THE LEGGATT REPORT ON THE REVIEW OF TRIBUNALS

AND THE RECOMMENDATIONS UPON THE REMOVAL OF JUDICIAL REVIEW POWERS

CONSULTATION RESPONSE OF THE ADMINISTRATIVE LAW BAR ASSOCIATION ("ALBA")

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1. These submissions address the recommendations made by Sir Andrew Leggatt's Report ("the Report") that rights to seek judicial review of: (i) tribunal decisions; and (ii) those appellate bodies hearing appeals from such tribunals should be removed. This recommendation is part of a wider network of institutional, procedural and substantive proposed reforms that aim to improve the consistency, quality and speed of tribunal decision-making.

2. It is important to note that in its request for consultation responses the Lord Chancellor's Department does not see the changes in relation to the availability of judicial review as being necessarily anchored to or conditional upon the other reforms proposed. In the Summary to the Consultation document of August 2001 it is stated:

> *The Government seeks views on a number of other important recommendations in the Report, which do not depend on the establishment of a unified Tribunal Service. These recommendations concern:*
>
> *... second appeals, precedent and judicial review (paragraphs 27-29);*

3. The specific questions put by the LCD as to the Report's recommendations on judicial review are put as follows:

> *Second appeals, precedent and judicial review*
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> *27. At present, there is a right to a further appeal against the decisions of some tribunals, but not others. The grounds on which these 'second-tier' appeals can be made vary. Decisions by second tier tribunals sometimes bind future decisions by first tier tribunals in similar cases; and sometimes not. A few second tier tribunals have an equivalent status to the higher courts, so their decisions cannot be challenged in the courts by way of judicial review; most tribunals can be challenged in this way.*
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> *28. The Report recommends that:*
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> - *there should be a right to a further appeal to a second tier tribunal (and beyond that to the Court of Appeal) in all tribunal jurisdictions, but the grounds for a second appeal should*

be limited to points of law only (recommendations 95 & 98); this would create new appeal rights in some cases (for example Mental Health Review Tribunals) and limit the scope of existing appeal rights in others (for example immigration and asylum);

- *second tier tribunals should be able to specify that certain of their decisions are binding on the lower tier in future cases (recommendations 104-105); and*
- *tribunals should be expressly excluded from judicial review (recommendations 106-107).*

29. *The changes are intended to secure a more coherent system; clearer and more consistent decision-making; and a simpler, cheaper and quicker means of correcting flawed decisions where the only recourse now is judicial review.*

- *Do you agree with these recommendations?*
- *Are there jurisdictions that should not have a second tier appeal, for example because it would introduce unacceptable delay?*
- *Are there jurisdictions where the grounds for a second tier appeal should be wider than a point of law?*
- *Should only selected second tier decisions be binding; or, given that they are limited to points of law, should all second tier decisions be binding?*
- *Should tribunals be excluded from judicial review, or should only second tier tribunals be excluded; or should judicial review remain available as now?*

4. ALBA's representations are primarily a response to the last question, although they touch in less depth upon some of the other questions put. These representations contain the following sections:

(a) general approach

(b) A critique of the ouster proposals recommended by Sir Andrew Leggatt.

(c) An analysis as to whether these changes should be linked in any event only to the wider reforms proposed in the Report or can be seen as "free-standing";

(d) A very general commentary on the structure of the proposed changes to the tribunal and appellate structure.

5. ALBA considers that limiting all appeals to a second tier tribunal to a point of law only needs to be considered with care in particular areas of law in the light of the issues, their importance and the degree to which it can be safely assumed that the facts have been well found at first instance. This is a matter of particular concern in the area of immigration, especially asylum, where the issues may be of fundamental importance to the individual and a review of the findings of fact may well be an important safeguard against error and changes

in circumstances. For instance, findings as to whether or not a country is a "safe country" or whether there is a well-founded fear of persecution upon return to the claimant's country of nationality may be altered substantially by intervening events.

(a) General approach

6. The established rule is that a claim for judicial review will not be entertained if the claimant has an adequate alternative remedy available to him. That rule has particular force in cases where Parliament has provided a statutory right of appeal.

7. In practice to exclude any possibility of judicial review of the acts or omissions of a tribunal by statute will be to exclude judicial review in those cases in which there is no adequate alternative remedy. In ALBA's view legislation to exclude the jurisdiction of the Administrative Court in such cases would create the possibility of avoidable injustice and of uncontrolled abuse of public power. For this reason ALBA is generally opposed to ouster provisions in principle.

