a very long historic period.

In LS the Court of Appeal has recently given the applicant permission to appeal against the judgment of Jay J [2015] EWHC 1077 (Admin) upholding our decision (as long ago as September 2012) rejecting the applicant's argument that the Lord Chancellor's discount rate for future loss had no application to pre-tariff cases.

Onward Appeals and Judicial Review

There is no right of appeal against decisions of the FtT – CIC, the only remedy being judicial review to the Upper Tribunal (Administrative Appeals Chamber) in England and Wales or to the Court of Session in Scotland. In 2015 – 2016, there were a hundred applications for judicial review of FtT - CIC decisions. Of these, forty-two were granted permission, forty-five were refused permission and nineteen remain outstanding. Of those granted permission, thirteen were remitted to the FtT for hearing de novo; nine were refused; and fourteen are awaiting judgment. There are two judicial review applications heard by the Court of Session on which a judgment is awaited.

Seminal Cases

There have been developments on several precedent-making cases as follows. The foetal alcohol syndrome cases remain stayed as the unsuccessful appellant awaits a hearing of her application to the Upper Tribunal for Judicial Review. The unsuccessful applicant for Judicial Review in the challenge to the "same roof" rule, (***R (JT) v First-tier Tribunal & Anor (Criminal Injuries Compensation – reduction and withholding of awards***) **[2015]. UKUT 478** (AAC) referred to in last year's report) is seeking permission to appeal to the Court of Appeal.

There have been no application for Judicial Review of our decision (referred to in last year's report that the terms of Paragraph 26 and Annex D paragraph 3 of the 2012 Scheme (no award to an applicant with an unspent conviction leading to a custodial sentence or community order) do not contravene the applicant's Article 14 rights. There is, however, a direct challenge to those parts of the Scheme about to be heard in the High Court.

There is an outstanding application for Judicial Review of a F-tT decision in which the applicant argues that the duties of reporting crimes to the police and cooperating with the authorities are less onerous for victims of human trafficking.

The F-tT is about to hear an appeal in which it is argued that ending the right to dependency payments on the day on which the deceased would have reached state pension age (Paragraph 69(1)(b) o the 2012 Scheme) unlawfully discriminates against the applicant on grounds of age.

People and Places

This year we are saddened to have lost Dr Harry Baker who died in service in March 2016 and Judge Kenneth Muir QC who passed away in November 2016. They will be missed by us all.

We have also lost to retirement or resignation ten highly experienced legal, medical and specialist members including the two former Principal Judges, Roger Goodier and Tony Summers. We are indebted to them all for their contribution to the jurisdiction and wish them well for the future. On a positive note, we have gained fourteen cross-ticketed judges from SSCS and AS who are now fully trained and sitting. Several of the cross-ticketed judges have also taken on interlocutory work and training responsibilities.

Operational Innovations

Over the past year all hearings in London have been listed at Anchorage House, East London.

The FtT - CIC has been working to improve the quality of its current venues and seeking out new venues with improved IT facilities. Our aim remains to ensure that all hearing rooms are equipped with adequate computer and printing facilities and that panel members have access to Wi-Fi. All hearings are now recorded by digital recording equipment.

In addition, we are continuing to explore the possibility of panel members receiving their case papers electronically. This has proved difficult as appeal bundles can often include hundreds of documents, the vast majority of which are medical records and reports. There have been two pilots during the periods June – December 2015 and January – May 2016. Feedback from the two judges involved in the 2015 pilot was encouraging but identified a number of issues concerning the numbering and size of the appeal bundles. Following some changes, and with CICA's assistance, a second larger pilot took place in 2016 involving thirteen judicial office holders and one-hundred and seven appeals. The feedback that followed was largely positive although several issues remained unresolved, of which the most serious concerned CJSM speeds. Regrettably, we were unable to take the project forward owing to lack of resources at CICA on whom we are dependant for scanning of the appeal bundles. We remain in discussions with CICA and our ultimate goal is to hold paperless hearings. However, we recognise that this is unlikely to be achieved in the very near future.

Asylum Support

This year the number of appeals received was 1,627. This is a fall of approximately 29% from the previous year, due largely to the Home Office's clearance of asylum-related fresh representations cases. However, the drop in numbers has been counterbalanced by a growth in the duration and complexity of hearings. This reflects an increased emphasis on background financial checks undertaken by the Home Office, giving rise to decisions to discontinue support based on previously undisclosed funds

and to refusals of support based on contradictory information provided in visa entry clearance and support applications.

Paper determinations remain relatively low, at under 15%, due in part to a party's right to opt for an oral hearing and in part to the necessity of listing for oral evidence in cases of suspected fraud or concealment of resources. The level of withdrawal of Home Office decisions remains static at around 21%. By contrast, only 3% of appeals were withdrawn by appellants. The adjournment rate at hearing remains extremely low and has decreased to less than 1%, due principally to careful judicial case-management and listing.

Legislative Change

The Immigration Act 2016 received Royal Assent on 12 May 2016. It makes major amendments to the support system for current and failed asylum seekers and in some cases restricts access to the appeal process. The significance of these developments cannot yet be accurately assessed, since much detail will be contained in Regulations yet to be laid before parliament. Initially, we were advised that implementation is not likely before April 2017 but to date, we have received no indication of when these provisions are likely to be in force. We have asked for early notification of any amendments to the Asylum Support Regulations to enable us to deliver bespoke training for Judges on the Immigration Act 2016. The most up to date indications suggest that the relevant provisions are unlikely to be in force before the end of 2017.

Significant Changes Post Judicial Review

There were no substantive judicial review hearings against decisions of the FtT-Asylum Support (FtT-AS) but a number of applications were remitted by consent to be heard de novo. Of these, the following significant cases were determined by the Principal Judge:

> In ***AS/15/05/33112***, there were two issues for determination. Firstly, what weight, if any, could be attach to the opinion of the appellant's own medical expert, where the courts had found the trauma that was said to have led to a deterioration in the appellant's mental health, was fabricated; and secondly, whether Home Office Medical Officers are qualified to give an opinion on the available medical evidence.
>
> In relation to the first issue, the Principal Judge determined that failure to note the findings of immigration and/or appellate authorities when writing expert medical reports could justify rejection of expert evidence. With reference to Home Office medical advisers, she expressed the view that their expertise could be utilised by FtT-AS judges to understand the medical issues and to evaluate for themselves the evidence before them. On the facts before her, she concluded that a perceived risk of suicide or situational depression worsened by negative decisions on asylum or support claims did not per se create an entitlement to support by virtue of the Human Rights Act. (SS(Sri Lanka) [2012] EWCA Civ 155, *Shala & Another v Birmingham City Council* [2007] EWCA Civ 624, and *London Borough of Wandsworth v Allison* [2008] EWCA Civ 354 refer).

In ***AS/15/11/3450***, the Principal Judge considered an appeal against refusal of section 95 support, in which the financial information provided by the appellant on his asylum support application was vastly at odds with that provided on his entry clearance application to enter the UK as a student. This is frequently a ground for refusal in applications for section 95 support where the applicant claims destitution having previously satisfied the entry clearance officer that they have the means to maintain and accommodate themselves without recourse to public funds whilst in the UK.

With reference to *SSHD v Maheshwaran* [2002] EWCA Civ 173 and *WN (Surendran; credibility; new evidence) Democratic Republic of Congo* [2004] UKIAT 00213, the Principal Judge warned that failing to put a point to a party to litigation, which if subsequently decided against them, may lead to a finding on judicial review of unfairness and injustice. She urged judges when assessing the credibility of a witness, to be especially careful not to invent their own theory of a case and to address what are significant issues and not minor points of detail.

People and Places

Unfortunately, there have been further changes at both Operational and Local Delivery Manager level within Asylum Support's administrative team. However, we have been fortunate to retain our experienced core of judges, save for one retirement. This has enabled us respond flexibly to the changing nature and duration of appeal hearings and to actively involve fee-paid judges in peer-to-peer training.

Cross-jurisdictional working remains a significant developmental tool and is crucial in maintaining the effective management of judicial time in the face of our volatile workload. The salaried judges are trained in interlocutory work for other jurisdictions (FtT-CIC and FtT-HESC (Mental Health)) and arrangements are in place so that this work can be undertaken at very short notice.

The Anchorage House site is under major redevelopment but, with the aid of regular site meetings, we have ensured that we remain open for business as usual. We continue to receive more requests for video-hearings than we can satisfy and are continually looking to identify more video venues. We are currently obliged to restrict video hearings to those whose medical condition or family circumstances prohibits travel to London.

Health, Education and Social Care Chamber

President: His Honour Judge Phillip Sycamore

The Jurisdictional Landscape

The Chamber comprises four jurisdictions. Mental health which covers the whole of England; special educational needs and disability, which also covers the whole of England; care standards, which covers the whole of England and Wales, and primary health lists which also covers the whole of England and Wales.

This has been a very busy year for the Chamber across all four jurisdictions. As a consequence of the HMCTS public consultation on the provision of courts and tribunals estate in England and Wales, the Chamber departed its only dedicated hearing centre in Pocock Street, London in December which closed as part of the proposals. Hearings have now been relocated within London mainly in the Thomas More building in the Royal Courts of Justice. In Manchester, we remain in the Civil Justice Centre but are moving in the New Year to a different floor. I am aware this has been a difficult period of change and uncertainty for all involved and am grateful to everyone for their continued patience and understanding whilst these changes take place.

Mental Health jurisdiction

Mental health cases continue to encompass a vast range of different situations, from anorexic teenagers, to men and women from all walks of life suffering from severe depression or schizophrenia, to restricted patients in secure hospitals following the commission of the gravest possible crimes. The mental health jurisdiction, which rarely attracts publicity, found itself in the media spotlight in the summer of 2016 after deciding that a well-known patient at Broadmoor Hospital no longer needed to receive psychiatric treatment in hospital and, after 32 years in hospital, could be returned to prison to serve his whole–life sentence in custody. Within days of the tribunal's decision, the new Lord Chancellor had approved the tribunal's recommendation, and the patient was quietly transferred back to prison. There was no appeal against the tribunal's decision.

The use of the Mental Health Act ("the Act") continues to increase, impacting on NHS Mental Health Trusts and private psychiatric hospitals and, consequently, on the workload of the tribunal. Statistics in the public domain from the Care Quality Commission (CQC) show that there continues to be a rise in compulsory detentions under the Act whilst, at the same time, available NHS beds have become more scarce[3].

It is also clear from the CQC statistics (provided to them by the Tribunal Secretariat[4]) that a very significant proportion of new cases received relate to patients admitted to hospital for assessment under Section 2 of the Act.

Reference has been made in a previous report to the possible over-use of S.2, given that S.2 is primarily for assessment purposes and yet a high proportion of patients detained under S.2 are already well-known to mental health services. Unfortunately, changes to the new Mental Health Act Code of Practice (pointing clinicians and social workers towards greater use of S.3 where little additional assessment, but immediate treatment, is required) have not produced a significant reduction in S.2 admissions.

It is thought that the reasons for the continued high use of S.2 may be the result of a number of factors. Anecdotally, these reasons include intense pressure on beds in some areas and the use of S.2 to "jump the queue", and some Responsible Authorities and other professionals also highlight the practice of 'sectioning' taking place out of hours when professionals who know the patient are

3 CQC Reports: Statistics on use of MHA - http://www.cqc.org.uk/content/publications
4 http://www.cqc.org.uk/sites/default/files/20151207_mhareport2014-15_full.pdf

unavailable. The division of services into separate teams is also mentioned because, obviously, stand-alone admission teams are likely to be unfamiliar with the patient's case.

Section 2 cases, where the period of detention for assessment is generally limited to 28 days, present the tribunal with the serious challenge of urgent listing. Rule 37(1) of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 requires that the hearing of any application by a S.2 patient must start within 7 days after the date on which the tribunal received the application notice. However, Rule 37(4)(a) also provides that the tribunal must give all the parties at least 3 working days' notice of the hearing. This means that, to comply with both rules, there is usually only one possible day, and at most two, for the listing team to fix the hearing.

With the current pressures on panel members, it is becoming very difficult to have a large enough pool of judges, medical members and specialist lay members, all on stand-by and available at very short notice to convene as a full panel of three different disciplines on a set day, anywhere in England. Even if the tribunal lists the case immediately upon receipt, most S.2 detentions for assessment will – by the time a full panel convenes – only have (on average) around 14 days left to run before they expire. However, for those patients who are then further detained for compulsory treatment under Section 3 of the Act (an authorisation that initially lasts for 6 months but is renewable) a further right of application to the tribunal then arises.

Apart from applications by patients or their nearest relatives, a number of cases are also referred to the tribunal by law. Sometimes, such patients have little interest in the tribunal process, but a periodic review remains an important safeguard and the tribunal will always call for written reports. Some of these cases can now be determined on the papers, with panels having power to remit for a full hearing if the circumstances are such as to require an oral hearing with the personal attendance of parties and witnesses. Many patients have said that they appreciate not having to attend when the issues are not contentious.

In addition to regular meetings and conferences, the mental health jurisdiction has engaged with its stakeholders in a number of ways. In particular, this year guidance was issued to hospitals about medical evidence and, in particular, who should attend as medical witnesses. The guidance was jointly produced by the tribunal and the Royal College of Psychiatrists and it has encouraged psychiatrist trainees to have the confidence to gain valuable experience under supervision, whilst discouraging some Responsible Authorities from sending a 'doctor for tribunals' who has not been directly involved in the patient's treatment and care.

According to the Royal College of Psychiatrists it is anticipated that 40% of all pre-specialisation 'Foundation Year' doctors will have a placement in psychiatry from 2017. Hopefully, this will encourage more doctors to choose psychiatry as their medical specialty. To assist with this programme, guidance has been issued for medical trainees wishing to observe tribunal hearings, which are usually held in private. The document was jointly produced by a working group of trainees, an NHS trust, and with input from the Royal College of Psychiatrists and from the tribunal itself. It has been publicised as applicable both for trainees in psychiatry plus nursing, social work and Occupational Therapy.

There has also been a large increase in the number of children and young people detained under the Act, so information is now provided for young patients about tribunals. The guidance was jointly written by young in-patients, NHS Trusts and Hospitals, and members of the tribunal's Child and Adolescent Mental Health Services (CAMHS) panel. A leaflet is also available on the Royal College of Psychiatrists' website[5].

In the autumn of 2016 the mental health jurisdiction, which relies heavily on secure email for communication with members and stakeholders, followed the example of the courts judiciary in enrolling all its judicial office holders in eJudiciary, and it was one of the first tribunal jurisdictions to do so. Feedback has been generally positive, with most judicial office holders appreciating the ease with which emails and reports can be accessed on laptops, tablets and smart-phones.

Special Educational Needs and Disability (SEND) jurisdiction

It has been a busy year in the Special Educational Needs and Disability jurisdiction, as a result of ongoing implementation of legislative changes arising from the Children and Families Act 2014 and an increasing caseload.

In the last report, the Recommendations Pilot, part of the review required by section 79 of the Children and Families Act 2014 of how effectively disagreements about the exercise of functions under Part 3 of the Act are resolved, had begun. The section requires a joint report by the Secretary of State for Education and the Lord Chancellor to be presented before Parliament by March 2017. The pilot, which extended the Tribunal's jurisdiction to enable the making of non-binding recommendations about health and social care matters within education health and care plans in 13 local authority areas, was initially set up to run for six months from 1 June 2015.

A further four local authority areas joined the pilot in February 2016 and the length of the pilot was extended to allow a maximum number of appeals and requests for recommendations to be considered. The pilot continued until the Regulations were revoked on the 31 August 2016. Pilot appeal hearings continued to the end of the year and some were listed early in 2017. About 30 appeals were involved in the pilot in total and the majority achieved amicable resolution without a tribunal hearing. Every pilot appeal was the subject of individual case management and several of the fully contested appeals required more time than the usual one day hearing. The experience from the tribunal's perspective was a positive one and the final report and recommendation is now awaited.

From 1 January 2016, the SEND administration moved to fully digital files and parties have been able to submit their documentation to the tribunal in either paper or digital format, with the tribunal converting papers to digital at Darlington. Local authorities have been able to submit hearing bundles electronically for dissemination to the tribunal panels, making the movement of papers much simpler.

From the 1 August 2016, the Tribunal shortened the appeal timetable for every appeal and claim to 12 weeks from registration to hearing. The Tribunal established the shorter timetable for all phase transfer appeals some years ago, and the shorter timetable already applied to a third of the tribunal's

5 www.rcpsych.ac.uk/pdf/CAMHS%20GUide%20to%20Mental%20Health%20Tribunals%20Feb%202016.pdf

annual workload. The effective processing of such appeals led to the conclusion that there was no practical reason why the shorter timetable could not be implemented across all of the tribunal's work. The implementation led to an eight week period of double listing to accommodate all the appeals, but despite the volume of appeals, none were cancelled due to lack of tribunal time and credit is due to the administrative staff who worked voluntary overtime and six days a week during September, October and November to ensure that the change was implemented without disruption to the tribunal's usual business.

In response to user demand, the tribunal also introduced paper hearings as the default listing for one type of appeal. The change arose from discussions at the tribunal's user group meetings, where appellant representatives expressed the view that in publicly funded cases, the inability to obtain funding to enable representation and attendance of experts at hearings was leading to a situation where the Respondent local authorities had an unfair advantage in the appeals, because they were able to bring their experts to hearings to give oral evidence. Currently, final hearings on the papers are subject to receiving both parties' consent and if it proves popular with the tribunal's users, may require a rule change in due course. So far, the number of requests for oral hearings has been fairly small and the process enables the Tribunal to list much more flexibly and to deal with appeals more efficiently because of the flexibility and speed afforded by paper hearings.

Primary Health Lists (PHL) jurisdiction

The jurisdiction hears appeals against the decisions of the NHS National Commissioning Board involving the listing of doctors, dentists and pharmacists as service providers. The transitional changes are now well established as are the consolidated Performers Regulations for Doctors and Pharmacists.

Although the number of appeals registered in the jurisdiction remains low, the reduction in the number of judicial office holders required expressions of interest exercises to be held between Care Standards and Primary Health Lists to enable judicial office holders to cross ticket across both jurisdictions, with the successful candidates receiving bespoke induction training from the jurisdictional lead.

Care Standards jurisdiction

The jurisdiction covers a range of regulatory appeals in the care industry, including registration, suspension and cancellation decisions by the Care Quality Commission and Ofsted.

The number of appeals registered in 2015 -16 and for the majority of 2016 has demonstrated a substantial increase in the tribunal's work year on year and the workload for 2015 -16 appears to be higher than it has been for some years. In 2015-16, the number of appeals registered was higher than it had been since 2009-10, and the figure appears likely to be exceeded in the current year.

People and Places

The Chamber continues to recruit judicial office holders using the increased flexible and cross deployment methods available.

Following a Judicial Appointments Commission exercise, Judge Habib Khan was appointed to the Chamber as judicial lead of the Care Standards and Primary Health Lists jurisdictions taking up his appointment in May 2016. Habib was the subject of the first formal swearing in of a salaried tribunal judge by the Senior President of Tribunals at the Civil Justice Centre in Manchester.

In September salaried judge Michael Fisher joined the Mental Health jurisdiction. Michael was successful in an "expressions of interest" exercise across all First-tier Chambers, and has transferred from the Immigration and Asylum Chamber, initially for three years. He brings with him a wealth of judicial experience, albeit from a very different jurisdiction.

Also across all First-tier Tribunal Chambers SEND carried out an expressions of interest exercise during the winter of 2015-16 to appoint additional fee-paid judges and fee-paid specialist members to sit in the jurisdiction. The response was much greater than anticipated, and the standard and quality of applications was very impressive. Two hundred and three applications were received for the 10 judicial posts, and 140 for specialist members. Twelve were appointed. They received two days of induction training to introduce them to the jurisdiction and an opportunity to observe one hearing before they started sitting themselves. Because all were already sitting in other jurisdictions, they adapted to the new jurisdiction and became effective members very quickly. Given the success of the exercise and the calibre of the judicial office holders appointed, the chamber is firmly committed to the use of further such expressions of interest again where it is appropriate.

Sixty new Medical Members were appointed this year via a JAC competition, all of whom are, or have recently been, Consultant Psychiatrists. Our dedicated tribunal doctors, along with our expert judges (including Circuit Judges and Recorders who assist with restricted patients) and our specialist lay members, continue to rise to the very great challenge of deciding thousands of demanding and important cases that go to the heart of the human condition, and directly affect personal liberty. We are very grateful to them all, and have no doubt that the jurisdiction will continue to benefit from their professional wisdom, knowledge and expertise for many years to come.

