

Chapter 3

From “Adversarial v Inquisitorial”  
to “Active, Enabling, and Investigative”:  
Developments in UK  
Administrative Tribunals

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**Introduction**

When designing an adjudication system, there are normally a number of procedural choices to be considered. A principal design issue concerns the role of the adjudicator and that of the parties. Should the adjudicator be passive or proactive? What should be the role of the parties and their contribution? This chapter explores these questions in the context of administrative tribunals in the United Kingdom.

As a common law jurisdiction, court hearings in the UK are generally conducted on an adversarial basis: each litigant will present his or her own case and attack that of the opponent.<sup>1</sup> The adjudicator is an impartial referee whose role is primarily to hold the ring between the parties and to decide the case solely on the basis of the evidence and arguments that the parties have chosen to present. Given the long history of adversarial process, this approach is adopted in virtually all civil and criminal litigation in the UK.<sup>2</sup>

By contrast, in inquisitorial proceedings, the judge assumes a proactive role of identifying issues and gathering evidence and also takes full control of the proceedings and governs the participation of the parties. The term “inquisitorial” is though nebulous and can carry a range of possible meanings. A soft inquisitorial approach may mean that the judge can make inquiries by asking questions or, with the assistance of the parties, investigate the issues. By contrast, a fully inquisitorial

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1 These definitions draw upon M. Allars, “Neutrality, the Judicial Paradigm and Tribunal Procedure” (1991) 13 *Sydney Law Review* 377 at 381–5; Andrew Leggatt, *Tribunals for Users: One System, One Service. The Report of the Review of Tribunals* (London: Tribunals Review Programme, 2001) at paras 7.2–7.5 [Leggatt].

2 The principal exceptions are the small claims court (which deals with low-value civil claims) and the Family and Children’s Courts. Both these courts tend to operate in a more informal way than other civil litigation.

procedure denotes a more wide-ranging role for the judge from the pre- to post-hearing stage; the judge takes charge of the case and of case management, issue directions as to which particular matters and evidence require examination; the judge may also commission expert evidence.

The labels – adversarial and inquisitorial – are commonly used in discussions of judicial procedure. However, it is arguable that they do not adequately capture, either descriptively or normatively, the distinctive nature of administrative adjudication. An alternative way of expressing the underlying idea is to consider what degree of intervention – ranging from a passive, reactive stance to a more proactive or intrusive one – is required to ensure that appeals are decided properly.<sup>3</sup>

Over recent years, a third method – the enabling approach – has been advanced specifically in relation to unrepresented claimants who appeal against decisions of a “repeat-player” government agency. In the enabling approach, the tribunal gives an unrepresented appellant every possible assistance to enable her to participate and to compensate for her lack of skills or knowledge.<sup>4</sup> This is achieved through a combination of creating the right atmosphere and assisting the appellant by bringing out relevant facts.

The question of judicial procedure in administrative tribunals is vexed and a perennial area of discussion – usually without clear conclusions. It can also be a difficult matter upon which to generalise because the issues are so complex and wide-ranging. The differences between the institutions vary enormously and there has been little cross-jurisdictional investigation. Nonetheless, a common theme emerges: tribunals have been relatively successful in moving more toward an active, enabling, and investigative approach. Major challenges remain of course. Tribunals have yet to articulate a fuller vision of what type of active approach they aspire to undertake. The need to develop this vision will become more insistent if proposed restrictions to publicly funded representation are implemented.

The structure of the chapter is as follows. After an overview of recent reforms to the UK’s tribunal system, the chapter considers the general position and debate over tribunal procedure and the pressures for and against active adjudication. The chapter then considers the practice in the largest two tribunal jurisdictions – social security and immigration adjudication.

### **Tribunal Adjudication in the UK**

In the UK, administrative tribunals are the standard mechanism for legal control over administrative decision-making. They determine appeals against various

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<sup>3</sup> Peter Cane, *Administrative Tribunals and Adjudication* (Oxford, Hart Publishing, 2009) at 239–244.

<sup>4</sup> K. Bell, *Research Study on Supplementary Benefit Appeal Tribunals – Review of Main Findings: Conclusions and Recommendations* (1975) at 18; Leggatt, *supra* note 1, at paras 7.4–7.5.

administrative decisions and are staffed predominantly by legally-qualified tribunal judges who are accompanied by non-legal members. Tribunals are separate statutory adjudicative bodies and are viewed as part of the judicial rather than administrative arm of the state. They specialise in deciding appeals across a wide-ranging of administrative decision-making, from high volume jurisdictions such as social security, immigration, and employment to lower volume jurisdictions such as education, mental health, and criminal injuries compensation. The Tribunals Service consists of 36 separate jurisdictions, yet over 90 per cent of the caseload is concentrated in just three jurisdiction: social security, employment, and immigration.<sup>5</sup> In 2009–10, tribunals received 793,900 appeals; in 2010–11, there will be over 1 million appeals.<sup>6</sup>

Individual tribunal jurisdictions have been in existence for decades and have developed on an ad hoc and unsystematic basis as isolated adjudication systems without any sense that they comprised an overall tribunal *system*.<sup>7</sup> Each tribunal adopted its own procedure without any joined-up approach. However, with the landmark Tribunals, Courts and Enforcement Act (TCEA) 2007, most of the major tribunals have been brought together into a single structure: the two-tier system of the First-tier and Upper Tribunals, each of which are comprised of distinct chambers. The First-tier Tribunal is currently organised into 7 chambers: War Pensions and Armed Forces Chamber; Social Entitlement Chamber; Health, Education and Social Care Chamber; General Regulatory Chamber; Tax Chamber; Immigration and Asylum Chamber; Land, Property and Housing Chamber. The Upper Tribunal has 4 chambers: Administrative Appeal Chamber; Tax and Chancery Chamber; Immigration and Asylum Chamber; and the Lands Chamber.

The First-tier Tribunal hears initial fact-based appeals while the Upper Tribunal determines onward challenges on error of law grounds. If the Upper Tribunal finds that there is an error of law, then it can either correct that error and determine the appeal itself, or it can send the appeal back for rehearing by the First-tier Tribunal.<sup>8</sup> The system of onward challenges used to be incoherent with onward challenges either by way of judicial review or to a specialist second-tier tribunal and then judicial review. The intention behind the TCEA 2007 has been to create a new, simplified statutory framework for tribunals which provides coherence and will enable future reform. Two particular features are worth highlighting. First, the

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<sup>5</sup> Tribunals Service, *Annual Statistics for the Tribunals Service 2009–10* (2010) at 4, online: <http://webarchive.nationalarchives.gov.uk/20110207135458/http://www.tribunals.gov.uk/Tribunals/Documents/Publications/tribs-annual-stats-2009-10c.pdf>. Most tribunals deal with “individual and state” disputes. Employment Tribunals, which decide with “party and party” disputes and are not *administrative* tribunals, are not discussed here.