8. There are currently a number of reasons why judicial review may be used even though a case is one in which a right of statutory appeal may exist. For instance:

(a) The right of appeal does not deal with the matter in issue. Thus, for example, applications may be made by way of judicial review to stay proceedings before a tribunal where they would cause a real risk of serious prejudice that is liable to cause injustice in other proceedings, whether civil, disciplinary or criminal.

(b) The tribunal may refuse to recognise or decline to exercise its jurisdiction.

(c) A tribunal's procedural decisions may not be the subject of appeal or the subsequent exercise of a right of appeal against the tribunal's final decision in such cases may provide inadequate protection.

(d) It may not be reasonable to require the exercise of a specific right of appeal. For example a tribunal may be bound by a decision of a superior tribunal on a point of law in a case in which immediate relief is required or a test case is required to be rapidly determined on a point of law authoritatively so as to establish how many cases should be treated.

(e) Rights of appeal may only be capable of being exercised from abroad in circumstances in which that ought not reasonably to be required.

(f) In addition third parties who may be adversely affected by particular decisions and be entitled to be heard before they are made may themselves have no right of appeal.

(g) The Tribunal has no jurisdiction to give a remedy in damages or other remedies that would be required under section 8(1) of the Human Rights Act 1998 and it is undesirable that there should be a multiplicity of legal proceedings.

These examples are not intended to be exhaustive.

9. It may be possible to seek to remedy some of the deficiencies in the tribunal system that may currently justify the intervention of the Administrative Court on claims for judicial review. The grounds upon which there are rights to appeal may be drawn more widely. The proposed Appellate Division might be empowered to intervene before the conclusion of the appeal to the tribunal at first instance. The overall tribunal system might be better organised to identify and deal with test cases and cases in which a rapid decision is required. Generally speaking there is no reason to oppose any such reforms.

10. But any such reforms do not justify excluding judicial review regardless of the circumstances. The more adequate the remedies provided by the tribunal system the fewer cases there will be in which that system does not provide an adequate alternative remedy to judicial review. To exclude any possibility of judicial review in respect of the tribunal system, however, is to assume that it will invariably provide an adequate remedy. This requires a confidence that cannot be justified in the effectiveness of any prospective reforms and the omniscience of those making them to anticipate accurately what will be required in all cases in the future.

11. Sir Andrew Leggatt's report put forward a number of reasons for excluding judicial review in the context of the new system proposed in his report. He thought it undesirable for parties to a tribunal case in effect to have the choice between an appeal to the Appellate Division or judicial review and that, as the approach of the Court to alternative remedies "*has given rise to some problems in the past*", "*it would be preferable to maintain a clear distinction*" in the context of the new proposed system [6.35]. He considered that systematic arrangements for the setting of precedent by the Appellate Division should lead to a change in the relationship between tribunals and the supervisory jurisdiction of the High Court [6.16, 6.32]. As the Senior President and a number of other presidents who can be expected to hear the most difficult cases will be judges of the High Court, he also considered that it would be "*inappropriate to subject these Presidents to review by another judge of equal status*" [6.32]. Finally he thought that there

might be a problem in reducing the current status of the EAT and Transport Tribunal if incorporated in the new system [6.32].

12. In ALBA's view none of these reasons justifies the exclusion of any possibility of judicial review whatever the circumstances.

13. Sir Andrew Leggatt does not appear to criticise the established rule that that a claim for judicial review will not be entertained if the claimant has an adequate alternative remedy available to him. If there have been any problems in the past in relation to the application of that rule by the Administrative Court itself when alternative remedies exist, they can and should no doubt (if they exist) be addressed by the judges of that Court and the Court of Appeal. In ALBA's view any "*problems*" which may have occurred in the past are more likely to relate to misconceived applications for judicial review.

14. While it is no doubt impossible wholly to exclude the possibility of misconceived claims for judicial review being made when an adequate alternative remedy exists, excluding judicial review completely when there is no adequate alternative remedy is not a justifiable response to any such problem. It is not acceptable in democratic society under the rule of law to deny justice or to leave uncontrolled an abuse of public power merely because there is a possibility that misconceived claims may be made to a court. The Administrative Court has powers to deter any such claims that it can use in cases where that is justified. The increased use of costs sanctions (including, where appropriate, increasing the number of costs awards made against the Legal Services Commission for funding misconceived cases) would appear to be a prime weapon in the reduction of such misconceived applications, particularly where rights of appeal are improved to provide an adequate remedy.