Two Tribunal Case Workers (TCWs), Elaine Farrin and Geeta Bhatti, were recruited by HMCTS to the Mental Health jurisdiction to assist with interlocutory case management. The Senior President has agreed that our TCWs are to have the same powers as our Registrars.

In March 2016, one of the original SEND Registrars, Allison Paddington retired from her post as legal adviser magistrates' court and also her position as Tribunal Registrar in Darlington. One of the two original legal advisers who joined the Registrar Pilot in 2011, Allison provided an excellent service to SEND throughout her tenure there. The cohort of registrars now consists of six individuals, working flexibly to provide 1.6 full time equivalent cover to deal with box work in the Darlington office.

War Pensions and Armed Forces Compensation Chamber

President: Mr Justice (William) Charles

Senior Resident Judge: Judge Fiona Monk

People and resources

As the names above indicate there have been further changes in the leadership arrangements in this Chamber since last year's report. The then Temporary Chamber President, Nick Wikeley, reported it had been a year of some change and that has continued. Following Alison McKenna's decision to step down as Chamber President after a period of ill-health and revert to her role as Principal Judge in the General Regulatory Chamber, the Senior President decided to put in place some interim arrangements. So from 5th September Bill Charles has gained yet another hat to add to his other leadership roles in the Upper Tribunal and Court of Protection and Fiona Monk has been assigned as Senior Resident Judge with responsibility for day to day management. Clare Horrocks remains as Principal Judge and continues to give the Chamber the benefit of her extensive knowledge and experience.

It follows that credit for the substance of the vast majority of this report relates to the period when Nick and Alison were leading and the Chamber owes a huge debt, in particular, to Nick for stepping in as temporary Chamber President at short notice and for more than keeping things ticking over for longer than he expected.

One of their significant achievements was a long overdue introduction from 1st January of payment for our fee-paid judges for writing up statements of reasons. This together with some changes in practice are intended to improve the quality of our decision writing and ensure, not just that the parties have a clear and comprehensive explanation of why they won or lost, but also to tell the Upper Tribunal the same thing. That has been coupled with a training programme designed to include sessions that will be of relevance for all three categories of panel members. As a small chamber we have two training days a year for all our panel members together so it is important that the training benefits Judges, the medical members and the Service members.

There are other resources to help us with both our judgecraft and technical skills; Alison McKenna revised the first edition of her Benchbook, taking account of feedback from the users, and we now have Version 2 just about ready for distribution. We also have the, very welcome and useful, publication of Upper Tribunal Judge Andrew Bano's book on War Pension and Armed Forces Compensation Law and Practice - a learned and comprehensive tome from a former Chamber President and the first text book ever written covering our jurisdiction.

One of the innovations introduced under the previous presidency was the assignment of salaried Social Entitlement Chamber (SEC) judges to help with interlocutory work in the Chamber. Their assignment has been invaluable and many of them have also started sitting for us as well. We have followed that successful assignment with another enabling us to recruit 13 new medical members from the SEC. We hold hearings in London and at seven other HMCTS venues around the country

and these newly assigned doctors help us have a better geographical spread without colleagues have to travel long distances to cover hearings. It is also welcome that two of our very experienced Service members have had extensions to their appointments which means we retain their valuable experience.

Understandably, the recent changes in leadership have given rise to questions relating to the future of the chamber and how what matters to those affected by its decisions and its members are to be advanced. The new leadership is keen to ensure that decision makers on change are made aware of such matters and to promote their implementation / preservation in the changes to be made. Fiona Monk has responsibility for day to day leadership and she is in very regular contact with Clare Horrocks and the administrative team. And the members know where she is! On more general and strategic issues Fiona and Bill Charles are in regular contact.

Jurisdictional Landscape and significant cases

The Chamber's workload comprises hearing appeals relating to claims and awards under the old Service Pensions Order (the SPO, broadly relating to injuries sustained by service personnel before 6 April 2005) and the Armed Forces Compensation Scheme (AFCS) for cases arising after that date. Nick Wikeley and Clare Horrocks submitted a very full response to the Ministry of Defence's Quinquennial Review of the Armed Forces Compensation Scheme on behalf of the Chamber and we await with interest the outcome of that.

The impact of the Upper Tribunal case (*JM v Secretary of State for Defence* [2015] UKUT 332 AAC) which dealt with a claim for arising out of alleged bullying and harassment in the Armed Forces continues to have ramifications as we work through the cases that were stayed pending the appeal to the Upper Tribunal.

The decision of the First-tier Tribunal hearing the appeals of those from the Services claiming compensation for the alleged effects of ionising radiation from the Christmas Island atomic tests is anticipated shortly. It is one of the longest and largest cases ever heard in WPAFCC having been remitted from the Upper Tribunal (*Abdale and others v Secretary of State for Defence (War Pensions)* [2014] UKUT 0477 AAC) The panel are having to consider, not just extraordinarily large volumes of documentary evidence, but some contentious and difficult medical and scientific concepts.

The Future

We continue to work closely with the Pension Appeals Tribunals in both Scotland and Northern Ireland and, through the Advisory Steering Group, look for ways of ensuring consistency of practice and procedure across all three jurisdictions. We have recently restarted our User Group and were fortunate to have the Senior President join us and explain to those there something about the likely impact of the Reform programme on the Chamber. We remain the only chamber of a tribunal that does not have direct lodgement of appeals (they are made to Veterans UK the agency of the MoD who is the respondent to the appeal) and there is a consensus that this needs to change whatever other new ways of working and communicating are suggested and then introduced.

In general, the approach of the new leadership to the Reform programme will be to try to preserve what is tried, tested and good about the existing position (e.g. panel constitution), to support improvements and importantly to try to ensure that all changes will work in practice to the benefit of those affected by decisions of the chamber. An example is direct lodgement. In theory it would clearly be an improvement but in practice that improvement will only materialize if the necessary resources in terms of people and systems are provided. Useful input has been received from members and others on proposals for change and we are sure that it will be repeated in the future.

Immigration and Asylum Chamber

President: Judge Michael Clements

Last year's report was written in anticipation of significant reform and change. This is an ongoing process and although many changes have already taken place there is much more to come. A welcome change has been the steady flow of sittings throughout the past year which has given our fee-paid judges much needed stability. We have also seen the introduction of eJudiciary which, despite some problems, offers a more modern and flexible working platform.

In 2016 we have seen the retirements of Resident Judges Christine Roberts, Francis Pinkerton and Nigel Poole and the retirements/resignations of a further 36 salaried and fee- paid judges. I thank them for their work in the Chamber and wish them well for their futures. It is anticipated a further Resident Judge will be retiring in 2017.

For more positive news we have Julian Phillips based at Birmingham and David Zucker based at Taylor House who were appointed through a JAC competition to be Resident Judges at those hearing centres. In addition to the two new appointments Frank Appleyard is Acting Resident Judge for the North-East until August 2017. Jonathan Holmes and Paul Cruthers have taken up positions as Assistant Resident Judges in North Shields and Manchester respectively, and Nihar Bird, Michael Keane and Carole Scott-Baker at Taylor House, London. A further recruitment campaign will take place in 2017 to fill the current and future gaps in our leadership and management structure.

This is a progressive and forward-thinking jurisdiction ready to embrace change. We are discussing various pilots to improve our service to justice and the public, are in close consultation with our stakeholders and some of the pilots may be underway by the time this report is published. These will include better ways of case management, procedure and the expeditious delivery of decisions in some cases by way of oral decisions at the end of the appeal hearing. There will be a greater use of virtual hearings and IT use. This will no doubt produce challenges for court users and judges alike. We will need better IT platforms and technology if we are able to fully embrace the challenges presented to provide a better, faster and more efficient service for both in-country and out-of-country appeals where the appellants will have been removed prior to their appeal hearing. We are also working with JUSTICE to explore an IT based process for appeals.

Following the case of the *Lord Chancellor v Detention Action* [2015] EWCA Civ 840 in which the

2014 Detained Fast Track Procedure was held to be unlawful, (the Supreme Court having refused the Lord Chancellor permission to appeal) I have set aside some 314 decisions heard under the 2014 Rules which have now been re-listed. Judgement in respect of the 2005 Detained Fast Track Rules has been handed down and we will be considering with the parties the appropriate venue to deal with any applications to set aside. The hearing centres at Yarls Wood and Harmondsworth where detained Fast Track were heard have not been idle. We are presently hearing at these centres detained immigration appeals (DIA) under the standard Procedure Rules. As these appeals are by persons who are detained utilising these courts and implementing my Presidential Guidance on listing has enabled these appeals to be expedited. I am grateful to Assistant Resident Judge Neil Froom at Hatton Cross who has worked hard in putting together a transparent procedure by which detainees can be more fairly processed through the system. We are awaiting the response of the government consultation on a new form of detained Fast Track.

We have been fortunate to have had the support of many judges from the Employment Tribunal and Social Entitlement Chamber both salaried and fee-paid. In 2014 we held an Expression of Interest for fee-paid and salaried judges to be assigned and of over 400 applications 198 were assigned for a set period of two years. 139 sought a new assignment by way of a recent Expressions of Interest and all of whom, after an Assessment and Evaluation panel with senior First-tier Tribunal Immigration and Asylum Chamber (F-tTIAC) judges, were offered a new assignment by the Senior President of Tribunals. I wish to extend my congratulations on their achievement in what was a challenging process and extend my thanks to the senior judges of the Tribunal who sat on panels with them and thereafter produced a comprehensive report on their judicial skills. Nevertheless they are not sufficient to meet the increasing demands to fulfil the work in this Tribunal taking into account the reducing number of judges. A further expression of interest has been recently sent to the Employment Judges resulting in the assignment of 37 judges and one Judge transferring from the Social Entitlement Chamber with training taking place in January, February 2017

There has not been a competition for salaried judges in this jurisdiction for some years. The number of salaried judges in FtTIAC has reduced due to retirements and resignations from 152 in 2005 to 65 as at October 2016. The Lord Chancellor has therefore approved the appointment of 20 salaried judges with 20 reserves and it is anticipated that the JAC will be able to run a competition for these judges in the first quarter of 2017. One important element in ironing out fluctuations in the areas of judicial workload across all chambers will be an increased facility for assignment to enable both fee-paid and salaried judicial officers to be deployed effectively and at relatively short notice to those locations of the judicial family where they are most needed. It is intended that on appointment our new salaried judges will be initially assigned to FtTIAC but will be encouraged to assign fully to other areas of judicial work if and when the business needs arise.

In order for this Chamber to operate efficiently it is necessary for parties to respect orders and directions given by judges. I regret to say that this does not always happen. Over the last few years we have been finding our way with the new cost sanctions afforded to us. It is likely that in future we shall give increasing effect to them to ensure in particular that the change in our work process is not derailed. We have also been fortunate to have been given Tribunal Caseworkers who are currently based at our back office at the National Business Centre in Leicester and at the London

centres and Birmingham. They have taken up many forms of interlocutory work as set out in the Senior President's Guidance allowing judges to concentrate on the substantive appeals.

As part of the reform programme Chamber Presidents, along with local liaison judges have been appointed to work alongside their counterparts in the Courts. I am grateful to Christine Martin and David Zucker who have taken on these roles, representing the Tribunals in the North-West and London respectively.

Notwithstanding the referendum result, judges from this jurisdiction have continued to make a valuable contribution to the understanding of European jurisprudence under the aegis of the European Asylum Support Office based in Malta. In this regard the contribution of Julian Phillips, who has also continued as the Training Judge in this Chamber, is of particular note. I was pleased to make my own foray into the European arena attending the annual conference of the IARLJ European Chapter in Oslo in May which I found useful and informative. Designated Judge Edward Woodcraft has continued his support for the Bulgarian judiciary and with Edward's help, the FtTIAC hosted a visit from a group of Bulgarian judges in April. Judge Anna Rose-Landes, Elizabeth Davidge and John Manuell have all taken part in the "Train The Trainers Event" in Malta thereby consolidating this chambers reputation as a centre of excellence for training judges in the first-tier area of immigration law.

Whilst on the subject of training I would like to thank all those judges who work so hard to prepare, deliver and facilitate at training events. We work in an area of extraordinary complex law, arguably in need of consolidation, but in the meantime these judges give effective support to Julian Phillips and his deputy, John Manuell and remain in my debt. These judges who are often willing to go the extra mile, often in their own time, to prepare the materials which enable the rest of us to be trained with the very fluid and ever changing law which we are charged to interpret and apply.

On 10 October 2016 a new fee structure was introduced substantially increasing the cost of bringing an appeal before this Tribunal. The Government on 25 November 2016 indicated that they wished for further consultation and the fees introduced have been suspended as with other proposed fees for the time being.

The caseload increased by 8000 appeals during 2016 peaking in June 2016 but has reduced each month since then and is now back to the same level it was in December 2015. The ceiling on the number of sittings made available to fee-paid judges has been increased and subject to judicial resources we are piloting afternoon courts in Manchester which appears to be successful so far. I am pleased to report however that due to various initiatives the outstanding caseload has been reducing.

As President of FtTIAC I have, as last year, been greatly assisted and supported by the proactive thinking and, from time to time, constructive criticism from the Council of Immigration Judges (CIJ). I work closely with the Council and whenever possible I share information and exchange ideas. I pay particular tribute to the President of the CIJ, Judge Christopher Buckwell, who has been an invaluable conduit for the varied, sometimes very emphatic, view of individual judges. I have also made mention of Designated Judge Russell Campbell who is now Chairperson of the Tribunal's Forum where he will perform the same task for Tribunals generally as does Judge Christopher

Buckwell for this jurisdiction. In that role and as a member of the Judges' Council, Judge Campbell is, among other things, able to ensure the continuing development of assignments and cross-ticketing which is so beneficial both to the judiciary and to the interest of justice.

The HMCTS Reform Programme, an important part of which is the rationalisation of the Courts and Tribunals estate continues. As I reported last year many of the leases on the FtTIAC estate come for renewal during 2017. We are working closely with the administration to identify appropriate venues. The move from Sheldon Court Birmingham to the Civil, Family and Tribunals centre in the city centre has been delayed due to construction works although we hope to be in the refurbished building by March 2018. The works at Taylor House, London, for the provision of more courts to be used by the Tax Tribunal have now been completed.

I record first of all my thanks to the Resident Judges of FtTIAC especially those who have or will be retiring. They have provided a strong and supportive leadership for FtTIAC over the past years. We have and hopefully will be appointing shortly new Resident Judges and Acting Resident Judges to provide a forward-thinking and progressive leadership and management role to meet the future challenges for FtTIAC and the HMCTS Reform generally. I would also like to record my thanks to the salaried and fee-paid judges of this Tribunal who continue to hear some of the most complex appeals in an ever-changing area of law which is, quite rightly, open to public scrutiny.

I would also wish to record my thanks to Jason Latham of HMCTS who has assisted greatly during the past year in obtaining financial resources for FtTIAC which may not otherwise have been available. He has, with Olwen Kershaw, supported me in my work as President. I am also grateful to record that both judiciary and administration have worked together and the constructive and amicable approach each has developed with the other over our increasingly heavier workloads.

I am sad to report that in the last 12 months FtTIAC Judges Michael Upson, John Jones and David Archer have passed away and I extend my sympathies to their families.

In my last report I mentioned the arrival of Sir Ernest Ryder as the Senior President of Tribunals. Over the last year I have been pleased to work closely with him in this challenging area of the law and HMCTS Reform. His enthusiasm, knowledge and interest in the myriad areas of this Tribunal are impressive as is his wholehearted support of FtTIAC and Tribunals generally. He has been a great and vociferous advocate on our behalf. My thanks also go to his admin support team and in particular Craig Robb and Rebecca Lewis who are always unfailingly courteous and helpful.

Looking forward to the coming year there will be a number of exciting challenges and we will be looking to see what Brexit actually means to FtTIAC in the terms of workload.

Tax Chamber

President: Judge Colin Bishopp

The last year has brought some disappointment but there has also been some good news.

The disappointments first: at the time of writing the London-based judges have still not moved to Taylor House. The original aim was that we should be there in late 2015, then May 2016, subsequently advanced to July and then November. The most recent forecast is that we shall be moving at the end of June 2017; I am not 100% confident but am nevertheless optimistic that on this occasion the forecast will be correct. The delay is disappointing because, in the meantime, we have been compelled to use courtrooms at the Royal Courts of Justice and Fox Court which are not always suitable for our work, and some of the judges have had to share, yet the courtrooms at Taylor House, which are as good, if not better, than we could have hoped for, have been constructed and the judicial offices are available for our occupation. We have been unable to use them because of a disagreement, only recently resolved, about responsibility for the necessary alterations to the heating and ventilation system, which was designed for an open-plan floor and cannot cope with partitioned rooms, as we have. There have been no judicial moves in our other permanent locations, in Birmingham and Manchester.

A second disappointment is that, after a substantial and apparently sustained improvement in the speed and quality of service we encountered a setback when a significant number of our staff at the processing centre in Hagley Road left, most joining (ironically) HMRC on better terms than HMCTS can offer. The staff numbers have been made up; but in the meantime the standard of service we have been able to offer to users has, undoubtedly, deteriorated. Again, I can only hope that the service will improve once the new members of staff have been fully trained. The managerial team have done very well in difficult circumstances, and I am most grateful to them. On the plus side, and in common with some other Chambers, we have been able to recruit four tribunal caseworkers, or TCWs, who are able to undertake in accordance with delegated authority some work which would otherwise have to be undertaken by judges. The appointments are relatively recent, but experience so far suggests that the experiment has been very successful. It will reduce the need to send files to judges (despite several opportunities to introduce one, we have no electronic file-handling facility) and should correspondingly increase the speed at which we can deal with the more routine interlocutory work.

Much of my time over the last few months, and even more of the time of Judge Roger Berner, to whom a considerable debt of gratitude is due, has been taken up with the necessary judicial input into the changes which the proposed introduction of fees in the Tax Chamber and the Tax and Chancery Chamber would necessitate—not merely in the detail of the Fees Order, but also in amendments to the rules and to our published guidance to users, and in the introduction behind the scenes of numerous changes to the manner in which appeals would be handled by the staff. The proposal was that fees would

be introduced at the beginning of 2017, but that did not happen because the Government decided to review the fees policy throughout tribunals, and at the time of writing the outcome of that review, so far as the Tax Chamber and Tax and Chancery Chamber are concerned, is not known.

The proposed introduction of fees did however bring with it one significant benefit for us. It was recognised that fee-handling would be made much easier if the Tax Chamber had an on-line system for starting appeals and, despite the abandonment or deferral of the introduction of fees, we will still have an on-line system; at the time of writing it is at the beta-testing stage. The statutory provisions about the bringing of appeals to the Tax Chamber are extraordinarily complicated but the IT team developing the on-line system have mastered them amazingly well and have produced what I am confident will be a robust system, user-friendly for appellants and a real aid to the staff.

In my last few contributions I have spoken of the forecasts of additional work due to reach us in consequence of the government's drive against tax avoidance. We have, of course, been dealing with tax avoidance (or alleged tax avoidance) appeals for many years, and a conspicuous recent appeal leading to a mammoth decision and a considerable amount of press coverage, called *Ingenious Games*, is an example of the cases of that kind. The new work was expected following, first, the introduction of a general anti-abuse rule, or the Government Anti-Avoidance Rule (GAAR), by the Finance Act 2013 and then the accelerated payment (or "pay now, argue later") provisions of the Finance Act 2014. Further provisions of a similar kind have followed, and more are predicted. So far we have seen no GAAR cases at all, and none are thought to be on the horizon. The original forecast was that we would begin to see appeals relating to the accelerated payment provisions in early 2015, but in fact we saw none until 2016. Appeals against penalties for late payment are, however, now arriving in substantial numbers and we are also beginning to see appeals against decisions rejecting taxpayers' claims for relief. They have been added to the thousands of late filing penalty appeals which are now coming on for determination following the refusal by the Supreme Court of permission to appeal against the Court of Appeal's decision in *Donaldson* that computer-imposed penalties are lawful.

HMRC constantly add further powers to their armoury, not all in the tax avoidance field, and I have been consulted on a regular basis about our capacity to handle the resulting appeals. Even collectively, however, the appeals resulting from other measures introduced over the last year will be small in number. There are further proposals in the pipeline, and most of those, too, will lead to little or even no extra work. The one possible exception is the proposal to tax, as disguised remuneration, certain employer loans which have not been repaid; it is difficult to predict what will reach the tribunal, but my own view is that we will see significant numbers of such cases.

