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"Due Process"
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Response from Lord Carnwath of the UK Supreme Court

Part A

Efficiency of Court Proceedings (at the Expense of Procedural Guarantees)

1. This response focuses on the law of England and Wales, which differs in some respects to the law of Scotland and Northern Ireland.

Relevant background: administrative justice procedure in the UK

2. The UK lacks a separate body of administrative courts of the kind which is common in continental Europe:

   "In England and Wales, administrative law has developed along lines entirely different from the development of continental administrative law… [D]isputes between the citizen and the administration are dealt with by the ordinary courts applying ordinary law..."[1]

3. As summarised in Judicial Office guidance for overseas visitors:

   "At common law, administrative acts can be challenged in appropriate cases by way of judicial review in the Administrative Court of the Queen's Bench Division of the High Court. The Administrative Court exercises the "supervisory jurisdiction" of the High Court, which means that it has the power to oversee the quality and legality of decision-making in the lower courts and tribunals and hears applications for judicial review of decisions of public bodies."[2]

   "Judicial Review is a High Court procedure for challenging the administrative actions of public bodies. The Court can make what are known as 'prerogative orders', commanding a person or body to perform a duty, prohibit a lower court or tribunal from exceeding its jurisdiction, or quash the decision under challenge. It is not, however, concerned with the conclusions of the actions being undertaken and whether they were 'right'; instead the focus is on making sure that the correct procedures were followed. The High Court will not substitute what it thinks is the 'correct' decision. Judicial Review is only appropriate when all other avenues of appeal have been exhausted. Its use has become more prevalent in recent years."[3]

4. This common law jurisdiction is supplemented by various statutory mechanisms permitting challenges to administrative acts. These include statutory rights of appeal to the Administrative Court (which includes a specialist Planning Court) and to statutory tribunals. The latter were reformed by the Tribunals, Court and Enforcement Act 2007 ("TCEA 2007"). These tribunals are sometimes described as "administrative"

[1] Frits Stroink, "Judicial control of the administration's discretionary powers" in Rob Bakker, A. W. Heringa, F. A. M. Stroink (eds.), *Judicial Control: Comparative Essays on Judicial Review*, (Antwerp: 1995) at 86.
[2] Judicial Office, "The Judicial System of England and Wales: a visitor's guide" (2016), available at: https://www.judiciary.gov.uk/wp-content/uploads/2016/05/international-visitors-guide-10a.pdf
[3] *Id.*

tribunals. However, their decisions can be appealed to courts of general jurisdiction, so they do not form a wholly separate body of administrative courts of kind which exists (for example) in Germany and France. Also, as set out below, some of the tribunals resolve private law disputes only.

5. The TCEA 2007 reorganised the previously fragmentary tribunals system into the following four tribunals:
   (i) the First-Tier Tribunal ("FTT")
   (ii) the Upper Tribunal ("UT") which has the same rights, privileges and authority as the High Court (including a statutory judicial review jurisdiction)
   (iii) the employment tribunals
   (iv) the Employment Appeal Tribunal

6. Only (i)-(ii) are concerned with the review of executive decisions; (iii)-(iv) are concerned with the determination of private law employment disputes.

7. The FTT is organised into the following specialist Chambers, with the following distinct rules of procedure:

   (i) the Social Entitlement Chamber, which applies the Tribunal Procedure (First-Tier Tribunal) (Social Entitlement Chamber) Rules 2008 ("FTSoc Rules").[4]

   (ii) the War Pensions and Armed Forces Compensation Chamber, which applies the Tribunal Procedure (First-Tier Tribunal) (War Pensions and Armed Forces Compensation Chamber) Rules 2008 ("FTWar Rules").[5]

   (iii) the Health, Education and Social Care Chamber, which applies the Tribunal Procedure (First-Tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 ("FTHea Rules").[6]

   (iv) the Tax Chamber, which applies the Tribunal Procedure (First-Tier Tribunal) (Tax Chamber) Rules 2009 ("FTTax Rules").[7]

   (v) the General Regulatory Chamber, which applies the Tribunal Procedure (First-Tier Tribunal) (General Regulatory Chamber) Rules 2009 ("FTGen Rules").[8]

   (vi) the Immigration and Asylum Chamber, which applies the Tribunal Procedure (First-Tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 ("FTIAT Rules 2014").[9]

   (vii) the Property Chamber, which applies the Tribunal Procedure (First-Tier Tribunal) (Property Chamber) Rules 2013 ("FTProp Rules").[10]

[4] SI 2008/2685.
[5] SI 2008/2686.
[6] SI 2008/2699.
[7] SI 2009/273.
[8] SI 2009/1976.
[9] SI 2014/2604.
[10] SI 2013/1169.