<sup>6</sup> For an overview of the UK tribunal system, see M. Elliott and R. Thomas, *Public Law* (Oxford: Oxford University Press, 2011), ch 17.

<sup>7</sup> RE Wraith and PG Hutchesson, *Administrative Tribunals* (London: Allen & Unwin, 1974).

<sup>8</sup> *Tribunals, Courts and Enforcement Act 2007*, s 11.

Upper Tribunal is a superior court of record, that is, it has a status akin to that of the higher courts and it has a role in providing leadership for the various chambers of the First-tier Tribunal.<sup>9</sup> Second, the Upper Tribunal is increasingly taking over the routine judicial review work of the higher courts.<sup>10</sup> The TCEA 2007 has also meant a wide-ranging unification of the tribunals system across multiple areas of work: a statutory guarantee of the independence of the tribunal judiciary; bringing tribunals more clearly within the judicial rather than the administrative system; a Tribunal Procedure Committee to write tribunal procedure rules; greater administrative coherence; and cross-ticketing of judges between different tribunal jurisdictions.

### **Tribunal Procedures**

Where do UK tribunals sit on the adversarial–inquisitorial spectrum? It is widely acknowledged that the complexity and fragmentation of the administrative justice “landscape” (including the plurality of approaches: adversarial versus inquisitorial or investigative; legally qualified judges or lay people; legal representation or self-representation, with or without advice and guidance) precludes easy generalisation. The nature of tribunals, the issues they deal with, and their caseloads vary enormously. Some tribunals (for instance, social security and criminal injuries compensation) adopt a relatively active approach.<sup>11</sup> Other tribunals (immigration and employment tribunals) tend to be more adversarial and court-like in nature. By contrast, other tribunals, such as special educational needs and mental health, have been described as hybrid or quasi-inquisitorial.

Despite the difficulties of generalising, the following points can be made. First, tribunals have long been viewed as less adversarial than formal court litigation. Part of the rationale for tribunals is that they can determine cases in a less formal way than the courts. Nonetheless, tribunals have developed against the backdrop of a court-focused adversarial process. No tribunal in the UK adopts a completely inquisitorial approach. They may often adopt a user-friendly approach, but tribunals are unable to step outside of their judicial role by assisting a party to prepare his case or to gather evidence. By contrast, other institutions, in particular, ombudsmen and the Independent Review Service which reviews social fund decisions, do not have oral hearings but do have a specific mandate to investigate cases themselves. No tribunal operates in this way. The basic obligation to prepare and present a case rests with the parties concerned. Tribunals have been established by their parent government department, but government has seldom paid much attention to the issue of procedure. Instead, the matter has normally been left to

<sup>9</sup> *Tribunals, Courts and Enforcement Act*, *supra* note 8, s 3(5).

<sup>10</sup> *Ibid*, ss 15–21. See in particular *R. (Cart) v Upper Tribunal* [2011] UKSC 28.

<sup>11</sup> Criminal Injuries Compensation Appeal Panel, *Annual Report and Accounts* (2005–06 HC 1428) at 14, online: <http://www.official-documents.gov.uk>.

the tribunals themselves to determine. The relevant legislation is almost always silent on the issue, though specific provisions often give an indirect steer.<sup>12</sup> In the absence of a direct mandate to adopt an inquisitorial approach, tribunals have habitually assumed that they should proceed more or less like courts by adopting an adversarial approach, though without some of the more trappings of formal court litigation.

The type of procedure a tribunal uses is the result of a wide range of factors. For instance, Mental Health Review Tribunals are “to a significant extent inquisitorial” in large part because the medical member must undertake a medical examination of the patient to form an opinion of the patient’s mental condition.<sup>13</sup> Other tribunals have been occasionally prodded by the courts to be more active. For instance, the courts have noted that the Special Educational Needs Tribunal “cannot proceed on a purely adversarial basis, but has a duty to act inquisitorially when the occasion arises by making sure it has the necessary basic information on which to decide the appeal before them, rather than rely entirely on evidence adduced by the parties. The tribunal will usually have much greater relevant expertise than the parents who appear before them.”<sup>14</sup>

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Other factors which influence tribunal procedures include: the particular adjudicative context and culture that a tribunal has developed; the emphasis placed upon the burden of proof; the inapplicability of the normal rules of evidence; guidance from the courts and the second-tier tribunal; the preferences of individual judges; operational factors, such as time targets for clearing cases; and whether the parties are represented and, if so, then how effectively.

The presence of all of these factors, can make it difficult to identify any general trends. Nonetheless, it is possible to discern a wider change over recent years away from a traditional adversarial approach. Often seen as court-substitutes, tribunals have adopted the default position of the adversarial process.<sup>15</sup> However, with the TCEA 2007, there is a general acceptance that the model of tribunals has shifted, and with it the appropriate procedure. The 2007 Act does not impose any particular procedural model on tribunals. Nonetheless, there is an implicit assumption that court procedures are not necessarily applicable. For instance, the Act explicitly

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12 There is no statute which explicitly enables a tribunal to adopt an adversarial or inquisitorial approach. The nearest – and a rare – instance is the Employment Tribunals (Constitution and Rules of Procedure) Regulations, SI 2001/1171, Schedule 1, para 11: “The tribunal shall make such enquiries of persons appearing before it and witnesses as it considers appropriate and shall otherwise conduct the hearing in such manner as it considers most appropriate for the clarification of the issues before it and generally to the just handling of the proceedings.”

13 *R. (Ashworth Hospital Authority) v Mental Health Review Tribunal for West Midlands* [2001] EWHC Admin 901 at para 16; The Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules, SI 2008/2699, r 34.

14 *W v Gloucestershire County Council* [2001] EWHC Admin 901 at para 15.

