JUDICIAL REVIEW TRENDS AND FORECASTS 2020

HERBERT SMITH FREEHILLS

Blackstone CHAMBERS

Public Law Project

JUDICIAL REVIEW TRENDS AND FORECASTS 2020

Speakers

Professor Jeremias Adams-Prassl, Zahra Al-Rikabi, Dr Julinda Beqiraj, Jonathan Blunden, Natalie Byrom, Tim Buley QC, Ayesha Christie, Carla Clarke, Jason Coppel QC, Professor Paul Craig, Cori Crider, Rosa Curling, Tom de la Mare QC, Kevin de Liban, Chanel Dolcy, Marina Fernandez-Reino, Deborah Gellner, Polly Glynn, Khatija Hafesji, Jo Hickman, Tom Hickman QC, Denisa Gannon, Bijan Hoshi, Rachel Jones, Jo Hynes, Charlotte Kilroy QC, Professor Jeff King, Zoe Leventhal, Andrew Lidbetter, David Locke QC, Sara Lomri, Shu Shin Luh, Ravi Naik, Jacqui Mckenzie, Kate Meakin, Jeremy Miles AM, Julian Milford QC, Allison Munroe QC, Hanif Mussa, Zia Nabi, Ravi Naik, Kate O'Regan, Dr Federico Ortino,Chai Patel, Naina Patel, Farhana Patel, Parishil Patel, Ollie Persey, Alison Pickup, Jason Pobjoy, Elizabeth Prochaska, Jasveer Randhawa, Alexandra Sinclair, The Right Hon Lord Justice Singh, Professor Maurice Sunkin, Mr Justice Swift, Dr Joe Tomlinson, Arianna Vedaschi, Harriet Wistrich, Nusrat Zar

Topics

Top Public Law Cases of the Year, Procurement and commissioning
|Judicial review of the regulators, Citizens' Rights post-Brexit,
The Post-EU Transition Landscape: Trade and Sanctions,
Judicial review of the delegated power to legislate,
The operation of the administrative court during COVID and the move to online court,
Access to justice: challenging unlawful systems and obtaining redress,
The dynamics of Judicial Review litigation,
The use and abuse of statutory instruments,
Using the law to protect the vulnerable during the pandemic,
Executive power and the pandemic, What is access to justice?, Race discrimination claims ,
Challenging algorithmic decision making and data discrimination

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Monday 12 October

Opening Address – Judicial Review: A View from the Court of Appeal
The Right Honorable Lord Justice Singh

Top Public Law Cases of the Year
Bijan Hoshi, Public Law Project
Jason Pobjoy, Blackstone Chambers
Nusrat Zar, Herbert Smith Freehills

The operation of the Administrative Court during COVID and the move to online courts
Chair: Mr Justice Swift
Dr Natalie Byrom, The Legal Education Foundation
Jo Hynes, Public Law Project
Rachel Jones, Blackstone Chambers
Shu Shin Luh, Doughty Street Chambers

Tuesday 13 October

EU Citizens' Rights post-Brexit
Tim Buley QC, Landmark Chambers
Marina Fernandez-Reino, The Observatory Centre on Migration, Policy and Society
Nicole Masri, Rights of Women
Ollie Persey, Public Law Project

Judicial Review of the Regulators
Andrew Lidbetter and Jasveer Randhawa, Herbert Smith Freehills

Judicial Review of the delegated power to legislate
Hanif Mussa, Blackstone Chambers

The use and abuse of statutory instruments
Tom de la Mare QC, Blackstone Chambers
Alexandra Sinclair, Public Law Project and London School of Economics

Wednesday 14 October

The post-EU Transition Landscape: Trade and Sanctions
Chair: Dr Julinda Beqiraj, the Bingham Centre for the Rule of Law
Zahra Al-Rikabi, Brick Court Chambers
Kate Meakin, Herbert Smith Freehills
Dr Federico Ortino, Kings College London
Naina Patel, Blackstone Chambers

Using the law to protect the vulnerable during COVID-19
Chair: Rosa Curling, Leigh Day
Ayesha Christie, Matrix Chambers
Deborah Gellner, ASAP
Khatija Hafesji, Monckton Chambers
Julian Milford QC, 11 Kings Bench Walk

Access to justice – challenging unlawful justice and obtaining redress

Charlotte Kilroy QC, Blackstone Chambers
Jacqui McKenzie, Centre for Migration Advice and Mckenzie Beute Pope
Chai Patel, Joint Council for the Welfare of Immigrants
Harriet Wistrich, Centre for Women's Justice and Birnberg Peirce

Thursday 15 October

Race discrimination claims
Chair: Sara Lomri, Public Law Project
Chanel Dolcy, Bhatt Murphy
Denisa Gannon, Coventry Law Centre
Allison Munroe QC, Garden Court Chambers
Farhana Patel, Bindmans

Procurement and commissioning
Chair: Jonathan Blunden, DLA Piper
Jason Coppel QC, 11 Kings Bench Walk
Zoe Leventhal, Matrix Chambers
David Lock QC, Landmark Chambers
Parishil Patel QC, 39 Essex Chambers

Executive power and the pandemic
Chair: Professor Jeff King, UCL
Tom Hickman QC, Blackstone Chambers
Jeremy Miles AM, Counsel General for Wales and Welsh Minister for European Transition
Catherine O'Regan, Director, Bonavero Institute of Human Rights and South Africa's COVID-19 Designated Judge
Arianna Vedaschi, Full Professor of Comparative Public Law, Bocconi University and Trinity College Dublin COVID-19 Law and Human Rights Observatory

Friday 16 October

The dynamics of Judicial Review litigation
Chair: Alison Pickup, Public Law Project
Carla Clarke, Child Poverty Action Group
Polly Glynn, Deighton Pierce Glynn
Zia Nabi, Doughty Street Chambers
Professor Maurice Sunkin, University of Essex

Closing conversation
Paul Craig, Emeritus Professor of English Law, Oxford University
Elizabeth Prochaska, Chair of Public Law Project

Algorithmic decision-making and data discrimination
Chair: Dr Joe Tomlinson, Public Law Project and University of York
Professor Jeremias Adams-Prassl, University of Oxford
Cori Crider, Foxglove
Kevin de Liban, Legal Aid of Arkansas
Ravi Naik, AWO Legal

JUDICIAL REVIEW TRENDS AND FORECASTS 2020

Welcome to PLP's annual conference,

Firstly, I want to say how much we appreciate your support for this event and for your attention online. Since our lives have changed shape so radically this year, so too has our relationship with time. Some things now take none (commuting anyone?). And some things, like annual conferences, take more! But either way we know your time, and your attention, is important, so thank you. And a particular thank you to all our amazing contributors, some of whom are joining us from different time zones, and to our steadfast sponsors: Herbert Smith Freehills and Blackstone Chambers. Continuity is important for us during times of change, as is community.

One striking aspect of the pandemic is our collective need for a sense of community. This conference addresses many of the concerns that have been brought into sharp focus in the last six months. The impact of inequalities, the importance of meaningful access to justice, and the centrality of public decision making to the way people are able to live their lives. Hence, in 2020, our particular focus on the Rule of Law and interest in the use (and abuse) of executive power. These are interests that define and unite our community.

It is only being part of this community that makes it possible for us to do the work we do. As usual, we'd love your feedback not only on this event but on our work in general. We'll be running a poll throughout the week: please do take the time to tell us what you think.

Jo Hickman, Director
Public Law Project
October 2020

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Speaker biographies

Professor Jeremias Adams-Prassl, University of Oxford

Jeremias Adams-Prassl is Professor of Law at Magdalen College, University of Oxford, and Deputy Director of the Law Faculty's Institute of European and Comparative Law. He read law at Oxford, Paris, and Harvard Law School. He is the author of numerous articles and books, including *The Concept of the Employer* (OUP 2015) and *Humans as a Service: the Promise and Perils of Work in the Gig Economy* (OUP 2018). His work has been recognised by prizes for teaching, research, and public impact, including the Modern Law Review's Wedderburn Prize, a British Academy Rising Star Engagement Award, and the 2019 St Petersburg Prize.

Jeremias is particularly interested in the role of technology in shaping the future of work and innovation. From April 2021, he will be the Principle Investigator of a five year project, funded by a €1.5m ERC grant, exploring the rise of algorithmic management with an interdisciplinary team of computer scientists, lawyers, and sociologist. Jeremias tweets about digitalisation and the future of work at @JeremiasPrassl.

Zahra Al-Rikabi, Brick Court Chambers

Zahra has a broad practice encompassing public law, European Union law, public international law and commercial litigation. She has advised on the implications of Brexit in a number of different contexts, and appeared in *Canary Wharf v European Medicines Agency* [2019] EWHC 335 (Ch), which considered whether Brexit would frustrate the EMA's lease in Canary Wharf, raising various issues of EU law, customary international law and domestic law. Zahra's EU law experience includes advising on and challenging EU economic sanctions, and her PIL experience includes ICSID and UNCITRAL investment treaty arbitration.

Zahra is recognised as a leading junior in Administrative and Public Law and European Union Law and she was selected for The Lawyer's Hot 100 in 2020.

Dr Julinda Beqiraj, Bingham Centre for the Rule of Law

Dr. Julinda Beqiraj is the Maurice Wohl Senior Research Fellow in European Law. She works on a number of projects, including one on the role of the rule of law in the context of the 2030 Sustainable Development Goals, and one on barriers and solutions to access to justice across jurisdictions. She is also involved in the organization of Bingham Centre events on these issues. Julinda also works as an expert consultant for the Council of Europe, Commission on the Efficiency of Justice (CEPEJ).

Prior to joining the Bingham Centre in 2014, Julinda worked for several years as research fellow and lecturer in international law at the University of Trento, where she taught courses on public international law, EU law and international economic law. She holds a Ph.D. from the School of International Studies in Trento and her doctoral dissertation focused on the international protection of the economic and social rights of migrant workers.

Julinda has published on topical issues of public international law and has carried out research in a series of projects covering subjects, such as, international migration, international economic law, regional human rights protection in Europe, European Union law, child labour issues, international humanitarian law and international criminal law.

Jonathan Blunden, DLA Piper

Jonathan works in public and administrative law and has a wide range of experience advising public and private sector bodies on contentious and non-contentious public law matters.

Jonathan's practice covers public sector and commercial matters and includes acting for claimants and defendants in judicial review and procurement proceedings, advice regarding defensible public sector decision-making, public inquiries, and statutory interpretation and drafting. Jonathan also maintains an information law practice and has experience of advising public and private sector bodies on data protection, GDPR and FOIA-related problems.

Tim Buley QC, Landmark Chambers

Tim Buley QC specialises in all areas of public and regulatory law, human rights, and planning and environmental law. He is recognised as a leading silk across eight areas in Chambers UK Bar 2020 and the Legal 500 2020: Administrative and Public Law, Civil Liberties and Human Rights, Planning, EU Law, Environmental Law, Local Government, Immigration and Community Care. Immediately prior to his appointment to silk in 2019, Tim was the only junior named in Band 1 in both directories in Public Law ("probably the leading junior at the Administrative Law Bar",) and was top ranked in five practice areas. He was nominated as Chamber's Public and Human Rights Junior of the Year in 2017.

Dr Natalie Byrom, The Legal Education Foundation
Dr Natalie Byrom is Director of Research at The Legal Education Foundation) where she leads work on their Smarter Justice programme. In 2020, the Foundation announced the development of a new strategic initiative, the UK Access to Justice Lab, which aims to improve the evidence base for what works in assisting individuals understand and use the law, and address gaps in research about the outcomes people secure in relation to their legal problems. Dr Byrom is part of the BBC Expert Women Network and her writing has been featured in the national and legal press. She sits on the Administrative Justice Council and has been seconded to the UK government as Expert Advisor on Open Data and Academic Engagement. Her final report to government set out a series of recommendations for the ways in which the data architecture underpinning online court projects should be developed to ensure that access to justice is upheld and enhanced. In 2020 she led a rapid consultation for the Civil Justice Council which aimed to explore the impact of COVID-19 on the Civil Justice System.

Ayesha Christie, Matrix Chambers
Ayesha specialises in public law, human rights, immigration and asylum, and international law. She has a particular interest in children and vulnerable adults, including victims of trafficking, who are involved in the immigration and asylum process, and is also involved in challenges to the treatment of children detained within the prison system. Her national security work involves human rights and equality challenges arising from airport stops under the Terrorism Act 2000, the retention of biometric data by the police, the cancellation of passports and the deprivation of British citizenship on national security grounds.
Recent cases include the *Detention Action* challenge to the ongoing immigration detention of persons with increased vulnerability to Covid-19, and those who could not be removed due to Covid-19 flight restrictions; various challenges to the government's cuts to financial support for victims of trafficking and asylum seekers housed in catered accommodation during the Covid-19 pandemic; and an intervention on behalf of Liberty in Shamima Begum's challenge to the deprivation of her British citizenship.

Carla Clarke, Child Poverty Action Group
Carla is the head of litigation at Child Poverty Action Group.

Jason Coppel QC, 11 Kings Bench Walk
Jason Coppel's practice focuses on public law, procurement law and information law, with particular emphasis on EU law and human rights issues. He has appeared regularly in the Supreme Court and the Court of Justice of the European Union, and in many of the leading cases of recent years, including the Article 50 TEU litigation, Miller v Secretary of State for Exiting the European Union. He is ranked by the directories as a leading barrister in administrative law, civil liberties, EU law and procurement law. He was the Legal 500 EU and Competition Law Silk of the Year 2018. He is a Deputy High Court Judge.

Professor Paul Craig, Emeritus Professor of English Law, Oxford University
Paul Craig, MA 1973, BCL 1974, Oxon, Gibbs Prize 1972, Henriques Prize 1973, Vinerian Scholar 1974.
Professor of English Law since 1998, at St John's College.
Formerly: Professor in Law 1996-1998 Worcester College; Lecturer, Magdalen College, 1974-75, Reader 1991-96.

Cori Crider, Foxglove
Cori is a US-qualified lawyer. She previously directed the national security team at Reprieve.
Cori has extensive experience in litigation, investigation and public advocacy. Her previous cases have won an apology from Britain's Prime Minister for the kidnap and torture of a family, restrictions on the UK's mass spying practices, and the release of dozens of prisoners from Guantánamo Bay. In 2019 she presented a documentary about artificial intelligence for Al Jazeera English.
At Foxglove Cori directs and leads our casework.

Rosa Curling, Leigh Day
Rosa Curling is an international and UK human rights and public law solicitor.
She is an expert in both areas of law, having advised, and led litigation, on issues such as freedom of information, privacy, anti-bribery, EU law, torture, immigration and refugee law, modern day slavery, right to life, right to death, welfare benefits, access to education services, death penalty, access to health services, the rule of law, international aid, unlawful detention, climate change and environmental law.
She has represented clients before the UK's High Court, Court of Appeal and Supreme Court, as well as several

Tribunals, including the Freedom of Information Tribunal and the Investigative Powers Tribunal. She has also represented clients before the European Court of Human Rights, the European Court of Justice, some of the African Regional Courts of Human Rights and the International Criminal Court.

Chanel Dolcy, Bhatt Murphy

Chanel Dolcy is a solicitor in our police law team specialising in actions against the police and other state bodies within the criminal justice system.

Chanel has acted in cases covering a wide range of issues relating to claims against the police including discrimination, assault and battery, wrongful arrest, false imprisonment, malicious prosecution and unlawful disclosure/retention of personal data. Chanel has also acted for a number of bereaved families following deaths in prison or police custody by representing them at the inquests and in subsequent damages claims.

Chanel has a longstanding interest in representing victims of domestic abuse and/or sexual assault who have been failed by the investigative process and she has developed a specialist caseload in this area. Chanel also has a particular interest in representing women and young people who are mistreated within the criminal justice and immigration system. She has achieved a number of successful outcomes against the police and the CPS in relation to inadequate and discriminatory investigations/prosecutions.

Prior to joining Bhatt Murphy in February 2016, Chanel worked for four years as a solicitor at Deighton Pierce Glynn. She completed her legal training at Solace Women's Aid and Birnberg Pierce and Partners.

Chanel is a member of the Police Actions Lawyers Group and the Inquest Lawyers Group.

Mariña Fernández-Reino, The Observatory Centre on Migration, Policy and Society

Mariña Fernández-Reino is a senior researcher at the Migration Observatory. Mariña completed her PhD in Sociology at the Universitat Pompeu Fabra in 2013 with a dissertation on ethnic educational inequalities in the UK. Before joining the Migration Observatory, she was a postdoctoral researcher at the Horizon 2020 project Growth, Equal Opportunities, Migration and Markets, where she investigated the labour market discrimination of ethnic and migrant minorities in Spain.

Mariña is a quantitative sociologist and her research interests include ethnic educational inequalities, the socio-economic integration of migrants and their labour market discrimination.

Denisa Gannon, Coventry Law Centre

Denisa is a solicitor at the Coventry Law Centre. She specialises in EUSS cases.

Deborah Gellner, ASAP

Deborah has been the solicitor at the Asylum Support Appeals Project since 2013. ASAP represents approximately 700 appellants per year in their oral hearings at the Asylum Support Tribunal. Deborah supervises the pro bono advocates, oversees the quality of ASAP's legal advice services and is responsible for legal strategy. She also co-writes the migrant support update series in Legal Action magazine. ASAP, as a legal charity, is unique in being part of both the social welfare/migrants' rights legal community and the refugee sector, where policy and campaigning work with the Home Office is central.

Polly Glynn, Deighton Pierce Glynn

Polly Glynn is Deighton Pierce Glynn's managing partner and one of the firm's founding partners. She qualified in 1993 having trained at Leigh Day and Fisher Meredith solicitors.

Polly Glynn is a public law and human rights specialist. She has conducted judicial review claims in the High Court, Court of Appeal, and the Supreme Court and has brought multiple cases before the European Court of Human Rights.

She has a broad range of public law expertise. She is currently working on challenges around the EU Referendum and Brexit. Additionally she has set up and is running the The PAP Project with the British Red Cross, the Asylum Support Appeals Project, working with a number of front line organisations to assist in challenging unlawful decisions made by public bodies, particularly around destitution. She has extensive experience of discrimination law, acting in the ECHR on a number of successful claims arising out of the discriminatory effect of the UK's rules on widows' benefits and tax allowances, and in relation to eligibility for housing. She also acts in relation to Equality Act damages claims.

Khatija Hafesji, Monckton Chambers

Khatija joined Chambers in 2017 after the successful completion of her pupillage. Khatija has a broad practice which covers competition, public law and human rights (with a particular expertise in community care), procurement, information, and tax.

As well as working as part of a team, Khatija is regularly instructed and appears as an advocate in her own right. She has appeared as sole counsel in the High Court (on substantive judicial reviews, interim relief hearings, permission hearings, and urgent out-of-hours applications), the Immigration and Asylum (First-Tier Tribunal), the Information Tribunal, the SENDist Tribunal, the Technology and Construction Court, and the County Court. As of January 2020, Khatija was co-opted to the Administrative Law Bar Association (ALBA) Committee.
Prior to joining the bar, Khatija worked as an advocate for children in care for the charity "Coram Voice" for 3 years and was a Tribunal volunteer advocate for IPSEA. She has been a Trustee for "Become", the charity for children in care, since 2011 and is currently the Senior Independent Trustee.

Jo Hickman, Public Law Project
Jo Hickman was appointed PLP's Director in 2015. She is a public law specialist with a background in both the private and voluntary sectors. Immediately prior to her appointment Jo was Head of PLP's Casework team where she developed and led the pioneering legal aid project, and acted in a number of seminal cases. She is widely recognised for her strategic expertise, having been historically named Legal Aid Lawyer of the Year and Times Lawyer of the Week. Most recently she was shortlisted as 2017 Lawyer of the Year at both the Legal Business and Solicitor Journal awards.
She is a member of the Law Society Access to Justice Committee, a Board member of the Legal Aid Practitioners Group, and sits on the Civil Justice Council.

Tom Hickman QC, Blackstone Chambers
Tom Hickman QC is recognised as a leading barrister in public law, international law, regulatory law, commercial law, media entertainment and sports law. Tom is instructed in cases both for and against the Government and public bodies.
Tom was named in the country's "Hot 100" lawyers by *The Lawyer* magazine in 2017.
As a junior barrister Tom was ranked by the Chambers and Partners guide in five practice areas and as the "Star Practitioner" in two. Tom was awarded Public Law Junior of the Year in 2019 by the Legal 500 and Public Law Junior of the Year in 2017 by Chambers and Partners.
Until taking silk, Tom was a members of the Attorney General's A Panel of Counsel, carrying out litigation on behalf of the Government. Tom continues to advise and represent the UK Government since taking silk.
Tom is also Standing Counsel to the Investigatory Powers Commissioner's Office (IPCO) which regulates the use of surveillance powers by law enforcement and intelligence agencies in the UK.
Tom was recently instructed by British Airways, Easyjet and Ryanair in a challenge to the 14 day quarantine regulations.
Tom is also a Professor of Public Law and member of the Law Faculty at University College London and regularly publishes articles, blogs and tweets on legal issues.

Bijan Hoshi, Public Law Project
Bijan is a barrister who joined PLP in 2019. He was called to the bar in 2011 and later specialised in public law as a tenant at Garden Court Chambers. He has acted in cases at all domestic levels up to and including the Supreme Court, as well as in proceedings before the European Court of Human Rights. At PLP, his work has predominantly concerned Brexit and, in particular, the European Union Settlement Scheme.

