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DOI:
10.1007/978-3-030-88927-2

Link to publication record in Manchester Research Explorer

Citation for published version (APA):
Thomas, R., & Tomlinson, J. (2021). *Immigration Judicial Reviews: An Empirical Study*. (Socio-Legal Studies). Palgrave Macmillan Ltd. https://doi.org/10.1007/978-3-030-88927-2

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Immigration Judicial Reviews

An Empirical Study

Professor Robert Thomas and Dr Joe Tomlinson

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Acknowledgments

We are grateful to the Nuffield Foundation for funding this research. HM Courts and Tribunals, the Office of the Senior President of Tribunals, and the Immigration Law Practitioners' Association have been supportive partners throughout this research. Interviewees—often busy professionals and judges—gave their time freely and greatly improved our understanding of the process. Throughout, we have also been supported by a diverse and able advisory group. We like to thank the following people: Marie-Laure Basilien-Gainche, Cris Coxon, Salima Budhani, Alison Harvey, Elodie Journeau, Lyn Kemp, Louis Kopieczek, Jason Latham, Jean-Benoit Louveaux, Marcelle Reneman, Elizabeth Ruddick, Surrinder Singh, James Stevens, Maurice Sunkin, Paula Waldron, and Karin Zwann.

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Abbreviations

AoS……………………………………………………………………………………….Acknowledgment of Service

GLD……………………………………………………………………….………Government Legal Department

HMCTS……………………………………………………………Her Majesty's Courts and Tribunals Service

IJR……………………………………………………………………………………….Immigration judicial review

LiP…………………………………………………………………………………………….……….Litigant in person

MoJ…………………………………………………………………………………….…………Ministry of Justice

UT(IAC)……………….………………………….…………Upper Tribunal (Immigration and Asylum Chamber)

1. Executive summary

This report investigates how the immigration judicial review system is operating in practice. In 2013, most immigration judicial reviews were transferred from the Administrative Court to the Upper Tribunal (Immigration and Asylum Chamber). At the start of the study in 2017, there were some 12,000 immigration judicial reviews lodged each year with the Upper Tribunal (the caseload has subsequently declined). Judicial review is a critical mechanism for challenging immigration decisions. However, there is comparatively little detailed evidence on how it is used by claimants and how the system works in practice. Policymakers wanted a more detailed understanding of this area of litigation. We therefore undertook an empirical study to fill this important gap in the evidence. We did this by collecting data from a sample of case-files. We also interviewed Upper Tribunal Judges, representatives, claimants, and others. We were assisted by an Advisory Group comprised of representatives, officials, and an Upper Tribunal Judge. Our key findings are as follows.

Many immigration decisions can be challenged by way of judicial review. The caseload varies over time. Following the transfer of most immigration judicial reviews from the Administrative Court to the Upper Tribunal in 2013, the tribunal's caseload was initially very high, but has since declined. Most judicial reviews are fact-specific; they turn on their own specific facts and circumstances and tend not to raise wider points of law and policy. Many claims raise issues concerning the application of asylum and human rights law, especially the right to respect for family and private life under Article 8 of the European Convention on Human Rights. Many judicial reviews are lodged in an attempt to secure an in-country right of appeal. While there is an ongoing debate about the relative advantages of appeals as against judicial review, the removal of appeal rights under the Immigration Act 2014 does not seem to have led to a significant increase in judicial reviews.

Many judicial review claims are refused permission because the Upper Tribunal decides that they are unarguable. The use of template, standard, and unparticularised grounds of challenge is a common, though not universal, feature. There are continuing concerns regarding the variable quality of representation for claimants. Action has been taken to deter lawyers from repeatedly lodging abusive and vexatious judicial review claims. Anecdotally,

this may have led to a reduction in the volume of judicial reviews. There is evidence that some people are at risk of exploitation by unscrupulous advisers. At the same time, good quality representatives work under a range of pressures and find that this can hinder their work.

The majority of judicial review claims are refused permission to proceed. Nonetheless, there are concerns about the quality of initial Home Office decisions. We encountered instances of poor decision-making challenged by way of judicial review. We found that 20 per cent of the cases we examined are settled out of court with agreement that the case be reconsidered by the Home Office. We also encountered the phenomenon of "repeat judicial reviews." That is, when a second judicial review is lodged against a fresh Home Office decision which is very similar to the initial decision. The overall process could operate more efficiently if there were greater communication and co-operation between the parties throughout the process.

As regards the categories of immigration judicial reviews, there is a wide range of immigration decisions that are challenged by way of judicial review. However, much of the caseload is concentrated within a few categories of case: asylum and human rights claims certified as clearly unfounded; fresh asylum and human rights claims; and removal decisions. Many judicial review challenges are lodged either to secure an in-country appeal or to prevent or delay an individual's removal from the country. Challenges to Home Office delay used to feature prominently in the caseload, but this is no longer the case.

There is a wider debate concerning the appropriate remedies that should be available. Judicial review is an important remedy, but its scope is relatively limited. By contrast, appeals to tribunals involve a full re-hearing of a case. We encountered the view from representatives that a right of appeal to the tribunal is a more preferable and effective remedy than judicial review. We also encountered the argument that some specific types of decisions that affect an individual's fundamental rights, but are currently non-appealable, should attract a right of appeal. These include decisions concerning human trafficking, statelessness, and domestic violence. As regards the empirical data, we found there to be little evidence that the restriction of tribunal appeal rights has led to an increased use of judicial review.

As regards claimants, we found evidence that they are often desperate and find the process difficult to understand and stressful. Most, though not all, claimants are legally represented, but the quality of such representation varies enormously. Most claimants are self-funding. Very few claimants appear to be in receipt of legal aid. The process for seeking Exceptional Case Funding is perceived as being difficult. We encountered concerns about the ability of litigants in person to navigate the system effectively. The judicial review process was not designed with litigants in person in mind and there is accordingly a need to address the situation of litigants in person by, for instance, greater provision of guidance. The Upper Tribunal is fully aware of this challenge. Greater understanding of the process would be assisted by more and better data on costs and how these drive the behaviour of litigants.

The wider programme of tribunal modernisation will in the future mean that aspects of the judicial review process will be digitalised. This will include both online applications and document-sharing. This is likely to enhance the efficiency of the process. Nevertheless, the parameters of the project are still being developed. More information needs to be made public about the project to enhance transparency and give the public and stakeholders the opportunity to scrutinise the project's development. The greater use of Tribunal Caseworkers, another part of the ongoing reforms, will free up judicial time, but needs appropriate monitoring and oversight. There is little reason to think that alternative dispute resolution would operate effectively as an alternative to judicial review in the immigration context. Nonetheless, the various forms of alternative dispute resolution already built into the process, such as administrative review, re-application, and settlement, could be made to work more effectively. The full implications of the withdrawal of appeal rights by the Immigration Act 2014 requires wider evaluation. The question whether to restore full appeal rights is a policy question. Nonetheless, it is arguable that certain decisions affecting issues of fundamental rights - human trafficking, statelessness, and domestic violence – could be more effectively handled through appeals than judicial review.

Based on our detailed evidence base and discussions with those involved in the immigration judicial review system, our key recommendations are as follows:

1. Representatives that make use of standard, formulaic grounds of challenge need to undertake better preparation of judicial review claims.

2. There are a variety of mechanisms to deal with vexatious claims: the Upper Tribunal's internal reporting system; deeming claims to be Totally Without Merit; *Hamid* hearings; and referrals to regulatory bodies. The recent reduction in the number of judicial review claims may be in part attributable to greater use of these mechanisms. The most effective way of seeking to reduce the number of hopeless judicial review claims is to reduce the levels of poor quality representation by pulling up those firms that lodge abusive and vexatious claims.
3. Most judicial review challenges are refused permission. We encountered many robust Home Office decisions. At the same time, there were also cases in which the Home Office decision was not robust and sustainable. Better initial decision-making requires that the Home Office learns lessons highlighted through the judicial review process. Better feedback mechanisms could be put in place to achieve this.
4. More involvement of legally trained staff, such as tribunal caseworkers, at the Pre-Action Protocol stage could increase the efficiency of the process if it leads to fewer cases being conceded at later stages of the judicial review process.
5. The process of settling claims through a consent order could operate more efficiently if there was improved communication between the parties throughout the process.
6. Repeat judicial reviews can be unnecessary, inefficient, costly, and likely to cause anxiety to claimants. To reduce the risk of this, the Home Office needs to exercise greater care when re-taking a decision so as to prevent further litigation. Fresh Home Office decision letters following a successful or conceded judicial review should be checked, if necessary by senior case-workers, to ensure compliance with the consent order or a ruling from the Upper Tribunal. Furthermore, when a consent order is agreed, then both parties need to fulfil their obligations. Further judicial reviews against the Home Office to ensure compliance with consent orders are wasteful and should be unnecessary.
7. HMCTS should routinely collect data on the types and categories of immigration judicial reviews, including on costs.
8. The Home Office's power to certify cases as clearly unfounded should be exercised carefully and only when appropriate. There may be a need for further guidance for decision-makers on this point.
9. Parliament and the Government ought to consider whether to re-introduce appeal rights in certain categories of case, such as: human trafficking; statelessness; and domestic

violence cases. Arguably, such cases could be better handled through the appeals system than judicial review.

10. Litigants in person need more support throughout the judicial review process. This could be provided through a combination of leaflets, online guidance, videos, and digital assistance.
11. The process for applying for Exceptional Case Funding needs to be more accessible and proportionate. Further improvements are required beyond those already implemented.
12. There is a need for a detailed review of how costs operate in practice drawing upon data from the Home Office and the Government Legal Department. This review could examine more detailed information as to costs with a view to reaching a better understanding of costs in this area and how costs influence behaviours.
13. Consideration should be given as to whether other types of immigration judicial review work could be usefully transferred from the Administrative Court to the Upper Tribunal, such as nationality cases.
14. Given that tribunal caseworkers are now exercising some powers and roles previously undertaken by judges, it is necessary to ensure that there is appropriate monitoring and oversight.
15. The Ministry of Justice and HM Courts and Tribunals Service should disclose more information about the digitalisation project, the principles informing its design, the broader direction of travel, and the timeline for implementation. It needs to be clarified whether litigants in person will be provided with digital assistance and the scope of this assistance.
16. Rather than introducing an alternative dispute resolution (ADR) mechanism, it would be more effective to enhance the quality and efficiency of existing processes. This could include: improving the Pre-Action Protocol process and encouraging better communication between the parties before oral permission and substantive hearings.

2. The research project

Immigrants and asylum claimants often use judicial review to challenge immigration decisions made by the Home Office. Immigration is the single largest area of judicial review. In 2013, most immigration judicial reviews were transferred from the Administrative Court to the Upper Tribunal (Immigration and Asylum Chamber) (UTIAC).[1] The purpose was to reduce the pressure on the Administrative Court and to enable expert and experienced immigration judges to determine such claims. The immigration judicial review caseload in both the Upper Tribunal and the Administrative Court accounts for around 85 per cent of all judicial reviews. There has been a significant growth over recent years. In 2014-15 and 2015-16, there were around 15,000 immigration judicial reviews lodged with the Upper Tribunal–an unprecedented number, making it the fifth largest tribunal jurisdiction overall. By contrast, the number of non-immigration civil judicial reviews has remained static at around 2,000 to 2,400 claims per year since the year 2000.[2]

Concerns have been raised over both the volume and cost of the caseload. Judicial review is a costly, lengthy, and legalistic process. A large caseload can mean delays in both the administration of justice by the courts and the administration of immigration policy by the Home Office. There is an equally important need to consider how effectively the system works from the perspective of the users involved, people who submit judicial review claims. Given recent restrictions on tribunal appeal rights,[3] judicial review is often the only means of legal challenge. The need for a better understanding of the system is likely to grow as we look towards the future. The caseload could increase if, for instance, the Home Office makes greater use of out of country appeals. Brexit also presents a very real possibility of challenges relating to, for instance, the three million EU citizens in the UK at present.[4]

The Ministry of Justice and HM Courts and Tribunals, as the government bodies responsible for the administration of the judicial review process, wanted a better understanding of the types of challenges lodged and the motivation of litigants. The official judicial review database

[1] The Tribunal Procedure (Amendment No. 4) Rules SI 2012/2067.
[2] R. Thomas, 'Mapping immigration judicial review litigation: an empirical legal analysis' [2015] *Public Law* 652.
[3] Immigration Act 2014, s.15; Immigration Rules, Appendix AR; Crime and Courts Act 2013, s.52
[4] The Migration Observatory, *Here Today, Gone Tomorrow? The Status of EU citizens Already Living in the UK* (Oxford, 2016); Institute for Government, *Implementing Brexit: Immigration* (London, 2017).

provides only limited data on the types and the topics of claims lodged.[5] This database categorises most immigration claims under two broad types – 'Immigration Not Asylum' and 'Immigration Asylum Only.' This coding system was carried over with the transfer to the Upper Tribunal. In practice, the categories are used as generic categories for a wide range of cases.[6] Accordingly, we undertook this research project to provide a more informed understanding of the underlying trends in immigration judicial reviews, such as the reasons for the growth in the caseload, the types of challenges lodged, and the experiences of users.

There are different perspectives on the immigration judicial review system. From one perspective, delay and administrative problems within the Home Office frequently prompt claimants to seek judicial reviews which could usually have been avoided.[7] By contrast, the Home Office has often perceived judicial review as a means by which claimants can tactically delay the enforcement of unwelcome negative decisions.

The policy issue here is, at its core, the choice of appropriate redress mechanism.[8] Without clear evidence, it is difficult to know what proportion of immigration-related grievances are suited to judicial review because they raise issues of legality or if the underlying claims could be better handled through an alternative complaint handling procedure because they concern administrative error rather than illegality. These are all complex questions and better answers can be offered when based on detailed data.

To understand how the system of immigration judicial reviews is working in practice, we sought to collect data on the following areas:

- How the system of immigration judicial reviews is working in practice, including the drivers of litigation as well as litigant motivation and behaviour;
- the quality of immigration judicial review claims and of Home Office decisions;
- the types of claims lodged and their outcomes; and

[5] Ministry of Justice, *Civil justice statistics quarterly*, available at: https://www.gov.uk/government/collections/civil-justice-statistics-quarterly
[6] See S. Nason, *Reconstructing Judicial Review* (Oxford: Hart, 2016)
[7] R. Thomas, 'Mapping immigration judicial review litigation: an empirical legal analysis' [2015] *Public Law* 652.
[8] For discussion, see: V. Bondy and A. Le Sueur, *Designing redress: a study about grievances against public bodies* (London, 2012).

- alternative approaches to dispute resolution and system costs.

3. Research Methods

The research project collected data on the types of immigration judicial review claims and the views and experiences of people involved in the system. Our approach to the research was to collect both quantitative and qualitative data. We then combined the data gathered through these methods to inform our analysis.

To collect data on the immigration judicial reviews caseload of the Upper Tribunal (Immigration and Asylum Chamber), we undertook a case-file analysis which involved collecting a range of data from case-files. The purpose of the case-file analysis was to collect data from immigration judicial review case-files concerning the types and categories of immigration judicial review claims lodged. In particular, we collected data on the following fields:

- Type of decision being challenged;
- The claimant's grounds of challenge;
- Whether the claimant was represented;
- The outcome of the paper permission and oral renewal permission decisions;
- The amount of costs awarded and to whom;
- Whether the claimant had brought previous immigration challenges;
- Whether the claimant was in detention;
- Whether the claimant was in receipt of legal aid; and
- The nationality of the claimant.

We undertook a pilot study in late 2017. The full study was undertaken in 2018 and involved collecting data from a sample of 342 case files. This sample was selected from a list of a total number of 9,640 judicial review claims lodged at the Upper Tribunal between November 2016 and November 2017. This list of case files was provided to us by the Upper Tribunal. We used random probability sampling to select the sample of 342 case-files. These case files were then scanned by HMCTS administrative staff at the Upper Tribunal onto pdf files to facilitate data collection. After constructing a database, we also extracted case studies from the files which demonstrated recurring issues.

In the recording of data, various practical challenges arose.

- First, immigration decisions are often long and complex. They often contain multiple claims. In recording the type of decision being challenged, we highlighted the main issue in the application being decided.
- Second, grounds advanced by applicants are often not clearly defined. This was usually the case with litigants in person but also when lawyers were involved in the case. We sought to record grounds that were considered by the judge but, in relation to some files, this required a careful construction of various documents in order to establish what the core grounds/legal issues actually were.
- Third, many of those applicants who were registered as unrepresented appeared to have some level of legal help or access to legal materials. This means we had to distinguish between those who were represented, those who were not, and those who were not represented but has some form of legal assistance.
- Fourth, some files provided no information on costs awards and some explicitly contained judicial orders for "no costs." These were placed in the same category in our data: "no order as to costs."
- Fifth, it was not always clear whether applicants had legal aid. The best source of establishing whether applicants had legal aid was by examining the judicial review claim form. However, in many cases it is likely that if legal aid is granted it is after this stage. Where it was unclear whether the claimant was in receipt of legal aid, we recorded the case as not having legal aid.
- Sixth, it is not always clear from the files if an applicant is in detention and, if so, for how long. Where there was evidence that an applicant was in detention at any stage during the litigation, we recorded them as "detained."
- Seven, some of the scanned files were incomplete. For instance, the relevant documents had not been scanned or the outcome of the case could not be known because it had not proceeded to the permission stage before being scanned.

To supplement data collected from the case-file analysis, we conducted interviews and observations. These included:

- Semi-structured interviews with Upper Tribunal Judges;

- Semi-structured interviews with Tribunal Case-Workers and tribunal lawyers;
- Semi-structured interviews with legal representatives advising claimants;
- Semi-structured interviews with claimants; and
- Observations of oral renewal permission hearings at the Upper Tribunal in Field House, London.

As regards the selection of interviewees, we contacted law firms specialising in immigration law and with experience of immigration judicial review litigation for interviews. As regards the interviews with claimants, we were assisted by lawyers that asked previous clients to be interviewed for the research. The interviews with judges were conducted in person at the Upper Tribunal. Interviews with representatives were conducted on the telephone and in person. Interviews with claimants were conducted on the telephone. All interviewees were given full information about the research and completed a consent form.

Data collected	**Total**
Case-files	342 case-files
Observation of oral renewal hearings	20 hearings
Interviews with Judges	5
Interviews with representatives	20
Interviews with claimants	4

The research was assisted by an advisory group. This was comprised of the following: representatives from the Ministry of Justice and HM Courts and Tribunals Service; a Judge from the Upper Tribunal (Immigration and Asylum Chamber); and legal representatives. The Advisory Group oversaw the research and provided advice. It also provided a forum for discussion.

4. Immigration judicial reviews

The overall purpose of the research project was to examine how the system of immigration judicial reviews in the Upper Tribunal (Immigration and Asylum Chamber) is working in practice. This section places the research in context by considering general features of the immigration judicial review system including: the wider immigration system in which it operates; the distinction between appeal rights and judicial review; the immigration judicial review caseload; key actors in the system; and the features of immigration judicial review process.

The wider context

Immigration decisions are taken by the Home Office to decide whether or not an individual fulfils the requirements of the Immigration Rules and other legislation to enter or remain in the UK. There is a large number of such decisions per year. Some types of refusal decisions can be appealed to the First-tier Tribunal. Refusal decisions that do not attract a right of appeal can only be challenged by way of judicial review. Since 2013, most, but not all, of such challenges are handled by the Upper Tribunal. Judicial review enables individuals affected by a government decision to challenge the legality of that decision. There are various contextual factors that need to be borne in mind throughout.

First, many immigration applicants are granted some form of immigration status by the Home Office but some are not. Many, though not all, applicants who have been refused will seek to challenge their refusal decisions by way of judicial review. Second, the immigration system is based on a notoriously complex set of rules.[9] One upshot of this is that the Home Office makes a range of different decisions on a variety of bases, which, in the context of the immigration judicial review system, become the subject of the cases. While there is a wide range of immigration decisions that are challenged via judicial review, certain types of case occur very frequently. People we interviewed, particularly representatives and judges, noted the complexity of the legal framework and Immigration Rules and that this complexity is itself often a driver of judicial review litigation. Given the nature of immigration decision-making, there are incentives for claimants to resort to formal judicial proceedings. Claimants and

[9] Law Commission, *Simplification of the Immigration Rules* (Consultation Paper 242, 2019).

representatives often lack trust and confidence in the Home Office. There is often a perception that the Home Office will seek to reject applications. However, in reality, many immigration applications are granted initially by the Home Office. Further, is a concern that some judicial review challenges are lodged by people merely seeking to prolong their stay in the country.

Third, the immigration judicial review jurisdiction is large, complex, and diverse. Immigration judicial reviews account for the vast majority of all judicial reviews in England and Wales. There is a high number of different law firms and representatives who take cases on. There is also a high degree of variety in the types of such providers. The jurisdiction's caseload is also dynamic. The caseload has increased and then decreased, but it could increase again in the coming years. There is always a fundamental degree of uncertainty as to future caseloads. This is influenced by a wide range of matters wholly outside the control of any single actor in the system. These include: the number of immigration applications and Home Office refusals; the content of the Immigration Rules; immigration and population movements; the willingness of claimants to challenge decisions; and the availability of legal advice. The nature of the caseload is often driven by short-term trends in the case-law and changes in immigration policy. For instance, a lead case is decided by the higher courts. Many subsequent challenges will then be lodged on the back of this seeking to challenge the application of the law in individual cases or seeking to extend the scope of the lead ruling or to exploit any ambiguities. Particular topics and issues come and go.

It is also a high pressure jurisdiction in which there is considerable focus upon the efficient and timely consideration of cases. Judges, representatives, and the Home Office are all under pressure to make the system work as effectively as possible. The pressures of high volumes and workloads affects all who work within the system. The Upper Tribunal, the Home Office, the Government Legal Department, and legal representatives all handle a high workload of immigration judicial reviews in addition to other types of work, such as statutory appeals.

Finally, the vast majority of judicial review cases are fact-specific. Some judicial reviews do raise broader issues that are of importance beyond the particular case, but such cases are

relatively few in number. Overwhelmingly, immigration judicial review challenges turn on the facts and circumstances of the particular case rather than issues of law.

Appeal rights and judicial review

A central issue of both administrative law in general and immigration law in particular concerns the appropriate remedy for challenging initial administrative decisions. There are a range of different remedies:

- **Administrative review.** The applicant can request that the Home Office review its earlier decision on the basis that it contains a case-working error. The Home Office can either affirm or reverse its decision. An administrative review decision can itself be challenged by way of judicial review.
- **Tribunal appeals.** The applicant can appeal to the First-tier Tribunal to have his or her appeal heard and determined. A First-tier Tribunal Judge will hear the evidence and submissions, make findings of fact and apply the relevant legal rules. The Tribunal can substitute its own decision for that of the Home Office.
- **Judicial review.** The applicant can challenge the legality of the Home Office decision. Judicial review is limited to reviewing the lawfulness of the challenged decision. The Judge does not generally have a fact-finding role, but is limited to reviewing whether the challenged decision is unlawful, irrational, or procedurally unfair. Judicial review is a more limited remedy than having a right of appeal on issues of both fact and law.
- **Complaints.** The applicant can complain against the Home Office on the basis that there was some administrative error or problem. Complaints can also be pursued to the Parliamentary and Health Service Ombudsman.

Both tribunal appeals and judicial review are judicial remedies. The Tribunal or the court is an independent and judicial body involved in reviewing or re-taking an administrative decision. By contrast, both administrative review and complaints are non-judicial remedies. Administrative review is an internal Home Office process. Such reviews are considered and decided by Home Office case-workers. By contrast, complaints are handled initially by the Home Office itself and then by the Parliamentary and Health Service Ombudsman.

A key issue concerns the respective roles of tribunal appeals and judicial review. These processes share some characteristics. As noted above, both are judicial procedures. In both appeals and judicial review, the case will be heard and the decision taken by a judge, whether of the First-tier or Upper Tribunal. Procedures must be fair and are informed by the overriding objective in the tribunal procedure rules to deal with cases fairly and justly. Another common feature is that an applicant and the Home Office can be represented before both appeals and judicial review, though an applicant's entitlement to legal aid varies.

However, there are important differences between tribunal appeals and judicial review. In statutory appeals, the jurisdiction of the tribunal extends to issues of both fact and law. In an appeal, the appellant can submit evidence and will often give oral evidence at an appeal hearing. The task of the tribunal is to hear and assess the evidence, make findings of fact, and then apply the relevant rules to make a decision. In statutory appeals, the tribunal can decide for itself whether or not the applicant qualifies to enter or remain under the Immigration Rules and the European Convention on Human Rights. By contrast, in judicial review proceedings, the jurisdiction is limited to a review of the legality of the challenged decision. The judicial review court or tribunal will not typically hear the evidence to make findings of fact. Instead, it will consider whether there is an arguable public law error in the challenged decision. In judicial review, the court or tribunal will at most strike down the Home Office's decision. The case will then be sent back to the initial decision-maker for a new decision. While any subsequent decision must be made lawfully, the substance of the new decision may be the same as that of the challenged decision. Another difference is that while tribunal systems that deal with particular types of cases (e.g. immigration, social security, tax) each have their own set of procedural rules, judicial review does not. The procedure rules for judicial review are the same irrespective of subject-matter, thought there are some particular differences as regards time-limits (e.g. for planning cases and *Cart* judicial reviews).

On the basis of the differences explained above, a right of appeal to the First-tier Tribunal is often seen as a more effective remedy than judicial review from the perspective of an individual seeking to challenge an administrative decision. In an appeal, the individual can appear in person and present oral and documentary evidence. The Tribunal will have to apply

the relevant rules and can substitute its own decision for that of the Home Office. If an appeal is allowed, then the Home Office will be bound by this decision unless it can be challenged successfully before the Upper Tribunal. Appellants tend to experience higher rates of success through appeals than judicial review. At the same time, appeal rights are always statutory. They can be granted and withdrawn by Parliament. By contrast, it is generally accepted that judicial review cannot be abolished, absent extreme constitutional tensions between the government and the judiciary. Judicial review is a remedy of last resort; it can only be used once alternative remedies have been exhausted. It operates as a catch-all mechanism by which all decisions that do not attract a right of appeal can be challenged.

It is one thing to consider the advantages and disadvantages of different remedies in the abstract, but in practice, each system develops in its own particular context and within its own history. There are wider political and economic forces that bear down upon the overall organisation of redress systems and the choice of appropriate remedies. In practice, the choice over the most appropriate redress mechanism against immigration decisions–appeals, judicial review, and/or administrative review, is not a solely legal issue, but also a political and operational one.

Over recent years, the routes of legal challenges against negative immigration decisions have changed frequently. First, the Immigration Act 2014 reduced the statutory rights of appeal because of their perceived costs, delays, and complexity. Previously, many types of immigration decisions could be appealed to tribunals. The 2014 Act restricted appeals to asylum and human rights cases.[10] Second, the 2014 Act introduced a different approach toward which immigration decisions could be appealed. Previously, legislation had specified which particular immigration decisions attracted a right of appeal. By contrast, the 2014 Act specifies the grounds upon which appeals may be brought. Depending on the type of appeal involved, an applicant can have their appeal heard either within or outside the UK. Third, the reduction in appeal rights has gone hand in hand with wider use of administrative review as a substitute redress mechanism. In the absence of a right of appeal, applicants can seek

[10] There is also a right of appeal against the deprivation of British citizenship: British Nationality Act 1981, s.40A.

judicial review. Fourth, it is no longer possible for the First-tier and Upper Tribunals to allow an appeal on the ground that a decision was not in accordance with the law.

The limitation of appeal rights has been controversial. Immigration practitioners generally opposed the withdrawal of appeals and their replacement with administrative review and then judicial review on the ground that it weakened the legal remedies available to individuals. The question in judicial review is not whether the challenged decision is one that the Upper Tribunal would itself make, but whether that is unlawful, procedurally unfair, or unreasonable. In some cases, it is quite possible that an individual who is unsuccessful in judicial review proceedings might have been successful in an appeal. Accordingly, it has been argued that in many cases a right of appeal would be a better course of action than judicial review. Many of the representatives interviewed highlighted the limitations of judicial review compared with appeals:

> "It would be better if far more Home Office decisions attracted a proper merits-based appeal. With the reduction in appeal rights, there are so many more cases now that don't have a proper right of appeal to the First-tier tribunal. The disadvantage of judicial review is obviously that it is a review process. It is not a merits-based appeal. The claimant is not giving evidence. You are not hearing witnesses. It is still a review rather than an appeal and that in many cases can have a significant disadvantage to the individual."[11]

Parliamentary select committees have raised concerns about the withdrawal of appeal rights. Following the Windrush crisis, the House of Commons Home Affairs Committee recommended the re-introduction of immigration appeal rights and legal aid.[12] On the other hand, the Government's rationale for reducing appeals was to limit the costs and delays of appeals and to simplify the system.

The immigration judicial review caseload

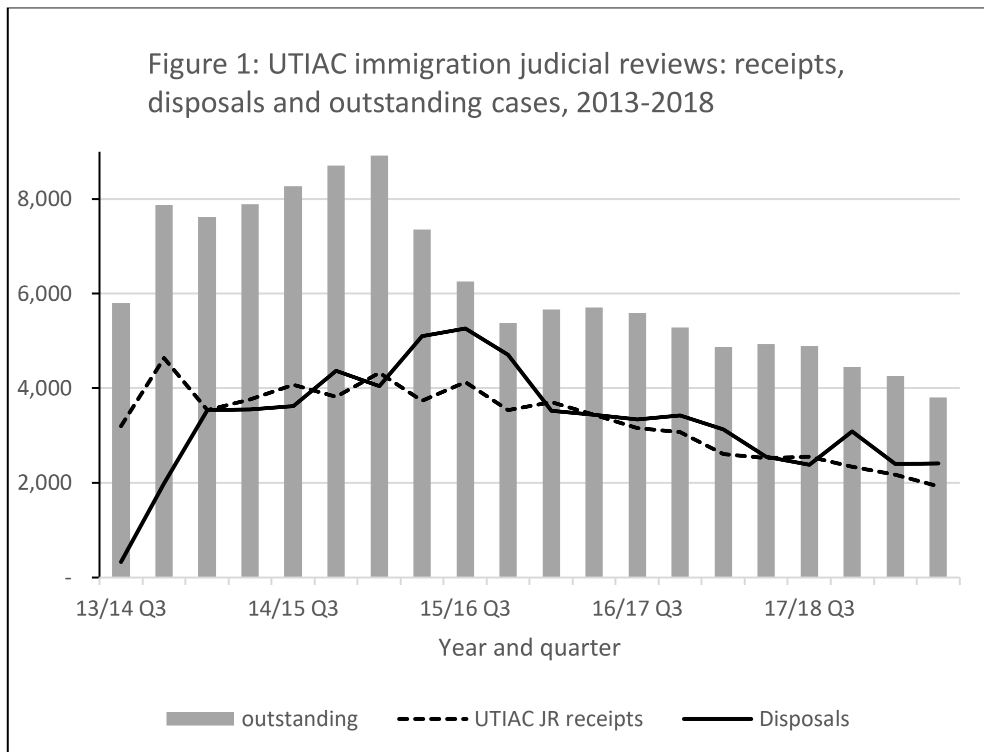
[11] Representative interview.
[12] House of Commons Home Affairs Committee, *The Windrush generation* (HC 990 2017-19), para 114.

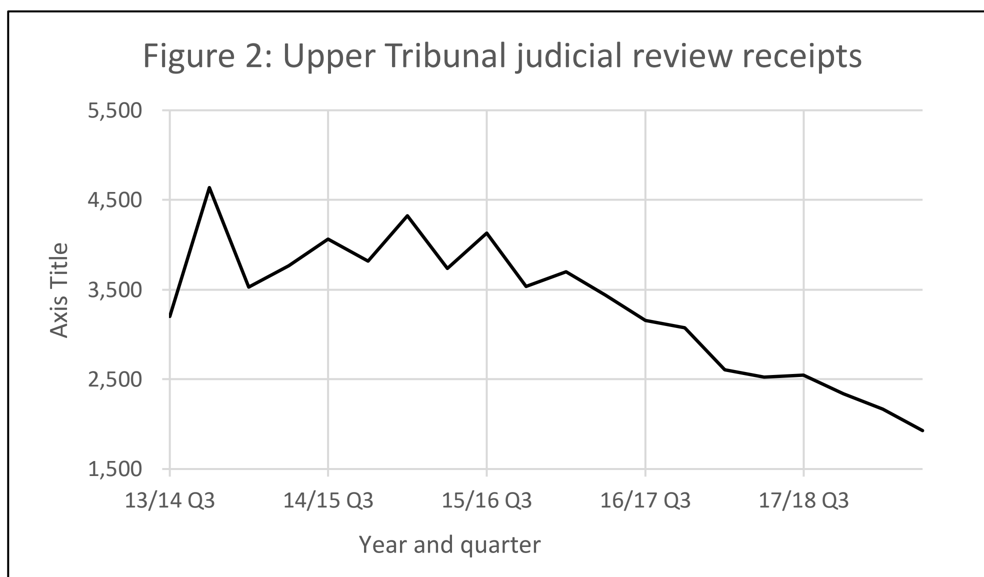
Caseload is an important issue for various reasons. The Upper Tribunal is required to handle a large judicial review caseload in a timely manner in addition to its statutory appeals work. The volume of immigration judicial reviews fluctuates over time. The caseload is influenced by a range of different factors, including: the number of refusal decisions made by the Home Office; the willingness of affected people to challenge those decisions; whether representatives are willing to take on such cases; the availability of other remedies; and other factors. It had been anticipated that the reduction in tribunal appeal rights would prompt an increase in judicial reviews. If so, then another issue would be how the judicial system would cope, bearing in mind that appeals are handled initially by the First-tier Tribunal whereas judicial reviews are lodged with the Upper Tribunal.

In 2013, the immigration judicial review caseload increased significantly. In September 2013, the Home Office reported to the High Court in *Singh* that there has been a rapid and unprecedented rise in challenges to asylum and immigration decisions made by the Secretary of State.[13] The number of judicial reviews received was 69% higher in July 2013 than July 2012. The number of pre-action protocol letters had more than doubled. Over 2,500 claims were received in July 2013 alone.[14] As a consequence of this, the Home Office was unable to stay on top of the caseload. There were significant delays in the Home Office and Government Legal Department filing Acknowledgements of Service with the Upper Tribunal and claimants. On 1 November 2013, the vast majority of immigration judicial reviews were transferred from the Administrative Court to the Upper Tribunal.[15] By 2016, the increased caseload had significant implications as regards the Upper Tribunal and its working practices. The increased number of judicial reviews had roughly doubled the Upper Tribunal's overall workload without an increase in salaried judicial resource.[16] The judicial review workload is in addition the Upper Tribunal's other main area of work, namely statutory appeals. Since then, a number of developments occurred. First, there has been the appointment of new Upper Tribunal judges. Second, in 2015, the relevant provisions of the Immigration Act 2014 were implemented which reduced the number of appealable decisions. Third, the caseload reduced

[13] *R (Singh) v Secretary of State for the Home Department* [2013] EWHC 2873 (Admin).
[14] *R (Singh) v Secretary of State for the Home Department* [2013] EWHC 2873 (Admin), [14].
[15] *Lord Chief Justice's Practice Direction on Judicial Review in the UTIAC* (2013).
[16] Senior President of Tribunals, *Annual Report 2016* (2016), p.35.

significantly. Figure 1 presents all receipts, disposals, and outstanding cases. Figure 2 shows receipts of immigration judicial review claims at the Upper Tribunal. The number of receipts has fallen from a highpoint of 4,638 claims in Q4 2013/14 to 1,928 receipts in Q2 2018/19.





It had been anticipated that the removal of most appeal rights under the Immigration Act 2014, brought into force in 2015, would prompt an increase in judicial reviews. However, this

increase did not materialise. On the contrary, the number of judicial review claims declined. To some extent, this may be attributable to changes in migration patterns. Another explanation concerns the types of immigration judicial review claims lodged. A major finding from our research is that the bulk of the caseload concerns challenges against certification and fresh claim decisions, types of decisions that either do not attract a right of appeal at all or do not attract an in-country right of appeal.

One way of determining whether the reduction in appeal rights has led to an increase in judicial review claims is to investigate whether previously appealable decisions were being challenged by way of judicial review. The case-file analysis did include some such claims. For instance, there were a substantial number of family visitor appeals until the abolition of that appeal right in 2013. By contrast, in the case-file sample, there were three judicial reviews challenging the refusal of a visitor visa. The volume of such judicial reviews is significantly lower than the volume of appeals. Another explanatory factor is that, with the withdrawal of appeal rights, it may well be that many appeals can be lodged on human rights grounds. According to an Upper Tribunal Judge:

> "Entry clearance cases. I think we probably expected to have more judicial reviews and no appeals, but I think in practice, what has happened to those is that they have just been run as human rights appeals, where the argument is, 'I've met the requirements of the rules, and that must weigh heavily as a proportionality factor.'"[17]

Similarly, one representative noted:

> "I cannot say there has been a huge increase in judicial reviews because of the abolition of many appeal rights. In a lot of cases it is still quite easy to get into the tribunal following a recent Upper Tribunal decision about what constitutes a human rights claim. A lot of applications are deemed to be human rights claims by the Home Office and the Upper Tribunal has adopted a pretty liberal interpretation of what constitutes a human rights claim and so a lot of cases are still in the tribunal."[18]

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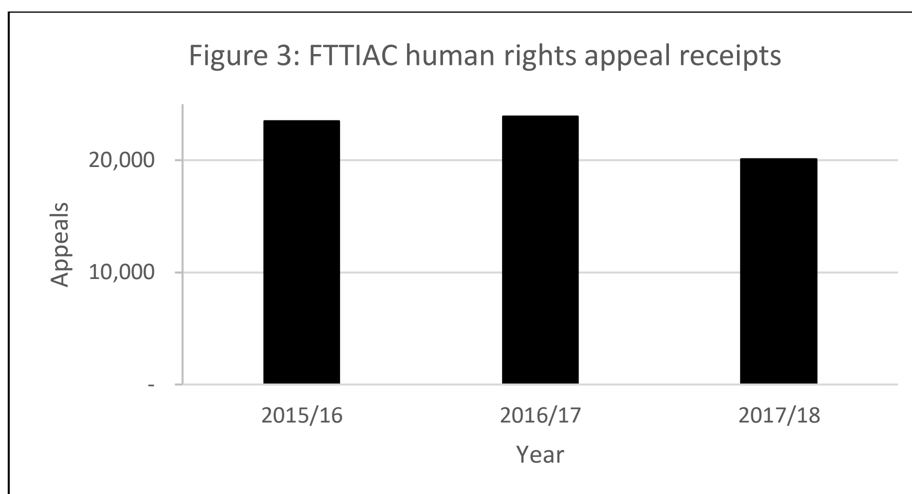
[17] Upper Tribunal Judge interview.
[18] Representative interview.

