

## ARTICLES

### TRIBUNAL JUSTICE AND PROPORTIONATE DISPUTE RESOLUTION

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*ABSTRACT.* The tribunals system in England and Wales has been transformed by the entry into force of the Tribunals, Courts and Enforcement Act 2007; among other things, tribunals are now located more firmly and explicitly than ever before within the judicial branch. Questions concerning the relationship between tribunals and regular courts fall to be confronted afresh within this new institutional landscape. Those questions form the focus of this article, which is particularly concerned with the issue recently considered by the Supreme Court in *Cart* whether, and if so to what extent, decisions taken within the tribunals system (by the Upper Tribunal) should be susceptible to judicial review by the High Court. In *Cart*, emphasis was placed upon the concept of “proportionate dispute resolution” as a means by which to delimit regular courts’ oversight of tribunals’ decisions, raising fundamental questions both of legal doctrine (relating to the relevance of the orthodox doctrinal tools of administrative law) and legal policy (concerning the degree of error on the part of a tribunal that a higher court should tolerate in the interests of the efficient, or proportionate, use of judicial resources).

**KEYWORDS:** *Judicial Review; tribunals; Tribunals, Courts and Enforcement Act 2007; proportionate dispute resolution*

#### I. INTRODUCTION

The delivery of administrative justice through tribunals comprises perhaps the largest part of the contemporary legal system. Tribunals annually determine a higher volume of cases than the combined output of both the civil and criminal justice systems. In 2010, tribunals

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heard 650,000 appeals, whereas the equivalent volumes for criminal justice and civil justice were 223,000 and 63,000 respectively.<sup>1</sup> In short, tribunals are “big business”. Their importance is also underscored by the large-scale reform of tribunals introduced by the Tribunals, Courts and Enforcement Act 2007 (“TCEA”).<sup>2</sup> By substantially implementing the recommendations of the Leggatt Report,<sup>3</sup> the Act created not just a *new* tribunals system, but the *first* such system, in that it replaced a disjointed collection of separate tribunals with a single juridical structure. The TCEA also marked the conclusion of the judicialization project that was triggered in earnest by the Franks Report, which famously deprecated the characterization of tribunals as administrative bodies.<sup>4</sup> As the then Senior President of Tribunals, Sir Robert Carnwath (as he then was), noted, the TCEA effects “a profound constitutional change, completing the process of embedding the tribunals judiciary in the judicial system”.<sup>5</sup> Against the background of these developments Peter Cane has argued that tribunals are now “best understood not as substitutes for courts but rather as a species of court”.<sup>6</sup>

Yet whatever the similarities today between tribunals and (regular) courts, a question remains as to the relationship between them. According to Carnwath that relationship can now be conceived of in “anti-hierarchical terms”, in the sense that the new tribunals system is, or should be, substantially free from control by the higher courts.<sup>7</sup> Viewed in less positive terms, however, freedom from *control* may imply freedom from *correction*. To what extent should the courts be regarded as guarantors of standards to which the tribunals system is expected to adhere – and to what extent is the very notion of such judicially-divined standards an affront to the institutional status and credentials of tribunals? Such questions are not unique to the present context: striking the balance between judicial intervention and agency autonomy is the enduring dilemma of administrative law. Yet those questions, as they pertain to tribunals, now fall to be confronted afresh in the light of the novel characteristics – further elaborated below – of the new tribunals system.

The purpose of this article, then, is to examine the new relationship, established by the TCEA, between courts and tribunals. In doing

<sup>1</sup> Administrative Justice and Tribunals Council, *Securing Fairness and Redress: Administrative Justice at Risk?* (London 2011), 13. The figure for criminal justice includes cases decided at both Crown Court and magistrates’ court level, but excludes guilty pleas.

<sup>2</sup> The jurisdiction of the tribunals system created by the TCEA extends principally to England and Wales, but there is UK-wide jurisdiction in relation to certain subject areas (e.g. asylum and immigration, and tax) that are “reserved” under the terms of the devolution settlement.

<sup>3</sup> Sir Andrew Leggatt, *Tribunals for Users: One Service, One System* (London 2001).

<sup>4</sup> *Report of the Franks Committee on Administrative Tribunals and Enquiries* (Cmnd 218, 1957) at [40].

<sup>5</sup> Senior President of Tribunals, *Second Implementation Review* (London 2008), para 11.

<sup>6</sup> P. Cane, *Administrative Tribunals and Adjudication* (Oxford 2010), 72.

<sup>7</sup> R. Carnwath, “Tribunal Justice – A New Start” [2009] P.L. 48 at 57.

so, we will examine in detail two recent decisions of the Supreme Court – *Cart*<sup>8</sup> and *Eba*.<sup>9</sup> We will pay particular attention to the way in which those cases demonstrate clear approval, at the highest judicial level, of the concept of proportionate dispute resolution (“PDR”) as a central principle of administrative justice. According to this notion – which has hitherto been advanced by government<sup>10</sup> – the means and costs of resolving disputes should be proportionate to the importance and nature of the issues at stake. Serious and important disputes should call for more rigorous dispute resolution procedures than trivial and unimportant disputes.<sup>11</sup> The prominence accorded by *Cart* and *Eba* to PDR is significant at two levels. First, the relationship between PDR and classical legal doctrine such as jurisdiction is uneasy (or at least unclear). To what extent do such doctrinal tools remain relevant in the contemporary world of mass administrative justice and PDR? Second, PDR is employed in *Cart* to answer a broader, underlying issue of legal process: is there an acceptable degree of legal error by a lower court or tribunal that a higher court should willingly tolerate in the interests of the efficient – proportionate – use of judicial resources? In short, are there some legal errors that must be accepted because the costs of correcting them would be excessive? Before examining these matters, it is first necessary to say something more, by way of background, about both the new tribunals system itself and the recent cases in which the Supreme Court has begun to explore the relationship between that system and the courts.

## II. THE NEW TRIBUNALS SYSTEM

The high volume of tribunal appeals generates significant pressure for onward challenges from the tribunals to the higher courts. Prior to the TCEA, tribunals were “overseen” by courts in the sense that tribunals’ decisions could typically be examined by courts, albeit through a confusing and incoherent system of onward challenges.<sup>12</sup> Given their (former) characterization as adjuncts of the administrative process, tribunals were regarded with the “deepest suspicion” and were often perceived as the poor relations of courts.<sup>13</sup> The conventional

<sup>8</sup> *R. (Cart) v Upper Tribunal; R. (MR (Pakistan)) v Upper Tribunal* [2011] UKSC 28, [2011] 3 W.L.R. 107 (hereinafter “*Cart*”).

<sup>9</sup> *Eba v Advocate General for Scotland* [2011] UKSC 29, [2011] 3 W.L.R. 149 (hereinafter “*Eba*”). In this article, reference is principally made to *Cart*. The conclusions reached in *Eba* were consistent with those reached in *Cart*, but *Cart* contains more detailed judicial discussion of relevant issues.

<sup>10</sup> Department of Constitutional Affairs, *Transforming Public Services: Complaints, Redress and Tribunals* (Cm 6253, 2004), ch. 2.

<sup>11</sup> See further M. Adler, “Tribunal Reform: Proportionate Dispute Resolution and the Pursuit of Administrative Justice” (2006) 69 M.L.R. 958.

<sup>12</sup> H. Woolf, “A Hotchpotch of Appeals – The Need for a Blender” (1988) 7 C.J.Q. 44.

<sup>13</sup> *Gillies v Secretary of State for Work and Pensions* [2006] UKHL 2, [2006] 1 W.L.R. 781 at [36] (Lady Hale).

wisdom – which in large part reflected the primacy of *ordinary* courts within the Diceyan conception of the rule of law<sup>14</sup> – had been that courts must stand as guarantors of the tribunals system: tribunal adjudication was rendered legitimate in part because of supervision by the higher courts; and allowing tribunals to exceed their jurisdiction would be to abandon the rule of law.<sup>15</sup> However, the new tribunals system possesses a number of interlocking features which present that conventional wisdom in a new context and may cast doubt upon it.

First, the reforms secure the judicial independence and status of tribunals to an unprecedented degree. This has been effected, *inter alia*, by enhancing the security of tenure<sup>16</sup> of tribunal judges,<sup>17</sup> making them subject to the same guarantee of judicial independence as court judges,<sup>18</sup> and shifting administrative responsibility for tribunals from their “sponsoring” government departments (whereby tribunals were funded by the very organizations against whose decisions they heard appeals) to HM Courts and Tribunals Service, an executive agency of the Ministry of Justice. Further judicialization may come with the possible creation of a single judicial head of the courts and tribunals judiciary.<sup>19</sup>

Second, the TCEA created a new juridical structure. Approximately 20 individual tribunals have so far been transferred into the First-tier Tribunal (“FTT”). Although a single legal entity, the FTT is divided into six chambers, many of which are subdivided into several jurisdictions.<sup>20</sup> The Upper Tribunal (“UT”), which determines appeals on points of law against the FTT’s decisions, is divided into four chambers. This structure reflects Leggatt’s desire for both jurisdictional flexibility – judges can be moved between jurisdictions and chambers, with obvious efficiency implications – and coherence. The latter objective is advanced by the creation of consistent pathways – as shown in the diagram – through the system: thus the FTT can review its own decisions (on its own initiative or at the request of a party),<sup>21</sup> as can the UT.<sup>22</sup> Most FTT decisions can be appealed on a point of law to the UT,<sup>23</sup> with an onward right of appeal against most UT decisions (again on points of law only) to the Court of

<sup>14</sup> A.V. Dicey, *An Introduction to the Study of the Law of the Constitution* (Basingstoke 1959), pp. 194–5.