Jo Hynes, Public Law Project
Jo is a Research Fellow at PLP and a PhD student at the University of Exeter. Her work at PLP focuses on online courts and tribunals and related access to justice issues. Jo's ongoing doctoral research explores the legal geographies of immigration bail hearings and video links. She is particularly interested in courtwatching methodologies and procedural fairness in remote hearings.

Rachel Jones, Blackstone Chambers
Rachel accepts instructions in all of Chambers' main areas of practice.
Rachel was seconded to Ofgem from January to April 2020.
Before coming to Blackstone, Rachel worked as a lawyer at a leading human rights and law reform NGO for two years, in which role she worked with judges, policy-makers and MPs. She also taught EU Law at Balliol College, Oxford and Medical Law at the LSE. Prior to this, Rachel was Judicial Assistant to Lord Reed and Lord Carnwath in the UK Supreme Court, and spent a year at Harvard Law School as a Kennedy Scholar.

Rachel was elected to the Council of the human rights organisation Liberty in 2018.

Charlotte Kilroy QC, Blackstone Chambers

Charlotte Kilroy is a leading public law, civil liberties and human rights specialist. She has a broad practice in areas including asylum and human rights law, constitutional law, actions against the police, and civil claims for damages.

She has considerable expertise in bringing systemic public law challenges, with a particular focus on constitutional issues, issues of fairness and access to justice, claims related to Dublin III family reunification of unaccompanied minors, asylum and immigration, and closed material procedures in the High Court, SIAC and the IPT.

Charlotte is highly rated by both leading independent legal directories, the Legal 500 and Chambers and Partners, for her work in Administrative & Public Law, Civil Liberties & Human Rights, and Immigration. "A dynamic human rights silk" and "a major driving force behind the jurisprudence that has been developed on many cases. She's quite brilliant," said Chambers UK 2020.

Professor Jeff King, UCL

Jeff King joined the UCL Laws as a Senior Lecturer in 2011, and has been Professor of Law since 2016. He is currently a Legal Adviser to the House of Lords Select Committee on the Constitution, and a Visiting Professor at the Faculty of Law, University of Oxford. He sits on the Editorial Committee of Public Law, the General Council of the International Society of Public Law (ICON Society), and is a member of the Study of Parliament Group . He was previously the Co-Editor of Current Legal Problems and the Co-Editor of the UK Constitutional Law Blog. Prior to coming to UCL, he was a Fellow and Tutor in law at Balliol College, and CUF Lecturer for the Faculty of Law, University of Oxford (2008-2011), a Research Fellow and Tutor law at Keble College, Oxford (2007-08), and an attorney at Sullivan & Cromwell LLP in New York City (2003-04). In addition to Oxford, he has held visiting posts at the University of Toronto (2013, 2020), Renmin University (Beijing), the University of New South Wales, and in 2014-15 was an Alexander von Humboldt Foundation visiting fellow at the Humboldt University of Berlin. His book Judging Social Rights (Cambridge University Press, 2012) won the Society of Legal Scholars 2014 Peter Birks Prize for Outstanding Legal Scholarship, and in 2017 he was awarded a Philip Leverhulme Prize in Law.

Zoë Leventhal, Matrix Chambers

Zoë practises in all areas of public law and human rights and is listed as a leading junior in these areas. She has particular expertise in social security and welfare benefits law, healthcare, mental health and mental capacity, local government, equalities duties, immigration, EU law, planning and environmental law. She is a member of the Attorney General's 'A' Panel of Counsel, having previously been a member of the 'B' Panel (appointed 2013) and 'C' Panel (appointed 2007). She is described in the directories as showing "total dedication to the cases she is involved in" and being "extremely clear, concise and accurate on paper and in oral advocacy."

Zoë is consistently instructed in high profile and complex cases both on her own and as a sought after junior. She is committed to working for all sides across her areas of practice and has a diverse range of clients including central government departments, local authorities and other public bodies as well as individuals, charities & NGOs and corporate entities.

Kevin de Liban, Legal Aid of Arkansas

Kevin De Liban is the Director of Advocacy at Legal Aid of Arkansas, nurturing and leading multi-dimensional efforts to improve the lives of low-income Arkansans in matters of health, workers' rights, safety net benefits, housing, consumer rights, and domestic violence. With Legal Aid, he has led a successful litigation campaign in federal and state courts challenging Arkansas's use of an algorithm to cut vital Medicaid home-care benefits to individuals who have disabilities or are elderly. In addition, he and Legal Aid, along with the National Health Law Program and Southern Poverty Law Center, successfully challenged Medicaid work requirements in federal court, ending the state's unlawful use of red-tape that stripped health insurance from over 18,000 people. Kevin regularly presents about imposing accountability on algorithm-based decisions and was a featured speaker at the 2018 AI Now Symposium with leading technologists, academics, and advocates. In 2019, Kevin received the Emerging Leader award from the national community of legal aid lawyers and public defenders. His work has appeared on or in the Washington Post, the Economist, the Wall Street Journal, PBS Newshour, MSNBC, the Verge, and other publications and podcasts. When not practicing law, Kevin is passionately creating music as a rapper.

Andrew Lidbetter, Herbert Smith Freehills

Andrew is a dispute resolution partner heading the firm's London-based public law practice.
A solicitor advocate, Andrew has considerable experience assisting clients in relation to a wide range of regulatory/public law and other commercial disputes.
His public law practice includes judicial review, professional regulation, public inquiries, human rights and freedom of information issues.
Andrew has worked with clients in numerous sectors including accountancy, consumer products, financial regulation, gambling including casinos and lotteries, gas and electricity, health, local government, pensions, planning and environment, professional discipline, public sector projects, tax, telecoms and broadcasting, transport and water.
He is the author of numerous publications. In particular, he has written the book *Company Investigations and Public Law* about Department of Trade and Industry (now the Department for Business, Energy and Industrial Strategy) investigations, and is responsible for the judicial review, human rights and references to the Court of Justice of the EU chapters in *Blackstone's Civil Practice*. Andrew is also on the advisory board for the leading judicial review journal JR.
Andrew is listed as a band 1 leader in both administrative and public law and professional discipline in both *Chambers and Partners* and *Legal 500.*

David Lock QC, Landmark Chambers

David Lock was called to the Bar in 1985 and made a QC in 2011. He is a public law specialist and was judged by a panel of leading lawyers to be the Legal500 Public Law QC of the Year for 2020. He sits as a Deputy High Court Judge in the Queen's Bench and Family Divisions.
David has appeared in the Supreme Court, the Court of Appeal on many occasions, the High Court, the County Court, the Court of Protection, has drafted Parliamentary Bills and has advised individuals, companies and government bodies in a variety of international jurisdictions. He has vast trial experience, including cross-examining expert and lay witnesses, but also has a wide-ranging public law and appellate practice.
He is exceptionally knowledgeable and gains the confidence of vulnerable clients.': Legal 500 2018
"Absolutely outstanding. He has all the attributes of a great silk. His knowledge of the case is second to none, and his knowledge of the law is absolutely superb. His judgement is impeccable." - Chambers and Partners (2015)
David took silk in 2011 and since then has appeared in a series of high profile administrative and public law cases, acting for public bodies and against them. David is joint editor (with Hannah Gibbs) of the leading practitioner's book, "NHS Law and Practice" and his technical expertise as a public lawyer has been recognised by his appointment as one of the joint editors (along with David Blundell) of the leading journal "Judicial Review".
David has a particular expertise in public sector pension schemes, particularly in cases involving medical retirement or pension rights associated with injuries suffered by public servants in the course of their work. He is the author of the Landmark Guide to the Law on Police Pensions.
He was on the panel of Treasury counsel before taking silk. David has also appeared in leading cases concerning local government, immigration, police, prisoners' rights and procurement law. David was appointed as a member of the Equality and Human Rights Commission's 'A' panel in May 2019. This panel of counsel plays an important role in helping the Commission to achieve its objectives which include reducing inequality, eliminating discrimination and protecting human rights.
Outside work: David takes time away from practice annually to complete another leg of a charity cycle ride from England to Australia – in segments over a number of years: see www.decade2australia.org for details. So far he and his wife have covered about 15,000km and got as far as Southern Thailand earlier this year but then had to return quickly due to Covid19!

Sara Lomri, Public Law Project

Sara is a solicitor and Deputy Legal Director. Sara has a broad public law and human rights practice with a particular focus on disability and gender discrimination, and assisting those facing multiple disadvantages. In addition to her casework, Sara is currently leading a significant project at PLP focusing on improving and providing access to justice for frontline organisations and charities and their stakeholders or service users.
Before Sara came to PLP she worked for ten years in private practice at Bindmans LLP, where she specialised in private and public law challenges against detaining authorities and was recommended in Chambers and Legal 500 in Civil Liberties and Healthcare categories.

Shu Shin Luh, Doughty Street Chambers

Shu Shin practices in all areas of public law. Her practice has a strong human rights, civil liberties, and anti-discrimination focus.
Her expertise covers a broad range of subject matters including community care, mental health and mental capacity, health care, education, housing, welfare benefits, human trafficking, immigration and asylum, and deprivation of liberty both in the context of immigration detention and the Court of Protection. She pursues significant public interest litigation on behalf of individuals and organisations.
Shu Shin aims to act for her clients in a comprehensive way, advising where possible on the full range of legal issues impacting on different aspects of their lives in the context of judicial review, statutory appeals, and actions against public authorities, where relevant. This depth of experience and breadth of legal knowledge and expertise enables her to have a truly creative approach to a case.
Shu Shin is committed to civil legal aid and to supporting individuals to have effective access to legal remedies. She is on the panel of junior counsel for the Equality and Human Rights Commission. She undertakes advisory and consultancy work for non-governmental and intergovernmental organisations and state bodies in the UK and other jurisdictions on legal policy and draft legislation. She acted as the specialist legal advisor to the Joint Committee on Human Rights in its immigration detention inquiry in 2018/ 2019. She also regularly provides training to governmental departments, local authorities, and public interest groups in the UK and internationally.

Tom de la Mare QC, Blackstone Chambers
Throughout his career Tom has worked in a wide range of areas. Tom has presented his cases in the ECJ/CJEU/General Court, the ECtHR, the House of Lords/Supreme Court, Court of Appeal and most divisions of the High Court.
On the public law side most of Tom's current work is for claimants. But Tom was on the Attorney-General's 'A' Panel of Counsel until he took silk in 2012 (and before that the B and C Panels); he also acted as a Special Advocate in a significant number of national security cases, starting with the *Belmarsh* case and culminating in the *Binyam Mohammed* litigation. Tom was appointed as the Special Adviser to the Constitutional Affairs Select Committee when it reviewed the use of Special Advocates.
After completing pupillage in Blackstone Chambers in 1996 Tom won the Bristow Scholarship which enabled him to work for c.9 months in the EU institutions, working both in the Commission Legal Service and in the Cabinet of AG Jacobs.
Tom is recommended in both of the leading independent legal directories, Chambers and Partners 2019 and The Legal 500 2018, and is also ranked in Chambers Global 2017 in Competition/EU. In addition, he has been recognised as the Legal 500 2019 Silk of the Year for EU and Competition.

Nicole Masri, Rights of Women
Nicole Masri is an immigration solicitor and Senior Legal Officer at the women's voluntary organisation Rights of Women where she provides legal advice and assistance to vulnerable migrant women, delivers training on immigration law to professionals and engages government on law and policy issues affecting migrant women. Since April 2018 she has attended the Home Office's 'safeguarding user group' addressing the needs of vulnerable people in the context of the EU Settlement Scheme. Rights of Women was one of seven community organisations that participated in the second private beta testing phase of the EU settlement scheme from 15 November – 21 December 2018. Rights of Women then became one of 57 organisations across the UK that received grant funding from the Home Office in financial years 2019/20 and 2020/21 to provide support to vulnerable people applying to the EU Settlement Scheme.
Since June 2019, Nicole and her team have provided advice to around 400 vulnerable women and children affected by gender-based abuse in relation to the EU Settlement Scheme.
In June 2020, Rights of Women's policy work led to an expansion of the EU Settlement Scheme to protect more victims of domestic abuse on relationship breakdown.

Jacqui McKenzie, Centre for Migration Advice and Research and Mckenzie Beute Pope
Jacqueline is a law graduate with post graduate qualifications in international relations and human rights. As a solicitor she practised in the areas of civil litigation, criminal and immigration law at top civil liberties firm, Birnberg Peirce and partners. There she acted in sensitive and high profile cases, including for the family of the late Jean Charles de Menezes. During this time she also managed a complex asylum and immigration portfolio of cases which included entry clearance and port refusals, settlement and naturalisation, EEA, ECHR, asylum and fresh claims and appeals against deportation. She has experience of advocacy in the Asylum and Immigration Chamber and a significant track record in securing bail from immigration detention, overturning refusals and in obtaining leave to remain for her clients.

Jacqueline is a level 2 OISC adviser and able to represent applicants and appellants across a wide range of complex immigration and asylum situations.

Kate Meakin, Herbert Smith Freehills
Kate advises and represents clients on corporate crime matters, in particular in respect of fraud, corruption, sanctions and money laundering. She assists clients in balancing the competing risks and demands they face from criminal and regulatory investigation by agencies in multiple jurisdictions, often alongside concurrent civil claims.
Kate has significant experience of internal and external investigations, including those conducted by the SFO, FCA and Police, and the US DoJ and SEC. She also has substantial experience of criminal prosecution and other methods of disposal such as deferred prosecution agreements. In 2017/2018 she was seconded to the SFO, and she has also spent time in-house at a FTSE 100 client as lawyer to their investigations team.
She acts for a range of clients, including banks, multinational corporates and individuals.

Julian Milford QC, 11 Kings Bench Walk
Julian Milford was called to the bar in 2000. His main areas of practice are public law, freedom of information/data protection, and employment law. Julian undertakes advisory and judicial review work in the field of public and constitutional law for central and local government, other public authorities, and individuals, and has been instructed for and against government on issues of major public importance. He appears regularly in the employment tribunal and civil courts in employment cases, where he has experience across the Tribunal's statutory jurisdiction, including extensive experience of acting in large-scale discrimination and equal pay claims and industrial action cases. He also frequently advises on and acts in data protection and freedom of information cases.

Jeremy Miles AM, Counsel General for Wales and Welsh Minister for European Transition
Jeremy Miles was born and brought up in Pontarddulais. As a Welsh speaker, he was educated at Ysgol Gyfun Ystalyfera in the Swansea Valley and New College, Oxford where he studied law. Straight after graduating, Jeremy taught law at Warsaw University in Poland. Later, he practised as a solicitor in London and then held senior legal and commercial posts in media sector businesses, including ITV and the US television network and film studio NBC Universal. After returning to live in Wales he set up his own consultancy working with international clients in the broadcast and digital sectors.
Jeremy was elected to the National Assembly for Wales for the Neath constituency in May 2016 as the Labour and Co-operative party candidate, following the retirement of Gwenda Thomas AM. On 13 December 2018 Jeremy was appointed Counsel General Designate and Minister for Brexit.
His interests include economic and community development, and education and skills. He also enjoys film, reading, cooking, hiking, cycling and following rugby locally.

Allison Munroe QC, Garden Court Chambers
Allison has extensive expertise and experience working on large scale Inquests and Public Inquiries of national and international importance. She represented a number of the bereaved families in the historic Hillsborough Inquests (2014-2016).
Presently she represents some of the Bereaved Families in the Grenfell Tower Fire Public Inquiry, as well as survivors and residents.

Hanif Mussa, Blackstone Chambers
Hanif is recommended in both of the leading independent legal directories. He currently has twelve rankings across eight different practice areas. Recent comments include: *"A phenomenal talent"* (Chambers and Partners 2020); *"Demonstrates huge wisdom as well as intelligence"* (Chambers and Partners 2020); "*Easy-going but ridiculously sharp*." (Chambers and Partners 2019); "*One of the brightest barristers I've ever worked with*" (Chambers and Partners 2019); "*Exceptionally brilliant*" (Legal 500 2018); *"He has a brain of the size of the planet and is at least three steps ahead of everyone else"* (Legal 500 2017); *"He has a first-class intellect and distils complex legal material into commercial advice"* (Legal 500 2017); *"Genius..."* (Legal 500 2017); *"Intellectually sharp and technically brilliant"* (Legal 500 2017); and *"A great all-rounder who is incredibly bright"* (Chambers 2018).
His broad-ranging practice combines core and complementary strengths in public and private law. He has expertise in Public & Regulatory law, EU law and Competition law, Commercial law, Civil Liberties & Human

Rights (including Discrimination law), and Public and Private International Law. He also has significant experience of cases in the Telecommunications, Financial Services, Environment, Energy and Professional Discipline sectors. Hanif has amassed considerable advocacy experience before a wide range of courts and tribunals and has appeared as sole counsel in a number of high-profile cases. He is currently Junior Counsel to the Crown (A Panel).

Zia Nabi, Doughty Street Chambers
Zia is an experienced specialist public and civil lawyer. He is an acknowledged leader in his field and is ranked both in the Chambers UK Bar Guide as a leading individual (Band 1) and in the Legal 500.
His broad practice includes homelessness and housing, community care, children, and education cases. He is also regularly instructed both by the Official Solicitor and local authorities in the Court of Protection in cases involving deprivation of liberty, residence and capacity disputes.
Zia has been involved in numerous reported cases at all levels including the Supreme Court and the European Court of Human Rights. He has been involved in many strategic test judicial reviews.
Zia gives regular legal training. He has spoken at the Housing Law Practitioners Association's bimonthly meetings and at their annual conference, and at LAG's Community Care conference. He has co-written and delivered a one-day LAG seminar on Homeless Children. He has had articles published in Legal Action, Solicitors Journal and the Journal of Housing Law.

Ravi Naik, AWO Legal
Ravi oversees our legal and litigation work. He is a leading solicitor in the field of data protection, data rights, and protecting human rights in a digital age.
Ravi is described in legal directories as "pioneering" and "a leading light in data protection", whose "knowledge in the area is unparalleled". His work has led to numerous awards, including being named the Law Society's Human Rights Lawyer of the Year 2018 – 2019. He is currently a Visiting Fellow at Oxford University's Internet Institute.
Ravi has a prominent litigation practice concerning human rights, data and developing technology, such as agenda setting cases against Cambridge Analytica, Facebook, Google and the online advertising technology industry.
He is a recognised expert on the GDPR, Data Protection Act and related issues such as data breaches, compensation claims, ICO actions, subject access requests, "right to be forgotten" requests and human rights analysis of developing technology. He is also renowned for administrative and public law challenges, as well as regulatory matters. He has successfully litigated at every level, including cases before the Supreme Court and European Courts.
In addition to his legal practice, Ravi is a member of the Law Society's Human Rights Committee, sits on the Legal Affairs Committee of the European Centre for Press and Media Freedom, is on the working group of the Ada Lovelace's institute's "rethinking data" programme amongst many other positions and appointments.
He has also delivered numerous keynote speeches on the regulations of developing technology, including in Westminster and Washington DC. Ravi also regularly gives guest lectures and has work published by leading academic institutions, including Harvard University and Oxford University.

Kate O'Regan, Bonavero Institute of Human Rights and South Africa's COVID-19 Designated Judge
Kate O'Regan is the inaugural Director of the Bonavero Institute of Human Rights and a former judge of the South African Constitutional Court (1994-2009). In the mid-1980s she practiced as a lawyer in Johannesburg in a variety of fields, but especially labour law and land law, representing many of the emerging trade unions and their members, as well as communities threatened with eviction under apartheid land laws. In 1990, she joined the Faculty of Law at UCT where she taught a range of courses including race, gender and the law, labour law, civil procedure and evidence. Since her fifteen-year term at the South African Constitutional Court ended in 2009, she has amongst other things served as an ad hoc judge of the Supreme Court of Namibia (from 2010-2016), Chairperson of the Khayelitsha Commission of Inquiry into allegations of police inefficiency and a breakdown in trust between the police and the community of Khayelitsha (2012-2014), and as a member of the boards or advisory bodies of many NGOs working in the fields of democracy, the rule of law, human rights and equality.

Dr Federico Ortino, Kings College London
Dr Federico Ortino is Reader in International Economic Law at King's College London. He joined King's in 2007. He is a member of the ILA Committee on the Rule of Law and International Investment Law; founding Committee

Member (and former co-Treasurer) of the Society of International Economic Law; consultative member of the Investment Treaty Forum; editorial board member of the Journal of International Economic Law; Yearbook on International Investment Law and Policy, Journal of International Dispute Settlement, Journal of World Investment and Trade. He is a Consultant to Clifford Chance.
Previously, he was co-rapporteur to the ILA Committee on the Law of Foreign Investment; Director, Investment Treaty Forum, British Institute of International and Comparative Law in London (2005-2007); Adjunct Professor at the Universities of Florence and Trento (2002-2007); Emile Noël Fellow and Fulbright Scholar at the NYU Jean Monnet Center in New York (2004); Legal Officer at the United Nations Conference on Trade and Development, Division on Investment and Enterprises (2003). He is a qualified attorney in Italy and in the state of New York. He holds: LLB, University of Florence; LLM, Georgetown University Law Center; PhD, European University Institute.