8. The UT is organised into the following specialist Chambers, governed by the following rules of procedure:

   (i) the Administrative Appeal Chamber, which applies the Tribunal Procedure (Upper Tribunal) Rules 2008 ("UTR").[11]

   (ii) the Tax and Chancery Chamber, which also applies the UTR.

   (iii) the Lands Chamber, which applies the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 ("UTLand Rules").[12]

9. Various administrative tribunals, panels and commissions continue to exist outside this structure. For example: the Valuation Tribunal for England, the Parole Board, local authority planning committees, schools exclusion panels, and the (online) Traffic Penalty Tribunal.

10. A diagram of the UK courts and tribunals structure is attached as Annex 1.

11. A diagram of the tribunals system is attached as Annex 2.

Question 1. Simplified proceedings

Does your administrative procedural law provide for the possibility of resolving administrative cases in simplified proceedings: on the level of the highest administrative court and/or in lower administrative courts? (YES/NO)

12. "Simplified proceedings" do not exist as a separate type of general administrative procedure in the sense contemplated in the questionnaire. Various procedural rules, and the recently reformed tribunals system, nonetheless reflect similar ideas of economy in administrative justice. This is explained in more detail below

13. As set out above (at paras. 2-11), there is no single body of "administrative procedure" because the UK lacks a wholly separate body of administrative courts.

If NO, then are there any other possibilities for simplifying administrative court procedures (are there exceptions in, for example, taking the minutes, procedural deadlines, format requirements, delivering the procedural documents, pre-trial proceedings, the formatting of a decision, the court panel, holding an oral hearing, etc.)?

14. This part of the questionnaire is answered with reference to: (A) Judicial review in the Administrative Court, (B) Challenges to administrative acts before statutory tribunals, (C) Miscellaneous procedures.

<u>(A) Judicial Review in the Administrative Court (within the Queen's Bench Division of the High Court)</u>

15. Judicial review proceedings in the High Court of England and Wales are governed by Part 54 of the Civil Procedure Rules ("CPR") and Practice Direction 54A ("54APD")

[11] SI 2008/2698.
[12] SI 2008/2686.

in addition to other provisions of the CPR which are of general application. Judges must interpret and apply the CPR in accordance with the "overriding objective" of dealing with cases "justly and at proportionate cost" (CPR r.1.1). The words "and at proportionate cost" were introduced in 2013 after the Review of Civil Litigation Costs (2009).

Procedural deadlines

16. A claim for judicial review in the High Court generally must be filed promptly and in any event within three months of the date when the grounds of review first arose, unless an enactment specifies a shorter deadline. For example, where a judicial review claim relates to a decision made by the Secretary of State or a local planning authority, the time limit is six weeks from the date when the grounds of review first arose. These time limits cannot be extended by agreement between the parties (CPR r.54.55).

Format requirements

17. The usual document format requirements apply to judicial review claims. For example, the format requirements for electronic documents are set out at Practice Direction 5B "Electronic Communication and Filing of Documents by E-mail." Guidance on the format of skeleton arguments, court bundles,[13] and authorities bundles is set out in the Administrative Court Judicial Review Guide 2017 (at paras. 17, 18.3 and 19 respectively.)[14]

18. However, non-compliance with the CPR or a Practice Direction does not by itself invalidate any step taken in the proceedings unless the court so orders. The court may also make an order to remedy the error (CPR r.3.10).

Delivering procedural documents

19. The rules governing the manner in which procedural documents must be filed and served are the same as those which govern private law litigation in the High Court (see CPR Parts 6-7, which are of general application). The deadlines for commencement of the proceedings differ, as explained above.

Pre-trial proceedings

20. A judicial review claim may proceed only with the permission of the court (CPR r.54.4). The court will generally, in the first instance, consider the question of permission on paper without a hearing (54APD, para. 8.4). Neither the defendant nor any other interested party need attend a hearing on the question of permission unless the court directs otherwise (54APD, para. 8.5). Where a defendant or any party does attend a hearing, the court will not generally make an order for costs against the claimant (54APD, para. 8.6). A grant of permission triggers the next stage in the judicial review procedure, which is the filing of a detailed response and written evidence by the defendant and interested parties under CPR r.54.13.