Figure 3 shows the number of receipts of human rights appeals in the First-tier Tribunal.



Returning the general reduction in the number of judicial review claims lodged, there is only a limited understanding as to why the number of cases has fallen as it is usually difficult to measure and isolate the importance of any one specific factor. It may be that there are fewer individuals seeking to challenge decisions or that individuals are making use of alternative courses of action, such as lodging a fresh application if an entry clearance application has been refused or applying for an administrative review.

There may also have been an "*Hamid* effect" on the volume of immigration judicial reviews. *Hamid* hearings are held by the higher courts and Upper Tribunal to ensure that lawyers conduct themselves according to proper standards of behaviour and do not bring hopeless or abusive claims for judicial review.[19] There has also been related action by the Office of the Immigration Services Commissioner, the Solicitors Regulation Authority, and the Solicitors Disciplinary Tribunal. What is apparent also is that, while the judicial review caseload has declined at present, it could increase in the future. As noted above, the caseload is driven by short-term trends in the case-law. As one Judge commented:

> "There are particular topics that come and go. You'll get a bunch of cases together across the system on various topics. So, recently on EEA durable relationships, where

[19] *R (Hamid) v Secretary Of State for the Home Department* [2012] EWHC 3070 (Admin).

> there was an Upper Tribunal decision that said there's no right of appeal so there was a flood of them that came in as JRs; they were all staged for a high court decision and now they're all working their way back into the appeal system instead of judicial review. There are also topics that come up like certification and whether an out of country right of appeal is appropriate, and there is often a leading case working its way through the court system at the time."[20]

Actors in the process

Claimants

Claimants who lodge judicial review claims are a highly diverse body of people. Claimants challenge decisions refusing entry to or leave to remain in the UK. There is a wide variety of such decisions. Someone may seek to enter or remain to seek asylum, for family life purposes, to visit a relative, for work or study, and other reasons.

One thing claimants do have in common is that they are universally non-UK nationals who are challenging a refusal decision made by the Home Office that affects their immigration status. There are also certain classes of claimant who share particular characteristics. Some claimants are living overseas and challenging an entry clearance refusal decision. However, from the sample of case-files, it was apparent that a significant proportion of claimants were currently in the UK and many had been for some years, though their immigration status may have changed several times. In fresh claim and certification cases, claimants have typically been through either or both of the asylum process and various other immigration decision processes and are toward the end of those procedures. Having lived in the UK for some time and often having built up some family relationships, there is naturally a desire to remain within the UK. Accordingly, individuals desperate to remain in the UK will use judicial review to challenge decisions, often relying on Article 8 claims.

Some claimants will have lodged a judicial review claim as the latest in a line of successive challenges. The immigration history of some claimants can be lengthy and complex. An individual can build up a complex immigration history over many years. An individual's

[20] Upper Tribunal Judge interview.

immigration status can change as one form of leave is extended, curtailed, cancelled, and another form of leave is applied for. Immigration judicial reviews are often either part or the culmination of a whole series of decisions about an individual's immigration status which are often made over a period of many years as someone has changed from one immigration status to another. Such decisions include various Home Office decisions on immigration applications, tribunal appeal determinations, decisions of the higher courts, and previous judicial review claims. The Immigration Rules also change frequently and this can affect an individual's immigration status.

The Upper Tribunal (Immigration and Asylum Chamber)

In 2013, most immigration judicial reviews were transferred from the Administrative Court to the Upper Tribunal to be heard and decided by salaried Upper Tribunal judges. Under the Tribunals, Courts and Enforcement Act 2007, the presiding judge hearing judicial reviews transferred to the Upper Tribunal must be either a High Court judge or such other persons as agreed between the senior judiciary concerned.[21] When the transfer of immigration judicial reviews took place, the Upper Tribunal was decided that immigration judicial reviews would be heard by salaried Upper Tribunal judges. Part of the rationale for the transfer of judicial reviews claims is that of having an expert and experienced immigration judge. Such judges are drawn from the Upper Tribunal (Immigration and Asylum Chamber), though for a period of time, judges from the Upper Tribunal (Administrative Appeals Chamber) were assigned to do immigration judicial review work.

The principal Upper Tribunal (Immigration and Asylum Chamber) hearing centre is at Field House, London, which is where the bulk of the work is concentrated. Upper Tribunal judges are based at Field House, but can and do travel to regional centres. The regional Administrative Court centres in Manchester, Leeds, Cardiff/Bristol, and Birmingham handle much smaller volumes of Immigration judicial reviews. The operation of regional centres is notable in the following respects. First, cases can be heard more quickly at a regional centre than at Field House, London. For this reason, claimants and representatives are actively

[21] Tribunals, Courts and Enforcement Act 2007, s.18(8). The senior judiciary comprises: the Lord Chief Justice, the Lord President, or the Lord Chief Justice of Northern Ireland, and the Senior President of Tribunals.

encouraged to issue cases regionally. Second, case at regional centres are often heard by a High Court Judge and/or Circuit Judges sitting as Upper Tribunal Judges. Third, it is possible that claims lodged in London can then be heard in a regional centre. Cases can be transferred to regional centres if legally qualified court staff make a "Minded to Transfer Order" where appropriate. The effect of such orders is to reduce the pressure on London and bring the Upper Tribunal nearer to the claimant.

Home Office and the Government Legal Department

Home Office immigration decisions are made by case-workers located within one of the Home Office's decision-making units. A claimant seeking judicial review should send a Pre-Action Protocol letter to the Home Office before lodging a claim with the Upper Tribunal. Once judicial review proceedings are lodged, grounds of defence are drafted by lawyers within the Government Legal Department. The Home Office is represented at oral renewal and substantive hearings by Treasury Counsel who are barristers. Some counsel are now in-house at the Government Legal Department. This is in contrast to the practice in the context of statutory appeals in which the Home Office is represented by a Presenting Officer. A view widely shared by both judges and representatives interviewed was that it is absolutely imperative to retain the highest quality representation for the Home Office.

Representatives

The provision of immigration advice and representation is regulated. It can only be provided by designated categories of person. These categories include: advisors registered with the Office of the Immigration Services Commissioner; and those authorised to provide advice and representation by a designated qualifying regulator, such as the Law Society and the Bar Council.

Many claimants receive immigration advice and representation. From our sample of 342 case-files, in 232 case-files there was a named law firm providing legal assistance. In 106 case-files no law firm or representative was explicitly mentioned. However, in a number of cases, it was quite clear that the claimant had received some form of legal advice and assistance even though a law firm or representative was not explicitly named on the judicial review claim form. In total in 271 case-files it was clear that the claimant had received some form of legal

assistance. Claimants often have some form of help even if they are not formally represented. For instance, there were many cases in which there was no adviser or representative recorded on the judicial review claim form, but the claim has been accompanied by grounds of challenge, which it is highly unlikely that a litigant in person could have drafted. Such assistance can include standard copies of grounds of challenge that are passed around in detention centres or poorly constructed grounds of challenge provided by low-quality advisers.

From both the case-file analysis and interviews, it was clear that the central issue is not solely whether a claimant is represented, but also the *quality* of such representation. There were examples of cases in which formulated and precise grounds were advanced and, in some instances, judges expressly recognised the work lawyers had put into the case. At the same time, there was evidence of standard grounds of challenge and of poor quality representation.

The quality of immigration advice and representation is a long-standing issue. From the sample of case-files, interviews, and observation of hearings, it is clear that the quality of immigration advice and representation exerts a major influence over the strength, preparation, and presentation of judicial review challenges. Both judges and representatives noted that a major problem and challenge are the poor quality representatives who take on cases that have little or no merit and who do not properly advise their clients that they have limited chances of success. Good, reputable law firms may be unwilling to take on clients with weak cases because of the non-existent or low chances of success. The basis for this is just standard good practice. However, some poor quality providers do take on claimants with very poor cases. There is a tension here as the principle of access to justice means that everyone should be able to access a court or tribunal.

There is a distinction to be drawn between lawyers who are poor quality and those who are deliberately exploitative, though the effects of both can often be comparable in many respects. Problems caused by poor representation include: claimants going unrepresented when they expected to be represented; delayed hearings; claimants being poorly advised; and generic and template grounds of challenge being used which do little, if anything, to not advance a case. However, desperate claimants concerned about their immigration status who

have been refused by better providers may then seek advice from less reputable providers who will take their cases on. The risk here is that such people may be exploited by unscrupulous providers who will take such cases on in return for a fee and the hopes of the individuals concerned may be falsely raised.

Litigants in person

With reductions in legal aid provision, there has been an increase in the number of litigants in person appearing before courts and tribunals. It is difficult to know precisely how many litigants in person there are in immigration judicial review proceedings. From the case-file analysis, it is clear that most claimants had received some form of legal advice and representation either throughout or at some stage. There were also many cases in which although there was no representative mentioned in the judicial review claim form, nevertheless, the grounds of challenge submitted strongly indicated that the applicant has received some form of assistance. However, we found wide-ranging concerns about the quality of some types of representation. A further complication is that a claimant in receipt of initial advice and representation may become unrepresented at a later stage of the process.

The Judicial review process

Initial stages

There are various stages to the judicial review process. The first is the Pre-Action Protocol (PAP) stage. The claimant will send a PAP letter to the Home Office to notify it that a judicial review claim is to be lodged. The intention is that this stage can enable the dispute to be resolved before formal proceedings are commenced. At this stage, cases are dealt with by Home Office staff in its Litigation Operations unit. Lawyers from the Government Legal Department are not normally involved until a judicial review claim is formally lodged and issued by a claimant.

The next stage is for claimants to lodge a judicial review claim at the Upper Tribunal accompanied by the grounds of challenge. The claimant will also send the claim and grounds of challenge to the respondent. The purpose of exchanging the grounds of challenge is to ensure that at the permission stage, the court or tribunal is placed in a properly informed position to decide the issue of arguability in order to grant, refuse or adjourn permission to

proceed. The purpose of the grounds of the claimant's challenge is to identify precisely why the challenged decision is arguably unlawful. Grounds of challenge take certain forms. First, they might identify the background facts of the applicant, such as: date of birth, nationality, immigration history. Second, there will be the grounds of challenge themselves. Third, there might be a heading covering the remedy or the type of relief sought.

The Government Legal Department will then issue an Acknowledgement of Service and summary grounds of defence. The purpose of the summary of grounds is not to provide the basis for full argument of the substantive merits, but to assist the judge in deciding whether or not to grant permission, and, if so, on what terms. The Acknowledgement of Service will also include a full chronology, setting out the applicant's immigration history as it appears to the Secretary of State, including details of the outcome of any appeal or previous judicial review. This is considered by the Upper Tribunal to be extremely important and that it should continue to feature in the summary grounds.[22] In *Singh*, Hickinbottom J noted that "[w]ith the retreat of legal aid, an increasing proportion of public law claimants are acting in person. Through no fault of their own, the immigration history that they are able to portray in their claim, and the issues to which that history has given rise, are often inaccurate. That of course may also apply to cases where the claimant relates that history to a legal representative who prepares the procedural documents, but generally to a much lesser extent."[23] In general, the claimant's immigration history will detail when the claimant entered the UK, what forms of leave to remain he or she has had, what type of immigration applications have been made and their outcome, whether the claimant has exercised an appeal right or previously sought judicial review and the outcome of those challenges. Given that immigration judicial reviews largely turn on the facts and circumstances of the particular case, a detailed immigration history will be an extremely important part of the wider background. For instance, a frequent issue concerns whether, for the purposes of an application to remain on the grounds of private life, someone has accumulated 20 years continuous residence in the UK.[24]

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[22] *R (KA) v Secretary of State for the Home Department (ending of Kumar arrangements)* [2018] UKUT00201 (IAC), [58].

[23] *R (Singh) v Secretary of State for the Home Department* [2013] EWHC 2873 (Admin), [3].

[24] Immigration Rules, r.276ADE(iii).

The substantial increase in the volume of immigration judicial reviews during the period 2012-14 placed the Home Office, the Government Legal Department and the Upper Tribunal under pressure. The Home Office was unable to file Acknowledgements of Service in immigration judicial review proceedings within the 21-day time limit. In *Kumar*, the Upper Tribunal held that it would not generally consider "on the papers" an application for permission to bring immigration judicial review proceedings until after six weeks from the filing of that application. As a result, it was not considered necessary for the Secretary of State to file an application for an extension of the 21 day time limit for filing an acknowledgment of service.[25] This decision attracted criticism from some practitioners on the ground that the Tribunal was extending the time limits for the Home Office whereas applicants and representatives had to comply with the ordinary time limits. In the case-file analysis, we encountered some instances in which the Home Office had not filed an Acknowledgement of Service within time.

In 2018, the Upper Tribunal in *KA* re-assessed the situation and decided that the *Kumar* arrangements would not have effect in respect of judicial reviews filed after 1 January 2019.[26] The Home Office also indicated that it intended to move away from its traditional approach of filing full summary grounds in most cases that it contests on the ground that the Upper Tribunal is an expert tribunal and will benefit less from summary grounds that set out settled law and case-law. In *KA* the Upper Tribunal made the following points. First, a full chronology, setting out the applicant's immigration history as it appears to the Secretary of State, including details of the outcome of any appeal or previous judicial review, is extremely important and should continue to feature in the summary grounds. Second, the grounds should set out what the Secretary of State considers to be the nature of the applicant's complaint. In some cases, this may not be readily apparent. It is for the judge to decide this issue, but the Home Office’s understanding will be helpful. Third, recitation of well-established case law on matters such as certification under section 94 or consideration of Article 8 within and outside the Immigration Rules is unnecessary. Fourth, in all cases, the summary grounds should identify the Home Office’s response to the applicant’s grounds of

[25] *R (Kumar) v Secretary of State for the Home Department (acknowledgement of service; Tribunal arrangements)* (IJR) [2014] UKUT 104 (IAC).
[26] *R (KA) v Secretary of State for the Home Department (ending of Kumar arrangements)* [2018] UKUT00201 (IAC).

challenge and whether and, if so, why the Secretary of State thinks the applicant's challenge is unarguable. Fifth, where the challenge concerns a decision under the Immigration Rules, the relevant rule (including the version which the Secretary of State considers was in force at the date of the decision) should be set out, along with the succinct reason or reasons why (if it be the case) the Secretary of State takes the view that the requirements of the rule or rules have unarguably not been satisfied.

Paper permission

All judicial review claims are initially considered on the papers by an Upper Tribunal judge. The purpose of the permission stage, both paper and oral renewal, is for the judge to decide whether the decision under challenge is arguably unlawful and therefore requires a full hearing.

The bulk of the judicial review workload takes the form of deciding paper permission applications. A day's list of paper permission applications typically contains some 8-12 judicial review claims. It is for the claimant to demonstrate that the claim is arguable. The judge will consider the Government Legal Department's Acknowledgement of Service and summary grounds of defence—these grounds typically arguing that permission be refused. Alternatively, the Government Legal Department may offer to settle the case through a consent order. Decision notices are typically one-page long. The judge will give brief reasons for granting or refusing permission. The grant of permission will be accompanied by case-management directions.

Figure 4 shows the number of paper permission decisions and the outcomes.

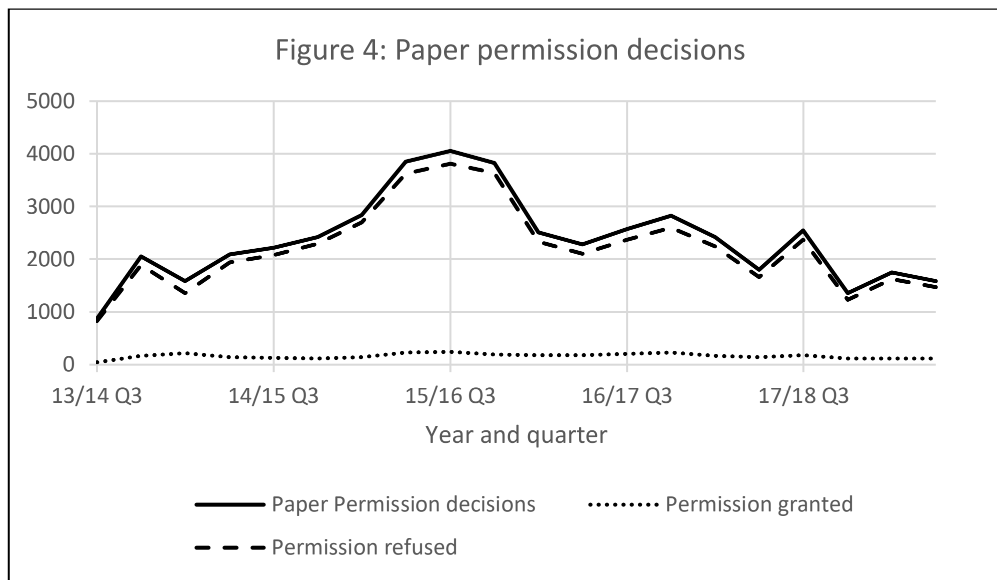
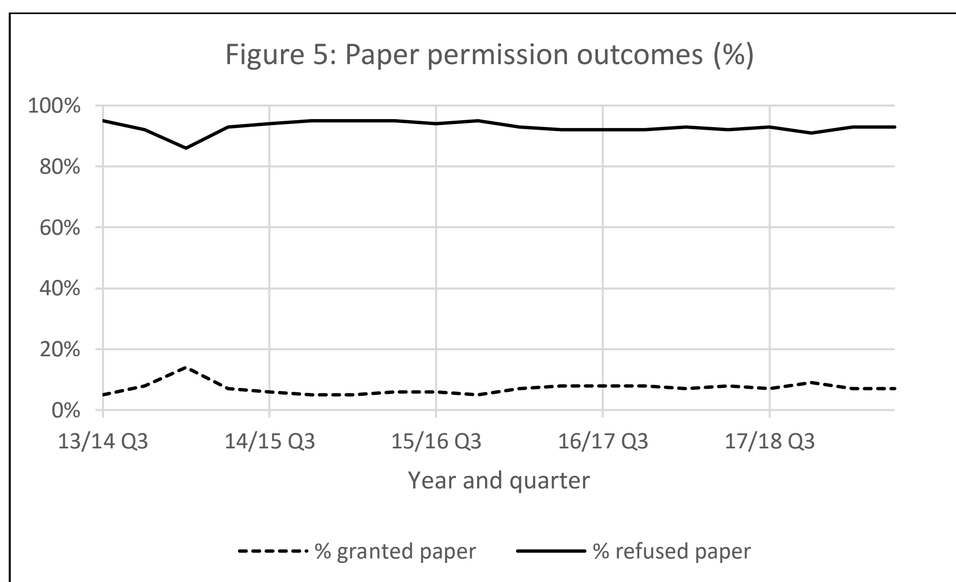


Figure 5 shows the percentage of paper permission claims granted and refused.



The majority of claims are refused permission on the papers. Refusal rates almost consistently exceed 90 per cent. However, when interpreting this data, it is important to bear in mind the following points. First, claimants refused on the papers can renew their application at a hearing. Claims refused on the papers may be granted permission through oral renewal.

Second, some claims are settled before the paper permission stage by the Government Legal Department on behalf of the Home Office. Third, when a claim has been settled by the parties and then reaches the permission stage, it will be refused by the judge on the ground that because the challenge has been settled, it now raises an academic issue and should therefore be refused. Such “academic” refusals are categorised as a refusal of permission. For these reasons, it is difficult to measure precisely the actual overall success rate. Nonetheless, it is the case that a substantial proportion of the paper permission caseload, and certainly well over half of it, is refused permission on the papers.

Some claimant representatives interviewed noted that the paper permission stage can seem to be lacking in transparency. A judge considers the case solely on the papers in her or his private office. There is no opportunity for any oral argument. By contrast, in a hearing, the representative can draw the judge’s attention to specific key points. The same procedure is used in non-immigration judicial reviews and other types of judicial work, such as permission to appeal applications.

The timeliness of the paper permission stage is an important consideration. We acquired data from the Upper Tribunal concerning the average number of days taken for a decision on the papers. It is important to note this data is subject to inaccuracies inherent in any large-scale case management system but it is the best data available. Figure 6 shows the average number of days from the lodgement of claims to a permission decision on the papers in the Upper Tribunal in Field House, London. This figure shows that, overall, it takes around 100 days from lodgement to a permission decision on the papers, though there is some fluctuation.

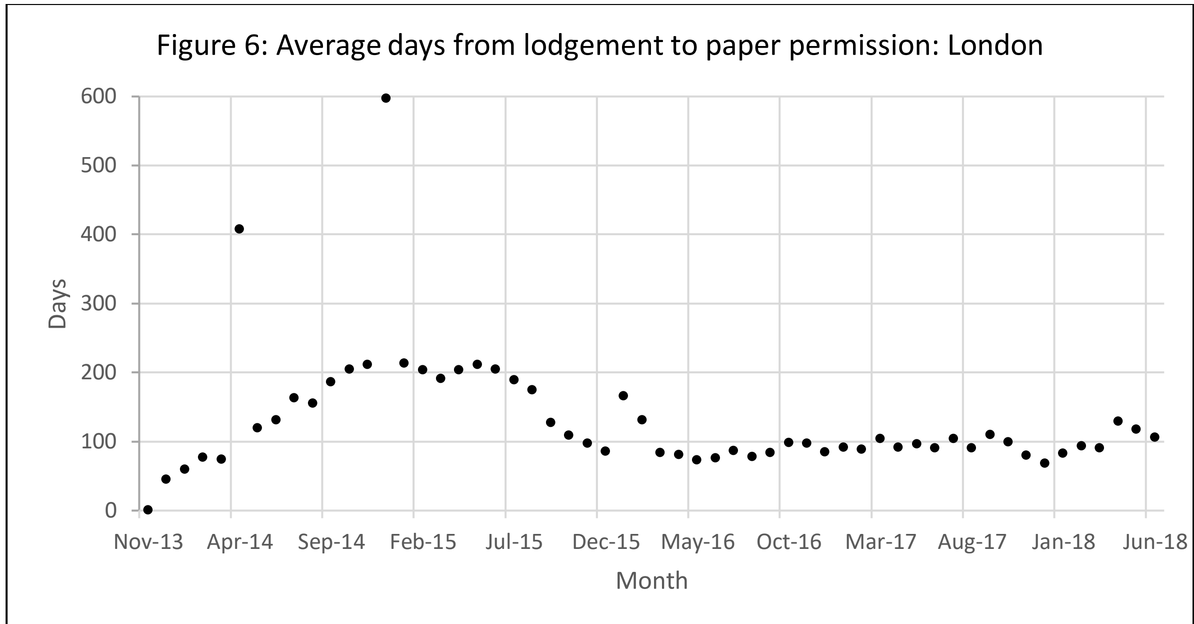
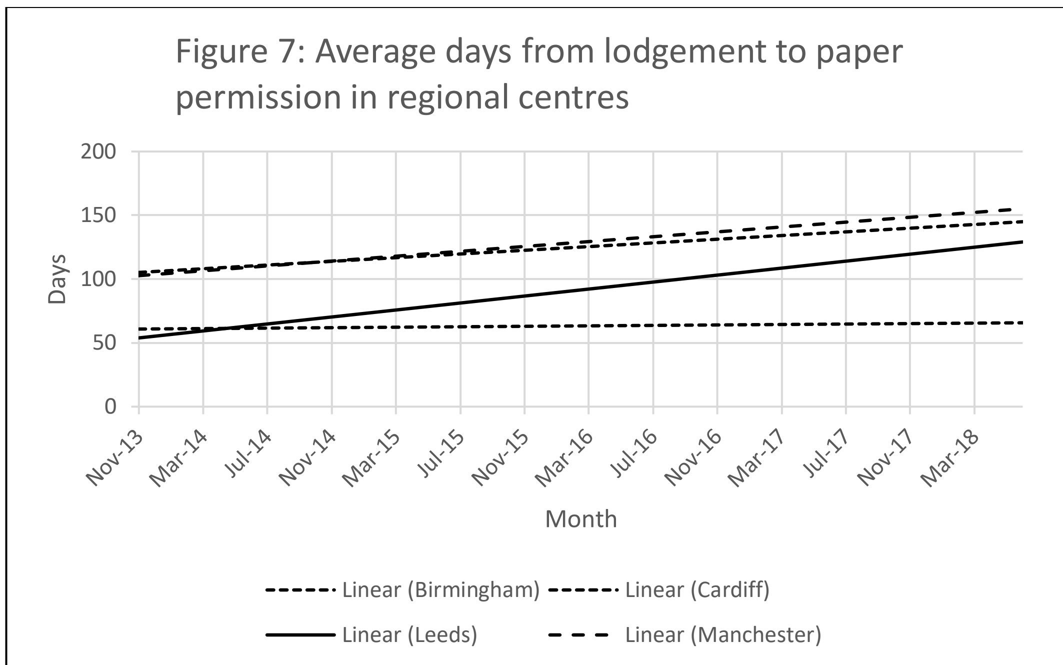


Figure 6: Average days from lodgement to paper permission: London

Figure 7 shows the average number of days from the lodgement of claims to a permission decision on the papers in the regional centres in Birmingham, Manchester, Cardiff, and Leeds. The figure show the trendlines, that is, the prevailing direction of the data rathe. It is appropriate to consider the regional centres separately from London because the volumes of claims are much lower. This figures show an overall increase in timeliness at both Manchester and Birmingham from 100 to 150 days. By contrast, overall, Cardiff is around 60 days (with fluctuations) and there has been an overall increase at Leeds from around 50 days to around 140 days.



Oral renewal hearings

A claimant refused permission on the papers can renew his or her permission application orally at a hearing (unless it has been certified at the paper permission stage as Totally Without Merit). The claimant will be able to submit further grounds of challenge and appear represented or in person at the oral renewal hearing. A list of oral renewal applications will typically contain six to seven cases. Each case will take approximately half an hour to an hour to be heard. The principal benefit of an oral renewal hearing is that the judge will hear oral argument as to whether or not the grounds merit the grant of permission. From our observation of oral permission hearings, it is quite apparent that the hearing often involves a detailed examination of the underlying strengths of a claim.

Figure 8 shows the number of oral renewal decisions and outcomes.

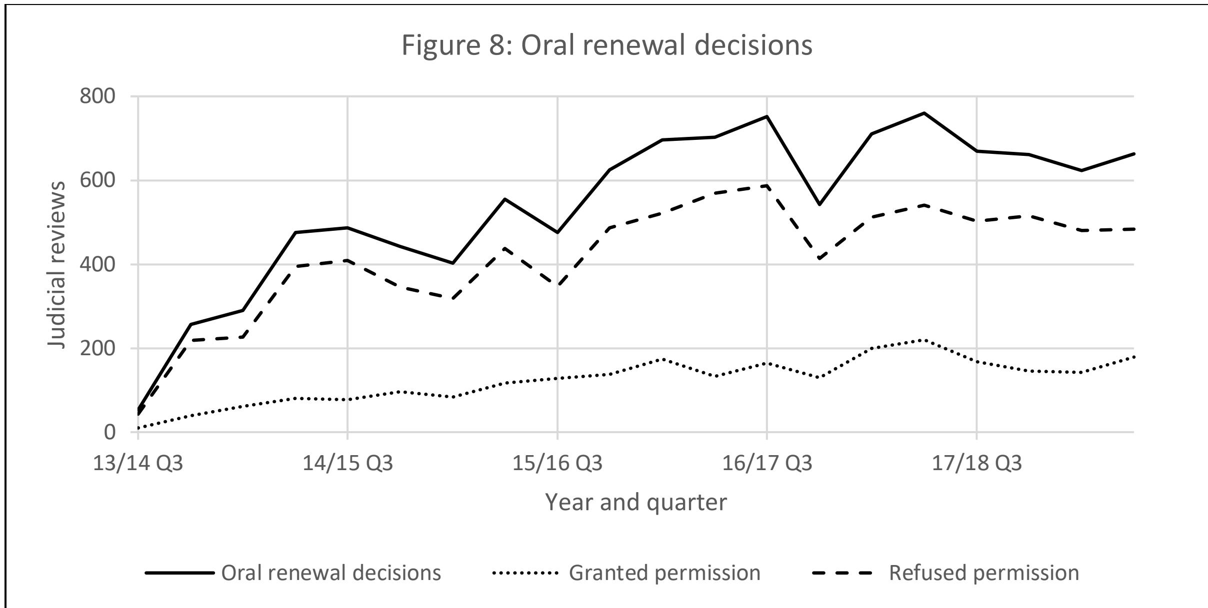
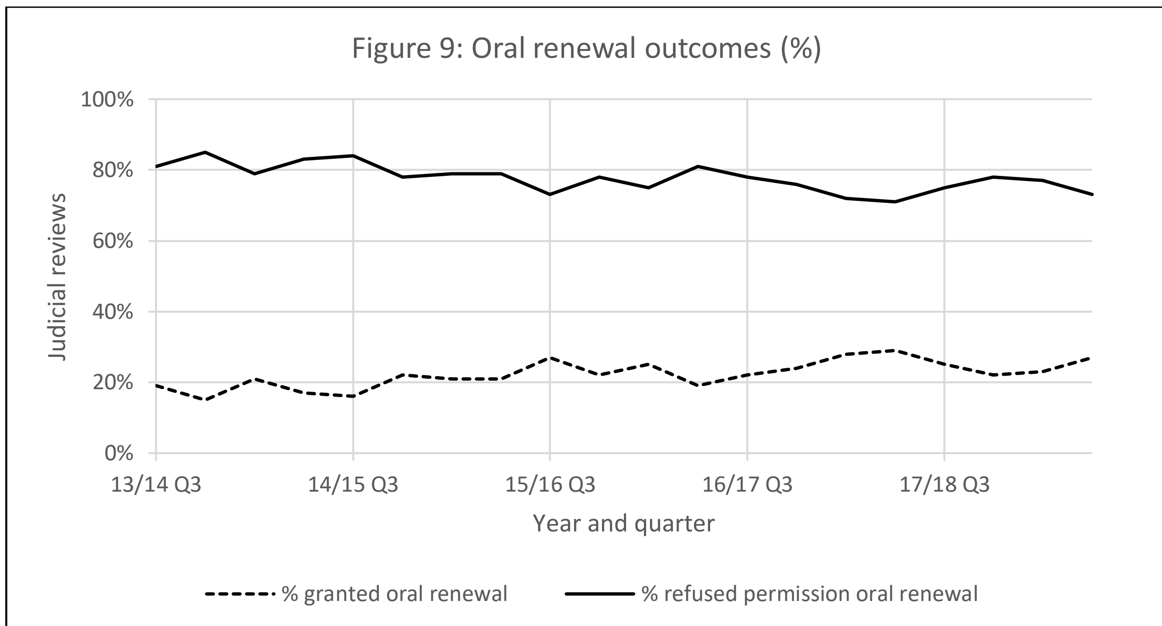


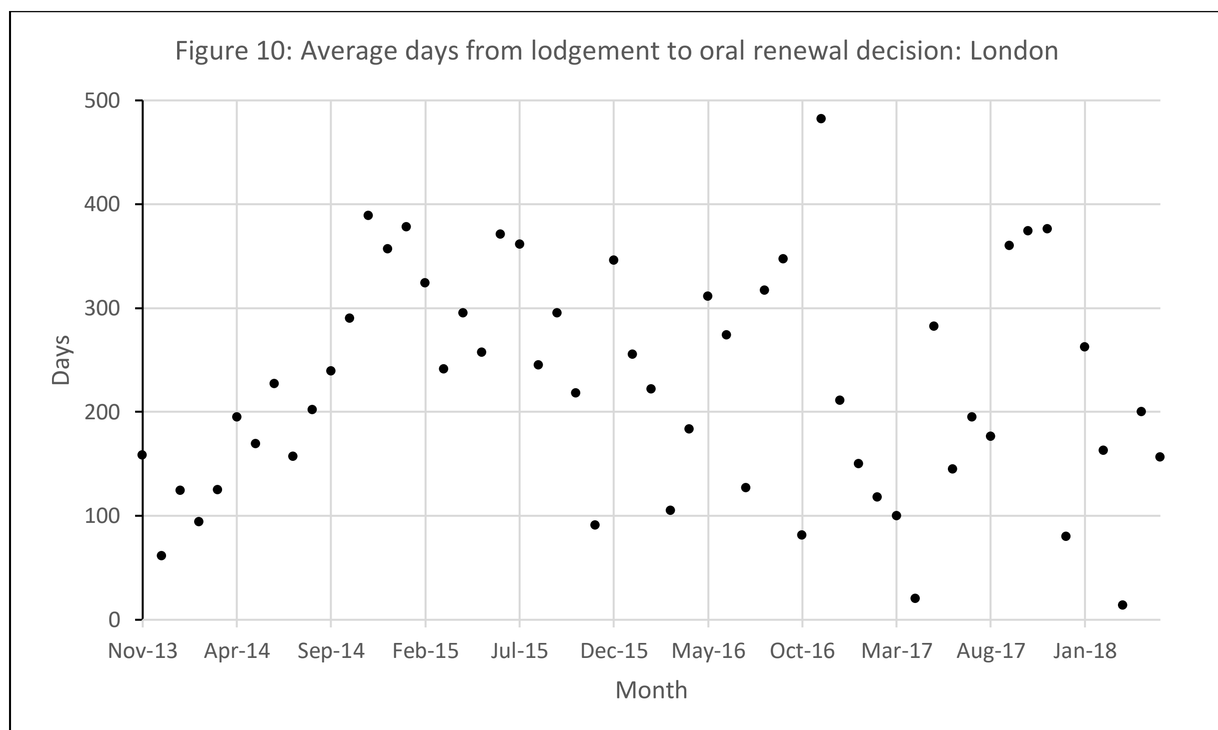
Figure 9 shows the percentage of oral renewal claims granted and refused permission.



The overall success rate for applicants at oral renewal hearings is higher than at the paper permission stage. The proportion of oral renewals granted permission is around 20%. This compares with around 10% of paper permission claims granted permission. This may be

explained by following factors. First, it is in the nature of the jurisdiction that the content of cases and the grounds of challenge can evolve and change. For instance, many applicants change their representative. Proceeding to an oral renewal will typically involve instructing counsel. In oral renewal hearings, the grounds of challenge may be modified and changed. Second, oral argument by counsel may be of greater weight in persuading the Judge that a claim previously refused permission on the papers is in fact arguable.

As regards timeliness, figure 10 shows the average number of days from the lodgement of claims to oral renewal permission decisions in Field House, London. The figure shows that, overall and taking account of some sharp fluctuations, it takes around 220 days from the lodgement of a judicial review claim to an oral renewal permission decision.



Judges noted that in a typical oral renewal list, two or so cases will fall out of the list or not turn up at the hearing. The judge will give an *ex tempore* decision. One judge noted that when granting permission at oral renewal stage, she would on occasion give an indication to the parties as to the relative strengths of case:

> “There are some cases that just clearly shouldn’t bother proceeding to a substantive hearing, either by the applicant or by the respondent so there are some that may be granted permission but ultimately they may not get anything out of it and there’s probably a better avenue for them to proceed, so I try and give them a hint of that if possible because it saves our resources and it saves significant costs being incurred by everyone for doing that.”[27]

If a case is granted permission at an oral renewal, then it is likely to be conceded by the Home Office, unless the parties continue to dispute the issue. In other words, the paper and oral permission stages will provide both of the parties with a clear indication of the likely prospects of success. This will be an important factor informing their decisions to proceed with the litigation or to settle or withdraw the case.

Substantive hearings

A judicial review claim granted permission–either on the papers or at oral renewal–can proceed to a substantive hearing to determine whether or not the decision under challenge is unlawful. In theory, the substantive hearing is the principal event in which the legal challenge against the impugned decision is either granted or refused and in which the challenged decision is assessed against established principles of administrative law. However, as Figure 11 indicates, in practice there are relatively few substantive hearings. Judges interviewed noted that they expected most cases to settle before a substantive hearing. Indeed, from the sample of case-files, only one case proceeded to a substantive hearing. Many cases listed for substantive hearings often settle just before the substantive hearing. Such cases may be settled to reduce costs or if the parties have agreed the matter between themselves or because the Home Office has decided to withdraw its decision and to reconsider the case.

[27] Upper Tribunal Judge interview.

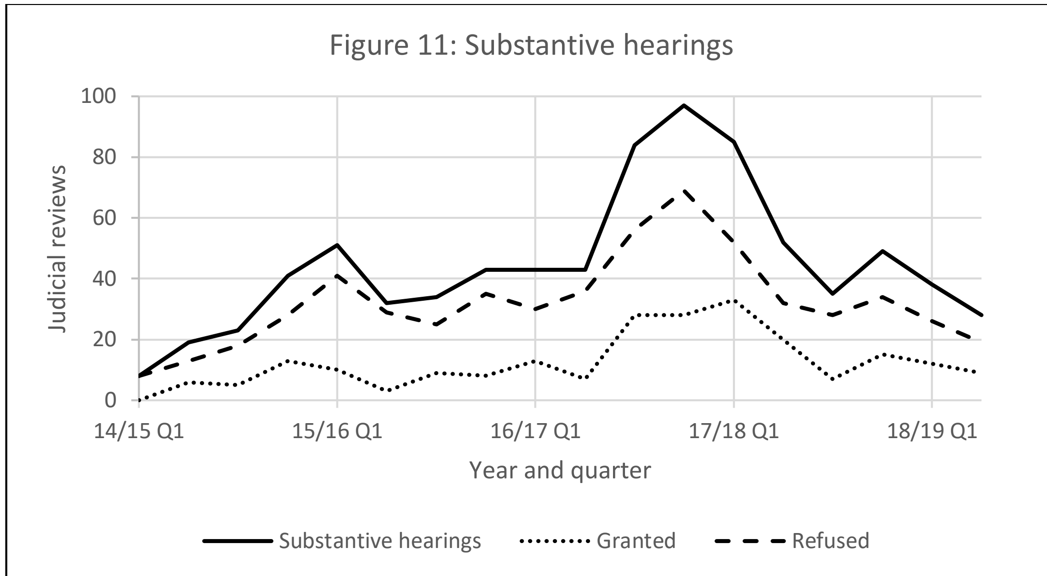


Figure 12 shows the average number of days from lodgement to a substantive decision. Overall and taking account of fluctuations, the average amount of time taken from lodgement to a substantive decision has increased from 390 days to 480 days. The total overall average has been 425 days from lodgement to a substantive decision.