Chai Patel, Joint Council for the Welfare of Immigrants
Chai is a solicitor specialising in public and human rights law, leading JCWI's advocacy on law and policy, and strategic litigation. He joined JCWI in 2015 from the Migrants Rights Network. Before that he worked in Human Rights department at Leigh Day on abuse and human rights claims, and in the death penalty team at Reprieve, focussing on international strategic litigation, casework and investigation.

Farhana Patel, Bindmans
Farhana has a diverse public law caseload and experience. She has worked on a number of high profile cases with John Halford. Her areas of specialism include: Judicial Review challenges to decisions taken by public authorities; Challenging inadequate investigations into reports of sexual violence by educational and other institutions including universities; Strategic and public interest litigation; Breach of data protection and GDPR claims; Breach of contract claims; Professional regulatory and compliance; Charity regulation; Challenging harassment warnings which have been inappropriately issued; Challenges to the termination of Legal Aid Agency contracts; Procurement; Assisting children who cannot attend school for reasons including illness to access adequate and appropriate education in an alternative setting such as their home; Challenges to unlawful age assessments; Challenging the imposition of NHS overseas charges against vulnerable migrants who are destitute; Community care cases involving challenging NHS continuing care decisions in respect of children's healthcare, and challenging local authority decisions in respect of children's social care; Challenges to pet shop and animal board licence applications submitted where animal welfare standards have not been met; and Preparing applications for the appointment of Court of Protection Deputyships.

Naina Patel, Blackstone Chambers
Naina is recognised as a leading barrister in a broad range of areas with 7 rankings across Chambers and Partners UK and Global and Legal 500, including in Administrative and Public Law, Civil Liberties and Human Rights and Public International Law.
Naina is experienced in international trade law, including investment treaty law. She has advised both Governments and corporations on WTO-related issues, including the UK Government on post-Brexit trade-related matters. She also advises in relation to ICSID and UNITRAL investment treaty arbitration. She has been a guest lecturer on Kings College investment arbitration LLM course.
Naina is experienced in both commercial and public law claims relating to sanctions, navigating and challenging asset restrictions and export controls in a variety of country contexts. Prominent recent cases include *R (Certain Underwriters) v HM Treasury* [2020] EWHC 2189 (Admin) and *Certain Underwriters at Lloyds & Ors v Syria & Ors* [2018] EWHC 385 (Comm).
Naina is a member of the Attorney-General's Civil and Public International Law Panels, the Equality and Human Rights Commission's Panel, UNHCR's Pro Bono Panel and HMG's Civilian Stabilisation Group. Naina was profiled as the Times' "Lawyer of the Week" in December 2011 and won the Sydney Elland Goldsmith Bar Pro Bono Award in 2008.
Naina is a Senior Rule of Law Fellow at the Bingham Centre for the Rule of Law and a widely published author on rule of law issues around the world. She regularly speaks and provides training in this area to governments and civil society in the UK and overseas. She has previously held a Director-level post at the Bingham Centre for the Rule of Law (September 2012-March 2015) and been a Rule of Law Advisor to DFID (January 2013-April 2013) and a Senior Justice Advisor to the Helmand Provincial Reconstruction Team (June 2010-July 2011).

Parishil Patel QC, 39 Essex Chambers

Parishil Patel has a wide ranging public law practice which encompasses health, community care, local government (including regulation, audit and standards), telecommunications, data protection and confidentiality, prisons, immigration, public international law, incapacity and best interests.
He has extensive experience of advising and acting for and against public bodies in judicial review claims (in the High Court), including claims brought challenging local and central government policy and involving statutory construction and in proceedings in various Tribunals. He also has extensive experience of arguing ECHR issues in domestic courts and advising on human rights in the policy context.
Over the last 8 years, Parishil has been regularly advising and acting in claims arising from the award of public and utilities contracts.
He also has a broad regulatory and disciplinary law practice acting for and against, amongst others, the SRA, GDC and NHS England.
Parishil is a CEDR accredited mediator.
Parishil is recommended by Chambers & Partners and The Legal 500 for Administrative & Public Law and also by Chambers & Partners for Court of Protection.

Ollie Persey, Public Law Project
Ollie is a barrister and coordinates PLP's EU Settlement Scheme Support Hub. He trained at PLP, with a secondment to Matrix Chambers, through a 2-year Justice First Fellowship. Before being called to the Bar, he was a researcher in comparative media law at Oxford University. He also worked on criminal justice, mental health and free speech issues at the American Civil Liberties Union and as a researcher for Professor Philip Alston, UN Special Rapporteur on Extreme Poverty and Human Rights.
Ollie set up a UK version of Yale Law School's Rebellious Lawyering Confernce ('RebLaw UK'), which brings together students, activists and practitioners to discuss how law can be used as a tool for social change. He is a co-chair of Young Legal Aid Lawyers, a trustee of Southwark Law Centre and a tutor in media law at the London School of Economics.

Alison Pickup, Public Law Project
Alison is a barrister, and PLP's legal director, overseeing the work of our casework and events teams. Alison is responsible for PLP's legal strategy and leads our work on benefit sanctions and on upholding the rule of law. As well as advising and representing PLP and its clients, Alison regularly speaks, trains and writes on public law and access to justice. Before joining PLP, Alison was in private practice at Doughty Street Chambers where she had a claimant-focused public law practice with a particular focus on migrants' rights. Alison was awarded the Outstanding Employed Barrister in an NGO award by the Bar Council in 2020.

Jason Pobjoy, Blackstone Chambers
Jason practises across all of Chambers' main areas of work, with particular expertise in EU & competition law, public and human rights law, commercial law, public international law, and sanctions law. He is ranked as a leading junior in eight practice areas in the leading independent legal directories. Recent comments include: *"He is a star who will rise to the very top. He is outstanding in every way."* (Legal 500 2018); "*Quickly rising to prominence within the public law sphere*" (Chambers 2018); "*a future superstar*" (Chambers 2018); "*very cerebral … while remaining personable and client-friendly*" (Chambers 2018); "*just excellent … surely a star of the future*" (Chambers 2018); "*very efficient, responsive, always available, bright, hard-working and super-easy to work with*" (Chambers 2018); *"a real team player"* (Chambers 2019); "*A real future star: meticulous, diligent and fantastically efficient under extreme pressure*" (Legal 500 2017). In the sanctions arena, Jason is recognised as the *"leading junior in the field"* (Chambers & Partners 2017). In 2018, Jason won the WorldECR's young practitioner of the year award. In 2019, Jason was shortlisted for EU and Competition Junior of the year in the Legal 500 2020 awards.
In addition to his London practice, Jason is a member of the Bar of Ireland and the Law Library of Ireland.

Elizabeth Prochaska, 11 Kings Bench Walk
Elizabeth Prochaska is a public lawyer, specialising in equality and human rights law.
Before joining 11KBW, Elizabeth was Legal Director of the Equality and Human Rights Commission where she oversaw high-profile public interest litigation and investigations.
Working collaboratively with clients, Elizabeth ensures that she delivers high quality advice that is sensitive to her clients' needs. She has a keen interest in institutional effectiveness and good governance. She is chair of the Public Law Project and a non-executive member of the Bar Standards Board.

Elizabeth has particular expertise in reproductive justice. She founded the charity Birthrights in 2013 and regularly advises women and health professionals in this area. She writes and lectures internationally on childbirth rights.
Elizabeth is a co-author of leading legal textbooks, Blackstone Guide to Human Rights Act (2015) and LAG Guide to Special Educational Needs and Disability in Schools (2017). She has also contributed to books on prison law, human rights and criminal justice.

Jasveer Randhawa, Herbert Smith Freehills
Jasveer is a solicitor advocate specialising in administrative and public law disputes.
Jasveer has over 10 years' experience of a wide range of public and administrative law disputes including judicial review, regulatory investigations, disciplinary proceedings, human rights and freedom of information issues. Over the years she has acted for a variety of clients, including private sector commercial organisations and public bodies / regulators, in a number of sectors including planning, energy, transport, financial services, pensions and taxation.
Jasveer has written a number of articles for journals such as Judicial Review and Public Law. She was named in *The Lawyer's* Hot 100 for 2017.

Alexandra Sinclair, Public Law Project and London School of Economics
Alexandra Sinclair has an LLB(hons) from Victoria University of Wellington, New Zealand and an LL.M for Columbia Law School where she studied as a Fulbright Scholar. Alexandra has worked as a judges' clerk at the New Zealand High Court and as a barrister in Auckland, New Zealand. She was awarded the Cleary Memorial Prize by the New Zealand Law Foundation in 2015 for showing outstanding promise in the legal profession. She is dedicated to public interest legal work, she was a member of Columbia Law School's Incarceration and the Family Clinic, she has worked as a legal intern at the Knight First Amendment Institute and she spent time as a Columbia Public Interest Fellow at the Center for Court Innovation in Manhattan. She is particularly interested in the intersection of public law and human rights.

The Right Honourable Lord Justice Singh, UK Court of Appeal
Sir Rabinder Singh was called to the Bar (Lincoln's Inn) in 1989 and was in practice at the Bar from 1990 to 2011. He was elected a Bencher of Lincoln's Inn in 2009.
He was on the Attorney General's Panels of Junior Counsel to the Crown from 1992 to 2002 (on the A Panel from 2000). He was also Additional Junior Counsel to the Inland Revenue from 1997 to 2002. He was appointed Queen's Counsel in 2002. He chaired the Administrative Law Bar Association from 2006 to 2008. From 2003 to 2011 he was a Deputy High Court Judge and Recorder of the Crown Court from 2004 to 2011. He was appointed a High Court Judge (Queen's Bench Division) in October 2011. He was a Presiding Judge of the South Eastern Circuit from 2013 to 2016 and the Administrative Court liaison judge for the Midland, Wales and Western circuits during 2017. In September 2018 he was appointed President of the Investigatory Powers Tribunal.
He was a visiting Professor of Law at the London School of Economics from 2003 to 2009 and has been an Honorary Professor of Law at Nottingham University since 2007 and a Visiting Fellow, Lady Margaret Hall, Oxford since 2016. His publications include The Future of Human Rights in the UK (1997) and (as co-author with Sir Jack Beatson and others) Human Rights: Judicial Enforcement in the UK (2008).
He was appointed a Lord Justice of Appeal in October 2017.

Professor Maurice Sunkin, University of Essex
Maurice Sunkin QC (Hon) is Professor of Public Law and Socio-Legal Studies in the School of Law. He has been General Editor of the journal Public Law since 2010 and is an Associate Member of Landmark Chambers, London. He is a member of the Administrative Justice Council and of the Regional Counter Terrorism Advisory Group. His advisory work also includes: acting as an adviser to the government on the overarching evaluation of its current major programme of court and tribunal reform; membership of the Public Law Project's Expert Group on Transforming Judicial Review; serving as Legal Adviser to the House of Lords Select Committee on the Constitution (Parliamentary Session 2013-14); and assisting the Equality and Human Rights Commission with its report on human rights in the UK (2011-12). He was a Trustee, and management committee member, of the Public Law Project between 2000-11.
Professor Sunkin's past university posts include: Director of Research in the School of Law (2007-14); Dean of the School of Law (2006-07) and the Faculty of Law and Management (2006-7); University of Essex Appeals Officer/Ombudsman(2002-04); and Head of the Department of Law (1997-2000). Before coming to Essex in 1989 he taught at the then Polytechnic of the South Bank and served as Head of School of Law (1981-3).

Maurice Sunkin's principal areas of research concern the use and effects of judicial review; the dynamics of public law (including human rights) litigation; and the impact of litigation and judicial decisions on public bodies and the quality of public services. He helped establish the UK Administrative Institute (UKAJI) and continues to play a key role in its work. He also has research interests in big data and human rights and was PI and later Co Director of the £6m ESRC project on Big Data and Human Rights based at Essex. His work on this project now principally concentrates on oversight of surveillance. His current research also includes work on the constitutional status and powers of the Victims Commissioner and research with The Law Society of England and Wales to inform its response to the government's programme of judicial review reform and the deliberations of the independent Review of Administrative Law established in August 2020. In 2018 the Queen appointed him QC Honoris Causa. This award was in recognition of his major contribution to the law of England and Wales outside of practice in the courts having in particular pioneered an empirical approach to the law and undertaken leading studies of the use, operation and effects of judicial review.

Mr Justice Swift
Mr Justice Swift has been appointed as Judge in Charge of the Administrative Court by the President of the Queen's Bench Division. This appointment took effect from 13 March 2020 for a period of three years. Mr Justice Swift will carry on in his role as Administrative Court Liaison Judge on the Western, Wales and Midlands Circuits.

Dr Joe Tomlinson, Public Law Project and University of York
Joe is PLP's Research Director. He is also Senior Lecturer in Public Law at the University of York and a member of the Wider Core Team at the UK Administrative Justice Institute. He completed an LL.B and Ph.D in law at the University of Manchester, and has held visiting positions at King's College London and Osgoode Hall Law School. He researches widely on public law, and particularly the administrative justice system. Joe's work has been published in leading journals and been funded by a range of organisations, including the ERSC and the Nuffield Foundation. His work has been cited by a variety of bodies, including the Ministry of Justice, the All Parliamentary Group on the Rule of Law, and the House of Commons Library. His work (with Professor Robert Thomas) on administrative review will also form the basis of a Law Commission project. Before joining PLP, he worked in the President's Chambers of the EFTA Court, at Joseph Hage Aaronson LLP, at the British Institute for International and Comparative Law, and as Legal Assistant to Gerard McDermott QC. At PLP, he is currently leading the development of a new research strategy.

Arianna Vedaschi, Full Professor of Comparative Public Law, Bocconi University and Trinity College Dublin COVID-19 Law and Human Rights Observatory
Full Professor of Public Comparative Law at Bocconi University. PhD in Law drafting techniques and law evaluation methods, University of Genova. "Silvano Tosi" Master in Parliamentary Studies and Research promoted by the Italian Parliament, University of Florence.
Visiting Researcher Professor at Trinity College, Dublin, Ireland and at Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany; Visiting Professor at Universities of Valencia (Spain), Lima (Peru), Austral and La Matanza (Buenos Aires, Argentina), Monterey (Nuevo León, Mexico); Visiting Scholar at Fordham University (New York, USA) and Exeter University (UK).
Secretary-General of the Association Diritto pubblico comparato ed europeo [Association of Comparative and European Public Law] (July 2019-present).
Member of Académie Internationale de Droit Comparé/International Academy of Comparative Law (July 2019-present).
Vice Director of the Law Review Dritto pubblico comparato ed europeo (January 2019-present).
Coordinator of the research group on Constitutional Responses to Terrorism within the International Association of Constitutional Law (IACL) and Coordinator of the research group on Security and Terrorism within the Associazione Italiana di Diritto Comparato.
Faculty member of the Bocconi PhD program in International Law and Economics. Regularly appointed as member of evaluation committees for PhD and Post-Doc Programmes in Italy and abroad.
National expert for the following research projects and seminars: Italian Key Opinion Formers led by the Istituto Affari Internazionali (IAI) – North Atlantic Treaty Organization (NATO) – Public Diplomacy Division Engagement Section, NATO Headquarters, Brussels, Belgium, 2016; The use of intelligence information, the 'national security' or 'state secrets' rule and secret evidence in national legislation and its interpretation by courts – Report 2014 – Centre for Research on Conflicts, Liberty and Security (CCLS) and Centre for European Policy Studies (CEPS), commissioned by the European Parliament; Meeting of European experts on national security and access to information, University of Copenhagen, Denmark, 2012 – European consultation on Open

Society's draft Principles on National Security and the Right to Information – Report 2014. Member of the Europol Platform for Experts.

Harriet Wistrich, Centre for Women's Justice and Birnberg Peirce
Harriet is the founder and director of the Centre for Women's Justice and a solicitor of 25 years experienced who worked for many years with renowned civil liberties firm, Birnberg Peirce Ltd. She is the winner of the Liberty Human Rights Lawyer of the Year award 2014, Legal Aid Lawyer of the Year 2018 for public law and Law Society Gazette personality of the year 2019. She has acted in many high profile cases around violence against women including on behalf of women who challenged the police and parole board in the John Worboys case, women deceived in relationships by undercover police officers and on behalf of women appealing murder convictions for killing abusive partners, most recently Sally Challen. She is also founder member of the campaign group, Justice for Women and trustee of the charity, the Emma Humphreys Memorial Prize.

Nusrat Zar, Herbert Smith Freehills
Nusrat is a disputes partner in the London-based public law practice.
A solicitor advocate, Nusrat has considerable experience helping clients with a range of public and administrative law matters including judicial review, the European Convention on Human Rights and freedom of information issues.
Nusrat works with commercial organisations and public sector bodies including regulators. She is listed as a leading practitioner in administrative and public law in Chambers, the *Legal 500* and *Legal Experts*.
Nusrat has worked with clients in numerous sectors including accountancy, consumer products, financial regulation, gambling including casinos and lotteries, gas and electricity, health, local government, pensions, planning and environment, professional discipline, public sector projects, tax, telecoms and broadcasting, transport (air, rail and bus) and the water industry.
Nusrat has written articles for a number of journals, including *Judicial Review*.

JUDICIAL REVIEW TRENDS AND FORECASTS 2020

Judicial Review in 2020: a view from the Court of Appeal

The Rt Hon Lord Justice Singh,
UK Court of Appeal

Judicial Review in 2020

A view from the Court of Appeal

The pandemic

- Remote hearings

Work of the CA

- Numbers
- About half of cases in Civil Division are public law

Permission to appeal

- Some old cases from before Oct. 2016
- Use of Respondent's statement
- Second appeals/*Cart* cases

Grounds of Appeal

- Grounds not submissions
- Skeleton arguments
- Don’t hide your best point

Role of appellate courts

- In particular in human rights cases
- When reviewing assessment of proportionality

Pure issues of law

- Contrast pure issues of law
- E.g. whether an interference is “in accordance with law”

Bundles

- Core Bundle
- Supplementary Bundles
- Bundles of authorities
- Electronic bundles

Draft judgments

- Not opportunity to re-argue the case
- Importance of agreeing the draft order in time

Permission to appeal to the Supreme Court

- Importance of 28 day time limit
- Cannot be extended by CA, only by SC

Interveners

- Role of interveners
- Evidence by interveners
- Written v oral submissions
- Costs

Duty of candour and co-operation

- Continuing duty
- Especially troubling if deficiency has to be corrected on appeal

Conclusion

- Importance of procedural rigour
- Fairness
- Public interest

JUDICIAL REVIEW TRENDS AND FORECASTS 2020

Top Public Law Cases of the Year

Bijan Hoshi, Public Law Project
Jason Pobjoy, Blackstone Chambers
Nusrat Zar, Herbert Smith Freehills

PUBLIC LAW PROJECT – JUDICIAL REVIEW TRENDS AND FORECASTS 2020

TOP PUBLIC LAW CASES OF THE YEAR (OCTOBER 2019-SEPTEMBER 2020)

12 October 2020

Jason Pobjoy, Blackstone Chambers
Nusrat Zar, Herbert Smith Freehills LLP
Bijan Hoshi, Public Law Project

As in previous years, the number and diversity of public law cases is now such that a review of the year can only hope to cover a small sample of these. The selection of cases below necessarily reflects our personal choices and no doubt there are many others that could have been included. We have selected 10 cases that appeared to us to be of particular interest or significance. They are summarised below in the sequence in which they will be presented.

1. *R (Jalloh) v Secretary of State for the Home Department* [2020] UKSC 4; [2020] 2 WLR 418

1. The claimant was released from immigration detention on bail in October 2013. On the following day, he reported to an immigration officer where he was given a document purporting to impose restrictions on him under paragraph 2(5) of Schedule 3 to the Immigration Act 1971. These included a requirement for him to report to an immigration officer every Monday, Wednesday and Friday, to live at a specified address, to submit to electronic tagging and to be subject to a curfew between 11.00pm and 7.00am every day. The notice warned him that he would be liable to imprisonment or a fine if he failed to comply with the curfew without reasonable excuse. Generally, the claimant complied with the curfew, which was in place from 3 February 2014 until 14 July 2016, a total of 891 days.

2. The curfew was eventually lifted following the judgment of the Court of Appeal in the case of *R (Gedi) v Secretary of State for the Home Department* [2016] EWCA Civ 409; [2016] 4 WLR 93. The court there held that paragraph 2(5) of Schedule 3 to the 1971 Act did not empower the Secretary of State to impose a curfew by way of a restriction under that paragraph. The claimant, therefore, sought damages for false imprisonment, arguing the curfew constituted imprisonment for the purpose of the tort of false

imprisonment. Mr Justice Lewis accepted that argument and awarded him £4,000 in damages. The Court of Appeal upheld his decision.

3. On appeal to the Supreme Court, the Home Secretary argued that (1) the curfew (although unlawful) did not qualify as imprisonment at common law; and (2) if it did, the common law concept of imprisonment should be modified and aligned with the more demanding concept of deprivation of liberty under article 5 of the European Convention on Human Rights ('ECHR').

Imprisonment

4. In her judgment, Lady Hale described the essence of imprisonment as "*being made to stay in a particular place by another person*". The methods which might be used to keep a person there are many and various. They include physical barriers, physical people or threats of force or of legal process. The point, she stated, is that the person is obliged to stay where he is ordered to stay whether he wants to do so or not.

