

The Work of a Justice of the UK Supreme Court

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Thank you very much indeed for inviting me to speak this evening with a question and answer session to follow. It is a long time since I was in the Oxford Union. As a student, I used to attend occasional debates and talks here – I recall listening to Lord Denning on one occasion – and I remember on my very first visit to the Oxford Union bar, I turned round from buying a drink and there, as a fellow student, was Benazir Bhutto, who went on to become Prime Minister of Pakistan. We all know of the many famous and influential individuals who started their political careers within these hallowed halls. I therefore consider it a real honour and privilege to have been asked to speak to you this evening.

As you may know, I am the first and so far only person to have been appointed to the highest UK court, whether House of Lords or Supreme Court, direct from a full-time position as a legal academic. Prior to joining the court I was Professor of the Law of England here in Oxford and a Fellow of All Souls College. But for over 20 years, I sat as a part-time judge for three to four weeks a year (mainly during university vacations) initially as a Recorder in the Crown Court, with a jury, hearing criminal trials and subsequently sitting in civil cases as a Deputy High Court judge.

My topic is the work of a Justice of the UK Supreme Court. But I want to begin by saying a little about the appointments process. Vacancies to the court are openly advertised and candidates have to apply to be considered. The appointments are made by the monarch on the recommendation of the Prime Minister who in turn must be notified of the selection by the Lord Chancellor. The selection is made by a special selection commission, convened by the Lord Chancellor. That selection commission comprises the President of the Court (who is the chair), another senior judge (it has usually been the Lord Chief Justice), and a member (usually the chair) of each of the Judicial Appointments Commissions of England and Wales, Scotland, and Northern Ireland. Those three members are usually lay people. The selection commission must consult a number of specified people, in particular senior UK judges (which includes other Supreme Court Justices). The Lord Chancellor can ask the selection commission to think again about its selection (but generally can only do so once) or can reject a selection on specified grounds. The details of the process are laid down in the Constitutional Reform Act 2005 and the Supreme Court (Judicial Appointments) Regulations 2013.

Perhaps not surprisingly, the applications process is demanding. There is a difficult application form to fill in, in which one has to provide evidence as to how one meets the specified criteria. The criteria are listed under four main headings: first, intellectual capacity, knowledge and expertise, secondly, judicial and personal qualities, thirdly, understanding and fairness, and, fourthly, communication skills. One also has to submit a specified number of pieces of written work (at the time of my application three) which, for most applicants, will presumably be judgments but, in my case, I submitted two judgments sitting as a Deputy High Court Judge and one academic piece.

Having been called for interview at the Supreme Court, there was then an hour-long interview with the five members of the selection commission. It started off with a five-minute presentation on a topic that had been sent in advance. There were then questions ranging far and wide from being asked to explain legal decisions to matters such as unconscious bias,

whether diversity makes a difference to decisions, the role of the court (eg, the relationship with Parliament and the Press) and what I saw as the particular challenges of coming straight from academia. Note that in contrast to the US Supreme Court, this is all in private and, even in private, there were no questions about my 'moral' views on, for example, assisted dying nor about my political beliefs.

I was appointed and joined the Supreme Court in June 2020. At that time, the court was locked down because of covid. It was an unusual start. I was sitting on the Supreme Court, using a live link, while in my slippers at home.

In looking at the work of a Supreme Court justice, I want to focus on what happens outside the court hearing because I am sure you are all familiar with the court hearing itself and, if you are not, you can watch our hearings on the live stream on the Supreme Court's website.

A case begins for us when we start to read the papers. For most cases I will have spent at least one to two days pre-reading before the hearing. The electronic bundles, which have largely replaced paper bundles but without any reduction in length, often run to thousands of pages. Obviously, we are not trying to pre-read all of that. But we have to pre-read, to be properly prepared for a case, the key documents bundle and this comprises the agreed facts, the written statements of case of both sides – that is the skeleton arguments – and the judgments of the courts below, in particular the Court of Appeal judgment which is being appealed. We are dealing entirely with points of law, not fact, and the issues are often complex and sometimes the arguments being put have to be read several times in order to appreciate what is being said. Even in the key documents bundle there are hundreds of pages to read and to digest.

What makes the exercise particularly challenging is that most of us come to the court with specialist expertise in particular areas of the law. I have spent most of my life primarily teaching, researching and writing in the areas of contract, tort and unjust enrichment. But many, and probably most, of the cases I have been sitting on since I joined the court have had nothing to do with contract, tort or unjust enrichment. I am therefore often outside my comfort zone. The Supreme Court deals with appeals on points of law in every area of law, civil and criminal, private and public.

So it can be a big challenge, and takes considerable time, to prepare for a hearing. As I have said in previous talks, the biggest challenge for me of becoming a Supreme Court Justice is that one has to become a generalist lawyer deciding on all aspects of the law, at a high level, rather than being a specialist as most of us have tended previously to be. But I have discovered that I love all matters legal, and I therefore enjoy that challenge. I enjoy learning about and thinking about all areas of law. Almost all of it is fascinating.

Then there is the hearing which you will probably know about. We normally sit in panels of five and most of our cases these days last for one day and rarely more than two days.

Immediately after the hearing is what, at least when I started on the court, I found to be the most daunting exercise of all. That is the private post-hearing deliberation. That requires each of us on the panel – with the most junior justice going first and then up in order of seniority with the presiding judge going last – to give a presentation or mini-judgment, uninterrupted by the others, explaining, at least on a provisional basis, whether and why one thinks that the appeal should be allowed or refused. That mini-judgment usually takes each of us about five to ten minutes. Following on that, and depending on whether there is consensus, there is usually a further short discussion or, more rarely, further meetings.