Over the last year four of the Chamber's fee-paid judges have retired, one has moved on to become a District Judge (Magistrates' Court) and no longer has the time to sit in the Tax Chamber and one, Kenneth Mure, has died, unexpectedly and very sadly as it was thought

he would make a good recovery from illness. As many as 17 non-legal members have retired during the course of the year. Because the anti-avoidance work has materialised more slowly and in smaller numbers than previously assumed, and the policy in the Tax Chamber (as in others) about the use of non-legal members has changed we have, despite natural wastage (a convenient term though one I ardently dislike), sufficient judicial resources for what is now our expected case-load.

The development of a Scottish tax tribunal, at both First-tier and Upper Tribunal levels, is proceeding apace; it broadly mirrors the UK-wide system, but for the time being will handle only appeals relating to purely Scottish taxes. Full devolution of all Scottish tax appeals is expected in 2019 or 2020. It remains to be seen whether it will be possible for Scottish judges and members to sit in other parts of the UK and vice versa, and whether, as I hope, we can share training. It would be a great shame if the two systems were to diverge.

This is the last of my contributions to the Senior President's annual report as I shall be retiring in October. I should like to take the opportunity of thanking my fellow judges, the non-legal members of the Chamber and all of the staff for their hard and uncomplaining work during the time I have been the Chamber President; though I may not say so as often as I should, I am truly grateful to them for all of the support I have received during my term of office. I have also had invaluable support from the Senior President and his predecessors and their staff; without it the work of any Chamber President would be much more difficult. I must, finally, extend my gratitude to many others working in HMCTS with whom I have had contact over the years. Their dedication to the delivery of justice is remarkable, but is all too frequently undervalued.

General Regulatory Chamber

President: Judge Peter Lane

This year has seen significant activity on various fronts.

The bringing of the First-tier's transport jurisdiction within the administrative ambit of the Chamber and the deployment of existing General Regulatory Chamber (GRC) judiciary to that jurisdiction have both been fully achieved. So far as appellants are concerned, one of the results is that there is now greater flexibility regarding the listing of appeals for hearing as well as the possibility of having the appeal dealt with without a hearing. The GRC's administrative staff and the Registrar are to be commended for their work in this regard.

In last year's Report, I mentioned two of my aims as President: building a clear Chamber identity and maximising the use of its skills. As well as the opportunity presented by the transport project, the GRC's pension jurisdiction has enabled the GRC to draw upon and expand its judiciary's expertise. In line with the growth of appeals under the Pensions Act 2008 regarding automatic enrolment in pension schemes, judges from the GRC's information rights, charity and immigration services

jurisdictions have been given training in the pension jurisdiction, before joining the cadre of judges who were authorised in 2015.

The community right to bid (CRB) jurisdiction continues to produce a steady stream of cases, concerning appeals against local authority decisions to list buildings or land as assets of community value. One of the most interesting (and potentially challenging) tasks of the GRC President is to undertake the first appeals in a new jurisdiction, or in a new area of an existing jurisdiction. During 2016, it became apparent that the number of CRB appeals was such as to necessitate the authorisation of additional judges. Accordingly, an expression of interest exercise was held within the GRC's judiciary, as a result of which both salaried and fee-paid judges have been selected and trained to hear CRB cases. The range of potential assets of community value is extremely wide. Cases so far have included public houses, churches, car parks, playing fields, a golf course, a wildflower meadow and a football stadium.

Last year, I referred to the first appeals being received in the jurisdiction known as professional regulation. Here too, there is now a steady caseload, involving appeals against financial penalties concerning the obligation of letting agents and property managers to belong to an approved redress scheme. We have also begun to receive the first appeals under the Consumer Rights Act 2015 against a financial penalty for alleged breach of the duty to publicise fees; and under the Smoke & Carbon Monoxide Regulations 2015, against penalty charges on landlords for failing to fit smoke etc alarms in leased residential premises.

As with the CRB jurisdiction, during 2015 the point was reached in the professional regulation jurisdiction when additional judges were needed. These have been selected and trained and are dealing with the appeals, alongside their existing GRC work.

The professional regulation jurisdiction includes several sub-divisions where the first appeals are awaited. These concern the control of ticket touting; lobbying; decisions of certain professional Institutes; and probate scheme compensation.

As can be seen, much of the GRC's training programme is highly-focussed. An innovation in 2016 has been to further the collegiate nature of the Chamber by bringing together, in the context of training, judges and members from several of the smaller jurisdictions, who might otherwise not get a suitable opportunity to meet to discuss their work, share experiences and receive training in matters of common interest and relevance, such as "judge craft".

In the claims management jurisdiction, we have been fortunate to have assigned to the GRC members from the Upper Tribunal, Tax and Chancery Chamber, who have brought their skills to bear on the system of interconnecting primary and secondary legislation, rules and codes of conduct that governs persons who have been authorised to provide claims management services.

An entirely new jurisdiction, animal welfare, has produced its first appeals. The cases involved decisions by the Food Standards Agency to suspend authorisations under the Welfare of Animals at the Time of Killing (England) Regulations 2015.

In the environment jurisdiction, which has several sub-divisions, the first appeals are arising in respect of designation by the Environment Agency of reservoirs as "high-risk reservoirs" under section 2C of the Reservoirs Act 1975 (as amended in 2013). There has, however, been a considerable delay in the issuing of notices relating to activities on land located within nitrate vulnerable zones. The GRC had anticipated determining appeals arising from these notices during 2016 but it now appears likely that this will be one of the tasks to be undertaken by the Chamber during 2017.

Information rights appeals continue to be received at around the level of previous years. In March 2016, the Independent Commission on Freedom of Information published its report. Amongst its recommendations was that the government should legislate "to remove the right of appeal to the First-tier Tribunal against decisions of the [Information Commissioner] made in respect of the [Freedom of Information Act 2000]". The Commission suggested that any appeal should lie to the Upper Tribunal on a point of law only.

As has been pointed out, there are important issues here regarding the integrity of the system established by the Tribunals, Courts and Enforcement Act 2007; access to justice; the resources of the Information Commissioner and of the Upper Tribunal; and the appeals regime under the Environmental Information Regulations 2004.

In 2016, the Government undertook a consultation exercise on "Transforming our justice system". So far as concerns Tribunals, the consultation asked for views on "streamlining procedures and encouraging a balanced approach", whereby procedure rules etc would be simplified, with increasing use being made of written representations and of electronic forms of communication; in contrast to the tribunal panel, the parties and their representatives being physically present in the same hearing room. The consultation document also sought views on the future of panel composition.

The way in which the GRC is already developing might be said, to some extent at least, to foreshadow several aspects of the reform programme for courts and tribunals.

The GRC is already making use of video-links and telephone hearings, where appropriate. It is also to be one of the first Chambers to run a trial of the technology which it is envisaged will deliver "virtual" hearings using online video solutions.

In addition to these procedural matters, the multi-jurisdictional nature of the GRC makes it, in a sense, a microcosm of what a future courts and tribunals system might look like. The GRC's recent experience suggests that the authorisation of existing judiciary to decide cases in one or more additional jurisdictions not only enhances the job satisfaction and career development of the individuals concerned but also maximises the use of resources, by facilitating the creation of "mixed" lists, whereby cases involving different jurisdictions can be listed for hearing or other disposal on a single day.

Following her welcome return to work after a long period of illness, Judge Alison McKenna has become Principal Judge (GRC). As well as continuing with her role in the Chamber's charity jurisdiction, Alison will be sitting on information rights appeals and in other jurisdictions. I am delighted that the GRC will be able to draw on her wide experience.

We have this year bid farewell to His Honour Michael Brodrick and Professor John Angel. Both were distinguished leaders of, respectively, the former Transport and Information Rights Tribunals. Michael was a key figure in the successful project to bring the transport jurisdiction fully within the two-tier tribunal structure, whilst John continued to apply his expertise in the GRC's information rights jurisdiction. We wish them both long and happy retirements.

Largely thanks to the typically determined efforts of Lara Moseley, the GRC's fee-paid judges and members are now able to make use of ejudiciary. This is proving extremely useful, not only as regards official communications but also in facilitating access to the Judicial College's on–line LMS systems and training materials.

I continue to be extremely grateful to the GRC's judges and members for their hard work and commitment to public service. The GRC is fortunate to have a highly accomplished and energetic Registrar, Rebecca Worth, as well as a professional and pro-active administrative team in Leicester (a city which had just cause for celebrations in 2016).

Property Chamber

President: Judge Siobhan McGrath

I am pleased to say that the Property Chamber has had another very successful year. We are fortunate to have interesting work and an excellent team of judicial and administrative colleagues. Our aim in the Property Chamber is to provide accessible, expert dispute resolution in an area of law which is notoriously complex.

Highlights of the year which I will explain further below include: the launch of the judicial deployment pilot following the recommendations from the Civil Justice Council; new jurisdictions for the Chamber under the Housing and Planning Act 2016; progress with reviewing and developing processes in particular for Agricultural Land and Drainage and Land Registration cases and new training initiatives in Continuing Professional Development (CPD)and e-learning.

Dispute Resolution in Property Cases

It is axiomatic to observe that disputes affecting residential property are of the upmost importance to the parties affected. As a Chamber we are working with HMCTS colleagues to explore better ways of providing adjudication and alternative dispute resolution in both the Tribunal and the Courts.

Judicial Deployment

In May 2016, the Civil Justice Council (CJC) published its report on the distribution of Property cases between the Courts and the Tribunal (https://www.judiciary.gov.uk/wp-content/uploads/2011/03/final-interim-report-cjc-wg-property-disputes-in-the-courts-and-tribunals.pdf).

As the report states, the idea for the project is simple: judges should be deployed in a way that ensures that litigants are able to resolve all the issues in a dispute in one forum. The premise for the idea is that in many cases, litigants may be required to have part of their dispute resolved in the County Court and part of the dispute resolved in the Property Chamber. Since all First-tier Tribunal judges are now also judges of the County Court (and vice versa), we are exploring the potential for a Tribunal judge or a Court judge to decide all aspects of multi-faceted cases in one place and at one hearing. This has become known as "double hatting". We have already dipped our metaphorical toes into the water and have double hatted to good result. Jurisdictions where deployment has been identified as suitable include service charge cases where we additionally decide rent and set-off issues; enfranchisement cases where we additionally decide notice validity issues; beneficial interest cases where we additionally decide TOLATA issues. The list continues to grow.

So far the pilot has been successful. Across the country a number of cases have been heard and we are starting to understand the benefits for the parties and for HMCTS; in addition to financial savings we are achieving a consistency of adjudication approach and the application of appropriate expertise. We now hope to report back to the CJC on progress so far in the summer of 2017.

As well as working towards a practical solution for cases where jurisdictions spans the court and the tribunal, we are also exploring whether there may be benefits for some categories of property case being dealt with by the Property Chamber instead of the court. The first example of this is business lease renewal under the Landlord and Tenant Act 1985. Where a landlord has admitted the tenant's right to a new lease, the only outstanding issues are the terms of the new tenancy and the rent. These issues may well be suitable for determination by an expert Tribunal and judicial deployment may provide an opportunity for that type of case to be decided in the Chamber. We hope to take this initiative forward in the autumn.

Alternative Dispute Resolution and Pro-bono advice and assistance

The Residential Property and Land Registration divisions of the chamber continue to offer a free mediation service. We are keen to expand the number and judges and members who are trained to undertake mediation and are working with the judicial college to develop a training programme.

For leasehold and mobile homes cases, the Residential Property division of the Chamber is greatly assisted by LEASE which as a government funded advice organisation is able to provide assistance to Tribunal users.

Additionally, LEASE has now launched an early neutral evaluation service where recently retired Property Chamber judges will give a view on the merits of a case.

Over the years, Residential Property has established a working relationship with the College of Law and BPP law school who have been able to provide advice and some representation to Tribunal users.

The Jurisdictions

Altogether the Property Chamber divisions deal with about 130 separate types of case. The broad areas are leasehold enfranchisement, leasehold management, land registration, rents, park home cases, agricultural disputes, and cases under the Housing Act 2004.

The Housing and Planning Act 2016 gives the Chamber further jurisdictions and it is expected that our caseload will increase by about 3,000. The bulk of the work will relate to appeals against local authority action against failing or "rogue" landlords. In extreme cases the Tribunal will be asked to make orders banning landlords and managing agents from letting activity. Additionally there will be new powers to order a landlord to repay rent to local authorities and tenants and an option for local authorities to impose fines as an alternative to prosecution

Amendments to leasehold law include a new power to be contained in schedule 11 of the Commonhold and Leasehold Reform Act 2002, which will enable the Tribunal to prevent a landlord from recovering contractual costs contained in a lease. It is anticipated that this will have an impact on the number of leaseholders making applications to the Tribunal and on the number of cases which settle.

The CJC are undertaking a scoping study for dispute resolution in boundary dispute cases. Lizzie Cooke has attended a meeting of a committee chaired by DJ William Jackson, in her capacity of Principal Judge for the Land Registry division of the Chamber.

Judges and members

As well as being Chamber President, I am the principal judge for the Residential Property division of the Chamber. The Principal Judge for Agricultural Land & Drainage is Judge Nigel Thomas and for Land Registration, Lizzie Cooke.

Residential Property has sixteen salaried judges and valuers and Land Registration has four salaried judges. Each of the Residential Property areas has a Regional Judge and one or more deputies. Otherwise the work of the Chamber is carried out by fee paid judges and members (about 300 in total). The membership includes those with expertise in valuation, housing conditions and in agricultural matters. Both the Residential Property, Agricultural Land and Drainage jurisdictions also have a cohort of lay members.

This year we welcomed two new drainage members to the Agricultural Land and Drainage tribunal and six new valuer members to the Residential Property tribunal. Also six of Residential Property's existing valuer members have been appointed as valuer chairmen and one was recruited externally. In the next year we will carefully consider whether we need further additional resource for the Residential Property tribunal as a result of the Housing and Planning Act 2016 legislation. We also have a number of salaried judges and valuers retiring over the next few years so we will be running Expressions of Interest and/or Judicial Appointments Commission exercises to ensure that the Residential Property tribunal can continue to hear cases promptly and effectively.

Training

The Chamber Training Committee is chaired by our training director, David Brown. A composite bid on behalf of all three divisions is made to the judicial college. The standard of training in all divisions is very high and the evaluation by participants is consistently enthusiastic.

This year we have developed a new CPD course for the residential property division. This will be delivered to groups of about 30 judges and members who are all trained together. The course runs over two days and teaching is based around three case studies. No lectures are delivered and no Power Point presentations are used. Instead participants observe mock hearings, consider questions and issues in syndicate and move back into plenary for facilitated discussion. It is a novel approach and seems to have been very successful.

In the new Housing and Planning Act jurisdictions we have planned face to face training for judges and are developing a modular e-learning package for other members. When the package has been successfully completed members will be able to claim a training fee.

Administration

Changes to support for the Chamber

In November 2015 I was very pleased that Tom Rouse was appointed as my support officer. Tom has worked with the Tribunal for a number of years and is experienced in many aspects of the Chamber's work.

The Residential Property division has five regional offices based in Birmingham, Cambridge, Chichester, Manchester and London. This year we have seen Maureen McCabe one of our longstanding delivery managers in Birmingham move to Birmingham Civil Justice Centre and she will be missed. In Maureen's place we welcome Claire Jones as Acting Delivery Manager who also has an excellent knowledge of Residential Property legislation and procedures.

Agricultural Land and Drainage is administered from our Manchester office. The nature of the jurisdictions means that it is inevitable that parties must be given a great deal of leeway to negotiate. Notwithstanding that consideration, adjustments to the process has been made to improve performance figures to give better certainty to parties.

The Land Registration (LR) division staff and judiciary are based at the London office. They have dedicated a large amount of time to review their processes and it has been encouraging to see staff come up with ideas to strengthen their own processes. Shazan Nazir, the Delivery Manager for LR has overseen a fundamental change to the structure of the teams that process the work. This has involved amalgamating two teams into one team with the ultimate aim of providing clerks with a wider skillset which will then allow resource to be allocated to where it is needed most.

Last year I commented on changes made to the Residential Property (RP) line management hierarchy and the utilization of what were dedicated RP staff resources across other jurisdictions. The performance targets continue to be met by the staff in each of the Regions and I remain very grateful to them for their dedication and work. However I am concerned that sufficient priority is given to maintaining the expertise of the RP staff to ensure that the quality of service we provide and the ambitious performance indicators that we achieve are maintained.

Fees

New application and hearing fees were introduced in July 2016 for Residential Property cases and I thank the hard work of the staff in ensuring that it had little impact on the business. It is too early to give an opinion on what impact the new fees will have on caseload.

Estate changes

In January 2017, the Southern Region of Residential Property moved from Chichester Magistrates Court and Tribunal Centre to Havant Justice Centre. The new Justice Centre will host a range of civil courts and tribunals and will take advantage of the excellent transport links into Havant, offering justice to people from a wide catchment area, including parts of Surrey and West Sussex.

IT and eJudiciary

Residential Property cases are administered from cradle to grave. Each application is allocated to a case officer on its receipt into the office and that member of staff will remain responsible for the case until the decision is issued. Staff are assisted in this task by the use of a sophisticated case management system (CMS) that has been developed over the last 14 years. The workflows and tasks follow the natural progression of a case from start to finish and the workflows are designed to allow a degree of autonomy for the case officer to manage the process. All documents, except for hearing bundles are scanned onto the system. It would be beneficial to have Agricultural Land & Drainage and Land Registration cases also included on CMS. At present we cannot receive electronic applications. My ambition is for this to be developed as a "front end" for CMS with the facility for parties to lodge documents throughout the course of a case.

Property Chamber intranet page and eJudiciary

Most of the salaried judiciary now have judicial laptops. Unfortunately neither the open build nor the DOM1 machines can accommodate our CMS or LR 2000 and therefore judges still need access to the old DOM1 system. Most of our fee-paid judges and members have now been allocated ejudiciary addresses. A Property Chamber intranet page has been created on the Judicial Intranet. This will allow judges and members to find all the information relevant to their job in one place.

YouTube Videos

In order to make the Tribunal more accessible we are trialing the use of You Tube videos to support our guidance booklets. The first will be a 45 second clip describing what is a "bundle" of documents. A script has been drafted and a staff volunteer will be filming a mock video to present to the

HMCTS Communications team.

Conclusion

In the last year solid foundations have been laid to take forward new initiatives and to support our effective and efficient business as usual. In the next year we look forward to working more closely with Court colleagues to provide a more streamlined platform for dispute resolution. However, in so doing we will not lose sight of the special quality of decision making that Tribunals bring to resolving disputes in this complex and important area of law.

Annex C

Employment

Employment Appeal Tribunal

President: Mrs Justice (Ingrid) Simler

The Employment Appeal Tribunal ("EAT") has jurisdiction to hear appeals on points of law arising from decisions of Employment Tribunals ("ETs") in a diverse range of disputes relating to employment across the UK. It sits principally in London and Edinburgh, but sat in Cardiff in November 2016, where (unlike London and Edinburgh) there is no dedicated court room or administrative resource in place because the volume of appeals originating in Wales is now so small that separate premises there cannot be justified. In Northern Ireland appeals lie direct to the Northern Ireland Court of Appeal, and again, the volume of appeals is now so small that a specialist appellate tribunal is regarded as unnecessary. Resolution of the question of what devolution means for the EAT in Scotland has still not been reached and the EAT remains a reserved tribunal in Scotland. This question continues to occupy time and energy but no detailed proposals for legislation have yet been produced.

2016 has seen further reductions in the number of newly registered applications for permission to appeal to the EAT, as part of the ongoing pattern of decline in the number of cases brought in the ETs following the introduction of fees, with a corresponding reduction in the numbers of appeals brought in the EAT. The EAT in London received 842 new applications in the 12 months to end September 2016. This represents a reduction in last years' receipts which totalled 1013 in the 12 months to end September 2015. Scottish appeals have also continued to decline: receipts of fresh applications to appeal are running at about 56 per annum. EAT statistics continue to show that the rate of success for appellants whose applications were made in the six months before the introduction of fee-charging remains substantially similar to the rate of success for those whose applications were made in the first six months of 2015 (there having been a small increase in success rate from 10.8% to 12.6% in this period, with a reduction in receipts for the same period of 50%) and we continue to think that this indicates that appeals with merit are being deterred by the fee charging regime.