5. In this case there was no doubt that the Secretary of State defined the place where the claimant was to stay between the hours of 11.00pm and 7.00am. Furthermore, there was no suggestion that he could go somewhere else during those hours without the Secretary of State's permission. The fact that the claimant did break his curfew from time to time made no difference to his situation while he was obeying it. He was imprisoned as long as he stayed at home under the curfew.

6. The Supreme Court went on to note that there was a crucial difference between voluntary compliance with an instruction and enforced compliance with that instruction. Here, although it was physically possible for the claimant to leave his home, there was no doubt that his compliance was enforced. He was wearing an electronic tag which meant that leaving his address would be detected. The monitoring company would then telephone him to find out where he was. He was warned in the clearest possible terms that breaking the curfew could lead to a £5,000 fine or imprisonment for up to six months or both. He knew it could also lead to his being detained again under the 1971 Act. All of this was backed up by the full authority of the State, which was claiming to have the power to do this.

7. That this amounted to imprisonment was supported by the case of *Secretary of State for the Home Department v JJ* [2007] UKHL 45; [2008] AC 385, in which it was taken for granted that a curfew enforced by electronic tagging, clocking in and clocking out, and arrest or imprisonment for breach constituted "*classic detention or confinement*".

Deprivation of liberty

8. Counsel for the Secretary of State raised an alternative argument, which had not been open to him in the courts below. In *Secretary of State for the Home Department v JJ*, Lord Brown expressed the view that an eight-hour curfew would not amount to a 'deprivation of liberty' within the meaning of article 5 ECHR. Consequently, the Secretary of State argued that the curfew in this case would not amount to a deprivation of liberty, and suggested that the time had come to align the domestic law of false imprisonment with the concept of deprivation of liberty under the ECHR.

9. In response, the Supreme Court noted the distinction between deprivation and mere restriction of physical liberty made by the ECHR and that the multi-factorial approach to this distinction is very different from the approach of the common law to imprisonment.

10. While the Supreme Court recognised that the common law is capable of being developed to meet the changing needs of society, what the Secretary of State was asking the Court to do was not to develop the law but to make it take a retrograde step: to restrict the classic understanding of imprisonment at common law to the very different and much more nuanced concept of deprivation of liberty under the ECHR. The Strasbourg court has adopted this approach because of the need to draw a distinction between the deprivation and the restriction of physical liberty. By contrast, there was no need for the common law to draw such a distinction and every reason for the common law to continue to protect those whom is has protected for centuries against unlawful imprisonment, whether by the state or private persons.

11. Accordingly, there could be imprisonment at common law without there being a deprivation of liberty under article 5. Whether the converse is true did not need to be decided.

2. *R v Adams (Northern Ireland)* [2020] UKSC 19

12. From 1922, successive items of legislation authorised the detention without trial of persons in Northern Ireland, a regime commonly known as internment. The way in which internment operated then was that initially an interim custody order ('ICO') was made where the Secretary of State considered that an individual was involved in terrorism. On foot of the ICO that person was taken into custody. The person detained had to be released within 28 days unless the Chief Constable referred the matter to a commissioner. The detention continued while the commissioner considered the matter. If satisfied that the person was involved in terrorism, the commissioner would make a detention order. If not so satisfied, the release of the person detained would be ordered.

13. An ICO was made in respect of the appellant on 21 July 1973. The matter was referred to a commissioner by an Assistant Chief Constable on 10 August 1973 and the commissioner decided that the appellant should continue to be detained. The appellant twice tried to escape from the place where he was detained and was twice convicted of attempting to escape from lawful custody.

<u>The issue</u>

14. Although an ICO could be *signed* by a Secretary of State, a Minister of State or an Under Secretary of State, the relevant legislation provided that the statutory power to *make* the ICO arose "*where it appear[ed] to the Secretary of State*" that a person was suspected of being involved in terrorism. On the assumption (which was common to the parties to the appeal) that the Secretary of State did not personally consider whether the appellant was involved in terrorism, the question arose whether the ICO had been validly made.

15. This question had come to light by virtue of the '30-year rule': the informal name given to laws in the United Kingdom ('UK') and other countries which provide that certain government documents will be released publicly 30 years after they were created. This had uncovered an opinion of JBE Hutton QC, legal adviser to the Attorney General at the time, dated 4 July 1974, which concluded that a court would probably hold that it would be a condition precedent to the making of an ICO that the Secretary of State should have considered the matter personally.

16. The question for the Court was, therefore, whether the making of an ICO under article 4 of the Detention of Terrorists (Northern Ireland) Order 1972 required the personal consideration by the Secretary of State or whether the *Carltona* principle operated to permit the making of such an Order by a Minister of State.

17. The '*Carltona* principle' here relates to the decision of the Court of Appeal in *Carltona Ltd v Comrs of Works* [1943] 2 All ER 560, which accepted that the duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department, and that the administration of government could not be carried on otherwise.

18. In his judgment, Lord Kerr provided a comprehensive analysis of leading authorities on the Carltona principle: *In re Golden Chemicals Products Ltd* [1976] Ch 300; *R v Secretary of State for the Home Department, Ex p Oladehinde* [1991] 1 AC 254; *Doody v Secretary of State for the Home Department* [1992] 3 WLR 956; *R v Harper* [1990] NI 28; *McCafferty's Application* [2009] NICA 59.

19. He then turned to paragraphs 1 and 2 of article 4 of the 1972 Order, which he described as having two noteworthy features. First, they establish a distinct segregation of roles. In paragraph 1 the *making* of the Order is provided for; in paragraph 2, the quite separate function of *signing* the ICO is set out. He concluded that if it had been intended that the *Carltona* principle should apply, there is no obvious reason that these roles should be given discrete treatment. The second noteworthy feature of article 4(2), when read together with 4(1), was that the ICO to be signed is that "*of the Secretary of State*". The use of the words, "*of the Secretary of State*", Lord Kerr held, denotes that the ICO was one which was personal to him or her, not a generic order which could be

made by any one of the persons named in paragraph 2 (including a Minister of State or Under Secretary of State).

20. Against that background, Lord Kerr reached the following conclusions. First, even if a presumption exists that Parliament intends *Carltona* to apply (which Lord Kerr doubts in *obiter* in the context of his analysis of *McCafferty's Application*), it is clearly displaced on the facts by the proper interpretation of article 4(1) and 4(2), read together. Second, the fact that the power invested in the Secretary of State by article 4(1) was a momentous one provides an insight into Parliament's intention, which was that such a crucial decision should be made by the Secretary of State personally (in agreement with Staughton LJ's view in *Doody*). Third, that there was no reason to apprehend that that this would place an impossible burden on the Secretary of State further lent itself to the conclusion that it was intended that the Secretary of State should make the decision personally.

Conclusion

21. For these reasons, Lord Kerr concluded that Parliament's intention was that the power under article 4(1) of the 1972 Order should have been exercised by the Secretary of State personally. The making of the ICO in respect of the appellant was, therefore, invalid and his convictions for attempting to escape from lawful custody had to be quashed.

3. *MS (Pakistan) v Secretary of State for the Home Department* [2020] UKSC 9; [2020] 1 WLR 1373

22. The appellant, MS, was a Pakistani national who entered the UK in 2011 at the age of 16. While still in Pakistan, he had been subjected to forced labour and physical abuse by his step-grandmother and her nephews in Pakistan. His step-grandmother then brought him to the UK where, on arrival, he was forced to work for no pay, as arranged by his step-grandmother for her own financial gain. He then moved from job to job for the next 15 months, under the control of adults and exploited as cheap and illegal labour.

23. In September 2012, the appellant came to the attention of the police. They referred him to a local authority social services department, which in turn referred him to the National Referral Mechanism ('NRM'), due to concerns as to his vulnerability and the possibility that he had been trafficked. In February 2013, however, the NRM decided that there was no reasonable ground to believe he was a victim of trafficking. The official who came to this decision did not meet or interview the appellant. The appellant sought judicial review of this decision in April 2013.

24. In the meantime, in September 2012, the Appellant had claimed asylum, but that application was rejected in August 2013 and on 2 August 2013, the Secretary of State decided to remove the appellant from the UK. The appellant appealed this decision to the First-tier Tribunal ('FtT'), who found that he had been under compulsion and control but nonetheless dismissed his appeal. The Upper Tribunal ('UT') granted permission to appeal and re-made the decision in view of errors of law by the FtT. In addressing the NRM's decision, the UT observed that this was not an "*immigration decision*" which could be appealed under section 82 of the 2002 Act; it could only be directly challenged in judicial review proceedings. However, the UT also held that if an NRM decision was perverse or otherwise in breach of the Secretary of State's guidance or contrary to some other public law ground, the UT could make its own decision as to whether an individual was a victim of trafficking. The UT went on to hold that, if the appellant was the victim of trafficking, he was entitled to the protection of European Convention on Action against Trafficking in Human Beings ('ECAT'), and the decision to remove him was not in accordance with the law because it had been based upon an unlawful NRM decision. It was also a breach of his rights under article 4 of the ECHR.

25. The Secretary of State appealed to the Court of Appeal, which allowed the appeal. The court held that, in accordance with *AS (Afghanistan) v Secretary of State for the Home Department* [2013] EWCA Civ 1469; [2014] Imm AR 513, the UT could only go behind the NRM's trafficking decision and re-determine the factual issues if the decision was perverse or irrational or one not open to the NRM to make. The court found that the UT had in effect treated the NRM decision as an immigration decision and had also been wrong to consider that the obligations under ECAT were positive obligations

under article 4 of the ECHR. Hence, the UT had been wrong to conclude that there had been a breach of the procedural obligations under article 4 ECHR.

The preliminary issue

26. After being granted leave to appeal to the Supreme Court, the appellant's immigration problems resolved themselves. He, therefore, wished to withdraw from the proceedings. Consequently, a preliminary issue arose as to whether the Equality and Human Rights Commission ('EHRC'), which had applied to intervene in the proceedings, could take over the appeal.

27. The Supreme Court noted that an intervener is a party to an appeal (Rules of the Supreme Court, rule 3(2)) and that an appeal can only be withdrawn with the consent of all parties or the permission of the Court (rule 34(1)). The appeal was therefore extant unless and until the Court gave permission to withdraw it. While Rules do not expressly state that the Court may permit an intervener in effect to stand in the shoes of an appellant, they do provide that if any procedural question arises which is not dealt with in the Rules, the Court may adopt any procedure that is consistent with the overriding objective, the Constitutional Reform Act 2005 and the Rules (rule 9(7)). The overriding objective is to secure that the Court is accessible, fair and efficient (rule 2(2)). Where an important question of law that may have been decided wrongly below is raised in an appeal, it is open to the Court to permit intervention and allow the intervener to take over the conduct of the appeal. Accordingly, the Commission were allowed to intervene and to take over the main conduct of the appeal.

The principal issues

28. There were two principal issues with which the Supreme Court was concerned:

    (1) The extent to which immigration appeals tribunals are bound to accept the decisions of the NRM as to whether a person is or is not a victim of trafficking.
    (2) The circumstances in which a decision to remove a person from the UK will be contrary to article 4 ECHR, read in the light of the UK's international obligations under ECAT.

Were immigration appeals tribunals bound to accept decision of the NRM?

29. On the first of these, the Secretary of State conceded that, when determining an appeal as to whether a removal decision would infringe rights under the ECHR, a tribunal must determine the relevant factual issues for itself on the evidence before it, albeit giving due weight to a decision-making authority's prior determination. It therefore became common ground that a tribunal is not bound by a decision of the NRM nor must it look for a public law reason why that decision was flawed.

30. This is because a tribunal has statutory jurisdiction to hear appeals from immigration decisions. The Nationality, Immigration and Asylum Act 2002 and Immigration Rules show that those appeals are clearly intended to involve the hearing of evidence and the making of factual issues on relevant matters in dispute. That this was a tribunal's role had been made clear in House of Lords in *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 AC 167.

31. The Supreme Court then went on to note that the proper consideration and weight to be given to an authority's previous decision will depend on the nature of that decision and its relevance to the issue before the tribunal. In *MS*, the Court found that the FTT and the UT were better placed to decide whether the Appellant was a victim of trafficking than the relevant authority.

The relationship between ECAT and Article 4 ECHR

32. The more difficult question for the Court was the relevance of that factual determination – that MS was a victim of trafficking – to the appeal before the tribunals. This depended upon the extent to which the detailed and specific obligations under ECAT could be said to form part of the positive obligations owed by the State under article 4 ECHR. To the extent that they do, they are relevant upon a challenge to an immigration decision in the immigration tribunals. To the extent that they do not, they are only relevant upon a judicial review challenge to a decision of the NRM.

33. Lady Hale carried out a detailed review of the relevant Strasbourg jurisprudence. The leading case of the relationship between ECAT and article 4 is *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1, in which the ECtHR concluded that trafficking within the meaning of article 4 of ECAT fell within the scope of article 4 of the ECHR. The judgment then went on to discuss what this entailed, including positive obligations not only to punish, but to prevent, to protect and to investigate situations of potential trafficking. This did not depend upon a complaint. The authorities must act of their own motion once the matter had come to their attention. The investigation must be independent and capable of leading to the identification and punishment of the individuals responsible. The appellant was, therefore, right to argue that ECAT informed the content of the state's obligations under article 4, as later cases of *Chowdury v Greece* (Application No 2184/15) and in *J v Austria* (Application No 58216/13) confirmed.

34. Following this review, Lady Hale made three findings.

(1) First, the UT having decided that MS was a victim of trafficking, it was necessary to decide whether his removal from the UK would amount to a breach of any of the positive obligations in Article 4 ECHR.

(2) Second, because of the defective NRM decision, the appellant was denied the protective measures required by ECAT, including the immigration status necessary for him to co-operate in the investigation and prosecution of the perpetrators. As the ECtHR cases had demonstrated, article 4 does require operational measures of protection where the authorities "*were aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an identified individual had been or was at real and immediate risk of being trafficked or exploited*". Ultimately, however, once he had come to the attention of the police, he was effectively removed from the risk of further exploitation.

(3) Third, however, it was clear that there has not yet been an effective investigation of the breach of article 4 as the police had taken no further action after passing the appellant on to the social services department. The UT had been right to hold that it was inconceivable that an effective police investigation and any ensuing prosecution could be conducted without the full

assistance and operation of the appellant, which would not be feasible if he were removed to Pakistan.

35. Accordingly, the appeal was allowed, and the decision of the UT restored.

4. *Plan B Earth v Secretary of State for Transport* [2020] EWCA Civ 214; [2020] PTSR 1446

36. The UK's 'Airports National Policy Statement: new runway capacity and infrastructure at airports in the south east of England' ('ANPS') was designated as a national policy statement for the purposes of the Planning Act 2008 ('Planning Act') by the Secretary of State for Transport on 26 June 2018. The ANPS provided for the proposed expansion of capacity at Heathrow Airport by adding a third runway.

37. The policy was subsequently subject to a number of challenges brought by five local authorities, the Mayor of London, Greenpeace Ltd, Friends of the Earth Ltd and Plan B Earth.

38. A number of grounds of judicial review were raised in the proceedings. The appellants succeeded on one ground: in the Plan B Earth appeal the Court of Appeal found that the designation of the ANPS was unlawful by reason of a failure to take into account the Government's commitment to the provisions of the Paris Agreement on climate change.

39. A key question upon which the decision turned was what is 'Government policy' relating to climate change pursuant to section 5(8) of the Planning Act, which requires that the reasons for the policy set out in the ANPS "*must […] include an explanation of how the policy set out in the statement takes account of Government policy relating to the mitigation of, and adaptation to, climate change*".

40. The Court of Appeal found that the Government's commitment to the Paris Agreement was "*clearly*" part of Government policy by the time of the designation of the ANPS because the Paris Agreement was ratified and there were statements re-iterating Government policy of adherence to the Paris Agreement by relevant Ministers. The concept of 'Government policy' did not have any specific technical meaning, but

should be applied in its ordinary sense. In particular, there was nothing to warrant limiting the phrase 'Government policy' to mean only the legal requirements of the Climate Change Act. The concept of policy is necessarily broader than legislation.

41. The Court of Appeal made a declaration that the ANPS is unlawful and should be prevented from having any legal effect unless and until the Secretary of State has undertaken a review of it.

5. *R (Bridges) v Chief Constable of South Wales Police* [2020] EWCA Civ 1058

42. The Court of Appeal considered an appeal by Mr Bridges in his claim for judicial review against the Chief Constable of South Wales Police ('SWP'). He challenged the legality of the police using automated facial recognition technology ('AFR') trialled in Cardiff, on the grounds that it was contrary to his right to privacy under article 8 of the ECHR and the requirements of data protection legislation. Mr Bridges further alleged that SWP failed to comply with the Public Sector Equality Duty ('PSED') under section 149 of the Equality Act 2010.

43. AFR is a way of identifying whether two facial images are the same. It operates by taking pictures of facial images, isolating each face, extracting unique biometric facial features which are compared against a database of existing images known as a "*watchlist*", and generating a "*similarity score*" indicating the likelihood that the faces match. When a possible match is identified, this is reviewed by a police officer who may either disregard the match or contact officers on the ground. If no match is made, AFR immediately deletes the biometrics and images of the persons whose faces were scanned. The public is notified each time AFR is deployed by (1) using social media prior to deployment, (2) displaying notices on the AFR-equipped police vehicles nearby and (3) handing out notices to the public.

44. The grounds of challenge in the first instance were that AFR is not compatible with the right to respect for private life under article 8 of the ECHR, which is one of the Convention rights set out in Schedule 1 to the Human Rights Act 1998 ('HRA'); data protection legislation; and the PSED.

Article 8

45. The Court of Appeal concluded that the Divisional Court had erred in finding that interference with Mr Bridges' article 8(1) rights was "*in accordance with the law*" under article 8(2). There was no clear guidance on where AFR could be used and who could be put on a watchlist. Police were given too broad a discretion to meet the standard required by article 8(2).

Proportionality

46. Had the interference with article 8 rights caused by the use of AFR been "*in accordance with the law*" for the purposes of article 8(2), it would have been a proportionate interference. The Divisional Court had properly performed the correct balancing exercise.

Data Protection

47. Three contentions regarding breaches of data protection laws were made: under the Data Protection Act 1998, under section 42 of the Data Protection Act 2018 ('DPA 2018') and under section 64 of the DPA 2018.

    (1) The appeal under section 64 DPA was allowed. The appellant alleged a material error of law *"concerning the non-engagement of Article 8"* of the ECHR and a material error of law concerning *"the processing of the (biometric) personal data of persons whose facial biometrics are captured by AFR but who are not on police watch lists used for AFR"*. The Data Protection Impact Assessment proceeds on the basis that article 8 is not engaged or, more accurately, is not infringed. Notwithstanding article 8, the Court found a failure to properly assess the risks to the rights and freedoms of data subjects and failed to address the measures envisaged to address the risks arising from the deficiencies.
    (2) The appeal under section 42 DPA 2018 was rejected. The Court considered that the two specific deployments which were the subject of the appellant's claim took place before the DPA 2018 came into force. There was no alleged failure to comply with the DPA 1998 on this point and therefore the only relevance of

compliance with section 42 was in relation to future use of AFR. A section 42-compliant document is an evolving document and must be updated from time to time to comply with section 42(3). The Information Commissioner had informed the Divisional Court that the existing policy document contained sufficient information to comply with section 42(2), if barely so. The Court of Appeal agreed with the Divisional Court's decision to leave SWP to make revisions as appropriate in the light of the Information Commissioner's future guidance.

(3) The focus of the DPA 2018 was the continuing breach of the continuing obligations under the Act. Although the Divisional Court acknowledged that the focus of the document was on the personal data of those on watchlists, it recognised that the data of members of the public would be processed and identified safeguards.

Public Sector Equality Duty

48. Mr Bridges alleged that SWP's failure to consider the possibility that AFR might produce indirectly discriminatory results (because it may produce a higher rate of false positives for female and minority groups) was a breach of the continuing duty of public sector equality. The Court of Appeal did not consider that provision for a human reviewer was sufficient to discharge the duty, and did not consider that SWP had satisfied themselves, either directly or by way of independent verification, that the software programme did not have an unacceptable bias. The appeal was also allowed on this ground.

6. *R (The Joint Council for the Welfare of Immigrants) v Secretary of State for Home Department* [2020] EWCA Civ 1058

49. The Secretary of State appealed against a decision that the 'right to rent' scheme ('the Scheme') in sections 20 to 37 of the Immigration Act 2014 is incompatible with article 14 of the ECHR read with article 8.

50. The Scheme prohibits private landlords in England from renting property under residential tenancy agreements to non- British, non-EEA or non-Swiss citizens who do

not have leave to enter or remain in the UK or whose leave is subject to a condition that prevents them from occupancy.

51. The Joint Council for the Welfare of Immigrants ('JCWI') claimed that the Scheme was in breach of article 14 of the ECHR when read with article 8 in that it caused landlords to discriminate against potential tenants who were not disqualified from renting under the Scheme, on the grounds of their nationality and/or race. Further, the JCWI claimed that landlords would seek to avoid risking a penalty under the Scheme by only renting to persons with British passports, or with ostensibly ethnically British traits (such as a 'British-sounding' name), and would thereby discriminate against non-British persons or ethnic minorities who were entitled to rent. It was argued that this discrimination should be seen as being caused by the Scheme itself. The JCWI also sought a declaration that it would be unlawful for the Secretary of State to make an order extending the Scheme to Scotland, Wales or Northern Ireland without conducting a further evaluation of its efficacy or allegedly discriminatory impact.