15 Gabriele Ganz, *Administrative Procedures* (London: Sweet & Maxwell, 1974) at 29–35.

emphasises the accessibility and expertise of tribunals (as opposed to courts) and the development of innovative dispute resolution methods.<sup>16</sup>

The traditional model of tribunals rested upon the following basis that they were essentially court-substitutes and part of the machinery for adjudication rather than administration. As tribunals operated under the shadow of the courts, the assumption was that they were adversarial rather than inquisitorial.<sup>17</sup> By contrast, the new model of tribunals, which has emerged over recent years, views tribunals as the adjudicative segment of a broader administrative process for implementing policy, the purpose of which is to achieve right decisions efficiently. A key feature is that tribunals possess special expertise and can, if need be, adopt an active approach to ensure that all those issues which have a bearing on the outcome of an appeal are investigated irrespective of whether or not they have been raised by the parties.<sup>18</sup> This new model is reflected in the overriding objective of the tribunal procedure rules: the need to ensure that appeals are dealt with fairly and justly in a manner proportionate to their importance, complexity, anticipated costs and the resources of the parties.<sup>19</sup> Tribunals should avoid unnecessary formality and seek flexibility, enable the parties to participate, use any special expertise effectively, and avoid delay. The parties are obliged to co-operate with the Tribunal in this objective. While this broader trend does not explicitly address the issue of whether adversarial or inquisitorial approaches are appropriate, the wider themes are that tribunals should be flexible and not tied down by an adversarial procedure but adopt an active approach if this is justified by the overriding objective. In short, the reform of tribunals has provided a new context for considering and analysing issues of tribunal procedure.

### **Pressures For and Against Active Adjudication**

One reason why the appropriate mode of tribunal procedure seems so unclear is largely because of the multiplicity of pressures motivating and restraining tribunal procedure and the complex and disparate situations in which the issues arise. The debate is also linked to wider issues such as the role of tribunals within the broader administrative process, the use of oral hearings and the role, and especially the funding of representation for tribunal appellants.

One of the principal forces for a more active approach arises from the position and function of tribunals as judicial institutions taking administrative decisions that

<sup>16</sup> See *Tribunals, Courts and Enforcement Act*, *supra* note 8, s 2(3).

<sup>17</sup> This model is closely associated with the *Franks Report of the Committee on Administrative Tribunals and Enquiries* (Cmnd 218, 1957).

<sup>18</sup> This model is associated with a variety of recent developments summarised and developed in R. Carnwath, “Tribunal Justice – A New Start” (2009) *Public Law* 48.

<sup>19</sup> *Tribunals, Courts and Enforcement Act*, *supra* note 8, s 22(4); Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules, SI 2008/2685, r 2.

implement public policy. Given the fundamental difference between ordinary civil proceedings and administrative adjudication because of the wider public interest at stake over and above the interests of the competing parties in achieving correct decisions, tribunals form part of a wider administrative process for implementing policy.<sup>20</sup> If tribunals are to take decisions that best implement policy goals, then they should rely upon the best available information rather than just the evidence presented by the parties, which requires an active style of adjudication.

An active approach often arises naturally from the issues upon which tribunals adjudicate. In some contexts, there can be a complex interrelationship between the nature of the decision exercise to be taken, the tribunal’s expertise, and the (partial) inapplicability of “adversarial” concepts, such as the burden of proof.<sup>21</sup> Tribunals are often concerned not so much with finding facts which are capable of exact demonstration, but with assessing future risk and/or engaging in a process of judgment or evaluation. For instance, different tribunals have to decide various matters such as whether it would be unduly harsh for an asylum applicant at risk of persecution in one part of a country to relocate internally to another part of the same country where he would not be at risk, or whether the illness of a mental health patient is of a nature and degree that it justifies detention, or whether agreements between businesses distort competition contrary to competition law.<sup>22</sup> Determining such issues properly is perhaps not best characterised as ascertaining whether the facts have been proved to the requisite standard of proof. Instead, it can involve an holistic approach to adjudication in which an expert tribunal engages in varying degrees of active investigation to ensure that the best decision is made because there is an important underlying public interest at stake. A related point, but one not yet fully developed in the UK, is that the lessons tribunals draw from an active approach can be utilised by agencies to improve initial decision-making.

On the other hand, there is still the strong influence of the court-based model, especially in relation to procedure. Oral hearings seem closely connected with representation and an adversarial process. However, recent government policy on tribunals has been to reduce the need for hearings before tribunals through better decisions and innovative proportionate dispute resolution (PDR) methods.<sup>23</sup> This in turn will reduce the need and cost of representation. As it is,

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20 Robert Thomas, *Administrative Justice and Asylum Appeals: A Study of Tribunal Adjudication* (Oxford: Hart, 2011) at 5–11 [Thomas].

21 The applicability of the burden of proof in such proceedings is problematic and contested. I say “partial” because a modified burden of proof – the burden of persuasion – remains relevant in much adjudication.

22 See *Karanakaran v Secretary of State for the Home Department* [2000] 3 All ER 449 (asylum); *JJB Sports PLC v Office of Fair Trading* [2004] CAT 17 (competition law); *R (DB) v Mental Health Review Tribunal* [2005] EWHC Admin 587 (mental health).

23 Department for Constitutional Affairs, *Transforming Public Services: Complaints, Redress and Tribunals* (Cm 6243, 2004) at para 10.11 [Department for Constitutional

tribunals have increased the number of paper-only appeals, but still remain tied to oral hearings as the norm.

Perhaps the most high-profile issue is the funding of representation. Indeed, it is no exaggeration to say that the debate over tribunal procedure is usually subsumed within the debate over legal aid funding. Representation is intrinsically connected to diametrically opposed factors: effective access to justice and its cost (and the government's wish to reduce it). The functions of representatives are to assist the tribunal and to advise and represent claimants. In this way, representation bridges the gap between the tribunal and the lay claimant in which the claimant knows the facts, but not the law, while the tribunal knows the law, but not the facts. If a claimant is unrepresented, then the tribunal should bridge the gap between itself and the claimant by adopting an enabling approach. However, tribunals mostly operate in those areas of social law in which the individuals concerned may not be able to afford to pay a representative. Hence the need for publicly funded representation. The general position until 2011 was that while legal aid was unavailable before tribunals, it was available for advice and assistance in some areas (for example, social security) and representation was funded in other areas (mental health and immigration).