[13] A "bundle" is the term used for the set of collated documents filed with the court in a given case.
[14] Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/647052/Admin_Court_JRG_2017_180917.pdf

21. Unless the application for permission is "totally without merit,"[15] the applicant may within 7 days request that a refusal of permission be reconsidered at an oral hearing (CPR r.54.12). Where the renewed oral application simply reiterates the original grounds without seeking to explain the asserted error in the refusing judge's reasons, the judge might make an adverse costs order or impose some other sanction.[16] Oral hearings are expected to be short.[17]

22. A materially identical procedure exists for the statutory review of planning decisions in the Planning Court (which is within the Administrative Court) as set out in Practice Direction 8C.

Formatting of a decision

23. The reasons for refusing an application for permission for judicial review must be served with the order refusing permission (CPR r.54.12(2)). In practice these reasons are generally not as extensive as the reasons given in the full judgment of the substantive judicial review claim.

Records of hearings

24. Hearings in the High Court are audio recorded so that a transcript can be produced if necessary. A party may request a copy of the transcript. This normally involves payment of a fee and is necessary in order to pursue an appeal, unless the appellant applies for the provision of a transcript at public expense.[18] There is no general right of access to the audio recording itself, unless there is cogent evidence that the transcript has been transcribed incorrectly. This is to minimise the risk of misuse of the audio recordings (see Practice Direction: Access to Audio Recordings of Proceedings.)

The court panel

25. An application for permission, and any substantive claim for judicial review, is ordinarily determined by a single judge. Where permission is granted, the court may in certain cases direct the substantive claim to be heard by the Divisional Court (CPR r.54.10), in which case two High Court judges and one Court of Appeal judge ordinarily hear the matter. The Divisional Court is part of the Queen's Bench Division of the High Court. Matters heard by the Divisional Court typically involve either the liberty of an individual or matters of significant public importance.

Holding an oral hearing

26. As discussed above (paras. 20-21), applications for permission to pursue a judicial review claim are ordinarily determined in the first instance on paper without an oral hearing.

[15] The rule prohibiting an oral hearing where the application is "totally without merit" was introduced in 2013 in response to a significantly heightened number of requests for an oral hearing.
[16] See e.g. *Roby Opalfvens v Belgium* [2015] EWHC 2808 (Admin), at [14].
[17] Administrative Court Judicial Review Guide (July 2017), para. 8.4.7.
[18] See Practice Direction 52C, para. 6.

Other observations: case management discretion & unrepresented litigants

27. It should be noted that, although there is no "simplified" set out procedural rules, the following provisions are of general application. They reflect the broad discretion afforded to individual judges in case management, in order to strike an appropriate balance between procedural economy and due process depending on the circumstances of the case:

- Under CPR r.3.1(2)(a), except where the CPR provide otherwise, the court may extend or shorten the time for compliance with any rule, practice direction or court order (even if an application for extension is made after the time for compliance has expired).

- Under CPR r.3.1(2)(m), the court's case management powers include the power to "take any step or make any other order for the purpose of managing the case and furthering the overriding objective" of dealing with cases justly and at proportionate cost, unless such step is precluded by another rule or practice direction.

- Where a party is unrepresented, the court must have regard to that fact when exercising its case management powers (CPR r.3.1A).

- Where a sanction has been imposed for failure to comply with a rule or practice direction, the defaulting party may apply under CPR r.3.9 for relief from sanctions. The court will consider all the circumstances of the case, including the need "for litigation to be conducted efficiently and at a proportionate cost" and the need "to enforce compliance with rules, practice directions and orders."

- Under CPR r.3.10, non-compliance with the CPR does not invalidate any step taken in the proceedings unless the court so orders. The court may also make an order to remedy the error.