Causation

52. On the causation ground, the Court of Appeal held that the Divisional Court was right to find that persons with a right to rent, but not holding British passports, were the subject of discrimination on the basis of their actual or perceived nationality, and that such discrimination was caused by the Scheme. But for the Scheme, that level of discrimination would not have occurred.

Article 8

53. The Court of Appeal agreed with the Divisional Court that the facts did not fall within the scope of article 8. Article 8 did not give any general right to a home, and there was nothing to prevent a state imposing general restrictions on the ability to find and obtain a home. However, where a state took positive action to demonstrate its respect for private and family life, this action would fall within the ambit of article 8, whether or not such action was required by article 8. The ambit of article 8 was to be widely construed and the Court was prepared to assume, without deciding, that the facts fell within it.

Justification

54. The Court of Appeal held that the Scheme's objective was sufficiently important to justify limiting a protected right. It was rationally connected to the objective, and a less intrusive measure could not have been used.

    (1) The issue was whether, when balancing the severity of the Scheme's effects on persons' rights against the importance of the objective, the former outweighed the latter. As the Scheme was capable of being operated by landlords in a proportionate way, this was a complete answer to the article 8 and article 14 claims.

    (2) The discrimination was justified in any event. If necessary, the Court would have concluded that the applicable test was whether Parliament's assessment that the Scheme's adverse effects were proportionate to the benefits to the public were "*manifestly without reasonable foundation*". The "*manifestly without reasonable foundation*" criterion recognised that, where there was a substantial degree of economic and/or social policy involved in a measure, the degree of deference to the assessment of the democratically elected or accountable body that enacted the measure had to be given great weight because of their wide margin of judgment in such matters. Therefore, the greater the element of economic and/or social policy involved, the greater the margin of judgment, and the greater the deference that should be afforded. However, if the measure involved adverse discriminatory effects, that would reduce the margin of judgment and thus the degree of deference. Whether seen in terms of the application of the manifestly without reasonable foundation criterion or simply in terms of the usual balancing exercise inherent in the assessment of proportionality, the result should be the same and the Scheme was justified.

7. *R (Christie Elan-Cane) v Secretary of State for Home Department* [2020] EWCA Civ 36

55. The appellant, a non-gendered person, appealed to the Court of Appeal regarding HM Passport Office ('HMPO') policy not to issue non gender-specific 'X' passports to persons who do not identify as, or exclusively as, male or female.

56. The appellant had been registered as female at birth. However, they identified as non-gendered and underwent gender reassignment surgery. The appellant had requested of HMPO that a third box be added to the passport application form, allowing an applicant to mark the box with an X, indicating "*gender unspecified*". They were told that a declaration of gender was a mandatory requirement.

Engagement of article 8

57. The Court of Appeal held that although the European Court of Human Rights has not yet been required to analyse non-binary gender, this does not remove the necessity of such analysis from the English courts. The case engaged Article 8 as there could be little more central to a citizen's private life than gender and it could not be suggested that the appellant had no right to live as a non-gendered person.

Breach of article 8

58. The Court of Appeal agreed with the Divisional Court that the margin of appreciation was relatively wide and a change to the HMPO policy should not be considered in isolation, as a result of the developing broad notion of gender identity, and that gender identity issues should be coherently reviewed across government. Despite the worldwide trend on gender identity towards recognising the status of non-binary people, there is no consensus regarding either the broad issue of the recognition of non-binary people, or the narrow passport issue. As regards an ethical or moral issue without consensus, a state was likely to enjoy a wide margin of appreciation despite the importance of the issue to the individual.

59. As a result, the margin of appreciation may vary over time as consensus crystallises: a fair balance would require the legal recognition of the positive obligation in question and the margin of appreciation would be wider or narrower at different stages of the process.

60. Coherence of government policy is relevant in the fair balance of interests: the Government is entitled to further consider the issues raised. The Court concluded that HMPO's policy did not currently amount to a breach of article 8.

8. *R (Elgizouli) v Secretary of State for the Home Department* [2020] UKSC 10; [2020] 2 WLR 857

61. The claimant was the mother of Shafee El Sheikh, who was alleged to have travelled to Syria and joined the terrorist organisation Islamic State of Iraq and the Levant ('ISIL'). El Sheikh was suspected of being a member of 'the Beatles', a notorious group of four terrorists with British accents said to have committed myriad unspeakable crimes including multiple beheadings which were filmed and posted on the internet.

62. The United States ('US') authorities were conducting a criminal investigation into the group's activities. Two of the offences being investigated – homicide and hostage taking resulting in death – carried the death penalty in the US.

63. The UK authorities had also been conducting a criminal investigation into the group's activities. In 2015, by way of a request for mutual legal assistance, the US authorities requested the materials gathered during the UK investigation. In accordance with long-standing practice, the UK authorities sought written assurances that that the US authorities would not seek to impose or carry out the death penalty against anyone found guilty of any criminal offence arising from the investigation. The US authorities refused to provide such an assurance and the UK authorities did not provide the materials requested.

64. In 2018, El Sheikh and another suspected Beatles member, Alexanda Kotey, were captured and detained in northern Syria. By this time, there had been a change of government in both the US and the UK. Following protracted diplomatic engagement, under apparently significant political pressure from the US authorities, the UK authorities agreed to provide the material without receiving any written assurances as to the use to which it would be put.

65. The claimant challenged this decision by way of claim for judicial review. The Divisional Court dismissed the claim ([2019] EWHC 60 (Admin); [2019] 1 WLR 3463). Permission to appeal was refused but two points of law of general public importance were certified and the Supreme Court later granted permission to appeal on those points, which ultimately crystallised as follows:

    (1) Whether it was unlawful at common law for the Secretary of State to facilitate the carrying out of the death penalty in a foreign state by providing information which may be used by that state in the trial of a person who is not currently in the UK.
    (2) Whether the decision to provide such information, in so far as it consisted of personal data within the meaning of the DPA 2018, was unlawful under Part 3 of that Act (which concerns law enforcement processing).

The common law issue

66. The Supreme Court held (Lord Kerr dissenting) that there was as yet no principle under the common law (or any other recognised system of laws) prohibiting the sharing of information relevant to a criminal prosecution in a foreign state merely because it carried a risk of leading to the death penalty. The court's power to develop the common law was to be exercised incrementally and with caution. The proposed development was not appropriate, *inter alia* because:

    (1) The death penalty has never attracted the interested of the common law.
    (2) Rather, developments of the law had come relatively recently from Parliament and the Strasbourg Court.
    (3) Developing a common law prohibition on transferring information in certain circumstances would be difficult to reconcile with the DPA 2018 which provided a carefully calibrated regime for doing so.

67. In his dissenting judgment, Lord Kerr concluded that the time had come to recognise a common law principle whereby it is unlawful to facilitate the trial of any individual in a foreign country where, to do so, would put that person at risk of the death penalty (except in certain, limited circumstances).

The Data Protection Act 2018 issue

68. The transfer of data to a third country is prohibited unless the three conditions in section 73 DPA 2018 are met. Here, the second condition was in dispute, under which the transfer must be based on: (a) an adequacy decision (a decision by the European Commission that a country outside the European Union offers an adequate level of data protection); (b) if not (a), there being appropriate safeguards; or (c) if not (a) or (b), special circumstances.

69. The Court held, allowing the claimant's appeal, that:

    (1) The transfer was not based on an adequacy decision since no such decision had been made in respect of the US.
    (2) The transfer was not based on there being appropriate safeguards because the material was transferred without any safeguards at all. The clear purpose of the relevant provisions is to set out a structured framework for decision-making, including record-keeping, and this did not happen. Further, recital 71 Law Enforcement Directive (2016/680), which concerns appropriate safeguards, states that the data controller should take into account that the data *"will not be used to request, hand down or execute a death penalty"* and the expectation is that appropriate safeguards will be designed to achieve that objective.
    (3) The transfer was not based on special circumstances because a specific assessment was required and this did not take place. The decision was based on political expediency rather than strict necessity under the statutory criteria.

9. *R (Elgizouli) v Secretary of State for the Home Department* [2020] EWHC 2516 (Admin)

70. The Crown Prosecution Service ('CPS') had initially taken the view that there was insufficient evidence to charge El Sheikh in the UK. In June 2019, Ms Elgizouli commenced proceedings against the Director of Public Prosecutions ('DPP') for refusing to conduct a 'Full Code Test review' of the charging decision. In November

2019, those proceedings were compromised when the DPP agreed to conduct such a review.

71. In August 2020, the US authorities provided the UK authorities with written assurances that, if its request for mutual legal assistance were to be granted, the death penalty would not be sought in any prosecutions brought against El Sheikh and Kotey and, if imposed, such a penalty would not be carried out. The same assurances were provided in respect of the material that had been provided in 2018. Later that month, the UK authorities granted the request (the Secretary of State undertook not to provide the material to the US authorities pending an application for urgent interim relief by the claimant).

72. Shortly thereafter, still in August 2020, having completed a Full Code Test review, the CPS decided that there *was* sufficient evidence to prosecute El Sheikh in the UK. The CPS took the view that it was necessary for the Attorney General to consent to the prosecution. Accordingly, such consent was sought. In response to an enquiry by the claimant's solicitors, the Attorney General refused to provide a timescale for deciding whether or not to so consent.

73. The claimant challenged the decision to provide mutual legal assistance on the basis that it was: (1) incompatible with the DPA 2018; and (2) irrational. Central to both issues was whether the provision of the material in question was strictly necessary or proportionate in circumstances where the CPS had decided that El Sheikh could be prosecuted in the UK and had sought the consent of the Attorney General to do so.

74. Following a rolled-up hearing, the Divisional Court refused to grant the claimant permission to claim for judicial review.

<u>The Data Protection Act 2018 issue</u>

75. The claimant had argued that because a prosecution was likely to be possible in the UK, disclosure of material to the US was not necessary or proportionate. However, that misstated the question which the data controller was required to consider, which is whether the data processing is necessary (or, if sensitive processing, strictly

necessary) for the performance of a task carried out for a law enforcement purpose. The necessity requirement attaches to the task in question (not to some inchoate or generalised objective). In circumstances where the US authorities would prosecute with the data and could not prosecute without it, disclosure of the data was strictly necessary and proportionate.

The rationality issue

76. All relevant issues were carefully and conscientiously considered. There was no principled basis and no authority for the submission that it was irrational for the Secretary of State to provide mutual legal assistance because El Sheikh might be prosecuted in the UK. Such a proposition was simply wrong.

10. ***Begum v (1) Special Immigration Appeals Commission; (2) Secretary of State for the Home Department*** **[2020] EWCA Civ 918**

77. In 2015, when she was aged 15, Ms Begum had travelled to Syria with two school friends. She was said to have aligned herself with ISIL on arrival there and, shortly thereafter, married an ISIL fighter. Her whereabouts were unknown until she was discovered by journalists in 2019, detained in a camp run by Syrian Democratic Forces. During her time in Syria she had given birth to two children, both of whom had died before she was detained, as had her husband. In the camp she gave birth to a third child, a boy. He, too, had died shortly thereafter, apparently of pneumonia.

78. The Secretary of State made a decision to deprive Ms Begum of her British nationality. She appealed against that decision to the Special Immigration Appeals Commission ('SIAC'). She also made an application to the Secretary of State for leave to enter ('LTE') the UK in order to pursue her deprivation appeal. That application was refused and Ms Begum challenged the refusal by way of both: (1) a human rights appeal before SIAC; and (2) a judicial review claim before the Administrative Court on common law grounds.

79. The deprivation appeal, LTE appeal and LTE judicial review claim were heard together. Three preliminary issues were identified:

(1) Whether the deprivation decision rendered Ms Begum stateless.

(2) Whether the deprivation decision was unlawful because it had the direct and foreseeable consequence of exposing Ms Begum to a real risk of breaches of articles 2/3 EHCR (and/or would be contrary to the Secretary of State's extra-territoriality policy, under which deprivation would not be recommended where such real risks existed, notwithstanding that it was the Secretary of State's position that the ECHR did not have extra-territorial effect in such cases).

(3) Whether Ms Begum could have a fair and effective appeal.

80. In due course, the following judgments were handed-down:

(1) An OPEN judgment of SIAC in the deprivation appeal determining all three preliminary issues against Ms Begum (there was no separate judgment for the LTE appeal).

(2) A judgment of the Administrative Court granting permission to claim for judicial review but dismissing the substantive LTE judicial review claim.

(3) A CLOSED judgment of SIAC in the deprivation appeal (this was not material to the case before the Court of Appeal).

81. Since the deprivation appeal had not yet been finally determined, Ms Begum's could challenge the decision of SIAC on the preliminary issues only by way of judicial review. She did so in respect of the second and third preliminary issues only and was granted permission. Separately, she was granted permission to appeal in respect of the LTE appeal and the LTE judicial review claim by SIAC / the Administrative Court. The Court of Appeal heard the preliminary issues judicial review and the LTE appeals together (as a Divisional Court and a Court of Appeal, respectively).

82. The issues before the Court of Appeal were essentially as follows:

(1) Whether, having found that the appellant could not have a fair and effective appeal from Syria, SIAC ought to have allowed her deprivation appeal outright.

(2) Whether SIAC was wrong to approach the second preliminary issue (articles 2/3 EHCR / the Secretary of State's extra-territoriality policy) on the basis of the principles of judicial review rather than as a full merits appeal.

The fair and effective appeal issue

83. SIAC had concluded that the appellant could not play any meaningful part in her appeal and that, to that extent, her appeal would not be fair or effective. The Court of Appeal held that, in circumstances where this clear and categorical finding was unchallenged, it was not open to the Secretary of State to argue that this position might be susceptible to immediate change. Nor were the circumstances in which the appellant left the UK and remained in Syria relevant to the question of the legal and procedural consequences of SIAC's conclusion that she could not have a fair or effective appeal. However, it did not follow from that conclusion that the appellant's deprivation appeal must be allowed. Such an approach would be wrong in principle and would potentially set a dangerous precedent.

84. For the Court of Appeal, then, the critical question was what steps could be taken to alleviate the unfairness and lack of effectiveness. SIAC had suggested that the appellant: (1) could continue with her appeal; (2) could apply for a stay in the hope that should would be in a better position to participate at some point in the future; or (3) could later seek reinstatement if she were to be struck-out for non-compliance. The Court of Appeal took options (1) and (3) together, and dismissed them describing as *"unthinkable"* the idea that the appellant should continue her appeal notwithstanding that it could not be fair or effective. As for option (2), the Court held that it was not satisfactory because it did not address the risk of article 2/3 ECHR harm (whether in a camp in Syria or on transfer to Iraq or Bangladesh) and it was wrong in principle to stay an appeal indefinitely.

85. The only way in which there could be a fair an effective appeal was to allow the LTE appeals. While cognisant of the Secretary of State's national security concerns the Court of Appeal considered that they could be adequately addressed on the appellant's return to the UK, either by way of arrest, charge and detention within the

confines of a criminal prosecution or, if that was not feasible, a terrorism Prevention and Investigation Measure (commonly referred to as a 'TPIM').

86. The appellant's appeals against the LTE decisions of SIAC and the Administrative Court were allowed.

The extra-territoriality issue

87. The Court of Appeal held that SIAC took the wrong approach when considering whether the deprivation decision breached the Secretary of State's extra-territoriality policy. This issue ought to have been approached as a full merits appeal, not on judicial review principles. SIAC ought to have considered all of the evidence before it and decided for itself whether the deprivation decision was unlawful because it had the direct and foreseeable consequence of exposing the appellant to a real risk of breaches of articles 2/3 EHCR. It had failed to do so and so the appellant's judicial review claim of SIAC's decision on the second preliminary issue in her deprivation appeal succeeded. The Court of Appeal remitted that issue to SIAC to decide *de novo*, for itself and on the totality of the evidence before it.

JUDICIAL REVIEW TRENDS AND FORECASTS 2020

The operation of the Administrative Court during COVID and the move to online courts

Chair: Mr Justice Swift

Natalie Byrom, The Legal Education Foundation and UK Independent Reviewer of COVID-19 Adaptations to Courts, Access to Justice

Jo Hynes, Public Law Project

Rachel Jones, Blackstone Chambers

Shu Shin Luh, Doughty Street Chambers

Public Law Project

PLP RESEARCH PAPER

Online Immigration Appeals: A Case Study of the First-tier Tribunal

Jo Hynes, Joe Tomlinson, Emma Marshall, Jack Maxwell, Maria Wardale & Cecilia Correale

August 2020

Public Law Project (PLP) is an independent national legal charity. Our mission is to improve public decision making and facilitate access to justice. We work through a combination of research and policy work, training and conferences, and providing second-tier support and legal casework including public interest litigation.

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Executive Summary

This report explores the recent shift towards adopting digital ways of working in the First-tier Tribunal (Immigration and Asylum Chamber) (FtTIAC).

The bulk of our research examines the transition to using the online procedure to manage appeals in this Tribunal. This new system involves the introduction of a digital platform to lodge and track appeals, as well as an adapted appeal process that aims to provide more active case management and encourage earlier engagement from parties.

Our research into this online procedure has two parts: first, an exploration of its use in the pilot phase in 2019, and second, its unplanned expansion as a response to the COVID-19 pandemic from March 2020 to June 2020.

We also explore wider developments in the Tribunal's transition to an online court during the pandemic, and the adoption of remote hearings in particular. In the FtTIAC, substantive hearing lists were vacated from March 2020 to June 2020. Instead, only Case Management Review Hearings and immigration bail hearings were heard. These were conducted almost exclusively via telephone, with some later hearings heard via the video conferencing platform, Cloud Video Platform (CVP). Our research explores the impact of these developments and how they have interacted with the online procedure.

Research methodology

Our methodology draws on both quantitative and qualitative data produced through interviews, observations, and Freedom of Information Act (FOIA) requests. Our data was collected between 20 April and 24 June 2020, which broadly corresponds with the first peak of the pandemic in the UK.

We conducted semi-structured interviews with 43 lawyers, appellants, representative bodies, and appellant support organisations. These interviews focused on interviewees' experiences of the online procedure during the pandemic and, where relevant, their experiences of the online procedure pilot. We also conducted observations of 13 immigration bail hearings, in order to observe how remote hearings were proceeding in the Tribunal during the pandemic. Quantitative data was sourced through a combination of publicly accessible data published by Her Majesty's Courts and Tribunals

Service (HMCTS), two FOIA requests, and correspondence from HMCTS that was shared with us.

Summary of key findings

- The online procedure offers significant benefits in principle. Interviewees saw the shift away from paper working and towards a digital system that facilitates earlier engagement of parties to be beneficial. Specifically, the role of Tribunal Case Workers (TCWs) and the respondent review stage were perceived to have clear benefits.

- There were substantial concerns with how the online procedure was implemented during the pilot and how it was expanded during the pandemic. It was clear that many of the issues experienced with the online procedure during the pandemic, both in terms of its implementation and its fundamental structure, had their antecedents in issues that were not addressed during the pilot phase.

- A number of key concerns need to be tackled for the online procedure to fulfil the potential that many interviewees saw in it. These concerns related primarily to the legal aid funding arrangements, the nature of the Appeal Skeleton Argument (ASA), and poor Home Office engagement with the respondent review process. As a frontloaded process, sufficient resourcing of the early stages in the online procedure was perceived to be vital in addressing these concerns.

- Conducting Case Management Review Hearings via remote link was generally seen as desirable if an appellant was represented. Interviewees saw advantages to remote hearings in the context of Case Management Review Hearings but had concerns about their use in substantive hearings.

Recommendations

1) The results of any evaluation of the online procedure, pertaining to its use either in the pilot phase or during its recent expanded use under presidential Guidance Notes Nos. 1 and 2, should be made publicly available.

2) Frontloading of work in the online procedure needs to be matched by a frontloading of resources. This applies to both the respondent, in terms of Home Office review capacity, and the appellant, in terms of legal aid funding. Without this, the value of the online procedure is undermined.

3) We support the Lord Chancellor's move to make a temporary transitional amendment to the 2018 Standard Civil Contract. This will mean that by September 2020 all immigration and asylum appeals lodged using the online procedure under a legal aid contract will be remunerated on an hourly rates basis pending a full consultation.[1] We suggest that this consultation should commence as soon as possible. It should include in its terms of reference an evaluation of the impact on the legal profession and access to justice of any proposals for a legal aid funding framework for the online procedure.

4) The capacity of the current TCW teams and Home Office review teams should be reviewed by HMCTS and the Home Office respectively. The ratio of the number of staff dedicated to the review process in these teams to the number of appeals lodged should be maintained, as a minimum, at pilot phase levels.

5) A coherent, systematic approach across all hearing centres is important in order to maintain both procedural fairness and support for the online procedure. The value of a streamlined approach should be communicated by the Chamber President to Resident Judges and facilitated by the provision of model directions and examples wherever possible.

6) We support the publication by HMCTS of a Vulnerability Action Plan[2] and in particular the collection of protected characteristics data on service users. We suggest this good practice can be built upon by urgently conducting research into the impact of the online procedure on especially vulnerable appellants.

7) HMCTS and the FtTIAC Chamber President should provide more publically available information on the powers exercised by TCWs, their level of supervision, and the training they receive. The TCW Code of Conduct referenced as a possible future publication in the Senior President of Tribunals' Annual Report 2020[3] would be a welcome step. As a new role with potentially substantial case management powers, the accountability of TCWs is integral to the success of the online procedure.

