

Council on Tribunals

The Use and Value of Oral Hearings in the Administrative
Justice System

Report of a Seminar held on 21 June 2005

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Preface

This report records the contributions and discussions at the seminar on 21 June 2005. I would like to take this opportunity to express my thanks to all those who took part.

Lord Newton of Braintree OBE, DL
Chairman of the Council

Delegates

Nony Ardill Policy Director, Legal Action Group

George Bartlett QC President, Lands Tribunal

Tony Boorman Principal Ombudsman and Decisions Director, FOS

Lord Justice Carnwath Senior President designate of Tribunals

Mr Justice Andrew Collins Judge in Charge of the Administrative Court List

Professor Hazel Genn Professor of Socio-Legal Studies, University College London

Adam Griffith Policy Officer, Advice Services Alliance

Michael Harris President, Appeals Service

David Laverick President, Adjudication Panel for England

Ben Linscott Inspector Manager for the South East, Planning Inspectorate

Siobhan McGrath Senior President, Residential Property Tribunal Service

Claire Morgan Policy Manager, Law Society

Professor Martin Partington Law Commissioner

Mark Rowland Social Security and Child Support Commissioner

Graham Smith Deputy Commissioner, Information Commissioners Office

Roger Smith Director, Justice

Paul Stockton Head of Administrative Justice Division, DCA

Mr Justice Jeremy Sullivan Chairman, JSB Tribunals Committee

Theodore Wallace Chairman, Finance and Tax Tribunals

Stewart Wright Legal Officer, Child Poverty Action Group

Tony Newton Chairman, Council on Tribunals

Susan Howdle Member, Council on Tribunals

Penny Letts Member, Council on Tribunals

Bernard Quoroll Member, Council on Tribunals

Genevra Richardson Member, Council on Tribunals

Programme

3.00pm **Introduction and Welcome by Lord Newton of Braintree OBE, DL**
Chairman of the Council

Professor Hazel Genn
University College London

Paul Stockton
Head of Administrative Justice Division, DCA

Nony Ardill
Policy Director, Legal Action Group

Group Discussion

Tea/Coffee Break

4.45pm **Tony Boorman**
Principal Ombudsman, Financial Ombudsman Service

His Honour Judge Michael Harris
President, Appeals Service

Group Discussion

6.00pm **Close**

Professor Hazel Genn

Faculty of Laws, UCL

The White Paper on PDR

- Views expressed as someone who has observed tribunals and worked in the training of tribunal judiciary
- Improve understanding of rights and responsibilities
- Ready access to early and appropriate advice and assistance (but not representation)
- Range of tailored dispute resolution services
- Cost-effective tribunal service targeted to those cases where hearing best option
- Stimulate improved decision-making

What do we know about oral hearings?

- Difficult to generalise about tribunals
- Variation in procedures
 - Formality
 - Adversarial v interventionist/enabling
 - Parking adjudicators / TAS v Immigration / CICAP
 - Complexity of issues
 - Prevalence and types of representation
 - TAS low level and mainly not-for-profit / VAT high level and skills
- Small proportion of those receiving nil decision challenge
 - General access to tribunal justice is problem
 - Oral hearing as disincentive?
- Success rates higher at oral hearings than on paper
- Some appellants are apprehensive about oral hearings
- More don't think they need representation or don't know possible
- Expectation of hearings frequently unrealistic
- Need more information / preparation
- Advice variable and patchy geographically

What happens in oral hearings?

- From point of view of tribunal
 - Collection of evidence

- Verification of factual information
- Opportunity to reconsider interpretation of regulations
- From point of view of appellant
 - Opportunity to be heard
 - Opportunity to understand process
 - Contribution to perceptions of fairness?
 - Acceptability of losing?
 - Confidence in fairness of process as a whole?