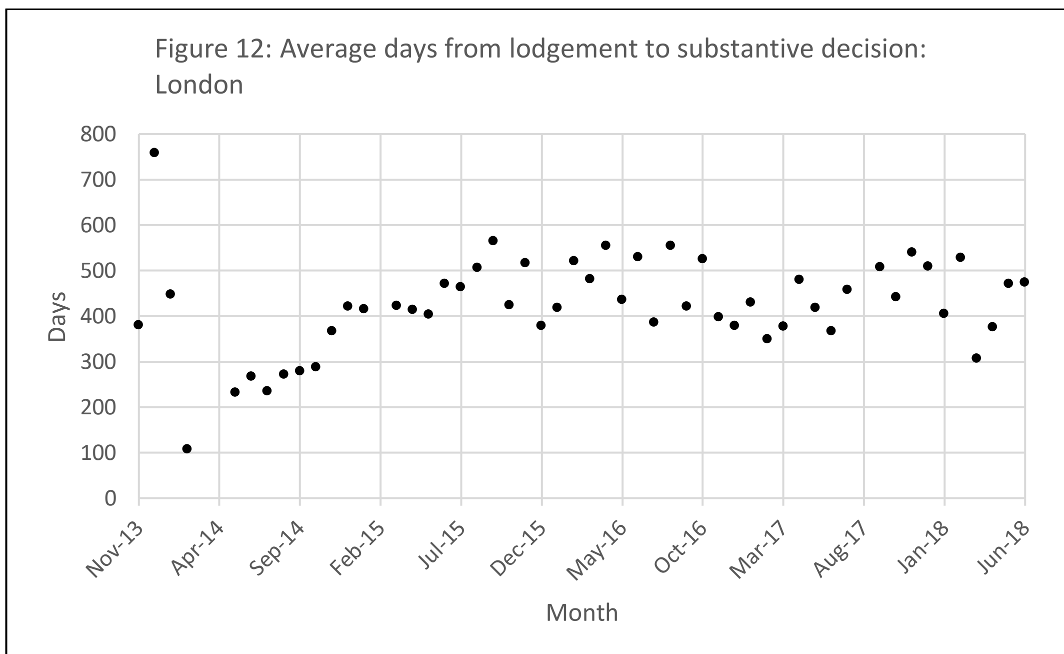


Figure 13 shows the average number of days from lodgement to a substantive decision for claims lodged and heard in Manchester and Birmingham.

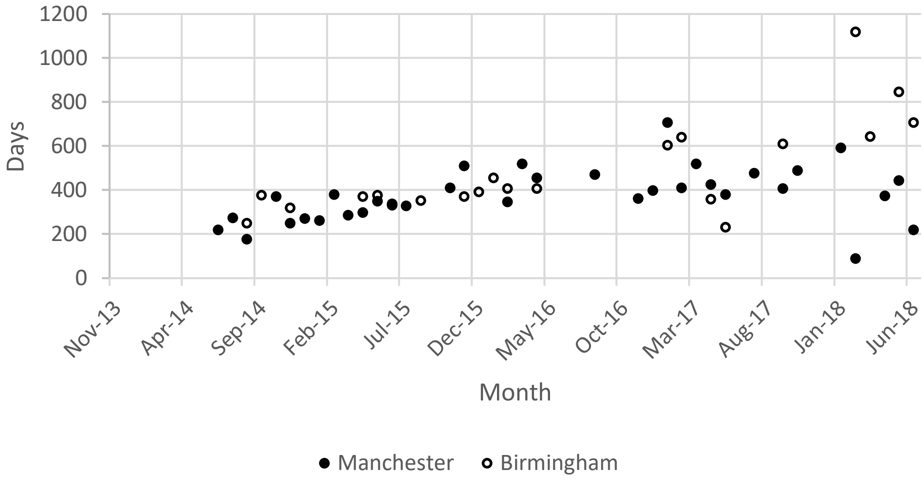


Figure 13: Average days from lodgement to substantive decision: Manchester and Birmingham
1200
1000
800
600
400
200
0
Days
Nov-13
Apr-14
Sep-14
Feb-15
Jul-15
Dec-15
May-16
Oct-16
Mar-17
Aug-17
Jan-18
Jun-18
Month
Manchester
Birmingham

5. Quality of judicial review claims and of Home Office decision-making

This section and the following sections present some of the research data and findings. This section considers issues concerning the quality of judicial review claims and of Home Office decisions. A general theme is the variation in the quality of both the grounds of challenge advanced by claimants and representatives and of Home Office decisions. There are examples of both high and low standards. We will examine the impacts of this variable quality and the measures taken to address them.

Cases lodged by claimants

The research considered the quality of cases lodged by claimants. We wanted to examine how the judicial review process is used and the degree to which strong challenges are brought. A key issue here is the quality of the claimants' grounds of challenge. The purpose of these grounds is to identify precisely why the challenged decision is arguably unlawful. Grounds of challenge take certain forms. First, they might identify the backgrounds facts of the applicant, such as: date of birth, nationality, immigration history. Second, there will be the grounds of challenge themselves. Third, there might be a heading covering the remedy or the type of relief sought.

Textbook accounts of judicial review tend to present a relatively clear set of legal grounds upon which an individual can challenge the legality of an administrative decision: illegality; procedural unfairness; and irrationality. However, in practice, the grounds of challenge tend to be much more fluid. Claimant representatives often set out their grounds in a variety of ways. At one end of the spectrum, there are focused grounds of challenge carefully tailored to the facts and circumstances of the individual case. At the other end of the spectrum, there are formulaic, standard grounds of challenge that only broadly, if at all, relate to the facts of the case. Between these two ends of the spectrum are those representatives who identify relevant grounds in generic terms but do not develop them, or tie them to the particular case.

From both the examination of the case-files and interviews, it was apparent that the quality of grounds of challenge varies. Some of the grounds of challenge have been tailored to the

facts and circumstances of the particular case and prepared with care and skill. Such attention does not guarantee success, but if the grounds have been properly formulated, then the prospects of success are likely to be increased. It was notable that in one case, the strong grounds of challenge clearly focused on the circumstances of the specific case lead to the case being conceded by the Home Office before the paper permission stage – a strong indication that the challenge had merit with the consequence that the Home Office and Government Legal Department will not contest the claim.

By contrast, it is apparent that in many cases the grounds of challenge were generic and pro-forma. Such grounds comprise long recitals of the relevant law and quotations from case-law. Some grounds of challenge often appear to draw upon standard templates or otherwise appear to have been simply cut and paste and transposed from one case to another with little, if any, tailoring to the specific facts and circumstances if the case. The following examples come from the case-file analysis:

Case 247. In a judicial review of a certification decision, the judge had refused permission on the papers because the Home Office had fully considered all matters and given cogent reasons for concluding that there would not be a breach of human rights on return. The Judge concluded that the asylum and human rights claims were hopeless, could not succeed, and were bound to fail. Accordingly, the certification of the claims as clearly unfounded was unarguably lawful. The applicant had a right of appeal from outside the UK and this was an adequate alternative remedy to judicial review. The judge noted that the grounds of challenged were poorly drafted. Following an oral renewal hearing, the Judge refused permission as follows:

"The paper grounds are in standard form. In my oral renewal list today there have been 3 sets of such grounds, all on applications in which … [the same law firm] … are the applicant's representatives. They are as follows:

1.The Judge should have considered the appellants claim both individually and collectively and this if [sic] had not been done by the respondent and the learned Judge.

2.The appellant should have been given an opportunity to advance oral evidence before a Judge given the ONUS is on the appellant to approve [sic] their case.

3.The appellant should not be removed whilst this judicial review application is outstanding.

4.It is important that the appellant should be here in the United Kingdom as we may need further instructions from him before the hearing.

Again, the grounds are unsigned. They are no more than a bare joinder of issue, if that, and do not disclose any arguable public law error by the respondent in her refusal decision. … The renewal grounds are without merit."

Case 92. Tthe applicant, had entered the UK in 2015 and had his asylum and Article 8 claims refused and certified as clearly unfounded. The applicant was represented. The grounds of challenge focused upon two points: the Home Office's failure to give independent consideration to Article 8; and "Article 8 considerations and Discretionary Leave". The grounds of challenge largely comprised long quotations from the Home Office's 2012 family migration publication and from case-law such as *Nagre* and *Razgar*. The claim was refused permission on the papers by a Judge as follows: "The grounds are hopeless. They give all the appearance of being a pro-forma with no proper attempt to engage with the respondent's decision, or to identify in any proper way why the decision was unlawful. It is of particular note that the grounds simply fail to challenge any aspect of the respondent's decision that the applicant's protection claim is without merit, even taking it at its highest". The Judge concluded that the specific grounds of challenge were without foundation. The submission that the Home Office had not given independent consideration to the Article 8 claim was unjustifiable given the discussion in specific paragraphs of the Home Office refusal letter. The Judge held that the second ground of challenge was equally devoid of merit as it was also apparent from the refusal letter that the Home Office had considered whether removal would be proportionate under the *Razgar* test. The claimant was also refused permission following an oral renewal.

Case 52. The applicant had sought to remain on Article 8 grounds. An appeal was heard and dismissed in 2015. A 2016 decision to remove the applicant was subject to judicial review. This was refused. The applicant submitted a fresh claim application. This was refused in 2017

and the applicant sought judicial review of this. The Government Legal Department argued that the applicant's grounds of challenge were identical to those pleaded in his previous application for permission to apply for judicial review save that they have been re-paginated. The Upper Tribunal refused permission for judicial review and deemed the claim to be Totally Without Merit: "[t]he nub of the respondent's decision is that the applicant has added nothing of significance to his previously exhausted claims. The grounds of challenge are vague and irrelevant. … The proceedings are only dilatory."

There were many other cases in which judges highlighted the use of standard grounds of challenge. In case 133), the only substantive ground of legal challenge was as follows: "The Defendant failed to set out a structured approach to the issue of proportionately when refusing their application under Art 8 of the ECHR. … It is averred that there is sufficient evidence to form a legitimate view that the Claimants have established a private and family life in the UK". Permission was refused.

In an oral renewal decision (case 232), the Judge wrote:

> "The renewal grounds are sparse and generic, adding nothing to the earlier grounds and with no reference to the refusal letter therein. They are also received out of time. The applicant did not attend or arrange representation today, and has proferred no explanation for his failure to prosecute this application. The respondent has arranged Counsel, which would not have been necessary had she been aware that the applicant would not attend today."

In a para 353 fresh claim judicial review, the Judge held that: "[i]nsofar as the grounds refer to certification, they are misconceived. This is because the respondent has not certified this claim." (case 45). The Judge then noted:

> "I have concluded that it is unarguable that the respondent's decision, that the applicants' further representations were not significantly different, was unlawful. The grounds do not explain precisely what evidence was significantly different. It is wholly unarguable that the respondent overlooked any such evidence or that her decision,

> that the further representations were not significantly different, was irrational or *Wednesbury* unreasonable. The remaining grounds amount to no more than an attempt to re-argue the case."

In another case (case 50), the grounds focused upon a challenge to a certification decision. However, the impugned decision was not a certification decision, but a fresh claim para 353 decision. In a fresh claim judicial review, the Judge stated:

> "The grounds of challenge are in general terms. They reiterate the appellant's assertion that he is at risk. They raise Article 8 in passing. Overall, they simply fail to engage with the respondent's reasoning" (Case 263).

In a challenge against the certification of an asylum claim as clearly unfounded (case 17), the Judge, refusing permission, held that the "the grounds of challenge are confusing and difficult to follow". In a previous judicial review by the same claimant, a different judge had held that the: "The grounds are generic, mainly rehearsing case-law, without any real engagement with the decision."

In another case (case 108), the Upper Tribunal noted that the claimant's grounds of challenge "largely comprise of an extended chronology and submissions consisting of three paragraphs". Permission was refused: "[t]he grounds of application are, in essence, little more than a disagreement with conclusions which the respondent had been plainly entitled to reach on the material before her."

Concerns about generic grounds of challenge are not limited to the cases in our sample. In its reported decisions, the Upper Tribunal has given guidance concerning the main standards and principles to be observed in the presentation of claims. Grounds of challenge should be "formulated with appropriate clarity and particularity. The pleading should be such that it is possible to identify on a relatively quick perusal the target of the Applicant's challenge, the public law misdemeanour/s said to have been committed by the Respondent, the core

elements of the latter and the remedy claimed."[28] Similarly, the Court of Appeal has also criticised the use of standard grounds of challenge in Article 8 cases. In *Parveen*, Underhill LJ stated that "this Court sees too many cases in which applicants for leave or their advisers – particularly in cases depending on article 8 outside the Rules – devote their energies to setting out extracts from the case-law rather than to demonstrating a compelling case based on the details of the applicant's particular circumstances. The latter exercise may require more work, but it is what the Secretary of State, and if necessary the Tribunal, will be more concerned with. Cases of this kind generally turn on their facts, and the applicable law does not require elaborate exposition."[29]

The low-quality preparation of many immigration judicial reviews is evident from the frequent use of template or standard grounds of challenge that have been recycled (cut and paste) from other immigration judicial reviews. Such grounds of challenge typically contain standard paragraphs concerning the law on fresh asylum claims, certification, the application of Article 8 ECHR and relevant case-law. However, they typically provide very little, if any, detail on the specific facts and circumstances of the individual claimant's personal situation and why the challenged decision was arguably unlawful, unreasonable, or procedurally unfair. Other grounds of challenge are often discursive and repetitious. They repeat the same case-law, but do little to relate this law to the specific facts and circumstances of the individual case. The following statement frequently occurred in a number of Acknowledgements of Service by the Government Legal Department:

> "The Respondent submits that the Applicant's grounds of challenge are not very well particularised and merely quote extensively from the case-law without applying it to the facts of her case. The Respondent submits that this amounts to no more than a disagreement with the challenged decision. The President of the Upper Tribunal in *R (on the application of SN) v Secretary of State for the Home Department* (striking out – principles) IJR [2015] UKUT 00227 (IAC) held at [32] that '[a] bare pleading that the impugned decision is unlawful, unreasonable and irrational, or one framed in

[28] *R (SN) v Secretary of State for the Home Department (striking out – principles) IJR* [2015] UKUT 00227(IAC), [30].

[29] *Parveen v The Secretary of State for the Home Department* [2018] EWCA Civ 932, [30].

> comparable terms, is never acceptable. The judge should not have to forage, dig and mine in order to identify the essentials of the Applicant's case'. The Respondent submits that the Applicant has not come close to identifying a public law error, and the claim should be dismissed for this reason." (Case 92)

In one case (case 135), the Government Legal Department argued that the applicant had failed to particularise the human rights grounds in the claim:

> "The applicant's grounds are generic and do not, in the Respondent's submission, amount to any sort of coherent pleading against his asylum claim. The claim is wholly deficient of any supporting evidence. The grounds are considered to be pro forma grounds that are typically found with Applicants in detention centres. There appears to be a cut and paste exercise at Section 9 of the claim form with paragraph 7 repeating paragraphs 5 and incomplete sentences throughout the claim form."

The claim was refused permission. In many cases, the summary grounds of defence stated: "The grounds of application are, in essence, little more than a disagreement with conclusions which the respondent had been plainly entitled to reach on the material before her."

Judges interviewed made the following points. First, many judicial review claims are an attempt to re-argue the underlying merits of a decision rather than focused upon arguing that the decision was unlawful. According to judges:

> "Representation is a big problem. Cases are often not pleaded like a public law error. They end up like an appeal by another name."[30]

> "I think the biggest improvement could be with representatives; better regulation of representatives, better compliance with directions, better information available to individuals or better legal advice available to individuals. There are many claims which are utterly hopeless. There are many claims by solicitors where they just don't

[30] Upper Tribunal Judge Interview.

understand judicial review at all. It looks like a statutory appeal because they don't understand the difference. There are lots of cases where there is just attempts at re-arguing a claim which is not what judicial review is about but people don't understand that."

> "Poor quality standard grounds are often used. The grounds of challenge used by claimants can be very poor. The Acknowledgement of Service is often just as bad."[31]

Second, there is extensive, though far from universal, use of standard template grounds of challenge that do not address the specific circumstances of the particular challenge. Third, judges noted that in many cases, the grounds of challenge are of the "kitchen sink" variety and representatives lack the confidence to focus upon their best ground of challenge. In other words, many representatives seek to spread the net as widely as possible and throw in all possible grounds of challenge rather than focus precisely upon their best point or points. Fourth, judges noted that many good quality practitioners do care about professional standards and want to provide the best service to clients and the Tribunal. Discussions between judges and practitioners in the Upper Tribunal practitioner liaison group provided evidence of this.

Judges also mentioned that a standard set of grounds of challenge and skeleton argument had been widely circulated within immigration detention centres and was frequently used in judicial review claims against removal directions:

> "Someone always has a copy of these grounds in each detention centre so it's normally the cases which are challenges to removal or detained cases where it's really the last chance for an individual. I know the particular set that's been in use for about the last year, you can tell them from the first page because it has the same typos in it. And then you go onto the next page and you see the same block of text in exactly the same format, sometimes with blanks filled in, sometimes not. But since I've done immigration there's always been a version of the template in circulation."[32]

[31] Upper Tribunal Judge Interview.

[32] Upper Tribunal Judge Interview.

> "Repetitive grounds, I think, probably tend to come up as often as not in certification cases, where you see these grounds that you know must be going around essentially, either from representative to representative or between applicants and detention centres. Very often, the grounds are the same word for word in a number of cases. It isn't focussed on a particular case at all, and it's unlikely really to get any further."[33]

Given the largely repetitive nature of the types of cases that arise, Judges do not necessarily need long recitals of the relevant legislation and case-law. In many cases, what is required is the claimant's immigration history and for the grounds of challenge to focus specifically on the legal arguments why the challenged decision contains a public law error or why the law has been incorrectly applied in the claimant's specific circumstances.

The use of repetitive grounds is closely linked to the frequent attempt by claimants and representatives to use judicial review as a surrogate appeals process. Immigration judicial review challenges are often, though very far from always, lodged in order to overturn a negative immigration decision so as to procure a reconsideration by the Home Office, a positive decision, or to achieve delay. Yet, judicial review is a limited remedy. Many claims are in practice an attempt to re-argue the merits of the challenged Home Office decision. However, if the grounds of challenge do not demonstrate that the Home Office's refusal decision is arguably unlawful, procedurally unfair, or irrational, then permission for judicial review is highly likely to be refused. The following, similar phrases occur frequently when judges refuse permission:

> "The grounds are in essence little more than a disagreement by the Applicant with the Respondent's decision and an attempt to re-argue and expand upon his claim." (Case 169)

[33] Upper Tribunal Judge Interview.

> “The grounds disclose no arguable basis to challenge this decision. The claim now advanced is effectively the same one that was examined but rejected at appeal.” (Case 320)

> “The Respondent unarguably applied the appropriate immigration rules and legal principles relating to article 8 applications. … The grounds amount to no more than a disagreement with a decision the Respondent was entitled to reach. Any appeal would be bound to fail on the basis advanced by the Applicant and the Respondent was fully entitled to certify the claim as clearly unfounded.” (Case 83).

> “This was plainly a completely hopeless article 8 claim and it is impossible to see what outcome was rationally possible than for the claim to be certified as clearly unfounded. The first of the grounds assert otherwise but there is no legitimate basis upon which this claim could succeed.” (Case 61).

Law firms that use standard and template grounds of challenge often fail to serve their clients well. It may also be an exploitative practice of vulnerable clients in some instances. Standard grounds of challenge may underplay the strongest points that could be taken on behalf of an individual. Alternatively, if there are no such good points that can be taken, then the law firm is providing very poor value for money on behalf of their clients and raising false hopes that template grounds of challenge would be accepted as an arguable claim for judicial review. The use of such standard grounds of challenge can undermine the effectiveness of the judicial review process. It represents a failure of representatives to comply with the overriding objective to assist both their client and the court.

It is important to emphasise the wide variety in the quality of grounds of challenge. We found many cases in which the grounds of challenge had been prepared with care and attention and had been carefully tailored to the circumstances of the specific case. Such cases tended to have much higher chance of success than those in which standard grounds were used. It is also important to recognise that there is a subtle distinction between those cases that are just unarguable and those that cross the line into the territory of being abusive, vexatious, and completely hopeless.

Litigants in person present different issues in this respect. Their grounds fall into three main categories. First, those unrepresented claimants who have sought to draft grounds unaided. As would be expected, such grounds often contained little or no law. When the grounds of challenge did contain some law and legal principles, it was broadly stated and often irrelevant. Second, those unrepresented claimants who—usually while in detention—have managed to get hold of a "stock" grounds template. Often the exact same phrasing and structure appeared in the grounds, but the substance of the grounds did little to advance the case. Judges were aware of this practice and could, in some instances, immediately identify where stock grounds had been used. Third, some unrepresented claimants appear to be have bought "unbundled" legal services, in which they get a template ground document as part of a cheap legal package, but in which the claimant is not formally advised or represented. Where this appeared to be the case, grounds were of poor quality.

The official line is that judges do not hunt around to discover grounds within the claim. In practice, some judges may on occasion do this. When unrepresented claimants are involved, judges may adopt more of an "enabling" approach of a tribunal appeal judge than what is conventional in a judicial review. In some cases, the presence of poorly drafted grounds hampers the efficiency and effectiveness of proceedings, and sometimes damage the chances of success for claimants. Grounds of challenge often change as cases proceed through the various stages of the process, sometimes for the better if a claimant changes his or her representative. In many instances, judges claimed it would be easier for claimants to simply set out the facts of their case than bury them in complex but unhelpful legal claims.

Recommendation:

Representatives that use of standard, formulaic grounds of challenge need to undertake better preparation of judicial review claims.

Totally without merit claims

In judicial review proceedings, the court or tribunal can certify a case as being Totally Without Merit (TWM) at the paper permission stage if the judge considers that the grounds advanced

are "bound to fail".[34] Claims certified as TWM cannot be renewed at an oral hearing. However, the applicant can apply to the Court of Appeal to challenge the case having been deemed TWM.

The rationale for the power to certify claims as TWM is that hopeless judicial review claims increase the cost and delay to public authorities and place an unjustified burden on judicial resources. Cases certified as TWM cannot then proceed to the oral renewal stage as there would be no value in oral argument. There are two safeguards. A claim can only be deemed TWM if the judge, after careful consideration, concludes that the case is truly bound to fail. Second, the claimant still has access to a Court of Appeal judge who, with even greater experience and seniority, will approach the application independently and with the same care.

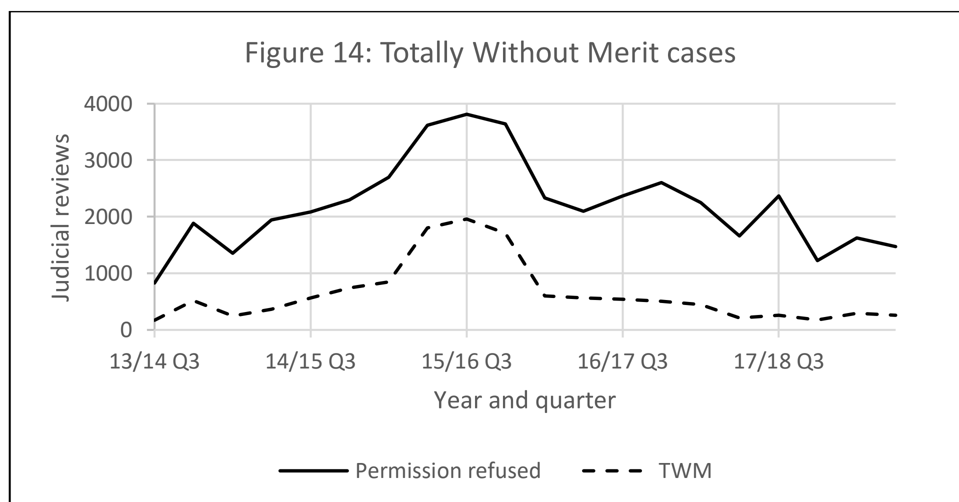
One concern with the TWM mechanism is that it precludes oral argument before a judge in person. Given the value placed by the common law tradition on oral argument, it is possible that using oral argument may on occasion persuade a judge that a claim that has previously been refused permission on the papers is in fact arguable and have a realistic chance of success.

In *Wasif* the Court of Appeal emphasised the following points. First, judges should not automatically certify applications as TWM when refusing permission. Second, Judges considering permission applications will quite commonly encounter cases, particularly where the claimant is unrepresented, in which the claim form/grounds and/or the supporting materials are too confused or inadequate to disclose a claim which justifies the grant of permission but where the judge nevertheless suspects that proper presentation might disclose an arguable case. In such cases, the judge should not certify the application as TWM. The right course will usually be to refuse permission, with reasons which identify the nature of the problem, giving the claimant the opportunity to address it at an oral renewal hearing if they can; but there may sometimes be cases where the better course is to adjourn the permission application to an oral hearing, perhaps on an *inter partes* basis. Third, the Judge

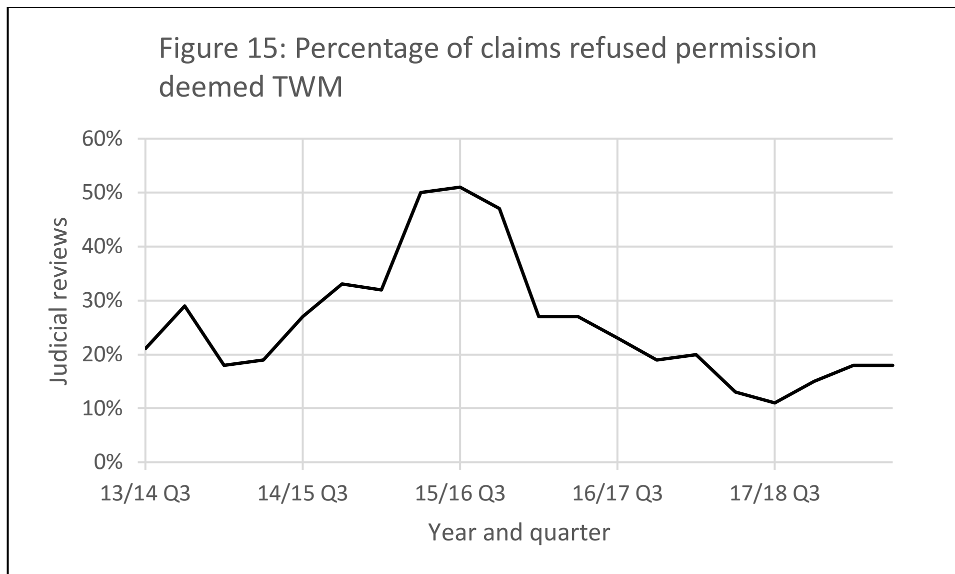
[34] The Tribunal Procedure (Upper Tribunal) Rules SI 2008/2698, r.30(4A); *R* (*Grace*) *v Secretary of State for the Home Department* [2014] EWCA Civ 1191; [2014] 1 WLR 3432.

must give separate reasons for both refusing permission and for certifying the case as TWM.[35] Underhill LJ noted that since the difference between the two thresholds – arguability and TWM – "is one of degree it may be that all that can be said in many or most cases is something to the effect of 'I consider the application is totally without merit: my reasons are those already given above.'"[36]

What does the data indicate about TWM? First, both the number and proportion of TWM cases varies over time. Figure 14 shows the number of claims refused permission on the papers and the number deemed TWM. Figure 15 shows that the proportion of claims refused permission on the papers deemed TWM has increased and then declined. The increase in the proportion of TWM claims coincided with the overall increase in the number of claims submitted over the period 2015-16. The number and proportion of TWM cases has since declined. Judges interviewed noted that the lower number of TWM might perhaps be linked to increased resort to the *Hamid* jurisdiction and an increased awareness amongst some law firms.



[35] *Wasif v Secretary of State for the Home Department* [2016] EWCA Civ 82.
[36] Ibid., [21].



Second, the number of cases from our sample deemed TWM was relatively small. There were 24 cases deemed TWM and 317 were not. The following are examples of cases deemed TWM.

Case 8. The claimant had delayed for two years in seeking judicial review against a decision that had already been appealed against and was therefore not judicially reviewable. The claimant had sought to judicial review a 2016 pre-action protocol letter. However, the actual Home Office decision was made in 2014. The 2016 letter was a letter defending the previous refusal decision. The Judge held that there had been a significant breach of the time limit for seeking judicial review and no good explanation for the delay. The Judge held that "giving weight to the need for litigation to be conducted efficiently and at proportionate cost, and the need to enforce compliance with the Rules I find it is inappropriate to extend time, particularly given the lack of merit in the application". The Judge held that the grounds of challenge did not properly particularise the claim: "The grounds are unarguable as they do not identify any arguable illegality in the decision and because they are an abuse of process. The applicant has had a statutory right of appeal to the First-tier Tribunal, which was unsuccessful." There was an abuse of process because the applicant had appealed without success. If he had wished to take his case further, the proper route would have been a *Cart* judicial review against the refusal of permission to appeal by the Upper Tribunal, not a judicial review of the original Home Office decision. The judge certified the case as TWM.

Case 125. The applicant had entered as a visitor in 2002 and overstayed. Her dependent partner and children remained in her home country. A private life claim was refused and certified as clearly unfounded. The Home Office had decided that the applicant could not satisfy the Immigration Rules and there were no exceptional circumstances that would render her removal disproportionate. The Judge concluded that the claim had no realistic prospects of success and was bound to fail. The certificate was neither unlawful nor irrational. The applicant had an out of country right of appeal. The case was deemed TWM.

Different Judges may adopt different approaches to certifying cases as TWM. Some might certify more cases as TWMs. Nonetheless, there is a rationale for having the ability to certify claims as Totally Without Merit when appropriate on a case by case basis.

Abusive and vexatious claims

The higher courts and the Upper Tribunal have, over recent years, made use of tougher measures to deal with abusive and vexatious judicial review claims. Judges can impose costs sanctions for breaches and non-compliance with the procedural rules and the *Administrative Court Guide*. In *Hamid*, the High Court focused on last-minute applications, often made out of hours, to restrain challenge removals.[37] That judgment strongly criticised "late, meritless applications by people who face removal or deportation" as an abuse of court process and warned that future abuses would be referred to the Solicitors Regulation Authority for professional misconduct. The purpose of the *Hamid* jurisdiction is to ensure that lawyers conduct themselves according to proper standards of behaviour. There have also been instances in which law firms have been struck off and appealed without success to the Solicitors Disciplinary Tribunal.[38]

In *Shrestha,* the Upper Tribunal explained that the bringing of hopeless applications wastes judicial time and risks delaying the prompt examination of other cases, which may have merit.

[37] *R (Hamid) v Secretary Of State for the Home Department* [2012] EWHC 3070 (Admin). See also *Okondu v Secretary of State for the Home Department* [2014] UKUT 377 (IAC)

[38] *Ip v Solicitors Regulation Authority* [2018] EWHC 957 (Admin).

The fact that a person with no entitlement to remain in the United Kingdom may, in practice, be able to remain in the country a little longer, as a result of bringing a meritless application, serves to reinforce the view that the procedure is being abused. In any event, it is doubtful whether such an applicant will gain a material advantage by making the application. In many cases, the only tangible result is that the applicant (or the applicant's friends or family) incurs significant professional fees, as well as the fees payable to the Tribunal. In such cases, the only real beneficiary is the solicitor.[39]

In *Sathivel*, the High Court stated that "the conduct of practitioners in the field of immigration and asylum poses a particular problem for the courts and tribunals. It is for this reason that the Courts have been forced to exercise their inherent jurisdiction to govern proceedings before them to hold to account the behaviour of lawyers whose conduct of litigation falls below the minimum professional and ethical standards which must be demanded of *all* lawyers appearing before the Courts."[40] The court noted that "there are of course many highly professional practitioners in this complex and difficult field who successfully reconcile the need to act in their client's interests with their duties to the Court. However, there is also a substantial cohort of lawyers who consider that litigation is a tactic or strategy that can be used to delay and deter removal proceedings."

The court explained that many practitioners do not have legal aid contracts. Clients are privately funded, and frequently vulnerable and desperate. Fees can often run into several thousands of pounds. To raise the necessary funds, individuals will often seek support from family and friends. The solicitors will not generally act unless they are placed in funds beforehand. "Some lawyers promise the highest quality of representation and we have no doubt that there are solicitors and other representatives who do provide excellent services. But there are other solicitors who having promised high quality specialist services then instruct paralegals and unqualified persons to draft what would ordinarily be viewed as complex and specialised pleadings and court documents (often prepared by counsel). The cases that are then advanced may be wholly lacking in merit. Judges are presented with

[39] *R (Shrestha and others) v Secretary of State for the Home Department* (*Hamid* jurisdiction: nature and purposes) [2018] UKUT 242 (IAC).
[40] *R (Sathivel) v Secretary of State for the Home Department* [2018] EWHC 913 (Admin), [4]

lengthy pleadings much of which is irrelevant and has been cut and paste from template documents, often available on the internet."[41] The court also stated:

> "the incentive of some practitioners in initiating court or tribunal proceedings is simply to delay the immigration process. They do this by exhausting every judicial or tribunal opportunity, irrespective of the merits of the case. Buying time is valuable. Even a hopeless application or appeal takes time to determine and whilst that is ongoing there is the possibility of lodging repeat "*fresh material*" applications to the Home Office with a view to generating new Home Office decisions (rejecting the contention that there is fresh material relevant to the applicants case) which then generates even more (unmeritorious) appeals which take up even more time to resolve and allowing (yet again) yet more fresh material applications, and so on. It is commonplace for such cases to continue for many years, and in extreme cases decades. And the longer the case goes on the more scope there is for an applicant to begin to develop an Article 8 "*private life*" claim, for example by getting married (sometimes through a sham process) or having (or claiming to have) children. Where an applicant is detained pending removal the longer that detention persists (which may be a consequence of the applications and appeals being pursued on the individual's behalf) the greater the scope for the detained person to then argue on well-known "*Hardial Singh*" grounds that it is no longer lawful to maintain detention. If a bail application succeeds the applicant might abscond. Sometimes the applicant re-appears years later, and the process then starts again."[42]
>
> "… when the Home Office sets a date and arrangements for removal a different dynamic sets in. Last minute applications to restrain removal are made to the High Court, and often to the "out of hours" duty Judge literally hours or even minutes before the removal flight departs the runway. Frequently the day before, or even the day of, removal lawyers serve a new "*fresh material*" claim upon the Home Office and then argue before the duty Judge that removal is unlawful pending determination by the Home Office of that new application and/or an appeal therefrom. It is of the nature of these cases that the applicant may have been engaged in a Home Office

[41] Ibid [9].
[42] Ibid., [10].

> and/or appeal process for some years. There is often a lengthy history. However, what happens is that at the last moment the applicant changes solicitors. The new solicitors draft the last-minute application seeking the restraining of removal and they explain to the Judge that they have been instructed late on and that they have had no time to obtain instructions (the client will be in detention). Frequently, the new lawyers do not have access to the prior documentation and they have not (because of lack of time they argue) sought or obtained the documentation from previous solicitors or the Operational Support and Certification Unit ("OSCU") of the Home Office. For this reason, arguments advanced to the Judge are based on details provided by the client who being in detention can give only the barest of instructions over the phone. Judges complain that all too often the version of events provided to them is materially inaccurate and/or incomplete. It is almost unheard of for the Defendant to be notified of the application or to have a chance to advance submissions, even in writing."[43]

The case-file analysis contained instances of unmeritorious challenges. There is a spectrum here in the degree of the lack of merit involved in a case and the degree of abuse. The following provides an extreme, but not isolated, example.

Case 133. The applicant had entered the UK as a visitor in 2005 and overstayed and subsequently followed by his wife and children who also then overstayed. A human rights claim in 2015 was refused because the applicant had failed to submit a passport. A judicial review of this decision was refused in 2015 and deemed TWM. The Judge stated that "the grounds appear to be templated as they contain incorrect facts about the nature of the refusal and also jump from paragraph 14 to 36." An application for permission to appeal this decision to the Court of Appeal was refused in 2016 as being out of time and "having regard to the templated and irrelevant grounds submitted." A subsequent judicial review against the refusal and certification of a human rights claim was refused permission and deemed TWM. The Judge wrote: "The applicant has an out of country right of appeal. The application is merely an attempt to frustrate removal." The applicant then sought permission to appeal this decision to the Court of Appeal. This was refused by the Upper Tribunal: "The application for

[43] Ibid., [11].

permission to appeal to the Court of Appeal is essentially a recitation of the law relating to Article 8 and unparticularised as to any error made in the decision." The Home Office then wrote to the applicant stating that the applicant's claim had previously been refused and certified. The applicant sought judicial review of this letter. The Government Legal Department argued that this letter was not an immigration decision and so could not be challenged through judicial review and the challenge was therefore an abuse of process. The Judge rejected the judicial review as being out of time. The judicial review claim was also refused on the merits and deemed TWM. The Judge stated: "The grounds recite case law but disclose no public law error on the part of the Respondent. Given the lack of merit in the grounds, I refuse to extend time." The Judge held the applicant could not satisfy the Immigration Rules and removal was proportionate. The claim was also certified as TWM. In 2017, the applicant had submitted an appeal to the First-tier Tribunal that was deemed to be invalid.

Monitoring poor quality representation

The Upper Tribunal is fully aware of poor quality representation and how it adversely affects both vulnerable claimants and judicial resources. The key issue is what can be done to reduce such behaviour. As one judge explained:

> "You could simply deal with these cases by certifying them as TWM, but I think it's important to go further than that if you've got a pattern emerging. For us, it's more a matter of just, 'this is a very bad case, which should never have been run and certainly should never have been renewed'. If a picture emerges of a repeated pattern of wholly unmeritorious cases, then there is a possibility of getting the law firm in front of a presidential panel or another panel to explain or the possibility of cost sanctions or reference to the disciplinary bodies."[44]

The Upper Tribunal has developed an internal system by which judges can report instances of poor, abusive, and exploitative representation. This mechanism enables the Upper Tribunal to identify and collect examples of bad practice in order to identify patterns and trends, with

[44] Upper Tribunal Judge interview.

a view to convening *Hamid* hearings or passing the material to the Solicitors Regulation Authority. The system is overseen by a designated Upper Tribunal Judge. Other Judges and Tribunal Case-Workers can refer cases and examples of abusive claims representation. This system has clear benefits in terms of compiling evidence base on poor quality and abusive representation.

Recommendation

There is a variety of mechanisms to deal with vexatious claims: the Upper Tribunal's internal reporting system; deeming claims to be Totally Without Merit; Hamid hearings; and references to regulatory bodies. Anecdotally, the reduction in the number of judicial review claims may be in part attributable to use of these mechanisms. The most effective way of seeking to reduce the number of hopeless judicial review claims is to reduce the levels of poor quality representation by pulling up those firms that lodge abusive and vexatious claims.