8) A guidance note about good practice for remote hearings (both telephone and video links) in the FtTIAC should be produced by the Tribunal. The judiciary, user groups, and interested stakeholders could make valuable contributions to this. This note should particularly focus on the technical, financial, and linguistic constraints experienced

by appellants in the FtTIAC, both represented and unrepresented, with regard to their ability to engage with digital processes.[4]

Acknowledgements

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Abbreviations

ASA	Appeal Skeleton Argument
CCD	Core Casework Database
CMR /CMRH	Case Management Review/ Case Management Review Hearing
CVP	Cloud Video Platform
EEA	European Economic Area
FOIA	Freedom of Information Act
FtTIAC	First-tier Tribunal (Immigration & Asylum Chamber)
HMCTS	Her Majesty's Courts and Tribunals Service
HOPO	Home Office Presenting Officer
HR	Human Rights
TCO	Tribunal Case Officer. As referred to in the Pilot Directions.
TCW	Tribunal Case Worker. The same role as TCO. HMCTS literature and most interviewees refer to TCWs and so we adopt TCW in this report.

Contents

Introduction

The First-tier Tribunal (Immigration and Asylum Chamber) (FtTIAC) is established by the Tribunals, Courts and Enforcement Act 2007.[5] It is one of seven chambers of the First-tier Tribunal. The FtTIAC hears appeals from Home Office decisions and applications for immigration bail from people in immigration detention.

The legal context of the FtTIAC

The Home Office makes millions of decisions every year about whether people can enter the UK.[6] Just over three quarters of the applications made are for visitor visas, and the remainder are people seeking permission to enter and remain for reasons relating to work, study and family. The UK also offers asylum or protection to those who qualify, with 20,703 people granted protection status in 2019.[7] Those who wish to continue their stay in the UK may apply for an extension of a temporary visa, or for settlement. These asylum and protection applications constitute a relatively small proportion of all immigration decisions.[8]

If a person receives an unfavourable decision from the Home Office on an application, they might have a right to appeal it in the FtTIAC. The FtTIAC is a creature of statute: it only has authority to hear and decide an appeal if legislation says so.[9] The categories of case with a right of appeal attached were significantly reduced by the Immigration Act 2014. Some of these rights of appeal can only be exercised if the person is outside the UK. At present, the FtTIAC can hear appeals from the following classes of decision:

- Refusals of human rights or protection claims or revocations of protection status[10]
- Deportations or refusals of residence documents under the Immigration (European Economic Area) Regulations 2016[11]
- Revocations of British citizenship[12]
- Deportations, refusals or revocations of status, and certain other decisions under the EU Settlement Scheme[13]

On an appeal, an independent tribunal judge considers whether the original decision was correct on the merits.[14] The judge takes a fresh look at the facts and can hear evidence and summon people to answer questions or produce

documents.[15] If the judge decides that the Home Office got the original decision wrong, they can substitute a fresh decision in its place.

The FtTIAC also has the power, on application, to grant immigration bail to people in immigration detention.[16] A person on immigration bail is released from detention subject to certain conditions. The proportion of people leaving immigration detention to be removed has significantly declined over recent years, from 64% in 2010 to 37% in 2019. At the same time, the proportion of people leaving detention through release on immigration bail has increased, from 34% in 2010 to 61% in 2019.[17]

The HMCTS reform programme

Courts and tribunals in England and Wales are undergoing a period of rapid change, guided by the vision outlined in the 2016 policy paper 'Transforming Our Justice System.'[18] Her Majesty's Courts and Tribunals Service (HMCTS) consequently launched a £1 billion reform programme with the aim of modernising the justice system, reflecting global trends towards digital justice. The reform programme is currently expected to be completed by December 2023. In the FtTIAC, the reforms build on recommendations made by the charity, JUSTICE, which published a report in 2018, suggesting that the HMCTS Reform Programme is an opportunity to make improvements to the system.[19]

COVID-19 developments

Like many other jurisdictions, the FtTIAC has been forced to change how it works as a result of the COVID-19 pandemic. Alongside expanding the use of remote hearings, the Tribunal has expedited its rollout of the online procedure, ostensibly to allow the Tribunal to continue functioning during the exceptional circumstances created by the pandemic. Specifically, the pilot outlined in the previous section has been expanded in two Presidential Guidance Notes.[20] This has allowed the FtTIAC to accelerate reform in the FtTIAC 'so that 90% of all IAC appeals can be submitted and concluded online.'[21]

Methodology

Prior to beginning our research, we had planned to examine the online procedure pilot in the FtTIAC. This developed into exploring both the online procedure pilot and its expanded use during the pandemic. We also explored wider developments in the Tribunal's transition to an online court during the pandemic, most notably its adoption of remote hearings.

Scope of the research

Our methodology draws on both quantitative and qualitative data produced through interviews, observations, and Freedom of Information Act (FOIA) requests. Our data was collected between 20 April and 24 June 2020, which broadly corresponds with the first peak of the pandemic in the UK.

This research represents the first evaluation of the online procedure in the FtTIAC. It constitutes a significant advancement in our understanding of the practical workings of the online procedure, both in its pilot phase and in its expanded format during the pandemic. More broadly, it makes a substantial contribution to the developing literature on online courts.[22] In particular, it highlights the challenges of parachuting in a digital process to an already established network of systems.

Despite this, the nature of conducting research during a pandemic presented a number of obstacles. Firstly, the data involves only limited engagement with appellants, particularly unrepresented appellants. This was due to the practical limitations of conducting research during a time when researchers were working from home and when appellant support organisations were under acute strains. We are also aware that our data relates largely to the implementation of the online procedure during a pandemic and are clear that our findings cannot necessarily be extrapolated beyond the unexpected experiment that this situation created. Nevertheless, we consider our findings to be a valuable indication of potential opportunities and challenges of the online procedure beyond a pandemic context.

We refer to the reformed, fully digital, 'end-to-end' appeal process journey in the FtTIAC, navigated through the Core Case Database (CCD) via MyHMCTS, as the "online procedure." We make it clear when we are referring to this online procedure in the context of the pilot or in its expanded form during the

pandemic. Our focus here is on the period from an appellant with a right of appeal appealing an initial immigration or asylum decision up until the First-tier Tribunal issuing a decision on their appeal.

Qualitative methods

As outlined in table 1, we adopted a mixed-methods approach combining semi-structured interviews with observations.

Table 1: A breakdown of qualitative research conducted.

Method	Details	Further Details	Total
Semi-structured interviews	Interviews with lawyers who were involved in the pilot about their experiences of the pilot and the online procedure during the pandemic.	Solicitors (8)	8
	Interviews with appellants about their experiences of the pilot.	Appellants (2)	2
	Interviews with lawyers about their experiences of the online procedure during the pandemic.	Barristers (14) Solicitors (10) Immigration caseworkers (2)	26
	Interviews with representative bodies about their experiences of the online procedure during the pandemic.	Representative bodies (3)	3
	Interviews with appellant support organisations about their experiences of the online procedure during the pandemic.	Legal practitioner (2) Support coordinator (2)	4
		TOTAL	**43**
Observations	Immigration bail hearings at Taylor House.		8
	Immigration bail hearings at Hatton Cross.		5
		TOTAL	**13**

Semi-structured interviews

Interviews were conducted with a mixture of lawyers and non-lawyers. In total, we conducted 43 interviews with individuals from across England and Wales. We secured these interviews through social media call-outs, emailing representatives whose firms had been involved in the pilot, and contacting individuals who we already knew worked in this area. There was also a significant 'snowballing' effect, as interviewees often suggested further potential interviewees.

After conducting ten interviews, we established four sets of questions (for barristers, solicitors, support organisations, and appellants) followed by a series of thematic prompts. The interviews were largely guided by the interviewees, following a 'conversation with a purpose' interview style.[23] As all researchers were working from home during this period, interviews were conducted via a video conferencing platform and recorded to generate transcripts.

Observations

At the time of the research, the FtTIAC was hearing almost exclusively immigration bail hearings and Case Management Review Hearings. We observed 13 immigration bail hearings in order to observe how remote hearings were proceeding in the Tribunal during the pandemic. We considered that findings in this context may be indicative of the way a broader adoption of remote hearings in the Tribunal may develop.

Access was established through emailing the bail team at the relevant hearing centre, who provided bail listings and joining details for us to be able to join the hearings. All 13 hearings were conducted via telephone and we informed parties on the call that we were present in a purely observational capacity.

Quantitative methods

We also sourced a range of quantitative data to contextualise our qualitative findings and establish how appeals were progressing through the online procedure. Our quantitative sources were:

- official statistics published by HMCTS, including the Tribunal Statistics Quarterly for January to March 2020;[24]

- weekly management information published by HMCTS, which does not have the level of accuracy that the official statistics are able to

provide, but which we use here as an indication of how tribunals are currently operating;[25] and

- data gained through other means, including FOIA requests and correspondence from HMCTS shared with us.

Two requests were made under the FOIA. The first was to establish how many asylum appeals were being lodged via the online procedure and their outcomes. The second was to establish what proportion of all FtTIAC appeals were being lodged through the online procedure and their outcomes. In both, the Ministry of Justice provided the requested data.

Approach

We explore primarily the transition to using the online procedure in the FtTIAC. This has two parts: firstly, an exploration of its use in the pilot phase in 2019, and secondly, its expansion as a response to the COVID-19 pandemic from March 2020 to June 2020. In the final section, we explore wider developments in the Tribunal's transition to an online court during the pandemic, involving the shift to conducting bail hearings and Case Management Review Hearings via telephone.

Part One – Online procedure: pilot phase

HMCTS have said that the reform programme will ensure that all cases can be started online and some cases will be resolved entirely online, creating a system which is 'digital by default.'[26]

Pilot process

In the FtTIAC, the reform programme has produced a reformed system for lodging and managing appeals online. This involves a three-step reformed process before the hearing goes to a physical hearing, providing what HMCTS refer to as a reformed, fully digital, 'end-to-end' appeal process journey.[27] The process is as follows:

1) Online application. Applications are submitted using an online platform with a simplified appeal form (25 fields reduced from 128 fields).

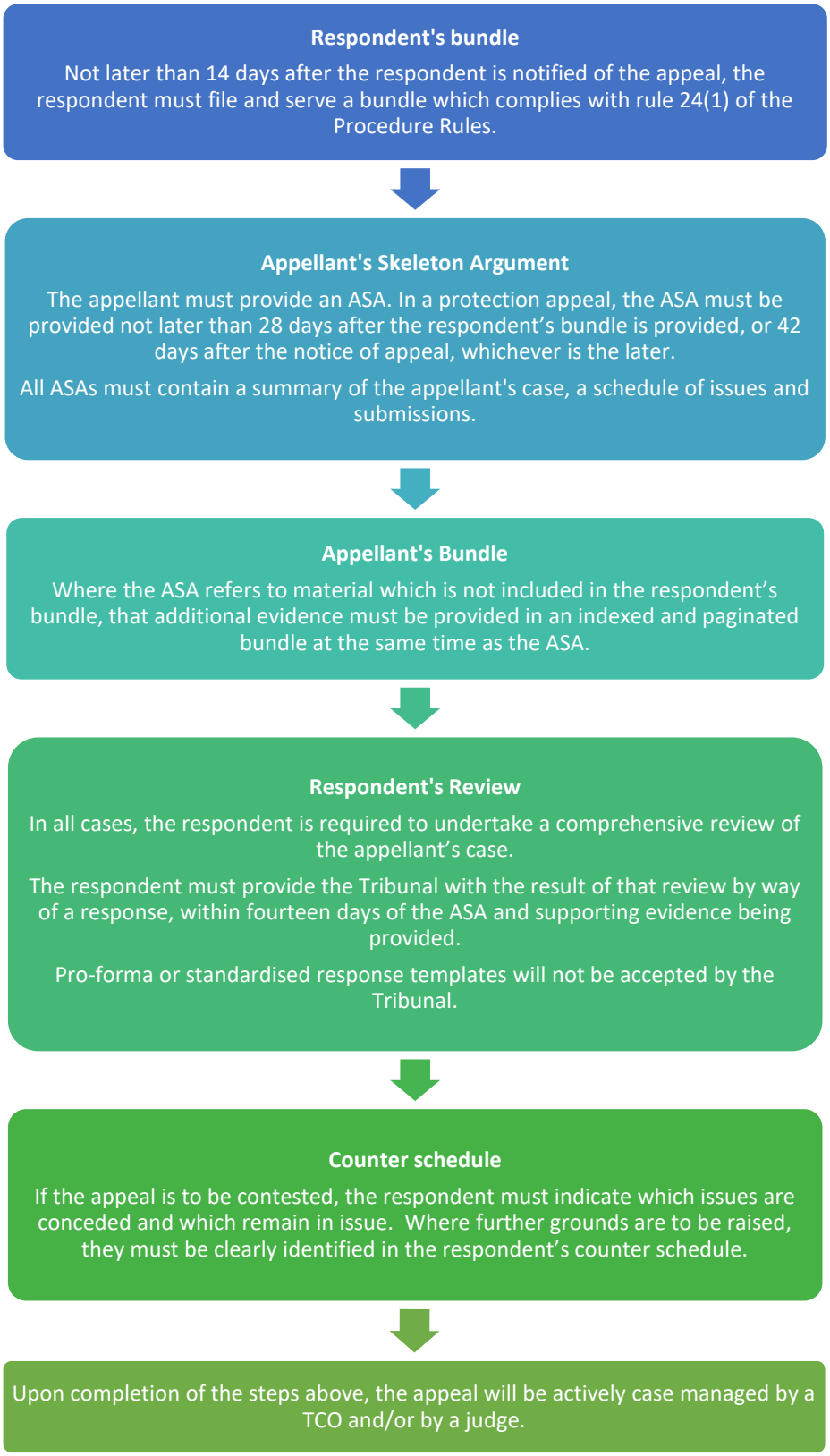
2) Digital bundle. Tribunal Caseworkers (TCWs) manage the progression of the bundle, requesting missing information and listing the appeal when they consider it is ready. A shared digital bundle is created as part of the process.

3) Review of the skeleton argument. The legal representative has 28 days from bundle submission to file an Appeal Skeleton Argument (ASA). The Home Office then has 14 days to review the appeal, giving them the opportunity to withdraw or concede parts of it at this stage.

4) Hearing. The appeal is then heard as per the traditional process in the FtTIAC, with the addition of screens, recording equipment, and digital bundles on devices.

From January 2019, HMCTS began piloting the use of this online procedure in Taylor House, London, and Manchester Piccadilly. This pilot was limited to a subset of appeals, specifically protection or revocation of protection appeals from six law firms that were invited to take part. Figure 1 summarises the directions that were originally issued to participants of the online procedure pilot ("the Pilot Directions").[28]

Figure 1 Summary of Pilot Directions, as issued by the Resident Judges at Taylor House and Manchester Piccadilly, from January 2019.



HMCTS hoped that the active case management and early engagement of parties built into the pilot would reduce the number of cases requiring a hearing, as well as making hearings shorter and more focussed.[29]

In September 2019, this pilot was expanded to Bradford and Newport, with a view to further expanding the service to North Shields, Hatton Cross and Birmingham by the end of 2019.[30] HMCTS then planned an iterative rollout of the online procedure throughout 2020. This involved its expansion to include all legal firms being able to submit asylum appeals through the online procedure, and later in the year to include a wider variety of appeal types (human rights and European Economic Area appeals), plus appeals from detained appellants and unrepresented appellants.

Pilot evaluation

Some information on the evaluation of the pilot has been made publicly available by HMCTS. Sources of information that are available include: updates published on the reform programme, which contain information about the development of the digital appeals process,[31] as well as events;[32] monthly newsletters that provide progress updates;[33] and articles on the Inside HMCTS blog.[34] However, what is not published is any detailed analysis of user perceptions of the programme or its effectiveness in meeting a set of objectives or specified criteria.

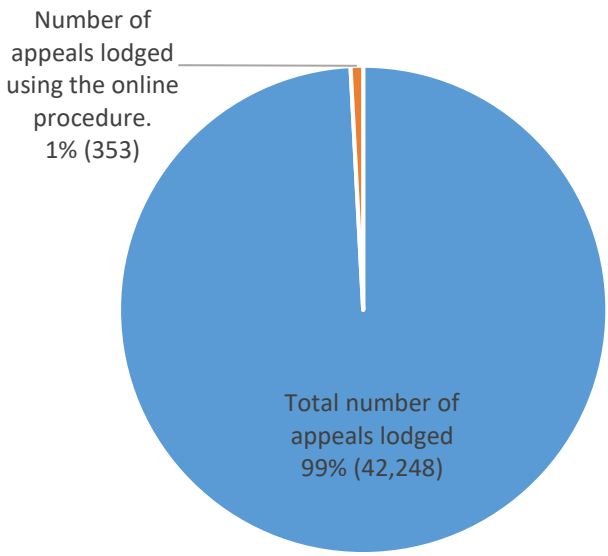
In a letter to Duncan Lewis solicitors dated 3 June 2020, HMCTS state that there has 'not yet been a formal evaluation of the project,'[35] but that evaluation has been ongoing as the project develops. The letter notes that 'a cross jurisdictional evaluation approach and methodology is currently being considered by the HMCTS Customer Directorate.' Consultation activities with users include 'research visits to immigration lawyers, practitioners, and representative bodies; the running of co-design and/or problem solve workshops; and attendance at Tribunal User Groups, the Law Society's Immigration Law Committee and the bi-annual IAC stakeholder meetings.'[36] The letter reports that user feedback is captured through a range of activities and attendance at events and meetings. From these sources, the project team capture thematic findings on user experience in a digital platform, which is not in a format that it is possible to share, but demonstrates 'anecdotally' that 'users report the process is improved and the technology easy to use.'[37]

The publication of official evaluation results from the pilot and the incremental introduction of the online procedure is essential in delivering a transparent service. Publishing any evaluation results would assist HMCTS in meeting their stated aim to deliver an 'efficient and transparent IAC service that is simple, fair and accessible for everyone using it.'[38]

The scale of the pilot

As figure 2 demonstrates, relatively few appeals were lodged under the pilot, compared to the total number of appeals lodged in the FtTIAC at the time it was running. This reflects the fact only a small number of appeals were eligible to take part in the pilot and highlights its relatively small scale.

Figure 2 The proportion of appeals lodged in the FtTIAC through the online procedure during the pilot.[39]



Empirical evidence

Benefits of modernisation

The underlying principles of the online procedure were seen by the vast majority of interviewees as extremely positive. Interviewees saw the shift away from paper working to be very desirable and an inevitability in the digital age.

> '[I]f those [concerns] can be resolved then I think it probably is the right way forward, to do things online because the world is online, you know, and we have to move and change and adapt.' [Interview #3]

> 'I think the concept is good, and I think that it could work well. … I like the idea of working paperless as much as possible, and being able to upload bundles is something that saves a huge amount on postage.' [Interview #4]

Tribunal Case Workers

Tribunal Case Workers (TCWs) were given an enhanced role as part of the online procedure. According to HMCTS literature, they 'proactively manage cases through [the online procedure] process, narrowing issues and deciding when it is ready for listing.'[40]

TCWs were spoken of very highly and many interviewees praised their responsiveness and the fact that they were not '*just in a call centre*' but knew the case they were referring to. A number of interviewees also highlighted the helpful role they played in actively case managing the appeal, particularly with regards to contacting the respondent for missing documents. Interviewees felt that TCWs elicited a better response from the Home Office and therefore served as a helpful mediator between parties. Furthermore, because an appeal would not be listed by a TCW until it was ready, several interviewees felt they could plan better as they were not going to be '*taken by surprise*' by an appeal hearing listed with short notice.

> '[T]here's a dedicated email addresses for Tribunal case workers and they've been very very responsive.... So if we've got things that we need to get from the Home Office and vice versa, there's a much better channel of communication and so that's really good.' [Interview #1]

> 'It took two or three times over email to explain to the TCW why we needed this, but the TCW engaged with it well and asked sensible questions and eventually agreed, and gave us what was quite a reasonably long extension in order to get the report because the expert couldn't do report for 3 or 4 months. ... [T]he process was much more transparent in a way. You felt like you were communicating with a real person rather than just getting something back a week later ... and they haven't really engaged with it. So I mean probably we would have gotten there in the end [with the standard procedure], but it was a much quicker process.' [Interview #6]

> '[I]f you get a respondent's bundle and you're missing something, it's not just you having to contact the presenting officers going, "Where is this? We need this", we now also have a TCO who's saying to them, we can't proceed with this appeal until you produce this evidence.' [Interview #8]

Flexibility

Many interviewees found the flexibility of the online procedure extremely helpful, and particularly valued the easier process of applying for extensions or adjournments. Interviewees suggested there was an improved sense of parties working towards the shared goal of getting the appeal ready for hearing.