Value for tribunal

- The party is present
- Adjudicating body is focusing on issues
- Able to ask questions
- What is the value / purpose of asking questions?
 - Collect new information
 - Clarify information
 - Satisfy themselves about veracity of information
- Most often value seen to be in opportunity to gather new information
- Less often opportunity to reconsider interpretation (more likely if representative present)

Value for appellant

- Giving information
 - Do not understand department / agency forms – help often not available for completing forms
- Value of spoken word – many are better able to respond orally than in writing
 - Many not literate at all
 - More not sufficiently literate
 - Not familiar with context and purpose of questions
 - Diverse populations of potential users
- Opportunity for day in court – given “voice”
- Understanding of process and reasons for failure, if given
- Increases acceptability of losing and general confidence in system (not perfect but possibly better than on paper)

Does this mean you need full oral hearings?

- Holistic approach to administrative justice
- Concept of PDR requires a better system of triage
 - How is initial information being collected?
 - How is information being assessed?
- Is there effective internal review on papers?
- Are cases being kicked up to the tribunal to spare resources at the earlier stage?
- Pre-tribunal checking of information by department
 - Telephone?
 - Interview?
- Tribunal triage system? Is there any now?
 - Telephone interview?
 - Paper decision?
 - Need for oral hearing?

Better case management

- Pick off the cases that are capable of early dispute resolution
- Intermediate procedures for those needing more than paper consideration
 - Information gathering by telephone or face-to-face interview
- Early and intermediate processes may be undertaken by trained case officers rather than legally qualified tribunal chairmen (see ombudsmen procedures)
- Identify cases where an oral hearing is indicated
 - Complex law and/or facts
 - Clear conflict of evidence between department and appellant
 - Configuration of parties i.e. type of appellant/type of respondent
- If oral hearing is indicated, does it require panel of three?
- If oral hearing is to take place, provide better explanation, information, support to appellants, including video examples of what happens during the hearing

Paul Stockton

Head of Administrative Justice Division, DCA

Introduction

- Not presenting views of Ministers. Do not know what they are. They may not have a view or may disagree. Just the personal thoughts of an official who has worked in tribunals reform, where inevitably some of these questions arise
- Does not support the view that dispute resolution can *all* be done on paper, for the reasons explained by the previous speaker, Hazel Genn
- Nonetheless believes that 'orality' dominates the present system to a degree

Disadvantages of oral hearings

- Disadvantages to the way things are done, particularly in the tribunals world
- Largely, tribunal processes imitate those of courts
- Efficiency and cost. Courts and tribunals which make little use of oral hearings or where hearings are strictly time-limited seem to get through more cases and /or cost less (though hard to compare jurisdictions)
- Having to bring people together on one particular day inevitably causes delay, which is hard on the claimant. Hearing-free processes (eg Social fund inspectors, who deal with 95% of cases in 2 weeks) can mean a genuine inquisitorial process in which a department does not get to put a case
- Delay. Even the most efficient tribunal processes introduce a potential for delay
- Delay is undesirable because of the impact on the claimant
- The need for hearing centres. Typically cost for accommodation to be the second or third cost to the taxpayer. The biggest cost is the judiciary and then the staff and the accommodation vie for second place
- This is money that goes to landlords, electricity companies etc, and does not stay in the administrative justice system to further benefit users
- The more oral hearings are regarded as the norm the more we have to have hearing centres and with property prices increasing and standards getting higher, the cost, as a proportion, is continually increasing
- The Leggatt Report and the Council on Tribunals regularly and rightly criticise low standards of accommodation
- Burden of preparation, particularly on people who may not be well equipped. The requirement to bring material, including material which may in the event turn out to be irrelevant

- Creates demand for representation and experts. The fact that somebody may have to present their case, give evidence is a wholly unfamiliar for most people
- In courts and tribunals where everybody is represented the cost of representation can exceed, sometimes by a large margin, the cost of running the tribunal itself and paying the judiciary
- Creates a demand for a full skill set
- If one applies the model of a 'bureaucratic machine' as most institutions making decisions are, actually those functions can be broken down
- Some people who are expert on customer care, don't have to be expert on evidence gathering. None of them have to be experts on law, to the same degree, because they can stop what they are doing and consult someone who is an expert in law
- The argument that oral hearings give an opportunity for everyone to be present at one time, is not the reality in the Appeals Service or in the Asylum and Immigration tribunals where the department is quite often not present
- The notion that a hearing is in 'public', is much more theoretical than real, most tribunal hearings are not reported, members of the public do not make a reality of the ability to attend