28. The "Administrative Court Judicial Review Guide" (July 2017) provides the following guidance for individuals who lack legal representation ("litigants in person" or "LIPs"), which may be of interest:

> "3.2.1… A litigant in person will be expected to comply with the Civil Procedure Rules ("CPR"), and the provisions of this Guide apply to them. Litigants in person should therefore make themselves familiar with those parts of this Guide which are relevant to their claim and also with the applicable provisions of the CPR."
>
> "3.3.6... At the hearing, the judge may make allowances for any litigant in person, recognising the difficulties that person faces in presenting his or her own claim. The judge will allow the litigant in person to explain his or her case in a way that is fair to that person. The judge may ask questions. Any other party in court, represented or not, will also have an opportunity to make submissions to the judge. At the end of the hearing, the judge will usually give a ruling, which may be short. The judge will explain the order he or she makes.

Representatives for other parties should also explain the court's order after the hearing if the litigant in person wants further explanation."

(B) Challenges to administrative acts in the Tribunals

29. As explained above, each of the chambers of the FTT has its own rules of procedure. Within the UT, the Lands Chamber has its own rules of procedure whereas the other two chambers are subject to the UTR. All such rules were created pursuant to the statutory objective of ensuring:[19]

> "(a) that, in proceedings before the First-tier Tribunal and Upper Tribunal, justice is done,
>
> (b) that the tribunal system is accessible and fair,
>
> (c) that proceedings before the First-tier Tribunal or Upper Tribunal are handled quickly and efficiently,
>
> (d) that the rules are both simple and simply expressed, and
>
> (e) that the rules where appropriate confer on members of the First-tier Tribunal, or Upper Tribunal, responsibility for ensuring that proceedings before the tribunal are handled quickly and efficiently."

30. In practice, FTT proceedings are generally less formal than those typically associated with the courts. That corresponds to the principles of accessibility and efficiency which informed the new tribunals structure.

Non-compliance with procedural deadlines, format requirements etc.

31. UTR r.7(2) is illustrative:

> "(2) If a party has failed to comply with a requirement in these Rules, a practice direction or a direction, the Upper Tribunal may take such action as it considers just, which may include-
>
> a) waiving the requirement;
> b) requiring the failure to be remedied;
> c) exercising its power under rule 8 [striking out a party's case] or;
> d) except in mental health cases, restricting a party's participation in the proceedings."

Delivering procedural documents

32. For present purposes, there is no material difference between the rules governing the method by which procedural documents in tribunal proceedings and in court proceedings are delivered.

[19] TCEA 2007, s.22(4). See also TCEA 2007, s.2(3), which requires the Senior President of the Tribunals to carry out the functions of that office with regard inter alia to the need for tribunal proceedings to be accessible, fair and handled quickly and efficiently.

Pre-trial proceedings

33. Subject to the provisions of the TCEA 2007 and any other enactment, the Chambers of the FTT have a broad power to regulate their own procedure, which includes dealing with any issue as a preliminary issue.[20]

Formatting of a decision

34. The common law duty to give reasons applies to Tribunal Judges just as it applies to other types of judge. The reasons given by Tribunal Judges resemble court judgments.

The court panel

35. "Tribunals are made up of "panels" comprising a legally-qualified Tribunal Judge, who is legally qualified, and Tribunal members, who are often drawn from other professions, such as medicine, chartered surveyancy, the armed forces or accountancy. The panels listen to the evidence and question parties and witnesses where appropriate. The members are not legally qualified, but do bring to their panels valuable specialist knowledge. They take an equal part in the decisions made by their Tribunal but are advised on points of law by the legally qualified chairperson who also writes the decision."[21]

Holding an oral hearing

36. "Tribunal hearings take place in Hearing Rooms. Unlike in a court room, many of these do not have a raised dais on which the Judge and panel sit at the front, but instead contain a large table which the litigant and the panel sit around. (However, some Immigration and Asylum Tribunals do have a dais)."[22]

37. Whereas the procedure in courts is generally adversarial, it is not unusual for Tribunals to take a more inquisitorial approach in order to further the objectives of accessibility and efficiency.