'[B]ecause hearings don't get listed until they're ready, there's no longer [the] need to try and get adjournments if you need to get expert evidence, … because you can just communicate that with the tribunal from the beginning. We've generally found getting expert reports, take around four to six weeks to get funding and to get the reports, and we often don't have time to do that within the Tribunal time frame, but the Tribunal have been very flexible about allowing additional time to get expert reports and evidence.' [Interview #1]

'[I]f from the initial stage, if you indicate that you need more time, then generally you will get that time because the case can't proceed until you're ready. So in terms of expert reports or for whatever reason you need more time than the 28 days that they give you, we're finding there's a lot more flexibility. Often getting an adjournment from a judge was quite difficult …, whereas with the TCO it seems like it's a much smoother process, because the purpose of the appeal … is to have all of that evidence in place for the respondent to review, but also before the hearing date. … [W]e have more time to prepare cases, certainly, which has been beneficial. That's probably the best thing.' [Interview #8]

Home Office 'withdrawal to grant' rate

One of the most popular elements of the online procedure was the increased rate at which the Home Office withdrew unsustainable decisions to contest an appeal, in order to grant the immigration status in question ('withdrawal to grant'). When this happened, interviewees felt that it significantly improved the appellant experience and saved significant resources for both the appellant and respondent.

'[W]e've had a much higher percentage of appeals that have been withdrawn than we have seen in the normal system. … So cases, I think, that normally would have gone all the way through the court system, waited for judge to make a decision, had a positive outcome, we get in a positive outcome much sooner. Which is really good and I think it just shows the level of engagement on both sides because we're preparing very detailed bundles, extra evidence, skeleton arguments that are really, really addressing all of the points and the caseworker is actually looking at that and being quite pragmatic and sensible, and realise there's a case that, you know, they're quite likely to lose. … I've been in immigration for seven years now at [law firm] and I don't know if I've ever had appeals where the Home Office have considered the bundle before the hearing and withdrawn.' [Interview #1]

'[I]t feels like a fairer process as well, because it feels as though the Tribunals are really putting the appellant and respondent on equal footing, which didn't always feel to be the case before with the paper process. And you can be very straightforward with the client about timescales and things as well. There isn't like months and months where you have to wait for an appeal hearing …, which isn't very good for our work life balance, but also for the client's mental health.' [Interview #5]

Even if the respondent review stage did not lead to a 'withdrawal to grant', the engagement from the Home Office, combined with the Appeal Skeleton Argument (ASA) was seen by some as helpful in focussing issues before the hearing.

> 'I don't think they would have conceded this [appeal] on the day. So if it had been under the old system and the presenting officer had got all our stuff the day before … they wouldn't have looked at it … they would have just come along and stuck to their refusal letter. So I think the fact that there is this period of time where they have to look at it, it's really good. …[E]ven if they hadn't conceded it, we should have been able to narrow down the issues on the basis that they are required then to tell us what issues remain in dispute.' [Interview #2]

A number of interviewees were also pleased with the general level of Home Office engagement, suggesting it improved throughout the pilot. This improved engagement primarily involved the timely upload of the respondent's bundle, which one interviewee noted would not have happened under the standard procedure.

Substantive hearings

A number of interviewees had been involved in appeals that had gone to hearing under the online procedure pilot. This hearing process involves the standard appeal hearing process, with the addition of screens, recording equipment and digital bundles on devices. This reformed hearing process was generally well-received by the interviewees who had experienced them.

One interviewee suggested that this reformed hearing process did not fundamentally alter their experience of advocating in the hearing, and felt that their client's experience was improved by having access to an electronic bundle on an individual screen.

> 'So for us, we just said it really is the same, just a few extra screens. The advocacy part of it really is just no different. The process of it is same and the structure of the hearing is the same. … I would say it's probably easier to refer to evidence. … It was quite handy for the client to actually have that [electronic bundle] in front of them rather than me having to pass them my bundle you know, so that side was a little more slick and probably beneficial.' [Interview #8]

However, an appellant we interviewed said they did not have access to an electronic bundle via a screen provided by the Tribunal like everyone else did, but would have liked one as this would put all participants '*at the same level.*'

General concerns with the implementation of the online procedure

Alongside these benefits of the online procedure in its pilot phase, many interviewees highlighted multiple challenges. Many of these concerns were framed as '*teething issues*' or issues that needing to be '*iron[ed] out*' before interviewees would be happy to use the online procedure. These were challenges that interviewees felt could be addressed reasonably quickly, given the right resources.

Legal aid

Many interviewees were anxious about the legal aid funding arrangements in place during the pilot. Multiple interviewees were concerned that the online procedure created additional work for representatives, but this was not paid work in fixed-fee cases.

> '[G]enerally these appeals take longer to prepare and yet you're not getting paid more money for them. Unless they're hourly rates cases, but if they're fixed fee cases and they're not going to become escape fee cases, which very few of them do. So you're doing more work for the same money which is, you know, a bit of a worry. … The thing is, as a bare minimum on every single case it's an extra 4 hours work and sometimes it will be lots, lots more than that. So effectively, that sort of work you're doing for free, so that's the concern.' [Interview #4]

> '[A]t the end of the day, if I'm going to be spending 4-6 hours extra on this, and not being paid more, it's just not financially viable. … [W]hat I'm afraid will happen is a lot of firms will start just doing standard skeleton arguments where they're not really engaging. Because if you're not getting paid for it and you're doing all this hard work, I think it's going to be back to the olden days but we're just doing it on CCD.' [Interview #7]

A number of interviewees specifically suggested that the timeframe and the extra review stages built into the online procedure generated some of this additional work for representatives.

> '[O]bviously you've prepared a case in response to a refusal letter and then in effect, in a few of ours, we've got a second refusal letter where you have to go back to the client in order to take further evidence, or collect further evidence in order to rebut those additional refusal points. And obviously that would not happen during the course of a normal appeal, so this is additional work that we're having to do within the same fixed fee.' [Interview #8]

> '[T]he difficulty is that if I have prepared everything 3 months beforehand, by the time I've been through the whole system I need to advise them [client] again about how the hearing will proceed. Which means, again, spending more time with clients which previously I didn't have to do because I would normally see them 3 weeks prior [the hearing] … I think with the CCD

> system, the majority of them [cases] will be going over [the fixed fee] because of the prep you have to do in readiness for the hearing.' [Interview #7]

One interviewee noted that this time lag between submitting an appeal via the online procedure and the appeal being decided was affecting the commercial viability of taking on these cases.

> '[W]e can't final bill a case, or stage bill a case, until we get a decision from the Tribunal, so that slowed things down. … I think in December last year, I had to stop putting appeals into the CCD because we had so many in there which weren't getting heard so it was a cash flow issue.' [Interview #8]

Several interviewees were also concerned that the funding arrangements led to counsel in fixed-fee cases being left without remuneration for drafting an ASA.

> 'The current situation we're in, Counsel can't get paid for what they're doing. I mean, that's not fair and not sustainable for anybody. So that needs to be addressed by the LAA if this is going to be rolled out. And we sort of had assurances from the Tribunal, you know they're going to help us speak to the LAA.' [Interview #1].

A number of solicitors were concerned that their appeals would be of poorer quality without this early engagement from counsel, as well as leading to possibly difficult negotiations between solicitors and barristers.

> 'And I'm very anxious about the fact that we cannot get a barrister involved until after the reconsideration. Or, you know, we can get a barrister involved on a pro bono basis which is just not sustainable for the barristers. … I feel that barristers are being put in really difficult positions and being asked, "Ooh, could you just have a look or, you know, do you mind just giving a view?", and that's really hard for both the solicitor and the barrister.' [Interview #3]

> '[S]ome of us are thinking, maybe that means we should do the [ASA] ourselves, which I think is fine to an extent but often I think we don't really have time to do justice to it. We are not so experienced as barristers in writing [ASAs] so in the best interest of the client, it would be better still to engage counsel, no matter if we think we can make a reasonable go at it.' [Interview #6]

Home Office engagement

Whilst some interviewees experienced improved engagement from the Home Office during the pilot, others expressed frustration at what they perceived to be poor Home Office participation with the online procedure. Most notably,

this involved limited engagement from the Home Office with the respondent review process.

> '[Respondent reviews] seem a bit formulaic and don't always seem to engage with the issues as well as I would have liked. Interestingly, I think the ones in [one hearing centre in the pilot] I've seen the reviews for seem to have engaged a bit more with the actual issues. …[B]ut what concerns me is … you've got these two people in [central review team] doing not many appeals and they're still being a bit cut and paste-y and a bit superficial to be honest.' [Interview #4]

> 'The decision, the response that we got back [from the Home Office] really didn't engage with the points that we had raised, so it was disappointing in that sense.' [Interview #7]

Prescriptive nature of the online procedure

A number of interviewees felt that the online procedure at times could be overly prescriptive and that this limited their ability to present the best possible case.

For the most part, interviewees said that there was sufficiently responsive communication with TCWs for requests for extensions, but one interviewee noted that they had been required to submit their ASA prior to receiving an expert report. It was then very unclear whether they were able to amend and re-upload their ASA.

Other interviewees found the ASA to have unnecessarily *'stringent requirements'* and in particular found the page limit difficult to comply with whilst still submitting a comprehensive ASA.

Delays

A small number of interviewees also expressed frustration at delays ('*the slow speed of things*') in the online procedure during the pilot.

> 'I think if you wanted an appeal to take place in 4 weeks' time then you wouldn't choose to use the pilot system, you would just choose the paper system to get your hearing sooner.' [Interview #6]

One interviewee expressed frustration at the delays in getting hearing rooms ready for hearings.

> '[I]t appeared that they didn't have the hearing room ready, or the technology in place, so they asked us to start lodging the appeals and getting them prepared … but I don't think we had any hearings until March.

> So there's sort of two months where we had a number of appeals ready but nothing happening, which was a bit frustrating.' [Interview #4]

Another interviewee noted that these delays made it impossible to advise clients of a hearing date. Furthermore, the same interviewee explained that clients would want to add additional information to their appeal as the hearing date got closer.

> 'I'm concerned that it's taking 3-4 months for the case to get listed, probably longer. And that means that I'm going to have clients who want to give me lots of documents. And again that's time consuming because I have to review all the documents again. Before because it was 4-6 weeks, we were ready. But now, because things are taking a lot longer, clients are getting frustrated and they then want to add information, which is relevant a lot of the time. So I think again that's more work on or side as well which we are not going to be remunerated for.' [Interview #7]

Both appellants we interviewed whose appeals had been through the pilot spoke of the frustration of the delays they experienced. For one appellant, it took six months between the initial refusal and the appeal hearing, which the appellant said has significant negative impact on their depression, anxiety, and overall health.

Structural concerns with the online procedure

Beyond these *'teething'* issues, more structural concerns also presented themselves during interviews.

Appellants in person

The 'frontloaded' nature of the online procedure led many interviewees to question its suitability for unrepresented appellants, or even those with less diligent representation.

> '[T]he work is very front loaded, so if representatives do that work it's great, but I think I would be worried about what happens if it gets rolled out further, in particular to unrepresented appellants. I'd be concerned about how they would be able to handle the system.' [Interview #1]

One interviewee expressed frustration that the online procedure platform, CCD, did not send email notifications to inform them that directions had been served. They suggested that this put the onus on the representative or appellant in person to keep checking for notifications on the system, which was '*hidden away on quite a small tab*'. They were unsure how an unrepresented appellant would manage this unintuitive process.

Interviewees highlighted language barriers, poor digital literacy and lack of access to technology in a secure environment as key obstacles to appellants in person being able to engage fully with the online procedure in its pilot form. In particular, one interviewee suggested some appellants in person may be able to '*muddle through*', but would not be able to get the '*full benefit*' of the online procedure. The role of the TCW in possibly addressing these barriers was also highlighted as a concern.

> 'It's [CCD] relatively straight forward for a lawyer to use, for someone who's used to working on a computer… but there are plenty of people for whom it would be completely baffling and then they would resort … to asking friends, disclosing things to people that they wouldn't otherwise want to disclose things to, or they just won't be able to use it at all. [I]f you're not computer literate and you can't read English, there's just no way you'd be able to do it.' [Interview #6]

> 'I think that if it's going to be rolled out to unrepresented appellants there's going to need to be a huge level of support. And then leading on from that, my concern would then be, does that support come from the Tribunal …? Do you have a caseworker effectively helping the appellant to prepare their case and then how does the Tribunal maintain their independence, if they're effectively, almost acting as a quasi-legal representative?' [Interview #1]

> 'I think they could be really lulled into a false sense of a facilitator becoming an advocate, or an advisor. And the thing is, the Tribunal person [TCW] could say until they're blue in the face, "I can't give you advice, I can't give you advice", but if you have a person who hasn't got any other source of advice then they will just follow what they [TCW] think.' [Interview #2]

> '[W]here do you draw the line? If you have an appellant who wants to submit lots and lots of documents and then you have this facilitator [TCW], do they just say, "Ok, this is how you upload everything"? They might get tempted to say, "Well actually I don't think you're going to need that". Because it would be easy to be drawn into that person giving advice about what to do. … [W]e've seen it [in other immigration contexts] where people [who] were only supposed to just assist with uploading, end up becoming sort of pseudo advisors and making things worse.' [Interview #4]

A represented appellant whose appeal had been part of the pilot phase was concerned about how someone who did not have the legal support they had would be able to navigate the process.

> '[S]ome of these people cannot speak English, maybe they don't know how to use the Internet. What will be their fate?' [Interview #19]

Complex appeals

Some interviewees suggested that the online procedure would be unsuitable for more complex appeal types.

For one interviewee, all fresh asylum appeals came under this category, because the appellant would invariably be '*still working through the process of talking about their experiences*' and would not be able to give '*neat little packages of information deposited into this online pilot.*' Another interviewee was concerned about meeting ASA requirements in complex cases.

One interviewee suggested that cases where the appellant was detained would be very difficult to conduct in the online procedure. Detained cases were exempt in the pilot and remain exempt from complying with the online procedure, as per the Presidential Guidance Note No 2 2020. Nevertheless, the interviewee felt that this may present issues at a later stage of the reform rollout.

> 'It's difficult enough communicating with client, I don't know how people in detention are going to cope with it. You can see that being a real sort of hurdle to overcome and I'm not quite sure whether the HMCTS are thinking about it… I assume they've got a plan about how to make sure that you know, detained clients are able to access the system and upload documents and so on, but I can't see that being straightforward.' [Interview #4]

Concerns about resourcing beyond pilot phase

Many interviewees expressed concern about how the online procedure would be supported to the same degree as they had experienced during the pilot phase. They felt that many of the benefits they had received, in particular the responsiveness of TCWs and the Home Office, may be compromised with a wider rollout of the procedure.

> 'What the big concern is, is if everyone's got to suddenly use it … will it cope with that many people? … At the moment you know, TCWs are fantastic – they're responding quickly, but then there are not many firms and not many appeals. If you're suddenly dealing with a whole range of firms and thousands of appeals a month, they're not going to be able to cope in the same way. Certainly in the Leeds Review Team the two senior Presenting Officers … at the moment, they can cope with reviews of appeals. But if there are suddenly 100 times more than there are now, they're going to need more. … The quality of the [Home Office] review undoubtedly is going to go down because they're not going to have enough time to do it so if they're relatively poor already, I hate to think what they'll be like when they've got so may more to deal with.' [Interview #4]

> '[I]n theory, it's not a bad thing but I think in practice … my fear is that there won't' be enough Tribunal or barrister time to make it operate well.' [Interview #6]

> 'So I am worried that once it gets rolled out, we're not going to get quick responses from the Tribunal like we do now. The Home Office might not even comply with directions or if they do it'll just be tick boxes – yes we reviewed it but we are maintaining our decision.' [Interview #7]

A number of interviewees also highlighted how the pilot only accepted a limited number of appeal types and where the appellant was over 18, living in the pilot area, had legal representation, was not detained, and the appeal was not linked. Some interviewees expressed concern about how it would work in a wider context.

Two interviewees were particularly concerned about how technical issues would be addressed when more appeals were channelled through the online procedure and their direct contact with technical support staff potentially ceased. One interviewee was already having issues with getting a response from technical support during the pilot and was concerned about what this would mean for an expanded online procedure.

> 'At the moment I'm ok because I've got the email address for the [name] Tribunal and they're more than happy for us to email because it's the pilot, but I'm sure when this is no longer the pilot, just like they have done in the past, they've said, "Please don't email us anything". … But if we have a technical issue and we can't comply with directions, and the technical team are not getting back to me in 24 hours or at least 48 hours, then what's going to happen further down the road? … He [technical support] still hasn't gotten back to me. That was two weeks ago or something.' [Interview #7]

Part Two – Online procedure: expansion during the COVID-19 pandemic

The Pilot Practice Direction issued by Sir Ernest Ryder on 19 March 2020 gave Chamber Presidents considerable discretion to 'adjust their ways of working' to respond to the COVID-19 pandemic.[41]

Expanded pilot process

President of the FtTIAC, Judge Michael Clements, first addressed the challenges presented by the pandemic through Presidential Guidance Note No 1 which was issued on 23 March 2020.[42] This note indicated that, '[w]ith the exception of HR [Human Rights]/ EEA [European Economic Area] appeals, all appeals to the First-tier Tribunal must be commenced using the online procedure unless it is not possible to do so.' HR appeals are just under half of the total applications made to the Tribunal, and EEA appeals are just over a quarter.[43]

In response to the Presidential Guidance Note No 1, Resident Judges began issuing directions, stating that parties must comply with the Pilot Directions.[44] All hearings that were scheduled were vacated, and appeals began to proceed instead through the online procedure and Case Management Review Hearings. In effect, appeals began to follow the processes outlined in figure 1, although the 'start date' from which days are counted differed between hearing centres.

Presidential Guidance Note No 2 was then issued on 11 June 2020 and came into effect on 22 June 2020, revoking Presidential Guidance Note No 1.[45] It indicated that all appeals must be started through the online procedure, with a more limited number of exceptions than the earlier note. Specifically, at paragraph 3, it noted the following exceptions:

> 'Where an appeal is brought in any of the following circumstances, it shall be deemed not to be reasonably practicable to commence that appeal by using MyHMCTS:
> a) under The Immigration (Citizens' Rights Appeals)(EU Exit Regulations 2020);
> b) if the appellant is outside the United Kingdom;

c) if the appellant is in detention;
d) any appeal brought by a person without representation by a qualified person within the meaning of s.84 of the Immigration and Asylum Act 1999; or
e) if the appellant's appeal is linked to another appeal. (This applies where the appeal of one or more appellants is brought at the same time in circumstances in which those appeals raise common issues).'

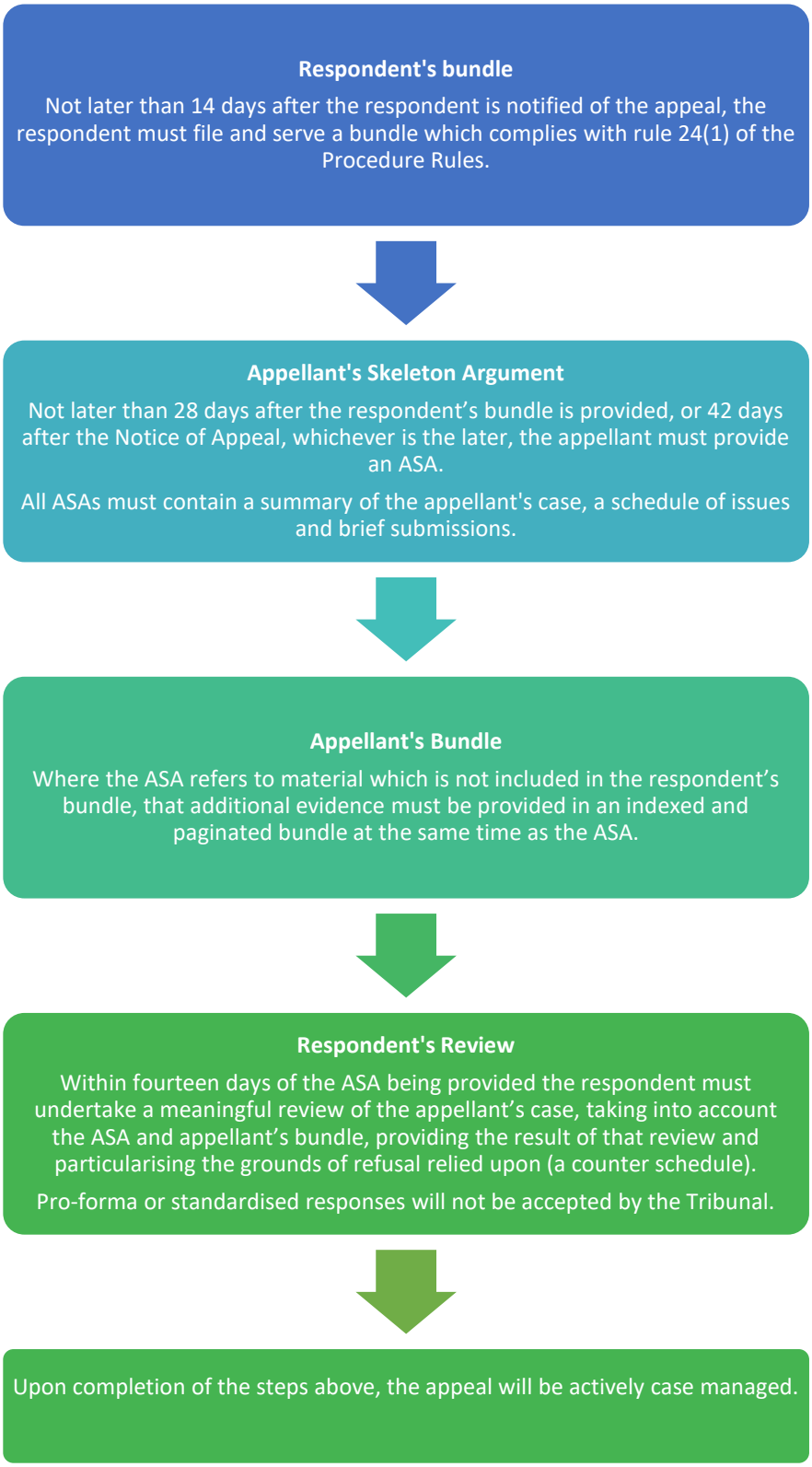
Attached to this later note were three annexes that outlined the process for appeals progressing through the online procedure, appeals not progressing through the online procedure, and appeals with unrepresented appellants. The first annex, for appeals progressing through the online procedure, is summarised in figure 3. There are minor differences between the Pilot Directions (summarised in figure 1) and the directions issued under Presidential Guidance Note No 2, but as figure 3 below highlights, the timeframes and stages remained the same.