The orthodox view has been that representation significantly enhances appellants' successful outcomes.<sup>24</sup> As tribunals have not been that adept at adopting an adequate enabling approach and the risk is that an unrepresented appellant will be disadvantaged, it has often argued that the resources must be found to provide publicly funded representation before all tribunals. But for reasons of cost, the government has always been reluctant to expand legal aid and is currently trying to restrict it. However, recent empirical research suggests that the orthodox view requires revision. Tribunals have become better at handling unrepresented appeals by assisting appellants. An unrepresented appellant who receives good advice before a tribunal hearing is just as likely to achieve a favourable outcome as a represented appellant.<sup>25</sup> Represented parties do not always do better than unrepresented parties, especially if they have received pre-hearing advice. Of course, represented appellants clearly benefit from representation in a variety of ways – providing technical or legal knowledge, giving moral support, speaking for the appellant and providing general support). Nonetheless, the evidence indicates that the success rates of unrepresented appellants can be attributed to the active and enabling approach adopted by tribunals.<sup>26</sup>

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24 H. Genn and Y. Genn, *The Effects of Representation in Tribunals* (London: Lord Chancellor's Department, 1989).

25 M. Adler, *Can Tribunals Deliver Justice in the Absence of Representation?* (ESRC Paper, 2007). See also M. Adler, "Tribunal Reform: Proportionate Dispute Resolution and the Pursuit of Administrative Justice" (2006) 69 *Modern Law Review* 958 at 980–2.

26 See Adler, *ibid.*

The overall picture may then be a more nuanced than it was previously thought to be, but it is not a perfect one. The extent to which a tribunal is able to provide an effective enabling approach will depend upon the individual judge and his or her experience in being able to draw out the evidence effectively. Research into asylum appeal hearings found that unrepresented appellants tended to experience lower rates of success than represented appellants and that there were significant differences of approach between different judges. Some judges provided the unrepresented appellants with assistance; others did not.<sup>27</sup>

However, policy developments have been moving quickly and the UK’s current Conservative–Liberal Democrat coalition government elected in May 2010 is intent on severely reducing publicly funded assistance and representation as part of its fiscal deficit reduction plan. The government’s plan is to remove legal aid entitlement completely from certain areas of law. Funding for advice for social security, advice and representation for immigration and other appeals (for example, education) would be removed altogether; only legal aid for asylum, immigration detention, and mental health cases would be retained.<sup>28</sup>

While normally indifferent to tribunal procedure, the government’s invocation of the inquisitorial nature of tribunals has often gone together with the view that tribunals are able to handle unrepresented appeals adequately (and therefore government need not fund representation).<sup>29</sup> From the government’s perspective, the adversarial tradition is seen as a major contributory factor to high legal aid costs.<sup>30</sup> Accessible, active, and user-friendly tribunals enable appellants to their cases without assistance.<sup>31</sup> However, the proposals have been criticised as highly problematic. As a Parliamentary Committee has noted, the proposals require considerable further refinement, assume a major change in the way the accessibility of the justice system has come to be viewed, and many concerned

27 Thomas, *supra* note 20, at 116–7, 125–8.

28 Ministry of Justice, *Proposals for the Reform of Legal Aid in England and Wales* (Cm 7967, 2010) [Ministry of Justice]. From the government’s perspective, the UK’s legal aid system is one of the world’s most expensive – currently over £2 billion per annum – and it intends to restrict legal aid as part of the Ministry of Justice’s commitment to reducing the deficit. Most of this is criminal and civil legal aid rather than legal aid for tribunals. In 2009–10, legal aid costs in relation to social security appeals were £28.3 million; immigration appeals £88.8 million; and education appeals £3 million. The government wants to cut the legal aid budget by £350 million a year.

29 Leggatt, *supra* note 1, at para 4.21; Department of Constitutional Affairs, *supra* note 23, at para 10.11.

30 R. Bowles and A. Perry, *International Comparison of Publicly Funded Legal Services and Justice Systems* (Ministry of Justice Research Series 14/09, 2009) at 36.

31 Ministry of Justice, *supra* note 28. The government’s other two arguments are that the issues involved are of lower importance than fundamental ones concerning safety and that help and advice are available from a number of other sources.

(including tribunals) are quite unprepared.<sup>32</sup> Nonetheless, the government is intent upon implementing its proposals.<sup>33</sup>

Despite the clear progress tribunals have made, it remains to be seen how they will cope with the near-wholesale withdrawal of legal aid. Tribunals need to do more to be more user-friendly and less legalistic. Judicial concerns have focused upon the limits of active tribunal procedure and the role of advisors and welfare organisations in explaining decisions and assisting claimants both hearings. Withdrawing assistance may mean good cases do not come before tribunals; conversely, those with hopeless cases may appeal and end up wasting both their own and the tribunal's time. The lack of pre-hearing assistance and preparation may also increase the length of hearings.<sup>34</sup>

Restricting legal aid is not the whole story though. Another issue, addressed below, is government representation. While government departments can be represented by a presenting officer, such officers rarely attend appeal hearings because of staff shortages. The absence of a government representative to defend the initial decision and cross-examine clearly changes the dynamics of the appeal hearing.

Another pressure for an active approach arises from the need for an efficient adjudication process. The risk is that an adversarial process increases delay and costs. By contrast, by adopting an active approach, the tribunal can focus the hearing on the issues that matter. Given the increasingly managerial contexts in which many tribunals operate, this has assumed some importance. Many tribunals operate within key performance indicator targets, typically to ensure that they determine a certain percentage of their caseload within a stated period of time.<sup>35</sup> Tribunals also have case-management powers and are expected to manage cases as efficiently as possible. It may be that, over time, the greater pressure for an active approach comes from this rather than other sources.

Opposing the pressures for an active approach are various counter-doctrines. First of all is the potential threat to judicial neutrality. To maintain the perception of impartiality, tribunals should not descend into the arena between the parties. This counter-doctrine is sometimes seen as over-blown. Nonetheless, it is not altogether invalid. UK tribunals place great store not just by their constitutionally independent position, but also by the perception of their neutrality in the context of day to day hearings. Some tribunals may be cautious about intervening for fear of criticism that they are biased. An active approach may be justified by the

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32 House of Commons Justice Committee, *Government's Proposed Reform of Legal Aid* (2010–11 HC 681).

33 Legal Aid, Sentencing and Punishment of Offenders Bill 2011.

34 Senior President of Tribunals, *Senior President of Tribunals' Annual Report* (February 2011) at 9, online: <http://www.judiciary.gov.uk/publications-and-reports/reports/Tribunals/spt-annual-report-2011> [Senior President of Tribunals].