15. Sir Andrew Leggatt does not suggest that the Tribunal system should be rendered an insulated self-contained system over which the courts have no control. His proposals involve a right of appeal to the Court of Appeal from the Appellate Division on a point of law [6.12]. But in any event there is nothing to suggest that the availability of judicial review when there is no adequate alternative remedy has had any materially adverse effect on the setting of precedents by second tier tribunals now. Nor is there any reason to fear it would do so in the future.

16. The other reasons advanced have even less force. There are already cases in which judges consider decisions of others of equal (or higher)[1] status without apparent difficulty. If this

[1] The various judicial reviews of the inquiry presided over by Lord Saville present an obvious example.

was perceived to be a genuine problem, however, such cases could be dealt with by a Divisional Court consisting of a Lord Justice of Appeal and a puisne judge, a composition not unlike the Court of Criminal Appeal. Equally, it is hard to understand what problem in principle there should be in reducing the status of the EAT or Transport Tribunal if they are incorporated in the new system or why any such perceived problem should justify excluding judicial review if there is no adequate alternative remedy.

17. In ALBA's view the preferable approach in principle is to improve the tribunal system so as to ensure it provides a more adequate system of remedies and to rely on judges of the Administrative Court to ensure that the system of judicial review is not used as a substitute for that system in any case in which it provides an adequate remedy. To exclude judicial review even in those cases in which the tribunal system does not provide an adequate remedy is not justifiable.

(b) The ouster proposals as recommended by Sir Andrew Leggatt

18. Some of these difficulties appear to be recognised in the form of the Report's proposals, at least in respect of first tier tribunals.

19. In relation to first tier Tribunals Sir Andrew Leggatt recommends a statutory provision "*prohibiting review of their decisions where there was a right of appeal which has not been exercised*" [6.36]. Such a provision would not oust judicial review in all cases. Many of the cases in which judicial review is currently available may not be excluded by such a provision. But the ouster's existence will change the focus of argument if a claim for judicial review is made. Instead of asking whether or not there is an adequate alternative remedy in the circumstances of a particular case, the argument will be focused on whether the case falls within the terms of the ouster provision. Such a change would be regrettable since it will divert attention from what should be the relevant question in substance. Nor is it clear what change in substance in the law it is designed in practice to achieve: if a person has a statutory right of appeal that will be an adequate remedy in most cases.

20. However, the provision as recommended would exclude judicial review in cases in which there is a right of appeal but it is one which it is not reasonable to expect the person concerned to use in all the circumstances or is inadequate for some other reason - for example the right may only be capable of being exercised from abroad in circumstances in which it is unreasonable to expect the person to travel there. For these reasons ALBA opposes the suggested provision.

21. The final terms of any such provision would need careful examination. Thus, it is not clear whether judicial review would be available if permission to appeal had been refused, the only area in respect of which Sir Andrew Leggatt specifically identified any specific problems in practice [6.27]. As currently drafted, such a person would not be excluded from judicial review as he would not have a right of appeal that had not been exercised (but instead a right of appeal that had been unsuccessfully exercised).

22. There is a danger that the present complaints about immigration judicial review (specifically in relation to IAT refusals of permission to appeal) may distort unreasonably the general relationship between the Administrative Court and the tribunal system as a whole. Rather than remove the important safeguard of judicial review altogether (particularly where vital interests are at stake, as for example in asylum), we believe this particular perceived problem should be solved by individual measures, in particular the appropriate use of the Court's powers on costs and better control of publicly financed cases by the LSC.

23. In relation to the Appellate Division, Sir Andrew Leggatt recommends modelling an ouster clause on section 29(3) of the Supreme Court Act 1981. Under this provision the High Court has a judicial review jurisdiction over the Crown Court other than in respect of that Court's jurisdiction in matters '*relating to trial on indictment*'. This is a strange model to embrace. It has generated a significant number of confusing judgements that can hardly be said to reflect well on the adequacy of the clarity of the provision. Moreover the recommendation leaves wholly unclear what the equivalent to '*matters relating to trial on indictment*' would be in relation to the Appellate Division. But, apart from these important matters of form, it is appears that Sir Andrew Leggatt's proposal for any ouster provision for the Appellate Division is that it should be wider than that which he recommends for the first tier tribunal. For the reasons given above, ALBA opposes this wider provision.

24. If any provision is to be introduced, however, ALBA would recommend that it should apply both to Tribunals and the Appellate Division and should be one which excludes judicial review of any decision in respect of which there is a right of appeal which has not been exercised unless:

(a) it is unreasonable in the circumstances for that right to be exercised; or

(b) it was in the public interest to entertain the application.

