UKELA ENVIRONMENTAL LITIGATION WORKING PARTY RESPONSE TO:

'EXTENDING THE JURISDICTION OF THE NEW ENVIRONMENTAL TRIBUNAL'

Background

Professor Macrory has been asked by Sir Robert Carnwath, Senior President of Tribunals, to prepare a report for him looking at the possibility of extending the jurisdiction of the new First-tier tribunal (environment) to determine other forms of statutory appeals under various environmental laws.

UKELA welcomes the opportunity to assist Professor Macrory with his research.

Response to questions posed by Professor Macrory

1. Does the current range of appeals bodies make any rational sense?

   The present range is only explicable by its history. However, its effect is to cause significant difficulty for parties and a sense or feeling that the law and its procedures are ill-considered and unfair. There are many examples.

   The unfairness (whether real or perceived) may arise from one party being able to chose the particular tribunal in which the procedural rules or costs consequences are advantageous to them. One example is the choice as between use of an administrative notice such as an enforcement notice and issuing a complaint in the Magistrates' Court. The costs position is favourable to the complainant in the Magistrates' Court, but generally neutral on appeal to the Secretary of State. That said, the use of the FTT would not entirely address this issue because criminal and civil proceedings remain options for litigants, whether regulators or individuals.

   Environmental issues often call for a wide range of legal skills in any one case. However, each tribunal may not have the full skill-set required, as the mind-set of each tribunal is necessarily different: one might have a policy focus, another be expert in public law principles while another has primary expertise in determining guilt or innocence.

   Some environmental cases merit a tribunal of the experience and background of deputy high court judge. It is impossible to obtain such a tribunal in the civil jurisdiction of the Magistrates' Court. Resident judges are not, in our experience, receptive to the suggestion that a specialist be imported to hear such cases in the Crown Court civil jurisdiction.

The present position of PINS requires careful consideration. PINS has much expertise which crosses technical and regulatory boundaries (eg. environmental regulation, water industry issues, planning, rights of way). Any new role for the FTT ought to respect and preserve the expertise in PINS. No doubt, PINS has been consulted in any event.

2. Do members have any views on whether procedures are currently satisfactory or not?

If this is the big question 'Should there be an environmental tribunal or court', then UKELA is very clearly of the view that the answer to that has been 'yes' for the last decade or so and for the reasons articulated in several well-researched reports on the topic.

If 'procedures' means rules of evidence, then there is no overriding difficulty with any particular set of procedural rules used at present to determine environmental cases. However, when there is a range of procedural rules in respect of broadly similar issues, then costs necessarily increase for all parties. A unified system avoids procedural proliferation.

Moreover, each tribunal lacks a full appreciation of the means by which the other operates. There is often (an understandable) lack of knowledge of the substantive law. Hence each tribunal has to be educated by the parties, at their cost. By this we mean each individual tribunal member. It is fantastically inefficient.

We have considerable experience of conducting appeals against abatement notices in Magistrates Courts. These can often involve huge implications for the business if the abatement notice is upheld.

Our experience has highlighted the following issues on procedures in the Magistrates Court:

- Individual Magistrates Courts often have no previous experience of the appropriate procedures for these cases (as they are in fact civil proceedings, often relying heavily on expert evidence).
- The lack of previous experience means that there is a considerable discrepancy in approach depending on which panel of Magistrates is dealing with the case in hand – in our experience, although some clerks are very good, others are not.

- If a District Judge is asked to hear the final trial because of the nature of the appeals there is often difficulty with this request because of budgetary constraints at the Courts. However, because of the importance of the issues to the Appellant and the (often) lack of experience in the panel, business disputes of this kind are more properly heard by an experienced, legally trained arbiter.

We would suggest that the issue of costs where one party withdraws before a hearing needs to be addressed.

Our members have been involved in appeals against Environment Agency enforcement notices where the notices have been withdrawn very late in the appeal process prior to a hearing. The Appellant is left with a large irrecoverable legal bill and no way of challenging the initial legitimacy of the notice that has to be complied with while an appeal proceeds. It may be the case that the solution to this unfairness lies in changes to the underlying legislation; for example, to remove the right to withdraw an enforcement notice after an appeal has been lodged unless agreed by the parties.

3. Are there advantages in consolidating more of these appeals with the new First-tier environmental tribunal (e.g. clearer procedural rules, legally argued decisions, etc)?

There must be advantages in consolidating more of these appeals with the First-tier environment tribunal.

In the sphere of immigration, the FTT and its appellate tribunals presently accommodate issues of fact and policy with the scope to deal with issues of law at a level equivalent to the High Court. We would expect an FTT, appropriately constituted, to be capable of providing the correct skill set both as to fact-finding and issues of law that arise in environmental cases. This would be an improvement on the current situation, described above, of different tribunals each having different mind-sets, and generally being ill-equipped to deal with complex, specialist legal issues. It would hopefully result in better, legally argued decisions and costs savings due to familiarity with the issues.

A genuinely specialist environmental tribunal would, it is hoped, also result in consistency of process and decision-making due to the expertise built up

through hearing a significant volume of cases. One clear set of procedural rules would have an obvious advantage for all parties.

4. The Tribunal would make final decisions rather than recommendations to the Secretary of State as happens in some current appeals. Is there any advantage in the Secretary of State retaining jurisdiction?

There must be an advantage in the Tribunal making final decisions. Indeed, that is the present trend in respect of planning appeals in which almost all appeals are now transferred for the Inspector's decision. In cases in which a minister receives a recommendation, the upshot is delay and a further stage at which legal error may arise.

What cost-savings if any would be likely from greater consolidation (a major factor in the current climate)?

Greater consolidation is likely to result in a specialist Court building up a bank of expertise therefore having the ability to hear and dispense of cases much more quickly thereby resulting in cost savings.

Costs savings for parties could also be achieved through consistent procedures to avoid lengthy hearings about procedure. One example is the use of s59 notices under the EPA 1990, to require waste to be removed or its effects remedied. They are appealable within 21 days to the Magistrates' Court on limited grounds. Given the complexities of waste regulation and its interaction with planning law, there are considerations which amount to an answer to a notice, but for which the Magistrates do not have jurisdiction. It is therefore necessary to apply for judicial review.

The availability of transfer to JR is an obvious attraction and would provide significant cost savings.

5. Any views on first candidates (e.g. sanctions such as emissions trading)?

As stated above, appeals against abatement notices are a prime candidate – in our view, they are currently held in an entirely inappropriate venue.

We think that UK EU ETS appeals are also a good option as a first candidate. We currently have a UK EU ETS appeal before the Planning

Appeals Commission for Northern Ireland. This is the first such case that it has heard and whilst it undoubtedly has an expertise in planning matters, it has no experience of the EU ETS. It is not just our EU ETS case which is experiencing these issues. In England, the Premier Foods case was heard in January and is still awaiting final determination by the Secretary of State some nine months later.

We do think there are other suitable candidates, such as appeals under the Environmental Liability Regulations and appeals against other types of civil sanction, eg appeals against works notices under section 161A of the Water Resources Act 1991. These appeals raise similar issues to appeals against RES Act civil sanctions, currently already within the Tribunal's jurisdiction.

In the longer term, if the FTT is to take on appeals against notices enforcing certain types of permit, it would seem logical and procedurally preferable for it also to deal with other appeals connected with the same type of permit (eg determinations of permit applications).

Overall Conclusion

This is an exercise which is very worthwhile and potentially quite productive in UKELA's view. The main risks are to add a further jurisdiction without eliminating another and doing harm to the expertise which has been assimilated in PINS.

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