38. Although there are nuances in the various rules of each Chamber, in general the FTT must hold a hearing before making a decision which disposes of the proceedings unless:[23]

    (1) A party's case is liable to be struck out, or

    (2) The decision is in respect of the correcting, setting aside, review or appeal of a tribunal decision; or

[20] FTSoc Rules, r.5(3)(e); FTWar Rules 2008, r.5(3)(e); FTHea Rules 2008, r.5(3)(e); FTTax Rules 2008, r.5(3)(e); FTGen Rules 2008, r.5(3)(e); FTIAT Rules 2014, r.4(3)(e); FTProp Rules 2013, r.6(3)(g).
[21] Judicial Office, "The Judicial System of England and Wales: a visitor's guide" (2016), available at: https://www.judiciary.gov.uk/wp-content/uploads/2016/05/international-visitors-guide-10a.pdf.
[22] This summary is lifted from the publication, "The Judicial System of England and Wales: a visitor's guide" (Judicial Office: 2016), available at: https://www.judiciary.gov.uk/wp-content/uploads/2016/05/international-visitors-guide-10a.pdf.
[23] FTSoc Rules, r.27; FT War Rules, r.25; FTHea Rules r.23; FTTax Rules, r.29; FTGen Rules, r.32(3).

(3) (a) Each party has consented to the matter being decided without a hearing, or the party has not objected to the matter being decided without a hearing and (b) the Tribunal considers that it is able to decide the matter without a hearing.

39. There are exceptions to this general approach. For example:

- In the Tax Chamber the most straightforward cases, categorised as "Default Paper cases", may be disposed of on the papers without a hearing.[24]

- In the Social Entitlement Chamber, appeals against decisions of the Criminal Injuries Compensation Commission may be disposed of without a hearing.[25] However the losing party may then request reconsideration at a hearing,[26] except in a limited category of decisions.[27]

- In the Property Chamber, a party's failure to respond to a notice of intention to dispose of the matter without a hearing can be taken as agreement to dispose of the matter without a hearing.[28]

40. The various procedural rules of the FTT chambers permit the tribunal "to decide the form of any hearing."[29]

41. With the exception of immigration judicial review proceedings,[30] there is no presumption in favour of a hearing in the UT.[31] The UT must nonetheless have regard to any view expressed by a party when deciding whether to hold a hearing to consider any matter and the form of any such hearing.[32]

Records of hearings

42. Tribunal hearings are not always recorded. The government advises litigants seeking a transcript of the hearing to contact the tribunal directly to ascertain whether the hearing was recorded.[33]

43. Any recordings of UT hearings are retained by the UT for six months and any party to the proceedings may, within that period, apply for a transcript. The applicant must pay for the cost of supplying the transcript unless the tribunal directs that it be supplied at public expense. It will do so only where certain conditions are satisfied. These include (i) that the applicant cannot afford to pay and (ii) that the transcript is necessary in

[24] FTTax Rules 2009, rr.26(6) and 29(1).
[25] FTSoc Rules, r.27(4)(a).
[26] FTSoc Rules, r.27(4)(b).
[27] FTSoc Rules, r.27(5).
[28] FTProp Rules, r..31(3).
[29] FTSoc Rules, r.5(3)(g); FTWar Rules 2008, r.5(3)(g); FTHea Rules 2008, r.5(3)(g); FTTax Rules 2008, r.5(3)(g); FTGen Rules 2008, r.5(3)(g); FTIAT Rules 2014, r.4(3)(g); FTProp Rules 2013, r.6(3)(i).
[30] UTR, r.34(3).
[31] UTR, r.34(1).
[32] UTR, r.34(2).

[33] UK government guidance: "Apply for a transcript of a court or tribunal hearing", available at: https://www.gov.uk/apply-transcript-court-tribunal-hearing.

order to challenge the decision of the UT to which the transcript relates. (See Practice Direction, Upper Tribunal: Transcripts of Proceedings, October 2008).[34]

(C) Miscellaneous

Traffic Penalty Tribunal

44. There is a completely online Traffic Penalty Tribunal for England and Wales, through which motorists can appeal Penalty Charge Notices issued by most local authorities for certain minor traffic and parking violations: https://www.trafficpenaltytribunal.gov.uk/