The most significant thing that then happens in the post-hearing deliberation is the decision by the presider as to who is going to write the lead judgment. That is sometimes simply allocated or, more often, the presider will ask if anyone is keen to write the lead judgment. Quite commonly, more than one justice will be asked to, or volunteers, to write the lead judgment. The high proportion of single judgments and, within that, the significant proportion of single judgments written by more than one justice, are noteworthy features of the present Supreme Court.

This decision as to who is to write the lead judgment is crucial in determining our workload. That is because, although sometimes not fully realised, judgment writing is the major part of our job. It takes an enormous amount of time. That is because the issues we have to decide are, almost invariably, complex and setting out a well-written, fully researched and convincing judgment is intellectually taxing work. For me, it is the very best part of the job. It involves a deep and creative understanding of the law. With rare exceptions, most of our judgments take most of us weeks of work. We are greatly assisted by our judicial assistants (we have one each) who help, for example, with research on points of law. But the judicial assistants do not draft judgments (I understand that this is a contrast with the position of law clerks in the US Supreme Court). And of course the difficulty is that one is having to write judgments while also having to prepare and sit in further cases. Most of us have judgments hanging over us most of the time.

I am told that our system is different from that in the Court of Appeal. We have to prepare in the same way for each case not least because we do not know in advance who is going to be asked to write the lead judgment. In contrast, in the Court of Appeal, I am reliably informed, decisions are made in advance of the cases being heard as to which of the three judges will take the lead for that case and *prima facie* will write the lead judgment. It has sometimes been suggested in the past by previous Supreme Court Justices that we too should move to that pre-allocation system to relieve some of the pressure. However, in my view, the system we have is justified because, as a panel of five, it ensures that everyone is fully involved and focused in each case: but it does mean that short-cuts in preparation time are less readily available.

Once one has written a draft judgment that is not the end of the process. It goes round to the panel of those sitting for their comments which can be very extensive and require considerable rewriting if one is to bring all the panel on board.

And we are all required to comment on the draft judgments of others. We take this very seriously. But again it all takes considerable time. Of course, one may decide to write one's own concurring judgment or a dissenting judgment. In our system, in contrast for example to the highest courts in France, dissenting judgments are allowed and are often influential in later developments of the law.

Finally there is the actual production of the judgment, once it has been agreed, for which we have great help from the judgments clerk and the law reporters, in particular in avoiding typographical and other similar errors.

On the day the judgment is handed down, the Justice responsible for the lead judgment (or another colleague on the panel for the case) will give a short oral summary of the judgment for about ten minutes which is live-streamed on the Supreme Court website. A written press summary is also produced in an attempt to make the judgment more easily comprehensible especially for lay people and as a quick way into the judgment for, for example, the legal press and law students.

Moving on from judgments, another significant part of the work of a Supreme Court Justice is the permissions to appeal. All cases coming to the Supreme Court have to be given permission to appeal by the Court of Appeal or the Supreme Court. The test we apply is whether the case raises 'an arguable point of law of general public importance'. In recent times, we have been granting permission in about 20-25% of applications made. Almost invariably, we deal with these 'on paper' (ie without an oral hearing), in panels of three usually once a month. There are usually between, in rough numbers, five-eight permissions to appeal to consider at each meeting (with that number including permissions to appeal to the Judicial Committee of the Privy Council). It normally takes me about 1 hour to prepare each permission to appeal and often longer. Therefore preparation for the PTA panel takes overall about one to two days a month.

The other aspect of our work that I wanted to mention is liaison with schools and universities. We judge university moots and we run what is called "Ask a Justice" which is a scheme for sixth formers from less privileged schools who ask us questions on a live link. Each of us do two of those sessions during the year.

There are then our outside speaking engagements, nationally and internationally (including conferences with courts from other jurisdictions). Many of our lectures are published on the Supreme Court website.

Finally Supreme Court Justices spend a surprisingly large amount of their time, for most of us at least a third, and often a higher percentage, sitting not in the Supreme Court but in the Judicial Committee of the Privy Council. Courtroom 3 in the Supreme Court building is the primary court for the Judicial Committee of the Privy Council.

There are over 30 jurisdictions, primarily present or former countries of the British Commonwealth, which retain the Judicial Committee of the Privy Council as a final Court of Appeal. Although all Court of Appeal judges are also Privy Counsellors, the Judicial Committee of the Privy Council, which normally sits as a panel of five, is almost always comprised of at least four and usually five Supreme Court justices. In Trinity Term 2022, there were more appeals being heard in the Privy Council from one jurisdiction, Trinidad and Tobago, than there were to the Supreme Court in appeals from England and Wales.

Some, albeit by no means all, of these are extremely interesting not least from a private lawyer's perspective raising issues on commercial law and trusts on appeals from, eg the British Virgin Islands or the Cayman Islands or the Isle of Man. There are also some very interesting constitutional cases involving interpretation of written constitutions, such as the constitution of Trinidad and Tobago.

It is also noteworthy that in some of those jurisdictions, most obviously Mauritius, we are not even dealing with a common law system. Mauritius is essentially a civil law system with a code based on French law. We are therefore deciding as the apex Mauritian court, difficult questions on a very different system from the common law. For example, we had a case a couple of years ago on water rights in Mauritius where the system of property and analogous rights is significantly different from those in common law jurisdictions.

I have already indicated that a major contrast from being an academic lawyer is that a Supreme Court judge has to be able to deal with every aspect of law so that one has to be a generalist rather than an expert on a narrow area. In the case of Privy Council sittings on appeals from civil law systems that generalisation extends even beyond a common law system.

I hope that has given you some insight into the work of a UK Supreme Court Justice. Thank you for listening.