<sup>15</sup> See the Franks Report, note 4 above at [107]; *R v Medical Appeal Tribunal, ex parte Gilmore* [1957] 1 Q.B. 574, 586 (Lord Denning M.R.).

<sup>16</sup> TCEA, sch. 2, paras 3–4; sch. 3, paras 3–4.

<sup>17</sup> TCEA, ss. 4–5; sch. 2, para 1; sch. 3, para. 1.

<sup>18</sup> Constitutional Reform Act 2005, s. 3(7A) and sch. 14.

<sup>19</sup> Senior President of Tribunals, *Annual Report* (London 2011), pp. 6–7.

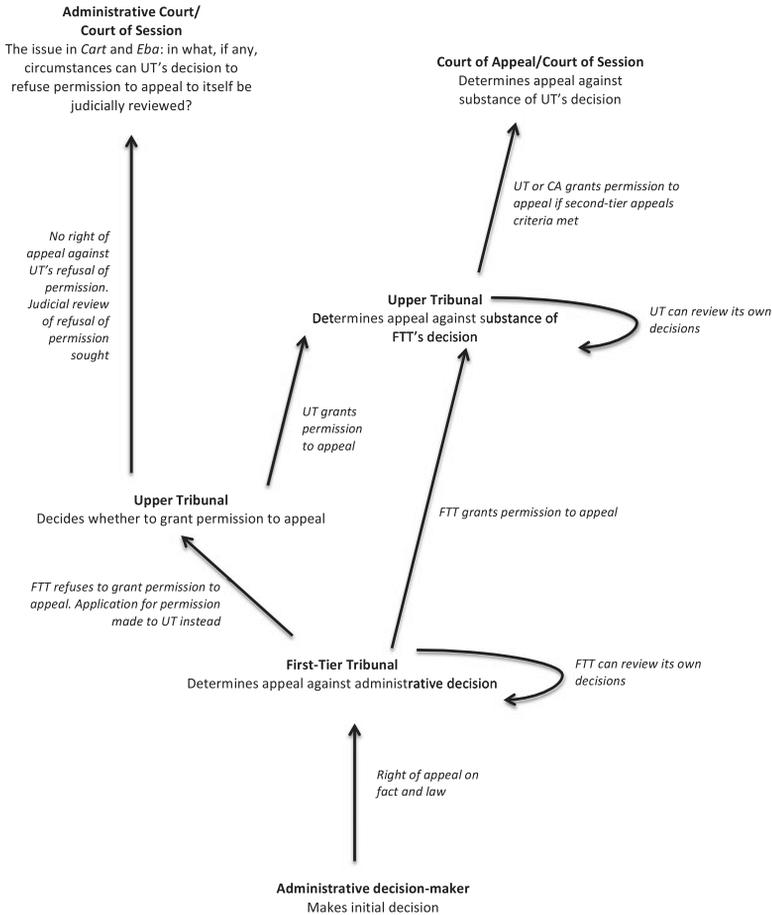
<sup>20</sup> For instance, the Health, Education and Social Care Chamber consists of four jurisdictions: Care Standards, Mental Health, Special Educational Needs and Disability, and Primary Health Lists.

<sup>21</sup> TCEA, s. 9.

<sup>22</sup> TCEA, s. 10.

<sup>23</sup> TCEA, s. 11.

Appeal.<sup>24</sup> However, that onward right of appeal is highly constricted, in that the normal second-tier appeal criteria apply: permission to appeal is only to be granted in cases which raise “some important point of principle or practice” or where there is “some other compelling reason”.<sup>25</sup>



Third, the UT has been invested with a set of characteristics that set it substantially apart from tribunals as traditionally conceived. Designated a “superior court of record”, the UT has a distinctive role as a strong and dedicated appeal body which can provide judicial

<sup>24</sup> TCEA, s. 13.

<sup>25</sup> TCEA, s. 13(6); Appeals from the Upper Tribunal to the Court of Appeal Order, SI 2008/2834. The second-tier appeal criteria have been applied to civil appeals since the Access to Justice Act 1999, s. 55.

leadership to the FTT.<sup>26</sup> The intention is that the UT will play an innovative and defining role in the new system, occupying a position equivalent to that of the Administrative Court.<sup>27</sup> To this end, the UT has taken the lead in providing, through lead cases, guidance to assist the FTT.

The status of the UT is augmented in a number of further respects. First, all High Court and Court of Appeal judges are *ex officio* members of the UT (as well as the FTT);<sup>28</sup> some have sat regularly in the UT (Immigration and Asylum Chamber) thereby directly contributing to the quality of its decisions. Second, three UT Chamber Presidents are High Court judges. Third, there has been the developing “tribunalisation” of judicial review through the UT. There is a clear recognition in the TCEA that many judicial review cases which raise ordinary legal issues can be more appropriately and conveniently dealt with by the UT because of its expertise in particular areas of law. The Act imbues the UT with powers of judicial review that are largely identical to those of the High Court, save that they are exercisable only in relation to prescribed matters.<sup>29</sup> Indeed, the UT has *exclusive* judicial review jurisdiction in relation to certain matters (in the sense that the High Court is obliged to transfer cases concerning such matters to it),<sup>30</sup> including those FTT decisions against which no right of appeal exists.<sup>31</sup>

Parallel with these reforms have been significant developments in the Administrative Court. Prompted by uneven geographical distribution of judicial review claims, that court has recently been regionalised.<sup>32</sup> The court’s caseload has also increased significantly over recent years, which has produced delays and an evident desire for the court to focus its limited resources. One means of doing this has been to transfer some of the judicial review caseload to the UT. Some low-volume categories of judicial review were transferred early on.<sup>33</sup> In 2011, the transfer of an especially high-volume area – asylum fresh claim judicial reviews, of which there have been around 1,000 annually – relieved more of the pressure on the Administrative Court.<sup>34</sup>

<sup>26</sup> TCEA, s. 3(5).

<sup>27</sup> Ministry of Justice, *Transforming Tribunals* (London 2007), 36.

<sup>28</sup> TCEA, ss. 4(1)(c) and 5(1)(g) read with s. 6(1).

<sup>29</sup> TCEA, ss. 15–21 and Senior Courts Act 1981, s. 31A.

<sup>30</sup> Senior Courts Act 1981, s. 31A. And see TCEA, s. 20 and Judicature (Northern Ireland) Act 1978, s. 25A in respect of transfers from the Court of Session and the Northern Ireland High Court respectively.

<sup>31</sup> Practice Direction (Upper Tribunal: Judicial Review Jurisdiction) [2009] 1 W.L.R. 327.

<sup>32</sup> The May Committee, *Justice Outside London: Report of Judicial Working Group* (2007); S. Nason, “Regionalisation of the Administrative Court and the Tribunalisation of Judicial Review” [2009] P.L. 440.

<sup>33</sup> See Practice Direction (Upper Tribunal: Judicial review jurisdiction) [2008] W.L.R. (D) 336 (concerning judicial reviews relating to criminal injuries compensation) and *R. (FZ) v Croydon London Borough Council* [2011] EWCA Civ 59, [2011] P.T.S.R. 748 at [31]-[32] (concerning asylum age assessment judicial reviews).

<sup>34</sup> Borders, Citizenship and Immigration Act 2009, s. 53; Practice Direction (Upper Tribunal: Judicial Review Jurisdiction) (No 2) [2012] 1 W.L.R. 16; Senior President of Tribunals, Practice

What this suggests is that the UT's role is, at least in part, a function of two factors: its own expertise; and the caseload pressures of the Administrative Court.

It was against this background that the Supreme Court in *Cart* considered the nature of the relationship between courts and tribunals today. The narrow question in *Cart* was this: could a party unsuccessful before the FTT and who had been refused permission to appeal to the UT then seek judicial review in the Administrative Court of that refusal? However, this narrower question inevitably raised wider issues: what is, and what should be, the relationship between the tribunals and the courts? And, what sort of factors – legal doctrine or policy considerations – shape that relationship?