45. The procedure is explained on the Traffic Penalty Tribunal website:[35]

> "Using the Tribunal's Fast Online Appeals Management system (FOAM) you can simply upload your evidence, view and comment on the authority's evidence and send messages if you wish. You can track the progress of your appeal and see your decision online. All parties can see information relating to the case. The charging authority's Notice of Rejection of Representations (NOR) will provide a web link to the Traffic Penalty Tribunal's FOAM appeal system and a telephone number for the tribunal's customer service team who can assist you if you are not able to use the online system.
>
> **E-decision**
>
> Most adjudication decisions are made online and are called e-decisions. The adjudicator will consider your and the authority's evidence, be able to ask for clarification using the online messaging system and decide your case without the need for a hearing.
>
> The decision will be made available on the online system to all the parties in the appeal.
>
> **Telephone hearing**
>
> In certain circumstances the adjudicator may decide it is is helpful to conduct a telephone hearing to decide your case. The phone call normally lasts around 15 minutes and the authority which issued the PCN can take part if they wish to.
>
> Telephone hearings give you the opportunity to speak to the adjudicator and present your case.
>
> We will contact you to arrange a suitable date and time for the telephone hearing and answer any questions you may have. You simply need to be available at the time arranged, on the phone number you have given. These hearings are relatively informal and the adjudicator will explain the procedure."

[34] Available at: https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Practice+Directions/Tribunals/Transcriptsofproceedings.pdf

[35] https://www.trafficpenaltytribunal.gov.uk/how-your-appeal-will-be-decided/

Question 1 (continued): Have there been discussions about the creation of simplified proceedings as a separate type of procedure? What are the main positions on the issue?

46. TCEA 2007 reflects, in broad terms, the recommendations of Sir Andrew Leggatt in his "Review of the Tribunals" (2001) which advocated the rationalisation of the previously piecemeal system of commissions and tribunals into a coherent structure. There have not been any subsequent proposals for major reform of administrative justice procedures as a whole.

47. In April 2017, after a public consultation, the government indicated its intention to introduce an expedited appeals process for detained immigration applicants.[36] The government's proposals, if accepted, "would apply to detained foreign criminals and failed asylum seekers."[37] No rules have yet been enacted.

Part B
Right to Public Hearing

Question 1. Are there any types of administrative cases or any court instances in which only oral proceedings are allowed (i.e. written proceedings are prohibited)?

48. No, but court directions impose deadlines by which written submissions be filed and served. Failure to comply with the deadline may prohibit the resulting party from relying on their written submissions.

Question 2. Under which circumstances may cases be resolved in written proceedings? Can the justification be, for example:

a. exclusively legal questions;
b. highly technical questions;
c. the case raises no questions of fact or law that cannot be adequately resolved on the basis of the case file and the parties' written observations;
d. ***other bases, for example at the request of one of the parties to the proceedings****?*

49. Interim applications may be determined without an oral hearing if so agreed between the parties or if the court does not consider an oral hearing to be appropriate (CPR r.23.8).

50. As set out above, applications for permission for judicial review (and the statutory review of planning decisions) are ordinarily determined in the first instance on paper but, unless an application is wholly without merit, the applicant may request reconsideration at an oral hearing.

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[36] Ministry of Justice, "Immigration & Asylum Appeals: The Government's response to its consultation on proposals to expedite appeals by immigration detaines", available at: https://consult.justice.gov.uk/digital-communications/expedited-immigration-appeals-detained-appellants/results/dft-consultation-response.pdf

[37] Ministry of Justice, "New fast-track immigration appeal rules proposed", (April 2017) available at: https://www.gov.uk/government/news/new-fast-track-immigration-appeal-rules-proposed

51. Where a party applies to an appellate court for permission to appeal the decision of the lower court, the application is also ordinarily determined in the first instance on paper without an oral hearing. Applications to the UK Supreme Court for permission to appeal are determined without an oral hearing unless the Court directs otherwise.

52. Some substantive issues are routinely determined on paper in low-value private law proceedings. For example, the quantum of damages in certain categories of low value personal injury claims is determined without an oral hearing unless a party requests otherwise. This procedure is used only where there is no substantial dispute of fact and liability has been admitted.[38]

Question 3. Can oral proceedings also be carried out via videoconferencing (i.e. in a manner where either a party to the proceedings or their representative or counsel can be in a different place during the hearing and carry out procedural acts in real time, through an audiovisual transmission)? (YES/NO)

- ***If NO, then has the creation of such a possibility been discussed? What were the main positions on the issue?***

- ***If YES, then:***

    a. ***what are the legal limitations (for example, in which kinds of cases is it not permitted)?***
    b. ***have the risks of videoconferencing and the protection of a person's rights been discussed? What were the main positions on the issue?***

53. There appear to be no examples of the conduct of civil or criminal proceedings exclusively by video conference in the courts of England and Wales, but certain aspects of civil and criminal proceedings can be conducted by video conferencing as explained below:

Civil proceedings

54. CPR r. 32.3 permits the court to "allow a witness to give evidence through a video link or other means." That discretion is unfettered. Practice Direction 32 ("32PD") Annex 3 provides detailed guidance on video conferencing ("VCF") and suggests that its most common use will be where a witness is overseas:

> "VCF may be a convenient way of dealing with any part of proceedings: it can involve considerable savings in time and cost. Its use for the taking of evidence from overseas witnesses will, in particular, be likely to achieve a material saving of costs, and such savings may also be achieved by its use for taking domestic evidence. It is, however, inevitably not as ideal as having the witness physically present in court. Its convenience should not therefore be allowed to dictate its use" [39]

[38] See Practice Direction 8B.
[39] 32PD, para. 2. This practice direction is substantially derived from guidance issued by the Federal Court of Australia.

55. 32PD Annex 3 also contemplates the use of VCF in certain parts of proceedings: "for example, interim applications, case management conferences, pre-trial reviews."[40]

56. The UK Supreme Court building is equipped to conduct appeal hearings by VCF. The Justices of the Supreme Court also sit as members of the Judicial Committee of the Privy Council, which recently used this technology, and encouraged its continued use, in a Trinidadian appeal.[41]

57. In addition, the practice of conducting hearings by telephone may be of interest. Where a court has the necessary facilities, certain matters of civil procedure ordinarily will be determined by telephone unless the court orders otherwise. Those matters include interim applications which are expected to last no more than one hour. This rule does not apply where the relevant application was made without notice to the respondent, nor when both parties are unrepresented (Practice Direction 23A, paras. 6.2 and 6.3).

Criminal proceedings

58. The Criminal Procedure Rules expressly clarify that the court's obligation to actively manage cases by the use of technology requires the use of VCF in certain case: Rule 3.2(4) provides:

> "Where appropriate live links are available, making use of technology for [the purpose of actively managing the case] includes directing the use of such facilities, whether an application for such a direction is made or not—
>
> (a) for the conduct of a pre-trial hearing, including a pre-trial case management hearing;
>
> (b) for the defendant's attendance at such a hearing—
>
> (i) where the defendant is in custody, or where the defendant is not in custody and wants to attend by live link, but
>
> (ii) only if the court is satisfied that the defendant can participate effectively by such means, having regard to all the circumstances including whether the defendant is represented or not; and
>
> (c) for receiving evidence under one of the powers to which the rules in Part 18 apply (Measures to assist a witness or defendant to give evidence).

59. High-risk prisoners identified to the court as presenting a significant risk of escape, violence in court or danger to those in the court and its environs, and to the public at large, as far as possible, have administrative and remand appearances listed for disposal by way of video link.[42]

Tribunals

60. The position in tribunals is more flexible, depending on the subject matter and the needs of the parties. For example, the Immigration and Asylum Chamber may use video-link to hear appeals by foreign applicants gainst refusal of entry clearance. The War Pensions and Armed Forces Compensation Chambersometime sometimes uses Skype to hear appeals from individual claimants against refusals of compensation.

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[40] 32PD, para. 1.
[41] *Fishermen and Friends of the Sea (Appellant) v The Minister of Planning, Housing and the Environment* (Respondent) [2017] UKPC 37, [1].
[42] Criminal Practice Direction, 3L.1.

The main positions on the issue

61. There has not been significant discussion of the issue in the context of administrative justice, but the use of VCF is under consideration in a proposed new "Online Court" for low-value private law disputes, which would have three stages to its procedure:

> "(1) an automated online triage stage designed to help litigants without lawyers articulate their claim in a form which the court can resolve, and to upload their key documents and evidence; (2) a conciliation stage, handled by a Case Officer; and (3) a determination stage, where those disputed cases which cannot be settled are determined by a Judge, by whichever of a face to face trial, video or telephone hearing or determination on the documents is the most appropriate."[43]