Representatives' perspectives

An important part of the research involved understanding the perspectives of representatives and their experiences of the judicial review process. The representatives we interviewed acknowledged the issues involved and the behaviours of poor quality representatives. At the same time, representatives highlighted the difficulties of legal practice caused by a lack of early legal advice for claimants and the difficulties involved in securing legal aid funding:

> "The funding side of judicial review is really tricky. We have to get it urgently and getting it urgently enough when it's a removal or detention case, which can be really, really hard. So, that is very stressful and that's the difficult part of it. It is really hard to navigate to apply for funding and then somebody in the Legal Aid Agency will make a decision as to whether they think there is merit, so fifty percent or greater chance of success. Quite often they will say 'no' and we will say 'well, we think there is, you know, the barrister thinks there is. Why do you think there isn't?' And we have to go through this whole process."[45]

[45] Representative interview.

> "One thing that I've been finding at the moment is a bit of a nightmare, is the legal aid situation where you do not get paid unless you get permission. This discourages responsible claimant lawyers from sorting their cases out. So, say you're putting in an urgent judicial review, which account for a lot of cases. The substantive case is not where it should be in an ideal world. And it stops you sorting out the substantive case because if you do that, your judicial reviews often become academic which is depressing."[46]

> "A key problem is legal aid, particularly in urgent removal cases. There is such little time for claimants to act in urgent removal cases, particularly where the claimant has been previously unrepresented and then newly instructing solicitors take it on at the last minute. Previously there used to be devolved powers so it was possible for the solicitor to make an assessment of the merits to determine legal aid eligibility to get on with the urgent work that needed to be done. But the time is very much compressed; there is very little time anyway because of Home Office removal policies. This creates difficulties for claimants in terms of perhaps getting all the information that they need in order to assess merit and to assess whether the claim is weak."[47]

> "Legal aid funding causes difficulties for representatives in terms of the time they then have to put forward a well-argued, well-presented claim which then assists the judge in making their decision. And also even for a strong case, the legal aid regime can act as a disincentive because unless you get permission, then there will be no legal aid. So, if it's difficult for the representative to work out whether or not there is sufficient merit and if there's not time to do that, then they're unlikely to take the case on. So that can lead to more claimants being unrepresented."[48]

Representatives also highlighted the difficulties of assisting clients in immigration detention:

[46] Representative interview.
[47] Representative interview.
[48] Representative interview.

> "Often the problem for detainees is that the original evidence in their case wasn't there because they did not have a lawyer when they made their application. So, however reasonably thought out their grounds for judicial review are, they are still too generic to win anything. If you don't have a lawyer prepare your case individually and setting you apart from the crowd, then everything is likely to be too generic to succeed."[49]

> "A real disadvantage is that you have got people who are in detention or who don't have many documents. They have to somehow prove their income and that is really tricky. We have to get evidence of their means and that is really hard for people that don't have that."

Our interviews found different approaches between different types of representatives. Better quality representatives are more likely to advise potential clients that there have very limited or no prospects of success. Some representatives also emphasised the importance of ensuring clients and solicitors both understand that if the chances of success are low, then the client risks being exposed to costs:

> "Solicitors are almost relieved when I say there is nothing in a case because they can go back to the client and say, 'Counsel says no.' I say, 'You're lighting your cigarettes with ten pound notes. Why do it? Your client is burning his money. If he chooses to do that…' It is often not so bad that you would actually be misleading the court, but I'm saying, 'does your client understand that they are likely to end up with their costs and the Secretary of State's costs?' Particularly when you get someone who's, say, haggling about your fees as counsel, I say: 'Well, I'm really worried because you're telling me this client is really poor, they've got a really weak case and they're going to pick up the Secretary of State's costs. So what have you told them about the risk they're exposing themselves to?' And I'm not sure these solicitors have always understood the risks themselves."[50]

[49] Representative interview.
[50] Representative interview.

A barrister explained:

> "Quite often, I'm instructed by solicitors to draft grounds, often at the last minute, often on a removal, and I ring them and say, 'There's nothing here in this case'. And they're not necessarily venal representatives I'm talking about. They are representatives who really don't seem to have understood, faced with a living, breathing person with a sad story, that there's no area of law in sight here, that the rules do say that some people don't have a good case. On the law, they've reached the end of the road."[51]

Some representatives also highlighted their perception of a lack of equal treatment between them and poor litigation conduct by the Home Office:

> "Some Upper Tribunal judges elaborate their reasons to why they have granted or refused permission, and some do not really explain, but just simply rely on the Acknowledgement of Service, where I would expect, and my client would expect, that if permission gets refused that the Upper Tribunal Judge does not simply regurgitate from the Acknowledgement of Service, but actually gives a reason in a short form summary for the refusal so the client will understand which factors the judge took into account and why permission was refused."[52]

> "I think the feeling that we have as claimant solicitors is that a lot of the judicial decisions are very quick to slap claimant solicitors down, but very slow to criticise the Home Office and the Government Legal Department when they act badly. They expect us to get everything perfectly right. I don't think they appreciate the pressures that we are working under, where we've got detained clients and a group of clients that are imminently removable and potentially being removed to countries where they fear torture or ill treatment and where we unfortunately don't have perfect information and it's a very difficult call to make. We are doing our best and most solicitors are acting in accordance with our professional duties and we are conscious

[51] Representative interview.
[52] Representative interview.

of them. But we really get the sense that we are damned if we do and we are damned if we don't. And the same standards are not applied to our opponents."[53]

"There's a whole line of sanctioning, the sanctions against reps who misbehave, and I have no problem with the vast majority of the judgments. They seem to me to be lawyers who have totally lost sight of their ethical obligations. There was judgment in a case the other day which was horrendous. The law firm was just ripping off the clients. But, the tribunal and the courts don't take a tough line with poor litigation conduct by the Home Office."[54]

Home Office decision-making

Issues concerning quality equally arise in relation to the Home Office and its decision-making. The issue of the quality of initial decisions has been raised in various reports by the Independent Chief Inspector of Borders and Immigration. The overall goal of an effective administrative justice system should be to achieve robust and good quality decisions first time round. If such decisions contain errors, then the person concerned will often have to use costly and lengthy remedies, such as tribunal appeals and judicial review. It is therefore important that government learns from errors to prevent their repetition wherever possible.[55]

Achieving this virtuous circle across the entire range of primary immigration decision-making has proved elusive. The long-standing concern is that mistakes, errors, and poor quality decision-making can arise from various political, cultural, and organisational factors. These have been said to include: the so-called culture of disbelief; having decisions taken by inexperienced and junior caseworkers who have to cope with high workloads without sufficient oversight by more senior staff; and a move away from discretion and face-to-face

[53] Representative interview.
[54] Representative interview.
[55] Administrative Justice and Tribunals Council, *Right First Time* (2011); R. Thomas, 'Administrative Justice, Better Decisions, and Organisational Learning' [2015] *Public Law* 111.

interviews toward a checklist approach and making more decisions solely on the basis of information provided.[56]

These arguments are the general points that are often raised. The reality can be more complex and difficult. Both the interviews and the case-file analysis shed some light on the quality of Home Office decisions. Representatives highlighted general concerns that Home Office decisions sometimes follow a standard template and use copied and pasted paragraphs:

> "The issue with the quality of Home Office decision-making is that it is made by case-workers who are obviously copying the standard format they give for other decisions of the same type, to the same country, making mistakes, drawing conclusions that to us seem to be completely wrong and we think, 'Oh, there's good grounds to appeal this decision.' If those are certified and they have no in-country right of appeal then we have no choice but to go to judicial review."[57]

> "It comes back round to the quality of the original decision-making because if there were not so many problems with some of the original decisions, then we would not have to go to judicial review."[58]

> "Home Office decision making can be poor. There are really bad examples, but they're not the majority. The really bad cases are where, for example, the person is being sent back to Tanzania, but they are from India. That's the exception. Home Office decisions are not normally that bad, but it's just how generic they mostly are. Asylum decisions are slightly better, slightly more detailed. But I think the problem with all the decision making is that the Home Office as a whole is so enforcement-focused. The obsession

[56] J. Grierson, 'Hostile environment: anatomy of a policy disaster' (*The Guardian,* 27 August 2018) available at <https://www.theguardian.com/uk-news/2018/aug/27/hostile-environment-anatomy-of-a-policy-disaster> (accessed 19.11.2018).
[57] Representative interview.
[58] Representative interview.

> with credibility in the asylum jurisdiction makes it feel like the Home Office is looking to trip people up."[59]

> "One of the issues with the Home Office decisions is that they are not taken by lawyers. So, when they are looking at deportation, for example, which might raise issues about the burden of proof and allegations of deception, case workers just do not quite seem to understand."[60]

> "What is it like dealing with the Home Office? Sometimes, they are just wholly illogical. I often think: why is the Home Office forcing us to litigate matters when there's no need to? Why can't they take a sensible position? It is very frustrating that sometimes you have to go through more and more procedures just so that someone sensible can look at a case. You get a really poor decision. You do a letter before claim so that it goes before someone in the Home Office litigation unit. They might be a bit more sensible. Sometimes they are; often they're not. If not, then you issue a JR and then it goes to someone at the Government Legal Department. This will be an actual lawyer who might look at this. So, you're hoping then that someone will do something sensible with it. It is, often, but not always, frustrating."

Home Office case-workers, like representatives, often have a difficult job to do in handling often complex evidence and applying complicated rules, and there is extensive evidence that the quality of decisions can be variable. As with the quality of claimants' grounds of challenge, Home Office decisions can be of variable quality. Many decision letters from the sample of case-files were lengthy, detailed and reasoned. Further, most judicial review claims are unsuccessful—meaning the quality of the decision is defensible to, at very least, a certain extent. Asylum decision letters are often very detailed and contain a lengthy assessment of a case, though length alone is not necessarily an indication of quality. By contrast, entry clearance refusal notices tend to be briefer.

[59] Representative interview.
[60] Representative interview.

At the same time, there were some instances of poor decision-making.The following examples drawn from the case-file analysis provide instances of successful challenges against Home Office decisions. Such challenges were either granted permission or settled out of court. Examples of problematic decision-making by the Home Office included the following errors: failing to exercise discretion or not exercising discretion properly; not applying the relevant immigration rules properly; non-compliance with an earlier judicial review ruling; failing to follow and apply country guidance; not considering relevant evidence; and not giving the claimant a fair opportunity to clarify concerns. A common theme in all of the examples of problematic Home Office decision-making is the failure to undertake the proper type of detailed consideration required to make a robust and defensible decision, especially when the case has complex factual, legal, and country guidance issues.

Failure to properly consider the evidence

Case 38. The claimant had been refused indefinite leave to remain. He had previously been granted three years leave to remain under the European Community Association Agreement. The claimant had applied for indefinite leave to remain using the same employment details and evidence, but was refused. This decision was upheld following an administrative review. There had been no change in the applicant's circumstances following his last grant of leave to remain. The refusal letter and administrative review stated that "the Secretary of State is not satisfied that your part in business does not amount to the disguised employment." The administrative review letter noted that the applicant's submission that there had been no change in his circumstances, but then proceeded to reject the application without any consideration of the evidence submitted. The claimant argued that the Home Office had failed properly to consider the evidence. The Government Legal Department argued that the challenge ought to be dismissed and should have been deemed TWM. The Judge held that the decision was arguably irrational to refuse to favourably review its earlier decision to refuse leave remain given that the Home Office had previously given the claimant three years leave to remain on the same facts. The case was then settled by consent order to be reconsidered by the Home Office within three months.

Failure to exercise discretion

Case 118. The claimant had applied for leave to remain as a Tier 1 (Entrepreneur) Migrant. The application was refused on the basis that the applicant had not provided specified documents to establish funds available to the applicant from third parties. Such documents had to be original documents and authorised and comply with other requirements. Under paragraph 245AA(d) of the Immigration Rules, if the applicant has submitted a specified document in the wrong format; or which is a copy and not an original document; or which does not contain all of the specified information, but the missing information is verifiable from other documents submitted with the application, then the Home Office decision maker *may* grant the application despite the error or omission, if satisfied that the specified documents are genuine and the applicant meets all the other requirements of the Rules. The claimant argued that the missing information was verifiable from a number of other verified documents that had been submitted with the application. The initial decision was upheld through administrative review. The claimant then sought judicial review arguing that the Home Office had failed to exercise its discretion under paragraph 245AA(d) to consider whether the additional documents submitted were sufficient to meet the requirements of the Immigration Rules to qualify for leave to remain. It was also argued that the evidential flexibility policy applied. In short, the Home Office had applied the mandatory terms of the Immigration Rules and failed to exercise its discretion that it possessed under the rules. The case was settled before reaching a permission decision on the basis that the applicant would withdraw the judicial review and that the Home Office would make a new decision. In short, the Home Office had failed properly to exercise the discretion given to it by the Immigration Rules.

Failure to exercise discretion

Case 131. The dependent child of an ex-Gurkha veteran had been refused indefinite leave to remain in the UK. A previous human rights appeal had been allowed and the claimant had been granted limited leave to remain. The applicant sought judicial review of the refusal of indefinite leave to remain. Previous case-law had held there to be historic injustice in Gurkha cases. But for this historic injustice, the claimant could have been able to settle permanently in the UK. Having been granted only limited leave to enter the UK, the claimant challenged the Home Office’s failure to exercise discretion to grant indefinite leave. The case was settled

before proceeding to the permission stage to be reconsidered by the Home Office. In short, the Home Office had failed to take account of the historic injustice in Gurkha cases and failed to exercise discretion accordingly.

Failure to consider fresh evidence in para 353 claim

Case 311. The Home Office had rejected the claimant's further submissions as a fresh claim. Having entered the UK as an unaccompanied asylum-seeking child, the claimant had been refused asylum but been granted discretionary leave. An asylum appeal was later dismissed. Some years later, the claimant made further submissions concerning the asylum claim and the changed country conditions. The claimant had made contact with a relative who could support the applicant's claim. Further, the relative had been granted asylum in France having been found to be credible. The Home Office rejected the further submissions. In the judicial review, the claimant argued that he had relied on new evidence – that of the relative who had corroborated his claim. The Home Office had rejected the relative's evidence and refused to consider the further submissions as a fresh claim. It was argued that this rejection was incorrect because the accepted credibility of the relative who had been given refugee status in France showed that the claim was not bound to fail. The Home Office, it was argued, had not given good and adequate reasons why there was no realistic prospect of success before a hypothetical tribunal. The claim was conceded by the Home Office to reconsider its decision.

Seeking to repudiate Upper Tribunal country guidance

Case 136. The applicant from a city in Iraq had been refused asylum on the ground that he could relocate internally to Baghdad. The Upper Tribunal had previously held that there was a state of internal armed conflict in certain parts of Iraq. The applicant was seeking a second judicial review against the refusal to consider his further submissions as a fresh claim. In the first judicial review in 2016, the Judge had granted permission finding the Home Office's decision to be arguably unlawful because it had failed to engage with the facts of the case and whether it would be unduly harsh to expect the applicant to relocate internally to Baghdad. The Judge also noted that the Home Office had failed to engage with the facts of the case in particular that the applicants had arrived without documentation to show that they were from Iraq.

The second Home Office refusal letter stated that an Upper Tribunal country guidance decision on Iraq and Article 15(c) of the Refugee Qualifications Directive had lost its currency and could no longer be properly relied upon; the country situation had changed since then. It is well-established that country guidance decisions by the Upper Tribunal are to be followed unless they have been expressly superseded or replaced by any later country guidance determination. Further, the Upper Tribunal had affirmed its country guidance on Iraq in another country guidance decisions issued two weeks before the Home Office's decision.[61]

The Home Office had, nonetheless, sought to depart from country guidance relying upon country information that was older than that relied upon by the Upper Tribunal in its affirmed country guidance. The applicant argued that the Home Office had failed to discharge its burden of demonstrating that recently affirmed country guidance had been rendered unreliable. Further, the Home Office had sought to do so by relying solely on the Home Office's own selectively referenced country material and had not considered other available country reports. Accordingly, the Home Office's rejection of the fresh claim in reliance on the rejection of the country guidance was unsustainable. The judicial review claim was settled by consent order.

Failure to apply country guidance and properly consider evidence submitted

Case 68. In 2012, a Pakistani national claimed asylum on the basis of his religious faith. His appeal was dismissed before the promulgation of a relevant country guidance decision by the Upper Tribunal, which superseded previous country guidance cases.[62] In 2014, the applicant made further submissions to the Home Office and sent further evidence including relevant letters concerning from a faith group association and information concerning the grant of asylum to his brother. Over a three year period, the applicant sent various 'chase-up' letters to the Home Office to get a decision. The Home Office refused the fresh asylum claim in 2017. In the judicial review, the applicant argued that the Home Office had failed properly to analyse and consider the further information and evidence and failed to appreciate the change in

[61] *BA v Secretary of State for the Home Department (Returns to Baghdad) Iraq CG* [2017] UKUT 18 (IAC).

[62] *MN and Others v Secretary of State for the Home Department* (Ahmadis - country conditions - risk) Pakistan CG [2012] UKUT 389 (IAC).

country conditions and Upper Tribunal country guidance, that the Home Office had made errors of fact and had failed to follow binding case-law. New country guidance had been issued which superseded previous country guidance cases.[63] Further, as regards the letters from the faith group association, the Upper Tribunal had decided that where credibility is in issue, the more such letters contain specific information as to the claimant's activities in the United Kingdom, the more likely the letter they are to carry weight.[64] In its refusal decision, the Home Office had not considered these letters in detail, but had rejected them as self-serving. Instead, the Home Office had relied on the 2012 tribunal decision despite the fact that the Upper Tribunal had subsequently issued new country guidance and other guidance which indicated that the further evidence submitted could allay the adverse credibility concerns in the 2012 tribunal decision. In light of this, it was argued that the Home Office had not given good reasons for rejecting the letters submitted. In a very similar case decided in 2015, two years before the refusal decision in this case, the Upper Tribunal had granted judicial review for failing to give anxious scrutiny to all the evidence including from the faith group association. The Judge in that case had concluded that the applicants' claims based upon the country guidance had not been fully and properly considered yet and that this had resulted from the "shifting sands" of the country guidance.[65] In the Acknowledgement of Service, the Government Legal Department offered to withdraw the decision and to make a fresh decision within three months. In summary, despite having had the case for some three years and receiving new evidence, the Home Office had not applied relevant and up to date country guidance. It had also not made a proper assessment of the evidence submitted by the applicant.

Procedural unfairness: not affording the claimant the opportunity to clarify concerns

Case 318. The applicant had been refused entry clearance as a student. The claimant's birth certificate had not been accepted by the entry clearance officer; the claimant's birth had been registered some 11 years after his date of birth. The entry clearance officer did not seek to clarify this with the claimant. The refusal decision was upheld through administrative review.

[63] *MN and Others v Secretary of State for the Home Department* (Ahmadis - country conditions - risk) Pakistan CG [2012] UKUT 389 (IAC).

[64] *AB v Secretary of State for the Home Department* (Ahmadi letters) Pakistan [2013] UKUT 00511 (IAC).

[65] *R (NJ and YJ) v Secretary of State for the Home Department IJR* [2016] UKUT 00032 (IAC).

The claimant's judicial review grounds argued that the process had been unfair and not taken into account the fact that the registration of births in the relevant country did not become mandatory until 2006 and that this explained the long delay in the registration of his birth. The claimant argued that the process had been unfair because the entry clearance officer had not sought to clarify the point or to give him an opportunity to explain. Furthermore, many other applicants from the same country had previously had their birth certificates accepted by the Home Office in similar circumstances. The Government Legal Department withdrew the refusal before the permission stage decision.

Recommendation

Most judicial review challenges are refused permission. We encountered many robust Home Office decisions. At the same time, there were also cases in which the Home Office decision was not robust and sustainable. Better initial decision-making requires that the Home Office learns lessons highlighted through the judicial review process.

Settlement

Judicial review claims can be settled out of court if the parties agree. Typically, the Home Office will review its decision and then offer to withdraw the decision and reconsider within three months. Settlement can occur at both the pre-action protocol stage and following the lodging of a claim with the Upper Tribunal.

Pre-Action Protocol stage

At this stage, cases are dealt with by Home Office staff in its Litigation Operations unit. Such staff are not usually legally trained. Lawyers from the Government Legal Department will not be involved until a judicial review claim is formally lodged and issued by the claimant at the Upper Tribunal.

A specific point of concern for claimant representatives was the lack of responsiveness and engagement by the Home Office at the Pre-action Protocol (PAP) stage. Representatives widely reported that this subverted the purpose of the Protocol itself. Some reported that the involvement of counsel in a case is often the point at which serious engagement takes place.

Some representatives noted that, for this reason, the PAP stage often does not work effectively:

> "A key problem is that the Home Office does not seem to fully engage with detailed letters before a JR claim, or fails to properly or adequately engage with those – or does not engage at all. So, the whole purpose of the pre-action protocol is to avoid litigation and if litigation cannot be avoided, to at least narrow or reduce the issues in dispute or for the party to properly understand their position and to exchange information. And that just doesn't seem to happen at those earlier stages of the JR process."[66]

> "Before we get even to the formal judicial review process, the whole PAP process is a joke. I did once have a concession on a PAP but generally, no matter how lawless a decision, they maintain it at the PAP stage. We have got to the point where we think, actually, the Home Office internal complaints procedure is more effective than judicial review. We send a PAP and we get a nonsensical response. We send something to the complaints procedure and we often get a more reasonable response and a remedy."[67]

The handling of claims at the PAP stage could become more efficient if Home Office received assistance from the Government Legal Department. The Independent Chief Inspector of Borders and Immigration has recommended that the Home Office trial (with a manageable cohort of claims) the involvement of Government Legal Department in the preparation of responses to Pre-Action Protocol letters to test whether this can reduce the percentage of cases that proceed to formal judicial review claims.[68] The Home Office Litigation Operations team has worked more closely with the Government Legal Department in drafting PAP responses with a view to reducing the number of cases that proceed to bring a judicial review and are then granted permission to proceed.[69] If successful, this approach could be extended to a wider cohort of case types.

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[66] Representative interview.

[67] Representative interview.

[68] Independent Chief Inspector of Borders and Immigration, *An Inspection of the Home Office's Mechanisms for Learning from Immigration Litigation April – July 2017* (2017), p.10.

[69] Home Office, *The Home Office response to the Independent Chief Inspector of Borders and Immigration's report: An Inspection of the Home Office's Mechanisms for Learning from Immigration Litigation. April – July 2017* (2017), para.2.5.

More broadly, in terms of the Home Office's litigation conduct, many representatives interviewed noted the Home Office's adversarial approach to litigation had become more pronounced in recent years. Claimant representatives characterised this in a variety of ways, including "bloody mindedness" and being "enforcement focused".[70] Some interviewees reported the Government Legal Department was able to manage claims more responsively than the Home Office, yet others reported that changes to the Government Legal Department's structure had meant it was more difficult to engage with. In addition to highlighting a lack of responsiveness and engagement by the Home Office at the Pre-action Protocol stage, representatives also noted that the involvement of counsel in a case often is the point that serious engagement takes place.

Recommendation

More involvement of legally trained staff at the Pre-Action Protocol stage could increase the efficiency of the process if it leads to earlier resolution of justified claims. This option should be explored.

Settlement after a claim has been lodged

Claims are also settled after having been lodged at both the pre- and post-permission stages. The typical concession is that the Home Office agrees to withdraw its decision and to reconsider it within three months. This is arranged by way of a consent order. The Upper Tribunal may, at the request of the parties but only if it considers it appropriate, make a consent order disposing of the proceedings and making such other appropriate provision as the parties have agreed.[71] The procedure for conceding a claim therefore requires the parties to agree a consent order and submit this to the Tribunal to be approved. According to the Upper Tribunal, "the consent order is a mechanism of fundamental importance and utility in public law litigation."[72] Consent orders promote the overriding objective of ensuring that cases are dealt with fairly and justly.[73] The Upper Tribunal has stated that all consent orders

[70] Representative interviews.
[71] The Tribunal Procedure (Upper Tribunal) Rules SI 2008/2698, r.39(1).
[72] *R (MMK) v Secretary of State for the Home Department (consent orders - legal effect - enforcement)* [2017] UKUT 198 (IAC), [42].
[73] The Tribunal Procedure (Upper Tribunal) Rules SI 2008/2698, r.2.

must "be couched in terms which respect and promote the essential values of transparency, clarity and certainty."[74]

Judges interviewed noted that settling judicial review claims through consent orders is common:

> "A lot of these cases do settle. Certainly, substantive hearings very often settle, and that is received wisdom. I had three in a list last week, and two of those went out in advance. That is not untypical. I think the problem is, it happens very late in the day, four o'clock, or after I've done all the reading which I don't object to, because you always learn something from reading these things, even if you never get to make a decision on it. But I think it's just in the nature of litigation across the board, isn't it? People talk at the door of court, but they don't talk two weeks in advance because they have things to do, talking at the door of the court in another case probably."[75]

> "Cases settle shortly before a hearing or there's a late adjournment request because the parties aren't ready. And I think realistically that's a workload problem for the Home Office and the Government Legal Department rather than anything else, but some solicitor firms on behalf of applicants do try and engage and try and deal with things or narrow things down beforehand. I'm not sure how much of a positive response that often gets. But if things can be narrowed down before they get to us then it saves time and money for everyone."[76]

> "Quite a few claims settle. Certainly when I look at the cases, if I grant permission I may try and give an indication to the parties as to what I think the relative strengths are because there are some that just clearly shouldn't bother proceeding to a substantive hearing."[77]

[74] *R (MMK) v Secretary of State for the Home Department (consent orders - legal effect - enforcement)* [2017] UKUT 198 (IAC), [42].
[75] Upper Tribunal Judge interview.
[76] Upper Tribunal Judge interview.
[77] Upper Tribunal Judge interview.

According to representatives:

> "A very small minority of judicial reviews proceed to a full hearing. On the whole, if we get permission, then we would expect to settle not long thereafter."[78]

> "There are frivolous judicial review applications and there's a lot of them, there has been reports of there being this big backlog and this big increase in the number of judicial review cases coming forward to tribunal and, you know, if that's happening, that might explain why the Home Office is giving out consent orders in order to sort of fight off the number of cases they're having to reconsider or the numbers that will go to a hearing because they just don't have the time or resources to go through all of it. So, I think there are definite problems with practitioners as well, not just the Home Office."[79]

> "During the JR process, we can't just be spending all this money. We need to try and settle it out of court. So you can't be really unreasonable during a judicial review, the Home Office can't be really unreasonable and so, they should be trying to settle it and negotiating it. That is good because it obviously saves time and money and stops one party being really unreasonable - if they do, then there are cost consequences and I think that's a real advantage. We often get a good result because of that."[80]

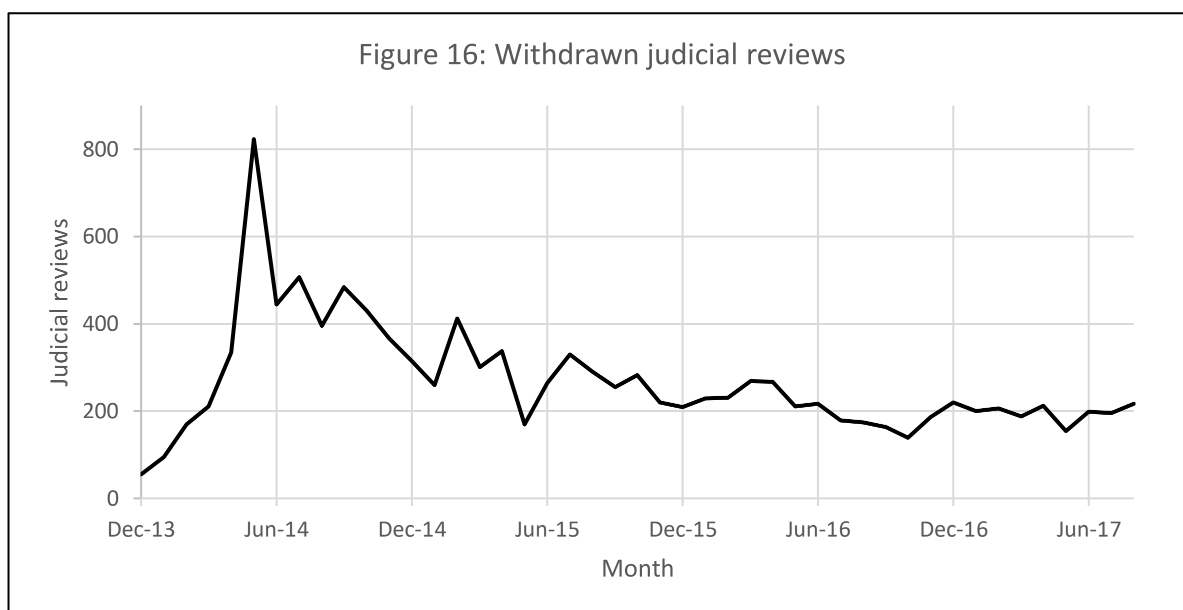
> "Nearly everything settles post-permission which is good in that you don't have to then go on and fight it at a full hearing. But we would like the Home Office to engage with the process earlier than that. Often it takes weeks and weeks and weeks to get an acknowledgement of service on summary grounds from the Government Legal Department. And often they do not really engage, but just regurgitate what is in the sort of original decision letter. More often, the GLD will argue that a claim is totally

[78] Representative interview.
[79] Representative interview.
[80] Representative interview.

without merit and they want costs and you think – well, again, they have not engaged with it."[81]

The case-file analysis contained cases in which claims had been settled both before and after consideration by a judge on the papers. From the case-file analysis, 67 of the 342 were settled by consent and/or withdrawn following a consent order. This amounts to just under 20% of the entire sample. In such cases, the claims are settled through a standard consent order for the underlying decision to be reconsidered by the Home Office within three months.

Figure 16 shows data from the Upper Tribunal concerning the overall number of judicial reviews withdrawn. This data includes those claims both withdrawn through settlement and those withdrawn by the claimant for other reasons.[82]



When offering a consent order, the Government Legal Department will notify the Tribunal and applicant that the Home Office will withdraw its decision and provide a new decision within a particular timeframe, which is usually three months but can be six months. The Government Legal Department will typically submit that the Upper Tribunal should refuse permission on the ground that the judicial review claim has been rendered entirely academic.

[81] Representative interview.
[82] Data supplied by the Upper Tribunal.

Only in exceptional circumstances could the court rule on academic disputes and if there is a good public interest reason for doing so, e.g. the case raises a wider point of law and a large number of similar cases exist or are anticipated.[83] The Government Legal Department will then note that the present case plainly does not satisfy the test of exceptional circumstances. There is no live issue remaining, no evidence that large numbers of similar cases exist or are anticipated, and the case turns on its own facts. Having withdrawn the decision, the Home Office will often, but not always, pay the claimant's reasonable costs.

Representatives acknowledged the advantages of settling cases out of court:

> "If the Home Office is offering a consent order, it doesn't make logical sense to refuse it and proceed with a full hearing before a judge who is then going to ask the Home Office to reconsider the decision just like they're offering to in the consent order."[84]

> "One advantage of judicial review when you are dealing with the Home Office is that it gives you a chance to get someone in the Home Office or Government Legal Department who is more senior, expert, probably better paid to take a considered look and of course you often get the Government Legal Department backing down on a ridiculous decision that someone in the Home Office has made."[85]

Why does the Home Office concede? In practice, an offer by the Government Legal Department to settle a case will not identify or explain the reasons for the offer of settlement. In general, there are two reasons why cases are settled. First, cases are frequently settled for pragmatic reasons. It is both quicker and cheaper to withdraw a decision and reconsider than to defend a judicial review challenge at a substantive hearing. Consider, for instance, the situation if a claimant is granted permission in a certification or fresh claim judicial review. Even if the claimant is ultimately successful, the most that he or she is likely to achieve through judicial review is a reconsideration by the Home Office. If the case is arguable, then

[83] *R v Secretary of State for the Home Department, ex parte Salem* [1999] 1 AC 450, 457 (Lord Slynn); *R (Zoolife International Ltd) v Secretary of State for Environment, Good and Rural Affairs* [2007] EWHC Admin 2995, [36] (Silber J).
[84] Representative interview.
[85] Representative interview.

it will typically be disproportionately costly for the Home Office to defend a judicial review to a substantive hearing. Proceeding with the litigation will only increase the costs and delay involved. For instance, the cost to the Home Office of reconsidering a decision is in the region of hundreds of pounds. By contrast, the cost to the Home Office of defending a judicial review in a substantive hearing can amount to something in the region of £80,000 to £100,000. As a result, it makes more much sense for the Home Office to settle cases frequently, even cases that could ultimately be defended, than pursue litigation and thereby risk higher costs, which are unlikely to be paid by the claimant if the Home Office is successful.

In such circumstances, the Government Legal Department will not concede that the challenge decision is flawed. Instead, it will offer to concede and for the Home Office to reconsider for pragmatic reasons. The grant of permission will have identified which grounds of challenge are arguable and these could be addressed more quickly and efficiently than by having to argue and defend a substantive hearing. In some offers of settlement, the Government Legal Department's view is that it considers the impugned decision to be defensible, to avoid the unnecessary costs and wasting the Tribunal's time, the Home Office is willing to offer the applicant a reconsideration. The approach typically taken by the Government Legal Department is that the agreement of a consent order is not to be taken as a concession that the challenged decision is unlawful.

A second reason for settling out of court, and despite claims to the contrary, is that the Home Office and/or the Government Legal Department recognise that the challenged decision is not legally sustainable. In other words, the challenged decision is likely to be legally flawed. Based on our reading of the files, this situation is more noticeable when the Government Legal Department concedes a claim at the pre-permission stage. In this way, the process by which judicial reviews are settled out of court operates as a *de facto* additional administrative-legal review process by which challenged Home Office decisions are reviewed by a government lawyer. The principal difference between this and standard administrative review procedures is that the reconsideration is not undertaken not by an administrative reviewer within the Home Office, but by a lawyer within the Government Legal Department and also after the claimant has instituted legal proceedings.

Settling out of court has various consequences. It represents a *de facto* victory for the claimant, who will then have their case reconsidered. But it does not by any means follow that the claimant will ultimately obtain a positive substantive decision on her immigration status. Nonetheless, the withdrawal of a decision indicates that the challenged decision is no longer valid and that the Home Office will have to reconsider the case. Settlement will also reduce the financial and time costs as the parties will not proceed to a substantive hearing. Settlement also has consequences for the Upper Tribunal as it reduces the demand on judicial resources.

There are other possible consequences of settlement. One issue is whether or not the Home Office will in fact take a new decision within the agreed timeframe, which is usually three months. Representatives highlighted that timeframes in consent orders are sometimes not met. The Upper Tribunal has ruled that in such circumstances, the Home Office cannot be subject to possible contempt action or other sanction. Instead, the remedy for non-compliance with a consent order will normally be to lodge another judicial review claim.[86] As the Upper Tribunal noted, "this discrete field of activity involves a highly regrettable, frankly deplorable, waste of scarce judicial and administrative resources".[87] As one representative noted, "so, the client, even though he was successful at first stage has to risk further costs in order to get the Home Office to make a decision, which is a futile exercise in my view, and costly for the client as well."[88]

Settling a case out of court will also mean that there will be no formal tribunal decision. Accordingly, if there has been any illegality, then the settlement of a case between the parties will not be reported by the Tribunal and will not be publicly highlighted or have any value as precedent in other cases.[89] In other words, settlement has the effect of reducing transparency and keeping the matter away from public attention. Word might get around between lawyers through word of mouth or social media, but there is no formality to this process.

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[86] *R (MMK) v Secretary of State for the Home Department (consent orders - legal effect - enforcement)* [2017] UKUT 198 (IAC).
[87] Ibid., [44].
[88] Representative interview.
[89] A. Lahav, *In Praise of Litigation* (Oxford: OUP, 2017); T. Farrow, *Civil Justice, Privatization and Democracy* (Toronto: University of Toronto Press, 2014); O.M. Fiss, 'Against Settlement' (1984) 93 *Yale Law Journal* 1073.

This issue was highlighted in 2018 in relation to the use of paragraph 322(5) of the Immigration Rules, which refers to “the undesirability of permitting the person concerned to remain in the United Kingdom in the light of his conduct (including convictions which do not fall within paragraph 322(1C), character or associations or the fact that he represents a threat to national security”. The issue became controversial following reports that highly skilled migrants had been threatened with removal from the UK for making minor and legal amendments to their taxes. The Home Secretary had promised that such cases would be paused.[90] During a Parliamentary debate, the Immigration Minister stated that no applications to overturn such decisions had been successful at judicial review.[91] However, it subsequently came to light that while no such judicial reviews had been successful before the tribunal, the Home Office had been settling judicial reviews of that type out of court just before the final hearing.[92] A barrister was quoted as stating that “the significance of this tactic … is that any unlawfulness that is evident in an impugned decision would not be reported in a published court judgment … [i]n this way, the public often does not hear about these cases.”[93]

Courts do not decide academic or hypothetical issues. However, in *Salem*, it was recognised that the courts have a discretion to hear and decide a case even if there is no longer a dispute between the parties which will directly affect their legal rights and obligations.[94] Such a discretion must be exercised with caution. Cases that are academic between the parties should not be heard unless there is a good reason in the public interest for doing so. For example, when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are

[90] A. Hill, ‘At least 1,000 highly skilled migrants wrongly face deportation, experts reveal’ (*The Guardian,* 6 May 2018) <https://www.theguardian.com/uk-news/2018/may/06/at-least-1000-highly-skilled-migrants-wrongly-face-deportation-experts-reveal> (accessed 19.11.2018); A. Hill, ‘Highly skilled migrants still face deportation despite Javid promise’ (*The Guardian* 11 June 2018) <https://www.theguardian.com/uk-news/2018/jun/11/highly-skilled-migrants-still-face-deportation-despite-javid-promise> (accessed 19.11.2018).
[91] Hansard Deb Vol 642 col 401WH 13 June 2018.
[92] A. Hill, ‘Minister accused of misleading MPs in deportations row’ (*The Guardian,* 20 June 2018) <https://www.theguardian.com/uk-news/2018/jun/20/minister-accused-of-misleading-mps-in-deportations-row> (accessed 19.11.2018).
[93] Ibid.
[94] *R v Secretary of State for the Home Department, ex parte Salem* [1999] 1 AC 450, 457 (Lord Slynn).

anticipated so that the issue will most likely need to be resolved in the near future.[95] There have been instances in which the Upper Tribunal has exercised this jurisdiction.[96]

Recommendation

The process of settling claims through a consent order could operate more efficiently if there were greater communication between the parties throughout the process.