Alternatives

- Public scrutiny of tribunals might actually be better achieved by creating an obligation to report and the ability to gain access to information, rather than the ability to be physically present at the hearings
- When one looks at what the real requirements are for resolving disputes, you have to question whether oral hearings are the most efficient
- In fact a direct communication with the individual, followed by a direct communication with the decision maker, may actually do a better job of pulling out what are the real issues of the case
- There are many examples of institutions that do not, as part of a resolution process, feel the need to gather people in a room. The Financial Ombudsman Service, in that respect, has been a spectacular success in this country
- Furthermore Australia, for example, has brought in all kinds of alternative methods of dealing with cases, that stop short of providing an oral hearing as such
- The Workers Compensation Commission in New South Wales have a system in which if the matter is a dispute between a worker and their employers' insurers, there is now mandatory telephone conferencing arbitration. There is a method whereby the arbitrator can arbitrate a dispute by telephone, with a facility to disconnect either party for private communications. Now the vast majority of cases are disposed of in that way

Focus of the Tribunals Service

- First priority is that the new Tribunals Service will work effectively, therefore the first criterion is that nothing will be done to disrupt the way in which justice is flowing through the tribunal system now
- Aware of sensitivity
- Approach has been to try and pick out a few areas where there is scope for a more proportionate resolution of disputes
- Pilots will be run in different areas to test out some of the alternatives and we will be able to report back on whether or not these have been successful

Nony Ardill

Policy Director, Legal Action Group

Introduction

- Before working for the Legal Action Group, I worked for 15 years in an inner-London law centre, specialising in immigration and employment law. I have a large experience working within the Tribunals field with disadvantaged people and will be drawing partly on my personal experiences
- Whilst working at law centre, attitudes towards oral hearings varied a great deal. Some people found them 'terrifying', others could not wait to have their day in court. There were a wide range of views
- At LAG we were pleased to see the DCA White Paper commitment that appellants can still have access to oral hearings. It is important for the appellant to have choice over the method of dispute resolution, and we are wary of building into the system a presumption that oral hearings should not take place
- Oral hearings can be important in assessing the credibility in disputed facts
- The oral element works well for many users, for example the National Audit Office reported favourably on outcomes (23% of paper hearings in the Appeals Service have a successful outcome, compared to 52% for oral hearings)
- Home Office research provides significant evidence of the influential presence of a sponsor of an appellant at family visitor appeal hearings. The presence of a sponsor enhances the appellant's credibility
- Oral hearings have an important role in examining new evidence and the persuasiveness of new witnesses
- Are they necessary for cases interpreting novel points of law? Perhaps the oral aspect could be avoided

Social Welfare Issues

- Many aspects of social welfare law are extremely complex. For example, the Child Poverty Action Group's 'Welfare Benefits and Tax Credits Handbook' is about 1600 pages long. Its clearly hard for someone with low literacy levels to understand. The law on disability living allowance alone covers 40 pages
- Appellants have problems understanding law – many have low levels of legal literacy
- Appellants have difficulty submitting applications and filling out forms – e.g. asylum claims and disability living allowance forms

- Written decisions are often hard to understand, especially if they quote legislation
- Appeal forms are increasing in size and detail – an example is an employment tribunal claim form which has increased from two to nine pages
- The appeal system is very paper-based at the moment with a growing focus on written witness statements in some jurisdictions. Statute and regulation underpins the decision; a written application is required; there is a written decision, followed by a written appeal application, with written procedure rules and often pre-hearing stages involving more documents
- Concern over levels of literacy. A government study in 2003 found that a 5% of all adults have literacy levels below the standard expected of an eleven year-old. 16% of all adults have levels below D-G grade for an English GCSE exam
- There is a direct correlation between literacy levels and poverty levels. Therefore a lot of people on welfare benefits are likely to fall within this literacy bracket

Benefits of Oral Hearings

- Oral Hearings provide a safety net for appellants who are unable to advance their case, experience confusion or are have been on the receiving end of ongoing administrative misunderstandings. Interactivity with a good tribunal chair can cut through a lot of this confusion
- Good oral interactivity within a tribunal – well handled, preceded by good case management, and a proper review of the decision, may be the fairest and most efficient way to resolve a case
- But a low level of literacy requires good, independent advice at all stages of the case. People who provide the oral contact within the tribunal system need training if they are to take over any of the oral interventions in the case. Important to have a high calibre of tribunal staff