### III. OUSTER CLAUSES, “SUPERIOR COURTS OF RECORD” AND THE CONSTITUTIONAL STATUS OF JUDICIAL REVIEW

Those wider issues would not have fallen for consideration at all in *Cart* had the boldest of the arguments concerning judicial review of the UT met with judicial agreement. The argument was that by designating the UT a “superior court of record”, Parliament had excluded any possibility of judicial review.<sup>35</sup> This argument was, however, as Lady Hale later remarked,<sup>36</sup> “comprehensively demolished” by Laws L.J. at first instance. Laws L.J. endorsed the uncontroversial view that judicial review can be excluded “only by the most clear and explicit words”, as Denning L.J. put it in *R. v Medical Appeal Tribunal, ex parte Gilmore*.<sup>37</sup> Statutorily designating a body as a superior court of record, pointed out Laws L.J., “says nothing on its face about judicial review”, and therefore fails to meet *Gilmore*'s explicitness requirement.<sup>38</sup> Laws L.J. supplemented this approach by considering more specifically the meaning of the term “superior court of record”. He noted that there were many *dicta* to the effect that so designating a body immunizes it against judicial review,<sup>39</sup> and that academic commentators had taken it as read that the UT would therefore be immune from review.<sup>40</sup> Nevertheless, Laws L.J. concluded that the better reading of the authorities was that the distinction between a superior and an inferior court reflected the distinction between “a court which is presumed to act within its powers until the contrary is shown and a court which

Directions: Fresh Claim Judicial Review in the Immigration and Asylum Chamber of the Upper Tribunal (October 2011).

<sup>35</sup> TCEA, s. 3(5).

<sup>36</sup> [2011] UKSC 28, [2011] 3 W.L.R. 107 at [30].

<sup>37</sup> [1957] 1 Q.B. 574 at 583.

<sup>38</sup> [2009] EWHC 3052 (Admin), [2010] 2 W.L.R. 1012 at [29].

<sup>39</sup> *Eg In re Medicaments and Related Classes of Goods (No. 2)* [2001] 1 W.L.R. 700 at [6] (Lord Phillips M.R.).

<sup>40</sup> *Eg De Smith, Woolf and Jowell, Judicial Review* (London 2007, 6<sup>th</sup> ed), para. 1–093.

enjoys no such presumption and whose proceedings must demonstrate on their face that the case in hand falls within its jurisdiction".<sup>41</sup>

Of course, asking whether a given formulation discloses a sufficiently clear intention to remove certain matters from the purview of the courts is only a worthwhile endeavour if, in the first place, it is constitutionally possible for Parliament to effect such a removal. It is noteworthy, then, that the way in which Laws L.J. interpreted the provision in the TCEA designating the UT a "superior court of record" was secondary to his conviction that Parliament is incapable of insulating legislation against interpretative control by an independent judicial authority. The absence of such control would cause statutory texts "at length be degraded to nothing more than a matter of opinion": and since this would undermine the effectiveness of statute law, the requirement of interpretative control by independent judicial authorities – and Parliament's resultant inability to dispense with such control – was "not a denial of legislative sovereignty, but an affirmation of it".<sup>42</sup> This is an ingenious attempt to render orthodox that which is inherently heterodox: Laws L.J. likened this putative limit upon Parliament's legislative freedom to the (supposed) rule that Parliament cannot bind its successors, both restrictions being conditions precedent to each successive Parliament's capacity to enact effective statute law. On this novel view, ouster clauses do not, as is normally thought, require courts to choose between upholding the rule of law on the one hand and parliamentary sovereignty on the other. Rather, judicial neutralization of – even disobedience to – ouster clauses is demanded by parliamentary sovereignty itself.

Space precludes detailed analysis of this argument, although it potentially opens a Pandora's box: what else might Parliament be prevented from doing in order that courts may save it from undermining the effectiveness of its own enactments? More generally, Laws L.J. arguably used an idiosyncratic conception parliamentary sovereignty as a Trojan horse whereby rule of law considerations are in practice elevated in a manner that is at odds with the orthodox conception of legislative supremacy. Such conceptual gymnastics, while possessing a certain intellectual grace, are ultimately a distraction from the underlying question whether the constitutional architecture is in the process of being realigned such that fundamental principles – such as those upheld via judicial review – are beyond legislative disturbance.<sup>43</sup> Against that background, it is perhaps significant that when *Cart* was

<sup>41</sup> [2009] EWHC 3052 (Admin), [2010] 2 W.L.R. 1012 at [54].

<sup>42</sup> *Ibid.* at [38].

<sup>43</sup> A view with which Laws L.J. has elsewhere associated himself: *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158, [2003] Q.B. 728 at [71]–[82].

decided by the Supreme Court, Lady Hale (in line with views she had earlier expressed in *Jackson*)<sup>44</sup> cited with approval Laws L.J.'s remarks concerning the limits of Parliament's legislative authority,<sup>45</sup> while Lord Phillips noted that they were controversial but did not explicitly reject them.<sup>46</sup> Of course, *Cart* does not bring clarity to this area – the crunch question did not squarely fall to be confronted in the absence of an explicit ouster clause – but it adds to the already rich tapestry of *dicta* and extra-judicial remarks in which the constitutional fundamentality of judicial review is hinted at with increasing directness.

#### IV. JUDICIAL REVIEW AND THE RULE OF LAW

The foregoing points towards two possibilities, the distinction between them generally being less practically important than that which unites them: either it is constitutionally impossible for Parliament unilaterally to remove matters from judicial control, or it is very difficult for Parliament to do so (in that unusually strong principles of interpretation tell against ascribing such effects to statutory provisions). *Anisminic* clearly demonstrated that *one* of these propositions – but not *which* one – is true.<sup>47</sup> At the same time, it would be simplistic to assert that it is impossible or even difficult for Parliament to oust the High Court's inherent supervisory jurisdiction *per se*. For instance, courts are quite prepared to give effect to legislative ouster of that jurisdiction when this is accompanied by provisions vesting in the High Court a broadly comparable statutory jurisdiction.<sup>48</sup> This serves as a reminder that the true objection to bald privative clauses is not that they oust the supervisory jurisdiction itself, but that they threaten the rule of law by excluding from the purview of any independent judicial body of appropriate constitutional stature the interpretation of the relevant legislation and the supervision of the statutory body concerned. Consequently, when exclusion of judicial review is accompanied by some alternative arrangement for oversight that meets the minimum requirements of the rule of law, there is no constitutional need, or justification, for judicial intransigence, whether by means of outright disobedience or strained interpretation.

From this flows a broader point: that, whether or not a given statutory regime contains anything resembling a privative clause, the constitutional case for judicial review by the High Court will lie somewhere on a continuum ranging from marginal (or even non-existent)

<sup>44</sup> *R. (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 A.C. 262 at [159].

<sup>45</sup> [2011] UKSC 28, [2011] 3 W.L.R. 107 at [30].

<sup>46</sup> *Ibid.*, at [73].

<sup>47</sup> *Anisminic Ltd. v Foreign Compensation Commission* [1969] 2 A.C. 147.

<sup>48</sup> *Smith v East Elloe Rural District Council* [1956] A.C. 736; *R v Secretary of State for the Environment, ex parte Ostler* [1977] Q.B. 122.

at one end, to compelling (or, depending on one's point of review, non-negotiable) at the other. So, in *Cart*, once the statutory designation of the UT as a "superior court of record" came to be regarded largely as a distraction, the courts had to engage with what Lady Hale, in the Supreme Court, described as "[t]he real question": "what level of independent scrutiny outside the tribunal structure is required by the rule of law[?]"<sup>49</sup>

In *R v Cripps, ex parte Muldoon*, Goff L.J. said that whether an election court was a suitable candidate for judicial review turned upon whether it had "a status so closely equivalent to the High Court that the exercise of the power of judicial review by the High Court is for that reason inappropriate".<sup>50</sup> For Laws L.J., then, the issue in *Cart* was whether the UT could be regarded as the "*alter ego*" of the High Court.<sup>51</sup> He concluded that it could, bearing in mind its independence, its stature, its position "at the apex of a new and comprehensive judicial structure" for the determination of administrative appeals, and its possession of a judicial review jurisdiction closely analogous to that of the High Court.<sup>52</sup> And while the Court of Appeal subsequently rejected Laws L.J.'s characterization of the UT as an *alter ego* of the High Court – the very fact that the UT had been *statutorily* invested with powers of judicial review showed that it was not the High Court's equal – it nevertheless accepted that "the new tribunal structure ... is something greater than the sum of its parts" in that it represented "a newly coherent and comprehensive edifice" for the resolution of administrative appeals.<sup>53</sup> By those somewhat different analyses, the Divisional Court and the Court of Appeal arrived at a common conclusion. Endorsing an approach adopted in *R. (Sivasubramaniam) v Wandsworth County Court*<sup>54</sup> concerning the susceptibility to judicial review of County Court decisions refusing permission to appeal, they held that the UT would be vulnerable to review only if guilty of an "outright excess of jurisdiction" in the pre-*Anisminic* sense, or a procedural irregularity so grave as to amount to a "fundamental denial of justice".<sup>55</sup> On this view, for example, a "mere" error of law would be unreviewable, but a "four corners" error – such as an assertion by a tribunal of jurisdiction over a subject area not statutorily assigned to it – would be.

If these conclusions had been accepted by the Supreme Court, they would have represented a highly minimalistic approach to judicial

<sup>49</sup> [2011] UKSC 28, [2011] 3 W.L.R. 107 at [51].

<sup>50</sup> [1984] Q.B. 68.

<sup>51</sup> [2009] EWHC 3052 (Admin), [2010] 2 W.L.R. 1012 at [40]–[42].

<sup>52</sup> *Ibid.*, at [87].

<sup>53</sup> [2010] EWCA Civ 859, [2011] Q.B. 120 at [42].

<sup>54</sup> [2002] EWCA Civ 1738, [2003] 1 W.L.R. 475.