Repeat judicial reviews

What happens after a judicial review claim is decided or settled by a consent order? Typically, the matter will return to the Home Office for a decision. There is no data available on the number and proportion of claimants who receive a positive or negative decision following a judicial review.[97]

We did, though, hear from representatives about "repeat judicial reviews". This refers to the following situation. A claimant successfully challenges a refusal decision through judicial review. The Upper Tribunal finds the initial decision to be legally defective or the parties agree to settle the case and for the Home Office to reconsider its decision. The Home Office then takes a new decision. Yet, this second decision is materially the same as the initial refusal decision. This then prompts a second or repeat judicial review.

It can be entirely lawful, following a successful judicial review or settlement of a case, for the Home Office to reach a further refusal decision. In the absence of an appeal, the final decision rests on an individual's eligibility to enter or remain in the UK remains with the Home Office. However, some of the data collected highlighted the situation in which the subsequent Home Office refusal decision either does not take into account the first judicial review or results in a second refusal decision for essentially the same reasons as those for which the claim was refused initially. For the Home Office to produce a second refusal decision which is largely the same as the first refusal decision is likely to prompt a second "repeat judicial review". In such

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[95] Ibid.

[96] See, e.g., *R (MMK) v Secretary of State for the Home Department (consent orders - legal effect - enforcement)* [2017] UKUT 198 (IAC).

[97] There is data on non-immigration judicial reviews. See V. Bondy, L. Platt and M. Sunkin, *The Value and Effects of Judicial Review: The Nature of Claims, their Outcomes and Consequences* (Public Law Project, 2015).

instances, the overall effect is to add further and unnecessary delay and expense to the proper resolution of the applicant's case. If the same legally flawed reasons are repeated, then this clearly indicates that the Home Office has not complied with the initial judicial review decision.[98]

Representatives interviewed commented as follows:

> "A big problem in judicial review, in my experience, is that the Home Office say they're going to reconsider and then just make the same decision again. Exactly the same. It's sometimes bordering on an abuse of process. In the second refusal letter they will change a couple of paragraphs, sometimes they won't even change a couple of paragraphs, but they will just change the date. So, that's a disadvantage of the wider judicial review process."[99]

> "Sometimes with judicial review, you get the right decision at the end. But sometimes you just get another refusal from the Home Office on more or less the same grounds and you have to start over again."[100]

Another representative noted that they had taken a first judicial review. The law firm had engaged counsel to draft grounds of challenge, costing some £2,500. The Home Office then offered a consent order including an agreement to pay the client's costs. The Home Office took some time to reconsider its position causing a further delay and then issued a decision that was in essence the same as the initial decision that was challenged. The law firm then took out another judicial review: "we just ended up going in a circle with that one." Other representatives noted:

> "One of my section 94B cases was a very compelling case, a very vulnerable family. The Home Office settled it. They withdrew their decision and then six months later,

[98] K. Refrew and N. Kandiah, 'Are Home Office consent orders worth it?' (Free Movement Blog, 23 March 2018) <https://www.freemovement.org.uk/guest-post-are-home-office-consent-orders-worth-it/> (accessed 19.11.2018).
[99] Representative interview.
[100] Representative interview.

made pretty much the same decision, so that was a waste of everybody's time. It went on for another year and then we got permission and they withdrew it again and then finally made an appealable decision. The Home Office has been known to make decisions that are very similar, slightly better drafted, but not always. A colleague in this firm has had cases in which the Home Office has settled a judicial review two or three times and every time the Home Office make a new decision, they certify it again."[101]

"I had a client with further submissions who was detained with seventy-hour removal directions in 2013. We JR'd that. We got very good language in the prohibiting order about the strength of the further submissions. It then went off to other solicitors for financial reasons and we could not get them to settle it with a consent order accepting the further submissions, even though we had very strong language from the Judge who had issued the prohibiting order, saying how the person's profile had changed. It was finally settled. Given how strong that language was, the Home Office said they were not going to do it again. They then issued the same refusal decision with the same language on the same facts a second time and served it on him while he was in detention. We went all the way through the grant of permission, and then they finally settled it and they did accept this time that it was a fresh claim because we got permission. And then they refused a third time, but with the right of appeal, using exactly the same language from 2013. In June 2017, when we finally got to the appeal hearing, they withdrew the refusal decision two days before the hearing, granted him refugee status, on the same evidence that had been in front of them for four years. In the second judicial review, I remember very clearly getting £10,000 off the Home Office for that and I thought, this is just absurd. Not only have they detained him twice on the same facts and the same law and then all the cost of detention, but the second time around he gets £10,000 of public money that they've given to me for a decision they knew, because they'd already made it once before and withdrawn it once before, they knew it was unlawful from the beginning. It's just a shameless waste of public money."[102]

[101] Representative interview.
[102] Representative interview.

It is not possible to know how frequently repeat judicial reviews occur in practice. Nevertheless, they do occur. We encountered the following example from the case-file analysis.

Case 130 concerned a repeat judicial review in which the Home Office did not comply with a substantive judicial review ruling by the Upper Tribunal. An asylum appeal by an Iraqi national had been dismissed in 2008 by an Immigration Judge. In 2012, the Home Office rejected the applicant's further submissions as a fresh asylum claim. Subsequent submissions made in 2013 and 2015 were made on the basis that updated country materials concerning conditions in Iraq highlighted the worsening conditions there which would put him at risk on return. The Home Office's 2015 refusal decision only referred to submissions made in the applicant's 2013 letter and not the subsequent submission made in his 2015 letter.

The claimant sought judicial review. In 2016, the Upper Tribunal quashed the 2015 decision to refuse to treat the claimant's further submissions as a fresh asylum claim. The basis for this decision was that the Upper Tribunal in the case of *AA* had recently issued country guidance to the effect that there was at the relevant time an internal armed conflict within the scope of Article 15(c) of the Qualification Directive taking place in various parts of Iraq, largely but not entirely as a result of the activities of the Islamist group, ISIL.[103] The Upper Tribunal Judge held that the situation in Iraqi had changed markedly over the intervening eight year period following the dismissal of the claimant's initial appeal. Fighting in the contested areas may well have disrupted means of communication, such that even if the claimant might in the past have been in touch with family members who were in a position to help him, this could by no means be assumed still to be the position. Accordingly, the Upper Tribunal Judge stated that the adverse credibility findings of the kind made by the Immigration Judge in 2008 should clearly "be looked at with considerable circumspection" and that the Home Office had not done this.[104] The Judge also found that the letter before action, or "pre-action protocol" letter, written by the applicant's solicitors after the country guidance case of *AA* echoed many

[103] *AA v Secretary of State for the Home Department* (Article 15(c)) Iraq CG [2015] UKUT 544 (IAC).
[104] *R (SA) v Secretary of State for the Home Department* (JR/2426/2016), para.35.

of the points made at the hearing. The Home Office had “failed properly to consider the significance of that case, in rejecting the claimant’s submissions”.[105] The Judge quashed the decision, but declined to issue a mandatory order because “[o]ne must assume that the respondent will reconsider the matter, in the light of what is said in this judgment, and then decide how to proceed.”[106]

The case was then reconsidered by the Home Office. In 2017, two and a half months after the Upper Tribunal’s decision, the Home Office issued a second fresh claim decision rejecting the claimant’s case. However, this new decision did not take full account of the 2016 Upper Tribunal decision.

The claimant then sought judicial review again arguing that this second fresh claim decision was materially the same as the previous Home Office decision that had been quashed by the Upper Tribunal and also that the Home Office had not properly considered the terms of that earlier Upper Tribunal decision. It was argued that the Home Office had placed too much reliance on previous adverse credibility findings and had not applied the latest country guidance properly. The claimant was awarded legal aid. The judicial review claim was refused permission on the papers by an Upper Tribunal judge for the reason that the Home Office had considered and applied country guidance and was entitled to consider that there was an insufficient degree of the risk of violence. On oral renewal, the Upper Tribunal granted permission on the basis that the Home Office had not complied with the 2016 judicial review decision noting that “the respondent may wish to consider avoiding further loss of time and expense in these proceedings by making a fresh decision, appealable or not.” The applicant’s representatives and the Government Legal Department then agreed a consent order to the effect that the applicant would have six weeks to provide further evidence and that the Home Office would issue a new decision within three months.

In short, the underlying purpose of the litigation was to get the case back into the First-tier Tribunal to hear and decide an appeal. The Home Office had failed to comply with the earlier Upper Tribunal ruling to reconsider the claimant’s credibility afresh and to consider country

[105] Ibid, para.36.
[106] Ibid., para.37.

conditions in detail. Overall, there had been two judicial review challenges considered by four Upper Tribunal judges, a number of Home Office decisions, the involvement of the Government Legal Department, a law firm, and Counsel for the applicant. Yet, the purpose was to obtain a right of appeal on the merits by a First-tier Tribunal judge to re-decide credibility and country guidance issues. The Home Office's failure to reconsider the case properly had the effect of unnecessarily increasing costs and delaying further the resolution of an asylum case.

Recommendation

Repeat judicial reviews can be unnecessary, inefficient, costly, and likely to cause anxiety to claimants. To reduce the risk of this, the Home Office needs to exercise care when re-taking a decision so as to prevent further litigation. Fresh Home Office decision letters following a successful or conceded judicial review should be checked, if necessary by senior case-workers, to ensure compliance with the consent order or the decision of the Upper Tribunal. Furthermore, when a consent order is agreed, then both parties need to fulfil their obligations. Further judicial reviews against the Home Office to ensure compliance with consent orders are wasteful and should be unnecessary.

6. The types and categories of immigration judicial reviews

This section considers the types and categories of immigration judicial review claims. There are many different types of immigration decisions challenged by way of judicial review. From the case-file analysis, the principal types of immigration judicial reviews were as follows:

- **Certification decisions.** These claims challenge a Home Office decision to refuse an asylum and/or human rights claim and also certify that claim as clearly unfounded. The consequence of this certification is that the individual can appeal the decision, but only from outside the UK. The decision to certify the claim as clearly unfounded is then challenged through judicial review.
- **Fresh claim para 353 decisions.** These claims challenge the refusal by the Home Office to consider further submissions as amounting to a fresh asylum and/or human rights claim. As there is no right of appeal, the refusal to consider the further submissions can only be challenged through judicial review.
- **Removal directions.** These claims involve a challenge against the making of removal directions to remove the claimant from the UK. One issue that arises is whether or not the individual has any outstanding applications with the Home Office.
- **Points-based scheme decisions.** These claims challenge Home Office refusal decisions that the claimant does not qualify under the points-based scheme in the Immigration Rules.
- **Entry clearance decisions.** These claims challenge the refusal of entry clearance, such as a visitor visa.
- **Refusal of EEA Residence Card to an extended family member.**

Judicial review and appeal rights

The types and categories of judicial reviews lodged is closely connected to the availability of appeal rights. The availability of a right of appeal will normally preclude applying for judicial review. However, an important feature of this area of litigation is that many judicial reviews are lodged by claimants either to get a right of appeal before the First-tier Tribunal or to have an in-country appeal. In other words, the claimant’s underlying purpose in seeking judicial

review is often, though not always, to acquire a right of appeal against the underlying decision, such as refusal of leave to remain on asylum or human rights grounds.

The use of judicial review for these purposes is apparent from the two largest types of immigration judicial reviews: certification and fresh claim para 353 judicial reviews. In certification cases, the claimant had been refused to remain in the UK and then certified that the claimant's application as clearly unfounded, with the consequence that there is an out of country right of appeal. In such cases, the claimant can appeal, but only from outside from the country. By seeking judicial review of the certification decision, the claimant is seeking to secure an in-country right of appeal. An in-country right of appeal is more advantageous remedy than an out of country appeal. In fresh claim para 353 judicial reviews, the Home Office has refused to consider the claimant's further submissions as a fresh asylum or human rights, claim with the consequence that the Home Office does not need to make a new decision, which would attract a right of appeal. The claimant then seeks judicial review of that decision. In such cases, the claimant is ultimately seeking to secure a right of appeal before the First-tier Tribunal. Both certification and fresh claim judicial reviews have existed for many years and long predate the withdrawal of appeal rights by the Immigration Act 2014.

The issue of whether or not an appeal or judicial review is the appropriate remedy is often complicated by the following: complex legislative provisions that have been repeatedly amended; complex transitional provisions; conflicting judicial decisions interpreting the relevant legislation; and broader legal uncertainty as to precisely which decisions attract a right of appeal and which do not. For instance, there has been much litigation concerning which "ETS" cases attract a right of appeal and whether there is a right of appeal in EEA cases concerning extended family members.[107] In both instances, the matter has been resolved only by the Court of Appeal because of the complexity of the legal framework and the uncertainty as to whether or not there is a right of appeal.

[107] *Ahsan v Secretary of State for the Home Department* [2017] EWCA Civ 2009; *Sala v Secretary of State for the Home Department (EFMs: Right of Appeal)* [2016] UKUT 00411 (IAC); *Khan v Secretary of State for the Home Department* [2017] EWCA Civ 1755; *SM (Algeria) v Entry Clearance Officer* [2018] UKSC 9.

Certification and para 353 cases comprise the bulk of the immigration judicial review caseload. The Home Office decisions in such cases are in the nature of summary or filter decisions. Such decisions can either only be appealed from outside the UK (certification decisions) or cannot be appealed (para 353 decisions). In such cases, the individual claimants have, in many instances, already been in the UK for some time, often years, under different types of immigration status, been refused or had their leave curtailed, and then seek to remain or renew a claim on asylum and/or human rights grounds. The power to certify and consider whether fresh submissions amount to a fresh claim is a means of filtering out hopeless claims from those with some merit that require more thorough consideration. However, the Home Office refusal decision is challengeable by way of judicial review.

An underlying issue in many certification and fresh claim cases is the right to family and private life under Article 8 ECHR. The general nature of such claims is that, during the period of staying in the UK under a temporary visa, the claimant has developed rights under Article 8.[108] Sometimes, similar circumstances are pleaded on the basis of something other than Article 8, such as the Article 2 right to life. The clear majority of these claims fail. There are also a large number of Article 8 claims under para 353 of the Immigration Rules. In these cases, the Home Office refuses to treat the new representations of the claimant as amounting to a fresh claim for asylum. The refusal is then challenged by way of judicial review.

There are many other types of immigration judicial reviews. Once the main types of decision discussed above are taken out of the data, there is a very diverse range of decisions that are subject to judicial review. It is important to note that our sample of case-files is representative of a certain period of time. What was clear from the case files and interviews is that there is a complex number of trends in the caseload. In addition, a leading case will often be working its way through a system on a particular issue. This can create backlogs. When a judgment is handed down by the Court of Appeal or the Supreme Court, representatives can seek to rely broadly on the principles set out and see how far they can advance new arguments at first instance. Many of the cases that are directly cited in submissions—even those submissions which are poorly formatted—are of relatively recent origin.

[108] See D. Thym, 'Respect for Private and Family Life Under Article 8 ECHR in Immigration Cases: A Human Right to Regularise Illegal Stay?' (2008) 57 *International and Comparative Law Quarterly* 87.

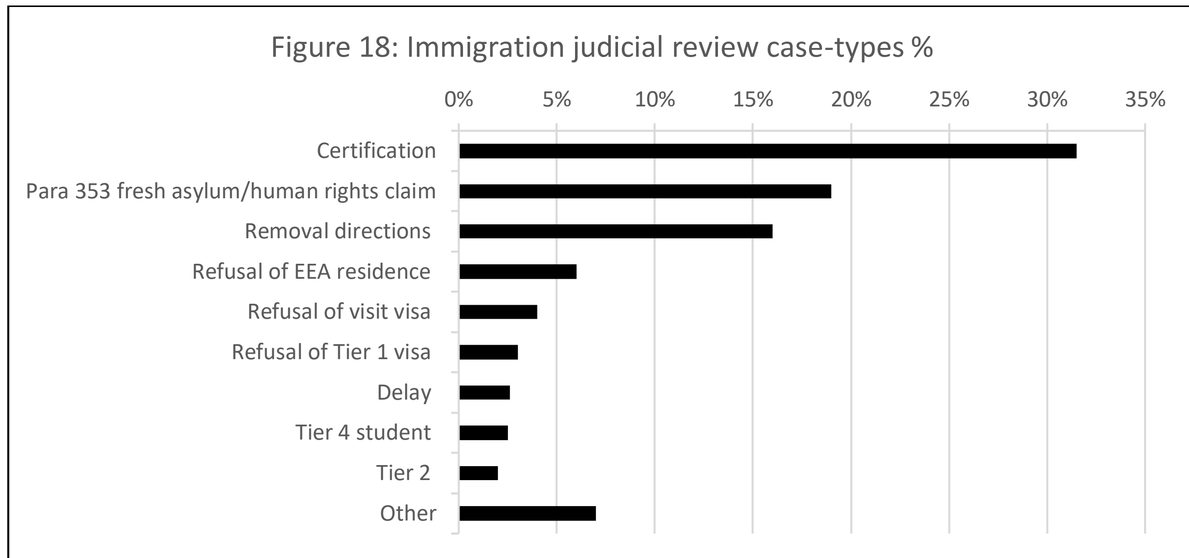
Immigration judicial review case-types

Table 1 shows the types and number of claims from the sample of 342 case-files.

Asylum or Human rights claim certified as clearly unfounded	110
Para 353 asylum or human rights claim	67
Removal directions	55
Refusal of European Economic Area (EEA) residence permit Extended Family Member	21
Refusal of visit visa	14
Refusal of Tier 1 visa	11
Delay	9
Tier 4 student	9
Tier 2	8
Refusal of permission to marry	2
Domestic violence decisions	2
Leave to remain outside of the rule	3
Refusal of limited leave to remain via 10 year partner route	1
EEA residence – non Extended Family Member	1
Certification under 94B – criminal deportation out of country appeals	2
Statelessness	5
Dublin asylum removal	2
Refusal to recognise as trafficking victim	2
Refused indefinite leave to remain entry clearance	1
Domestic violence	1
Deportation	1
Passport facilities	1
Entry central refusal of domestic worker	1
European Community Association Agreement decisions	1
Refusal to accept a take charge request by Syrian unaccompanied minor in Greece	1
Indefinite leave to remain revoked on the basis of deception	2
Refusal of visitor visa for medical treatment	1
Invalid application for Leave to Remain as no fees paid or ID documents	2
Home Office letter advising to leave	1
Tier 5 religious worker	2
Asylum age assessment	2
Fee waiver	2
Leave to remain on compassionate grounds	1
Tier 4 general visa	2
Refusal of naturalisation	1
Request for reconsideration refusal	1
Refused under Rule 276B	1

Total	349[109]

Figure 18 shows the percentage of the largest case-types from the sample of case-files.



This research collected data on the types and categories of immigration judicial review during the time period from which the cases in the sample were selected. However, it would be profitable to all concerned if in future this data was collected routinely.

Recommendation

HMCTS should routinely collect data on the types and categories of immigration judicial reviews.

We now consider the principal types of judicial review in more detail.

Certification of asylum and human rights claims

The Home Office has statutory powers to certify asylum and human rights claims as clearly unfounded.[110] Claims can be certified on either a case by case basis or a class basis. For instance, asylum or human rights claims lodged by nationals entitled to reside in designated

[109] The total number is slightly higher than the number of case-files (342). This is because some cases fell under more than one case-type.

[110] Nationality, Immigration and Asylum Act 2002, s 94.

countries are to be certified unless the Home Office is satisfied that the claim is not clearly unfounded.[111]

The consequence of a claim being certified as clearly unfounded is that the applicant can only appeal from outside the UK. An out of country appeal is typically seen to be disadvantageous in various respects. The applicant cannot attend in person to give oral evidence or to be cross-examined. The rationale for the power to certify claims is that to permit clearly unfounded asylum and human rights claims to progress through the in-country appeals system would adversely impact upon the limited resources of the tribunal appeal process by delaying the hearing of the many other appeals which are considered to be properly arguable. Further, permitting clearly unfounded claims to proceed in-country can provide further scope for applicants to delay the final conclusion of their case so as to evade immigration controls. In essence, the certification power gives the Home Office a "gate-keeping" or "screening" function so as prevent those individuals with clearly unfounded cases from pursuing their appeals in-country.

From one perspective, the ability of the Home Office to certify a claim as clearly unfounded may seem to be somewhat anomalous: the Home Office both makes the initial decision and also decides whether or not the claim is clearly unfounded, with the consequence that it is the Home Office that decides the location from which the claimant can appeal against the decision (i.e. from within or outside the UK). In such cases, the claimant retains a right of appeal, but it can only be exercised out of country. The decision to certify a claim as clearly unfounded is susceptible to judicial review.

The legal test for certification is that an asylum or human rights claim can only be certified as clearly unfounded if it is so wholly lacking in substance that the appeal would be bound to fail.[112] In *ZL and VL*, the Court of Appeal held that Home Office decision-makers must: (i) consider the factual substance and detail of the claim; (ii) consider how it stands with the known background data; (iii) consider whether in the round it is capable of belief; (iv) if not, consider whether some part of it is capable of belief; and (v) consider whether, if eventually

[111] Nationality, Immigration and Asylum Act 2002, s 94(3).
[112] *R (Bagdanaviciene) v SSHD* [2003] EWCA Civ 1605, [58].

believed in whole or in part, it is capable of coming within the Convention. If the answers are such that the claim cannot on any legitimate view succeed, then the claim is clearly unfounded and can be certified as such.[113] The question on judicial review is whether the Home Office was right to certify the case as clearly unfounded. In *ZT (Kosovo)*, Lord Philips noted that:

> "a challenge to the Secretary of State's conclusion that a claim is clearly unfounded is a rationality challenge. There is no way that a court can consider whether her conclusion was rational other than by asking itself the same question that she has considered. If the court concludes that a claim has a realistic prospect of success when the Secretary of State has reached a contrary view, the court will necessarily conclude that the Secretary of State's view was irrational."[114]

The Upper Tribunal must examine whether the Home Office has adequately considered and decided whether the applicant's claim is clearly unfounded. The reviewing court needs to bear in mind that the onus rests on the applicant to demonstrate his or her asylum or human rights claim. The intensity of review in a certification case is at the more, and possibly most, intensive end of the spectrum. Nevertheless, the jurisdiction remains a supervisory and reviewing one.[115] If an asylum or human rights claim has been lawfully certified to be clearly unfounded, then an out of country appeal is considered to be an effective and adequate remedy.

From the case-file analysis, there were 110 certification judicial review claims. Figure 19 shows the outcomes of these judicial reviews. The majority of such claims are then refused. Such cases are refused permission for judicial review on the basis that the challenged decision is not arguably unlawful or unreasonable.

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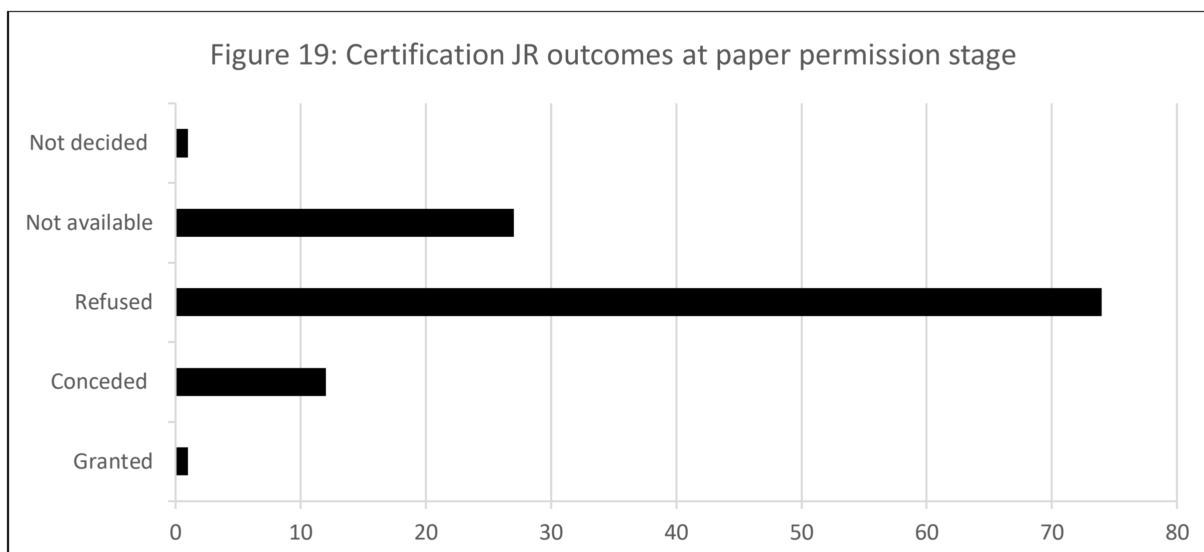
[113] *R (L and another) v Secretary of State for the Home Department and the Lord Chancellor's Department* [2003] EWCA Civ. 25, [2003] 1 WLR 1230, [57].
[114] *ZT (Kosovo) v Secretary of State for the Home Department* [2009] UKHL 6, [23].
[115] *R (FR (Albania)) v Secretary for the Home Department* [2016] EWCA Civ 605, [62].



Our study of the case-files highlighted some issues concerning the use of the Home Office's certification powers. One issue concerns the application of the legal test to certify a claim. In legal terms, there are two decisions being made by the Home Office in such cases: first, the substantive decision to refuse the asylum or human rights claim; and, second, the decision to certify the claim as clearly unfounded. The Court of Appeal in *FR (Albania)* emphasised that it is impermissible for the Home Office case-worker to conflate the substantive asylum or human rights decision with the certification decision. As the court emphasised, there is a two-stage reasoning process in play here: the substantive decision and certification decision and the two are to be given separate consideration. In other words, it does not follow that an asylum or human rights claim is clearly unfounded simply because it has been rejected.[116] There are different legal tests in play which must be applied properly. For instance, a claim may be refused, but it does not automatically follow from this that the claim is clearly unfounded. It is possible for a claim to be refused, but for there to be an argument that the claim would have a possibility of success on appeal. However, we encountered instances in which this analytical separation did not happen in practice.

Case 330. The applicant's human rights claim had been refused and certified by the Home Office as clearly unfounded. The Home Office decision considered in detail the substance of the applicant's human rights claim. As regards certification, the decision letter stated: "After

[116] *R (FR (Albania)) v Secretary for the Home Department* [2016] EWCA Civ 605, [126].

considering all the evidence available it has been decided that your human rights claim is clearly unfounded as it has been certified under section 94(1) of the Nationality, Immigration and Asylum Act 2002. This is because you fail to meet Appendix FM and Paragraph 276ADE of the Immigration Rules and there are no grounds to warrant a grant of leave to remain outside the Immigration Rules. This means that you may not appeal while you are in the United Kingdom." The applicant argued that the Home Office had failed to apply the proper legal test when certifying the claim because the decision to certify was entirely predicated on the basis that the application had been refused. Further, it was argued that there had been a failure to adequate reasons why certification was appropriate in this case and why the claim was bound to fail before the First-tier Tribunal. It was also argued that the Home Office had failed to take any account of the legal test for certification. It was not enough for the Home Office to certify on the basis that the substantive application had been refused; if this was correct then all refused applications could be certified, but such an approach would be unlawful. The case was settled through a consent order. In summary, the Home Office had failed to apply the correct legal test to the certification decision and it had conflated the substantive decision to refuse the claim with the decision to certify the claim as clearly unfounded.

The interviews with Judges highlighted important points. One Judge noted that there was a perception that the Home Office was certifying too many cases. Another judge explained:

> "I have probably granted permission on more certification cases than others, largely because I think the Home Office are stretching their use of that power a bit at the moment. They have got a standard paragraph in those cases which says: 'you have not satisfied the rules, you have not identified anything exceptional. Therefore we are also certifying your claim as clearly unfounded'. Now, there is a different test. There is a gap between satisfying the rules and meeting the threshold that says on no legitimate view can your claim succeed. So, in many of those cases, I have granted permission because the Home Office have not really applied their minds to the difference in those two things and they have not given proper reasons as to why it goes that stage further as to not being able to get anywhere ever."[117]

[117] Upper Tribunal Judge interview.

A third judge commented:

> "I think I would agree to an extent with the view that the Home Office are a bit more 'gung ho' about certifying than they were when I started doing this work. Whether that reflects a change in policy or just some sort of drift I don't know. I suspect the latter. 'If we, the Home Office, don't think it's a good claim, then it is unlikely a first tier judge would think it is a good claim' and so on and so forth. But I think we have to be alert to the possibility that it really has got to be completely hopeless for a certification decision to be a lawful one, and if you can see some room there, even if you would not agree with it yourself, if it is something that has some possibility to it, then I think one has to look at the certification decision in that light."[118]

The risk with excessive certification is that, in some cases, it does not necessarily result in the quicker handling of cases, but tends to increase both timescales and costs. One judge noted that in some cases, a certification decision challenged by way of judicial review saves neither time nor money, but can actually increase them.

Representatives also highlighted the risk that refusal letters conflated the merits of a claim with the clearly unfounded test. One representative noted, "to say something is bound to fail is a very stringent test. There's probably a very good chance that a case might fail, but that is not the test. The test is whether the case is bound to fail. And there are not many protection claims that you can really say that about. Some will be bound to fail, but not many." Another representative explained:

> "A lot of judicial reviews are about certification. It was much better when there was a right of appeal because then somebody could look at the substantive case and the evidence in the case. It's clumsy. Judicial reviews is a clumsy way of looking at certification decisions because Judges cannot really engage fully with the substantive merit of the case but then they have to kind of crystal ball gaze about what a judge

[118] Upper Tribunal Judge interview.

> would do. So it's very unsatisfactory. To win in a certification case, if you've got something very robust, such as a new expert report. You are likely to lose if what you have got is just more detailed witness statements and things, but actually that's not necessarily what would win or lose in an appeal. So it's not very realistic."[119]

The overall picture of certification decisions is mixed. The case-files also contained cases in which the decision to certify did contain separate detailed reasons for why the case was considered to be clearly unfounded. The case-file analysis also contained other instances in which the Home Office had made legal errors when certifying asylum and human rights claims.

The following cases include those both refused permission and settled in favour the claimant.

Case 37. The applicant had entered in 2012 and remained after the expiry of her leave. The applicant could not satisfy the requirements of the Immigration Rules to remain on private and family life grounds. There were no exceptional circumstances, which would result in unjustifiably harsh consequences. The Home Office had applied the correct test in certifying the claim and considered all relevant matters. The claim, taken at its highest, had no realistic prospect of success and was bound to fail. The Judge refused permission as the decision to certify was not arguably unlawful or irrational.

Case 306. An applicant with a long immigration history had re-entered the UK and later arrested and convicted of drugs offences. He was served with a deportation notice, but did not lodge any representations. Removal directions were set. The applicant then sought asylum. The Home Office refused the asylum claim on the basis that there was a sufficiency of protection and internal relocation. The Home Office considered that there was no reasonable explanation for the delay in claiming asylum and therefore certified the asylum claim as clearly unfounded under section 96 of the 2002 Act. The applicant had been issued with notices reminding him of the need to supply particulars to support any claim. The applicant had not sent those particulars to the Home Office. The Judge concluded that it was

[119] Representative interview.

the claim had been lawfully certified as being clearly unfounded. "Certification itself provides an out of country appeal which in the circumstances of this case provides an adequate remedy."

Case 25. The applicant had entered the UK in 2010, which later expired. In 2016, he claimed asylum, which was refused and certified. Judicial review was refused permission because the asylum claim was, taken at its highest, bound to fail as the applicant could relocate internally within his home country. An article 8 claim was also bound to fail because the applicant and his partner could re-establish family life in India without encountering even arguably insurmountable obstacles.

Case 273 The applicant from Pakistan had married his wife, a national from a third country, in the UK. An asylum claim by the applicant and his wide as a dependant was refused and certified by the Home Office. The Home Office accepted that the applicant's wife would be at risk in Pakistan. However, the refusal letter only assessed the husband's claim on the basis of the risk on return to wife's country of nationality, not Pakistan. There was no evidence to indicate that the applicant was removable to the wife's country of nationality or entitled to reside there. However, the Home Office had proceeded on the basis that the applicant could reside in the wife's country when in fact no such entitlement had ever been claimed. The applicant argued through judicial review that his asylum claim had not been properly examined by the Home Office and the refusal decision and certification was fundamentally flawed and that the whole basis of the decision was misconceived from the outset. Further, the Home Office had certified the claim under section 94(3) on the basis that the claim concerns nationals from designated countries. However, neither Pakistan nor the other country were designated for this purpose. The claim was settled by a consent order.

Case 120 The applicant's human rights claim under Article 3 had been certified as clearly unfounded. The applicant had raised the issue of risk to health on return. However, the Home Office had not applied the decision of the European Court of Human Rights in *Paposchvili* which held that the authorities in the returning state must verify on a case-by-case basis whether the medical care generally available in the receiving state is sufficient and

appropriate in practice for the treatment of the applicant's illness so as to prevent him or her being exposed to treatment contrary to Article 3.[120] Accordingly, it was argued that it could not be said that any appeal would be clearly unfounded. The case was conceded. In short, there was a failure to apply relevant case-law thereby rendering the decision legally defective.

Recommendation

The Home Office's power to certify cases as clearly unfounded should be exercised carefully and only when appropriate.

Certification under section 94B

A related, though different, power to certify arises in section 94B cases. This power enables the Home Office to certify a human rights claim made by an individual subject to a deportation order so that any appeal can only be brought from outside the UK. Section 94B provides that the Home Office can certify in a deportation case if removal would not be unlawful by being contrary to section 6 of the Human Rights Act 1998. The grounds upon which the Home Office State may certify a claim include (in particular) that the applicant would not, before the appeals process is exhausted, face a real risk of serious irreversible harm if removed to the country or territory to which he or she is proposed to be removed. The power has been amended by section 63 of the Immigration Act 2016 which enables the Home Office to certify any human rights claim irrespective of whether the claimant is liable to deportation.

A key difference between section 94B and other certification powers is that the section 94B power does not require the claim to be considered to be clearly unfounded. The section 94B power can be used to certify any claims irrespective of whether it is well-founded or clearly unfounded. Indeed, the Home Office will use the 94B power if it is unable to certify the claim as clearly unfounded. Accordingly, the fairness of the out of country appeals process in such cases assumes greater importance than in ordinary certified-as-clearly-unfounded decisions.

[120] *Paposchvili v Belgium* [2016] ECHR 1113. See also *AM (Zimbabwe) v Secretary of State for the Home Department* [2018] EWCA Civ 64.

In *Kiaire and Byndloss* the Supreme Court held that there were significant practical obstacles that weakened the effectiveness of out of country appeals in such cases.[121] This ruling has been subsequently used to challenge the fairness of out of country appeal procedures in deportation cases. In one case, an Upper Tribunal judge granted permission on the basis that "the grounds are arguable in the light of *Kiarie and Byndloss*" (Case 122).

The application of *Kiarie and Byndloss* is, though, limited to section 94B cases. It does not extend to ordinary non-deportation certification cases because there is a different test for certification. For instance, in a case concerning a human rights certified as clearly unfounded, the claimant had sought to argue, following *Kiarie and Byndloss*, that an out of country appeal was an ineffective remedy. This argument was rejected on the basis that *Kiaire and Byndloss* concerned the exercise of section 94B, which is certification of a human rights challenge against a deportation decision. The section 94B certification power can be used irrespective of whether or not the claim is clearly unfounded (Case 61).

The difference between "ordinary" certification cases and section 94B cases is likely to affect the handling of appeals. The First-tier Tribunal has been developing a system of video-link hearings for appellants with section 94B appeals returned overseas. However, such a system will not, so it seems, be used in cases certified as being clearly unfounded, principally because such appeals have been so certified.

Fresh asylum/human rights claims - paragraph 353 judicial reviews

Under paragraph 353 of the Immigration Rules, when an asylum or human rights claim has previously been refused, the claimant may then make further submissions. The Home Office will then decide consider the further submissions and whether they are amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content: (i) has not already been considered; and (ii) taken together with the previously considered material, they create a realistic prospect of success, notwithstanding its rejection. The consideration of further submissions under paragraph 353 therefore

[121] *R (Kiarie and Byndloss) v Secretary of State for the Home Department* [2017] UKSC 42.

involves a two-part test. First, the Home Office must assess whether leave should be granted on the basis of the further submissions; and, second, if leave is not granted, the Home Office must then consider whether the further submissions amount to a fresh claim in accordance with the test in paragraph 353. The essential issue for the Home Office to decide is whether the claimant would have a reasonable prospect of success before a hypothetical First-tier Tribunal judge.

All applicants who receive a paragraph 353 decision have already been refused on asylum or human rights grounds. However, neither asylum nor human rights decision-making is static and fixed. New evidence and facts may come to light. In asylum claims, country conditions can improve or deteriorate. The claimant may present further evidence that might enhance his or her credibility. In a human rights claim, facts can also change, such as the amount of time that a person has spent in the country or their family relationships. Such factual changes and developments may mean that the individual could lodge a fresh asylum or human rights claim.

