need for consultation could be addressed case by case, the dissenting judges thought this was not appropriate in the context of a statutory scheme where national interests are at stake. In their view Parliament could not have intended the Treasury to undertake such an uncertain assessment in each case. Thus they concluded that Parliament had impliedly excluded any requirement for consultation and there was no room for rewriting the scheme.

Underlying both decisions are key questions concerning statutory interpretation and fundamental principles. The decisions themselves point in different directions. Whilst *Bank Mellat (No.1)* reads in a power to erode constitutional principles, in *Bank Mellat (No.2)* the Court refused to read out principles of fairness and good administration. The differences perhaps reflect the strong protection of principles such as fairness and good administration in administrative law, and a sense that the disclosure principle has already been swept away by Parliament. This may mean that the approach in *Bank Mellat (No.1)* may be isolated to its particular facts. Nevertheless, the broader issues concerning the rationale for reading constitutional principles in or out of statutes requires serious reflection. On that front it is hoped that there will be a quick return to principle and that the whims of pragmatism will be short-lived.

KIRSTY HUGHES

REVIEWING BRITAIN'S TRIBUNAL SYSTEM

WEATHER was poor in the early days of 2005. Snow was falling. Workers had to toil round the clock in order to keep roads passable. In the small hours of 18 January, Mr Jones was operating a gritter near the Dartford River Crossing. Nearby, a Mr Hughes suddenly ran out in front of an articulated lorry, intending to commit suicide. The driver of the lorry braked, but could not avoid a collision with Mr Hughes, who was killed instantly. Worse was to follow as the lorry spun out of control and collided with the gritter. Mr Jones was thrown onto the road and suffered catastrophic injuries.

The resulting case, *Jones (by Caldwell) (Respondent) v First Tier Tribunal* [2013] UKSC 19, [2013] 2 A.C. 48, illuminates some important areas of modern law: the tribunal system; and the allocation of authority between tribunals and the superior courts. *Jones* sheds light on the route cases take through the tribunal system. It also spotlights the appropriate judicial response to allegations that the tribunal system has committed serious errors. *Jones* is a strong statement that reviewing courts are to approach tribunal decisions with a

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deferential attitude; judicial intervention is to be the exception rather than the norm.

Acting through his mother, Mr Jones made a claim under the Criminal Injuries Compensation Scheme. A successful claim requires identification of a "crime of violence". Concluding that Mr Jones was not a victim of such a crime, the Criminal Injuries Compensation Authority rejected the claim.

Onwards went Mr Jones to the First-tier Tribunal, alleging that two crimes had been committed. One was an offence under road traffic legislation: this argument was not pursued beyond the tribunal system. The other was the offence of causing grievous bodily harm under the Offences against the Person Act 1861, s. 20. As was said by Lord Ackner in *D.P.P. v Parmenter* [1992] 1 A.C. 699, at 751, to prove an offence under section 20 "it must be proved that the defendant *actually* foresaw that physical harm to some other person would be the consequence of his act" (emphasis added). On the facts, however, the First-tier Tribunal was not satisfied "Mr Hughes intended to cause harm or was reckless as to whether harm of whatever degree might be caused when he ran out into the dual carriageway".

The next step was to the Upper Tribunal. Yet again, Mr Jones was unsuccessful. Ordinarily, an appeal on a point of law lies from the First-tier Tribunal to the Upper Tribunal (Tribunals, Courts and Enforcement Act 2007, s. 11) but cases involving the Criminal Injuries Compensation Authority are of a class in which the Upper Tribunal exercises its judicial review jurisdiction (ibid., s. 15; *Practice Direction (Upper Tribunal: Judicial Review Jurisdiction*) [2009] 1 W.L.R. 327). There was thus no *de novo* appeal at this stage: the only appeal proper that Mr Jones had was from the Authority to the First-tier Tribunal. Unfortunately for him, the Upper Tribunal concluded that the conclusion was "one to which a rational [First-tier] Tribunal could have come". And in a passage evocative of the reserve typically shown on judicial review, the Upper Tribunal commented: "It is not our function to act as an appellate body and substitute our own opinion of the facts even if that would have been different to the Tribunal's" ([2010] UKUT 199, at [39]).

Yet the matter did not rest there. Mr Jones won at the Court of Appeal ([2011] EWCA Civ 400, [2012] Q.B. 345). Patten L.J. held that the First-tier Tribunal had committed two errors of law: one in finding that there was no crime of violence (at [27]–[28]); another in concluding that the *mens rea* of a section 20 offence was absent (at [29]).

From there, the case went to the Supreme Court, which reversed the Court of Appeal and restored the decision of the First-tier Tribunal. Lord Hope gave the leading speech which had the support of Lord Carnwath, Lord Walker, Lady Hale and Lord Sumption.