(c) Free-standing reforms

25. ALBA is concerned about the apparent stance of the LCD that these changes to judicial review should be seen as somehow free-standing. Moreover, in its consultation document the questions asked by the LCD appear to assume that Sir Andrew Leggatt has recommended complete exclusion from judicial review of all tribunals, first and second tier.

26. Such a complete exclusion ALBA opposes for the reasons given above.

27. ALBA also considers that exclusion of judicial review, which was not recommended by Sir Andrew Leggatt in the absence of the reforms that he proposed to the tribunal service, should not be introduced in their absence.

28. Much of the Report serves to identify problems and shortcomings in the existing Tribunal structure, against which judicial review currently serves to provide "back stop" protection after the exhaustion of all alternative remedies. The proposal in the Report that the availability of judicial review should be limited is plainly made in the context of the proposed improvement to both the institutional make-up of the tribunal system, its procedures, and (via the improved precedent system) its substantive law. It would, in ALBA's view, be a complete misreading of the Report to view the proposed restrictions upon judicial review as other than anchored to these reforms. Given the deficiencies identified (both in the Report and above) ALBA believes that any free-standing proposal that judicial review rights should be limited should be rejected.

(d) General remarks on the wider reforms

i. Starred Decisions

29. Sir Andrew Leggatt has recommended that a system of designating some decisions of the Appellate Division as binding should be adopted. The decision as to which decisions are to be binding is recommended to be taken by the President of the appellate Tribunal concerned subject to the approval of the Tribunals Board [6.26]. The Tribunals Board is to comprise the Senior President, the Presidents of the appellate tribunals who are judges of the High Court and the Presidents of first tier Divisions, together with the Chairman of the Council of Tribunals, the Chairman of the Tribunals Committee of the Judicial Studies Board and the Chief Executive of the Tribunals Service [6.40].

30. The reason for having a system of precedent is, as Sir Andrew Leggatt observed, that it enhances "*the prospects for clear and consistent decision making across the System*" [6.22]. However, he rejected the approach that all decisions of the Appellate Division should be binding on first tier tribunals: "*it would require users to be aware of all relevant decisions, to know what law would be applied to their case*" [6.24].

31. One problem with any system of selected precedents is that it leaves opaque the status of those that are not selected. Sir Andrew Leggatt refers to the possibility of limiting the cases that can be cited in argument. But completely preventing the citation of non-starred authorities is not an obviously desirable solution. There seems little reason to deny a first tier tribunal or indeed the Appellate Division the benefit of any (well)-reasoned decision of the Appellate Division that is in point. An important reason for the existence of a second tier tribunal dealing with appeals on a point of law is precisely to give guidance on the law that is applicable in other cases. Indeed, far from promoting clear and consistent decision making across the system such an approach would be likely to maximise the prospect for inconsistent decision making on points of law.

32. Without further explanation and clarification such a system of exclusive starred precedent would also be liable to bring the system into disrepute, particularly from the perspective of the lay people that the tribunal system is meant to be serving. A person in possession of a non-starred decision of the Appellate Division in point is likely to find any rule that he cannot cite it to support his own argument on any point of law incomprehensible and he will not understand why a first tier tribunal or the Appellate Division may depart from that earlier decision without at least considering it and explaining why they may disagree with it.

33. However, if non-selected decisions of the Appellate Division may be cited (albeit, with such authorities being treated as non-binding), it is inevitable that first tier tribunals and the Appellate Division itself will be influenced by them, in some cases decisively. This already happens in the field of immigration. However, such an approach has the disadvantage that some parties (particularly the Home Department) have huge informational advantages, whereas other parties are ignorant as to the latest legal developments. It is important to recognise, therefore, that users of the system will need to be aware of them to know what the law is which is likely to be applied in their case. This has important implications for the general availability of Appellate Division decisions (both starred and unstarred) and the system of legal advice and representation which may be required to enable cases to be dealt with justly.

34. In ALBA's view any system of starred decisions must have an appropriate mechanism for selecting which decisions on points of law are to be treated as binding. ALBA has significant reservations about the appropriateness and transparency of the method of selection proposed.

(a) No criteria are suggested by reference to which decisions should be selected.

(b) Any system which is based solely on the views of the President of the relevant appellate tribunal gives a disproportionate influence to one person, however senior.