The House of Commons Justice Committee report published in June 2016 recommended a substantial reduction in the level of fees in ETs, an increase in fee remission thresholds, and replacement of the binary distinction between fees for type A and type B claims.

On 31 January 2017 the Government published the results of its post-implementation review on the impact of ET fees. It acknowledges that the fall in claims has been greater than anticipated when fees

were introduced, and that people have been discouraged from making claims, but states that there is no conclusive evidence that they are prevented from doing so. The review sets out proposals for consultation (to run until 14 March 2017) for widening access to the fee remission scheme by raising the income threshold at which full remission is available to correspond broadly with the level of a single person working full time on the National Living Wage (NLW) (currently £7.20 per hour). The new gross monthly income threshold for a single person with no children would be £1,250 (which is about the income of a person on the NLW working 40 hours per week). There is to be no corresponding increase in the income level for those with children or for couples. The level will not rise in line with future increases to the NLW.

The review also states that fees should no longer be charged for claims against insolvent employers to be paid out of the National Insurance Fund (i) relating to redundancy payments under s.170 Employment Rights Act 1996; (ii) about the Secretary of State's failure to make a payment under s.188 ERA; and (iii) relating to complaints under s.28 Pension Schemes Act 1993. The review states that these claims are exempt from fees with effect from 31 January 2017 but no statutory instrument has yet been made to make the necessary amendment to the Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013 SI 2013/1893.

The Government's conclusions on the impact of fees on access to justice will be considered by the Supreme Court on 27 and 28 March 2017 in *R (on the application of UNISON) v Lord Chancellor*.

Procedurally, the only significant change during 2016 is the introduction of section 37ZA of the Employment Tribunals Act 1996 allowing leapfrog appeals from the EAT to the Supreme Court for appeals involving a point of law of general public importance and which satisfy one of the following conditions: the appeal concerns a point of statutory construction that was fully argued before the EAT and fully considered in its judgment; the EAT is bound by previous Court of Appeal or Supreme Court authority on the point; the decision concerns a matter of national importance; the result of the proceedings is so significant that the EAT considers a Supreme Court hearing is justified; or the EAT considers the benefits of earlier consideration by the Supreme Court outweigh those of consideration by the Court of Appeal.

Substantively, cases decided by the EAT remain varied across the full employment and equality jurisdiction. Significant cases decided this year include the following. Guidance and clarification was provided in respect of the ACAS early conciliation provisions in *Science Warehouse Ltd v Mills* [2016] IRLR 96. In a number of cases culminating with *Beckford v London Borough of Southwark* [2016] IRLR 178, the EAT held that there should be an uplift of 10% in awards of damages for injury to feelings following the principle established in *Simmons v Castle*. In *Banaszczyk v Booker Ltd* [2016] IRLR 273 the EAT confirmed that UK law on who is protected as a disabled person should be interpreted in light of the wider concept of disability derived from the UN Convention on the Rights of Persons with Disabilities, applied by the CJEU in *HK Danmark (acting on behalf of Ring) v Dansk almennyttigt Boligselskab*. Guidance on the use of interpreters in employment tribunals was provided by the EAT in *Hak v St Christophers Fellowship* [2016] IR LR 342. In *Mustafa v Trek Highways Services Ltd* [2016] IRLR 326 the EAT considered the question whether employees can transfer under TUPE if there is a temporary cessation of work or activities before the transfer date;

while the criteria for a service provision change falling within TUPE was considered and addressed in *Arch Initiatives v Greater Manchester West Mental Health NHS Foundation Trust* [2016] IRLR 406 in the context of a re-tendering exercise for services provided by the drug and alcohol directorate to Bolton Council. The question of when knowledge of an employee's disability can be imputed to the employer was addressed in *Gallop v Newport City Council (No. 2)* [2016] IR LR 395. In *Roberts v Wilsons Solicitors LLP* [2016] IRLR 586 the EAT dealt with the rights of members of limited liability partnerships to bring proceedings claiming compensation for detriment suffered as a result of making protected disclosures in circumstances where they are unable to treat themselves as discharged following acceptance of a repudiatory breach (following *Flanagan v Liontrust Investment Partners LLP*). Restricted reporting orders, and the extent to which tribunals have power to revoke such orders following withdrawal of a claim is dealt with in *Fallows v News Group Newspapers Ltd* [2016] IRLR 827; and most recently, in *Gilham v Ministry of Justice* [2016] UKEAT 0087_16_3110, the EAT held that district judges do not work under a contract of employment or for services but hold office, so that they are not workers the purposes of protection from detriment for whistleblowing under the Employment Rights Act 1996.

People and places

Mr Justice Langstaff's term as President came to an end after four successful years on 31 December 2015 and I took over as his successor on 1 January 2016. I have been fortunate to inherit an efficient, effective and well managed Appeal Tribunal, and no small thanks are due to him for this, and, of course, to the Registrar (Julia Johnson) and staff at the EAT who work so well and so cohesively to provide what is a highly effective and reliable service to all litigants in the EAT.

The EAT's judicial resource comprises a pool of High Court judges authorised to sit in the EAT, Lady Wise from Scotland, the two resident senior circuit judges (HHJ Peter Clark and Jennifer Eady QC), together with a small number of circuit judges with particular experience in employment law on whom we rely heavily (HHJ David Richardson, John Hand QC and Murray Shanks). Sadly, after more than 20 years' service at the EAT, HHJ Clark will retire on 31 March 2017. Irreplaceable as he is, additional judicial resource has been secured through an expressions of interest process and HHJs Mary Stacey, Martyn Barklem and Katherine Tucker have been appointed to sit at the EAT from time to time.

Lay members continue to sit on appeals in which their practical experience of the workplace is considered likely to assist in the resolution of an appeal, and their contribution in those cases where they sit continues to be useful and valued.

Training of judges and lay members is organised by HHJ Eady QC. This year it involved an illuminating presentation by Lord Kerr JSC on employment status, together with presentations from Sir Brendan Barber, giving us some social context, and a distinguished academic, Prof Sandra Fredman FBA QC (Hon). In 2017 there will be presentations from Michael Rubenstein, Prof Catherine Barnard who will address "Brexit, Employment Law and a bit of Migration" and Prof Tom Fahy who will address the challenges of dealing with those who litigate on a persistent basis.

Pro bono legal advice schemes, ELAAS in London and SEALAS in Scotland, continue to operate (as they have for many years) successfully at the EAT with legal professionals giving their time freely to assist and represent litigants in person at renewed application to appeal hearings and full appeal hearings. Their assistance is invaluable, both to the litigant in question, but also to the Appeal Tribunal itself and enables appeals to be dealt with more speedily and effectively than would otherwise be the case.

The EAT continues to maintain contact with a wide range of judicial and legal organisations. There are regular meetings with the Presidents of the ETs in both England (Brian Doyle) and Scotland (Shona Simon). A user group meets the judges of the EAT twice yearly to discuss issues of concern. Judges of the EAT meet regularly and contribute to the training of employment judges and employment judges who are interested to do so attend the EAT on a rota basis to observe proceedings. All EAT judges learn from these contacts, as they do from assisting visiting international judges on a regular basis.

Employment Tribunal (England and Wales)

President: Judge Brian Doyle

The jurisdictional landscape

The workload of the Employment Tribunal (ET) continues to be influenced by the introduction of issue and hearing fees since July 2013. An updated overview of the issue is found in Doug Pyper and Feargal McGuiness, Employment Tribunal Fees (House of Commons Library, Briefing Paper No. 7081, updated 22 June 2016).

The number of single cases has averaged 4,400 per quarter since the introduction of fees (a 67% decrease). Multiple cases have averaged 400 per quarter in the same period (a 72% decrease).

For a more sophisticated understanding of the trends in ET claims reference should be made to the quarterly and annual reports (and supporting data files) provided online by the Justice Statistics Analytical Services Division of the Ministry of Justice.

As reported in previous Annual Reports, a challenge to ET issue and hearing fees had been launched by way of two applications for judicial review by the Unison trade union. The Court of Appeal dismissed an appeal by Unison in respect of both applications on 26 August 2015: [2015] EWCA Civ 935. The Supreme Court has granted Unison permission to appeal. The appeal is expected to be heard in March 2017.

The Ministry of Justice commenced an internal review of ET fees on 11 June 2015. The report of that review was published on 31 January 2017. It concluded that the introduction of fees had broadly met its objectives. It does not propose to abolish or amend the fees regime. Instead it proposes to raise awareness of remission of and exemption from fees and to make some changes to the income

threshold below which fees are not payable.

The House of Commons Select Committee on Justice launched a general inquiry into court and tribunal fees and charges on 21 July 2015. ET fees were within the scope of that inquiry. The ET judiciary submitted written evidence to the internal review and to the Select Committee inquiry. The Senior President of Tribunals gave oral evidence to the Select Committee on 26 January 2016. The Committee published its report on 20 June 2016. It concluded that fees should be reduced, restructured and subject to a more generous remissions system. The Committee was critical of the Government's delay in publishing its internal review, now published.

The other important variable in influencing the size of the ET caseload is the Acas Early Conciliation Scheme introduced in April 2014. Further evaluation of the scheme has been reported in Matthew Downer and others, *Evaluation of ACAS Early Conciliation 2016* (ACAS Research Paper 04/16). ACAS also publishes quarterly statistical information about the Early Conciliation scheme at www.acas.org.uk.

Last year the ET Presidents in England & Wales and in Scotland established a joint judicial working group to bring forward new guidance on the calculation of compensation for pensions loss. Consultation on the working group's proposals took place during 2016. The responses to that consultation are under consideration. It is now expected that this work will result in new guidance during 2017.

The use of electronic signatures has been introduced in England & Wales in order to speed up the process whereby judgments and reasons are drafted, transcribed and approved by the judges. Applying an electronic signature to the document once the judge instructs that this may be done potentially saves time that would otherwise be lost by a process for obtaining "wet signatures". Recognising the efficiency of promulgating judgments by email where appropriate has led to changes in standard operating procedures.

Changes to the way in which open track cases are listed in the Midlands East and London Central regions have been made. The ET already lists an early case management hearing in such cases. It now also provides a notice of final hearing at the same time. This should ensure that open track cases have a booking in the forward list earlier than if final listing had to await the case management hearing. Although this has not been rolled out nationally, other regions are considering how to improve the forward listing of open track cases.

The pro bono initiative supported by the Employment Lawyers Association at the London Central ET has been a success. The presence of a lawyer to assist an unrepresented party, short of providing representation at a hearing, has added considerably to litigants in person being able better to engage with the ET process. A similar initiative has now commenced in the Wales region.

By means of Presidential Guidance, the ET has introduced Judicial Assessments – a form of judicially-led early neutral evaluation – from 3 October 2016. As part of a case management hearing, and once the usual case management orders have been determined, with the agreement of the parties the judge may be prepared to give a confidential indication of the strengths and weaknesses of each side's case.

The intention is to promote better case management, a narrowing of the issues between the parties and the possibility of settlement or other disposal short of a final hearing.

The pace of legislative change in the ET's jurisdiction slowed a little during the period. Some marginal changes were made by the Enterprise Act 2016 and by the Immigration Act 2016. The major changes to collective labour law wrought by the Trade Union Act 2016 only indirectly touch upon the large body of individual employment rights that are litigated in the ET. Similarly, the rate of change effected by statutory instruments was less marked. Of particular significance are the Exclusivity Terms in Zero Hours Contracts (Redress) Regulations 2016; the Employment Tribunals (Constitution and Rules of Procedure) (Amendment) Regulations 2016; the Employment Rights (Increase of Limits) Order 2016; the Automatic Enrolment (Earnings Trigger and Qualifying Earnings Bands) Order 2016; and the Posted Workers (Enforcement of Employment Rights) Regulations 2016.

During 2015 and 2016 the ET judiciary contributed to the Civil Court Structure Review conducted by Lord Justice Briggs. His interim report was published in January 2016 and his final report followed in July 2016. In due course the proposal to establish an online court for civil claims valued at up to £25,000 may have some significance for litigating small claims in the ET. For now, however, of greater interest to the ET are the "boundaries" issues concerning the shared jurisdiction between the Civil Court (the County Court and the High Court) and the ET/EAT. Lord Justice Briggs made a number of observations, but declined to make any firm recommendations. How the ET is to be structured and positioned in or between the First-tier Tribunal and/or the Civil Court in the future must await political decision and possible further consultation.

Of more immediate interest, perhaps, is the question of how the ETs will be affected by the HMCTS Reform Programme; the Joint Vision Statement made by the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals in September 2016; and the various consultations underpinning the Statement (on matters such as tribunal panel composition, fixed tenure for fee paid-judges and so on). I expect to report on those matters in more detail in future annual reports.

Among the reported cases that serve as examples of the nature and extent of work done by the ET the following are noteworthy.

P v Commissioner of Police for the Metropolis [2016] IRLR 301 explored the boundary between the ET and a statutory disciplinary tribunal. The Police Misconduct Panel was held by the EAT to be a judicial body enjoying immunity from suit. The ET was correct to strike out a claim brought in respect of proceedings before the Panel.

A high profile aspect of ET caseload in recent years concerns claims regarding the proper basis for calculating statutory holiday pay. The latest stage in that litigation is the EAT decision in *Lock v British Gas Trading (No.2)* [2016] RLR 316. The Working Time Regulations can be interpreted so as to conform to the Working Time Directive and EU case law. Employees are entitled to receive normal remuneration as statutory holiday pay so as to include results-based commission payments that would have been earned but for annual leave.

Guidance on the use of interpreters in the ET (and when the ET might proceed where an interpreter

is otherwise not available) is to be found in the EAT's decision in *Hak v St Christopher's Fellowship* [2016] RLR 342.

In *Michalak v General Medical Council* [2016] RLR 458, restoring the original decision of the ET, the Court of Appeal held that Equality Act claims against qualifications bodies should be decided by the ET rather than by judicial review in the High Court if there is no statutory right of appeal against the qualifications body's decision.

The High Court has inherent jurisdiction to make a Civil Restraint Order preventing claims being brought in the ET. In making such an order in *NMC v Harrold* [2016] RLR 497, Laing J suggested that it would be desirable for the ET expressly to consider and to make a finding on the question whether the claim is "totally without merit".

In *McBride v Scottish Police Authority* [2016] RLR 633 the Supreme Court, restoring the decision of the ET, confirmed that an ET has no power to order reinstatement in terms which alter the contractual terms of employment.

The concept of "employment" is a crucial one in many ET causes of action. In *Secretary of State for Justice v Windle* [2016] RLR 628 the Court of Appeal considered the status of interpreters working for HMCTS. On the facts, the ET held the interpreters to be self-employed professionals and not employees, not least because of the absence of an umbrella contract between assignments. The Court of Appeal agreed.

Windle is perhaps an example of a number of cases currently before the ET that will test the employment law limits of the so-called "gig economy". The most recent example of this is the ET decision in the test cases brought against Uber: www.judiciary.gov.uk/judgments/mr-y-aslam-mr-j-farrar-and-others-v-uber/.

For the past two decades or more the ET has been determining thousands of public sector equal pay claims, particularly affecting local government employers and the NHS. More recently, attention has switched to equal pay litigation against private sector employers. *Asda Stores Ltd v Brierley* [2016] IRLR 709 addresses the question of whether the claimants were entitled to bring their claims in the ET or whether the employer can seek to transfer the claims to the High Court. In the Court of Appeal, refusing a transfer, Elias LJ stated that "very few High Court judges have experience in this field, whereas a number of highly able ET judges do. They will have built up a degree of expertise in the subject. It seems to me that implicit in the appellant's case is the belief that ET judges will not be capable of taking a firm grip of this action or of making robust decisions when necessary. If that is indeed what lies at the core of their argument, I consider that it is an unwarranted assumption which does less than justice to the quality of some outstanding judges who sit in the ETs."

In *Taiwo v Olaigbe* and *Onu v Akwiwu* [2016] IRLR 719 the Supreme Court ruled that discrimination on grounds of immigration status does not amount to discrimination because of nationality within the meaning of the Equality Act 2010. Immigration status is not the same as nationality.

The Court of Appeal in *Bhardwaj v FDA* [2016] IRLR 789 has considered the principles of apparent

bias and waiver in the ET in a case where two of the respondents were ET members.

If discrimination arises during a vocational placement as part of a professional educational course is that to be litigated in the ET or in the County Court? In *Blackwood v Birmingham & Solihull Mental Health NHS Foundation Trust* [2016] IRLR 878 the Court of Appeal held that a student who experiences discrimination during a work placement can bring a claim directly against the work placement provider and can do so in the ET.

In *Fallows v News Group Newspapers Ltd* [2016] IRLR 827 the EAT considered the ET's power to make a restricted reporting order. It held that such an order does not lapse automatically following settlement and withdrawal of a claim (contrast the position where a decision has been promulgated). An ET has power in an appropriate case to make a permanent order that continues beyond the proceedings. A withdrawal does not affect the ET's discretion whether to vary or revoke a temporary order.

People and places

Employment Judge Barry Clarke was appointed as Regional Employment Judge for Wales from 1 December 2015.

Regional Employment Judge Fiona Monk (Midlands West region) has been seconded to be the Senior Resident Judge in the War Pensions and Armed Forces Compensation Chamber of the First-tier Tribunal from 5 September 2016 for a period of up to two years. Employment Judge Lorna Findlay has been appointed as Acting Regional Employment Judge during Judge Monk's secondment.

A number of salaried Employment Judges regularly sit in another jurisdiction for a defined number of days each year, typically as First-tier Tribunal judges, Deputy District Judges or Recorders. In future the need for a flexible judiciary will anticipate judges holding at least another "ticket" other than that for their main jurisdiction. This does not threaten their specialism and expertise as Employment Judges, but rather is likely to strengthen their judicial skills and experience.

Twenty-seven salaried Employment Judges (including one Scottish judge) are taking part in a two years pilot to test flexible judicial deployment. The judges have been deployed to sit as "judges of the County Court" and are exercising a civil (but not family) jurisdiction in a number of County Courts in England. They are sitting for up to 30 days per year with the remainder of their time in the ET.

A further five salaried Employment Judges are also taking part in a pilot to cross-assign them to sit for 30 days in the Immigration and Asylum Chamber of the First-tier Tribunal. A large group of fee-paid Employment Judges are already sitting in this jurisdiction.

Three salaried Employment Judges are due to take up office as Deputy Chairs of the Central Arbitration Committee shortly.

The following salaried Employment Judges retired during the period of this report: Christopher

Carstairs, Humphrey Forrest (who remains a judge in the SENDIST jurisdiction), Colin Goodier, Nigel Mahoney and Michael Zuke.

The following fee-paid Employment Judges, some of whom are former salaried judges sitting in retirement, ceased sitting in the last year: Brian Charlton, Kevin Fletcher, Colin Grazin, Richard Griffiths, David Hesselberth, Ian Lamb, Jane Liddington, John McMahon, John Metcalf, Brian Mitchell, Bill Owen, Geoff Pettigrew, Chris Saunby, Frances Silverman, Ian Soulsby and Christopher Tickle.

Two fee-paid Employment Judges were appointed to salaried positions in other jurisdictions and ceased sitting as judges of the ET. James Tindal was appointed as a Circuit Judge from 15 January 2016. Richard Davison was appointed as a High Court Master (Queen's Bench Division) from 1 February 2016.

A number of non-legal members resigned or retired during the relevant period.

As at 31 October 2016 the ET in England & Wales comprised one President, 10 Regional Employment Judges, one Acting Regional Employment Judge (with one further Regional Employment Judge on secondment), 117 salaried Employment Judges (104.3 full-time equivalent), 190 fee-paid Employment Judges and 887 non-legal members.

Employment Tribunal (Scotland)

President: Judge Shona Simon

The jurisdictional landscape

Last year I began this report by wishing I was more like Cerberus, the three-headed dog of Greek mythology, so I could look both north and south at the same time. While the acquisition of this skill remains high on my wish list, I now find myself hoping, in addition, to acquire the attributes of Titan, the Greek god of endurance – you know the one who had to carry the world on his shoulders for an awfully long time! I say this in the context of leading Employment Tribunals (Scotland), from a judicial perspective, as we navigate across uncharted territory on the journey to the final devolution to Scotland of the powers associated with the management and operation of the tribunal, in accordance with the terms of the Smith Commission Agreement.