35 See Tribunals Service, *Annual Report* (2009–10 HC239), appendix C, online: <http://www.official-documents.gov.uk/document/hc1011/hc02/0239/0239.pdf>.

power-disparities, but there is also the need for fairness to the relevant government department. Furthermore, there can sometimes be a conflict of goals. For instance, tribunals often experience difficulty in seeking to investigate a case thoroughly and to ensure that the best aspects of an individual’s case are brought out as fully as possible, while at the same time seeking to raise those points which might be unfavourable to an individual’s case because, for instance, the relevant government department is either poorly represented or not represented at all. Trying to tread this delicate line while also remaining independent and impartial poses a real challenge for even the most experienced tribunal judges. By contrast, a traditional adversarial approach is safer, more conservative, and less likely to result in claims that the tribunal has acted unfairly.

Other counter-doctrines include the concern that too active an approach risks placing excessive trust in the tribunal and that it can lead to prejudgment of the issues. A general view is that a tribunal aided by representation on both sides is more likely to arrive at better decisions than a tribunal acting alone. There is also the influence of adversarial bias: the adversary process is habitually seen as the “gold standard” process for producing and testing evidence.

Practical obstacles to an active approach can arise if tribunals lack adequate powers and resources with which to case-manage appeals proactively from start to finish or with which to collect their own reports or evidence. While judges can ask their own questions at hearings and help unrepresented appellants, tribunals cannot normally build and develop a case from its start by taking overall responsibility for investigating the issues. Any procedure that emerges is then likely to be seen as a compromise position in which much of the responsibility rests with the parties, but which also enables the tribunal to undertake important though limited investigation.

There is also the issue of judicial competence and training. To ask carefully phrased and neutral questions into sensitive matters which may sometimes appear detrimental to an individual’s case requires training, skill, and experience. Many tribunal judges are part-time and not necessarily equally competent to do this. Finally, there is the risk that a more active approach might relieve the parties of their responsibilities of presenting and scrutinising the evidence and somehow shift the applicable burden of proof from the appellant to the tribunal.

To summarise: tribunals have developed a more inquisitorial approach, but they have not totally rejected the adversarial approach; rather, they have applied an inquisitorial gloss to a basically adversarial process.<sup>36</sup> This suggests that the adversarial–inquisitorial dichotomy is no longer an insightful way to understand the role of tribunals. The practice of tribunals will often seem inadequate in some way because it can rarely be described as fully adversarial or inquisitorial. Instead, a new model – active, investigative, or intrusive adjudication – is required, one which recognises the need for tribunals to adopt varying degrees of intervention

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<sup>36</sup> T. Mullen, “A Holistic Approach to Administrative Justice?” in M. Adler, ed., *Administrative Justice in Context* (Oxford: Hart 2010) at 391 [Mullen].

and activism depending upon a wide variety of different factors which will fluctuate from one case to the next. It is therefore to the practice in individual tribunal systems to which we now turn.

### **Social Security Adjudication**

Like other welfare states, the UK spends a considerable proportion of total government spending on social security and benefit programmes. There are annually 5.9 million benefit claimants. Social security is a highly complex, intricate, and fast-changing area of law. Claims for benefits are made initially to one of the various decision-making agencies of the Department for Work and Pensions. If refused, then a claimant may appeal. Social security adjudication has a low appeal rate (less than 2 per cent of claimants who could appeal do so), but is the largest appeal system. In 2008–09, the tribunal decided 245,500 appeals. In 2009–10, it received 339,000 appeals and is forecast to receive 436,000 appeals by 2011–12.<sup>37</sup> In 2007–08, the tribunal overturned the department’s decision in 47 per cent of appeals.<sup>38</sup>

Social security tribunals are strongly predisposed toward active adjudication. The department and the claimant are not supposed to be locked into adversarial combat, but engaged in a co-operative process of investigation in which both parties play their part. The adjudication process is viewed as part of a wider decision-making process which is designed to ensure that claimants receive neither more nor less than the amount of social security benefit to which they are properly entitled (as opposed to the benefits to which the parties may be contending that they are entitled). Tribunals’ investigatory function is to decide cases correctly; they are not limited to the issues raised by the parties. As the Supreme Court has put it, the adjudication process is “inquisitorial rather than adversarial”.<sup>39</sup>

The active or investigatory nature of the adjudication process arises in large part because of the legitimate public interest in ensuring that policy is being implemented; the tribunals form part of the statutory machinery for investigating claims.<sup>40</sup> But there are other factors.<sup>41</sup> Social security law is highly complex. It is extremely unlikely that a claimant will be able to navigate the regulations

<sup>37</sup> Senior President of Tribunals, *supra* note 34, at 39.

<sup>38</sup> President of Appeal Tribunals, *Report by the President of Appeal Tribunals on the standards of decision-making by the Secretary of State 2007–08* (Tribunal Service, 2008) at 12.

<sup>39</sup> *Kerr v Department for Social Development* [2004] 1 WLR 1372 at paras 61–62 (Lady Hale); *R v Medical Appeal Tribunal (North Midland Region), ex parte Hubble* [1958] 2 QB 338, 240.

<sup>40</sup> *R v Deputy Industrial Injuries Commissioner, ex parte Moore* [1965] 1 QB 456, 486.

<sup>41</sup> R (IS) 11/99 [1998] UKSSCSC CIB 4189 1997 (01 October 1998) [31].

and decision-making process unaided. Many claimants may be poorly educated. Given this, tribunals are under a duty to consider and determine relevant questions irrespective of whether they have been expressly raised by a claimant.<sup>42</sup>

There is also the distinctive role of the appeals stage within the wider decision-making process. Indeed, the tribunal’s active approach can partly be understood as a response to changes in initial decision-making. Initial claims are paper-and form-based; the claimant will not meet the decision-maker until the appeal hearing. The hearing then provides the sole opportunity for establishing the facts of the case by enabling the decision-maker to engage directly with the claimant. Many appeals are allowed because the tribunal elicits additional information from the claimant through face-to-face engagement at the hearing.<sup>43</sup>

As regards representation, claimants may qualify for publicly funded advice and assistance before hearings, but not for representation at them. The degree of representation varies – 72 per cent of appellants are currently unrepresented – its provision depends upon local government, *pro bono* funding, and welfare organisations.