<sup>55</sup> [2010] EWCA Civ 859, [2011] Q.B. 120 at [37].

review of the UT. As Laws L.J. put it, while judicial review would have been available, the possibility would have been “theoretical”, so “grossly improbable” would be the commission by the UT of relevant errors.<sup>56</sup> It is noteworthy, however, that in arriving at this position, the lower courts’ principal focus was upon (as Laws L.J. put it) configuring the judicial review jurisdiction so as to meet “the practical demands of the rule of law”.<sup>57</sup> Such were the institutional characteristics and qualities of the UT that the rule of law was felt neither to compel nor to justify subjecting it to “judicial review’s full panoply”.<sup>58</sup> Indeed, Lord Phillips, in the Supreme Court, had been sorely tempted to go further still, his initial inclination having been “to treat the new two-tier tribunal system as wholly self-sufficient”.<sup>59</sup> In the end, however, he was persuaded by Lady Hale’s judgment – the substance of which commanded the agreement of all members of the Court – according to which it was necessary, at least for the time being, for the UT to be amenable to judicial review, and on grounds broader than those contemplated by the lower courts. The Supreme Court’s unanimous view was that the extent of judicial control of the tribunals system was best delimited by reference to the second-tier appeal criteria. As a result, it is only possible to seek judicial review of a UT decision – just as it is only possible to appeal against such a decision – if the case raises “some important point of principle or practice” or if judicial review is necessary in the light of “some other compelling reason”. This approach, it was said, was a proportionate one that would ensure that the demands of the rule of law were met in a way that made efficient use of scarce judicial resources.<sup>60</sup> In this way PDR considerations were placed front and centre by the Supreme Court.

#### V. JURISDICTION, THE SECOND-TIER APPEAL CRITERIA AND THE AUTONOMY OF THE TRIBUNALS SYSTEM

On the face of it, the Supreme Court’s unwillingness to endorse the lower courts’ approach calls into question the viability of Carnwath’s vision of an “anti-hierarchical” relationship between courts and tribunals, according to which the latter would be largely free to develop a distinctive tribunals jurisprudence with little interference from ordinary courts. Certainly, the Supreme Court made it clear that it envisaged judicial review in circumstances broader than those for which the lower courts’ decisions in *Cart* would have allowed. As Lord Dyson put it in *Cart*, the absence of judicial review risked “the fossilisation of bad

<sup>56</sup> [2009] EWHC 3052 (Admin), [2010] 2 W.L.R. 1012 at [99].

<sup>57</sup> *Ibid.*, at [93].

<sup>58</sup> *Ibid.*, at [93].

<sup>59</sup> [2011] UKSC 28, [2011] 3 W.L.R. 107 at [91].

<sup>60</sup> *Ibid.*, at [89] (Lord Phillips).

law” within the tribunals system<sup>61</sup> – and restricting judicial review in line with the lower courts’ approach would insulate post-*Anisminic* errors in a way that “does not promote the rule of law”.<sup>62</sup> Meanwhile, Lady Hale noted that the lower courts’ approach would risk the development of “local law” in the sense that erroneous or outmoded constructions might be perpetuated if the regular courts were effectively locked out of the tribunals system.<sup>63</sup> This view is built partly upon institutional competence – the implication being that High Court and Court of Appeal judges may be better situated to furnish corrections – and partly upon precedent, the risk being that the tribunals system might continue to apply precedent set by the courts thinking (perhaps wrongly) that those courts would be unwilling to disturb it. How, then, does the Supreme Court’s approach differ from that of the lower courts – and to what extent does it impinge upon the autonomy of the tribunals system?

This is, in part, an obviously practical question, which we examine below: how much more likely is intervention by the courts under the framework adopted by the Supreme Court? However, a logically prior doctrinal question also arises. Notwithstanding the Justices’ concerns, sketched above, about the risks of unduly limiting judicial review of the UT, the Supreme Court’s invocation of the second-tier appeal criteria plainly imposes considerable restrictions upon the availability of review. But what doctrinal form do those restrictions take? The Court of Appeal supplied a clear answer to this question:<sup>64</sup> only in exceptional circumstances, such as the making of a pre-*Anisminic* jurisdictional error or a denial of fundamental justice, would the UT trespass “outside the range of its decision-making authority”.<sup>65</sup> Errors not crossing the exceptionality threshold would be unreviewable because, in the first place, they would disclose no excess of jurisdiction. On this analysis, then, the doctrinal vehicle for limiting judicial review was to be the ascription to the UT of unusually broad *vires*. In contrast, Lady Hale and Lord Dyson – the Supreme Court Justices who addressed this point most directly – were highly resistant to the idea of reintroducing the distinction between jurisdictional and non-jurisdictional errors of law, which, as Lady Hale put it, had been “given its quietus by the majority in *Anisminic*”.<sup>66</sup> Indeed, in *Eba – Cart’s* Scottish counterpart – Lord Hope laid to rest the notion, sustained by Lord President Emslie’s judgment in *Watt v Lord*

<sup>61</sup> *Ibid.*, at [112].

<sup>62</sup> *Ibid.*, at [110].

<sup>63</sup> *Ibid.*, at [43].

<sup>64</sup> Albeit that the content of the limits favoured by the Court of Appeal differed from those adopted by the Supreme Court.

<sup>65</sup> [2010] EWCA Civ 859, [2011] Q.B. 120 at [37].

<sup>66</sup> [2011] UKSC 28, [2011] 3 W.L.R. 107 at [40].

*Advocate*,<sup>67</sup> that the distinction persisted in Scots administrative law.<sup>68</sup> There were two reasons why the Supreme Court rejected any return to a category of non-jurisdictional errors of law. First, requiring courts to draw distinctions between jurisdictional and non-jurisdictional errors would involve a “return to some of the technicalities of the past” and consequential practical difficulties.<sup>69</sup> Secondly, as Lord Dyson noted, the distinction was simply incompatible with constitutional principle, in particular the rule of law, because it would insulate from review serious (but non-jurisdictional) errors of law raising important points of principle.<sup>70</sup>

On the Supreme Court’s analysis, then, the UT is *not* authorized conclusively to determine questions of law, meaning that it is capable of committing jurisdictional errors of law in the same (wide) range of circumstances as other statutory bodies. This, in turn, means that decisions, reached in reliance upon the second-tier appeal criteria, to grant or deny permission to seek judicial review (or, for that matter, to appeal on a point of law) cannot be taken to reflect any conclusion as to whether the UT has acted lawfully or unlawfully. Whereas the Court of Appeal’s approach in *Cart* accorded a very wide jurisdiction to the UT, meaning that the commission of an error of law would have been extremely rare, the Supreme Court’s analysis makes it inevitable that situations will arise in which the UT commits jurisdictional errors of law that cannot be challenged on review (or, for that matter, appeal).<sup>71</sup> The Supreme Court’s judgment, then, in a sense presents a post-jurisdictional view of administrative law – analysis of the extent of the UT’s legal powers being secondary to the application of PDR-inspired criteria that limit the availability of review but which are not tied to any assessment of the scope of the body’s jurisdictional competence. On this approach, whether judicial review lies turns centrally upon a pragmatic assessment of the case for intervention by a court, as opposed to any conventional doctrinal analysis.

<sup>67</sup> 1979 S.C. 120.

<sup>68</sup> [2011] UKSC 29, [2011] 3 W.L.R. 149 at [29]–[34].

<sup>69</sup> [2011] UKSC 28, [2011] 3 W.L.R. 107 at [40].

<sup>70</sup> *Ibid.*, at [110]. In this paragraph, Lord Dyson somewhat confusingly refers to the notion of “non-jurisdictional” errors of law. It appears, however, that he is not condoning the existence of such a category of errors of law, but is rather using the term as shorthand for those errors of law that might, before *Anisminic*, have been regarded as non-jurisdictional.

<sup>71</sup> The possibility arises, however, of such decisions being challenged collaterally, even if they cannot be challenged directly. Take, for instance, a remedial order issued by the UT disclosing an error of law, but one that cannot be challenged on appeal or review because the second-tier appeal criteria are not met. On the Court of Appeal’s approach, no possibility of collateral challenge would arise because, unless the exceptional circumstances threshold was crossed, the decision would be valid notwithstanding the error of law. In contrast, the Supreme Court’s approach would leave room to argue that the unappealable, unreviewable order was nevertheless collaterally challengeable on account of a jurisdictional error of law rendering it a nullity. If the second-tier appeal criteria ruled out a direct challenge, it would be difficult to argue (in line with *R. v Wicks* [1998] A.C. 92) that collateral challenge had been impliedly excluded.

