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Permission to review

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*Natsai **Manyarara** examines the amenability of judicial review of the Upper Tribunal*

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In Brief

The Supreme Court has held that the High Court should use the same test for second appeals when considering applications for permission to bring a judicial review claim against an unappealable decision of the Upper Tribunal.

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The Supreme Court considered the scope of judicial review available to unappealable decisions of the Upper Tribunal established by the Tribunals, Courts and Enforcement Act 2007 (TCEA 2007) in its recent judgment in *Cart*. The debate centred upon the effect of the creation of a new and integrated tribunal structure under TCEA 2007. It was argued on behalf of the respondent that the Upper Tribunal was not amenable to judicial review other than in the wholly exceptional circumstances of an outright excess of jurisdiction or a procedural irregularity which denied the right to a fair hearing.

The Supreme Court rejected this approach and held that the same test as for second appeals should be applied by the High Court in considering applications for permission to bring a judicial review claim against an unappealable decision of the Upper Tribunal (see *R (on the application of Cart) (Appellant) v The Upper Tribunal (Respondent)*; *R (on the application of MR (Pakistan) (FC) (Appellant) v The Upper Tribunal (Immigration & Asylum Chamber) and Secretary of State for the Home Department (Respondent)* [2011] UKSC 28, [2011] All ER (D) 149 (Jun)).

TCEA 2007

Part 1 of TCEA 2007 established a new unified tribunal structure which accommodates a diversity of jurisdictions. At the peak of the structure is the Upper Tribunal. The Upper Tribunal has been labelled a "superior court of record" (s 3(5)). TCEA 2007 was to implement the recommendations of the *Leggatt Review* (referred to below) by bringing a better structure, and coherence, to the previous pattern of tribunals. The Upper Tribunal has the power in the main to hear and determine appeals from the First-tier Tribunal (also established by TCEA 2007). To understand the significance of this particular piece of legislation, it is necessary to look at the history of the creation of Administrative Tribunals.

The 20th century saw the development of statutory tribunals which were set up to determine claims between the individual and the state; to adjudicate on disputes in various specialised areas, and to administer constantly changing areas of law. Members of the tribunals were expected to know the subject matter in dispute. The Tribunals and Inquiries Act 1958 (TIA 1958) followed the report by the *Franks Committee on Administrative Tribunals and Inquiries 1957* (Cmnd 218). The report insisted upon openness and accountability to the higher courts. Section 9 of TIA 1958 made provision for appeals to the High Court. Exclusions of judicial review were abrogated by s 11. TIA 1958 has since been replaced by the Tribunals and Inquiries Act 1992. It is under these Acts that the Council on Tribunals came into being.

The supervisory jurisdiction of the High Court

The former Court of King's Bench had an inherent jurisdiction to control all inferior tribunals. The Judicature Act 1873 however created a new hierarchy of courts, including a High Court and a Court of Appeal. The common law powers of the King's Bench were then vested in the High Court, and the Court of Appeal provided an alternative means of reviewing errors of law.

To illuminate this, the case of *R v Northumberland Compensation Appeal Tribunal, ex parte Shaw* [1952] 1 KB 338, [1952] 1 All ER 122 provided that the High Court had "an inherent jurisdiction to control all inferior tribunals, not in an appellate capacity, but in a supervisory capacity". Control is exercised by means of a power to quash any determination by a tribunal which, on the face of it, offends the law. The control extended to seeing that inferior tribunals keep within their jurisdiction, but also to seeing that they keep within the law.

There then came the landmark case of *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147, [1969] 1 All ER 208. The breakthrough made by *Anisminic* was that, with respect to administrative tribunals and authorities, the old distinction between errors of law that went to jurisdiction and errors of law that did not was for practical purposes abolished. Since *Anisminic*, the requirement that an error of law within the jurisdiction must appear on the face of the record was rendered obsolete. *Anisminic* was a legal landmark which made possible the rapid development in England of a rational and comprehensive system of administrative law on the foundation of the concept of ultra vires. It is true to say that any error of law by a public body is beyond its jurisdiction. A key question is therefore: "What is it that allows the common law to abandon *Anisminic*?"

In the case of *Pearlman v Harrow School Governors* [1979] QB 56, [1979] 1 All ER 365, Lord Denning MR stated at 70C-F that: "No court or tribunal has any jurisdiction to make an error of law on which the decision of the case depends."

Following the recommendations of the Law Commission's *Report on Remedies in Administrative Law* (1976, Law Com No 73), Order 53 of the Rules of Supreme Court was introduced. This provided for the prerogative writs of certiorari, prohibition and mandamus, or declaratory relief.

Since 1873, a series of statutes have dealt with the administration of justice. The Supreme Court Act 1981 is significant in this respect. Section 19 preserved the jurisdiction that the High Court enjoyed. The High Court therefore continued to have supervisory jurisdiction over all inferior tribunals on ordinary public law grounds (where there was no statutory right of appeal). The former prerogative orders were seen to be necessary in cases where questions of jurisdiction are involved and in cases where there is no appeal on a point of law. No statute could oust the remedies provided by judicial review--which is the principle engine of the rule of law.

Leggatt Review

In 2000, Lord Irvine (then lord chancellor) invited Sir Andrew Leggatt (a former Lord Justice of Appeal) to review the Tribunals in England and Wales (see Sir Andrew Leggatt *Tribunals for Users--One System, One Service*, published on 16 August 2001)). The report recommended extensive reform. When commencing review, Sir Andrew said that: "Tribunals decide nearly half a million cases every year. By providing a forum for dealing with most of the disputes which arise between citizens and the state, the tribunal system also plays a vital part in maintaining the health of a democratic society and enhancing the rule of law."..."This is, however, the first time they have been examined systematically since the Franks committee which reported in 1957."

The government followed up the *Leggatt Report* by introducing TCEA 2007. In place of the Council on Tribunals, a new Administrative Justice and Tribunals Council came into being on 1 November 2007. There was concern about the autonomy vested in the Upper Tribunal, given the constitutional role of the High Court as a guardian of the standard of legality and due process, from which the Upper Tribunal was not exempt. Nothing in TCEA 2007 purported to oust judicial review as clear words are needed to do this. In the case of *R (Sivasubramaniam) v Wandsworth County Court* [2002] EWCA Civ 1738, [2003] 2 All ER 160, Lord Phillips, then MR, stated that "the weight of authority makes it impossible to accept the jurisdiction to subject a decision to judicial review can be removed by statutory implication". It is clear therefore that even finality is not an ouster.

The concern with the exceptional circumstances approach to judicial review is that a tribunal may often decide a point of law wrongly while keeping well within its jurisdiction. There is the risk of the Upper Tribunal becoming the final arbiter of law. It would not have been logical to turn the clock back to pre-*Anisminic* errors.

Conclusion

Giving the lead judgment in *Cart*, Lady Hale stated that: "the scope of judicial review is an artefact of the common law whose object is to maintain the rule of law. The question is, what machinery is necessary and proportionate to keep mistakes of law to a minimum? What level of judicial scrutiny outside the tribunal structure is required by the rule of law."

The court concluded that the adoption of the second-tier appeals criteria would be a "rational and proportionate restriction upon the availability of judicial review of the refusal by the Upper Tribunal of permission to appeal to itself. It would recognise that the new and in many ways enhanced tribunal structure deserves a more restrained approach to judicial review than has previously been the case, while ensuring that important errors can still be corrected...it is capable of encompassing both the important point of principle affecting large numbers of similar claims and the compelling reasons presented by the extremity of the consequences for the individual".