Conclusion

- Law is becoming more and more complex for appellants. Oral hearings play an important part in this situation, and we are wary against building into the system a presumption that oral hearings should not take place

Tony Boorman

Principal Ombudsman and Decisions Director

Financial Ombudsman Service

Introduction

- Not in favour of paper hearings to the exclusion of everything else
- Will talk about what FOS does in practice, because it does represent, around this table, an extreme side of the oral hearings discussion
- FOS is a private not for profit company appointed by the Financial Services Authority to be a scheme operator to provide an ombudsman service
- Not itself a statutory or government body
- Settles individual disputes between consumers and financial firms. Service free to consumers
- Powers are to make awards against firms binding up to £100,000
- Decisions not binding on customers who may take case to court if they so choose
- Probably speak to about 1/3 million customers per year
- Take on 100,000 formal cases per year
- Cover a very broad range of financial products from banking services to pet insurance
- Topics? From simple to complex disputes, for example, from bounced cheques to disputes following out of the Equitable Life collapse
- Research shows in practice more 'Financial Times' than 'Sun' customers
- Because of this variation the FOS process is not about a particular single model answer for resolving disputes

Flexible process

- Based on concept of matching the significance of the case to the parties to the process which they adopt
- Considerable flexibility under their legal arrangements to shape their process as they basically see fit
- In essence, what does the FOS do? At one extreme as a customer all one has to do is sign a form. Customers can even have a form filled out by a member of staff over the phone
- The essence of the process is that the customer has to tell FOS what the problem is with a financial firm

- Interesting to compare this with colleagues who are round a table dealing with government departments

Regulatory aspect

- FOS *not* a regulator – but firms are regulated, including as to how well they deal with complaints
- FOS is important part of regulatory regime that ensures firms deal with complaints properly and all those involved learn from complaints in terms of systemic problems that may emerge
- Financial firms must 'signpost' to the FOS

Structure

- Stepping outside FOS process for a moment into structure: Chief Ombudsman and Chief Executive
- Over 1,000 members of staff, including 500 adjudicators
- The adjudicators resolve around 90% of cases without any direct involvement from the 'ombudsmen' - there are around 20 ombudsmen

Further details of process

- For adjudicator to judge how best to handle issue
- First identifies if complex and difficult or if straightforward, for example some simple complaints may be resolved by them a quick phone call to the bank
- Around 40% of cases in fact resolved through very informal practices
- Usual approach - this is what we think the complaint is about, would you like to settle it on this basis
- Or in different cases we use the authority of the office to say we think we know what the outcome of this dispute will be
- If informal approaches do not work adjudicators take the next step up
- This might involve writing to customer to explain why they have lost, usual length might be 1 ½ pages
- May invite the customer or the firm to come back if they disagree with that assessment
- Or may say that case has really very significant issues involved, is particularly complex, and might set out much more formal document. Usual length may be 10-30 pages. Letter is sent to parties and invite them both to comment on. This is all before a case will go officially to an ombudsman

- If a party doesn't like what they are seeing in writing, they can then push the case on to an ombudsman for a final decision
- Before any ombudsman makes a final decision, they will, to put it crudely, 'soften up' the side that has lost. Compare this to tribunals, where the answer comes out all in a rush at the end with a decision
- This might be why over 80% of customers are 'satisfied' with service
- This might be why, even when we turn them down, 20% of customers still express themselves as 'very satisfied' with the service
- What about 'hearings'? Because processes are so flexible oral hearings can be held, but chances are very slim. Only 1 oral hearing heard for every 10,000 cases
- In what circumstances? A hearing, though exceptional, would be held if it was thought that a case would be particularly hard fought. In some circumstances it might be better for the FOS to have a hearing in-house as opposed to letting the matter go on judicial review to the Administrative Court
- May also decide, off own bat, that a hearing would assist with identifying facts of case or making a judgement about the reliability of the evidence that is being presented