Devolution

Responses to the Scottish Government Consultation document on the draft Scotland Act 1998 (Employment Tribunals) Order 201X, which proposes that the functions of Employment Tribunals (Scotland) should be transferred to the First Tier Tribunal for Scotland, created by the Tribunals (Scotland) Act 2014, identified a number of concerns

on the part of the judiciary and system users, relating, amongst other things, to perceived threats to judicial status and tenure, and to the status of the judicial body for determining employment disputes in Scotland compared to its counterpart in England and Wales. Concerns have also been expressed about the proposed removal of the 'separate pillar' arrangements currently in place for Employment Tribunals and the Employment Appeal Tribunal in Scotland.

However, given that it now appears that the devolution process will not be completed before April 2020 it is to be hoped that there is still time for arrangements to be made which will result in a smooth transition, with system users experiencing no decline in the standard of service which they currently receive. All concerned are actively working to secure that aim.

While change always brings uncertainty, and can affect morale, the Employment Judges and non legal members, have been heartened by the positive feedback about the current system contained in the consultation responses. While we are always striving to improve the system it has been very encouraging to know that our efforts to provide a user focussed, high quality service are appreciated.

On what might be regarded as a more mundane level (but nonetheless an extremely important one), the Vice President and I have been providing judicial input to assist UK and Scottish Government officials charged with the responsibility of drafting provisions which will address the scope of the jurisdiction of the tribunal in Scotland post devolution (currently encapsulated in rule 8(3) of the ET Rules of Procedure) and the most appropriate mechanism for the cross border transfer of qualifying cases.

Both of the provisions identified above will, of course, be of critical importance, given that the Scottish Government has indicated on several occasions, that it intends to abolish fee charging for employment claims on transfer of functions (stated most recently in the Scottish Government's Programme for Government 2016-17, A Plan for Scotland). Given there is no indication that the UK Government will do likewise this means that "forum shopping" may arise in the minds of some as a concern. It is in this context that the jurisdictional scope of the relevant tribunals north and south of the border, and the mechanisms for transfer of cases across the border, may attract far more scrutiny and interest than they have ever done in the past.

Caseload and a snapshot of cases

Of course, despite all the uncertainty in the background about what the future holds for the tribunal and its judiciary, the "day job" of the Employment Judges and members still has to be done to the highest standard. While the caseload of the tribunals may have fallen since the introduction of fees, the number of single claims being received appears to have stabilised. In the first six months of 2016 745 single claims were received compared to 749 in the first six months of 2015 (1530 in total in 2015). What is also clear is that the proportion of single claims received which can reasonably be described as "complex" is much higher now than

before the introduction of fees; very few single claims are received now of the type which used to be described as "short track" (for example, stand alone unlawful deduction from wages claims). The salaried Employment Judges, in particular, face an almost unremitting diet of multijurisdictional, multi day hearings with all that means for the consequential writing burden.

Multiple claim receipts are notoriously volatile, of course, as can be seen from the fact that in the first six months of 2016, 3,193 were received compared to 8621 in the first six months of 2015 (13,219 total in 2015). The relative large number in 2015 reflects the significant volume of public sector pension claims received in that year amongst other factors.

As one would expect in this area of the law, there have been many cases heard by the tribunal in the past year of interest and significance. It is not possible to mention them all but perhaps a flavour can be given by reference to *Scottish Police Services Authority v McBride* [2016] ICR 788, [2016] IRLR 633, a case which has attracted a good deal of public and press interest, given it deals with the dismissal of a fingerprint officer who was one of those caught up in the aftermath of the disputed identification of a particular fingerprint at the scene of a murder. The print was said to be that of a police officer who denied at the murder trial ever being in the house in question. That in turn had various ramifications including a public enquiry being held which led to a good deal of criticism of the Fingerprint Service in Scotland and the eventual dismissal of Ms McBride. She sought reinstatement, and on finding the dismissal unfair, the tribunal made a reinstatement order. That order was appealed. While the decision referred to is one by the Supreme Court, from the perspective of the tribunal it is notable because the Supreme Court reinstated the decision of the original Employment Tribunal, which had been overturned by the EAT, with that reversal being upheld by the Inner House of the Court of Session (albeit on different grounds to those of the EAT).

The case of *Glasgow City Council v Mr B Dahhan* IDS Emp. L Brief 2016, 1057 serves as a reminder that an Employment Tribunal may need to determine issues which some might think fall only within the jurisdiction of the civil courts. In this case the claimant argued that a settlement agreement (contract) he had entered into under the provisions of s.203 of the Employment Rights Act 1996 was void because he lacked the mental capacity to enter into the contract at the relevant time. It was argued for the respondent that an Employment Tribunal did not have jurisdiction to determine an issue of this kind. The Employment Judge held that she did have such a power because the relevant legislation required her to decide if a valid settlement agreement was in place which ousted the tribunal's jurisdiction. This decision was upheld by the EAT.

Similarly, the case of *Miss C v Roshni and Ali Khan* S/4112620/2015 serves as a reminder that the Employment Tribunal does have jurisdiction to award damages for personal injury in appropriate circumstances. In this case the claimant was found to have suffered more than one hundred acts of discrimination of various types and was awarded £20,000 for personal injury in addition to £35,000 for injury to feelings.

Fee charging in Employment Tribunals

Last year I made reference to the UK Justice Committee Parliamentary Inquiry into the impact of court and tribunal fees and charges. The Committee issued its inquiry report on 16th June 2016. Amongst other things it recommended that "the overall quantum of fees charged for bringing cases to Employment Tribunals should be substantially reduced" and that the "disposable capital and monthly income thresholds for fee remissions should be increased". However the Government's response to the report, published in November 2016, stated that these recommendations, and the others made in connection with Employment Tribunal fees relate "mainly to matters under consideration in the Government's review of fees in the Employment Tribunals". The outcome of that review was published on 31 January 2017. It acknowledges that "The fall in ET claims has been significant and much greater than originally estimated" but concludes that "While there is clear evidence that ET fees have discouraged people from bringing claims, there is no conclusive evidence that they have been prevented from doing so." There is no proposal to change the level of fees charged or the capital limit in connection with qualifying for Help with Fees. However, at the time of writing the UK Government is consulting on increasing the gross monthly income threshold for a single person, in relation to qualifying for Help with Fees, from £1085 to £1250 (with knock-on changes for couples and those with children). Meantime the judicial review challenge to the fee charging scheme, brought by Unison, was heard by the Supreme Court at the end of March 2017 with the decision awaited.

Innovations

Judicial Mediation

Our Judicial Mediation scheme has continued to prove an attractive option for parties in appropriate cases. Indeed, in October 2016 another group of salaried Employment Judges was trained as judicial mediators thereby enhancing our ability to meet user requests for this service. The success rate in the past year has remained similar to that in previous years at just over 70%.

Judicial Training

In March 2016 we piloted a new training course for judges devised by one of the Scottish Employment Judges, its working title being "Behavioural Awareness on the Bench". In essence, the course is designed to assist judges to increase their awareness of how their behaviour may be affected by and perceived by others present in the hearing room, to assist judges in understanding how to consciously adapt their behaviour and approach to manage hearings as effectively as possible and to develop their resourcefulness in dealing with some of the challenging situations which can arise when managing hearings. The course proved to be extremely successful and has been developed further for use by the Judicial College in cross jurisdictional training available for both Court and Tribunal Judges.

Connections with the Scottish legal system

While Employment Tribunals (Scotland) remains a Reserved Tribunal, under the leadership of the SPT, we have continued to develop our links with the judicial system in Scotland. In particular, I continue to sit as a member of the Judicial Council for Scotland, a body chaired by the Lord President, and as a member of the Advisory Board of the Judicial Institute for Scotland (the Scottish equivalent of the Judicial College). Both the Vice President and I have also been involved over the past year in providing input to courses run by the Judicial Institute in Scotland. We value out contacts with out judicial colleagues in Scotland and, looking to the future, are keen to develop these relationships further.

People and Places

The salaried Employment Judges in Scotland continue to travel a good deal from their base office locations to ensure that all ET offices in Scotland have sufficient judicial resource available. Unfortunately the pressure on the salaried Employment Judges has been considerable this year due to the fact that, sadly, a number of the salaried judges have experienced significant health problems that have led to them being absent from work, or on phased return programmes, for considerable periods of time. In addition, one of the salaried Employment Judges resigned at the end of 2016 to pursue other interests. Despite the resulting pressures, the remaining salaried judges have risen magnificently to the challenge of continuing to provide a good standard of service with depleted judicial resources, ably assisted by their fee-paid colleagues who have stepped into the breach, often at short notice. However, the number of fee-paid Employment Judges in Scotland is at its lowest level in living memory. Against this backdrop I am delighted to report that a recruitment exercise is underway with the aim of appointing three salaried and eight fee paid Employment Judges. This news has undoubtedly raised the morale of the judges currently in post who are looking forward to welcoming new colleagues.

I am particularly grateful to the HMCTS management team in Scotland who have been of great assistance in our efforts to ensure that we have had sufficient judicial resources to maintain a reasonable standard of service this year and going forward. We have a new HMCTS Delivery Director for Scotland, Mark Stewart, who has joined us at a time when we are facing a number of challenges but his measured, thoughtful and supportive approach has been of great assistance in meeting these challenges.

While the Employment Judges have been travelling a great deal across Scotland I had the good fortune to travel somewhat further afield. In late October I delivered six talks/ workshops on employment law topics in Brazil (2 in Rio de Janeiro, 2 in Recife, 1 in Florianopolis and 1 in Sao Paolo). The welcome I received was overwhelming and the connections I made with the employment judiciary there will, I am sure, last a lifetime. While the procedures they use to determine cases are very different from ours (robust, inquisitorial gives a flavour) their substantive employment law is actually very similar to that which applies in the UK. Of particular interest is the fact that they already have a completely

electronic, paperless system (and have had since 2012) and that they have much stronger enforcement mechanisms in place than we do here.

In my last report I mentioned that at the start of 2016 we found ourselves, somewhat surprisingly, without a permanent operating base in Aberdeen. Over the course of this year we have been able to run Employment Tribunal hearings, for 3 days a week, from the Sheriff and Justice of the Peace Court in Aberdeen. This temporary arrangement allowed us to continue to provide a local service for those based in the North of Scotland. I am pleased however to report that alternative premises have been secured to house both the Employment Tribunals and the Social Entitlement Chamber in Aberdeen. The premises are close to the city centre, with good public transport links and generally of a high standard. They have been fitted out to accommodate the specific needs of both tribunals and I am delighted to report that Employment Tribunal hearings have been taking place there since 20 February 2017.

Conclusion

Last year I said it was difficult to predict what the future held for Employment Tribunals (Scotland). That remains the position. Uncertainty normally has an adverse impact on those affected by it. If we add to that the pressure on the judges, which arises from the judicial resource difficulties that I have already mentioned, then it would be easy to conclude that the service being provided to users must have deteriorated. However, it is to the very great credit of the Employment Tribunals judiciary in Scotland that I have seen no indication that this, in fact, is so. It is a great privilege to lead a group of judicial office holders who continue to put the interests of the system and its users well ahead of their own.

Annex D

Cross Border Issues

Northern Ireland

Dr Kenneth Mullan (Chief Social Security Commissioner)

There have been no further developments with tribunal reform in Northern Ireland. A new mandate for the Northern Ireland Assembly has commenced following elections in May 2016. The nomination process for Ministerial appointments in the Northern Ireland Executive resulted in the election of a new Minister of Justice. At the time of writing there has been no indication that the previously reported 'staged' progression in tribunal reform will continue.

The first stage had previously been described as a process to build on the policy of transfer of statutory responsibility for the administration of tribunals to the Department of Justice from other individual Departments with the aim of creating a unified tribunal administration. There has been some further progress in this area with the Northern Ireland Courts and Tribunals Service assuming responsibility for the Planning Appeals and Water Appeals Commission and continuing preparation for assuming responsibility for the Appeals Service.

The second was to introduce legislation to effect tribunal reform during the next Northern Ireland Assembly mandate. The last formal indication was that the legislative timetable was for the reform programme to take place in the second half of the present mandate i.e. in 2018/1019. Progression of the reform programme was also stated to be subject to 'legislative and resource constraints.'

The Northern Ireland dimension for those First-tier and Upper Tribunal jurisdictions which extend to Northern Ireland has been described in the other relevant sections of the Senior President's Report.

As noted by the President of the UT (AAC), following a length impasse, the Northern Ireland Assembly, on 18 November 2015, consented to the stalled Northern Ireland (Welfare Reform) Bill 2015 being taken forward by the Westminster Parliament. The subsequent enactment of the Northern Ireland (Welfare Reform) Act 2015 and the Welfare Reform (Northern Ireland) Order 2015 has allowed for the implementation of substantive welfare reform which will lead to an alignment of the social security schemes in Northern Ireland

with those in Great Britain. This will eventually result in a parallel coordination of the social security jurisdictions of the Commissioners in Northern Ireland with those of the SSCS Judicial Group in the UT (AAC).

Scotland

Mr Justice (Brian) Langstaff

The power to legislate in relation to a number of policy areas passed from the UK Government ("UKG") to the Scottish Parliament in terms of the devolution settlement set out in the Scotland Act 1998. In respect of those policy areas, provision was made for various tribunals to determine disputes (almost entirely those between citizens and public authorities) just as they continued separately to do in respect of corresponding English and Welsh administrations. These tribunals were not, on the whole, properly independent of government and following the Philip Report, the Tribunals (Scotland) Act 2014 established a structure under which those tribunals could function as parts both of a coherent whole and of the Scottish judicial system.

Following the Scottish referendum, the Smith Commission was set up to consider how best effect could be given to policy commitments which the UK Government had made during the course of the campaign to increase devolution. Some of those related to the future management and operation (including judicial leadership and administration) of those tribunals which determine disputes in relation to which the substantive law is reserved to the Westminster Parliament. That is, they related to those tribunals which apply law that is common to either the whole of Great Britain or the whole of the UK. They are known as the "reserved tribunals". They include a tribunal which adjudicates only on "party - party" disputes, namely the Employment Tribunal (Scotland).

The Smith Commission report said of these "reserved" Tribunals:

> "63. 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 Commission and the Proscribed Organisations Appeals Commission.
>
> 64. Despite paragraph 63, the laws providing for the underlying reserved substantive rights and duties will continue to remain reserved (although they may be applied by the newly devolved tribunals)."

This led to the provisions of the Scotland Act 2016, which envisaged a transfer of the administrative and judicial functions of reserved Tribunals, to be effected by an Order in Council. In summary, s.39 of the Act (which relates to tribunals) provides for the preservation of the integrity of the underlying substantive rights and duties; maintenance of the integrity of the tribunal system; ensuring the ability of individuals across Great Britain to enforce their rights effectively; and ensuring that tribunal

systems in England and Wales, and Scotland operate in a way which allows for the efficient delivery of reserved policy.

S.39(8)(b)(ii) specifically refers to "promoting judicial co-operation in the interests of consistency"; and both UKG and Scottish Government (SG) considered it desirable to have the input of judges from an early stage in the development of the appropriate OiC.

With that in mind, the SPT (whose remit currently extends to reserved Tribunals, and will continue to do so until any OiC has taken effect in relation to all the reserved tribunals) established a judicial working group ("JWG"), to be chaired jointly by Lady (Anne) Smith, a judge of the Inner House of the Court of Session, and myself. He did so in the summer of 2015 in anticipation (presciently) that the Bill would be enacted, as eventually transpired.

This represents my report on the work of the JWG throughout 2016.

With a view to efficiency the group is small – Lady Smith, me and Judge (Shona) Simon, President of the ET (Scotland). This reflects the initial working assumption, strengthened by the Scottish Government's early outward focus, that the employment jurisdictions would be first to transfer.

Its role is to consider, respond to and advise upon specific proposals (and on the draft OiC), to provide the judicial engagement which has been anticipated from Smith onwards.

Judges have no greater right than any member of the public to express views as to policy generally, which is entirely the preserve of government in Parliament, nor should they express any views they hold individually where it might (as is highly likely) conflict with their role as independent arbiters of disputes, or as impartial umpires in criminal trials. The one exception to this constitutional principle is where matters affecting the judiciary directly are involved. Accordingly, the JWG has taken the view that it may comment and (especially since Parliament anticipated that the judiciary should be involved, and it is invited to do so as representing the judicial perspective) should do so; it is on matters such as judicial independence that it would, in any event, be both entitled and obliged to speak.

In the event, although it had been envisaged that there would be early judicial consultation, SG consulted upon proposals for devolution of judicial and administrative control of the Employment Tribunal before the JWG had an opportunity to consider its proposals. A central proposal was to transfer the ETs into the structure created by the Tribunals (Scotland) Act 2014 ("the 2014 Act").

Following the opening of the consultation period, the JWG has on three occasions during the year had formal meetings with those civil servants of SG and UKG (both from MoJ and BEIS) who have been tasked with drafting the OiC and making detailed arrangements for giving effect to devolution of reserved tribunals. These have twice been in Edinburgh, and once in London.

Thus far, the subjects under consideration have been a draft OiC providing for the transfer of judicial and administrative control of ETs insofar as "Scottish cases" are concerned; and, in separate discussion, the transfer of the EAT: it was perhaps initially thought that transfer of these might take place first,

providing a template for other reserved tribunals to follow at a later date.

Apart from these formal meetings, and several meetings of the JWG itself (sometimes by email and phone exchange) there have been further interactions, amongst which have been the drafting of papers for consideration by policy officials. The JWG has kept the SPT closely informed and, through him, the Lord Chief Justice of England and Wales; and he for his part has met senior civil servants, the Lord President, and the Minister of SG into whose remit falls the devolution of tribunal functions.

Despite enactment of the Scotland Act early in the year, progress towards devolution of tribunals has been slow in 2016, though this was perhaps to be anticipated: the Scottish landscape in view at the time of the 2014 Act was one populated almost exclusively by fee-paid decision makers, determining disputes which did not involve many of the complexities thrown up by many if not most employment, asylum and immigration, tax, and social entitlement cases – in short, complexities which were part of the very reason for those jurisdictions having been reserved in the first place. There remain significant issues of principle and of detail to consider, including as to whether the structure provided for by the 2014 Act requires adaptation and if so by what means, and to what extent, to meet the demands of the workload which is set to transfer.

The JWG, with the active support of the SPT and TJEB, has voiced the view that (from the perspective of the Judicial Office Holders who anticipate being asked to transfer into the new devolved framework, and from the user perspective) devolution should be effected so as to achieve Parliament's stated legislative objective of consistency with what will remain south of the border, so that Scots do not feel that the "tribunals brand" has been devalued by its transfer. Centrally, judges who were appointed as salaried Tribunal judges under the Employment Tribunals Act 1996, or the TCEA 2007 must, in the view of the JWG, remain secure in their posts and in their status as judges. This, we have said, could be achieved (a) if judges were recognised as such – the 2014 Act draws a distinction between "judicial members" of Tribunals, an expression it reserves for judges of the Court of Session and sheriffs already appointed as such, and "legal members" into which category those appointed as employment or First-tier Tribunal judges would fit; and (b) if their independence were ensured by a guarantee in primary legislation of their tenure, as there is for their present posts – the 2014 Act provides that there will be tenure for 5 years, renewable *except in situations which include "business need"*.

Particular considerations will apply to the devolution of the administrative and judicial functions of the EAT insofar as it considers cases arising from decisions of ETs sitting in Scotland; and to the wider appellate jurisdictions of the reserved Upper Tribunal. Discussions are at an early stage as to transfer of the EAT – and I am pleased to report that, though on this occasion, consultation on proposals has not yet begun, the JWG has already been asked for its views. Amongst those views is a further emphasis on continuing cross border judicial collaboration and co-operation to best achieve the objectives of the Scotland Act 2016 and its precursor, the Smith Commission report.

While the working assumption has, initially, been that the employment jurisdictions would transfer ahead of others, no firm decision of which we know has yet been taken as to the dates on which any

tribunals will transfer: It may well be, however, that the transfers occur at the same time, rather than on a sequential, jurisdiction-by-jurisdiction basis. The JWG hopes to be able to give similar depth of consideration to the proposals for the transfer the Chambers of the First-tier Tribunal and Upper Tribunal, insofar as they relate to Scotland, as it has to the first instance and appellate tribunals in the employment sphere: it may well be they give rise to similar issues to those being explored in respect of ETs and the EAT, though the devolution of immigration and asylum appellate decision making will inevitably arouse considerable interest of its own.