The extent to which the second-tier appeal criteria preclude challenges to unlawful UT decisions obviously depends upon precisely how they are interpreted and applied. And while the Supreme Court evidently thought that judicial review should be available more readily than the lower courts' approach would have permitted, it is certainly not the case that the second-tier appeal criteria are easily satisfied. As Lady Hale said, the Supreme Court's preferred approach "would lead to a further check [upon the UT], outside the tribunals system, but not one which could expect to succeed in the great majority of cases".<sup>72</sup> Lord Dyson, meanwhile, said that the first of the second-tier appeal criteria, requiring an "important point of principle or practice", will only be satisfied where there is an element of "general interest" – it is not enough that the law has "not been properly applied in the particular case"; and the second criterion, requiring "some other compelling reason", will be met only if the case "cries out for consideration" by a court.<sup>73</sup> This relatively restrictive view of the second-tier appeal criteria as they apply to the UT – which is itself reflective of the general case law on the meaning and application of those criteria<sup>74</sup> – is, if anything, pressed further by the post-*Cart* decision of a powerfully-constituted Court of Appeal in *PR (Sri Lanka) v Secretary of State for the Home Department*.<sup>75</sup> The Court said that "compelling", in the "compelling reason" limb, means "legally compelling, rather than compelling, perhaps, from a political or emotional point of view".<sup>76</sup> Meanwhile, the Court suggested that the first criterion might carry a particularly limited meaning in respect of the UT. The context, said the Court, "is relevant": "The point of principle or practice should be not merely important, but one which calls for attention by the higher

<sup>72</sup> [2011] UKSC 28, [2011] 3 W.L.R. 107 at [56].

<sup>73</sup> *Ibid.*, at [130].

<sup>74</sup> *Uphill v BRB (Residuary) Ltd.* [2005] EWCA Civ 60, [2005] 1 W.L.R. 2070; *Cramp v Hastings Borough Council* [2005] EWCA Civ 439. See generally Jenns, "Is it all downhill for second appeals?" (2006) 25 C.J.Q. 439.

<sup>75</sup> [2011] EWCA Civ 988, [2012] 1 W.L.R. 73 (Lord Neuberger M.R., Sir Anthony May P., Carnwath L.J. (Senior President of Tribunals)). The restrictiveness of the second-tier appeal criteria and of the interpretation accorded to them by the Court of Appeal in *PR (Sri Lanka)* is evident in the recent refusal of the Ouseley J. to quash several UT decisions declining to grant permission to appeal: *R. (Khan) v Secretary of State for the Home Department* [2011] EWHC 2763 (Admin).

<sup>76</sup> [2011] EWCA Civ 988, [2012] 1 W.L.R. 73 at [36]. In *JD (Congo) v Secretary of State for the Home Department* [2012] EWCA Civ 327 it was held that this should not be interpreted as meaning that "extreme consequences" for the individual were irrelevant, but that "absent a sufficiently serious legal basis for challenging the UT's decision, extreme consequences would not suffice". It was also held in *JD* that the second-tier appeal criteria are sufficiently flexible to take account of the different circumstances in which onward appeal to the Court of Appeal might be sought. The classical situation is where the individual has lost twice (at FTT and UT levels) and is seeking a third bite of the cherry. However, an individual might win in the FTT and then lose on appeal to the UT, or might get the FTT's decision quashed (on account of an error of law) but then lose by virtue of the UT substituting a new adverse decision and dismissing the appeal against that decision. In the latter scenario, the graver the failure at first instance, the more generously the second-tier appeal criteria should be applied (according to *JD*) in recognition of the fact that there will not genuinely have been two prior levels of judicial consideration.

courts, specifically the Court of Appeal, rather than left to be determined within the specialist tribunal system.”<sup>77</sup> On this view, it would be comparatively rare for permission to be granted either to appeal against or to seek judicial review of the UT’s decisions. All of this suggests that notwithstanding the Supreme Court’s rejection of the doctrinal approach which the lower courts used to impose fixed limits on judicial review of the UT, judicial review under the Supreme Court’s preferred approach is unlikely to be commonplace.

## VI. ONWARD CHALLENGES

Understanding *Cart* at a doctrinal level is important, but it only offers us one perspective. Underlying the whole issue of judicial oversight of tribunals lie a wider set of questions which, to some extent, transcend the doctrinal issues. How many opportunities should a party have for challenging a tribunal decision? How extensive should onward rights of challenge be? What degree of legal error, if any, can be tolerated? Answering these questions requires the ascertainment and then ranking of different considerations: not only the general interest in ensuring legality, but also the cost and expense of onward challenges, and the degree to which courts should recognize the expertise of tribunals.

A good starting point is to consider the functions of onward rights of challenge. Systems of onward challenge serve a range of private and public purposes. The private or corrective purpose is to put right any legal error which results in an injustice to the individual claimant. For instance, the claimant may contend that the tribunal has incorrectly applied the law in the particular case. Onward challenges can also serve wider public purposes, such as: ensuring public confidence in the administration of justice; allowing the higher courts to clarify and develop the law, practice, and procedure; and maintaining the standards of first-instance courts and tribunals. A classic illustration of an onward challenge serving a wider public purpose is one that raises some broader point of law or practice, the outcome of which will affect other similar cases. Such onward challenges may be of considerable benefit to lower tribunals – as a source of authoritative guidance, and thereby a means of ensuring consistency amongst tribunal judges. All onward challenges, at least potentially, serve a corrective purpose because the claimant is seeking to persuade the higher tribunal or court that there has been a legal error; but only some onward challenges also serve a wider public purpose.

These different functions of onward challenges reflect different types of public law litigation. Much judicial review litigation can be

<sup>77</sup> [2011] EWCA Civ 988, [2012] 1 W.L.R. 73 at [37].

differentiated into two categories: “bureaucratic” judicial review and “policy” or “high-profile” judicial review.<sup>78</sup> Bureaucratic judicial review is primarily concerned with remedying unlawful decisions that only affect the individual claimants involved. By contrast, policy judicial review is concerned with resolving constitutional disputes and with clarifying general points of law and practice which affect not just the individual claimant, but many other individuals as well. In this way, policy judicial review may involve the setting of guidance or precedent to be followed in the future by lower courts and tribunals.

Given the distinct functions involved, a principal issue is how to organize any system of onward challenges. A number of different considerations are relevant in this regard, such as: the need to correct legal errors; the different role of judicial bodies within the overall judicial hierarchy; and limited judicial resources. Examination of the issue can be facilitated by drawing upon the economic analysis of law which tends to view the goal of legal procedure as the minimization of both error and administrative costs.<sup>79</sup>

Consider first error costs. The primary purpose of any system of onward challenges is to reduce the number of legal errors that can result from the adjudication process. For instance, if a social security tribunal failed to give adequate reasons for a decision, then the appellant’s error costs would include not knowing the proper reasons for the decision and potentially the wrongful denial of a welfare benefit. By correcting such errors, a system of onward challenge reduces those costs. Such legal error costs are significant, but they have to be weighed alongside the other types of cost that arise. These include the direct administrative costs of operating the legal dispute-resolution process for identifying and correcting such errors. These costs are not negligible and always have to be weighed in any consideration of legal process. There are also indirect opportunity costs, that is, the costs that arise elsewhere in the wider judicial system if resources are dedicated to correcting errors in one area of casework. For instance, allowing challenges in one area of decision-making may well, given limited resources, increase overall delays in judicial decision-making and reduce administrative certainty.

However, bearing in mind the different purposes of onward challenges outlined above, error costs are not limited to the individual claimant involved. The error costs involved in a challenge serving the private interests of the individual claimant may well be significant, but

<sup>78</sup> See P. Cane, “Understanding Judicial Review and its Impact” in M. Hertogh and S. Halliday (eds), *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (Cambridge 2004), 18–19.

<sup>79</sup> See generally R.A. Posner, “An Economic Approach to Legal Procedure and Judicial Administration” (1973) 2 *Journal of Legal Studies* 399.

they will not be as great as the potential error costs arising from the adoption by various tribunals of an erroneous approach to some wider point of law or practice that will adversely affect many other similar cases. The difference here is between the error costs that arise when (say) a social security appellant's *individual* application has not been lawfully determined and those costs occasioned when a *wider* category of such appellants' appeals have not been legally determined because tribunals have consistently misconstrued a legal rule of general application.

To summarise: checks over tribunal decisions are necessary (no decision-making process is infallible), yet they are also costly. In theory, there should be an optimum point at which the costs of operating a system of onward challenges outweighs the benefits of correcting such errors. While this type of analysis has its difficulties – not least those associated with quantifying and comparing the different costs involved – it does illuminate the underlying and perennial tensions in organizing aspects of legal procedure, such as onward challenges.<sup>80</sup>

Abstractly stated, there is then an inherent trade-off between different considerations – legality, cost, certainty, and timeliness – yet such matters will also be influenced by more concrete experience. Consider, for instance, experience of judicial review of tribunal decisions over recent years. Tribunals operate across many different areas of law and their caseloads fluctuate, yet three tribunal systems stand out in terms of the volume of appeals that they handle: social security; immigration; and employment.<sup>81</sup> In terms of judicial review of permission to appeal decisions, only immigration has figured prominently in terms of caseload. Although it was well-established that the refusal of permission to appeal by a social security commissioner<sup>82</sup> was open to challenge through judicial review on conventional public law grounds,<sup>83</sup> such challenges were rare and never generated any problems.<sup>84</sup> By contrast, judicial review has been used extensively in the immigration and asylum context, partly because claimants wish to challenge adverse decisions that affect crucial human rights and partly because claimants have an incentive to delay unwelcome decisions. Over recent years, the

<sup>80</sup> A.I. Ogus, *Costs and Cautionary Tales: Economic Insights for the Law* (Oxford, Hart 2006), 110–111.