Examples of disputes

- Income protection policies: disputes can arise in this area about whether people are 'disabled' and cannot earn income
- How does the FOS resolve these cases? Sometimes these cases are complex medical disputes, sometimes about the veracity of the evidence customers are giving about their own circumstances. An adjudicator might phone the customer on an ombudsman's behalf, or the ombudsman might phone themselves might phone customer to probe their evidence. FOS might, very rarely, ask for a medical review of the papers to them
- In the end, these are disputes of whether financial firms have met the standard of proof required of them. They are resolved by a paper review of the medical evidence, without an oral hearing in the traditional sense, though there may be a phone interview with customers. This is not done by someone who is medically qualified, or even legally qualified, but by adjudicators, or an ombudsman in the few cases that get that far

Access

- Do the FOS processes prejudice those who are less able? Possibly, though that is true of all complaint processes

- FOS tries to minimise prejudice, and can do so in a number of ways. One example of better access, is that if a Cantonese speaker wants to speak to the FOS, they can do so on ½ hour's notice
- Further, much of the FOS service is accessible without putting much if anything in writing
- All complaint handling and justice systems worry about their accessibility, but the focus of the FOS is very much about allowing customers to access it in a simple way
- Does the FOS deny customers their day in court? Yes, but customers are generally satisfied, and if they want to go to court, generally they can
- Inconveniences of oral hearings for firms must also be taken into account
- Public access to processes. It is true the public cannot sit in to see an ombudsman exercise the authority, which Parliament has granted. But vast quantities of information is publicly available, for example, summaries of cases over last few years, and ombudsmen can talk for example to the Law Commissioners about the need for reform of financial law, and they can then go and view FOS case files and discover why that would be a good idea
- In that sense justice is 'seen' to be done
- Advantage of FOS process is consistency which is achievable because staff are accommodated in a single central office, with same computer systems, processes

His Honour Judge Michael Harris

President, Appeals Service

The Current Oral Hearings System

- Financial Services Authority model – would be interesting to see if the Tribunals Service can incorporate some aspects of best practice
- Some cases can only be resolved by judicial hearings
- And there will be a core of appellants who will want their day in court
- Whilst in agreement that everyone should have a right to an oral hearing – this should be a last resort, as often cases could be avoided or dealt with in other ways. Many appellants would prefer a resolution of their case which doesn't involve appearing at a tribunal
- It is often assumed that oral hearings 'provide the best service' that justice can offer – this may not be the right assumption, and we should be careful not to overvalue oral hearings
- Proceedings in courts and tribunals can often be 'artificial'. The oral hearing can be daunting and few are able to give their best
- A tribunal's ability to determine credibility by demeanour is questionable
- Often adversarial systems favour the party who has the best advocate
- There are no facilities to operate an inquisitorial system, at best we can 'enable' and this is perhaps what we should be doing in the tribunal world
- Not yet explored how oral hearings might be avoided – the White Paper has thrown down the gauntlet!

The Way Forward – Avoiding Oral Hearings?

- More likely to rise to meet this challenge if we reverse the assumption and assume that oral hearings provide the worst solution
- Continental systems do not place such a reliance on oral hearings
- Exploring how oral hearings could be avoided is part of a wider challenge. We should look at devising a system where those with a genuine grievance have an opportunity to put it right

A Starting Point

- It would be possible to reduce the number of people with genuine grievance if departments made better departmental decisions – should be firmly part of our agenda
- However, better departmental decisions may not reduce the number of grievances
- Best time to sort out a grievance is at beginning of process before things get out of hand
- This is when most people need help and currently don't receive it
- This is where we should put our resources
- Departments have a key role in getting this right – decisions must be clear, supported by adequate reasons, suitably expressed and sign-posted to the next stage
- Compulsory departmental review, as per the FSA would in many cases be appropriate
- At this stage applicants need advice – but where? There should be a Tribunals Advisory Service – should be there to supplement advice agencies
- A fundamental shift is needed towards early resolution of dispute
- Applicants want to know the answers to these questions: Do I have an arguable case? Should I provide further evidence?
- The Tribunals Service should have trained staff to deal with those questions
- Advice should be available via telephone / online / face-to-face
- Don't get rid of venues – needs to be a place to go to talk face-to-face
- Our challenge is to find solutions which do not involve a full-blown hearing
- Early intervention at this stage might produce better answers

Group Discussion

Alternative forms of oral interchange

The use of different ways to achieve oral interchange was discussed. There is scope for enabling oral interchanges in different ways with all the advances in modern technology. It is important that cases requiring certain levels of judicial training continue to be determined by an adjudicator with that training. It is important for the user to have a role in choosing the process by which a case is dealt with.