The purpose of paragraph 353 is, like certification, to operate as a filter mechanism. On the one hand, there must be a process by which fresh asylum and human rights claims can be identified and considered. On the other hand, there is the risk of frivolous or abusive attempts to make repeated claims to re-open cases without sufficient new cause. The summary nature of the para 353 decision affects the ability of an individual to access the appeals process. If the Home Office accepts the applicant's further submissions as a fresh claim, but refuses it on its substantive merits, then the applicant can appeal that decision in-country to the First-tier Tribunal. As there is no appeal against the Home Office's refusal to accept the applicant's further submissions as a fresh claim, judicial review is the only remedy. Only a small percentage of further submissions are treated as fresh claims by the Home Office. Around 86% of further submissions are refused outright.[122]

In *AK*, the Court of Appeal stated:

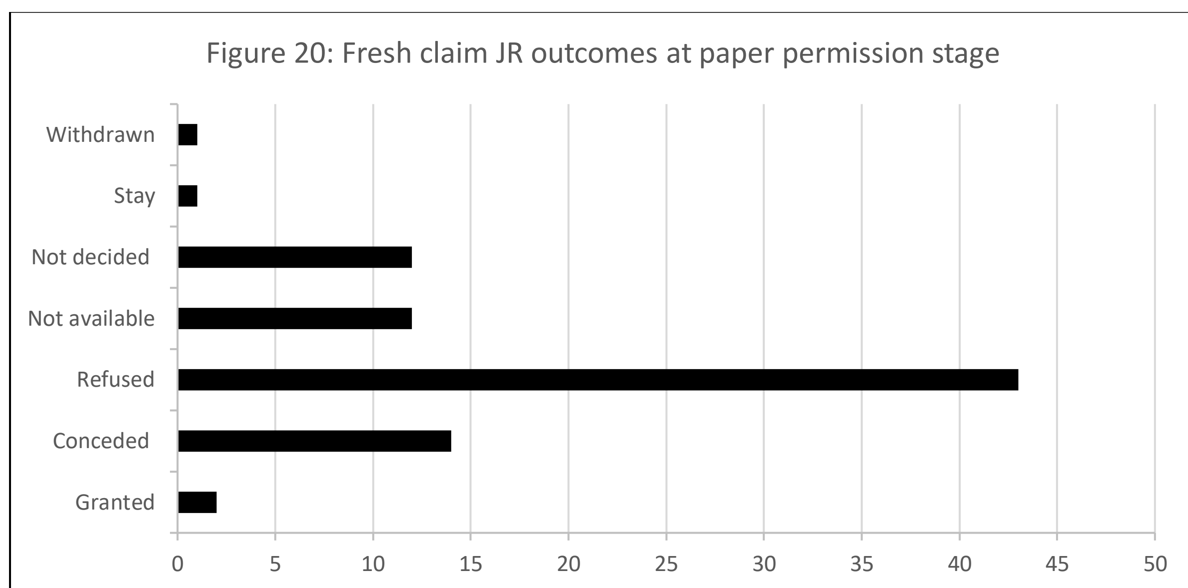
[122] Refugee Council, 'Subsequent applications' <http://www.asylumineurope.org/reports/country/united-kingdom/asylum-procedure/subsequent-applications> (accessed 19.11.2018).

> “Rule 353 is aimed at the mischief of an unsuccessful claimant seeking, after he has exhausted the appellate process, to begin the whole process all over again by making a supposedly fresh claim without sufficient cause. If an unsuccessful applicant is allowed to remain for a long time after the failure of his initial application, that is liable to magnify both the risk of abuse of process by the making of further supposed fresh claims when there is no substantial basis for them, and also the possibility of genuine fresh material of sufficient weight to justify a fresh claim. Rule 353 provides a test for determining what should be regarded as a fresh claim. The mechanism provided is that the Home Secretary determines whether the test is passed. The court has a power and responsibility through judicial review to see that the system is properly applied, but the role of the court is limited to that of review. To allow the same appeal process as applies to the original application would defeat the purpose of the exercise. It follows from the nature and structure of the rule 353 scheme that a decision by a Home Office official whether further representations pass the rule 353 threshold amounting to a fresh claim is a decision of a different nature, and requires a different mind set, from a decision whether to accept an asylum or human rights claim.
>
> Precisely because there is no appeal from an adverse decision under rule 353, the decision maker has to decide whether an independent tribunal might realistically come down in favour of the applicant's asylum or human rights claim, on considering the new material together with the material previously considered. Only if the Home Secretary is able to exclude that as a realistic possibility can it safely be said that there is no mischief which will result from the denial of the opportunity of an independent tribunal to consider the material.”[123]

Para 353 imposes a somewhat modest test for further submissions to be accepted as a fresh claim. The applicant only has to show that there is a realistic prospect of success. It is not necessary to demonstrate success is guaranteed.

[123] *AK (Aghanistan) v Secretary of State for the Home Department* [2007] EWCA Civ 535, [22]-[23].

In *WM (DRC),* Buxton LJ stated that the court must ask two questions.[124] First, has the Secretary of State asked himself the correct question? The question is not whether the Secretary of State himself thinks that the new claim is a good one or should succeed, but whether there is a realistic prospect of a Judge, applying anxious scrutiny, thinking that the applicant will be exposed to a real risk of persecution on return. Second, in addressing that question, both in respect of the evaluation of the facts and in respect of the legal conclusions to be drawn from those facts, has the Secretary of State satisfied the requirement of anxious scrutiny? If the court cannot be satisfied that the answer to both of those questions is in the affirmative then it will have to grant an application for review of the Secretary of State's decision. In a judicial review case, the challenge is to the rationality of the Home Office's decision, not as to its correctness or otherwise. From the case-file analysis, there were 67 fresh claim judicial reviews. Figure 20 below shows the outcome of these claims.



Many fresh claim judicial reviews are refused permission by the Upper Tribunal because the Home Office's refusal to consider the further submissions as a fresh claim is not irrational. It is important to understand the process involved. In fresh claim judicial reviews, the Upper Tribunal is considering whether there is an arguable public law error in the Home Office's refusal to consider further submissions as a fresh claim. This refusal is itself based upon the Home Office decision-maker's assessment that there is not a realistic prospect of success that

[124] *WM (DRC) v Secretary of State for the Home Department* [2006] EWCA Civ 1495, [11].

a First-tier Tribunal Judge, applying the rule of anxious scrutiny, would think that the applicant would be exposed to a real risk of persecution on return. Cases refused permission are weak cases on their own facts.

At the same time, both the interviews and examination of case-files highlighted a general risk with fresh claim decision-making. There is a risk that the Home Office may take the approach that because it has previously refused the applicant's asylum or human rights claim on its merits, it is likely to be refused again. This may arise in relation to credibility issues. For instance, while country conditions may change, if an asylum applicant has previously been refused on grounds credibility grounds, then the approach might be taken that it is unlikely that further submissions would be significant different from those previously submitted and create a realistic prospect of success.

One judge interviewed noted that there is often excessive reliance by the Home Office in fresh claim decisions on the findings in previous appeal determinations, sometimes beyond their reasonably permissible limits. In such cases, there will normally have been an earlier tribunal appeal determination on asylum and/or human rights grounds. In *Devaseelan*, it was held that the first determination by the Tribunal should always be the starting point.[125] However, a previous decision is only a starting point and not an end point for the purposes of a fresh claim. The judge noted that there is sometimes a tendency by the Home Office to use *Devaseelan* beyond what it actually says. Rather than seeing the earlier determination as a starting point, there is a tendency to treat the earlier determination as set in stone and to refuse to recognise the factual basis for an asylum or human rights claim may move. Accordingly, there may be a need to move away from the initial determination when there is good reason for doing so. *Devaseelan* is not relevant to post-decision facts. Another Judge commented:

> "You can get a case where really nothing extra has been done or said since the first-tier judge's decision, where it was understandable that Home Office placed weight on the previous decision. Then in other cases, the Home Office will tend to focus quite extensively and quote from a decision, perhaps from eight or ten years ago, and also

[125] *Devaseelan v Secretary of State for the Home Department* [2002] UKIAT 00702; [2003] Imm AR 1.

> possibly ignoring the fact that at the appeal the applicant may not have been represented, which has always seemed to me to be potentially quite a relevant factor to the weight you would give to a decision."[126]

One representative interviewed highlighted a perception that "the Home Office is very reluctant to accept something as a fresh claim when to most reasonable observers it clearly is. If it is something that has not been raised before and it raises realistic prospects of success before an immigration judge and it's only a modest hurdle, then it is very frustrating that the Home Office doesn't seem to be able to apply that test correctly."

A common theme in refused fresh judicial reviews refused permission is that, on examination, the applicant had not submitted fresh evidence that the applicant's situation had changed. In one case (case 103), the Judge refused permission on the basis that the grounds of challenge failed to address the fact that the Home Office decision letter had stated that the applicant did not submit any evidence in support of his further representations. It was unarguable that the Home Office overlooked any evidence given that the representations made by the applicant's representatives did not amount to evidence, but were unarguably assertions.

Another theme is that the applicant has recently had an appeal dismissed and nothing had changed in the meantime. For instance, in one case (case 52), the applicant had sought to acquire an immigration status for 10 years. Two applications to remain as a dependant relative had been refused. An application for leave to remain on the basis of Article 8 was refused with a right of appeal. The appeal was dismissed. A year later, the applicant was issued with a notification of a decision to remove. He then made a fresh claim. This was refused. A judicial review of this was refused on the grounds and deemed TWM. The applicant then submitted a further application for leave to remain. This was rejected as a fresh claim and a judicial review was refused permission as follows: "The nub of the respondent's decision is that the applicant had added nothing of significance to his previously exhausted claims. The grounds of challenge are vague and irrelevant. They do not show that non-recognition of a

[126] Upper Tribunal Judge interview.

fresh claim may have been unlawful. No other outcome should sensibly have been expected. The proceedings are only dilatory." The case was certified as TWM.

The following cases illustrate the types of issues that arise.

Case 64. For two years, Home Office did not consider the claimant's further submissions in its refusal decision. The case was then settled by consent. The claimant, a Sri Lankan national had sought asylum and then, sometime later in 2015, had submitted further submissions. The claimant then submitted a number of 'chase up letters' and a letter before action. The Home Office had not responded to this and did not acknowledge the fresh claim submitted in 2015. In 2017, the Home Office issued a refusal decision. However, the refusal decision did not engage with the fresh claim material submitted in 2015. The 2017 refusal decision referred to the applicant's previous asylum refusal and did not refer to the 2015 further submissions. The applicant argued that the Home Office had appeared not to have specifically addressed the new evidence in its refusal decision. It was argued that the Home Office had, accordingly, unlawfully delayed, had failed to apply the para 353 test and had failed to have regard to the relevant evidence provided. The Government Legal Department responded that the fresh claim submissions were not before the decision-maker because they had been considered as invalid because they had been posted to the Home Office. Home Office policy requires that further submissions must be made in person at the Further Submissions Unit in Liverpool unless the applicant falls into one of the exceptions. The decision was withdrawn.

Case 50. In 2015, the applicant's application for leave to remain was refused by the Home Office. In 2016, the applicant to the First-tier Tribunal, which subsequently dismissed his claim that removal would breach his Article 8 rights. The First-tier Tribunal held that the applicant did not qualify to remain under 276ADE of the Immigration Rules. Also, as the applicant had been in the UK illegally, his private life attracted little weight. The First-tier Tribunal Judge concluded that there would not be significant obstacles to integration in India. Permission to appeal this decision was refused by a First-tier Tribunal judge and then by an Upper Tribunal judge. In 2017, the Home Office refused leave to remain on the basis of family and private life and rejected his further submissions as a fresh claim. The applicant then sought judicial review

of this. The Upper Tribunal Judge held that the applicant had provided no evidence that the situation had changed at all let alone significantly since the previous appeal. The applicant had no basis of stay under the Rules and had provided no evidence to show that his family and private life were sufficiently strong to even arguably outweigh the public interest in removal, particularly where he had been in the UK unlawfully for most of the period of residence. For these reasons, the Home Office's decision was unarguably lawful and rational.

If the Upper Tribunal judge grants permission in a fresh claim judicial review, then the judge will have held that it is arguable that the refusal to consider further submissions as a fresh claim is unlawful. The claim may then proceed to a substantive hearing. However, in practice, very few para 353 judicial reviews reach a substantive hearing because the Home Office may, for pragmatic reasons, withdraw and reconsider its decision. An alternative to this could be to introduce better linking up between judicial reviews and appeals. When the Upper Tribunal grants permission in a fresh claim judicial review, the case will be returned to the Home Office to reconsider whether the further submissions amount to a fresh claim. The Upper Tribunal does not have the power to direct that, if the Home Office resists the case, then the case should be transferred directly to the First-tier Tribunal for an appeal. However, in such cases, the First-tier Tribunal will very frequently be the eventual destination for the case. If the Upper Tribunal could direct that the case be transferred there directly, then this would be more efficient and timely. The ability to make such a direction might be resisted on the ground that it blurs the division between legality and merits. On the other hand, such a power could be more efficient as it could reduce costs and the amount of time involved.

Removal judicial reviews

Foreign nationals without leave to remain and no outstanding immigration applications with the Home Office are liable to be removed. The Home Office can commence removal action by issuing removal directions. The decision to issue removal directions can be challenged by way of judicial review. Such individuals will often, but not necessarily always, be in immigration detention. The judicial review will challenge the decision to issue a notice of removal or removal directions. The grounds of challenge will often focus upon challenging previous immigration applications, such as consideration under Article 8. As one representative explained:

> "Technically, you cannot get legal aid for a challenge against removal directions. In fact, more often than not you would not be challenging the removal direction; it would be the underlying decision that led to the removal decision that is being challenged. Although, when one looks at a spate of recent decisions in the Solicitors Disciplinary Tribunal and elsewhere, it certainly seems there are a lot of solicitors out there who are challenging removal directions which as I say, often is not what you should be challenging. It should be the underlying decision that led to the detention and removal."

Such judicial reviews are also known as seeking a stay against removal. Home Office Immigration Enforcement will give the individual a removal window indicating that the individual will not be removed before a certain date and advising that legal advice be sought or to lodge a judicial review lodged before a specified date. Such judicial review claims typically require urgent consideration. In most circumstances removal will only be deferred if the individual lodges a judicial review or is granted an injunction. In some circumstances only an injunction will defer removal if, for instance, within the last three months a previous judicial review was concluded on the same or similar grounds or if a statutory appeal was concluded on the same or similar grounds.

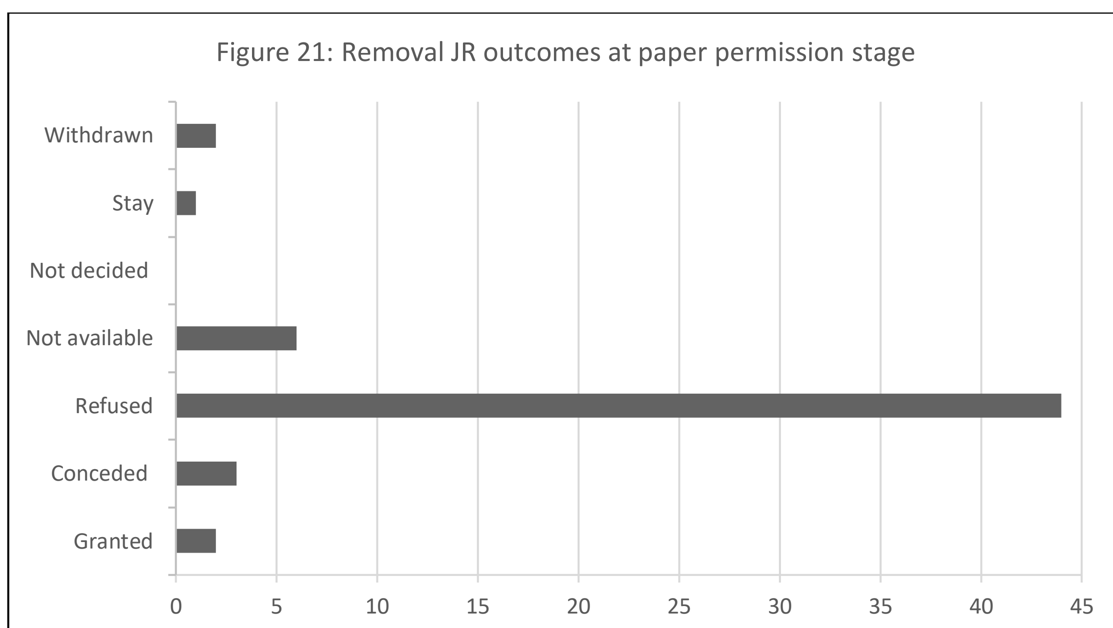
Three features of removal judicial reviews stand out. First, the speed with which they are lodged by claimants and representatives. It is common for the claimant's representatives not to have complied with the Pre-Action Protocol because of the urgency involved. Removal judicial reviews are also considered with expedition by the Upper Tribunal. For instance, typically a judicial review claim is issued and decided by a Judge on the same day.

Second, there is sometimes a changing factual basis of a claim in removal judicial reviews. For instance, a judicial review of a removal order on the basis that the applicant has an outstanding immigration application will be remedied if the Home Office makes a substantive decision on that application. Judicial review claims can also quickly become academic if the claimant has already been removed or for other reasons. Third, the courts have highlighted that some of these claims have been made by representatives when there is no real merit to

them, but they are lodged to disrupt the removal process and to buy more time in the UK for their clients.[127] Claimants' motives for seeking judicial review in such circumstances are quite clear. As one representative explained:

> "We have an exclusive contract to deal with detainees at an immigration detention centre and you'll find that those that are detained and threatened with removal want to JR everything, anything that comes in from the Home Office. There's obviously something circulating within the removal centres encouraging people to go for JR as it is the only thing that's going to, as they say, cancel your ticket. And you'll have clients on the phone saying, 'Yeah. You've got to issue a judicial review, you've got to cancel my ticket.' And, of course, it's not as simple as that, but that service seems to be the prevailing experience of those who are detained and threatened with fairly imminent removal."[128]

From the case-file analysis, there were 55 judicial reviews challenging removal directions (and related decisions). The outcomes were as follows:



[127] *R (SB (Afghanistan)) v The Secretary of State for the Home Department* [2018] EWCA Civ 215.
[128] Representative interview.

From the sample, most judicial review orders against removal were refused on the ground that the claim lacked merit and has been previously considered and refused, that there were no outstanding applications with the Home Office, and no other obstacles to removal. Many such challenges may amount to a desperate and last-minute attempt to prevent removal. Representatives noted the difficulties: "it is really hard to get injunctions against removal."

The following cases illustrate the type of removal judicial reviews that arise.

Case 180. The applicant sought judicial review of removal and judicial review that the Home Office consider his asylum claim. The Home Office had previously written to the applicant that it considered that his asylum application had been explicitly withdrawn. Refusing permission for judicial review, the Judge decided that:

"If there any basis at all for the applicant's claimed fear of return to Pakistan, it is reasonable to assume that he would not have waited 11 years to make his claim for asylum; would not have waited until after being detained for the first time in 2005 before making the claim; would not have absconded in 2016; would have cooperated with the asylum process, and would not have attempted to evade detection by UK authorities by attempting to enter the UK in 2017 by means of a false document. On his application notice in relation to the application for a stay, the applicant states that his intention is not to frustrate removal. It seems to me that that is precisely the applicant's intention."

Case 89. The applicant, an overstayer, had exhausted his appeal rights in 2011. He challenged a removal decision. Further submissions had been made and rejected under para 353. The grounds complained that it would be unlawful to remove the applicant whilst he had submission spending. The Judge held that the submissions were a repetition of submissions made previously and which had already been addressed by the respondent and rejected. The Judge stated: "The respondent is not obliged to defer removal pending repeatedly made representations from an application, particularly when they raise the same issues already examined and considered. The applicant is a person without leave. His grounds raised nothing

which disclosed any illegality in the respondent's decision to remove him. The balance of convenience does not favour a stay on removal."

Case 82. The applicant, an overstayer, had exhausted his appeal rights. The Home Office sought to remove him. The applicant sought judicial review of the removal directions and the next day claimed asylum. The Government Legal Department argued that the applicant was using the judicial review process to raise new grounds (Article 8) and that this was an abuse of process. Insofar as the judicial review could be read as a challenge to the removal direction, then it was reasonable lawful. Given the asylum claim, the removal directions had been deferred by the Home Office. Refusing permission, the Judge concluded that this had been a hopeless judicial review that had been superseded and should have been withdrawn as it had become academic following the deferral of the removal directions.

Case 128. The applicant sought a stay of removal. The applicant had previously made a human rights applications and his appeal had been dismissed. The applicant then made further submissions on human rights grounds, which were refused, and then sought and been refused judicial review of this fresh claim decision. In this second judicial review, the applicant argued that the Home Office had failed to consider further submissions relating to a human rights claim. The applicant had argued that her charitable work had not previously been considered as a part of a human rights claim. However, a copy of the appeal decision had not been included and so it was not possible to assess this point. Nonetheless, the Judge stated that charitable work was not likely to be given significant weight. Furthermore, submissions based on *Agyarko* did not make any material difference. The application for a stay was refused.

Of the 55 removal judicial reviews in the sample, three were granted permission. In one case, a litigant in person argued that he had a right of appeal as the family member of an EEA national exercising Treaty rights in the UK. That right of appeal was not suspensive (it could be exercisable out of country), but the Judge held that, applying *Kiarie and Byndloss*, it may be arguable that an out of country appeal is not an adequate remedy (Case 48). In another case, the applicant had made an asylum claim on account of her sexuality that attracted an in-country right of appeal. The applicant had appealed out of time. However, the applicant's

representatives had mistakenly faxed the appeal to the out of country appeals number. In the meantime, the Home Office had detained the applicant and served removal directions. Granting permission for judicial review, the Judge held that it was arguably contrary to the interests of justice that the applicant be removed until at least it was known whether the First-tier Tribunal had accepted the explanation and allowed the appeal out of time (Case 70). In an ETS/TOEIC alleged student deception case, the Upper Tribunal granted permission for judicial review against a removal notice because, following *Ahsan,*[129] the applicant had an in-country right of appeal (Case 73).

Again, the overall picture is mixed. On the one hand, there have been instances in which people have been unlawfully removed from the UK and then the courts have ordered the Home Office to return the person.[130] On the other hand, the higher courts have on various occasions stated that last minute representations to the Home Office and accompanying judicial reviews can be highly disruptive of attempts by the Home Office to remove individuals who do not have any right to remain in the UK. The courts have also emphasised that such challenges often lack merit and are an abuse of process to disrupt removals. The courts have accordingly issued guidance emphasising the professional obligations of legal advisers to make applications for interim relief to prevent removal promptly and with a maximum of notice.[131]

A high profile case, *SB (Afghanistan),* was decided by the Court of Appeal in February 2018.[132] The High Court decision in the same case had earlier attracted attention as an instance of the Home Office unlawfully removing the claimant.[133] However, the Court of Appeal took the claimant's representatives to task and criticised them for their failures and shortcomings when seeking an interim injunction against removal. The Court of Appeal held that the High

[129] *Ahsan v Secretary of State for the Home Department* [2017] EWCA Civ 2009.
[130] See, e.g., M. Bulman, '"I was terrified": Asylum seeker speaks out after being wrongly deported from UK by Home Office' (*The Independent,* 22 July 2018) https://www.independent.co.uk/news/uk/home-news/deported-error-asylum-seeker-ethiopia-home-office-solomon-getenet-yitbarek-a8458651.html> (accessed 19.11.2018).
[131] *Madan and Kapoor v Secretary of Statement for the Home Department* [2007] EWCA Civ 770; *R (Hamid) v Secretary Of State for the Home Department* [2012] EWHC 3070 (Admin).
[132] *R (SB (Afghanistan)) v The Secretary of State for the Home Department* [2018] EWCA Civ 215.
[133] D. Taylor, 'Home secretary ignores court order and sends asylum seeker to Kabul' (*The Guardian,* 14 September 2017) <https://www.theguardian.com/uk-news/2017/sep/14/home-secretary-ignores-court-order-sends-asylum-seeker-kabul-samim-bigzad > (accessed 19.11.2018).

Court judge who had previously granted the interim injunction had done so on the basis of a mistaken misrepresentation by the claimant's representatives. The Court of Appeal noted that particular difficulties can arise when a new set of legal advisers come on the scene at the last minute:

> "The duty of candour is directed in the most part to ensuring that matters unfavourable to the applicant are drawn to the attention of the judge. There are many late applications for injunctive relief which are based on little more than an assertion that something may turn up if the new advisers are given time to investigate. Such applications should get nowhere. Yet there is a strong imperative for those instructed late in the day to make no representations or factual assertions which do not have a proper foundation in the materials available to them."[134]

Anecdotal evidence suggests that, following the Court of Appeal's ruling in *SB (Afghanistan),* the number of last minute judicial reviews for interim injunctions has declined significantly.

Points-based scheme cases

The points-based scheme concerns migration for work and study purposes. The whole rationale of the process is that decision-making focuses upon whether applicants score the necessary points. Applications are determined against objective rule-based criteria. Claimants must, for instance, submit specified documents. At the same time, the rules are very intricate and complex. Across almost all interviewees with experience of these cases, there was consensus that the particular complexity of the rules relevant to Tier 1 visas often gave rise to arguable points and a situation where Home Office officials appear not always to have properly understand the rules.

The rule-based nature of the points-based scheme can affect the nature of judicial review. One judge explained that because judicial review is limited to looking at what was before the Secretary of State, if the claimant has not submitted mandatory documents, then the Home Office can reject the application:

[134] Ibid., [57].

> "An individual might get before a first tier tribunal and be able to explain those documents or explain a gap or be asked questions on it, whereas they cannot do this in a judicial review. So, you are literally having a review of the decision that was made on the papers that was before the Home Office decision-maker. Was that a reasonable decision to have made? And it is a high threshold to say it is not a decision that no reasonable Secretary of State would have made. Have they taken into account all the documents? Have they followed the right process? Well, often yes and that makes it a lawful decision. It does not necessarily make it the right decision, and certainly not the right one for the applicant otherwise they would not be challenging it."[135]

Another judge noted two features of the points-based scheme. First, the highly complicated nature of the relevant rules, especially in Tier 1 points-based applications. Second, the judge noted that the traditional *Wednesbury* model of judicial review does not easily fit within the context of judicially reviewing points-based decisions. This is because such decisions are rule-based rather than an exercise of administrative discretion. *Wednesbury* review of decisions is based upon the model of a decision-maker exercising discretion and the court can only intervene if relevant considerations have been ignored or if irrelevant considerations have been taken into account, or if the decision is so unreasonable that no reasonable decision-maker could ever have arrived at it. By contrast, points-based scheme decisions are typically a box-ticking exercise and it can be difficult in practice to see how *Wednesbury*-style review operates in that context. A typical refusal of permission against a points-based scheme refusal is as follows: "The grounds express disagreement with the decision, but they do not identify arguable public law error. The decision is a reasonable response to the application and discloses no arguable irrationality" (Case 121).

Home Office delay as a ground of challenge

An applicant may seek judicial review of delay by the Home Office to make a decision. The failure to make an immigration decision within a reasonable timeframe may provide grounds for judicial review. Judges interviewed noted that claims challenging delay by the Home Office in considering immigration applications was previously a larger category of case. It was

[135] Upper Tribunal Judge interview.

common to have judicial review challenges against administrative delay by the Home Office in making initial decisions. Similarly, the Parliamentary Ombudsman has previously identified delay as the most prominent concern in complaints upheld against the Home Office. Delay accounted for 48 per cent of complaints upheld in 2014-15 and 27 per cent in 2016-17.[136] Representatives interviewed made the following points:

> "One of my recent cases was delay. The Home Office was just taking too long to make an asylum decision. Years and years and years and lots of excuses. I have had cases where we have won an appeal and the Home Office won't implement a decision, won't issue the stamp in the passport and obviously you correspond with them or solicitors do and they basically, they look for excuses, you know, they don't like the decision, they don't think it was right and they obfuscate and delay implementation."[137]

> "Delay is a really difficult one. We often threaten JR and do letters before claim. But then you wonder what would be the point of actually issuing a JR because more often than not it will take months and months. Most of them will settle because the Home Office will say, 'We'll make a decision within three or six months' and most judges would say, 'Well, the Home Office has got a lot to deal with and so it's perfectly reasonable that they give you this time scale.' I find the delay and the threat of delay JRs really problematic for clients because most clients just want to get a decision as soon as possible and it's very frustrating that you have to threaten JR just to get any sort of response sometimes."[138]

Judges interviewed emphasised that the number of delay cases had declined significantly and it was no longer a large component of the judicial review caseload. As one judge explained, "delay used to be a system-wide issue at the Home Office, but the number of delay judicial reviews has reduced."[139] Another judge noted:

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[136] PHSO, *Complaints about UK government departments and agencies, and some UK public organisations 2014-15* (2015), p.23; C*omplaints about UK government departments and agencies and other UK public organisations 2016-17* (2017), p.24.
[137] Representative interview.
[138] Representative interview.
[139] Upper Tribunal Judge interview.

> "You will get the odd case where the amount of time it has taken to make a decision surprises you, but it is nearly as bad as it was in past days and it is very context driven I think. So, a First-Tier Judge has allowed an appeal, but there is no decision by the Home Office implementing that decision for three or four months. You can see their frustration. But equally from the Home Office point of view, you can see they have got an awful lot of other priorities and it is really not been appropriate at that time scale to expect the Home Office to make a decision in ten days or something."

In many cases, delay can be resolved through the threat of judicial review and letters before claim. The case-file analysis contained three judicial reviews challenging administrative delay by the Home Office in reaching a decision. For instance, in one case (case 35), the applicant had made an asylum claim in 2015 and later provided the Home Office with additional information, including a medical report. The applicant had sent chase-up letters to the Home Office. By 2017, the Home Office had not made a decision on the asylum claim and had not responded to requests for updates. The applicant sought judicial review of the Home Office's failure to make a decision on the ground that it amounted to unreasonable delay. The Home Office then made a decision on the asylum claim. The judicial review was refused on the ground that it had been rendered entirely academic.

In another case (case 88), the applicant had been refused entry clearance to be granted indefinite leave to enter the United Kingdom as the child of parents settled in the United Kingdom. The applicant's appeal against this decision had been allowed by the First-tier Tribunal. The Entry Clearance Officer had then been refused permission to appeal. The applicant had then waited for nine months to be granted entry clearance and then challenged this through judicial review on the ground that there had been undue delay by the Entry Clearance Officer in implementing the decision of the First-tier Tribunal. The issue of what type and length of delay is unlawful is far from clear from the case-law. In one case (case 291), the applicant had waited for some eight months for a decision from the Home Office before seeking judicial review. The Upper Tribunal Judge refused permission on this ground in the following way: "The delay of 8 months in processing the applicant's application may be a sign

of maladministration but it is not of sufficient length to even arguably constitute unlawfulness."

Visitor visa judicial reviews

Before 2013, individuals refused a visitor visa to visit family members in the UK had a right of appeal. This was withdrawn in 2013.[140] Refusal decisions are frequently based on the conclusion of the Entry Clearance Officer that it is unlikely that the applicant would leave the UK at the end of his or her visit or that the applicant lacks sufficient funds to support himself during the visit. The nature of visit visa decision-making continues to attract controversy. According to representatives, the Home Office sometimes refuses applications for visit visas for trivial reasons.[141] Previously, family visitor appeals used to experience relatively high success rates on appeal. In the absence of a right of appeal, an applicant can seek an administrative review or make a new application that meets the reasons why a previous application was refused. Refused applicants can also seek judicial review. In a 2014 inspection, the Independent Chief Inspector of Borders and Immigration found that the removal of the full right of appeal from family visitor visa applicants had not led to a higher refusal rate, or to an overall reduction in decision quality.[142]

From our sample, there were three judicial review claims against the refusal of a visitor visa. Such a low volume of judicial reviews compares with the previously high number of appeals. For instance, in 2012/13, there were over 20,000 family visitor appeals decided by the First-tier Tribunal. The much lower number of judicial reviews is likely to be attributable to the more legalistic and limited nature of judicial review as a remedy compared with appeals and the costs involved. Individuals who could have succeeded through an appeal face lower prospects of success through judicial review. For instance, in one such case, the judge held that the reasons for refusing a visitor visa were neither arguably irrational nor otherwise unlawful. The grounds, while challenging the correctness of the decision, did not raise any

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[140] Crime and Courts Act 2013, s.52.

[141] A. Hill, 'Lawyer blames visitor visa refusals on 'deep underlying racism'' (*The Guardian,* 6 July 2018) < https://www.theguardian.com/uk-news/2018/jul/06/lawyer-blames-visitor-visa-refusals-on-deep-underlying-racism> (accessed 19.11.2018).

[142] Independent Chief Inspector of Borders and Immigration, *An Inspection of Family Visitor Visa Applications* (2014).

arguable basis upon which the decision could properly be said to be irrational (case 32). In another case (case 43), the applicants, who were refused visitor visas, used judicial review to obtain a statutory human rights appeal, but this was rejected by the Upper Tribunal.

Human Trafficking

Under the European Convention on Action Against Trafficking in Human Beings ("ECAT"), the Home Office is the Competent Authority to make decisions on human trafficking. Potential victims of human trafficking are to be referred to the National Referral Mechanism (NRM), the UK's official framework for identifying victims of human trafficking. A decision whether or not to recognise someone as a victim of human trafficking is not a decision under the Immigration Rules. In certain circumstances, a victim of human trafficking could seek asylum.

The legal position as regards challenges is somewhat complex and has evolved through case-law. There has never been a full right of appeal against trafficking decisions. Decisions on claims by a person to be a victim of trafficking are not immigration decisions for the purposes of immigration legislation.[143] Judicial review was the only means of challenge. However, an individual could also appeal on other grounds, such as asylum. The Court of Appeal has held that First Tier Tribunal judges could consider whether the Secretary of State has complied with her policy in relation to trafficking.[144] In 2016, the Upper Tribunal held that an individual could mount an indirect challenge to a human trafficking decision by way of an appeal on perversity and other public law grounds. Where a tribunal is satisfied that a negative trafficking decision is perverse, then the tribunal will be empowered to make their own decision on whether an appellant was a victim of trafficking. The Upper Tribunal also held that tribunals may well be better equipped than the Competent Authority to make pertinent findings relating to trafficking.[145] However, the Court of Appeal subsequently overturned the Upper Tribunal's decision in 2018.[146] The Court of Appeal held that as a negative trafficking decision is not an appealable immigration decision, the Tribunal cannot go behind the

[143] *AA (Iraq) v Secretary of State for the Home Department* [2012] EWCA Civ 23, [33]. See also *SHL v Secretary of State for the Home Department* [2013] UKUT 00312 (IAC).

[144] *AS (Afghanistan) v Secretary of State for the Home Department* [2013] EWCA Civ 1469.

[145] *MS v Secretary of State for the Home Department* (Trafficking - Tribunal's Powers - Art. 4 ECHR) Pakistan [2016] UKUT 226 (IAC).

[146] *Secretary of State for the Home Department v MS* [2018] EWCA Civ 594.

decision unless its first finds it to be perverse or irrational. This approach restricts the Tribunal to considering only the evidence that was before the Competent Authority at the time of its decision. Following, changes to the appeals system in 2014, there is no right of appeal on the basis that a decision was not in accordance with the law - for instance, there was a failure properly to apply the National Referral Mechanism. Any such failure could only be challenged by way of judicial review.[147] In summary, there is no full right appeal against trafficking decisions but judicial review remains available.

From the case-file sample, there were two judicial reviews against trafficking decisions. In one case (Case 47), the applicant had been trafficked to the UK and subject to various forms of traumatic abuse for some 15 years. The Home Office accepted that the applicant was a victim of human trafficking, but refused leave to remain in the UK on the basis of exceptional circumstances under Article 8 ECHR. The applicant sought judicial review. The applicant argued that she was receiving counselling in the UK and removal would adversely affect her mental well-being. The case was settled with a commitment to reconsider within three months.

The principal issue here is that trafficking cases will often be fact-sensitive. As judicial review is a limited remedy, an appeal would, in general terms, be a more effective remedy. Arguably, such cases could be better handled through the appeals system than judicial review. Accordingly, consideration should be given to the appropriate roles of appeals and judicial review in human trafficking cases.

Recommendation:

Consideration needs to be given to the appropriate roles of appeals and judicial review in human trafficking cases. Arguably, such cases could be better handled through the appeals system than judicial review.

Statelessness

[147] *ES v Secretary of State for the Home Department* (s82 NIA 2002; negative NRM) Albania [2018] UKUT 335 (IAC).

Under the Immigration Rules, an individual can apply for leave to remain on the basis that he or she is stateless.[148] The criteria that govern whether to grant or refuse such leave to remain include whether the applicant: is recognised as a stateless person by the Home Office; is not admissible to their country of former habitual residence or any other country; and has obtained and submitted all reasonably available evidence to enable the Home Office to determine whether he or she is stateless. The statelessness provisions in the Immigration Rules were introduced in 2013. There has never been a right of appeal against such decisions. If someone is granted limited leave to remain as a stateless person, but refused indefinite leave to remain, then there is no right of appeal against either this. The question of whether there should be a right of appeal does not appear to have been explicitly considered. For instance, the issue was not discussed in the Parliamentary debates concerning the Immigration Act 2014.

Decisions concerning statelessness are qualitatively different from many standard types of decisions concerning leave to enter or remain. This is because a person who is stateless is neither admissible to their country of former habitual residence nor to any other country. An applicant can seek an administrative review of a refusal of leave to remain as a stateless person and then judicial review. The case-file sample contained five statelessness judicial reviews. In each of them, the key underlying issue was a challenge to the Home Office's assessment of the evidence. However, any challenge by way of judicial review is restricted to error of law grounds. Three challenges were refused. One was conceded by the Home Office and no data was available on the remaining case.

One of the cases was was misconceived. A young child had been born in the UK. The parents had been unable to register the birth with the relevant overseas country because their passports were with the Home Office for over two years. The Home Office rejected a statelessness application on behalf of the child because the child had been stateless were born, but the parents could now register the birth as the passports had been returned. There was no evidence that the parents had contacted the Home Office about the return of their

[148] Immigration Rules, part 14.

passports. The claimant sought judicial review, which was refused permission by the Upper Tribunal (case 245).

Other cases from the sample and referred to in interviews with representatives highlighted the difficulties with using judicial review as a remedy in such cases over and above the normal difficulties associated with judicial review. These problems included that it is an unwieldy, expensive, and inaccessible remedy compared with ordinary tribunal appeals, the difficulties of getting legal aid for a case, and the lack of finality for both the claimant and the Home Office. Statelessness decisions are typically fact-specific in which personal evidence, credibility, and country information will normally be of crucial importance in deciding whether someone qualifies for the status. As one representative noted:

> "In statelessness cases the relevant evidence could be a letter from an embassy saying that they don't recognise the person as one of their nationals. It could be a letter from the Palestinian mission saying that the person concerned has a Palestinian passport but is nevertheless not entitled to enter Palestinian territories because s/he does not have an ID card. It could be objective evidence about which Palestinians can and which Palestinians can't enter Palestine and an expert report."[149]

In judicial review, such evidence cannot be considered and evaluated - even though an Upper Tribunal Judge is well-placed to undertake this type of assessment.

It could be argued that statelessness decisions are of a similar weight and importance as refugee and human rights decisions. There are, of course, some differences. For instance, refugee decisions focus on risk on return whereas statelessness decisions are concerned with inability to return. Furthermore, in refugee decisions, there is a lower standard of proof whereas in statelessness decisions, the standard of proof is the balance of probabilities.[150] Nevertheless, there are also similarities. Like asylum and human rights decisions, statelessness decisions are typically quite fact-specific and can raise complex issues of fact, evidence, and law. It is therefore anomalous that someone can appeal on asylum and human

[149] Representative interview.