<sup>81</sup> In 2010–11, 93 per cent of all tribunal appeals (831,000) were received by Social Security and Child Support (SSCS), Employment Tribunals (ET) and Immigration and Asylum (IA): Ministry of Justice, *Annual Tribunals Statistics 2010–11* (London 2011), 6.

<sup>82</sup> The role of social security commissioners has now been absorbed by the Upper Tribunal (Administrative Appeals Chamber).

<sup>83</sup> *Bland v Chief Supplementary Benefit Officer* [1983] 1 W.L.R. 262; *R. v Secretary of State for Social Services, ex parte Connolly* [1986] 1 W.L.R. 421.

<sup>84</sup> *R. (Cart) v Upper Tribunal* [2011] UKSC 28, [2011] 3 W.L.R. 107 at [51]; *R. (Wiles) v Social Security Commissioner* [2010] EWCA Civ 258 at [51]. See also P. Robson, "Judicial Review and Social Security" in T. Buck (ed), *Judicial Review and Social Welfare* (London 1998).

burden placed on the Administrative Court by asylum and immigration cases has been considerable, and has generated unacceptable delays.<sup>85</sup> It has also meant that the Administrative Court has, over recent years, been dealing with a repetitive and routine caseload rather than targeting its resources on those challenges with the most wide-ranging consequences. It is apparent that Parliament, the government, and the courts have all been concerned about the pressures here, which have prompted various changes in the organization of onward challenges in the immigration context, such as the move from a two-tier appeal structure to a single tier of appeal, and then transfer into the TCEA scheme.<sup>86</sup> Nonetheless, this transfer still left open the question raised in *Cart*: could a party refused permission to appeal by the UT seek judicial review of that refusal?

#### VII. *CART* AND PROPORTIONATE DISPUTE RESOLUTION

In *Cart*, the court's answer was to allow judicial review only if the second-tier appeal criteria are fulfilled, meaning that judicial review is unavailable if its sole purpose is to correct a legal error that only affects the individual claimant involved. As noted above, the Supreme Court's reasoning was primarily influenced not by doctrinal considerations, but by concerns of proportionate dispute resolution. So, it held, while judicial review should be available to challenge the legality of decisions, its scope should be no more than is proportionate and necessary for maintaining the rule of law. In the context of the UT, unrestricted judicial review would be disproportionate in light of: the re-organisation of the tribunal system and, in particular, the UT's status and expertise; the availability of opportunities to challenge adverse decisions within the tribunal system; and the limited resources of the Administrative Court. The importance of the last consideration – and hence the need for a proportionate system of onward challenges – is illustrated by Lady Hale's contention that “[t]here must be a limit to the resources which the legal system can devote to the task of trying to get the decision right in any individual case”.<sup>87</sup> Likewise, Lord Phillips noted that “judges must pay due regard to the fact that, even where the due administration of justice is at stake, resources are limited”.<sup>88</sup>

The Supreme Court's explicit recognition of the need to attain a proportionate balance between the cost of challenges and their importance is notable. It has been observed that the use of efficiency and cost arguments to restrict the availability of onward challenge runs

<sup>85</sup> Lord Chief Justice, *Review of the Administration of Justice in the Courts* (HC 448, 2008), 36; May Committee, note 32 above, para. 46.

<sup>86</sup> See R. Thomas, *Administrative Justice and Asylum Appeals* (Oxford, Hart 2011), 240–253.

<sup>87</sup> [2011] UKSC 28, [2011] 3 W.L.R. 107 at [41].

<sup>88</sup> *Ibid.*, at [89].

contrary the rhetoric and values of legality.<sup>89</sup> Of course, resource considerations and judicial review caseloads have, at times, influenced substantive law and procedure.<sup>90</sup> Nonetheless, the explicit invocation of efficiency and resource arguments in *Cart* represents an important shift in judicial reasoning: PDR has received judicial recognition. As Lord Phillips noted, “Rights of appeal should be proportionate to the grounds of complaint and the subject matter of the dispute. More than one level of appeal would not normally be justified unless an important point of principle or practice was involved.”<sup>91</sup>

Following *Cart*, merely pointing to a litigant’s private interest in correcting a legal error is insufficient; it is also necessary to demonstrate that the case raises an element of wider public interest. On the Supreme Court’s approach, the increment in potential error costs arising in cases fulfilling the second-tier appeal criteria justifies the availability of judicial review; conversely, the error costs in claimant-specific challenges are outweighed by the administrative or transaction costs that such challenges impose on the Administrative Court. After all, part of the rationale for amalgamating different tribunals into the TCEA system was to rationalize the previously confused and illogical network of appeal routes and to introduce procedural simplicity; to allow many cases to proceed to judicial review would risk undermining the new scheme. This approach expressly recognizes that there is an acceptable level of legal error because of the competing demands placed upon the limited resources of the judicial process.<sup>92</sup> In other words, only some legal errors – namely, those which have broader significance – are worth correcting; by providing guidance on a general point of principle or practice, the judicial resources invested are justified because of the implications for other cases. More broadly, any justice system must be able to deliver a sound way of settling disputes and ensuring both that cases can be resolved as quickly and justly as possible and that only appropriately important cases proceed further up the judicial hierarchy for resolution.

### VIII. TRIBUNAL PRACTICE

The Supreme Court’s view in *Cart* was that the criteria for onward appeals should be informed by “experience of how the new tribunal system is working in practice”.<sup>93</sup> Before the Supreme Court decided

<sup>89</sup> R. Nobles and D. Schiff, “The Right to Appeal and Workable Systems of Justice” (2002) 65 M.L.R. 676, 683.

<sup>90</sup> See, e.g., *R. v Secretary of State for the Home Department, ex parte Swati* [1986] 1 All E.R. 717; *Puhlhofer v London Borough of Hillingdon* [1986] A.C. 484. See also M. Sunkin, “What is Happening to Applications for Judicial Review?” (1987) 50 M.L.R. 432.

<sup>91</sup> [2011] UKSC 28, [2011] 3 W.L.R. 107 at [68].

<sup>92</sup> *Ibid.*, at [42] (Lady Hale).

<sup>93</sup> *Ibid.*, at [92] (Lord Phillips).

*Cart*, the UT (Immigration and Asylum Chamber) had put significant efforts into allocating appropriate judicial resources at the UT permission to appeal stage. Applications for permission to appeal against FTT decisions are determined by Senior Immigration Judges acting as FTT judges. Renewed applications to appeal to the UT are decided by a selected panel of Senior Immigration Judges, usually on the papers, but with the option of an oral hearing if necessary. In cases of doubt, the Tribunal has generally considered it appropriate to grant permission to appeal. Given comparable rates of granting permission between the High Court and the UT, the UT has suggested that it gives at least as intensive scrutiny to cases as was formerly the case.<sup>94</sup>

Looking to the future, it is possible to envisage potential difficulties given reduced provision of legal aid.<sup>95</sup> While legal aid has always been limited in relation to tribunals, further restrictions present the familiar problem of tribunals seeking to deal with unrepresented appellants who are often amongst the most vulnerable, and resultant inefficiencies for the tribunal process. The problem can be quite acute, especially when the jurisdiction of the second-tier court or tribunal is limited to correcting errors of law. Tribunals are generally obliged to offer assistance to unrepresented appellants.<sup>96</sup> Given that the UT's refusal of permission will mark the end of the road, it is likely to be all the more necessary for adequate judicial resources to be channeled into the permission stage if justice is to be done. The other option is that, following *Cart*, the UT changes its own approach when considering applications for permission to appeal by simply granting permission in order to remove any possibility of judicial review.

#### IX. MANAGING JUDICIAL RELATIONSHIPS

In one sense, a system of onward challenges implies a hierarchical structure in which superior tribunals or courts correct decisions of lower tribunals. However, as Nobles and Schiff have argued, a fuller appreciation of onward challenges places at least equal weight upon the need for higher courts to establish stable, workable relationships with the bodies that they supervise.<sup>97</sup> From this perspective, the relationship between a higher and a lower court or tribunal may best be conceived of not in terms hierarchical control, but by reference to the need for self-restraint on the part of the higher court, in order that the lower

<sup>94</sup> Senior President of Tribunals, *Annual Report* (London 2011), 30–31.

<sup>95</sup> Legal Aid, Sentencing and Punishment of Offenders Act 2012.

<sup>96</sup> *R (IB) 2/04* Decision of the Social Security Commissioners (now the Upper Tribunal (Administrative Appeals Chamber)) (21 January 2004) at [32]; *Mongan v Department for Social Development* [2004] NICA 16 at [14]–[17]; *Hooper v Secretary of State for Work and Pensions* [2007] EWCA Civ 495.

<sup>97</sup> See Nobles and Schiff, note 89 above.

court or tribunal may proceed with its workload without substantial interference while also ensuring its decisions are subject to a further check. In the context of the new tribunals system, the crucial relationship is that between the UT and the Administrative Court: how is this relationship to be effectively managed? And what factors shape that relationship?