(c) ALBA has reservations about whether the requirement for the President to obtain the approval of the Tribunal Board provides a sufficient safeguard given its proposed composition. Many of those involved may have no familiarity with the law in the particular appellate tribunal. Indeed ALBA considers it objectionable in principle that any person who is not a member of the relevant appeal tribunal (and in particular any person who does not even hold a judicial appointment) should decide which of that appeal tribunal's decisions should be binding.

35. Transparency is also important in this connection because such a system has the disadvantage, as Sir Andrew Leggatt recognised, that "*it allows the selectors a power that is potentially open to abuse*". Accordingly in ALBA's view any system of starred, binding decisions must incorporate a system which identifies the criteria by reference to which decision are to be chosen; makes the decision one for the members of the relevant appeal tribunal as a whole; and which requires reasons to be given for the choice of decisions. Such a system would be more transparent than that recommended.

36. ALBA recognises, however, that such a system will still have a significant disadvantage when a choice has to be made between conflicting decisions. If ALBA's recommendation was accepted, reasons would have to be given why one decision was right and another wrong in law. But it is inevitable that a decision that one Appellate Division decision as to the law is to be preferred to another is an important decision in law. It may be reached without open argument in public. It is also a decision which would not itself be susceptible to appeal. In ALBA's view it is preferable for the resolution of any difference in the view taken of the law by differently constituted appeal tribunals to be left either to the Court of Appeal or to a specially constituted enlarged Appellate Tribunal to resolve after open argument. Accordingly ALBA considers that any system of starred decisions should not be used to

decide which of two or more conflicting decisions of the Appellate Division should be binding.

37. Against this background there are two questions important questions of principle: (i) whether a system of starred decisions is to be preferred to one in which all Appellate Division decisions are binding and (ii) what role should have starred decisions have.

38. One reason why in some jurisdictions it has been decided that not all second tier appellate decisions should be binding is, as Sir Andrew Leggatt recognised [para 6.20] that "*there have been concerns about the consistency and quality of decisions, so that selectivity has a valuable role*". In substance this is a recognition that in practice the quality of decision-making is not always what it should be. No doubt adoption of some of the reforms proposed by Sir Andrew Leggatt should help alleviate some of those concerns. Nonetheless, there also remains a significant possibility that decisions on important points of law may be taken in the Appellate Division without sufficient legal argument given the approach to legal aid and representation (see our recommendations below) in the Appellate Division recommended. The number of cases that will have access to the Court of Appeal in the event of error will inevitably be limited. In such circumstances ALBA is opposed to any proposal to make all decisions of the Appellate Division binding precedents.

39. With the above reservations in mind, ALBA believes that a system of starred decisions has a useful role in identifying to users the most important decisions on points of law taken by the Appellate Division. But it should not be used to create decisions that are binding precedents. In particular the resolution of any difference in the view taken of the law by different appeal tribunals should be left either to the Court of Appeal or a specially constituted enlarged Appellate Tribunal to resolve after open argument.

(ii) Legal Aid

40. ALBA accepts that many tribunal cases will not require much detailed knowledge of the law. But, as Sir Andrew Leggatt recognised, some second tier tribunals, notably in social security and immigration, already have to "*deal with increasingly complex case law*". The Report has considered the issues of representation and CLS assistance at paragraphs 4.21 to 4.28. ALBA would make the following points:

(a) Removal of the safety net of judicial review leaves even less margin for error in the hearing before tribunals and the Appellate Division, potentially making the

availability of legal assistance yet more crucial. Many, if not all tribunals made Article 6 ECHR determinations. The availability or not of CLS funding raises real "access to court" issues, particularly where grounds of appeal are limited to error of law grounds.

(b) ALBA would wholly endorse the recommendation of the Report [4.22] that CLS funding should be more widely available. However, ALBA would query that CLS should be made available only on an "exceptional basis". This sets the test too high. ALBA would recommend that both the President and senior members of the relevant Tribunals, together with practitioners and other representative groups operating in that particular tribunal, should be consulted to draw up criteria for each tribunal. Whilst ultimately the test should be the needs of one particular applicant in one particular case, in many instances that is likely to be substantially the product of the tribunal in which the case is brought or the type of case which is brought (e.g. a sexual harassment case in which good cross-examination is central to the prospects of success).

(c) As indicated above, rather than ousting the availability of judicial review completely ALBA would recommend that the CLS funding rules for judicial reviews of tribunal and Appellate Division decisions be reappraised to prevent the frequent prosecution under CLS funding of cases that are either obviously hopeless or obviously unlikely to succeed.