[150] *AS (Guinea) v Secretary of State for the Home Department & Anor* [2018] EWCA Civ 2234.

rights grounds, but not on statelessness grounds, especially when the latter type of decisions are of a similar weight and importance and raise analogous factual and legal issues. As one representative commented:

> "We're beginning to argue that you should have an Article 8 appeal when you make a statelessness claim. Potentially, that could mean that you could end up with an appeal on Article 8 in relation to your statelessness claim but not on statelessness grounds, which is a bit bizarre. That's not particularly good. It would be just a roundabout way of getting to an appeal, but not actually on statelessness issues. The current situation is anomalous. Judicial review is not an adequate remedy. There should be a full right of appeal instead."

On the other hand, there are wider issues concerning the overall robustness of the immigration system. For instance, there is a risk that statelessness is being abused as a route to remaining in the UK is being abused by representatives who submit unmeritorious applications. If a right of appeal was introduced, then this would give the green light to a greater use of statelessness as a backdoor route to remaining in the UK.

Recommendation

There are arguments for statelessness decisions attracting a right of appeal. Consideration should be given to whether a right of appeal in such cases would be a more effective remedy.

Domestic Violence

Under paragraph 289A of the Immigration Rules, a victim of domestic violence can apply for indefinite leave to remain in the United Kingdom. The sample contained three challenges against the refusal of indefinite or limited leave as a victim of domestic violence—none of which were successful.

The issues here concern the availability and scope of appeals against such decisions, the complexity of the legal position, and the appropriateness of judicial review. The High Court has noted that the primary and secondary legislation concerning appeals against domestic violence decisions contain "provisions which make it extremely difficult for a domestic

violence victim to navigate even with expert representation, which many such victims do not enjoy".[151] In the same case, the High Court ruled that some, although not necessarily all, applications for leave to remain as a victim of domestic violence are also human rights claims and therefore attract a right of appeal. However, those individuals who claim to be victims of domestic violence, but whose claims are not human rights claims do not have a right of appeal and can only seek administrative review and then judicial review. In practice, there is then a separate procedure between domestic violence applications and human rights applications. In addition, it has been reported that success rates through administrative review have been 2 per cent compared with previous appeal success rates of 82 per cent.[152]

As with statelessness decisions, domestic violence cases raise fact-specific evidential issues of allegations of domestic violence and counter-allegations. Decisions in such cases often involve the evaluation of contested factual evidence and the personal credibility of the claimant and others. It is widely accepted that such matters are best resolved not through a paper-based review of legality, but through a fact-finding tribunal hearing oral evidence from the appellant. Arguably, domestic violence decisions are of similar weight as asylum and human rights decisions, which do attract a right of appeal. Overall, the most appropriate remedy in domestic violence cases is not administrative review and then judicial review, but an ordinary appeal to the First-tier Tribunal.

Recommendation

Domestic violence decisions should attract a right of appeal. Consideration should be given to whether a right of appeal in such cases would be a more effective remedy.

[151] *R (AT) v Secretary of State for the Home Department* [2017] EWHC 2589 (Admin), [45].

[152] N. McIntyre and A. Topping, 'Abuse victims increasingly denied right to stay in UK' (*The Guardian*, 16 August 2018) available at: <https://www.theguardian.com/uk-news/2018/aug/16/abuse-victims-increasingly-denied-right-to-stay-in-uk?CMP=Share_iOSApp_Other> (accessed 19.11.2018).

7. Claimants and costs

This section considers some remaining issues that affect claimants. It presents data concerning the views and experiences of claimants and representatives. It considers the position of litigants in person. It also considers issues relating to funding and costs.

The views and experiences of claimants and representatives

The views and experiences of claimants

We wanted to collect data concerning the views and experiences of claimants; what do they make of judicial review? We experienced various practical difficulties in accessing and interviewing claimants. We tried to access claimants via law firms and many were unable or unwilling or too busy to facilitate this. We encountered other difficulties in accessing claimants. Many were reluctant to be interviewed because of privacy concerns. It is often the case that claimants have a deep scepticism of authority and are concerned that their details might be disclosed to the relevant authorities. There are ethical concerns concerning extremely vulnerable claimants. There are also obvious difficulties in trying to access claimants who have instructed less reputable representatives. Seeking to interview claimants in immigration detention also presents difficulties. Nonetheless, we were able to interview a small number of claimants concerning their experiences and perspectives of judicial review. Such interviews cannot be considered to be representative of all claimants' experiences. Nevertheless, the interviews provide valuable data on the views and experiences of the claimants concerned.

Claimant 1: Sangeen[153]

Sangeen had sought asylum, been refused and had his appeal dismissed. He was then detained in order to be removed quickly. His first representative was going to make an asylum fresh claim. The representative then changed his mind and refused to make the fresh claim. The claimant then changed representation. Sangeen's second representative submitted a fresh claim on his behalf. This was then refused. The representative also sought an injunction against the removal and judicial review of the Home Office's refusal to accept his fresh asylum

[153] Names have been changed.

claim. The Upper Tribunal granted the injunction against removal on the basis that the nature and volume of material submitted for the asylum fresh claim required more detailed consideration than the judge could provide in a quick removal judicial review. Sangeen was then released from detention. The asylum fresh claim judicial review took about a year and a half. The Home Office then offered to withdrew its decision, to which Sangeen agreed. After hearing nothing from the Home Office for a few months, both Sangeen's solicitor and MP contacted the Home Office to prompt a decision. Sangeen was later detained by the Home Office for removal purposes and his case was refused by the Home Office. However, the Home Office did not serve either Sangeen or his solicitor with a reasoned decision and he had no right of appeal. Sangeen was informed that he would be removed from the UK. His solicitor then made another fresh asylum claim, which was refused again, and then another judicial review. According to Sangeen:

> "It was stressful because the Home Office was not replying to the court even. Because the court said, 'we had a judicial review and you (the Home Office) need to respond to the judicial review as soon as, quicker'. But the Home Office did not respond, they took quite a long time. After that, they had to, because my case was in the court and the judge was asking them to respond."

Sangeen's solicitor then agreed with the Home Office to withdraw the judicial review if the Home Office made a new decision and if Sangeen could exercise an in-country right of appeal against a refusal decision. After some eight months, the Home Office refused the asylum claim with an in-country right of appeal. Sangeen appealed:

> "When I attended the tribunal court, the Home Office representative said he didn't know why my case had been refused, when he saw everything, my evidence, everything. He said, he's going to speak with his colleague, with the Home Office, whether he's going to come to the next hearing or not. So, the judge said, 'okay, the Home Office have seven days to respond'. After that the Home Office said, 'okay, we're not going to the court, and we're going to grant you the refugee status very soon.' So that is what happened."

Sangeen was then granted refugee status by the Home Office. Reflecting on his overall experience, Sangeen said:

> "My experience with the Home Office has been awful. They said 'no' to me for about four years. They refused my case around five or six times. They put me on a wait for a long time and they kept refusing my case, without looking into my case, without looking into my evidence and without knowing the fact that my case is genuine, they just kept refusing and they just decided once; once they decided they want to deport you, they stick on it, they don't care. But, it was judicial review that saved my life. If there was no judicial review, the Home Office would have deported me a long time ago. I know there are some cases that just try to abuse the system, they just go for judicial review with no reason. But for me, the judicial review was very fair."

Claimant 2: Gladstone[154]

Gladstone had applied overseas to enter the UK as a spouse. His first application was deemed to be invalid because of an out of date form he had been used. Gladstone then submitted another application, which was refused without a right of appeal. He then sought judicial review:

> "Well, at the time I had an immigration advisor. She was claiming to be a solicitor, but in the end she couldn't represent me at judicial review, so then she kind of left me on my own. So, I had to get all the documents done and submitted, my statement of events, and everything else."

Gladstone said:

> "It wasn't a straightforward process at all. There's a strict process that you have to follow, lodging the application itself, serving notice. It's quite longwinded and it isn't as clear cut or straightforward as one would have thought."

[154] Names have been changed.

The Home Office then withdrew its decision and granted Gladstone leave to remain under the 10-year route, but not permanent settlement. He then sought judicial review of this with the support of a lawyer and was ultimately granted leave to remain. According to Gladstone:

> "The two judicial reviews, they took about two years. It wasn't just my life on hold, but my partner's life, my whole family life. I was just in a very bad stressed out state, really depressed. It was a really daunting and challenging whole process, the whole two years was kind of like there's a cloud over your head in terms of your legal status. It was just a horrible experience. I did all my research, I did put a lot of hours into doing the research. I don't think the judicial review process is actually set up for anybody to challenge the Home Office on their own. The Home Office themselves make things as difficult as possible. They overlooked their own policy of the twenty-eight day grace period, and that was one of the fundamental reasons or arguments I used for my case. I think that legal aid would benefit a lot of people trying to then challenge flawed decisions I think, if I'm right, from my experience, there are a lot of other people who will get put in that same situation. But because they don't have the financial resources or they feel incapable of doing it themselves they don't challenge decisions and then they get deported, and all of this is under the radar. I think also the Home Office could benefit in conducting interviews. So, they would invite applicants to conduct an interview so then they could submit any evidence. You could have like a proper interview, like face-to-face it's more human rather than dealing with paperwork. The whole way the Home Office decides on cases and applications, I think, is fundamentally flawed. It doesn't feel human and kind. It feels kind of robotic, everything is based upon numbers, reducing migration."

Representatives' perspectives on the experiences of claimants

We also interviewed representatives about their experiences of handling their clients. A principal theme here was the difficulties claimants experience in understanding judicial review alongside other problems and uncertainties in their lives. As one representative noted, claimants "don't really understand the distinction between the merits of their case, whether they should stay in the UK and a challenge by way of judicial review to the process by which

the decision was made."[155] Furthermore, it can be quite difficult to explain this to claimants. For instance, in para 353 fresh claim cases, claimants "can get frustrated that they are not getting the remedy that they want".[156] According to representatives:

> "What is it like for clients? It's really difficult to explain to them what is happening. A judicial review is really difficult to explain anyway to a client because of its technical nature and the fact they are not going to get a substantive decision from the High Court or the Upper Tribunal. And then when you are spending two or three years in litigation, it's very hard on the client, extremely hard on the client. We have had some really, really difficult moments with very vulnerable, mentally unwell clients."

> "It's quite hard to explain to a client that in a judicial review, they are not going to come out with refugee status, which is what the client wants. And in a judicial review, we are not putting forward all this evidence, it is not like we are in a first-tier tribunal and we have appealed the decision. Instead, we are arguing that a decision that has already happened is unlawful. It is all about the past. So, it is hard for clients to understand that this is not really going to give them what they want. It is just the next step on the way."

> "The High Court has this obsession with what it calls rolling JRs. But there are times in which a case changes so significantly that it becomes another case, but more often than not, that does not happen. … It's also tricky because life does not stand still. Often we are forced to issue claims before we're able to get evidence. I had a client recently who was so unwell that my trainee who went to the detention centre, asked her to see this client first because they were so concerned about his welfare. And they asked her to report back afterwards about how he was and he was so clearly unwell and we had to issue a judicial review. We are not able to produce a full on medical report because the removal window had already started and we are going to want to produce evidence in that case."

[155] Representative interview.
[156] Representative interview.

> "Clients find judicial review very hard to understand. So, your typical claimant, because they're privately paying, a lot of our clients can speak English and some of them are students or Tier 1 general. So, they are relatively well-educated and relatively less vulnerable than many. We have to explain it again and again and again what a judicial review process is, in person at least once at length, and in writing at least twice, because it's so bewildering. This is a hugely time consuming and expensive stage to get not much of anything, except back to where you ought to have been before you even started, and the different stages and the permission."

Representatives also highlighted difficulties concerning claimants in judicial review hearings:

> "In judicial reviews, clients cannot speak in court, unless they seek permission from the judge. If they have previously had an appeal in which they spoke, and then have a judicial review, in which they cannot speak, clients get concerned. They are worried as to whether the judge will be able to hear their voice. We explain that their voice is essentially in their grounds, and/or the barrister speak on their behalf. So, they find that in terms of access judicial review is quite limited compared to a statutory right of appeal and that's also an issue that they tend to take up with us."

> "It is really hard for clients to understand judicial review, especially if they have got English as a second language and they are in detention and they are really stressed or they've got mental health problems. It is really hard for them to understand that, unfortunately, it is not an appeal. So, I will constantly have clients saying 'Oh, you need to tell the Judge about this, we need to argue this', and we will say 'no, it is not about what is happening now. It is about whether the decision that was made whenever was lawful and whether we should get a right of appeal and then you will be able to argue your case'. And actually for them to understand this could go on for years and years is really difficult."

> "From our client's point of view, he found the paper permission stage and the whole thing baffling. He had been in the judicial review system process for about a year by that point. He had no opportunity to actually see who was going to be the judge. So,

> unlike in an asylum appeal - and I know they're not all perfect and they don't all go smoothly - but the client can see the judge in the court. They can give evidence and hear the submissions, but in a JR paper permission, they're not exposed to any of that at all. So, I think their confidence in the process can be quite low, because of that."

Litigants in person

It is generally accepted that litigants in person are more likely to encounter problems and obstacles than those in receipt of good legal advice and representation.[157] The judicial review system has been designed on the assumption that litigants will be advised and represented. Consequently, the system finds it difficult to accommodate the needs of litigants in person. As the Judicial Working Group on Litigants in Person noted, "litigants in person are not in themselves 'a problem'; the problem lies with a system which has not developed with a focus on unrepresented litigants."[158] That Working Group recommended that judges should be enabled and empowered to adapt the system to the needs of litigants in person, rather than *vice versa*. These considerations apply equally to judicial review in general and immigration judicial review in particular. One underlying assumption of the judicial review process is that litigants will have specialist advice and representation to assist them through what is a technical and complex legal process.

In addition to the ordinary difficulties encountered by litigants in person, persons seeking to challenge immigration decisions by way of judicial review often face further obstacles. Some claimants will have difficulties in communicating in English. Immigration and asylum law is a notoriously complex area of law. It is also a quick-changing area of law in which new cases are decided and then appealed to the higher courts. Litigants in person may also understand little about the nature of the proceedings. They often struggle with the conceptual difference between an appeal and review. There are also important differences for litigants in person between statutory appeals and judicial review proceedings, which can mean that the latter type of proceedings may pose greater challenges. In an appeal, a litigant in person can attend a hearing in person and the judge can provide assistance in person. By contrast, in judicial

[157] H. Genn, 'Do-it-yourself Law: Access to Justice and the Challenge of Self-representation' (2013) 32 C.J.Q. 411; JUSTICE, *Delivering Justice in an Age of Austerity* (London, 2015).

[158] *The Judicial Working Group on Litigants in Person: Report* (2013), p.6.

review proceedings, there is much more emphasis upon the initial preparation of the grounds of challenge. Further, the permission stage is considered initially on the papers. Other challenges include: not understanding the limited role of judicial review, including its technical and legalistic nature; limited understanding of directions and the need to comply with them; the underlying complexity of the Immigration Rules and legislation and the enormous and ever-changing volume of case-law.

Judges noted that there are particular challenges when handling cases brought by litigants in person. It can be difficult for both representatives and judges to explain to a litigant in person the nature of judicial review. Many potential litigants may be desperate and/or suffering from stress and anxiety. Some will be detained in immigration detention. Vulnerable immigration detainees are open to exploitation by unscrupulous "advisers" who sell standard templated grounds of challenge which are not individualised to the circumstances of the particular person and do nothing to assist. Some litigants in person will bring cases that lack merit. Conversely, some with potentially good or strong cases will find it difficult to access the judicial review process.

Representatives highlighted the practical challenges:

> "How is the judicial review system working? It probably seems to the judges that the system is working better than it is some of the time. Judges see the high volume of judicial review cases. So, they might well assume that people have access to judicial review. Whereas I think in practice there are quite a large number of people who are unrepresented and so either some of them will try and put their own judicial reviews in sometimes, but they don't really go anywhere; or they just don't have any access to the system at all."[159]

> "Unrepresented people in detention is a big issue. We have come across people that are 'helping' (in inverted commas), people to put in judicial reviews which are just to try and frustrate removal. Although they might frustrate removal initially they can just

[159] Representative interview.

cause so many problems because judicial review is a big deal, there are real cost consequences and there are things you have to comply with. So, if someone is unrepresented and they don't serve the claim on the Home Office for example after they have issued it, it can get struck out or if they don't send their certificate of service to the court to tell them they have served the claim on the Home Office. There is no reason why people would know or understand that. So, cases can get struck out and there can be cost consequences which can affect future immigration applications. People who are unrepresented, I think, really struggle. And also in terms of what they are actually arguing and their grounds with the judicial review. A lot of people put in judicial reviews because they are desperate but they don't really understand what they are doing. The risk is that it taints all JRs and especially all removal JRs."[160]

"Many people in detention seem to know about JR. It's amazing the number of litigants in person just lodging their own JRs. They come to see me at the detention duty advice surgery and say, 'I have got a JR outstanding. Can you do something?' I look at it and say, 'No, because this is absolutely hopeless. There's no merit. There's nothing I can do'. But as I say, it's amazing how they pick it all up from somewhere."[161]

"I see people who want me to do cases on a direct access basis and members of the public coming straight to me, and some of them have done a lot of JRs themselves, unrepresented, but they are clearly hopeless. They often do more than one and they keep on losing. But what they haven't spotted is they keep losing because, actually, there's nothing in it. Because the Secretary of State behaves so badly, because the procedure is so confusing to them, it's harder for people, the litigating person, to see clearly that what's really going on, to realise that there simply isn't a point of law they can take."

From the observation of litigants in person appearing in oral renewal hearings, it was apparent that litigants in person require additional assistance to help them understand the judicial review process. In one case we observed, the judge explained to the applicant's

[160] Representative interview.
[161] Representative interview.

mother, who had attended on his behalf, the format of a permission hearing and the limited role of judicial review. In the particular case, the applicant was overseas and his mother had sought to progress with his case. The applicant's mother had spent some £5,000 paying a law firm to help. Just before the oral renewal hearing, the law firm had informed her that they would not be attending the hearing as the Home Office decision under challenge had been superseded by another decision. The mother was clearly confused and upset by the proceedings. She also felt aggrieved and badly let down by the law firm. The judge gave reasonable assistance to the mother. The judge also provided contact details of both the Immigration Law Practitioners' Association and the Solicitors Regulation Authority so that the mother could contact another representative and seek redress against the law firm.

Judges highlighted the difficulties concerning litigants in person. As one Judge explained:

> "It's pretty difficult for a judge. It really does test your judgecraft skills, to have a litigant in person in a judicial review oral renewal hearing and to explain to that person, either through an interpreter or if there isn't an interpreter, through very, very simple English, what the difference is between an appeal and judiciary review. Because if it's a para 353 case that would be somebody who ordinarily would have been through the appeal process and is now seeking to put in more material and you have to say to that person, judicial review is really quite a different animal. We are essentially bound, although there are cases that blur the boundary from time to time, but we are normally bound by the position as it was at the date of the decision that is under challenge, so you cannot expect to come up today with more arrest warrants, newspaper articles and so forth."[162]

There are also inherent limits as to what type of assistance judges can provide. First, it is only possible for judges to assist litigants in person at oral renewal hearings. It is not possible to provide such assistance at the paper permission stage. At this stage, the judge will consider the case on the papers and litigants in person will have their case considered on its own merits. Cases do not commence at the oral renewal stage. Some litigants in person refused

[162] Upper Tribunal Judge interview.

on the papers may not proceed to an oral renewal hearing. Assistance by a Judge at an oral renewal hearing is unavailable in such instances. More information needs to be readily available to litigants in person at a much earlier stage.

Second, there are legal limits as to how far litigants in person can be assisted. Consider, for instance, compliance with procedural rules such as time limits. Is there scope for some discretion when a litigant in person does not comply with a time limit? In *Hysaj,* the Court of Appeal held that being a litigant in person is not of itself sufficient reason to excuse a failure to comply with procedural requirements. According to Moore-Bick LJ:

> "Litigation is inevitably a complex process and it is understandable that those who have no previous experience of it should have difficulty in finding and understanding the rules by which it is governed. The problems facing ordinary litigants are substantial and have been exacerbated by reductions in legal aid. Nonetheless, if proceedings are not to become a free-for-all, the court must insist on litigants of all kinds following the rules. In my view, therefore, being a litigant in person with no previous experience of legal proceedings is not a good reason for failing to comply with the rules."[163]

Another view is that litigants in person are, on the whole, actually better off without representation than being badly represented. As one judge explained:

> "People often do better coming in person than by having a bad representative. The reason why is that litigants in person are very good at explaining what their situation actually is. They might not be good at identifying case law or legal language, but they can tell you the facts and if we know the facts then we can probably work out what the situation is, as long as we've got enough of the bare bones there to start from. Whereas a bad representative can just simply not advise them to put in the right paperwork, pursue challenges which are hopeless where they should be doing something different instead; where there's a much easier, quicker, cheaper alternative than judicial review proceedings. And you get to the point where, you

[163] *Hysaj v Secretary of State for the Home Department* [2014] EWCA Civ 166, [44].

> know, sometimes you get counsel who's got the papers the night before but they come along and say, 'Well, I can't really speak to any of the grounds of challenge but there is this one really good ground but that's not actually before you.' And they have to try and make applications on the day to amend the grounds which are not normally successful because it's far too late. But then individuals may lose their chance. I mean normally there's something else they can do with the Home Office but you can't always rectify badly drafted proceedings at a later stage."[164]

Those judges interviewed also noted that, in permission decisions, they take into account that a person is acting as a litigant in person. For instance, in one case, the judge noted that "[t]he grounds are vague in nature and insufficiently particularised, although I make allowance for the fact that the Applicant is not legally represented" (Case 135). Another judge interviewed highlighted the problems and difficulties that can arise when a litigant in person seeks judicial review and the Government Legal Department offers a consent order. The judge noted that the litigant in person will not have any idea as to what a consent order is or realise that the Home Office is to retake its decision.

The Upper Tribunal is fully aware of the issues and challenges concerning litigants in person. An Upper Tribunal Judge has been assigned responsibility for considering the provision of assistance to litigants in person and has been discussing the issues with external stakeholders. Consideration is being given, in conjunction with the Upper Tribunal User Group, as to whether and if so how to formulate a guide to assist litigants in person in judicial review proceedings. There are already various guides for litigants in person.[165] In 2013, the Upper Tribunal produced a guide for unrepresented appellants as regards statutory appeals.[166] It is also necessary to inform litigants in person about the nature and format of judicial review proceedings. It is therefore sensible to devise leaflets that provide guidance tailored to immigration judicial reviews. Such guidance could take the form leaflets that HMCTS staff can

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[164] Upper Tribunal Judge interview.

[165] Judiciary.uk, 'Advice for Litigants in Person' available at: <https://www.judiciary.uk/you-and-the-judiciary/going-to-court/advice-for-lips/> (accessed 19.11.2018).

[166] Upper Tribunal (Immigration and Asylum Chamber), *Presidential Guidance Note 2013 No 3: A Guide for Unrepresented Claimants in the Upper Tribunal (Immigration and Asylum Chamber)* (September 2013), available at: <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Guidance/Guide+for+Unrep+Claimants+_F_.pdf> (accessed 19.11.2018).

give out which set out what a litigant in person must do at the various stages of the process. Such leaflets could include a glossary explaining technical terms and refer to the relevant practice statements. An important issue in designing such leaflets would be to test their usability in advance.

Another option would be to develop online videos or tools. HMCTS has produced some YouTube videos on social security tribunals and other tribunals.[167] Equivalent videos could be devised for litigants in person bringing immigration judicial reviews. They could explain and highlight what the Upper Tribunal is like, what happens in it, how things are done, and how best to prepare a case.

There might also be a need for detailed guidance aimed at practitioners. There is already a lengthy Administrative Court Guide.[168] This provides detailed legal guidance on bringing a judicial review case in the Administrative Court. As regards immigration judicial reviews, the Upper Tribunal has issued various decisions with important procedural and other points particular to the immigration judicial review jurisdiction. An equivalent guide could draw upon the Administrative Court Guide, but be focused on immigration judicial reviews. Another issue is the degree to which the digitisation of the judicial review process will provide digital assistance to claimants.

Recommendation:

It is recognised that litigants in person need more support throughout the judicial review process. This could be provided through a combination of leaflets, online guidance, videos, and digital assistance.

Funding

Most, but not all, claimants receive advice and representation. There are three main ways litigation is funded: claimants pay privately; conditional fee agreements (commonly referred to as a 'CFA'); and legal aid. For those paying from private funds, the most straightforward

[167] See HMCTS, 'Appealing against an Employment and Support Allowance (ESA) decision' <https://www.youtube.com/watch?v=tbWXG6Ho4i8> (accessed 19.11.2018).

[168] *Administrative Court Guide* (London, 2017).

way is to simply pay the bill. A fixed fee could also be agreed with lawyers. This may allow claimants to make their expenditure more predictable. However, this transfers risk to lawyers who may be reluctant to accept it. Because of this, fixed fee agreements are sometime bundled together with a CFA into what is known as a Discounted Fee Agreement. CFAs are sometimes referred to as "no win no fee agreements." All of these arrangements broadly still depends on the means of the claimant.

Legal aid is another source of funding. To be eligible for legal aid, the claim must be of a kind that is 'within scope';[169] and the applicant must be able to satisfy the 'means test'[170] and the merits test.[171] Recent reforms have restricted access to legal aid and have prompted concerns about access to justice.[172] Restrictions on when legal aid would be paid were also introduced—for instance, legal aid is only payable if permission is granted.[173] This is designed to encourage strong challenges, yet representatives informed us that the risk involved often operate as a disincentive.

It is difficult to know the average costs of an immigration judicial review. The legal costs will vary in accordance with a number of factors, such as: the length of litigation; the complexity of a case and the amount of work involved; the type of case; the rates charged by a law firm; and whether Counsel is instructed. We were informed that an initial judicial review claim might cost in the region of £1,000-1,500. If Counsel is engaged and a case proceeds to a substantive hearing, then costs can increase considerably. As one representative explained:

> "I think firms vary wildly in what they charge. I would say we used to try to do fixed fees for around £2,000, and then we decided we were protecting the Home Office here and we had no idea how long this is going to go on. So, we've got conditional fee arrangements and, when we actually bill at an hourly rate, we have bills of £10,000/£15,000. Now, they don't pay that. That's including counsel. They don't pay

[169] Legal Aid Sentencing and Punishment of Offenders Act 2012, ss.9 and s.10.
[170] Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 (SI 2013/480) (as amended).
[171] Civil Legal Aid (Merits Criteria) Regulations 2013 (SI 2013/104) (as amended).
[172] See, e.g., The Bach Commission, *The Right to Justice* (London: Fabian Society, 2017).
[173] *R. (on the application of Ben Hoare Bell Solicitors & Ors) v The Lord Chancellor* [2015] EWHC 523 (Admin); The Civil Legal Aid (Remuneration) (Amendment) Regulations 2015 (SI 2015/898).

> all of that. But if you look at the number of hours that go in, at a reasonably hourly rate, that is the cost."[174]

Another representative noted that "People find judicial review expensive. They understand that it costs far more than appeals, and they find it to be an expensive route."[175]

The issues can be more complex in practice because some claimants change their representatives throughout the process. This can happen when a claimant has initially received poor quality advice from one provider and then instructs a new set of representatives. This can in turn increase costs. For instance, the new set of representatives has to undertake work that done poorly or not done at all by the first set of representatives.

From our sample of cases, the vast majority of immigration judicial review claims were self-financed. It was not clear what the structure funding arrangements took or the rates being charged. This may vary from one law firm to another. It was not always clear from the case-file whether applicants had legal aid. The best source of establishing whether applicants had legal was via the claim form. In many cases, it is likely that if legal aid is granted it was after the permission stage. In cases where there was no evidence of legal aid, we recorded the case as not having legal aid. In five cases, there was clear evidence from the file that the case was in receipt of legal aid. Overall, the picture we encountered if that legally-aided claimants do exist, but are rare. One representative explained:

> "You can, potentially, get legal aid for the judicial review. It's still at risk. There are still lots of problems. The risk is for the clients because there's the risk of the Home Office's costs. So the client can be put off the judicial review in circumstances where, if it were an appeal, they would feel more confident about having a go. Also, you only get legal aid if you get permission."[176]

[174] Representative interview.
[175] Representative interview.
[176] Representative interview.

Exceptional case funding is available to applicants whose human rights or European Union rights would be breached if they do not have legal aid.[177] Broadly speaking, this means that it would be unfair or impossible for a claimant to handle their own case. The volume of applications under the exceptional case funding scheme have been less than the government expected when it established the scheme. As a result, there were concerns that the process of applying was an onerous one as the form was lengthy and required detailed answers to a range of questions derived from case law on Article 6 ECHR, there was no procedure for urgent cases, and a large amount of evidence was required in certain cases. As a result, there was further concern that solicitors in private practice were reluctant to make lengthy and time-consuming applications, for which they would not be remunerated if the application was not granted. In *I.S. v Director of Legal Aid Casework and the Lord Chancellor*,[178] both the High Court and Court of Appeal voiced similar concerns. In November 2015, following the High Court's judgment in *I.S.*, a new ECF application for was introduced. This was shorter and also allowed for an application for funding to investigate whether a full ECF application was worthwhile.

According to the Legal Aid Agency's published statistics there now has been an increase in the number of people applying for ECF in general, and for immigration claims in particular. LAA statistics show that between the beginning of April 2015 and the end of March 2016, there were 493 applications for ECF for immigration cases, of which 326 were granted. Across the same stretch of time in 2016/2017, there were 1,008 applications of which 693 (71%) were granted. These figures still remain lower than expected when the scheme was introduced.

In relation to immigration judicial review, the general concerns about exceptional case funding were reflected in our data. One representative noted that the complexity of the process can dissuade some representatives from applying:

> "The process to apply for ECF still acts as a disincentive although there is perhaps more knowledge about how ECF works and how to apply for it. The number of grants of ECF,

[177] Legal Aid, Sentencing and Punishment of Offenders Act 2012, s.10. See also HC Commons Committee, 8th sitting, 6 September 2011, Column 349 (Jonathan Djanogly MP).
[178] [2015] EWHC 1965 (Admin) and [2016] EWCA Civ 464.

the rate of grants, seems to be quite high, but the number of applications that are made is still relatively low. From my experience and the work that I've done on projects to do with immigration judicial review and access to justice, it seems that representatives aren't willing to do this – they are reluctant to apply for ECF."

***Recommendation**:*

The process for applying for Exceptional Case Funding needs to be accessible and proportionate. There have been some improvements, but further work is required.

Litigation costs

The general principle on costs applies in immigration judicial review proceedings: costs follow the event. This means that losing party will normally bear both their own costs and those of the other side. The underlying rationale is that a party has been compelled by the conduct of the other party to come to court in order to vindicate his legal rights. Normally, there will be a causal link between the underlying merits of a legal claim and the award of costs.[179] In deciding what order to make on costs, the court will have regard to all the circumstances, including the conduct of the parties; whether a party has succeeded on part of its case, even if that party has not been wholly successful; and any admissible offer to settle made by a party which is drawn to the court's attention. In *M v Croydon LBC*, the Court of Appeal issued guidelines concerning costs in the following situations.[180]

1. The claimant has been wholly successful whether following a contested hearing or pursuant to a settlement. In this situation, the claimant should be able to recover all of his costs, unless there is some good reason to the contrary.

2. The claimant has only succeeded in part following a contested hearing, or pursuant to a settlement. In this situation, when deciding how to allocate liability for costs after a trial, the court will normally determine questions such as how reasonable the claimant was in pursuing the unsuccessful claim, how important it was

[179] *ZN (Afghanistan) v Secretary of State for the Home Department* [2018] EWCA 1059, [67] (Singh LJ); *R (Khan) v Secretary of State for the Home Department* [2018] EWCA Civ 1684, [44] (Singh LJ).
[180] *R (M) v Croydon London Borough Council* [2012] 1 WLR 2607, [60]-[63].

compared with the successful claim, and how much the costs were increased as a result of the claimant pursuing the unsuccessful claim. When a case has been settled, the court will, at least normally, be in a significantly worse position to make findings on such issues than where the case has been fought out. Where the parties have settled the claimant's substantive claims on the basis that he succeeds in part, but only in part, there is often much to be said for concluding that there is no order for costs.

3. There has been some compromise which does not actually reflect the claimant's claims. In this situation, there is an even stronger case for there to be no order for costs. This is mitigated, he said, by the proviso that there will be some cases in which it may be sensible to consider the underlying claims and consider whether it was “tolerably clear” who would have won if the matter had not settled.

The issues involved in dealing with costs are fact-specific. Further, the courts has often stated that costs applications must not be allowed to become in reality cases in which the underlying merits of a claim have to be determined. Satellite litigation around costs should be avoided.

In the vast majority of cases, the Upper Tribunal will award costs against the claimant when refusing permission. The level of the Respondent’s costs is assessed by the Government Legal Department. The sum of costs will include the costs of preparing and filing an Acknowledgement of Service on the basis of the number of hours involved, reading the claim, advising and corresponding with the client, and drafting the summary grounds of defence. If a case proceeds to an oral renewal, then the costs of representation will be included. If the Government Legal Department has not submitted an Acknowledgement of Service, then the judge will typically not make any costs order. If permission is granted, then a decision on the award of costs will be reserved for the conclusion of the substantive hearing. If a claim is settled following the grant of permission—as is the norm in such instances—then the consent order will typically include an agreement that the Home Office pay ‘reasonable costs.’ This is almost a matter of routine.

There is generally a lack of data on costs in judicial review.[181] There is no easy way of calculating the overall costs involved in judicial review. Through our case-file analysis, we had access to data on costs awarded, usually after the grant of permission. This provided a window into the areas of costs but the question of how much claimants have paid for services or how many people found the prospect of costs to be a barrier to bringing a claim is unknown. If a challenge is refused permission, then the judge will normally order costs against the claimant. In cases where there was an order for a specific amount of costs at permission, the range of awards ran from £90 to £1,148. The average award in those cases was £458.

In theory, costs should drive litigant behaviour to resolve cases without running up large expenses. In practice, the issue of costs seems to generate frustration and angst. As one representative noted:

> "There will be arguments over costs. We were right to issue a judicial review claim when we did. But the court will nearly always say, 'No order as to cost' if the claim becomes academic and that's them thinking they're being generous because you've wasted the Home Office's time. But actually you had no choice when you issued it but you're not going to get paid at all because there's no legal aid funding unless you've got permission. So that's the kind of freezing thing on sensible litigation. It also means that the Home Office can afford not to reply to pre-action correspondence because they still don't have to pay any costs if it becomes academic later."[182]

However, it is not necessarily all one way. From the Home Office's perspective, there is the situation in which the claimant, having been refused on the papers, renews on different grounds and is granted permission. In such circumstances, the Home Office might argue there is good reason why it should not pay the initial costs.

How many unsuccessful claimants pay the costs awarded against them? The Home Office and the Government Legal Department collect data on how much litigation debt from immigration

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[181] R. Low-Beer and J. Tomlinson, *Financial Barriers to Accessing Judicial Review: An Initial Assessment* (Public Law Project, London 2018).
[182] Representative interview.

judicial reviews remains outstanding and how many claimants who have to pay costs in practice do so, but this information is not publicly available. However, the overall position seems to be that very few, if any, unsuccessful claimants pay their costs.

Further, the Upper Tribunal does not award the full costs of unsuccessful judicial review claims. In other words, the Home Office's legal costs can be many times greater than the amount of costs awarded to them and what costs are awarded to the Home Office are rarely paid by claimants. As a result, it makes more much sense for the Home Office to settle cases frequently, including cases that could ultimately be successfully defended, than pursue litigation and thereby risk higher costs – costs that are unlikely to be paid if the Home Office is successful. For instance, the cost to the Home Office of reconsidering a decision is in the region of hundreds of pounds. By contrast, the cost to the Home Office of defending a judicial review in a substantive hearing can amount to something in the region of 80,000 to £100,000.

From the Home Office's perspective, the issue of costs is one area of the judicial review that does not work as it should. Costs awarded by the Upper Tribunal do not cover the entirety of the Home Office's litigation costs. Those costs awarded against claimants are not recovered. The Home Office cannot pursue solicitors and representatives for legal costs, only claimants, who will not typically be able to pay. From this perspective, there is little, if any, incentive from the costs regime to deter representatives from taking on unmeritorious judicial review claims because they will not bear the costs involved. Instead, the consequence is that the Home Office (ultimately the taxpayer) will bear the costs of winning – despite the legal rule that costs follow the event. Furthermore, while the Home Office has the resources of the state behind it, the reality is that those resources are both limited and have diminished in line with overall reductions in public spending. The greater the costs incurred through judicial review litigation, the less resources are available to improve the quality of decision processes and substantive decisions.

In 2016, a specific power to refuse immigration applications on the basis that an applicant owes a litigation debt was introduced as a general ground of refusal in Part 9 of the Immigration Rules. This power is discretionary and applies to applications made on or after 6 April 2016. Home Office guidance explains that a litigation debt can arise from all types of

litigation, including judicial review. It instructs caseworkers to take into account all litigation debts, including those accrued before 6 April 2016 when considering applications made on or after 6 April 2016.[183] There is an operating presumption in favour of refusal of all application types, save for a few exceptions. To check for debts, there is communication between the Home Office's Litigation Finance Team and caseworkers considering applications. Though there is a general presumption in favour of refusal where an unpaid litigation debt exists, Home Office caseworkers must consider whether refusal is reasonable taking account of all relevant factors, including: how the debt was accrued; level of cooperation with Home Office debt recovery attempts; the location of an applicant; the purpose of the application; an applicant's ability to pay; how long the debt has been outstanding; and the amount of the debt.

The approach to litigation costs in judicial review was considered by Lord Justice Jackson in his review of civil litigation costs.[184] There has long been an active debate on what the best model for distributing litigation costs in judicial review is. The key models regularly discussed are:

1. the current, general cost-shifting rule whereby the losing party bears their own costs and those of the winning party;
2. both parties bear their own costs regardless of the outcome of the case (what has been called 'the US rule');
3. one-way costs shifting, where one party will never be required to pay the other's costs, regardless of the outcome, but costs may be awarded in that party's favour;
4. qualified one way costs shifting (QOCS), where one party will not normally be required to pay the other's costs regardless of the outcome, but where that general rule is qualified, so that costs may be awarded against the party if certain conditions are met; and
5. a system of fixed costs, where the costs that can be recovered from the opponent are fixed by reference to the type of claim and stage reached in the proceedings.

[183] See Home Office, *Litigation Debt: Version 2.0* (September 2018) < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/742058/ggfr-litigation-debt-v2.0ext.pdf>.

[184] Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (2009); Lord Justice Jackson, *Review of Civil Litigation Costs: Supplemental Report, Fixed Recoverable Costs* (2017).