Some relevant factors – finality, the minimisation of delay and cost, and the reducing of the burdens on the Administrative Court – have already been mentioned, but there are other relevant matters. A particularly important consideration is that the UT comprises a dedicated cadre of specialist senior tribunal judges whose role is to develop the law through guidance on substantive legal rules and on overarching principles of administrative law as applied by tribunals, as well as through practical guidance on decision-making.<sup>98</sup> The UT's specialist expertise and its role in providing judicial leadership is reflected in its divisional structure. By contrast, as a generalist court, the Administrative Court hears judicial review cases from across the range of governmental action, but it is not necessarily specialist in any particular area of law. The tensions that can arise between a generalist higher court and a specialist lower court or tribunal are well-known.<sup>99</sup> At the same time, although the UT has been formed through an amalgamation of well-established specialist second-tier tribunals, it is a relatively recent creation and does not possess the long-standing pedigree and status of the Administrative Court. Furthermore, the jurisdiction of the Administrative Court is based on common law whereas the UT's jurisdiction is statutory and therefore susceptible to changes in legislative and executive policy.

A central issue is then the relative expertise of the UT vis-à-vis the Administrative Court. It has often been assumed that specialization in a particular area of law generates expertise which should be respected. For instance, tribunals develop their expertise in both the complex legal rules they apply and also in the broader policy context and the fact-finding challenges involved in adjudication.<sup>100</sup> Many of the pre-UT tribunals, such as the Social Security Commissioners, had well-established reputations as expert bodies.<sup>101</sup> The UT's different chambers administer highly complex areas of law – social security, immigration, and so on – and therefore develop a particular expertise in those areas of law. Tribunal expertise is buttressed by two other features. First, there has been the expanding jurisdiction of tribunals

<sup>98</sup> G. Hickinbottom, "A Forum to Clarify and Develop the Law", *Tribunals* (Spring 2009) 3.

<sup>99</sup> See generally S. Legomsky, *Specialized Justice* (Oxford 1990).

<sup>100</sup> Leggatt report, note 3 above, paras. 1.12–1.13.

<sup>101</sup> See *Hinchy v Secretary of State for Work and Pensions* [2005] UKHL 16, [2005] 1 W.L.R. 967 at [30]. See also T. Buck, D. Bonner, and R. Sainsbury, *Making Social Security Law* (Aldershot 2005), 172–177.

beyond the simple determination of statutory appeals. For instance, some tribunals, such as the Social Security Commissioners (now the Upper Tribunal (Administrative Appeals Chamber)), can assess the legality of secondary legislation.<sup>102</sup> Also, the jurisdiction of tribunals is not limited to just applying relevant statutory rules, but also involves the application of general principles of public law – thereby avoiding the cost, delay and potential injustice of multiple proceedings.<sup>103</sup> Secondly, the UT is aware, through its extensive overview of FTT decisions, of those issues which are causing difficulties at first instance, which, in turn, enables it to give priority to suitable appeals so as to facilitate the giving of authoritative guidance. These features of the UT and of its predecessor tribunals prompted the higher courts to develop a doctrine that challenges against the decisions of expert tribunals should be approached by the courts with an appropriate degree of caution.<sup>104</sup> Tribunal expertise is, though, not a given fact, but something to be demonstrated – principally through the quality of a tribunal's decisions and reasons. Furthermore, there is a risk that the amalgamation of tribunals might dilute rather than enhance the specialist expertise of tribunal judges, though this is clearly something that the Senior President of Tribunals will be aware of, given the post's responsibility to ensure that tribunal members possess expertise.<sup>105</sup>

Set against this background, the restriction of judicial review in *Cart* is a clear statement of the Supreme Court's confidence in the UT. The assumption is that a senior tribunal judge is just as adequate to the task of handling individual onward challenges as a High Court judge. However, to the extent that the Administrative Court retains a supervisory jurisdiction over the UT, there is a potential for tension between the two bodies, especially in light of the intention that the UT's status will be equivalent to that of the Administrative Court. Put simply, excessive leakage of judicial review challenges on important points of principle or practice could pose problems and has the potential to undermine the UT's position. The tension arises precisely because the UT's role is to use its expertise to issue guidance, yet judicial review of the UT's refusal of permission is restricted to correcting important points of principle or practice. If, when exercising this jurisdiction, the Administrative Court shows little deference to the UT, then this may encourage judicial reviews, thereby increasing caseloads and delays.

<sup>102</sup> *Chief Adjudication Officer v Foster* [1993] A.C. 754.

<sup>103</sup> *AA v Secretary of State for the Home Department (Highly Skilled Migrants: legitimate expectation) Pakistan* [2008] UKAIT0003 at [32]–[58] (Immigration Tribunal can apply general public law principles); *Oxfam v Her Majesty's Revenue and Customs* [2009] EWHC 3078 (Ch), [2010] S.T.C. 686 at [61]–[71] (jurisdiction of the Tax Tribunal includes common law principles).

<sup>104</sup> *Cooke v Secretary of State for Social Security* [2001] EWCA Civ 734, [2002] 3 All E.R. 279 at [15]–[17]; *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49, [2008] A.C. 678 at [30].

<sup>105</sup> [2011] UKSC 28, [2011] 3 W.L.R. 107 at [54] (Lady Hale); TCEA s. 2(3)(c).

It may also generate uncertainty for both the FTT and UT, which will still need to determine appeals pending authoritative judgment(s) from the Administrative Court. It could also work to draw the source of guidance away from the UT to the Administrative Court and, ultimately, it could lead to something of a stand-off between the two bodies. If a workable relationship is to be maintained, the Administrative Court will need to exercise restraint; at the same time, it will also have to correct important errors.

To illustrate the re-ordering of the judicial hierarchy and the relationships involved, consider the role of precedent in the UT-Administrative Court relationship. Tribunals do not have a common law based jurisdiction and have therefore often been seen as lacking the power to set precedents. However, some second-tier tribunals, and now the UT, have developed their own mechanisms for identifying lead decisions which are to be followed by first-instance tribunals.<sup>106</sup> This is essential in terms of producing guidance for the lower tribunals and for providing judicial leadership. Also, the higher courts have accorded respect to lead judgments of second-tier tribunals; for instance, in the context of asylum appeals, the Court of Appeal has explicitly encouraged the immigration tribunal to give detailed guidance on country conditions to ensure consistency of approach amongst different tribunals when determining asylum cases.<sup>107</sup>

However, looking at the matter from the opposing perspective, the crucial issue is the extent to which tribunals consider themselves bound by higher court decisions. Given that there is a direct right of appeal from substantive UT decisions to the Court of Appeal, it is clear that the UT is bound by decisions of that court. What, though, is the position as regards decisions of the Administrative Court? As Carnwath has argued, recent developments, including the TCEA, imply a different notion of judicial hierarchy, one which is based not so much on the formal level occupied by the relevant judge, as on the notion of a cadre of specialist judges whose expertise generates a status that exceeds their formal position within the judicial structure. What matters under this new model is that those shaping the law in a particular area should possess the relevant specialist competence to do so. In terms of formal institutional relationships, tribunals were previously bound by Administrative Court decisions.<sup>108</sup> However,

<sup>106</sup> See T. Buck, "Precedent in tribunals and the development of principles" (2006) 25 C.J.Q. 458.

<sup>107</sup> See, e.g., *Manzeke v Secretary of State for the Home Department* [1997] Imm. A.R. 524, 529 (Lord Woolf M.R.); *S and Others v Secretary of State for the Home Department* [2002] I.N.L.R. 416, 435-436 (Laws L.J.).

<sup>108</sup> However, even this has on occasion been questioned. For instance, in one case a Senior Immigration Judge described an Administrative Court decision as "a first instance decision not binding on the Tribunal, and not likely to be followed by it", a view which Beatson J. considered

with the creation of the UT, it is possible to detect a change in the relationship. The UT does not regard itself as formally bound by High Court decisions when it exercises a jurisdiction formerly exercised by the High Court.<sup>109</sup> Indeed, the UT's view is that where specialised issues arise, it may in a proper case feel less inhibited in revisiting issues decided even at High Court level, if there is good reason to do so.<sup>110</sup> For its part, the Administrative Court has noted that "the mutuality of respect constitutionally required of judicial institutions demands that the Upper Tribunal follow decisions of this court"; judicial comity requires Administrative Court decisions to be followed unless they are considered to be wrong.<sup>111</sup> Following *Cart*, Administrative Court decisions judicially reviewing the UT will no doubt be treated as binding.<sup>112</sup> Nonetheless, the "co-ordinate" nature of the two bodies means that considerations of judicial comity necessarily cut both ways, inviting a *mutuality* of respect. That suggests, in part, that the Administrative Court should in the first place adopt a cautious approach so that it only intervenes where necessary and thereby avoids the kind of excessive intervention that could undermine the position of the UT.

Managing the relationship between the two bodies is more a matter of developing judicial policy and practice than of strict law.<sup>113</sup> Effective communication between the UT and the Administrative Court through the Senior President will be crucial as will the ability of higher court judges to sit in the UT and thereby contribute to the quality of its decision-making by way of direct involvement rather than by way of subsequent correction. As noted above, Lord Phillips' initial inclination in *Cart* had been to treat the new tribunal system as self-contained, but he was persuaded that there was, "at least until we have experience of how the new tribunal system is working in practice, the need for some overall judicial supervision".<sup>114</sup> The informal understandings of the relationship between the Administrative Court and UT will be significant in terms of informing practice.