In overview, the work has been challenging, considerable time and effort has been spent already by the members of the JWG[6], any rewards of that work are not yet tangible, and much remains to be done.

If this were a teacher's end-of-term report, and the JWG or devolution of tribunals the pupil, that report would, I think, best read: "Worked hard. Look forward to next year's results with interest"…..

Wales

Judge Libby Arfon-Jones

It has been another significant year for tribunals in Wales, with continued challenges alongside meaningful progress.

The creation of Regional Leadership Judges has been successful throughout England and Wales. In Wales it has been particularly valuable and seems to have worked really well.

It is encouraging that the Welsh Government remains keen to engage meaningfully with HMCTS reform and with the Briggs reforms.

The Justice Policy team, established within the Welsh Government, led by Andrew Felton, covers, amongst other areas, administrative justice policy. Margaret McCabe continues to lead the Welsh Tribunals Unit with Rhian Davies-Rees, having responsibility for the operational aspects of devolved tribunals as a "Welsh Tribunals Service".

Whilst many areas such as complaints handling and training remain areas of some concern, the Welsh Government is opening up discussions with relevant teams in each of the arm's length judicial bodies. This is to tap in to their resources and expertise and ensure the same standards are applied across England and Wales in the devolved and non-devolved tribunals

The Welsh Tribunals Unit is leading a programme of reforms with the Justice Policy team designed to strengthen the independence of the Tribunals and to improve their operation,

6 I would like to pay especial tribute to my co-chair Lady Smith and colleague Shona Simon: we have reached agreement amongst ourselves on every contentious issue, after full discussion, but they in particular have been indefatigable despite the very considerable demands of other pressing judicial and administrative work upon them; to Craig Robb of the S.P.T's office for his thoughtful support, and to Steven d'Arcy of the Judicial Office in Scotland for his clear and efficient guidance.

through greater consistency of procedures, more independent appointment processes, and improving services to the tribunal users. This programme of reform has been informed by two key reports namely the AJTC Welsh Committee's Review of Tribunals Operating in Wales in 2010 and the Review of Devolved Tribunals Operating in Wales (the Felton report) in 2014.

These two reports set out comprehensive programmes of work, with many recommendations, some completed and others to be delivered. The Committee for Administrative Justice and Tribunals, Wales published its Legacy Report in March 2016. The Welsh Government's response to its recommendations has also been published with a statement from the First Minister and the link for that is:

http://gov.wales/about/cabinet/cabinetstatements/2016-w/cajtwlegacyreport/?lang=en

One important area of progress is the arrangement under section 83 of the Government of Wales Act for the Welsh Ministers to use the JAC recruitment and selection of tribunal members for the devolved Welsh tribunals. Also encouraging are the discussions which have opened up between WG and the Judicial College to explore the options for quality training and appraisal arrangements which are cohesive, proportionate and cost effective and which take account of Welsh factors such as the increasing divergence between Welsh and English black letter law.

Work continues on putting in place arrangements for cross-ticketing of judiciary between devolved Welsh tribunals and HMCTS courts and tribunals. This is important for providing career enhancing experience and ensuring consistency of judicial standards. The Wales Act makes statutory provision to enable this to happen. Complaints handling is another area where work is in progress.

The Legal Wales Conference, this year in Bangor, North Wales was very successful. The LCJ was among excellent contributors to the day's proceedings. Although a separate Welsh Legal Jurisdiction was not on the day's agenda, it clearly continues and will continue to be a topic of interest and debate. One continuing concern is how to retain legal expertise in Wales. This is a real challenge, requiring a comprehensive strategy to encourage legal talent to remain in Wales. The Welsh Government, the universities, the legal profession as a whole and many related organisations are focussed on the challenge.

The most notable development for Welsh tribunal judiciary, however, this year has been the Lord Chief Justice's request of the Honourable Mr Justice Wyn Williams (as he then was) to explore the ways in which Welsh tribunal judiciary can best be supported. This development has been universally welcomed. There have been useful meetings between Wyn Williams J and leaders of the Welsh Tribunals. Sir Wyn Williams will continue in this role until a substantive appointment is made in due course.

Although there have been some significant recent developments in Wales, including the Assembly election in May, the EU referendum result in June and the Tata Steel crisis, the

UK Government's Wales Bill moved at pace, keeping to an ambitious timetable. Some contentious clauses required resolution, such as the inclusion of the requirement for justice impact assessment.

The Wales Bill received the Royal Assent on 31 January 2017. Welcomed in the Wales Act 2017 were the provisions for the appointment of a Senior President of Welsh Tribunals and for the cross-deployment of members of Welsh tribunals. The Act recognises that there is a distinct body of Welsh Law, although it does not change the single England and Wales jurisdiction

One continuing concern is retaining legal expertise in Wales. This remains a challenge requiring a comprehensive strategy to encourage Welsh legal expertise to remain in Wales. The Welsh Government, universities, the legal profession and many other organisations are focussed on this challenge.

The Presidents of the devolved tribunals in Wales meet on a regular basis at the Welsh Tribunals Contact Group. It meets on a bi-annual basis for the moment. The Contact Group met recently in Cardiff and welcomed helpful comments and insights from the Senior President of Tribunals, Lord Justice Ryder.

The Contact Group received an update on the Wales Bill and a presentation from Dr. Huw Pritchard on Justice in Wales. He enlarged on the suggestion that there be a Commission set up to oversee Justice in Wales, a proposal which is supported by the First Minister. Close judicial liaison at an appropriate level with the Welsh Government is important.

Overall, the tribunal landscape in Wales continues to improve and commitment to independence in the areas of judicial appointment and training is indeed encouraging.

On a sad note, Andrew Morris, President of the Residential Property Tribunal Service for Wales died suddenly and unexpectedly on 22 December 2016.

Annex E

Case Reports

Citation	Parties	Jurisdiction	Commentary
[2016] UKUT 419 (AAC)	*Secretary of State for Work and Pensions v BM (RP)*	Claims and payments	The claimant, a few days before his death, wrote to the Department for Work and Pensions (DWP) to claim his retirement pension, including payment for the period since his 65th birthday some years before. Later the administrator of his estate completed a claim form at the DWP's request and it awarded 3 months arrears but no more on the basis that a lump sum payment was not payable because the claimant had not claimed one before he died. The First-tier Tribunal (F-tT) upheld the appeal against that decision, on the basis that the claimant's letter had been received by the DWP before his death and therefore was a valid claim. The Secretary of State appealed against that decision to the Upper Tribunal (UT The UT dismissed the appeal. The judge held that the F-tT's decision that the claimant's letter was a claim was the only conclusion reasonably open to it on the facts; a document was a claim if it made it clear that a claim to benefit was being made, and a reasonable official receiving it could understand, with or without further information, which benefit was being claimed: *Novitskaya v London Borough of Brent* [2009] EWCA Civ 1260; [2010] AACR 6. The judge considered whether, pursuant to regulation 4(7ZA) Claims and Payments Regulations, the administrator could, after the claimant's death, perfect a claim made by letter so that the claim was treated as made when the claimant was alive, or whether the claim was posthumous. She decided that the reasoning in R(IS) 3/04 did not apply and explained why, in claims for other benefits, a claim which was perfected or completed after the claimant's death will be made under regulation 4(1) at the time of the original claim.

Citation	Parties	Jurisdiction	Commentary
[2016] UKUT 202 (AAC)	*R.(Y) v First-tier Tribunal (CIC)*	Criminal Injuries Compensation	The applicant was born with severe congenital abnormalities as a result of his mother's rape by her father. The Criminal Injuries Compensation Authority rejected his claim for compensation on the basis that he was not injured in a crime of violence and that his congenital condition was a result of the relationship between his parents (not the assault itself). The First-tier Tribunal (F-tT) rejected his appeal, holding that as the applicant never had, or could have had an uninjured state, his condition did not amount to an injury: *Millar (Curator Bonis to AP) v Criminal Injuries Compensation Board* 1997 SLT 1180 followed. The Upper Tribunal (UT) distinguished, or declined to follow Millar, as having been influenced by common law developments which were not relevant to the 2008 Scheme, and distinguished the Court of Appeal decision in *CP v First-tier Tribunal and Criminal Injuries Compensation Authority* [2014] EWCA Civ 1554; [2015] AACR 8, which was about whether a crime had ever been committed. The judge held that the 2008 Scheme provided that compensation was payable to "an applicant"; that at the time of the claim the applicant was clearly a person and there had been no provision in the scheme that the applicant must have been "a person" at the time that the crime of violence was committed; and that in everyday terms and in common parlance the applicant had suffered injuries which had been sustained in and were directly attributable to a crime of violence. Permission to appeal to the Court of Appeal was granted by the judge and judgment of the court is pending.

Citation	Parties	Jurisdiction	Commentary
[2016] UKUT 306 (AAC)	*R.(RT) v First-tier Tribunal (CIC)*	Criminal Injuries Compensation	The applicant, a battered and abused wife, made allegations to the police against her husband. She then withdrew them and was prosecuted for attempting to pervert the course of justice. She then told the truth again and was prosecuted for and convicted of that same offence but in relation to her wrongful retraction of her truthful allegations! The applicant appealed to the Court of Appeal against a custodial sentence for perverting the course of justice. The Court held that this was an exceptional case and, where a woman had been convicted of perverting the course of justice after retracting a truthful allegation against her husband, it might be appropriate, depending on the nature of the relationship between the woman and her husband, for the sentencing court to allow for the pressures to which the woman had been subjected: *R v A* [2010] EWCA Crim 2913. The applicant's subsequent claim for criminal injuries compensation was refused by the Criminal Injuries Compensation Authority. On appeal the First-tier Tribunal (F tT) found her eligible for an award but reduced it by 40% under paragraph 13(1)(b) of the 2008 Scheme.(a failure to co-operate with the police in attempting to bring the assailant to justice). The Upper Tribunal judge, having considered among other things the Court of Appeal's remarks, set aside that aspect of the F tT's decision, concluding that he could not see how any reasonable tribunal could have gone on to make any deduction under paragraph 13(1)(b) given the applicant's particular circumstances and that her temporary withdrawal of co-operation with the police and prosecution arose in such circumstances.

Citation	Parties	Jurisdiction	Commentary
[2016] UKUT 149 (AAC)	*MM v Secretary of State for Work and Pensions (DLA)*	European Union law	Both appellants were children with substantial disabilities. MM was a Ugandan national whose mother had been granted refugee status and he joined her with entry clearance on the basis of family re-union. SI was a Somali national whose family had been granted indefinite leave to remain within the UK. The Department for Work and Pensions refused the claims for disability living allowance (DLA) submitted on behalf of the appellants on the basis that neither of them had been present in the UK for 104 weeks. The appellant's appealed to the First-tier Tribunal (F-tT) claiming that the past-presence test (PPT) discriminated against them contrary to Article 28 of the Qualification Directive. The F-tT rejected their appeals, it held that DLA was social assistance for the purpose of the Qualification Directive, that the PPT indirectly discriminated against refugees and their family members, as compared with UK nationals but that the discrimination was justified. The Upper Tribunal (UT) upheld the appeal deciding that the PPT in the Disability Living Allowance Regulations was unlawfully discriminatory contrary to Article 28 of the Qualification Directive and Article 14 European Convention on Human Rights. In relation to the Qualification Directive, the judge decided that a) Article 28 had direct effect; b) DLA was social assistance within the meaning of the Directive; c) The PPT indirectly discriminated against refugees and their family members; d) The discrimination was not justified. In relation to justification, the judge considered the decision of the Supreme Court in *R (Lumsdon) v Legal Services Board* [2015] 3 WLR 121, and rejected the respondent's submission that the appropriate test for justification in this case is whether the measure was "manifestly inappropriate". The judge decided that the regulatory provision should be disapplied.

Citation	Parties	Jurisdiction	Commentary
[2016] UKUT 321 (AAC)	*IC v Glasgow City Council (HB)*	Housing and council tax benefits	The claimant, an unemployed Slovakian national, was awarded housing benefit (HB) on the basis that he was an EEA jobseeker. He challenged the lawfulness of the Housing Benefit (Habitual Residence) Amendment Regulations 2014 which, by decoupling the link between HB and jobseeker's allowance (JSA) for EEA jobseekers, had removed his entitlement to HB. His grounds were that there was either no or insufficient consultation with the Social Security Advisory Committee pursuant to sections 170-174 of the Social Security Administration Act 1992. The Secretary of State said that there was insufficient time to consult given the perceived urgency of introducing these benefit changes with effect from 1 April 2014. The Upper Tribunal (UT) expressed some surprise that a policy decision of this magnitude was taken so late in the day, but found the Regulations to have been lawfully made. The judges considered the relevant case law and expressed doubt whether *R v Secretary of State for Social Security ex parte Association of Metropolitan Authorities* [1992] HLR 131 remained good authority on the failure to consult by the Secretary of State in circumstances of purported urgency. It allowed the appeal on the basis that the F-tT did have jurisdiction to consider the lawfulness of the amending regulations and set the decision aside but re-made it, confirming the decision of the Secretary of State to remove entitlement to HB from the claimant.

Citation	Parties	Jurisdiction	Commentary
[2015] UKUT 592 (AAC)	*AS v Secretary of State for Work and Pensions (CA)*	Human rights law	In 2004 the Department for Work and Pensions (DWP) decided that the appellant had been overpaid carer's allowance (CA) from 2001 following confirmation of his employment and earnings by Her Majesty's Revenue and Customs. In 2007 the DWP decided that the overpayment was recoverable but it failed to act upon the appellant's appeal until 2012. The appellant stated that his earnings had been below the statutory limit for CA and the CAB wrote to say that he returned an order book in 2004. The First-tier Tribunal (F-tT) hearing was adjourned after the appellant stated that he had phoned the DWP in 2001 to confirm his employment and had received no payments after returning an order book in 2002. The DWP later confirmed that the order book was returned in 2004 as stated in the CAB's letter and the reconvened F-tT rejected the appeal. Among the issues before the Upper Tribunal (UT) were whether the F-tT should have obtained confirmation of the DWP's procedure for recording telephone calls and whether there had been a breach of the appellant's Article 6 (1) rights under the European Convention on Human Rights to a fair hearing within a reasonable time. The UT rejected the appeal holding that: the burden of proof was not usually decisive and its application was only useful if the relevant evidence, having been gathered and weighed, was genuinely equally balanced: *Kerr v Department for Social Development* [2004] UKHL 23; R 1/04 (SF) The F-tT's decision that the appellant had failed to disclose his earnings was reasonable, given the available evidence; even if the accuracy of the DWP's telephone recording systems had been an issue raised by the appeal, a tribunal was not legally obliged to call for evidence of the DWP's system of recording telephone

Citation	Parties	Jurisdiction	Commentary
[2015] UKUT 592 (AAC)	*AS v Secretary of State for Work and Pensions (CA)*	Human rights law	calls in every overpayment case where telephone disclosure was alleged. The DWP had no record of any contact: *Mongan v Department for Social Development* [2005] NICA 16; R 3/05 (DLA) applied; all section 12 of the Social Security Act 1998 required was for the F-tT to consider an issue raised by the appeal and to determine if it assisted in resolving a contested issue of fact. There was no general rule that, regardless of all other evidence, evidence of the DWP's telephone record keeping ought to be provided to, or sought by, the F-tT in all cases where it was alleged that telephone disclosure had been made; there was no credible evidence that ought to have led the F-tT to seek further evidence from the DWP as to where the order books had been sent or who had cashed them or to take these issues as relevant to the appeal; the F-tT could not remedy a breach of Article 6 by allowing the appeal. Its obligation was to decide the appeal on the evidence before it, making due allowance for any delay. Neither the F-tT nor the UT had any statutory power to award compensation for any delay that remedy lay elsewhere: *AH v London Borough of Hackney (HB)* [2014] UKUT 47 (AAC).

Citation	Parties	Jurisdiction	Commentary
[2016] UKUT 83 (AAC)	*Department of the Environment (Northern Ireland) v The Information*	Information rights	The Department of the Environment received a Freedom of Information Act 2000 (FOIA) application for, among other things, all the emails sent and received by two employees in May 2012. The Department refused the request as being invalid under section 8(1)(c) of FOIA because it failed to describe the information requested. The Information Commissioner decided in favour of the applicant and the First-tier Tribunal (F tT) rejected the Department's subsequent appeal, holding that the crucial issue was whether the request described the information required and that the Department's approach had been too limited. The Department appealed to the Upper Tribunal (UT) arguing that the F tT had erred in law by failing to give adequate reasons for its decision, to take account of the decision in *M L Johnson v Information Commissioner and Ministry of Justice* (EA/2006/0085) and to distinguish between "information" and the "medium" on which it was held or communicated. The UT rejected the appeal holding that: the F-tT had clearly understood the dispute, had explained the reasons for its decision and had not erred by failing to take into account the decision in *M L Johnson v Information Commissioner and Ministry of Justice*. That decision had not been binding on the F-tT and was of limited value as it involved a different issue: whether the cost of compliance involved in providing the requested information exceeded the appropriate limit; the purpose of section 8(1)(c) was to enable the public authority to identify the requested information with sufficient precision that it could be ascertained whether the authority held the information, whether the information was exempt or vexatious. There was no requirement in the legislation to describe information by subject or topic; there was no conceptual difference between a request for a particular e-mail and a particular piece of handwritten correspondence. Each involved a request for the information carried by the particular medium under section 1(3) of FOIA. The statutory obligation to provide information was relieved when the information requested was described in such a way that the public authority could not reasonably identify what it was that the requester was asking for. In the present case the scope of the request for information was clear, and the F tT's finding that the request was valid had been reasonable.

Citation	Parties	Jurisdiction	Commentary
[2015] UKUT 671 (AAC)	*The Department for Energy and Climate Change v (1) The Information Commissioner and (2) AH*	Information rights	A Freedom of Information Act (FOIA) request was made by the applicant to the Department for Energy and Climate Change (DECC) for information about the Project Assessment Review (PAR) into the Smart Meters Programme (SMP), under which the government had pledged to take all reasonable steps to equip all domestic and smaller non-domestic premises with smart metering by the end of 2020 following the EU Electricity Directive (Directive 2009/72/EC). The DECC provided him with a redacted copy of the PAR, relying on sections 35(1)(a) (the formulation of government policy), 36(2)(b)(ii) and (c) (prejudice to effective conduct of public affairs), 40(2) (personal information) and 43(2) (prejudice to commercial interests). The applicant complained to the Information Commissioner who decided that the appropriate access regime was FOIA (not the Environmental Information Regulations 2004 (EIR)) and that while 35(1)(a) (formulation of government policy) was engaged, the public interest favoured disclosure of the requested information. Both DECC and the applicant appealed to the First-tier Tribunal (F-tT); the DECC against the decision ordering disclosure and the applicant as to the applicability of the relevant access regime. The F-tT allowed the applicant's appeal and concluded that the information he requested was covered by the EIR. The Upper Tribunal (UT) allowed DECC's appeal. It concluded that the F tT had erred in its approach to the interpretation and application of regulation 2(1)(c) and (e) of the EIR, which defined (in part) the ambit of "environmental information". It re-made the decision only to reach the same conclusion, namely that the requested information was "environmental information" within regulation 2(1)(c) of the EIR. It also held that it was permissible to look at the "bigger picture" of which the disputed information was part, applying broad principles derived from the Åarhus Convention. The judge set out some general principles of construction governing the application of the EIR. Permission to appeal against the UT decision was granted by the Court of Appeal and judgment of the court is pending.

Citation	Parties	Jurisdiction	Commentary
[2016] UKUT 10 (AAC)	*LO v Secretary of State for Work and Pensions (ESA)*	Tribunal procedure and practice	The Secretary of State decided that the claimant no longer had limited capability for work and stopped her award of employment and support allowance (ESA). She appealed to the First-tier Tribunal (F-tT) stating that she still suffered from mental health problems and for this reason was unable to attend a hearing and nor could she afford medical evidence. The F tT decided to proceed without a hearing and, after considering all the documentary evidence, provided a detailed explanation for its decision to dismiss the appeal. Among the issues before the Upper Tribunal (UT) were what account should be taken by a tribunal of a claimant's mental health problems when deciding whether to hold or to proceed with a hearing, and whether there had been a breach of the claimant's rights under the Equality Act 2010, to natural justice or under the European Convention on Human Rights. The Upper Tribunal dismissed the appeal holding that a duty to make reasonable adjustments under section 29 of the Equality Act 2010 did not apply as the F-tT was exercising a judicial function and that a claimant's mental health problems must be taken into account when applying the overriding objective set out in rule 2 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008, which included dealing with a case fairly and justly, and ensuring, as far as practicable, that the parties were able to participate fully in the proceedings. Rules 27(1)(b) (the power to decide an appeal without an oral hearing) and 31(b) (the power to proceed with a hearing in the absence of a party if it is in the interests of justice) had to be applied in the light of the overriding objective in rule 2. The same approach applied where a tribunal was considering whether to proceed with a hearing in the claimant's absence. It was impossible to apply the correct approach without first establishing the nature of the claimant's mental health problems. The requirements of natural justice and the right to a fair hearing under Article 6 of the ECHR were additional to the tribunal procedure rules and, in contrast to the Rules, their application was not a matter of judgment, but a test of fairness: *Terluk v Berezovsky* [2010] EWCA Civ 1345.