In such circumstances, social security tribunals have long adopted an enabling approach.<sup>44</sup> Likewise, the courts have emphasised that tribunals need to have particular regard to the presence of representation. Nonetheless, representation should not relieve a tribunal of adopting an active approach; a poorly represented claimant should not be placed at any greater disadvantage than an unrepresented party.<sup>45</sup> According to the Tribunal President, an active role by a tribunal may reduce the “added value” of having representation; nonetheless, representation remains of immense benefit to claimants.<sup>46</sup>

While the Department is entitled to be represented at hearings, the actual levels of attendance by departmental presenting officers has declined substantially. In 2000–01, the Department was represented at some 40 per cent of hearings. Since then, levels of government representation have dropped to 16 per cent.<sup>47</sup> The explanation is simply that it is too expensive for the department to be represented in

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42 Decision of the Social Security Commissioners (now the Upper Tribunal (Administrative Appeals Chamber), Decision CIB/4751/2002, CDLA/4753/2002, CDLA/4939/2002, and CDLA/5141/2002 (21 January 2004) at para 32; *Mongan v Department for Social Development* [2004] NICA 16 [14]–[17]; *Hooper v Secretary of State for Work and Pensions* [2007] EWCA Civ 495.

43 President of Appeal Tribunals, *Report by the President of Appeal Tribunals on the standards of decision-making by the Secretary of State 2007–08* (Tribunal Service, 2008) at 6.

44 See House of Commons Social Services Committee, *Social Security: Changes Implemented in April 1988* (1988–89 HC 437-ii) at paras 26–37.

45 *Mongan v Department for Social Development* [2004] NICA 16 at 18.

46 House of Commons Work and Pensions Committee, *Decision-making and Appeals in the Benefits System* (2009–10 HC 313), Ev 118 (evidence of Judge Robert Martin, President of the First-tier Tribunal (Social Entitlement Chamber)).

47 *Ibid* at para 164.

every case, so it focuses upon its resources upon the most important cases. Without government representation, the tribunal will explain the department's decision to the appellant, prompting concerns of undermining tribunal neutrality. The absence of a presenting officer should not necessarily be problematic. However, what the tribunals' unease illustrates is that they have not fully changed their mind-set.

There are limits to the degree of active adjudication by social security tribunals. Claimants must opt in for an oral hearing; those who do not have their appeals determined on the papers, which limits an active approach.<sup>48</sup> While the tribunals investigate at the hearing, the responsibility for gathering evidence, such as medical reports, rests with the claimant. Tribunals cannot assist a claimant in the way an advisor might by advising a claimant to appeal, or collecting evidence in the preparation of an appeal. Consequently, the Tribunal has criticised proposed legal aid restrictions, but their concerns have been largely ignored by the government.<sup>49</sup> When claimants are represented, tribunals are not obliged to adopt an active approach.<sup>50</sup> Furthermore, it is important to appreciate that an active approach is not limited to assisting the claimant; it can equally extend to investigating those issues which may ultimately be detrimental to the outcome of an individual's appeal. For instance, tribunals may, but are not obliged to, investigate when there are positive aspects of an initial decision not in issue before the tribunal, but which were possibly invalid (that is, the tribunal might make a less favourable decision than the one under appeal) so long as it acts fairly and is not seen as both prosecutor and judge.<sup>51</sup> Finally, the substantial increases in caseload combined with an increasingly managerial approach risk undermining an active approach; the risk is that the pressure to process appeals quickly will undermine efforts to investigate.

### **Immigration and Asylum Adjudication**

By contrast with social security adjudication, the immigration appeals system starts from the premise that the process is and ought to be primarily adversarial. The burden of proof is on the appellant; it is for the parties to present the evidence

48 N Wikeley, "Burying Bell: Managing the Judicialisation of Social Security Tribunals" (2000) 63 *Modern Law Review* 475 at 496.

49 *Proposals for the Reform of Legal Aid in England and Wales: Response by President of the Social Entitlement Chamber* (February 2011), online: <http://www.judiciary.gov.uk/media/media-releases/2011/responses-proposals-for-the-reform-of-legal-aid>.

50 [2000] UKSSCSC CSDLA\_336\_2000 (27 December 2000).

51 [2008] UKSSCSC CDLA 884/2008 (7 July 2008); *AP-H v Secretary of State for Work and Pensions* (DLA) [2010] UKUT 183 (AAC). For instance, a welfare claimant may have received a decision that he is entitled to a certain level of benefit because of disability needs and may challenge the decision on the basis that the benefits awarded are too low. However, the tribunal may investigate the matter and hold that the claimant is not entitled to any benefit at all if it finds that the individual's disability is insufficiently serious.

that they wish to rely upon and to advance whatever contradictions they wish; and, to maintain its independence, the Tribunal should not descend into the arena. The Immigration Judge acts as an impartial assessor of the evidence presented rather than as an investigator who takes the lead in ascertaining the evidence. Nonetheless, there is an ongoing debate over the issue. The views of the higher courts on the matter have oscillated wildly.<sup>52</sup> Many Immigration Judges recognise that the adversarial process does not necessarily work well in practice and engage in varying degrees of active adjudication.

The immigration appeals process is the second largest tribunal after social security. Initial decisions are taken by the UK Border Agency. In 2009, the agency made some 2.45 million visa decisions in addition to 297,780 after-entry decisions and 24,285 initial asylum decisions. Some categories of refusal decisions can be appealed to the First-tier Tribunal (Immigration and Asylum Chamber) (FTIAC), which in 2009 decided 198,505 appeals.<sup>53</sup> The caseload is diverse: asylum represents approximately 10.8 per cent of all receipts, managed migration 24.8 per cent, entry clearance appeals 24 per cent, and family visit appeals 39.7 per cent.<sup>54</sup>

It has been said that the degree to which the process can engage in active adjudication depends on which issues are being dealt with, moment to moment, in an appeal.<sup>55</sup> There are various factors which motivate and constrain an active approach in immigration appeals.

First, there is the particular prominence of human rights issues in immigration appeals, especially in refugee cases. The Tribunal has doubted whether the terms adversarial or inquisitorial accurately explain the nature of the asylum jurisdiction because of its distinctive features: the lower standard of proof (reasonable degree of likelihood); the shared duty of co-operation between the parties; the fact that the appellant will be possessed alone of almost all the relevant personal knowledge while the Home Office will be better placed to deal with general country conditions;

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<sup>52</sup> See *R v Special Adjudicator, ex parte Demeter* [2000] Imm AR 424 at 430 (Moses J noting that “the appeal should be, and is, adversarial. It is important that the special adjudicator should avoid, if possible, giving any appearance of entering into the arena by challenging the account that the applicant gives himself”); *Shirazi v Secretary of State for the Home Department* [2003] EWCA Civ 1562; [2004] 2 All ER 602 at 611 (Sedley LJ noting that the asylum jurisdiction is “as much inquisitorial as it is adversarial”); *HK v Secretary of State for the Home Department* [2006] EWCA Civ 1037 at para 27 (Neuberger LJ noting that “an Immigration Judge has an almost inquisitorial function, although he has none of the evidence-gathering or other investigatory powers of an inquisitorial Judge”).