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In Lord Hope's view, the Court of Appeal had conflated two questions: whether the elements of the offence of causing grievous bodily harm had been proved and whether, if proven, the offence could amount to a crime of violence. Rather, "[f]airly read", the First-tier Tribunal had determined that the elements of the offence had not been made out (at [20]). This was "a question for the tribunal, having informed itself as to what the law requires for proof of that offence, to determine as a matter of fact" (at [18]). This being so, the First-tier Tribunal did not have to consider at all whether the offence amounted to a "crime of violence".

Two important points of principle emerge from Lord Hope's discussion. First, reviewing courts – and this includes the Upper Tribunal when exercising its judicial review jurisdiction – should approach tribunal decisions with an attitude of "judicial restraint" and "not assume too readily that the tribunal misdirected itself just because not every step in its reasoning is fully set out in it" (at [25]). Put another way, tribunal decisions should be presumed correct; a burden lies on the appellant (or applicant for judicial review) to demonstrate an error of law (at [26]). But if on a fair reading of the tribunal's reasons the finding at issue was one "to which a rational tribunal could have come" there is no basis for intervention (at [24]).

Secondly, the distinction between law and fact is the means of allocating responsibility between decision-making tribunals and appellate bodies. In the instant case, the finding that Mr Hughes did not have the *mens rea* of the offence of causing grievous bodily harm was one of fact "which was not open to review by the Upper Tribunal or by the Court of Appeal" (at [24]). To use the language of administrative law, it was a matter within the jurisdiction of the body empowered by Parliament to make the relevant determinations of fact. Yet the First-tier Tribunal did not have a *carte blanche*. If the elements of the offence of causing grievous bodily harm had been made out, it would follow that a crime of violence had also been committed: "The crime that section 20 defines will always amount to a crime of violence for the purposes of the scheme for compensation for criminal injury" (at [18]). To find that the offence of causing grievous bodily harm is not a crime of violence would be to err in law and invite correction by the Upper Tribunal or superior courts.

In his concurring speech – which also attracted the agreement of Lord Walker, Lady Hale and Lord Sumption – Lord Carnwath explained why permission to appeal this apparently run-of-the-mill case had been granted by the Court of Appeal. Counsel for Mr Jones had identified an apparent inconsistency in the treatment of criminal injuries compensation cases involving the offence of causing grievous bodily harm. Unfortunately, a fully reasoned record of the allegedly inconsistent decision was not made available to the Court of Appeal,

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so the point was not addressed on the merits. With the benefit of a transcript of the handwritten summary of reasons for the allegedly inconsistent decision, Lord Carnwath was able to explain that there was in fact no inconsistency (at [32]–[39]).

More importantly, Lord Carnwath underscored the importance of the distinction between law and fact. In fact, he quoted from an extra-judicial article of his, to the effect that the distinction "is not purely objective", but must take account of a number of factors, including the relative competencies in that field of the tribunal of fact on the one hand, and the appellate court on the other". Moreover, even on questions of law, the view of the first-instance tribunal "must still be given weight" by a reviewing court ("Tribunal Justice, A New Start" [2009] P.L. 48, 63–64).

Lord Carnwath's speech prompts two comments. First, if courts are using the formal law/fact distinction – or, for that matter, other distinctions, such as jurisdictional/non-jurisdictional error, law/policy, or law/discretion – to achieve substantive ends, they ought to be clear about what those substantive ends are. Clearly, the Supreme Court thought it was appropriate to defer widely to the First-tier and Upper Tribunals. The Court should have been clear about why it considered this to be the appropriate approach. Masking substantive ends with formal references to "law" and "fact" was unhelpful.

Secondly, it must be recognised that Lord Carnwath's comments have implications far beyond the confines of the First-tier and Upper Tribunals. Legislative choice to vest decision-making authority in these bodies, according to their expertise, the complexity of the problems with which they deal and the ability of interested parties to participate in their proceedings, justifies a deferential approach to judicial review of their decisions. But these reasons apply with equal – and sometimes greater – force to other bodies empowered by Parliament to deal with matters of policy. The "relative competencies" of these bodies and reviewing courts may not always point, for example, to automatic correction of errors of law by the superior courts. If these implications are recognized, this case will certainly prove to have marked Lord Carnwath's "new start".

PAUL DALY

ENCOURAGING OR ASSISTING CLARITY?

SECTION 4 of the Misuse of Drugs Act 1971 prohibits the supply of controlled drugs. Schedule 4 of that Act explains that maximum sentences differ depending on the class of drug supplied (life imprisonment

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