Citation	Parties	Jurisdiction	Commentary
[2016] UKUT 73 (AAC)	*BS v Secretary of State for Work and Pensions (DLA)*	Tribunal procedure and practice	A fraud investigation, involving video surveillance authorised under the Regulation of Investigatory Powers Act 2000 (RIPA), found that the appellant was regularly playing crown green bowls and the Secretary of State decided that he had been overpaid some £41,000 in disability living allowance (DLA). The appellant appealed and the First-tier Tribunal (F-tT) directed the Secretary of State to provide a copy of the authorisation under RIPA for the surveillance. He failed to do so, contrary to rule 2(4) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008. The F-tT rejected the appeal, relying upon the presenting officer's evidence that authorisation had been obtained and was held by the fraud investigation team. The appellant appealed to the Upper Tribunal (UT) and among the issues before it were whether the absence of the authorisation made it unlawful, the extent to which this might affect the weight of the video evidence and whether there were breaches of the appellant's rights under Article 6 (right to a fair hearing) and Article 8 (right to respect for private life) under the European Convention on Human Rights (ECHR). The Secretary of State subsequently provided the UT with a copy of the authorisation in response to its directions. The UT held that the question for it was not whether the Secretary of State had breached rule 2(4) but whether the tribunal had erred in law. It was not inevitable that impropriety or unfair behaviour by the Secretary of State would cause the F-tT to err as it may put right failures of one party or the other. Nor was it inevitable that unfairness shown by a party would justify the UT in setting aside a decision. If the unfairness was trivial it would be inappropriate or disproportionate to do so and if it could not have affected the outcome it was immaterial. The UT rejected the submission that authorisation under RIPA for the surveillance had to be proven. Unlawfully obtained evidence was admissible in civil litigation, if it was relevant and the unabated "best evidence" rule had been substantially superseded. Rule 15(2) expressly permitted a tribunal to admit evidence whether or not it was admissible in a civil trial. Courts and tribunals may be reluctant to exclude evidence which was reliable and probative although unlawfully obtained, and Strasbourg jurisprudence accepted that there may be no unfairness in admitting such evidence: Khan v UK [2001] 31 EHRR 45. If the evidence had been lawfully obtained, the prospect of its exclusion as unfair was minimal.

Citation	Parties	Jurisdiction	Commentary
[2016] UKUT 73 (AAC)	*BS v Secretary of State for Work and Pensions (DLA)*	Tribunal procedure and practice	Whether authorisation had been obtained was a question of fact for the tribunal to establish on the balance of probability given the relevance and credibility of the available evidence including the presenting officer's evidence: *PL v Walsall Metropolitan Borough Council* [2009] UKUT 27 (AAC). It was open to the F-tT to accept evidence from the presenting officer that authorisation had been obtained, subject to being satisfied that the evidence had a credible basis. There were no grounds for setting aside the F-tT's decision on the basis of some unfairness or breach of natural justice within the proceedings; the presenting officer had confirmed the existence of the authorisation and explained why it was unavailable, it had not been required by the tribunal and the appellant's case had not been prejudiced. Even if the F-tT had erred by acting without the document, its error would have been immaterial as it could not have affected the outcome of the case. There was no breach of either Article 6 or Article 8 the appellant had had a full and fair opportunity to put his case and to deal with the video evidence while the right to respect for private life was lawfully and proportionately qualified under RIPA.

Citation	Parties	Jurisdiction	Commentary
[2016] UKUT 82 (AAC)	*William Harrison Jones v (1) Information Commissioner, (2) Department of the Environment (Northern Ireland)*	Tribunal procedure and practice	There was maladministration in the granting of planning permission for a development in a village, but the permission could not be withdrawn according to the legal advice obtained by the Department of the Environment (Northern Ireland). The appellant, a local resident, made a request under the Freedom of Information Act 2000 (FOIA) for a copy of the Department's questions to its lawyers for that legal advice. The Department refused his request and the Information Commissioner (IC) upheld that response, on the basis of an exception to disclosure of internal communications between government departments under regulation 12(4)(e) of the Environmental Information Regulations 2004 (EIR) and alternatively that regulation 12(5)(b) applied. The appellant appealed against that decision to the First-tier Tribunal (F-tT) but failed to challenge either the legality of the notice or the Commissioner's exercise of his discretion and instead raised matters over which the tribunal had no jurisdiction. The F-tT struck out the appellant's appeal under rule 8(3) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (the F-tT Rules) as having no reasonable prospects of success but also held that the information was either exempt or an exception under the EIR and that the public interest in maintaining the exception outweighed the public interest in disclosing it. The appellant appealed to the Upper Tribunal (UT) and among the issues before it were whether the F-tT had failed in its inquisitorial obligation to look beyond the formal grounds of the appeal, to have regard to the overriding objective of dealing with cases fairly and justly or had erred in its approach to regulation 12(4)(e) and/or regulation 12(5)(b) of the EIR. The UT allowed the appeal holding that: the power to strike out an appeal under rule 8(3)(c) was subject to the overriding objective of the F-tT to deal with cases fairly and justly (rule 2(2)(b)) and to ensure, so far as practicable, that the parties are able to participate fully in the proceedings (rule 2(2)(c));

Citation	Parties	Jurisdiction	Commentary
[2016] UKUT 82 (AAC)	*William Harrison Jones v (1) Information Commissioner, (2) Department of the Environment (Northern Ireland)*	Tribunal procedure and practice	that in considering the use of the power to strike out an appeal under rule 8(3)(c), the F-tT must apply its knowledge of the law to the established facts, and it was not limited in its consideration of the facts by the arguments advanced by the appellant. But the tribunal was not required to investigate an issue that had not been the subject of argument by the appellant if, regardless of the facts found, the issue would have no prospects of success: *Hooper v Secretary of State for Work and Pensions* [2007] EWCA Civ 495, reported as R(IB) 4/07; that "the appellant's case" in rule 8(3)(c) was not synonymous with "the grounds on which the appellant relies" in rule 22(2)(g): *Birkett v Department for the Environment Food and Rural Affairs [2011] EWCA Civ 1606*; [2012] AACR 32. The F-tT's role was not to review the decision of the Information Commissioner but to consider de novo the propriety of releasing the information. To be satisfied that an appeal had no reasonable prospect of success, the F tT would need to be satisfied that on no legitimate view of the facts or the law could the appeal succeed; that the exemption under regulation 12(4)(e) of the EIR was engaged and the public interest in maintaining the exception outweighed the public interest in disclosing the information (no view was expressed as to whether the exception at regulation 12(5)(b) applied). The judge set aside the decision of the F-tT to strike out the appeal and upheld the decision of the Information Commissioner that the request for information had been correctly refused.

Citation	Parties	Jurisdiction	Commentary
[2016] UKUT 476 (AAC)	*The Cabinet Office v Information Commissioner and Lamb*	Tribunal procedure and practice	In 2014 Dr Lamb made a request to the Cabinet Office under the Freedom of Information Act 2000 (FOIA) for information about the criteria used to decide upon the form of the Chilcot Inquiry and its membership. At that time the enquiry was still running. The Cabinet Office decided that the information in question was exempt from disclosure under section 35(1)(a) of FOIA (formulation or development of government policy). The Information Commissioner did not accept that the policy formulation and development was still live at the time of Dr Lamb's request. But the Commissioner did accept that disclosure would be likely to result in a significant and notable chilling effect on the way in which officials advise Ministers on matters of similar importance in the future and that this and the danger of distracting from the ongoing Inquiry itself outweighed the arguments in favour of disclosure. Dr Lamb's appeal to the First-tier Tribunal (F-tT) was allowed. It held that section 35 of FOIA was engaged, that the relevant policy had "crystallised" by the time of the FOIA request; and that the arguments for disclosure outweighed those in favour of maintaining the exemption (including the chilling effect). The Cabinet Office appealed to the Upper Tribunal (UT). The UT concluded that there was no arguable error of law in the F-tT's decision nor was there any other good reason for giving permission to appeal.

Upper Tribunal (Immigration and Asylum Chamber)

Schedule of Leading Reported Cases

Case		Commentary
HD (Trafficked women) Nigeria CG [2016] UKUT 00454 (IAC), 17 October 2016	Country Guidance	The Upper Tribunal considered the position of victims of trafficking returning to Nigeria, provided that the guidance set out at paragraphs 191 – 192 in PO (*trafficked women*) Nigeria [2009] UKAIT 00046 should no longer be followed and confirmed that the key risk criterion was now vulnerability to re-trafficking.
MST and Others (national service – risk categories) Eritrea CG [2016] UKUT 00443 (IAC), 7 October 2016	Country Guidance	The Upper Tribunal considered the Eritrean system of military/national service and replaced the country guidance given in MA (*Draft evaders - illegal departures - risk*) *Eritrea CG* [2007] UKAIT 00059 and *MO (illegal exit - risk on return) Eritrea CG* [2011] UKUT 00190 (IAC).
FA (Libya: art 15(c)) Libya CG [2016] UKUT 00413 (IAC), 7 September 2016	Country Guidance	This decision replaces *AT and Others (Article 15c; risk categories) Libya CG* [2014] UKUT 00318 (IAC) in respect of assessment of the Article 15(c) risk in Libya and provides that the question of whether a person is at such risk should, until further Country Guidance, be determined on the basis of the individual evidence in the case.
SSH and HR (illegal exit: failed asylum seeker) Iran CG [2016] UKUT 00308 (IAC), 29 June 2016	Country Guidance	The Upper Tribunal found that an Iranian male in respect of whom no adverse interest had previously been manifested by the Iranian State did not face a real risk of persecution or breach of his Article 3 rights on return to Iran on account of having left Iran illegally and/or being a failed asylum seeker.
IM and AI (Risks – membership of Beja Tribe, Beja Congress and JEM) Sudan CG [2016] UKUT 00188 (IAC), 14 April 2016	Country Guidance	The Upper Tribunal give wide guidance about the risk of persecution on return to Sudan generally.
TD and AD (Trafficked women) CG [2016] UKUT 00092 (IAC), 9 February 2016	Country Guidance	In considering the risk faced by Albanian women of being trafficked and re-trafficked, the Upper Tribunal concluded that it was not possible to create a typical profile of a trafficked woman from Albania and that trafficked women came from all areas of the country and from varied social backgrounds.
SM and MH (lone women – ostracism) Pakistan CG [2016] UKUT 00067 (IAC), 2 February 2016	Country Guidance	The Upper Tribunal found that lone women in Pakistan without family support may be at risk of persecution and examined the possibility of internal relocation depending upon the woman's circumstances.

Case		Commentary
OO (Gay Men) Algeria CG [2016] UKUT 00065 (IAC), 26 January 2016	Country Guidance	Upper Tribunal addressed the current situation in Algeria in relation to the risks faced by homosexual men and found that the only real risk of ill-treatment at a level to become persecution likely to be encountered by a gay man in Algeria was at the hands of his own family.
TG and others (Afghan Sikhs persecuted) Afghanistan CG [2015] UKUT 00595 (IAC), 3 November 2015	Country Guidance	The Upper Tribunal considered the risk to followers of the Sikh and Hindu faiths in Afghanistan and replaced the county guidance provided in the cases of *K (Risk - Sikh - Women) Afghanistan CG* [2003] UKIAT 00057 and *SL and Others (Returning Sikhs and Hindus) Afghanistan CG* [2005] UKAIT 00137.
AA (Article 15(c)) Iraq CG [2015] UKUT 00544 (IAC), 30 October 2015	Country Guidance	In replacing all existing country guidance on Iraq, the Upper Tribunal considered the degree of indiscriminate violence in certain parts of Iraq and found that it was such as to expose persons to a real risk of serious harm within the meaning of Article 15(c) of the Qualification Directive merely due to their presence there, although other areas of the country (including Baghdad City) did not meet that threshold.
Miah (section 117B NIAA 2002 – children) [2016] UKUT 00131 (IAC), 23 November 2015	Children	The factors set out at section 117B(1)-(5) of the Nationality, Immigration and Asylum Act 2002 apply to all ages and are not an exhaustive list of relevant factors which must also be weighed in the balance.
R (RK)(s.117B(6); "parental relationship") IJR [2016] UKUT 00031 (IAC), 22 December 2015	Children	It is not necessary for an individual to have "parental responsibility" in law for there to exist a parental relationship.
PD and Others (Article 8 – conjoined family claims) Sri Lanka [2016] UKUT 00108 (IAC), 17 March 2016	Children	In considering the conjoined Article 8 ECHR claims of multiple family members decision-makers should first apply the Immigration Rules to each individual applicant and, if appropriate, then consider Article 8 outside the Rules.
AT and another (Article 8 ECHR – Child Refugee – Family Reunification) Eritrea [2016] UKUT 00227 (IAC), 24 March 2016	Children	While the Immigration Rules make no provision for family reunification in the United Kingdom in the case of a child who has been granted asylum, a refusal to permit the family members of such child to enter and remain in the United Kingdom may constitute a disproportionate breach of the right to respect for family life enjoyed by all family members under Article 8 ECHR.
R (on the application of ZAT and Others) v Secretary of State for the Home Department (Article 8 ECHR - Dublin Regulation – interface – proportionality) IJR [2016] UKUT 00061 (IAC), 29 January 2016	Dublin Regulation	The full rigours of the Dublin Regulation process can, exceptionally, be circumvented where this would result in a disproportionate interference with Article 8 ECHR rights.

Case		Commentary
R (on the application of Hassan and Another) v Secretary of State for the Home Department (Dublin – Malta; EU Charter Art 18) IJR [2016] UKUT 00452 (IAC), 28 September 2016	Dublin Regulation	While there may be imperfections in the Maltese asylum decision making processes, these are not sufficient to preclude returns under the Dublin Regulation and, in particular, do not amount to a breach of Article 18 of the EU Charter.
R (on the application of SA & AA) v Secretary of State for the Home Department (Dublin – Article 8 ECHR – interim relief) IJR [2016] UKUT 00507 (IAC), 12 October 2016	Dublin Regulation	By virtue of the decision of the Court of Appeal in ZAT & Ors the duty to admit a person to the United Kingdom under Article 8 ECHR without adherence to the initial procedural requirements of the Dublin Regulation requires an especially compelling case.
R (on the application of MK, IK (a child by his litigation friend MK) and HK (a child by her litigation friend MK) v Secretary of State for the Home Department (Calais; Dublin Regulation – investigative duty) IJR [2016] UKUT 00231 (IAC), 24 May 2016	Dublin Regulation	In making a decision whether to accept a "take charge" request under the Dublin Regulation, the Secretary of State is obliged to take all material considerations into account and to comply with the "Tameside" duty of enquiry.
Arshad and Others (Tier 1 applicants – funding – "availability") [2016] UKUT 00334 (IAC), 27 June 2016	Immigration and Asylum generally	Every applicant for Tier 1 Entrepreneurial status bears the onus of proving satisfaction of all of the material requirements of the Immigration Rules which includes that the applicant have £50,000 "available" to invest in the proposed business venture, meaning that the applicant must be in a position to invest this money in his business consequential upon a positive decision of the Secretary of State.
Johnson (deportation – 4 years imprisonment) [2016] UKUT 00282 (IAC), 13 May 2016	Immigration and Asylum generally	When a foreign offender has been convicted of an offence for which he has been sentenced to imprisonment of at least 4 years and has successfully appealed on human rights grounds, this does not prevent the Secretary of State from relying on the conviction for the purposes of paragraph 398(a) of the Immigration Rules and s.117C of the 2002 Act if and when he re-offends even if the later offence results in less than 4 years imprisonment or, indeed, less than 12 months imprisonment.
Al – Sirri (Asylum – Exclusion – Article 1F(c)) [2016] UKUT 00448 (IAC), 17 August 2016	Immigration and Asylum generally	In every case involving exclusion of protection under Article 1F of the Refugee Convention, the onus of proof is on the Secretary of State, a detailed and individualised examination of the facts is required, there must be clear and credible evidence of the offending conduct, and the overall evaluative judgment involves the application of a standard higher than suspicion or belief.

Case		Commentary
R (on the application of Bhudia) v Secretary of State for the Home Department (para 284(iv) and (ix)) IJR [2016] UKUT 00025 (IAC), 2 December 2015	Immigration and Asylum generally	This decision, in addition to construing paragraph 284 (iv) of the Immigration Rules, highlights the Upper Tribunal's discretion to adjudicate in judicial review proceedings even where the Secretary of State's decision has been withdrawn.
Dasgupta (error of law – proportionality – correct approach) [2016] UKUT 00028 (IAC), 11 December 2015	Immigration and Asylum generally	The Upper Tribunal provided general guidance on errors of law appeals and proportionality and found that the question of whether family life existed in a child/grandchild context required a finding of something over and above normal emotional ties and would invariably be intensely fact sensitive.
Abdul (section 55 – Article 24(3) Charter) [2016] UKUT 00106 (IAC), 13 January 2016	Immigration and Asylum generally	In this EEA deportation case, the Upper Tribunal considered regulation 21(6) of the EEA Regulations and the best interests of the child and found that Article 24(3) of the EU Charter of Fundamental Rights created a free standing, although not absolute, right.
Vigneswaran (abandonment: s 104(4B)) [2016] UKUT 00054 (IAC), 7 January 2016	Immigration and Asylum generally	This decision highlighted that inaction was not the same as giving notice for the purposes of section 104(4B) of the Nationality, Immigration and Asylum Act 2002, accordingly an appeal was treated as abandoned if leave was granted unless active notice was given to the tribunal.
SM and Qadir v Secretary of State for the Home Department (ETS – Evidence – Burden of Proof) [2016] UKUT 00229 (IAC), 21 April 2016	ETS cases	The Upper Tribunal considered the evidential burden of proving whether TOEIC certificates had been procured by dishonesty. Mohibullah (ETS – judicial review grounds) IJR [2016] UKUT … (IAC) (not yet reported) Where there is a multiplicity of decision making mechanisms, some generating a right of appeal and others not, there is a public law duty on the decision maker to be aware of the options and to take same into account when opting for a particular mechanism.
Sheidu (Further submissions; appealable decision) [2016] UKUT 00412 (IAC), 7 September 2016	Practice and Procedure	If the SSHD makes a decision that is one of those specified in s 82(1) of the Nationality, Immigration and Asylum Act 2002, it carries a right of appeal even if the intention was not to treat the submissions as a fresh claim.
Sala (EFMs: Right of Appeal) [2016] UKUT 00411 (IAC), 19 August 2016	Practice and Procedure	There is no statutory right of appeal against the decision of the Secretary of State not to grant a Residence Card to a person claiming to be an Extended Family Member.
VOM (Error of law – when appealable) Nigeria [2016] UKUT 00410 (IAC), 10 August, 2016	Practice and Procedure	In a statutory appeal, the right of appeal under s 13 of the 2007 Act does not arise until the Upper Tribunal has completed the process required by s 12.