Jackson LJ's *Final Report* was published in December 2009. It concluded that QOCS is 'the right way forward' for judicial review.[185] This was because: it is the simplest and most obvious way to comply with the UK's obligations under the Aarhus Convention in respect of environmental judicial review cases (where costs caps operate); it is undesirable to have different costs rules for environmental judicial review and other judicial review cases; the permission requirement is an effective filter to weed out unmeritorious cases, therefore the present approach is not necessary to deter frivolous claims; it is not in the public interest that potential claimants should be deterred from bringing properly arguable judicial review proceedings by the financial risks involved; and QOCS has proved satisfactory in Canada. Jackson LJ ultimately suggested the following costs rule should be adopted:

> Costs ordered against the claimant in any claim for personal injuries, clinical negligence or judicial review shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances including:
>
> (a) the financial resources of all the parties to the proceedings, and
>
> (b) their conduct in connection with the dispute to which the proceedings relate.[186]

It was also suggested that, in order to 'strike the right balance as between claimant and defendant in judicial review proceedings,' claimants should no longer be able to recover a success fee in claims funded by a contingency fee agreement. The Government's response rejected QOCS in judicial review but ended success fees.[187] I

n November 2016, Jackson LJ announced a further review of civil litigation costs. As part of this further review, a working group was set up under Martin Westgate QC. The group was given the task of 'work[ing] up the detail of a model based on the current regime for Aarhus

[185] Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (2009), Ch. 30.

[186] Ibid, p.326.

[187] *Reforming Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson's Recommendations: The Government Response* (Cm 8041, 2011).

claims that could be applicable to judicial review claims more generally.'[188] The final Westgate Group's recommendations concluded that the introduction of a version of the Aarhus model, in most cases, would be an improvement on the current costs rule in judicial review. [189]

Recommendation

There is a need for a detailed review of how costs operate in practice drawing upon data from the Home Office and the Government Legal Department. This review could examine more detailed information as to costs with a view to reaching a better understanding of costs in this area and how costs influence behaviours.

[188] Lord Justice Jackson, *Review of Civil Litigation Costs: Supplemental Report, Fixed Recoverable Costs* (2017), Appendix 16.
[189] Ibid.

8. Current, future and comparative approaches to the operation of immigration judicial review

This section considers some remaining issues relating to the current and future operation of the immigration judicial review system. These issues include: the jurisdiction of the Upper Tribunal; Tribunal Case-workers; digitalisation; the appropriateness of alternative dispute resolution; whether appeal rights should be restored or introduced. The section ends with a comparative look at the French and Dutch systems.

The jurisdiction of the Upper Tribunal

One question that arises is whether or not other types of immigration judicial reviews could be usefully transferred from the Administrative Court to the Upper Tribunal. When the transfer occurred in 2013, some types of immigration judicial reviews remained at the Administrative Court, most notably detention and nationality cases. The justification advanced for the Administrative Court retaining detention cases is often the constitutional nature of such claims given that such cases typically involve actions for damages for unlawful imprisonment. However, one judge queried whether nationality judicial reviews could also be transferred to the Upper Tribunal:

> "It always seems rather odd to me that we can deal with nationality issues in appeals, but we cannot in judicial reviews. That seems a bit random. You can see the force of keeping other things in the high court, most obviously detention cases. But I would have thought that one type of case that could probably pass our way would be the nationality ones."[190]

Recommendation

Consideration should be given as to whether other types of immigration judicial review work could be usefully transferred from the Administrative Court to the Upper Tribunal, such as nationality cases.

Tribunal case-workers

[190] Upper Tribunal Judge interview.

Upper Tribunal Judges are assisted by both administrative staff and Tribunal Case-Workers (TCWs) or UTIAC lawyers. There are three TCWs in the Upper Tribunal. They undertake pro-active case management, provide expert advice and assistance to the parties and the judiciary by overseeing how cases are managed.[191] They can also exercise judicial functions under delegated powers. Their functions are controlled by Rules and practice directions. At present, TCWs are focused upon exercising case-management functions to ensure swift and efficient consideration of cases with regard to issues such as: extension of time; adjournment requests; compliance with directions; and ensuring that case-files are ready to proceed to a hearing so as not to waste judicial time and to ensure that the process is running smoothly. TCWs also work particularly on identifying cases raising linked issues and test cases. For instance, TCWs had been working on Dublin/Third country cases and ETS cases stayed pending decisions from the Court of Appeal.

The general view from within the Upper Tribunal is that the system of using TCWs is working effectively. They are seen as a valuable resource that enables a significant amount of work currently undertaken by the Duty Judge to be delegated, thereby freeing up a judge to deal with substantive matters. The lawyers exercise delegated powers in judicial reviews and this is to be piloted in the Tribunal's appellate jurisdiction. There will also be delegation of more mundane matters from TCWs to Caseworkers. TCWs and caseworkers work to a judge who trains and supervises them. By contrast, one representative highlighted a different perspective: "We had a very strong claim and should have succeeded. But we were refused. There was a lot of correspondence which suggested that the court lawyer was playing a much stronger role than we would have expected and making, I thought, decisions that we would have expected the judge to make."[192]

TCWs themselves identified some areas for development. First, while there was a good level of TCW staffing, it was not thought to be optimally utilised in terms of numbers of staff. Second, working practices could be made leaner. Third, it was thought that there could be

[191] Senior President of Tribunals, 'Practice Statement: Delegation of functions to staff in the Upper Tribunal (Immigration and Asylum Chamber) on or after 9 December 2013' <https://www.judiciary.uk/publications/delegation-of-functions-to-staff-in-the-upper-tribunal-immigration-and-asylum-chamber-on-or-after-9-december-2013/> (accessed 19.10.2018).

[192] Representative interview.

more joining-up between appeals and judicial review. For instance, the admin teams for appeals and judicial review are largely separate from each other. Also, there are different databases between appeals and judicial review. Linking up these databases could enable the overall immigration administrative law processes to be more efficient. Overall, the development of the role of tribunal lawyers/TCWs is a relatively new and ongoing development.

Recommendation

Given that tribunal caseworkers are now exercising some powers and roles previously undertaken by judges, it is necessary to ensure that there is appropriate monitoring and oversight.

Digitalisation

Alongside most judicial processes, the immigration judicial review system is a paper-based process. Case-files are assembled and both the parties add documents to the file as the case progresses. This can often produce physically large case-files. One practical challenge with a paper-based system is that new and additional documents must be linked up with the physical case-file. If documents are not linked up in a timely way or are lost or mislaid, then serious problems can arise. Current processes do make some use of email. The judicial review claim form can be completed online, but it needs then to be printed out and posted to the Upper Tribunal.

There is a wider programme of tribunals modernisation that is currently being developed and implemented.[193] A major aspect of this reform programme is to enhance the efficiency and effectiveness of tribunal processes by moving from current paper-based systems to digital processes.[194] Experience in other tribunals, in particular the Traffic Penalty Tribunal, strongly indicates that there are considerable efficiency and accessibility gains to be made from online

[193] Sir Ernest Ryder, 'Justice in a Modern Way" (Speech to the Administrative Law Bar Association, 16 July 2018) available at: https://www.judiciary.uk/wp-content/uploads/2018/08/spt-speech-alba-lecture-july-2018.pdf> (accessed 19.10.2018).

[194] *Senior President of Tribunals' Annual Report* (2018).

systems. Case administration can be improved by digitalisation in terms of speed and efficiency.

There is a digitalisation project currently being developed, known as the “RCJ project.” This is a joint project between the Administrative Court and the Upper Tribunal to introduce an online system for judicial review. This will include an IT and database common platform. Claimants will be able to file an application online and upload documents. The Home Office and the Government Legal Department will likewise be able to upload grounds of defence and other documents to the online system. The idea is to have a root and branch reform away from a paper-based system to an online system in which all forms, grounds of challenge, listing of cases *etc.* will be placed online.

Many of the Judges and representatives we interviewed noted that changing the current paper-based to an online process would be a timely and welcome reform. This would enhance the accessibility and efficiency of the process. We also encountered a receptiveness from some representatives, though they expressed the desire to know more about this project. At a simple practical level, one representative highlighted that being able to pay the judicial review fees online rather than going to the Fees Office at Field House would be a practical, beneficial development.

It is likely that the digitalisation of judicial review will enhance the efficiency of the process and is therefore a welcome development. However, so far, relatively few details about the project have been made publicly available. It is not known how the new systems will work in practice and when it will be introduced. For instance, would a digitalised system involve only online document sharing? Or would it include the use of video-link for oral renewal and substantive hearings?

On the use of video-link, there are arguments both for and against its use. In favour of video link, there would be the convenience involved for claimants and representatives. On the other hand, most representatives appearing before the Upper Tribunal at Field House in central London are located within a five- or ten-minute walk away. Furthermore, video-link hearings needs will not necessarily facilitate the informal discussion and negotiation between the

parties and representatives outside the hearing room, which is just as important as the formal hearing itself. Such informal discussion assists the efficiency of proceedings by enabling the parties to narrow down the issues or to agree consent orders.

Another area of uncertainty whether litigants in person would be able to seek advice from the Assisted Digital service established by HM Courts and Tribunals Service. Overall, it would be helpful to know more from the Ministry of Justice and HM Courts and Tribunals Service about the scope and nature of this project, the principles informing its design, the broader direction of travel, and the timeline for implementation.

Recommendation

The Ministry of Justice and HM Courts and Tribunals Service should disclose more information about the digitalisation project, the principles informing its design, the broader direction of travel, and the timeline for implementation. It needs to be clarified whether litigants in person will be provided with digital assistance and the scope of this assistance.

Alternative dispute resolution

One of the original purposes of the research project was to investigate whether delay accounted for a significant proportion of judicial reviews claims and, if so, whether such cases can be resolved through a quicker and less expensive alternative dispute resolution (ADR) process, such as a specialist complaint-handling body. One of the findings of the research noted above is that while Home Office delay used to account for a greater proportion of the judicial review caseload, it does not currently feature in a significant way. Nonetheless, the research considered the issue of ADR and collected the views of representatives and judges on the possible adoption of ADR methods. There are a number of points to make in this respect.

First, both representatives and judges overwhelmingly saw little, if any, scope for ADR. Representatives highlighted that ADR would not be a formal, judicial, and independent process and therefore compared ADR unfavourably with the judicial process. For instance, one representative noted that "ADR with the Home Office would seem pointless. They

respond much better to threats of judicial review."[195] Another representative noted that "the difficulty is that with these types of cases, particularly with removal cases, the Home Office takes quite a robust view. I can't see that they would agree to ADR. I don't see the Home Office being flexible. There are very strong policy reasons for wanting to enforce removal. Obviously, the Home Office's point of view is that they have made lawful decisions."[196] Similarly, judges saw little scope for mainstream ADR techniques such as mediation or arbitration.

> "ADR is not something that really works in public law cases very well. So, it's not an arbitration or a mediation or a getting people round the table just to deal with, in the majority of cases. But there are alternative ways of ADR, not the kind of standard ADR that you would expect in other parts of the court system, but there are ways that things can be resolved without a judicial review. And I think it's about information to applicants and legal reps about appropriate cost. But in many cases I'd look at a file and think well, there's a really easy answer to this problem which is not a JR - it's another application or it's a letter to the Home Office or it's just putting in the documents that you didn't put in the first time round."[197]

Nevertheless, to some extent, there are already various alternatives to judicial review in operation. First, there is administrative review by the Home Office. We encountered different views concerning the effectiveness of administrative review. As one judge noted:

> "Where there's an administrative review process - so all the points-based type of system cases - it has to be JR because there is no other way of challenging it. On the administrative review process: I have seen some decisions which are good and I have seen some which completely miss the point. Errors are repeated or, you know, cases where there's been two or three administrative reviews and because at each point the decision has been changed slightly, in which case they – it generates a new right and then it still ends up in a JR because it hasn't been sorted out."

[195] Representative interview.
[196] Representative interview.
[197] Upper Tribunal Judge interview.

Some representatives commented critically on the usefulness and adequacy of administrative reviews, noting that they expected reviews to uphold initial refusal decisions and viewed administrative review as a preliminary stage before seeking judicial review:

> "The problem with administrative review is that the Home Office have given the claimants very limited grounds of appeal. When you submit an administrate review application, in effect it goes to another case worker at the Home Office who simply reviews the original decision and the majority of the time the outcome of the administrative review is just relying on the refusal letter. It doesn't really engage with the representations that are submitted with the administrative review. So, in my view, an administrative review, as a remedy, I think, is not very good for claimants, hence why they decide to go for a judicial review where there's oversight by a judge, who is independent from the Home Office. Furthermore, with administrative review, there is no impartiality from the claimant perspective."

> "Administrative review is just another decision under challenge, so you are challenging both the initial and the review decision. You have to find flaws in both. It may be that the first decision has been largely superseded by the review so they may have said, 'Oh yes, we've made a mistake in X but we still stand by our overall conclusion' in which case you're focusing on the second decision. But I don't think it really changes the experience of challenging it very much. I don't think it's treated with more deference by the court, for example."

There have, though, been improvements to the Home Office's administrative review system following reports by the Independent Chief Inspector of Borders and Immigration.[198] It is possible that further improvements could be undertaken. In this respect, it is also important to note that the Law Commission intends to undertake a law reform project on administrative

[198] Independent Chief Inspector of Borders and Immigration, *An Inspection of the Administrative Review Processes Introduced Following the Immigration Act 2014* (2016); Independent Chief Inspector of Borders and Immigration, *A Re-inspection of the Administrative Review Process* (2017).

review in general and this could lead to improvements in administrative review systems in general.[199]

Another form of ADR is how cases are settled between claimants and the Home Office. As one judge explained:

> "The individual cases I have, and I think my colleagues have as well, issued orders to try and get the parties to agree things and to try and narrow down and define the issues. So I don't think it's a kind of general push but on a case by case basis it can be appropriate. So particularly for examples cases where expedition is sought or there's a vulnerable individual, I try to make sure there's agreement at least in the case management perspective in terms of directions. An example would be a number of cases brought in relation to unaccompanied asylum seeking children, often those who are in France – there's a handful of those cases, where the claimants have tried to engage with the Home Office and haven't got much response. They've issued proceedings to try and deal with this. They've asked for a list of directions and expedition and things to be complied with. I've looked at those in some cases saying, 'Well, I'm not going to make those directions because it – the Home Office have got to be given a realistic chance to have legal advice and respond. But this is a case where sensible grown-ups with proper legal reps on both sides should be able to agree an appropriate way forward which should avoid the use of court time doing so.' And then I'll say, 'Please go away and agree this amongst yourselves and if not, you're coming to court and explain why you haven't agreed or we'll deal with it in court.' And we can do short case management hearings of that nature for particular cases which often does lead to quite a lot of agreement between the parties."[200]

Some representatives also explained how they often raise issues with the local Member of Parliament in a case in which the claimant had attended the Home Office reporting centre and been detained:

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[199] Law Commission, *Thirteenth Programme of Law Reform*, HC Paper No.640 (Session 2017-19), pp.13-14.
[200] Upper Tribunal Judge interview.

> "We were really trying to get to the Home Office to find out what was going on. So, we got our client to contact their local MP to make enquiries, and then we received a decision that was backdated about a month or so, but it was handed to the client in his hands. We are always asking for most of the cases in which big issues come up for help from the local MP, who is helpful. Sometimes the Home Office don't respond or the detention centre's phone number doesn't work. They are never giving any response so we are asking through the MP that's quicker and easier. Most of the MPs are helpful."

Judges also noted how judicial reviews can quickly become academic for practical reasons. For instance, when judicial reviews issued on the same day as further representations are submitted before removal. If the further representations are submitted and then the removal is deferred or the representatives are considered, then this will often render the judicial review unnecessary. Similarly, in entry clearance cases where the applicant has not submitted the correct documents, then it would be quicker and cheaper in the long run for the applicant to submit a fresh application with the correct documents and explain the matter rather than seek judicial review. Furthermore, some judicial reviews can become academic very shortly after they have issued, certainly by the time they come for an oral hearing, because something else has happened and therefore there is no purpose in in dealing with it because the person's immigration history has moved on since the claim. As one judge put it, "there is a need I think for people to stand back and practically look at the situation rather than jump for a judicial review claim."[201] A related point is that better communication between the parties before oral renewal and substantive hearings could enhance the efficiency of the process.

Overall, there are various mechanisms which operate as *de facto* ADR methods, in particular settlement. Introducing a separate form of ADR before judicial review is unlikely to work and there is little appetite for it.

Recommendation

[201] Upper Tribunal Judge interview.

Rather than introducing an ADR mechanism, it would be more profitable to enhance the quality and efficiency of existing processes. This could include: reducing the number of hopeless judicial review claims lodged, improving the Pre-Action Protocol process, and better communication between the parties before oral renewal and substantive hearings.

Should some appeal rights be used rather than judicial review?

Given the limited scope of judicial review as a remedy, the question arises as to whether or not appeal rights should be used rather than judicial review. Under the Immigration Act 2014, immigration decisions can only be appealed on asylum and human rights grounds. It is possible for some decisions to be challenged under Article 8 on human rights grounds on the basis that the decision was not in accordance with the law. However, the question arises as to whether a wider range of Home Office decisions should attract a right of appeal.

The question whether to have appeal rights is partly a technical matter of administrative law. For instance, the Leggatt review of tribunals suggested that the allocation of disputes to tribunals should be informed by the following values: participation; accessibility for users; and specialist expertise of the tribunal.[202] At the same time, the existence of appeal rights is also a policy issue to be determined by the Government and Parliament. Tribunal appeal rights are always statutory. Any change to the current position would require primary legislation. At a policy level, the matter raises a number of issues such as the desirability of having appeal rights and the cost, delay, and resources involved in administering appeals.

There are three possible options: (1) restore all appeal rights to the position pertaining before the coming into force of the Immigration Act 2014; (2) restore or introduce appeal rights in a limited range of cases, for instance, cases that raise important issues of fundamental rights; or (3) do nothing.

The principal argument in favour of option 1 – restoring appeal rights – is that an appeal provides a more effective remedy than judicial review. It is quite possible that someone would have been successful in an appeal where they cannot be in a judicial review because is limited

[202] A. Leggatt, *Tribunals for Users: One System, One Service, Report of the Review of Tribunals* (2001).

to considering the legality, procedural fairness, and reasonableness of the challenged decision. Previous high appeal success rates are not replicated within judicial review because of its limited nature. At the same time, there are legitimate issues concerning the current pressure on the tribunal system and limited resources.

The arguments against restoring appeal rights include the associated cost and delay of appeals. Further, the rationale behind the removal of appeal rights under the Immigration Act 2014 was to limit appeals only for those decisions that raised the most important issues, such as fundamental rights cases. Restoring appeal rights beyond this would require Parliament to re-frame its policy for immigration appeals. This is a possible option, but it is principally a policy issue.

Another issue is that restoring appeal rights to the position prior to the Immigration Act 2014 would do little to reduce the overall volume of judicial reviews. This is because, as considered above, most judicial review litigation is concentrated in areas such as certification and para 353 fresh claim decisions, in which judicial review is being used to obtain a right of appeal. Introducing appeal rights in such areas would reduce judicial review litigation, but would undermine the basic purpose of these filtering mechanisms, which is to reduce unfounded appeals.

What then of the possibility of restoring or introducing appeal rights in a limited range of cases, for instance, those cases that raise important issues of fundamental rights? The research has highlighted various decisions that do not attract full rights of appeal, such as decisions concerning human trafficking, statelessness, and domestic violence. The research has also highlighted the limited remedy provided by judicial review in such cases. Furthermore, the right of appeal to the tribunal is generally a quicker remedy than judicial review.

It is arguable that extending full appeal rights in such cases would be fulfilling the policy rationale behind the Immigration Act 2014, which was to limit appeals those decisions that affect fundamental rights. Human trafficking, domestic violence, and statelessness decisions are important “fundamental rights” decisions in a wider sense. Furthermore, Parliament did

not specifically consider the issue of appeal rights in human trafficking, statelessness and domestic violence cases when debating the Immigration Act 2014.[203] Arguably, the lack of full appeal rights in such cases is anomalous when set against the policy behind the Immigration Act 2014 to restrict appeals to cases of fundamental rights.

The number of such decisions is not particularly large. The associated costs and delays caused would be limited. It might be argued that the number of such cases would increase if full appeal rights were introduced as abusive unmeritorious would be lodged in the appeal system to delay removal. On the other hand, scope for this already exists with regard to asylum and human rights appeals. Furthermore, the need to limit abuse should not be achieved at the cost of preventing genuine claimants from proving their case. Accordingly, it is recommended that consideration be given to introducing appeal rights in a wider range of decisions, such as domestic violence and statelessness decisions. Introducing appeals in such cases would provide individuals with a more effective and timely remedy than judicial review.

Recommendation

There are some types of decisions that are low in number in which there is a strong argument for having appeal rights. These are decisions concerning domestic violence, statelessness, and human trafficking. These decisions are relatively small in scale and of fundamental importance to the people involved. Judicial review is typically an inadequate remedy because the issues raised are factual and evidential. It seems anomalous that asylum and human rights decisions attract a right of appeal, but that other 'fundamental rights' cases do not. Accordingly, it is recommended that the introduction of full appeal rights for such decisions be considered.

What happens elsewhere? A Comparison with France and the Netherlands

We wanted to compare the UK system with what happens elsewhere in Europe. To do so, we looked at equivalent systems in France and the Netherlands. Both of these countries have, like the UK, implemented the Asylum Procedures Directive. We contacted academic and

[203] For instance, the Joint Committee on Human Rights resisted the withdrawal of appeals, but did not consider the lack of appeals in human trafficking, statelessness, and domestic violence decisions. See Joint Committee on Human Rights, *Legislative Scrutiny: Immigration Bill* (HL 102 HC 935 2013-14).

practising lawyers in those countries for information. We also collected information from the internet and other sources.

A major difference between administrative law remedies in the UK and elsewhere in Europe is that the UK draws a clear distinction between the two separate procedures of judicial review and tribunal appeals. In the UK, judicial review and tribunal appeals are discrete jurisdictions and procedures.

France

In France, asylum claims are considered initially by the French Office for the Protection of Refugees and Stateless Persons (OFPRA), which is an administrative body.[204] Refusal decisions can be appealed to the National Court of Asylum (CNDA).[205] The CNDA systematically examines the merits of whether to grant refugee protection or subsidiary protection. The court holds hearings. Legal aid is automatically available, unless the appeal is considered to be clearly inadmissible.

In France, there is a procedure broadly similar to para 353 asylum fresh claims. An individual previously refused asylum can apply for a new asylum claim, but only if they present new evidence supporting their case they had no knowledge of before the court's decision (if it is older than the date of the decision) or were in such a vulnerable situation at that stage they were not able to disclose it before. This includes the situation in which the conditions in the relevant country have worsened. If, after the preliminary examination OFPRA considers that the "new evidence" or facts do not significantly increase the risk of serious threats or of personal fears of persecution in case of return, then it can declare the subsequent application to be inadmissible.[206] An individual whose fresh asylum claim has been refused can challenge that refusal before the court. A suspensive appeal can be lodged within a time period of 1 month when: (i) the subsequent application has been deemed inadmissible by; or (ii) OFPRA has rejected the admissible subsequent application after it has been processed through the

[204] See generally: <https://www.ofpra.gouv.fr/> (accessed 19.11.2018).
[205] See generally: <http://www.cnda.fr/> (accessed 19.11.2018).
[206] Forum Réfugiés – Cosi, 'Subsequent applications' <http://www.asylumineurope.org/reports/country/france/asylum-procedure/subsequent-applications> (accessed 19.11.2018).

accelerated procedure. The CNDA will then have 5 weeks to issue a decision on the appeal.[207] We were informed that individuals can submit various successive applications if they are still in France. We were also informed however that the rules were being tightened up to make it more difficult for people to stay and to apply for other types of residency cards after a failed asylum claim.

There are, broadly speaking, equivalent situations that arise in the UK's process of certifying asylum and human rights claims. As regards asylum claims, we were informed that there was a proposed law passed by the French Parliament would reduce delays and increase the scope for out of country appeals before the CNDA.[208] An asylum claimant who has been refused and is appealing to the CNDA could ask the court to suspend the removal order against him.

As regards human rights claims, an individual who has managed to stay in France for a sufficiently long period of time, such as three or five years or seven or ten years depending on the individual's profile, can lodge an application to remain under Article 8 ECHR. For such applications to succeed, it is necessary for applicants to demonstrate that they are integrated in the sense that their private life now belongs in France as evidenced through marriage and children. We were informed that a "circulaire" (a formal statement by the executive interpreting a legal text) issued by the French Interior Ministry of 2012 allows the national authorities ("prefectures") to regularise illegally present nationals.

An applicant refused under Article 8 ECHR can appeal the decision in France and is allowed to remain in-country throughout the first instance proceedings. However, if the tribunal rejects the claim, then the applicant may be deported and have to appeal from abroad through a lawyer. The family reunification procedure can take some time and requires that a Third Country National returns to his country of origin, to wait some months, possibly even years,

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[207] Ibid.

[208] 'France approves controversial immigration bill' (*BBC News*, 23 April 2018) <https://www.bbc.co.uk/news/world-europe-43860880> (accessed 19.11.2018); K. Willsher, 'Macron faces internal dissent as MPs pass tough immigration bill' (*The Guardian*, 23 April 2018) <https://www.theguardian.com/world/2018/apr/23/macron-faces-internal-dissent-as-mps-pass-tough-immigration-bill> (accessed 19.11.2018).

for a decision. In 2014, the French government lost five cases before the European Court of Human Rights for violating Article 8 ECHR in the context of family reunification decisions.[209]

The Netherlands

In the Netherlands, asylum and immigration decisions are taken initially by the Dutch Immigration and Naturalisation Service (IND). Most asylum claims are processed through an eight day procedure.[210] A key difference with the UK is that initial decisions are mostly taken by legally trained staff. Dutch "case workers are required to have a university degree. Most are lawyers, some studied anthropology or specific cultures. Their training is based on the European Asylum Support Office curricula and lasts at least 9 months."[211] Another difference is that the Dutch system does not have two separate procedures for separate decisions on an asylum claim and on the decision whether or not to return an individual. Instead, a single composite decision is taken. The decision to refuse asylum includes the decision to remove. There is no possibility to appeal the expulsion itself.

Before commencing a judicial challenge, the individual must use the administration's objection procedure. This is commenced by lodging a notice of objection with the administrative authority in question. If the objection is declared unfounded, an application for judicial review may be lodged with a District Court. Judicial challenges against refusal decisions are decided in the first instance by a District Court. At the appeal stage of the asylum procedure asylum seekers continue to have access to free legal assistance. No merits test applies. A particular feature of the Dutch system is that most asylum claims are decided within less than two months including appeals. Onward challenges lie to the Dutch Council of State. The Administrative Jurisdiction Division of the Council of State is the highest administrative court.[212]

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[209] *Senigo Longue v France* (19113/09); *Tanda-Muzinga v. France* (2260/10); *Ly v. France* (23851/10); *Mugenzi v. France* (52701/09).

[210] Dutch Council for Refugees, 'Netherlands regular procedure' <http://www.asylumineurope.org/reports/country/netherlands/asylum-procedure/procedures/regular-procedure> (accessed 19.11.2018). For more detail, see Asylum Information Database, *Country Report: Netherlands* (2017) <http://www.asylumineurope.org/reports/country/netherlands> (accessed 19.11.2018).

[211] European Stability Initiative, "*Amsterdam in the Mediterranean" How a Dutch-style asylum system can help resolve the Mediterranean refugee crisis* (2018), p.4.

[212] https://www.raadvanstate.nl/

There are some key differences between the UK and Dutch judicial procedures. First, Dutch administrative law judges are generalist rather than specialist. Second, although phrased in the language of appeal, in the Dutch system, the administrative court is limited to that of reviewing the initial decision on the grounds of illegality. Dutch administrative law does not draw the same distinction between judicial review and tribunal appeals that is drawn in the UK. A Dutch administrative court will typically quash an administrative decision because it has not been sufficiently well-reasoned. The case will then be sent back to the immigration service to be re-decided. A Dutch court will never, for instance, rule whether an asylum claimant is credible or has a well-founded fear of persecution under the Refugee Convention. Accordingly, the type of scrutiny afforded by the Dutch courts is called marginal judicial review as contrasted with intensive judicial review.[213]

In 2016, the Dutch Council of State ruled that the Asylum Procedures Directive did not impose a general intensity of judicial review under administrative law in asylum cases:

> "In the Dutch context, the Regional (District) Court is not allowed to examine the overall credibility of the statements of the asylum seeker intensively (full review). This is, according to the Council of State, due to the fact that the IND has specific expertise to verify statements of the asylum seeker and is therefore in general in a better position to examine the credibility of the claim. An administrative judge can never substitute his or her own opinion on the credibility of the asylum seeker's statements for that of the authorities. Where contradictory or inconsistent statements are made by the asylum seeker, the review can, however, be more intensive; this is different than it used to be. The other elements – not the credibility of the statements – for assessing whether the asylum seeker qualifies for international protection (*de zwaarwegendheid*) have always been reviewed intensively by Regional Courts."[214]

[213] S. Essakkili, 'Marginal judicial review in the Dutch asylum procedure: An assessment in light of article 3 and 13 of the European Convention on Human Rights' (VU Migration Law Series No 2, 2005) <https://rechten.vu.nl/en/Images/Essakkili_Marginal_judicial_review_in_the_Dutch_asylum_procedure_tcm248-60756_tcm248-60756.pdf> (accessed 19.11.2018).
[214] Ibid.

Appeals against an asylum refusal decision automatically suspend the applicant's removal. This does not apply when an application is deemed manifestly unfounded. During the process of a challenge to the Council of State or if there is a further asylum application, a claimant will not have the right to stay in the Netherlands. If an individual wants to prevent removal, it is necessary to request the court to issue an interim measure to suspend removal during an appeal. In some cases, it is necessary to seek an urgent procedure in order to prevent expulsion.

As regards family life applications, individuals seeking can apply for a regular residence permit on family unification grounds, but must first return to their country of origin first before applying. We were informed that such applications are usually rejected on the basis that the applicant is still in the Netherlands.

As regards fresh asylum claims, an individual previously refused asylum can subsequently lodge a "Repeated asylum application" (HASA). This process usually takes one day and is termed the one-day assessment (EDT). The applicant can submit fresh circumstances and is then invited for an interview with the immigration service. The basic principle is that the asylum seeker must submit all the information and documents known to him or her in the initial asylum procedure. However, the circumstances and facts submitted in a subsequent application are considered 'new' if they post-date the previous refusal decision. In some circumstances, certain facts, which could have been known at the time of the previous asylum application, are nevertheless being considered 'new' if it would be unreasonable to decide otherwise. This is the case, for example if the asylum seeker, only after the previous decision, gets hold of relevant documents which are dated from before the previous asylum application(s).[215]

If the immigration service thinks that there are no grounds for granting asylum status or there is nothing new, then they can provide an intent of rejection on the same day. The applicant will then have one day to consult a lawyer and to respond. On the third day, a decision will be

[215] Dutch Refugee Council, 'Subsequent Applications' <http://www.asylumineurope.org/reports/country/netherlands/subsequent-applications> (accessed 19.11.2018).

made. This is a very quick procedure so as to reduce delay and also limit the ability of asylum applicants to access reception facilities again.

An individual whose repeat asylum application has been refused can appeal the decision to the District Court. The appeal has to be lodged within one week after the rejection. The lodging of an appeal does not automatically suspend the asylum seeker from retaining lawful residence in the Netherlands. This means that the applicant may be removed during the appeal. To prevent removal, the asylum seeker has to request for a provisional measure with the District Court.

Discussion

Some comments can be made on the basis of this brief comparison. First, while there are differences in administrative and judicial procedures, all countries handling asylum and immigration applications must address similar issues. Second, compared with the UK, both the Netherlands and France, have a more unitary system of judicial challenges. There is not the equivalent and complex interpenetration between judicial reviews and statutory appeal rights as exists in the UK. This is most apparent from the comparison between the UK and the Netherlands. Dutch administrative courts exercise a jurisdiction akin to judicial review in England and Wales. There is no equivalent of the statutory appeal jurisdiction of the First-tier Tribunal (Immigration and Asylum Chamber) in the Netherlands. There are both advantages and disadvantages of this – depending on the point of view. A limited single right of challenge to an administrative court is a simpler process than a system in which statutory appeals and judicial review intermingle with one another at various stages. On the other hand, having a limited right of challenge provides less potential protection for the individual when compared with a full right of appeal on both issues of fact and law as is the case in the UK. It is also important to highlight that other factors will condition and affect the system of administrative law remedies. For instance, in the Dutch immigration service is generally perceived to be an efficient administrative body staffed mostly by trained lawyers and makes relatively quick decisions. The Dutch system is not perfect or without any problem. Over recent years, backlogs have increased following the 2015 refugee crisis. The Dutch system was increasingly

unable to ensure ensuring quick procedures staffed by sufficient personnel and resources.[216] Nevertheless, the perceptions of the Dutch administrative process appear quite encouraging. In considering these matters, it is therefore important to bear in mind two points: first, the historical-legal traditions that influence the selection of administrative law remedies; and second, the perception toward the administrative system making the decisions to be challenged.

[216] See, *e.g.*, D. Thränhardt, *Asylum Procedures in the Netherlands* (2016) <https://www.bertelsmann-stiftung.de/fileadmin/files/Projekte/28_Einwanderung_und_Vielfalt/IB_Studie_Asylum_Procedures_NL_Thraenhardt_2016.pdf> (accessed 19.11.2018).

9. Conclusion

This report has investigated how the immigration judicial review system is operating in practice. More specifically, the report has presented empirical evidence as to the types of immigration decisions challenged by way of judicial review.

The evidence shows that judicial review is an important remedy for challenging the legality of administrative decisions. In many instance, it is a claimant's last chance to vindicate their rights and provides an important safeguard against injustice. However, this report has also demonstrated that the process is under strain in a number of respects. The system is a largely one centred on the permission stage, with substantive disputes being rare. Claims are of various quality. Many claims contained standard and formulaic grounds of challenge are refused permission because the Upper Tribunal decides that they are unarguable. The quality of representation varies drastically, with instances of poor representation being common. At the same time, there is also evidence that initial Home Office decisions, and the processing of judicial review claims by both the Home Office and the Government Legal Department, could be enhanced. More effective communication between the parties could improve the effectiveness of the overall judicial review process.

In the wider context of immigration administrative justice, the evidence presented in this report suggest that some areas need revisiting. In relation to some categories of immigration decision-making, a right of appeal to a tribunal would be a more effective remedy than judicial review. With the ongoing HMCTS Transformation reforms increasing the use of technology in courts and tribunals, there is scope for increasing the accessibility and efficiency of the judicial review process.

All of this presents a challenge of justice system design. It is clear from our analysis there is no "magic bullet" reform which will lead to less litigation and more justice. Issues we have identified within the judicial process usually have complex causes and are interlinked. Furthermore, many of the difficulties that appear in the judicial review process are manifestations of much wider problems outside of the process, such as flaws in initial decision-making. Improvement, therefore, is likely to be attained by incremental changes

which are tested and reviewed when implemented. Our evidence base suggests the following recommendations are worthy of consideration:

1. Representatives that make use of standard, formulaic grounds of challenge need to undertake better preparation of judicial review claims.
2. There are a variety of mechanisms to deal with vexatious claims: the Upper Tribunal's internal reporting system; deeming claims to be Totally Without Merit; *Hamid* hearings; and referrals to regulatory bodies. The recent reduction in the number of judicial review claims may be in part attributable to greater use of these mechanisms. The most effective way of seeking to reduce the number of hopeless judicial review claims is to reduce the levels of poor quality representation by pulling up those firms that lodge abusive and vexatious claims.
3. Most judicial review challenges are refused permission. We encountered many robust Home Office decisions. At the same time, there were also cases in which the Home Office decision was not robust and sustainable. Better initial decision-making requires that the Home Office learns lessons highlighted through the judicial review process. Better feedback mechanisms could be put in place to achieve this.
4. More involvement of legally trained staff, such as tribunal caseworkers, at the Pre-Action Protocol stage could increase the efficiency of the process if it leads to fewer cases being conceded at later stages of the judicial review process.
5. The process of settling claims through a consent order could operate more efficiently if there was improved communication between the parties throughout the process.
6. Repeat judicial reviews can be unnecessary, inefficient, costly, and likely to cause anxiety to claimants. To reduce the risk of this, the Home Office needs to exercise greater care when re-taking a decision so as to prevent further litigation. Fresh Home Office decision letters following a successful or conceded judicial review should be checked, if necessary by senior case-workers, to ensure compliance with the consent order or a ruling from the Upper Tribunal. Furthermore, when a consent order is agreed, then both parties need to fulfil their obligations. Further judicial reviews against the Home Office to ensure compliance with consent orders are wasteful and should be unnecessary.
7. HMCTS should routinely collect data on the types and categories of immigration judicial reviews, including on costs.

8. The Home Office's power to certify cases as clearly unfounded should be exercised carefully and only when appropriate. There may be a need for further guidance for decision-makers on this point.
9. Parliament and the Government ought to consider whether to re-introduce appeal rights in certain categories of case, such as: human trafficking; statelessness; and domestic violence cases. Arguably, such cases could be better handled through the appeals system than judicial review.
10. Litigants in person need more support throughout the judicial review process. This could be provided through a combination of leaflets, online guidance, videos, and digital assistance.
11. The process for applying for Exceptional Case Funding needs to be more accessible and proportionate. Further improvements are required beyond those already implemented.
12. There is a need for a detailed review of how costs operate in practice drawing upon data from the Home Office and the Government Legal Department. This review could examine more detailed information as to costs with a view to reaching a better understanding of costs in this area and how costs influence behaviours.
13. Consideration should be given as to whether other types of immigration judicial review work could be usefully transferred from the Administrative Court to the Upper Tribunal, such as nationality cases.
14. Given that tribunal caseworkers are now exercising some powers and roles previously undertaken by judges, it is necessary to ensure that there is appropriate monitoring and oversight.
15. The Ministry of Justice and HM Courts and Tribunals Service should disclose more information about the digitalisation project, the principles informing its design, the broader direction of travel, and the timeline for implementation. It needs to be clarified whether litigants in person will be provided with digital assistance and the scope of this assistance.
16. Rather than introducing an alternative dispute resolution (ADR) mechanism, it would be more effective to enhance the quality and efficiency of existing processes. This could include: improving the Pre-Action Protocol process and encouraging better communication between the parties before oral permission and substantive hearings.

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