<sup>53</sup> Home Office, *Control of Immigration: Statistics United Kingdom 2009* (Home Office Statistical Bulletin 15/10, 2010).

<sup>54</sup> Senior President of Tribunals, *supra* note 34, at 50. Some appeals (for example, asylum and managed migration) are conducted in-country; in entry clearance appeals, the appellant will not attend their appeal hearing because the appeal is being pursued from overseas, but his or her sponsor may attend.

<sup>55</sup> Interview with the Vice-President of the Upper Tribunal (Immigration and Asylum Chamber).

and the overriding duty that cases receive anxious scrutiny.<sup>56</sup> Given the error costs, decisions should be made on the best available material.

Again, the role and presence of representation is crucial. Given concerns over the variable quality of immigration representatives, only regulated persons can act as an immigration representative. Legal aid is available for both advice and representation, but is shrinking and likely to be withdrawn altogether except for asylum and detained cases. The difficulties may be especially acute in the immigration context given the importance of the issues at stake, the complexity of the extensive rules and case-law, and the fact that the tribunal system is principally viewed and operated as an adversarial process. Judges are expected to adopt an enabling approach in unrepresented appeals.

On the other side, non-attendance by the agency at appeal hearings has been a persistent problem. In 2009–10, 30 per cent of appeals proceeded without the Home Office.<sup>57</sup> The lack of a government representative to cross-examine appellants raises obvious difficulties for judges when testing an appellant's account is essentially to fact-finding, but who want to remain neutral.<sup>58</sup> Critical of the absence of presenting officers, the Tribunal has issued guidance so that judges can ask questions for clarification purposes while remaining neutral.

However, the difficulty of treading the fine line between acceptable questioning of an appellant to clarify certain issues and unfair and acceptable cross-examination combined with opportunistic claims of judicial misconduct has prompted many challenges against “biased” judges, with different responses from the Tribunal and the courts.<sup>59</sup> The Tribunal's view has been that the public interest requires that matters are properly investigated; it would be wrong for an asylum appellant either to succeed or fail because of no or inadequate representation of the Home Office.<sup>60</sup> As the purpose is to ascertain the true position, the proceedings are not purely adversarial.<sup>61</sup> By contrast, the courts have emphasised that extensive

56 United Nations High Commissioner for Refugees (UNHCR), *Handbook on Determining Refugee Status* (Geneva, UNHCR, 1992) [196]; *Gimedhin v Secretary of State for the Home Department* (1464), date notified 23 August 1996; *RK v Secretary of State for the Home Department (Obligation to investigate) Democratic Republic of Congo* [2004] UKIAT00129 at para 46.

57 Hansard HC Debs vol 511 col 551W 17 June 2010. This prompted headlines such as “Home Office surrenders to migrants” *The Sunday Times* (25 April 2010).

58 As one Immigration Judge has explained, “theoretically, we are conducting an adversarial hearing. It is bad enough when the appellant is unrepresented. It becomes even worse when there is no presenting officer as well.”

59 This jurisdiction is well-known for producing such a plethora of cases which can be used to support any proposition or view.

60 *LK v Secretary of State for the Home Department (Adjudicators: “anxious scrutiny” – public interest) Democratic Republic of Congo* [2004] UKIAT 00308; *M (Chad) v Secretary of State for the Home Department* [2004] UKIAT 00044.

61 *SH v Secretary of State for the Home Department (Subsequent decision: how far relevant?) Turkey* [2005] UKIAT 00068 at 20: “it is a strange reflection on the ways of

questioning would undermine the tribunal’s neutrality and the adversarial nature of the process.<sup>62</sup>

The degree of activism is also affected by wider issues of tribunal procedure. Consider, for instance, the pressure on the tribunal to determine appeals quickly. The adoption of active adjudication often presupposes a hearing in the first place, but this will often not be the case. Paper-only appeals illustrate the tensions between justice and managerial pressures: they impose lower transaction costs and enable quicker processing, but afford little opportunity for an active approach and leave appellants with lower success rates.<sup>63</sup>

Other factors might militate against an active approach at appeal hearings. Judges normally only have access to the appeal file on the day of the hearing and there is little opportunity to undertake pre-hearing research. In asylum cases, Immigration Judges may often have a difficult task in dealing with all of the factual issues raised in an appeal. Evidence in chief is usually given by a written statement and representatives are relied upon to draw the judge’s attention to those points specifically relied on to justify asylum. Judges are discouraged from undertaking post-hearing research.<sup>64</sup> As appeals can only be determined on the basis of evidence disclosed to both parties, any such research would require the hearing to be re-convened, which risks delay. Furthermore, the Tribunal has no ability to commission expert evidence; this rests with the appellant.

Statutory rules as to which facts can be taken into account – either expanding or limiting the evidence that the tribunal can consider – also give an indirect steer in terms how active the tribunal can be. For instance, in asylum cases, the fundamental issue is a forward-looking one – assessing future risk of persecution or torture. The tribunal can take account of new evidence,<sup>65</sup> and this forward-looking approach is more amenable to active investigation, especially given the issues at stake in refugee and human rights appeals.

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thinking that have been allowed to grow up around a judicial system that it should be possible for counsel seriously to criticise an adjudicator for trying to get at the truth.”

62 *JK (Democratic Republic of Congo) v Secretary of State for the Home Department* [2007] EWCA Civ 831.

63 Robert Thomas, “Immigration Appeals for Family Visitors Refused Entry Clearance” (2004) *Public Law* 612; H. Genn and G. Richardson, “Tribunals in Transition: Resolution or Adjudication?” (2007) *Public Law* 116.

64 *EG v Entry Clearance Officer, Lagos (post-hearing internet research) Nigeria* [2008] UKAIT000015. For instance, in asylum cases a common issue is whether or not the conditions in the claimant’s country of origin are such that he may be at risk on return. A judge who feels that the country information presented at the hearing is inadequate may be tempted to undertake research after the hearing.