It is possible that there are other ways in which to interrogate evidence. For example, oral statements could be recorded so people do not have to attend hearings in person. If there was such a 'documentary' consideration of the case, and if something did not emerge that would have had the participant been there in person, then it may be necessary to give the decision-maker wider powers of review.

The problems associated with oral hearings are typically those associated with a traditional court model of oral hearing. Tribunals should therefore have greater freedom to deviate from the traditional model of an adversarial hearing because parties do not have 'equality of arms' to the same extent in tribunals. There is a good case for enabling tribunals to use their own expertise to decide what the most effective form of oral hearing is.

The role of oral interventions is fundamental to what the Information Commissioners do as an independent adjudicator with complainants and the bodies who are being complained about. Inspections play a vital role in what is otherwise a paper-based process in The Planning Inspectorate because they add value by allowing Inspectors to gather factual information only.

We should not be afraid to test some of the traditional justifications for the use of oral hearings. Studies show that an adjudicator's ability to assess the credibility of a witness by their demeanour is questionable. Having said that, it is important to remember that techniques such as cross-examination are effective in establishing the facts.

It should not automatically be assumed that the presence of a participant is to their advantage. For example the presence of a professional at their own disciplinary

hearing can paradoxically be to their disadvantage (if an adjudicator does not like what he sees).

Proportionate solutions

The just procedure for the resolution of a particular dispute is the one that is appropriate for the jurisdiction and the particular case within that jurisdiction. In that sense it is particularly important not to make generalisations about what is a just or what is an unjust procedure. The question of what is proportionate is closely related to the nature of the rights that are being enforced within a jurisdiction.

Oral hearings are much less appropriate where there is no representation on a point of law only. It is important to recognise that cost / benefit considerations will differ in different jurisdictions and that in some jurisdictions procedures may already be proportionate. It may be difficult to find successful alternatives to processes in some appellate jurisdictions that already operate without heavy reliance on the use of oral hearings.

It was observed that there is considerable scope to save costs and expedite proceedings in certain jurisdictions by streamlining panels according to the issue in question.

The concept of 'triage'

The use of a central location from which cases can be channelled into different dispute resolution procedures depending on the nature of the case was discussed. Concern was expressed that such filtering systems may not work effectively.

It was observed that the Lands Tribunal uses four different procedures depending on the nature of the case: special, standard, simplified, and written. Cases are channelled into a particular procedure at an early stage. It was acknowledged that there is a perception amongst some users of that paper-based hearings will be determined by less experienced adjudicators. However, it was noted that in that this is not the reality in the Planning Inspectorate and that the most experienced decision-makers dealt with cases being passed through a range of different procedures.

The potential benefit of a system that provides the user with better levels of advice at an earlier stage of a dispute was discussed. Providing enhanced advice in areas

such as tax and social security presents a formidable challenge in terms of resources due to the complexity of tax. It was observed that it is important to recognise the inherent conflict in one body undertaking both advice and adjudication functions.

Fundamental rights

Do citizens have a fundamental right to a traditional oral hearing in those tribunals that govern core state services? One observation was that individuals currently have a right to an *effective* appeal under Article 6 of the European Convention on Human Rights but that this does not equate to a right for individuals to impose personal procedural wishes.

When considering the right under Article 6 it was observed that it is important to consider the *entirety* of the process, or in other words the process looked at as a whole. It does not follow from this that an individual has a right to an oral hearing at every possible stage.

When developing an interpretation of Article 6 it is important to reflect that one of the motives behind the Article was to ensure that decisions were not being made behind closed doors. It was also observed that when Article 6 was first being drafted it was not intended that it would apply to administrative justice.