Case		Commentary
Jan (Upper Tribunal: set-aside powers) [2016] UKUT 00336 (IAC), 7 July 2016	Practice and Procedure	The decision of the Court of Appeal in Patel [2015] EWCA Civ 1175 entails the view that the Upper Tribunal's powers to set aside its own decisions are limited to those in rules 43 and 45-6 of the Upper Tribunal Rules.
R (on the application of Spahiu and another) v Secretary of State for the Home Department (Judicial review – amendment – principles) IJR [2016] UKUT 00230 (IAC), 25 April 2016	Practice and Procedure	The amendment of a judicial review claim form preceding the lodgement of the Acknowledgement of Service does not require the permission of the Tribunal; such permission is required in all other instances.
Katsonga ("Slip Rule"; FtT's general powers) [2016] UKUT 00228 (IAC), 19 April 2016	Practice and Procedure	The 'Slip Rule', rule 31 of the First-tier Tribunal Procedure Rules, cannot be used to reverse the effect of a decision.
VV (grounds of appeal) Lithuania [2016] UKUT 00053 (IAC), 27 October 2015	Practice and Procedure	An application for permission to appeal on the grounds of inadequacy of reasoning in the decision of the First-tier Tribunal must generally demonstrate by reference to the material and arguments placed before that Tribunal that (a) the matter involved a substantial issue between the parties at first instance and (b) that the Tribunal either failed to deal with that matter at all, or gave reasons on that point which are so unclear that they may well conceal an error of law.
MSM and others (wasted costs, effect of s.29(4)) [2016] UKUT 00062 (IAC), 16 January 2016	Practice and Procedure	Section 29(4) of the Tribunals, Courts and Enforcement Act 2007 results in the Upper Tribunal having powers in relation to the making of wasted costs orders (as defined in section 29(5)) which are not subject to the limitations in s.29(3) or r.10 of the Tribunal Procedure (Upper Tribunal) Rules 2008.
Elayi (fair hearing – appearance) [2016] UKUT 00508 (IAC), 15 November 2015	Practice and Procedure	Justice must not only be done but must manifestly be seen to be done.
Katsonga ("Slip Rule"; FtT's general powers) [2016] UKUT 00228 (IAC), 19 April 2016	Practice and Procedure	The 'Slip Rule', rule 31 of the First-tier Tribunal Procedure Rules, cannot be used to reverse the effect of a decision.
R (on the application of B) v Secretary of State for the Home Department (Rule 33A JR amendments and transfers) IJR [2016] UKUT 00182 (IAC), 15 March 2016	Practice and Procedure	Neither s.18, nor any other provision in the Tribunals, Courts and Enforcement Act 2007, nor any provision in the Tribunal Procedure (Upper Tribunal) Rules 2008 gives the Upper Tribunal a discretionary power to transfer to the High Court a case which has been begun in the Upper Tribunal.

Case		Commentary
R (on the application of Onowu) v First-tier Tribunal (Immigration and Asylum Chamber) (extension of time for appealing: principles) IJR [2016] UKUT 00185 (IAC), 31 March 2016	Practice and Procedure	In considering whether to exercise discretion to extend time for seeking permission to appeal to the Upper Tribunal, both the First-tier Tribunal and the Upper Tribunal should apply the approach commended by the Court of Appeal in Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1537.
MST and others (Disclosure – restrictions – implied undertaking) Eritrea [2016] UKUT 00337 (IAC), 10 May 2016	Practice and Procedure	The test for disclosure is whether receipt of the material in question is necessary for the just and fair disposal of the appeal.

Upper Tribunal (Tax and Chancery Chamber)

Citation	Parties	Jurisdiction	Commentary
[2016] UKUT 0447 (TC)	*Carrimjee v Financial Conduct Authority*	UT (TCC)	In this case the Upper Tribunal has given guidance as to the extent of the Tribunal's jurisdiction in relation to a "non—disciplinary reference" of a decision of the Financial Conduct Authority. In respect of disciplinary references, that is in cases where the Authority wishes to impose a financial penalty the Tribunal has a full merits jurisdiction. In relation to "non-disciplinary references", such as decisions to prohibit a person from working in the industry on the grounds of a lack of fitness and propriety, the jurisdiction of the Tribunal is now limited by S133 (6 A) FSMA 2000 to making such findings of fact and law as it considers appropriate and either dismissing the reference or referring it back to the Authority for further consideration in the light of those findings. The Tribunal held that the correct approach was to consider whether, in the light of the Tribunal's findings, the Authority's decision was one which was within the range of reasonable decisions open to the Authority. If that was found to be the case, the reference should be dismissed; if not the matter should be remitted to the Authority for further consideration. The Tribunal also found, contrary to the submissions of the Authority that it was permissible to make findings of fact in relation to matters which arose after the date of the Authority's decision and was not confined to considering the circumstances as they prevailed at the time of the Authority's decision.

[2016] EWCA Civ 121	*BPP Holdings v The Commissioners for Her Majesty's Revenue and Customs*	Court of Appeal (Civil Division)	The Court of Appeal restored the decision of the FTT in debarring HMRC from participation in proceedings before it for their serious and prolonged breach of an order requiring them to give particulars of their pleaded case. The Court of Appeal held that when considering non-compliance with rules and directions, a tax tribunal should adopt the stricter approach to compliance under the CPR as set out in *Mitchell and Denton*. The Court held that even though the wording of the overriding objective set out in the Upper Tribunal Rules had not been amended in the same way as the overriding objective in the CPR to place greater emphasis on the need to ensure compliance, the recent case law on the CPR was relevant by analogy. The Court held that there was nothing in the wording of the overriding objective of the tax tribunal rules that is inconsistent with the general legal policy described in *Mitchell and Denton*. There was no justification for a more relaxed approach to compliance with rules and directions in the tribunals and tribunal's orders, rules and practice directions are to be complied with in like manner to a court's
[2016] EWCA Civ 761	*Donaldson v The Commissioners for Her Majesty's Revenue and Customs*	Court of Appeal (Civil Division)	The Court of Appeal considered whether a statutory requirement that HMRC 'decide' that a penalty should be payable required HMRC to consider in each individual case whether a penalty should be imposed and therefore precluded a system whereby a computer generated penalty notices automatically upon the happening of certain defaults by the taxpayer. The computer had been programmed to implement a high policy decision that all taxpayers in default should be subject to daily penalties. The Court held that Parliament must have been aware that it would be impractical for HMRC to exercise a discretion in relation to each defaulting taxpayer individually. A generic policy decision of the kind taken by HMRC in June 2010 is a decision which satisfies the requirement that HMRC decide that a penalty should be payable.
[2016] EWCA Civ 930	*Longridge v The Commissioners for Her Majesty's Revenue and Customs*	Court of Appeal (Civil Division)	The Court of Appeal considered the test for when a person carries on an economic activity for VAT purposes when determining whether a building occupied by that person is intended for use solely for relevant charitable purposes. The Court accepted HMRC's contention that the domestic authorities relied on that have looked at the wider context in order to determine whether the provision of services for a money payment was an economic activity were not consistent with EU law. The correct test according to EU Law was whether there was a direct link between the payment and the service.

[2016] UKUT 0221 (TCC)	*Drummond v The Commissioners for Her Majesty's Revenue and Customs*	UT (TCC)	The Tribunal confirmed a previous unpublished decision in holding that it does have jurisdiction to make a protective costs order by virtue of section 29 of the TCEA and rule 10 of the Upper Tribunal rules. The Tribunal referred to the 'Rees Practice' whereby HMRC does not seek their costs when they are successful on an appeal where there would be financial hardship for the taxpayer and the point at issue is one of significant interest to taxpayers as a whole. The Tribunal went on to apply the same principles that would be applied by the High Court when deciding whether such an order was appropriate. Further the Tribunal should apply the conditions and considerations in CPR 3.19 to applications for cost capping orders in appeals to the Upper Tribunal and the principles applied under CPR 52.9A to making an order limiting costs in an appeal. The Tribunal set out the relevant issues that should be addressed in applications for a protective costs order, a cost capping order or an appeals cost order and in the submissions in response.
[2016] UKUT 0359 (TCC)	*Euro Wines (C&C) Limited v The Commissioners for Her Majesty's Revenue and Customs*	UT (TCC)	The Tribunal considered (i) whether the penalty imposed for handling goods subject to unpaid excise duty amounts to a criminal charge for the purposes of Article 6 of the Human Rights Convention and (ii) whether reverse burden of proof in section 154 of the Customs and Excise Management Act 1979 placing the burden of proving to the place from which any goods have been brought or whether or not any duty has been paid on the other party to proceedings rather than on HMRC was contrary to Article 6 and the presumption of innocence. The Tribunal held that the penalty was intended to act as a deterrent and was punitive in nature rather than compensatory. Despite the fact that it was classified in domestic law as a civil penalty the nature of the offence and the nature and severity of the penalty in this case render it criminal in nature for the purposes of Article 6 of the Convention. However the Tribunal went on to find that the penalty provisions as a whole represent a proportionate scheme and accordingly the imposition in that context of the burden of proof on the relevant person as to payment of duty does not go beyond what is necessary for the protection of the revenue. They held that the reverse burden of proof in s 154 CEMA was not incompatible with Article 6.

[2016] UKUT 173 (TCC)	*Telefonica v Revenue and Customs*	UT (TCC)	The Tribunal heard a judicial review application that had been transferred from the Administrative Court pursuant to section 31A Supreme Court Act 1981 (as inserted by section 19 of the Tribunals, Courts and Enforcement Act 2007). The Tribunal upheld HMRC's construction of VAT provisions concerning the attribution payments for services provided domestically and overseas. The Tribunal also rejected Telefonica's claim based on substantive and procedural legitimate expectation.
[2016] UKUT 0210 (TCC)	*The Charity Commission v Hunt*	UT (TCC)	The Tribunal considered who is 'the subject of the decision' of the Charity Commission for the purpose of determining whether the 42 day period under rule 26(1) of the General Regulatory Chamber rules started to run from the date on which notice of the decision was sent to the appellant (where the appellant is the subject of the decision) or only from the date when the decision was published (when the appellant is not the subject). The Tribunal held that not every person who is affected by the decision is the subject of the decision. However, a person does not have to be a person about whom the decision is made in order to be the subject. Thus a trustee (being a charity trustee within the statutory definition) of an unincorporated charity which is removed from the charities register is "the subject of" the decision to remove it, as would be the charity trustees of a body corporate which is a charity if there was a decision to remove that charity from the register. Therefore the applicants for the constitution and registration of a Charitable Incorporated Organisation are properly to be regarded as the subject of a decision refusing their application and there application was out of time.
[2016] UKUT 0198 (TCC)	*Nicholson v The Charity Commission*	UT (TCC)	The Tribunal considered who has 'standing' to bring an appeal to the FTT (Charity) in respect of the decision of the Charity Commission not to remove certain charities from the register. The Tribunal held that it was not sufficient for the proposed appellant to be an addressee of the decision, since a decision of the Commission may be sent to a variety of individuals and institutions each of whom has had a different level of connection with the decision process or none and is affected by the decision or is not. In order to be affected by the decision, first the decision itself must relate to the person in some way and secondly, the person's legal rights must have been impinged or affected by the decision. To be a person who "may" be affected, there must be an identifiable impact on the person's legal rights which is likely to occur.

First-tier Tribunal (Social Entitlement Chamber)

Citation	Parties	Jurisdiction	Commentary
[2016] EWCA Civ 413	*Reilly and Hewstone v Secretary of State for Work and Pensions and Jeffrey and Bevan v Secretary of State for Work and Pensions*	SSCS	These are the appeals against two decisions in the "*Reilly and Wilson*" litigation (referred to in previous annual reports). In *Reilly and Hewstone* the Court of Appeal dismissed the Secretary of State's appeal against the decision of Lang J in which she had granted a declaration under section 4 of the Human Rights Act 1998 that the Jobseekers (Back to Work) Schemes Act 2013 was incompatible with the claimants' rights under Art. 6(1) ECHR. The retrospective provision made by the 2013 Act (to validate sanctions imposed under the Jobseeker's Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011) was incompatible with Art. 6, as it was unquestionably an interference that engaged the principle in *Zielinski v France* (2001) 31 EHRR 19 and was not justified. *Zielinski* had confirmed that while the legislature was not precluded in civil matters from adopting retrospective legislation, Art. 6 precluded any interference by the legislature (other than on compelling grounds of the general interest) designed to influence the judicial determination of a dispute. Given its decision on the retrospectivity of the 2013 Act, in *Jeffrey and Bevan* the Court unsurprisingly allowed the Secretary of State's appeal against the majority decision of the UT three-Judge panel, which had held that the 2013 Act was at least partly retrospective. The provision in section 1(1) of the 2013 Act that the 2011 Regulations were to be treated "for all purposes" as regulations made under section 17A of the Jobseekers Act 1995 was too clear and unequivocal to admit of the construction favoured by the majority of the Three-Judge Panel. The Court also clarified the guidance given by the Three-Judge Panel in relation to the "prior information requirement" (as set out in paragraph 74 of the Supreme Court's decision in *R (Reilly and Wilson) v Secretary of State for Work and Pensions* [2013] UKSC 68).

[2015] EWHC 3382 (Admin)	*Hurley & Ors v Secretary of State for Work and Pensions*	SSCS	This case held that a failure to exempt carers who were caring for adult family members from the benefit cap was in breach of ECHR. As a consequence, the Housing Benefit Regulations 2006 and the Universal Credit Regulations 2013 have been amended with effect from November 7, 2016 to provide that the benefit cap does not apply where the claimant, his/her partner or a young person for whom the claimant or partner is responsible, is entitled to carer's allowance or (in the case of universal credit) the award includes a carer element.
[2016] UKSC 58	R (on the application of Carmichael and Rourke) (formerly known as MA and others), R (on the application of Daly and others) (formerly known as MA and others), R (on the application of A) and R (on the application of Rutherford and another) v Secretary of State for Work and Pensions	SSCS	These appeals concerned the under occupation penalty (colloquially referred to as "the bedroom tax") in connection with housing benefit claims in the social rented sector. The appeals had proceeded in the lower courts on the basis that the penalty was discriminatory on the grounds of disability (in the case of the *MA* claimants and *Rutherford*) and sex (in the case of A). In MA the Court of Appeal, emphasising that it was the housing benefit scheme as a whole, including discretionary housing payments ("DHPs"), that had to be considered, found that the discrimination was justified. However, in *Rutherford* and A the claimants' appeals had succeeded. The Supreme Court unanimously dismissed the MA claimants' appeals, except in the case of *Carmichael*. Mrs Carmichael cannot share a bedroom with her husband because of her disabilities. Regulation B13 of the Housing Benefit Regulations 2006 allows an extra bedroom for a child who cannot share a bedroom but not for an adult partner who cannot do so. Similarly, the Rutherfords need a regular overnight carer for their grandson who has severe disabilities. Regulation B13 allows an extra bedroom for an overnight carer for an adult but not for a child who requires overnight care. The Court found that there was no reasonable justification for these differences in treatment of adults and children. However, the Court, by a majority of 5 to 2, allowed the Secretary of State's appeal in the case of A (who had been the victim of serious domestic violence and lived in a Sanctuary Scheme home). While people may have strong reasons for wanting to stay in their property, the majority of the Supreme Court considered that this could be taken into account through the DHP scheme.

[2016] NIQB 11	*McLaughlin's (Siobhan) Application*	SSCS	In this case the Northern Ireland High Court held that the complete exclusion of Ms McLaughlin on the grounds of her marital status (she had lived with her partner for 23 years before he died and they had four children but they had not married) from widowed parent's allowance, could not be justified and was therefore in breach of Art. 14, read with Art. 8, ECHR. The Secretary of State's appeal against this decision was heard by the NI Court of Appeal on 25.10.16. Judgment was reserved.
[2016] EWCA Civ 395	*Alhashem v Secretary of State for Work and Pensions*	SSCS	This decision holds that employment and support allowance is not a benefit that is intended to facilitate access to labour market.
Case C-308/14, CJEU	*European Commission v United Kingdom*	SSCS	The Court of Justice of the European Union dismissed the European Commission's action in relation to the requirement that a claimant for child benefit or child tax credit has to have a right to reside in the UK.
Case C-218/14, CJEU	*Singh & Others v Minister for Justice and Equality*	SSCS	This case involved the retention of the right of residence by a third-country national after his Union citizen spouse had left the host Member State. The CJEU ruled that the third-country national could not retain a right of residence on the basis of Art. 31(2) of EC Directive 2004/38 ("the Citizenship Directive") where the divorce proceedings did not start until after the Union citizen spouse had left the host Member State.
Case C-515/15, CJEU	*Secretary of State for the Home Department v NA*	SSCS	This decides, among other points, that a child and a primary carer of the child have a right of residence in the host Member State under Art. 12 of Regulation (EEC) No. 1612/68 (now Art. 10 of EU Regulation 492/2011), even though the Union citizen parent who has worked in that Member State has ceased to reside there before the child started to attend school in that Member State.
[2016] UKUT 321 (AAC)	*IC v Glasgow City Council and Secretary of State for Work and Pensions (HB)*	SSCS	In this case a Three-Judge Panel of the Upper Tribunal decided that the regulations that deny housing benefit to EEA nationals who are jobseekers were validly made, despite the Secretary of State's failure to adequately consult the Social Security Advisory Committee about them.
[2016] UKUT 331 (AAC)	*VK v HMRC (TC)*	SSCS	This concerned late tax credits appeals against HMRC decisions made before 6.4.14 and whether the First-tier Tribunal had power to extend a statutory time limit. The Three-Judge Panel, overruling the decision of a single UT judge in JI v HMRC (TC) [2013] UKUT 199 (AAC), held that Schedule 5, paragraph 4 of the Tribunals, Courts and Enforcement Act 2007 authorised the making of procedural rules that could extend statutory time limits in other Acts (including the 30-day time limit in the then section 39 of the Tax Credits Act 2002). Further, rule 5(3)(a) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 gave the First-tier Tribunal power to extend the 30-day time limit.

[2016] UKUT 149 (AAC)	MM and SI v SSWP (DLA)	SSCS	In these appeals the UT Judge decided that the application to refugees of the past presence test in regulation 2(1)(a)(iii) of the Social Security (Disability Living Allowance) Regulations 1991 (which requires presence in Great Britain for at least 104 weeks in the last 156 weeks before the date of claim) amounted to unlawful indirect discrimination contrary to Art. 28 of EC Directive 2004/83 ("the Qualification Directive") and Art. 14, read with Art. 1, Prot. 1, ECHR. The test therefore had to be disapplied in the case of refugees. This ruling will also apply to attendance allowance, personal independence payment and carer's allowance which have the same past presence test.

First-tier Tribunal (Health, Education and Social Care Chamber)

Citation	Parties	Jurisdiction	Commentary
[2016] UKUT 0496 (AAC)	*JD v West London Mental Health NHS Trust & SoS (Justice)*	Mental Health	The patient in this case occupied a 'super seclusion suite' consisting of a room with a partition dividing it into two. No one is allowed to enter without the partition in place, except nurses wearing personal protective equipment in order to administer the patient's depot injections. He is only allowed out of the suite in physical restraints that restrict his circulation and under escort by several members of staff. At the tribunal hearing the patient's representative argued that the patient was being contained but not effectively treated and she presented detailed arguments on Articles 5 and 8 of the ECHR. These were not properly addressed in the tribunal's written decision. The Upper Tribunal said that this was an error. The tribunal should have made clear whether or not it accepted the ECHR arguments (presumably it did not) and should have briefly explained why not. However, this failure did not justify a re-hearing. The tribunal is constrained by the statutory duty to discharge a patient unless the statutory criteria are all met. Those provisions are structured around a proportionality analysis that favours the patient's liberty unless all of the criteria are satisfied. The ECHR arguments could have been put just as well without any reference to the Convention. They were all sufficiently covered by the statutory criteria.

[2016] UKUT 0499 (AAC)	*GW v Gloucestershire County Council*	Mental Health	The patient was born in 1965. Like her mother and brother, she has Huntington's disease. She was made subject to Guardianship under the Mental Health Act in 2013, and then the Court of Protection made a Standard Authorisation in 2015. She lived in a specialist nursing home. The essence of the case was that Guardianship was no longer necessary in view of the Standard Authorisation. The Upper Tribunal found that the First-tier Tribunal had correctly recognised the importance of having the (Section 18) power to ensure that the patient returned to the nursing home if she left. There would be practical difficulties in operating under the Mental Capacity Act 2005 to achieve this. Staff had to consider using their powers to ensure her return to the home without delay. The patient's condition was also deteriorating and the tribunal properly referred to the crucial power under Guardianship to ensure treatment and provide access to the medical team. It was also submitted that the tribunal had failed to follow the guidance given in *KD v A Borough Council and the Department of Health* [2015] UKUT 0251 (AAC). Here Charles J had set out a lengthy checklist of matters to consider in cases such as this. Judge Jacobs in the Upper Tribunal accepted that KD was relevant, but said that it was important to recognise that the checklist was not legislation and should not be elevated to that status. As Charles J had himself said at paragraph 67 of KD, 'it is likely to assist'. But the checklist must not be interpreted as a rigid template. Ultimately, every case is different and what matters is the substance of the tribunal's reasoning rather than whether a tribunal's reasons follow a particular format.