65 *Nationality, Immigration and Asylum Act 2002*, s 85(4) [*Nationality, Immigration and Asylum Act*].

By contrast, in ordinary immigration appeals, the tribunal can only consider those facts in existence at the date of the initial decision.<sup>66</sup> The appeal process is viewed as a means of appealing against the assessment of evidence rather than an extension of the original administrative decision-making process with new facts being introduced along the way.<sup>67</sup> Even here, though, there is some leeway as the tribunal can consider evidence that was in existence but not submitted to the initial decision-maker. However, concerns have been expressed at the high number of appeals that succeed because of new evidence and the associated costs; allowing new evidence to be submitted on appeal encourages inadequate applications and leads to unnecessary and expensive appeals: applicants should make a new application rather than use the appeal process.<sup>68</sup> This in turn has prompted government either to prohibit the Tribunal from considering evidence not previously submitted or to consider abolishing some appeal rights altogether.<sup>69</sup>

Over recent years, the jurisdiction has made important steps toward an active approach. This has mainly taken the form of judges questioning appellants at hearings. However, the Tribunal has always avoided making any general statement of principle. As immigration is the most highly contested area of public law, there is clear concern within the Tribunal that hardening a discretionary active approach into a positive duty to investigate would raise acute problems. Given the difficult factual basis (for example, in asylum cases), such an obligation could in many cases never be fully discharged; it could always be open to the losing party to argue that he had lost not because he failed on the facts, but because the judge had failed to investigate fully. It could also result in perverse behavioural consequences: representatives might give up preparing appeals and off-load the work onto the Tribunal. In practice, the risk would be this would shift the burden of proof away from the appellant to the Tribunal.

Particular considerations arise in relation to the Upper Tribunal. In considering onward challenges, the second-tier tribunal is not necessarily limited to the arguments advanced by the claimant. If there is an obvious point of asylum law clearly apparent from the evidence but which has not been raised, then the tribunal should investigate.<sup>70</sup> Second, the Upper Tribunal has a special responsibility to assist first-tier judges, primary decision-makers, and appellants, by giving general

<sup>66</sup> *Ibid*, s 85(5). For similar provisions in other tribunal systems, see, for example, the Education (Prohibition from Teaching or Working with Children) Regulations, SI 2003/1184, reg 13(2)(b); *Social Security Act 1998*, s 12(8)(b).

<sup>67</sup> *R v Immigration Appeal Tribunal, ex parte Weerasuriya* [1983] 1 All ER 195.

<sup>68</sup> House of Commons Home Affairs Committee, *Immigration Control* (2006–05 HC 775) at para 339.

<sup>69</sup> *Nationality, Immigration and Asylum Act*, *supra* note 65, s 85A (Tribunal prevented from considering evidence not submitted at the time of making the original application); A. Travis and O. Bowcott, “Overseas relatives of British families to lose visit visa appeal rights” *The Guardian* (9 May 2011).

<sup>70</sup> *R v Secretary of State for the Home Department, Ex parte Robinson* [1998] QB 929.

guidance through lead cases. In the asylum context, this takes the form of factual country guidance on the risks facing a generic category of asylum applicant, which is to be followed in subsequent individual appeals.<sup>71</sup> This enterprise requires an investigative approach to ensure all relevant evidence is considered.<sup>72</sup>

Third, country guidance can sometimes involve the Tribunal overriding the wishes of a party who does not wish to continue with an appeal. For instance, fearful that the Tribunal may issue country guidance beneficial to many asylum claimants, the Home Office has sometimes conceded the individual case thereby preventing the appeal from proceeding further.<sup>73</sup> A major problem for the Tribunal, the solution has been to require the Tribunal’s consent thereby taking the conduct of litigation out of the litigants’ hands. For the Upper Tribunal, the public interest in engaging in up to date assessments of risks in countries giving rise to commonly occurring situations (for example, whether there is a risk of indiscriminate violence arising from armed conflict in Iraq) and in using its expertise to assist Immigration Judges, primary decision-makers and many hundred other appellants can override the wishes of the parties.<sup>74</sup> Overall, despite its predisposition toward adversarial processes, the immigration and asylum tribunal system has made significant steps toward active adjudication.

## Conclusion

This brief exploration and analysis suggests three main conclusions. One is that despite its significance, the question of tribunal procedure has rarely been consciously addressed by policy-makers. No tribunal in the UK has been deliberately established as an inquisitorial or adversarial tribunal. Tribunal procedure has not been imposed, but has developed incrementally and interstitially as a result of a wide range of factors. A second conclusion is that the language of “adversarial” and “inquisitorial” can safely be set aside: it does not capture the distinctive nature of variable active or intrusive administrative adjudication. Under this model, the role of tribunals fluctuates in accordance with the nature of the issues being considered, the presence and ability of the parties to contribute, the broader public interest in implementing policy goals, and other factors. UK tribunals are already a fair way down this road of carving out for themselves a distinctive active role. Many

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<sup>71</sup> See generally Thomas, *supra* note 20, ch 7.

<sup>72</sup> As Laws LJ noted in *S & Others v Secretary of State for the Home Department* [2002] EWCA Civ 539; [2002] INLR 416 (CA) 436, 431 (Laws LJ), the enterprise assumes “something of an inquisitorial quality, although the adversarial structure of the appeal procedure of course remains”.

<sup>73</sup> *MA v Secretary of State for the Home Department (Operational Guidance, prison conditions, significance) Sudan* [2005] UKAIT00149 at paras 27–8.

<sup>74</sup> *HM and Others v Secretary of State for the Home Department (Article 15(c)) Iraq CG* [2010] UKUT 331 (IAC).

commentators would like tribunals to proceed further.<sup>75</sup> However, what is lacking is a coherent articulation of a model of variable active or intrusive adjudication which applies across all tribunals. Given its role in providing judicial leadership to first-tier tribunals, this is clearly a task for the Upper Tribunal. Thirdly, looking to the future, tribunals are likely to face a number of challenges, not least possible reductions in publicly funded representation. Tribunal procedure has not attracted the sustained research it deserves. More study is required to discover how tribunals can best perform the role of active adjudication to deliver individual justice and to implement policy.

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<sup>75</sup> C. Harlow and R. Rawlings, *Law and Administration* (Cambridge: Cambridge University Press, 2009) at 526–7; Mullen, *supra* note 36, at 411.