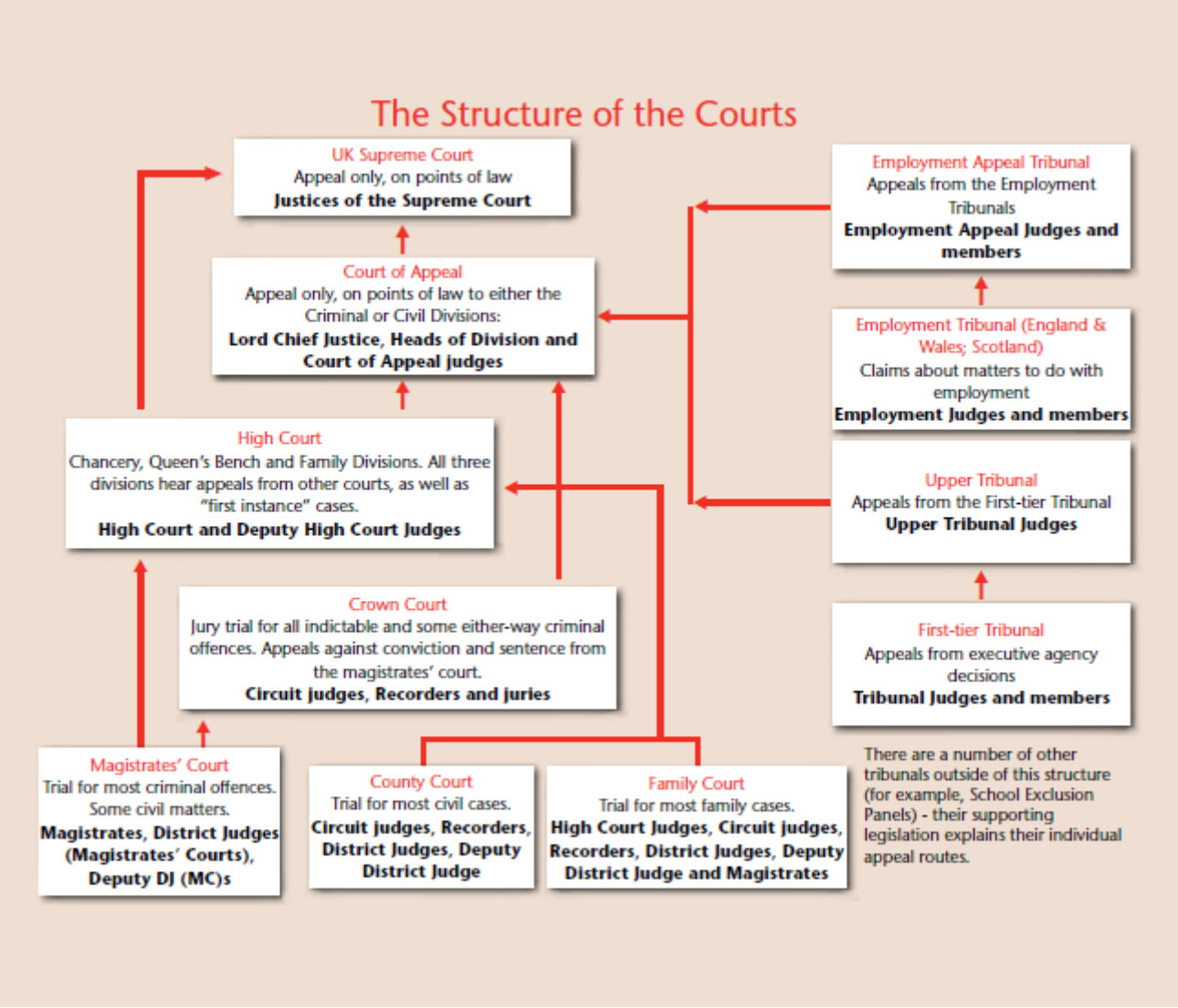
4. Can oral proceedings also be carried out outside the court-room (in prison, hospital etc)? In which circumstances is this possible?

62. This is possible but only in exceptional cases. Some high-security prisons have facilities for hearings to minimise the cost and risk of transporting prisoners to courts elsewhere. The only cases regularly heard in hospitals are tribunal appeals relating to the detention of mental patients, for which members of the relevant panel of the Health, Education and Social Care Chamber travel to the hospital in which the patient is detained. There are (rare) examples of courts or tribunals sitting in ad hoc court rooms, such as town halls or even hotel rooms, where this is justified by special circumstances.

11 January 2018

[43] "Civil Courts Structure Review: Final Report" (2016), para. 6.4, available at: https://www.judiciary.gov.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf

Annex 1: diagram of courts and tribunals in England and Wales



Annex 2: diagram of the UK Tribunals system

(Although not shown on the diagram, further appeals are to the UK Supreme Court)