"to be a surprising approach for a tribunal judge to take to a decision of the Administrative Court". See *R. (K) v Secretary of State for the Home Department* [2010] EWHC 3102 (Admin) at [19]–[20].

<sup>109</sup> *Secretary of State for Justice v RB* [2010] UKUT 454 (AAC) at [40]–[43]. See also *AW v Essex County Council* [2010] UKUT 74 (AAC) at [33].

<sup>110</sup> *Secretary of State for Justice v RB* [2010] UKUT 454 (AAC) at [41]. By way of comparison, the Employment Appeal Tribunal, a "superior court of record" (Employment Tribunals Act 1996, s. 20(3)), has for many years asserted a right to depart from High Court decisions, although treating them as of great persuasive authority, see *Portec (UK) v Mogenson* [1976] 3 All E.R. 565.

<sup>111</sup> *R. (B) v London Borough of Islington* [2010] EWHC 2539 (Admin), [2011] P.T.S.R. 716 at [31].

<sup>112</sup> *Secretary of State for Justice v RB* [2010] UKUT 454 (AAC) at [46].

<sup>113</sup> cf. *PR (Sri Lanka) v Secretary of State for the Home Department* [2011] EWCA Civ 988, [2012] 1 W.L.R. 73 at [39].

<sup>114</sup> [2011] UKSC 28, [2011] 3 W.L.R. 107 at [92].

## X. CONCLUSION

One of the great complexities of administrative law concerns the degree to which the courts should review decisions of other decision-makers. This complexity arises because, through the application of administrative law, the role of the courts is to determine the lawfulness of the acts of other branches of the state, yet the legitimate extent of judicial involvement is itself a sensitive matter that raises questions about the courts' role under the separation of powers. It follows, as we noted at the outset of this article, that the proper limits of curial intervention – and so the proper extent of other institutions' autonomy – forms one of the enduring dilemmas of administrative law. In this paper, our concern has been with an area in which that dilemma arises in an unusual though important form. The relationship between tribunals and courts presents a special challenge because of the way in which Diceyan orthodoxy, which demands “judicial” control of “administrative” tribunals, collides with the contemporary characterization, cemented by the TCEA scheme, of tribunals as judicial bodies. Against that background, this conclusion will draw together the implications of *Cart* for the new tribunals system from three perspectives: the practical reality of the relationship between courts and tribunals; the role of doctrine in administrative law; and the rule of law.

On the face of it, the Supreme Court's approach in *Cart* leaves greater scope for the involvement of regular courts in supervising the work of the tribunals system. That is so because the relatively bright-line distinction drawn by the lower courts between matters that were and were not to be regarded as susceptible to review is replaced, in the Supreme Court's analysis, by the potentially more open-textured second-tier appeal criteria. This may appear to call into question the extent to which the UT and the Administrative Court can properly be regarded as exercising cognate jurisdictions that sit in a non-hierarchical relationship with one another. However, the practical difference between the approaches of the lower courts and the Supreme Court may be less significant than initial appearances would suggest. The second-tier appeal criteria are themselves expressed in restrictive terms – and, as noted above, post-*Cart* jurisprudence suggests that they might be subject to especially narrow interpretation as they apply to the UT. It is also important to bear in mind that satisfaction of one of the second-tier appeal criteria merely determines *susceptibility* to review (or appeal), not *legality*. Even if, on application of those criteria, a decision is reviewable, it may nevertheless turn out to be lawful – a possibility which is enhanced by the likelihood that the courts' deference to pre-TCEA tribunals' expertise will persist under the new scheme in relation to the UT. The upshot, then, is that while

the Supreme Court's emphasis upon PDR led it to cast the scope of tribunals' autonomy in terms different from those adopted by the lower courts, the resulting practical extent of judicial supervision may not be substantially greater.

However, viewed from a doctrinal perspective, the Supreme Court's analysis does depart significantly from that of the lower courts. By placing PDR centre-stage, *Cart* necessarily leaves less room for the operation of administrative law's "normal" doctrinal machinery. This is most obviously apparent from the Supreme Court's rejection of the Court of Appeal's reasoning, which invoked the notion of non-jurisdictional error in order to shield the UT from judicial review. The Supreme Court's preferred approach is at once both orthodox and heterodox. It is orthodox in that it reaffirms the (now) conventional view that, in general, no distinction should be drawn between jurisdictional and (what were formerly regarded as) non-jurisdictional errors of law. Yet by resisting the Court of Appeal's attempt to reintroduce that distinction and instead invoking PDR as a factor independently capable of determining the availability of judicial review, the Supreme Court's decision strikes a markedly heterodox note: the approach is a raw, pragmatic one that engages with policy considerations unvarnished by doctrinal analysis. It is undeniable that administrative law's doctrinal edifice is heavily shaped by, *inter alia*, policy considerations. What is unusual, however, about the Supreme Court's decision in *Cart* is that rather than informing the content and application of doctrine, policy – in the form of PDR – operates as a free-standing determinant of when judicial review should and should not lie. Whether this is to be welcomed or deprecated turns upon the underlying question whether the formalism of doctrine is a necessary discipline that gives shape and coherence to the law, or a distraction that disguises the role of implicit policy considerations that would better be made explicit.<sup>115</sup> It is beyond the scope of this article to attempt to resolve that issue, but it is clearly the case that, for the Supreme Court in *Cart*, the pull of doctrinalism proved to be relatively weak.

The charge that *Cart* marginalizes (at least in this context) the regular doctrinal apparatus of administrative law is one thing. Might it also be said that, viewed in broader constitutional perspective, it erodes the rule of law? In orthodox Diceyan terms, control of "administrative" tribunals by "regular" courts is imperative if the rule of law is to be upheld. On this view, allowing considerations such as PDR to enter into play is necessarily suspect, because it permits the rule of law to

<sup>115</sup> For contrasting views, see T. Allan, "Doctrine and theory in administrative law: an elusive quest for the limits of jurisdiction" [2003] P.L. 429; C. Forsyth, "Showing the fly the way out of the flybottle: the value of formalism and conceptual reasoning in administrative law" [2007] C.L.J. 325.

be traded off against competing concerns. But this presupposes (at a general level) that the rule of law requires judicial supervision of tribunals, and (at a specific level) that this is so even when PDR considerations suggest otherwise. Yet the rule of law does not require oversight of the administration by a regular court; it requires oversight by an independent judicial body: and the TCEA scheme furnishes such oversight through the provision of tribunals that are functionally and constitutionally analogous to – whether or not, as Laws L.J. thought, the *alter ego* of – the courts. Against this background, it is at least arguable – as Lord Phillips evidently thought – that the rule of law would not be threatened were the tribunals system to be regarded “as wholly self-sufficient”.<sup>116</sup> Once the matter is approached in this way, a constitutional space opens up in which the sort of pragmatic considerations that are the concern of PDR can legitimately operate. On this analysis, PDR and the rule of law are not (in the present context) factors that are in tension with one another: under the TCEA scheme the requirements of the rule of law are primarily satisfied not by judicial oversight of the tribunals system, but by the characteristics with which that system has been invested.

In *Cart*, Lord Brown said: “The rule of law is weakened, not strengthened, if a disproportionate part of the courts’ resources is devoted to finding a very occasional grain of wheat on a threshing floor full of chaff.”<sup>117</sup> Taken in isolation, this statement is a potentially dubious one, in that there are undoubtedly many circumstances in which the rule of law demands precisely the level of judicial vigilance that Lord Brown appears to deprecate. Lord Brown’s view is, however, far more palatable from a rule-of-law perspective when account is taken of the nature of the process and institutions that produce the “wheat” and the “chaff” in the tribunals context. This suggests that the legitimate influence of PDR is heavily contingent upon the institutional context, such influence being less suspect in rule-of-law terms when the prospective target of judicial review is itself a judicial body with the sort of constitutional stature and institutional expertise of the UT. In that sense, *Cart* is arguably a case that is not in fact classically concerned with what we earlier called the enduring dilemma of administrative law. Properly understood, the question in *Cart* was not about the appropriate reach of judicial intervention in relation to another branch, but was rather about the respective spheres of influence of cognate parts of the judicature. *Cart* therefore tells us a great deal about contemporary judicial perceptions of how regular courts should relate not to executive bodies generally, but to tribunals in particular – and about how far

<sup>116</sup> [2011] UKSC 28, [2011] 3 W.L.R. 107 at [91].

<sup>117</sup> *Ibid.*, at [100].

those perceptions radically diverge from the Franks report, which was “*firmly* of the opinion that *all* decisions of tribunals should be subject to review by the courts on points of law”.<sup>118</sup> It should not be assumed that the notion of PDR can be applied across the board or that it is uniquely applicable to tribunals. However, the fact that it *can* be legitimately applied in that context tells us that courts and tribunals should now be viewed as engaged in a common enterprise of ensuring governmental legality in which the focus is upon resolving cases at the most appropriate level of the judicial hierarchy, and in which the demands of the rule of law can be met by means other than substantial oversight of tribunals by regular courts.

<sup>118</sup> Franks Report, note 4 above at [107] (emphasis added).