The user guide issued alongside Presidential Guidance Note No 2 also indicates how the Tribunal is approaching the listing of hearings until December 2020.[46] This information is summarised in table 2.

Table 2 Summary of FtTIAC plans to list hearings June to December 2020. Summarised from the original in the FtTIAC User Guide, p. 6.

Timescale	Action
June 2020	The Tribunal will continue to focus on remotely conducted Case Management Review Hearings. An increasing number of these will be held via Cloud Video Platform (CVP).
July to September 2020	Ensure that all judges can be trained in the use of CVP. Begin to conduct substantive hearings. Some face to face hearings will begin. Hearings involving several participants will likely take place on a hybrid basis with some participants attending in person and others attending remotely using CVP.
October to December 2020	Period of consolidation as judiciary, staff, and Tribunal users increase their familiarity with the use of remote hearing technology.

Figure 3 Summary of model directions in annex 1 of Presidential Guidance Note No 2.

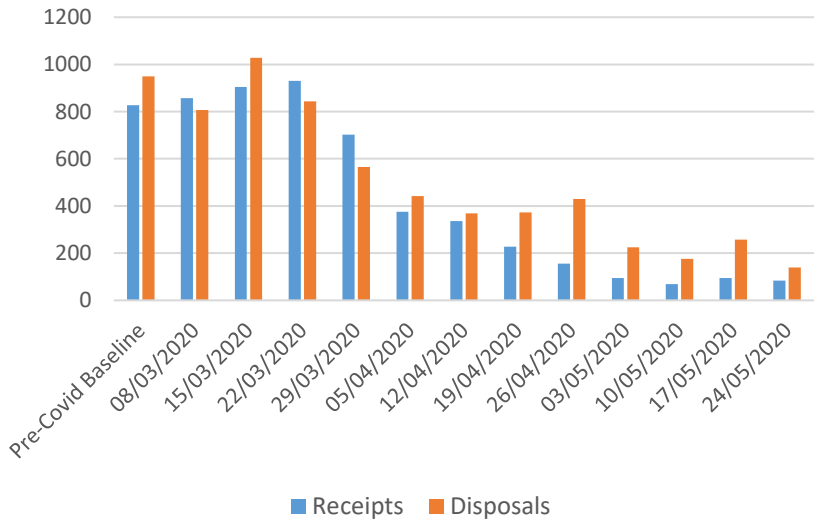


Impact of COVID-19 on the FtTIAC

Weekly management information published by HMCTS gives some indication of the volume of cases progressing through the Tribunal during the pandemic. However, this weekly management information is subject to a number of caveats. First, the notes that accompany the data indicate that '[t]he data does not include some cases which are currently collected through a different platform, which is currently being piloted.' This suggests that some cases proceeding through the Tribunal are not recorded in the management information, which may include those lodged via the online procedure. However, it is not clear how many cases are not included, or whether these correspond directly with the figures obtained by Duncan Lewis, which indicate that 369 appeals were received via the online procedure up to 23 March, and a total of 461 up to 1 June. Second, the figures from the case management system differ from the official statistics that are published quarterly, and government guidance on the use of management information data is clear that it should not be relied upon. It does, however, give an indication of the effects of Covid-19 on the functioning of the Tribunal.

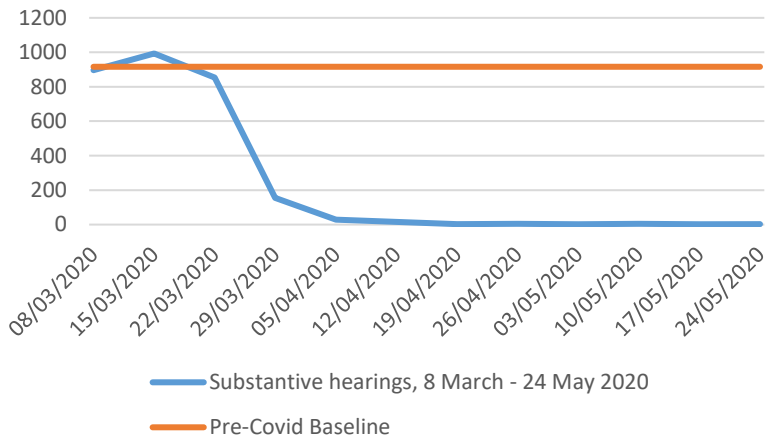
The weekly management information indicates a sharp drop in the number of cases received and disposed of by the Tribunal in the early months of the pandemic. The receipt of cases dropped from a 'Pre-Covid Baseline' of 827 receipts per week to 84 by the week ending 24 May 2020. The disposal of cases (the number of cases that have been determined) similarly dropped from a 'Pre-Covid Baseline' of 950 disposals per week to 139 in the week ending 24 May 2020 (see figure 4).

Figure 4 Workload in the FtTIAC per week, 8 March - 24 May[47]



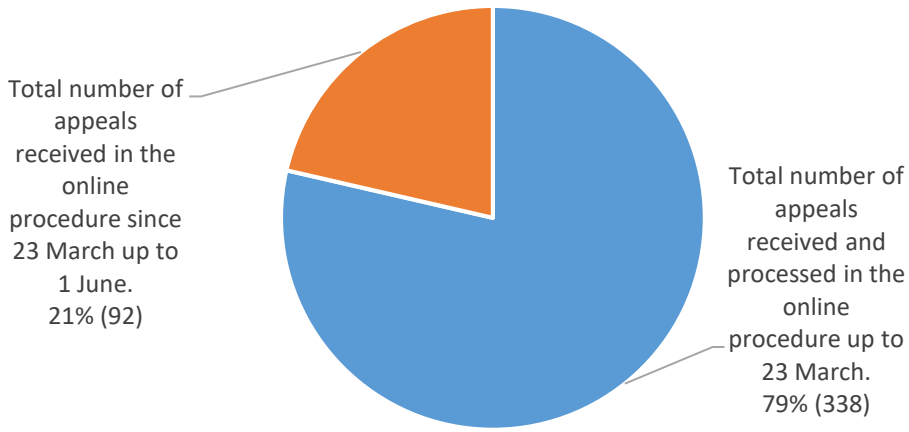
The number of substantive hearings for the same period has also fallen dramatically, as lists were vacated and converted to Case Management Review Hearings. The number of substantive hearings fell from a 'Pre-Covid Baseline' of 916 hearings per week to 3 hearings in the week ending 24 May 2020 (see figure 5).

Figure 5 Hearings (substantive) in the FtTIAC per week, 8 March - 24 May 2020[48]



Finally, figure 6 shows the rapid expansion of the use of the online procedure after Presidential Guidance Note No 1 was issued on 23 March 2020. Of all the appeals lodged via the online procedure since the pilot began in January 2019, 79% were lodged between January 2019 and 23 March 2020, and 21% were lodged in the 10 weeks after 23 March. On average, during the pilot phase (January 2019 to 23 March 2020), 5 appeals were lodged via the online procedure per week. This increased to 9 appeals lodged via the online procedure per week in the period from 23 March to 1 June 2020.

Figure 6 Appeals received in the online procedure in the pilot compared to in the first 10 weeks of its expanded use during the pandemic.[49]



Empirical evidence

Benefits of the online procedure

Generally, interviewees could see clear benefits with lodging and tracking appeals online.

> 'I mean as a system, it makes sense to do it online.' [Interview #4]

> 'Having an online way of doing it, is good in some ways for uploading evidence and getting the decision at the end and then seeing if they appealed. I think that all works better because you don't have to ring the Tribunal to chase for decision or to check if the other side has appealed. It's quite good way of being able to access everything. So having that stuff digital is good.' [Interview #22]

Early engagement of parties

Although many interviewees had issues with the ASAs, a small number felt that they were helpful in focussing the issues at an early stage and found them a useful stage in the process.

> 'I quite like them! This is a bit controversial to say, but it feels like it does sort of focus attention … and it does sort of straight jacket you a bit, but also is quite good in terms of getting all that stuff in the First-tier Tribunal judge's mind early on in terms of what the issues are going to be.' [Interview #14]

> 'I think actually an ASA does focus the mind. Because if you are supposed to simply say, "This is the decision, these are the issues that you need to look at, Mr or Mrs or MX tribunal and this is what I say about them", in a condensed format, then it does really help to focus you.' [Interview #38]

One interviewee noted that this narrowing of issues and the early engagement of parties that the online procedure created could reduce the number of adjournments.

> 'It's positive in that there is a consolidated bundle and cases are, I think, timetabled to proceed only when the parties are ready. So, in that respect, I think there are fewer instances of cases being adjourned on the day and because of the party not being ready. The other aspect as well is that through the various pleadings and written submissions that go on, it does tend to narrow the issues. So there are fewer instances of the parties being surprised on the day.' [Interview #20]

Home Office 'withdrawal to grant' rate

In the pilot phase of this online procedure, HMCTS indicated that the Home Office withdrew unsustainable decisions to contest an appeal, in order to grant the immigration status in question ('withdrawal to grant') in around 23% of cases that they reviewed.[50] However taking the total number of withdrawals to grant up to 1 June means this rate drops slightly, to 18%.[51]

The filtering out of stronger cases and the avoidance of a lengthy appeal process was noted by multiple interviewees as something that initially struck them as potential benefit of the online procedure.

> 'HMCTS had essentially what was a good idea which came out of the JUSTICE Working Group, which was to build in this early review stage to try and filter out the strong cases. And one of the main reasons for that was actually from the Home Office, because what the Home Office were saying [was] the high overturn rate on appeal is because the Tribunal has evidence that we didn't have and so had we had this expert report, had we had the evidence that the Tribunal had, we would have granted [the disputed immigration status].' [Interview #26]

> 'I personally welcome this whole thing, you know in the new standard practice directions for the respondent to review matters actively, that's a positive thing because that really hasn't been happening enough and that's why we're in this, such a mess.' [Interview #28]

> '[I] like having a requirement for the respondent to consider in the light of initial submissions whether or not the decision was sustainable to try and stop cases from running senselessly through to contested hearings at great distress to the client and great cost for the public purse.' [Interview #38]

> 'My general position is that I can see real merit in an advocate skeleton arguments [ASAs], and proceedings being front loaded so that the Secretary of State does at an early stage have an opportunity to properly consider its position. All this makes perfect sense.' [Interview #39]

Tribunal Case Workers

The enhanced role of the Tribunal Caseworker (TCW) was also viewed by a number of interviewees as being a helpful element to the online procedure.

> '[T]hat's [the introduction of TCWs] an improvement because there is a direct line of communication to the caseworkers there, which never was before. We never had telephone number. We didn't have direct email.' [Interview #32]

General concerns with the implementation of the online procedure

For the most part, interviewees often saw significant benefits to the online procedure, particularly in relation to the early engagement of parties and the respondent review stage. It is clear that the majority of the interviewees felt that, as one interviewee phrased it '*this system had the potential to be positive.*' However, almost all those we interviewed expressed significant concerns both with how the online procedure had been implemented and with elements of its underlying structure.

We explore, first, the general concerns with the implementation of the online procedure since the pilot phase, and second, the concerns that specifically relate to its implementation in a pandemic context. Finally, we turn to the structural issues with the online procedure that interviewees highlighted.

Legal aid

The Civil Legal Aid (Remuneration) (Amendment) (Coronavirus) Regulations 2020 (SI 2020 No. 515) ("new Regulations") came into force on 8th June 2020 and introduced two new standard fees.[52] These were payable for asylum and immigration (non-asylum) cases which were appealing to the FtTIAC and used the online procedure. Consequently, they dictated the legal aid fees lawyers could expect when undertaking legally aided FtTIAC appeals using the online procedure.[53]

Concerns about the impact of the new legal aid fee structure were expressed in the majority of the interviews we conducted.[54] These concerns took a variety of forms.

Firstly, some interviewees expressed concern about the lack of consultation before the new Regulations were introduced and the speed at which the new Regulations had come into force.

> '[C]onsultation has been non-existent.' [Interview #21]

> 'But when ILPA and various other bodies made the MOJ and HMCTS and the Home Office aware that there was a funding problem, there was going to be a consultation, we were at the early stages of that. And then the pandemic seems to have precipitated this mass or general application of the pilot to all cases and then obviously we got the new fee Regs which had been rushed through Parliament.' [Interview #26]

There was also a repeated view that the new Regulations undermined the commercial viability of immigration legal aid providers and make *'surviving on legal aid… near impossible.'* Our interviews were conducted before the new

Regulations came into force, but practitioners were already concerned about the planned legal aid changes.

> 'I mean, we're not [a large firm], but we've got three or four different departments in the law centre, so it's trying to then explain this madness to the CEO and the director who don't do immigration. And they're like what? … From a business perspective grappling with what this could mean, what the main remuneration rates could mean. Because if we're doing the work for if it would be paid, paid to counsel for less than minimum wage, if we do the work that's us being paid less than minimum wage. It doesn't solve doing it. I mean we do our own advocacy in house, we do our own skellies [skeleton arguments] from time to time, so it's not something we can't do, but obviously it's still work we're barely getting paid for.' [Interview #9]

Similarly, some barristers experienced this from a different perspective:

> 'I did speak to another firm who told me that they're doing it in-house. … What that firm said was the directions basically include a lot more work. The money that was available on the fixed fee regime was not enough. They are unable basically to kind of forgo some of that income because the actual work they have to do to instruct a barrister and pay a barrister as well, so what they've been doing in effect is complying in the sense that they've been putting together something like a skeleton argument, but they know pretty well it's not really adequate, doesn't say very much because they can't afford to do to do it properly. And as a result that firm at any rate, who send me normally quite a lot of the FT tribunal work haven't sent me any.' [Interview #11]

Many interviewees felt that they were being asked to undertake significant extra work at minimal or no pay. The Ministry of Justice has said that cases under the online procedure require between 4 and 12 hours of additional work.[55] Yet simply drafting an ASA, one interviewee indicated could take *'[u]p to 10 hours, 7-10 hours. But with the other work around it, sometimes more.'* Another interviewee suggested:

> '[Y]ou're looking at anything between three and five hours work for a good skeleton argument. Plus getting all these bundles together, they want all these bundles and you know … we're only a small legal aid firm and we've to purchase all these like expensive fancy bundle makers that all the city firms use. You know we've had to pay for them as well and it's really, really expensive. So in total, just the preparation itself, I mean this is not even sitting down with the client, this is after all that. I would say to do a good job, you're looking at five or six hours work. That's a pretty standard job and that's nowhere near escape.' [Interview #16]

As a result, there were anxieties about the potential impacts of the undermining of the commercial viability of legal aid providers. A number of

interviewees felt that new Regulations may incentivise poorer quality representation.

> '[It] incentivises bad representation because it makes it profitable to do as least work as possible. I think in the long run, obviously the impact on the client is massive, but it also means that appeals aren't getting finished because cases that should have won that weren't properly represented and can be won. And we see a lot of them.' [Interview #22]

Others we interviewed suggested firms may start 'cherry-picking' less complex cases to avoid being in the 'at risk zone' where the fixed fee has been exceeded but the threshold for the 'escape' claim fee has not been met.[56] In reference to complex trafficking cases, one representative told us: *'firms aren't going to want to take on cases where they're not going to get paid that much for doing all this work.'*

The perceived issues with the Regulations have led some barristers to refuse to draft the ASA in appeals that are legally aided. All the barristers we spoke to had a policy in their chambers to not accept instructions under the online procedure to prepare an ASA, except in exceptional circumstances or in cases that were adequately remunerated.[57]

> '[A] number of chambers of decided to adopt a chambers wide policy that says, unless there are exceptional circumstances, we won't accept instructions in this reformed procedure. And I that would certainly be my approach if I ever got asked to act on legal aid basis.' [Interview #10]

> '[M]y view is that we're striking. … [I]t's completely impossible for you to do essentially a full day's work for 60 quid.' [Interview #18]

This refusal to draft ASAs has left both barristers and solicitors in a difficult position, according to many of the interviewees. Although many interviewees noted that it was, as one barrister suggested, *'a pretty united front so far'*, a number of interviewees were concerned that the new Regulations would *'drive a wedge'* between solicitors and barristers by undermining their distinct roles.

> 'But ultimately, that's the way the system works in this country, that we have division of roles and … the Tribunal can't just white wash that by creating new systems and expecting solicitors to pick up the work. Because my solicitor doesn't have any more time on their clock than they did before.' [Interview #28]

> '[I]t means you end up having some quite difficult conversations about remuneration for cases, and I don't think those are alleviated by the remuneration changes by way of regulations at all. And it's kind of pitting you against each other in terms of who is best or best placed or most

> suitable to do the work. And I just don't think that's appropriate.' [Interview #38]
>
> '[Y]ou don't want to have to take work away from barristers, you know, but we're kind of fighting to survive here at the same time. .... But we want to keep very, very good relations with the barristers chambers as we have in the past.' [Interview #16]
>
> '[T]he Ministry of Justice's position seems to be wanting to pit solicitors and barristers against each other because they think that it will be the most cost effective way forward if we are at each other's throats which is a bit depressing.' [Interview #39]

A number of interviewees felt that appeals would suffer as a result of this lack of early engagement from counsel.

> 'You said the solicitor would do it, but let's face it, in legal aid there are a lot of non-qualified caseworkers who do this work. So I mean obviously they will need to have their immigration and asylum accreditation, but you can't tell me that a paralegal is going to do the same job as a barrister. So then it's an access to justice [issue].' [Interview #21]

Lack of engagement from the Home Office at the respondent review stage

Many of the interviewees described the online procedure as a '*frontloaded*' process, predicated on significant involvement from all parties at an early stage.

In a majority of the interviews with individuals involved in casework, interviewees said that the Home Office had either not complied with their obligation outlined in the directions to review the appellant's case and provide a response, or that their response had not meaningfully engaged with the ASA provided.[58]

> '[T]he Home Office have not done anything at all, so not responded to us, not engaged. We still don't really know what their case is. The [other case] they have responded to it by basically just copying, pasting our list of issues and saying we disagree with all of these. You know I think the Tribunal is overly optimistic about the idea that they would really be able to narrow issues.' [Interview #18]
>
> 'The thing that the judge said in the telephone CMR was ... he directed to the Home Office for them to please make the effort to do something beyond just saying whether or not they would uphold the decision. ... So the judge specifically asked that you know offer some engagement. Because that's always our problem.' [Interview #30]

> '[T]hey sent back … what they call their standard template response, which doesn't deal with any of the issues. [It is] one side long, there was no reference to any inquiries they've made, no reference to the directions that were made.' [Interview #35]

> 'But in both cases I've done, I think, at least a 20 page skeleton argument and got back, I think, five lines in each case about why they were maintaining their decision. So extremely cursory and quite frustrating as well, because had I known that that was going to be the nature of their review, I'm not sure I'd have invested so much time at the earlier stage dealing with all the issues in the case.' [Interview #41]

In particular, one interviewee was exasperated that when the Home Office did not comply with the directions set, they were simply given extra time to do so. This contravened the directions being issued at the time which stated that 'if no response is received within the said time limit it will be assumed that the Respondent does not take issue with the submissions contained in the ASA.'[59]

> '[T]he directions from the Tribunal in [regional hearing centre] basically say that if the Home Office don't reply then they're taken to accept what is said in the skeleton argument. … [B]ut none of the Judges have said, "Ok, we will just allow your appeal"…. So the Judge has basically said, "Right, the Home Office needs to reply within 14 days and then we will list for a substantive hearing." So really, the CMR has not fulfilled the function that it's set out to do which is to narrow the issues because the Home Office rep who has been involved in the CMR hasn't been sufficiently au fait with the case so they can say what they agree and disagree with.' [Interview #43]

A number of interviewees expressed frustration that the team responsible for undertaking the review of appellants' cases were not then the Home Office representatives at the hearing.[60] This points to a wider systemic issue of the role of Home Office Presenting Officers (HOPOs) in FtTIAC hearings. However, in this particular context, several interviewees were exasperated that if the Home Office had failed to complete a review, the HOPO present at the Case Management Review Hearing or substantive hearing would not have the discretion to concede any points during the hearing.

> 'I mean there has been narrowing down of points at the hearing, but I don't think it happens effectively because if they don't do the review then often the HOPO is not prepared to make concessions at the hearing and that's the difficulty.' [Interview #40]

Practical difficulties

Interviewees also noted smaller practical difficulties which nevertheless affected their ability to engage with the online procedure effectively. For

example, one interviewee had difficulties finding the relevant TCW's email address.

> 'I've heard that the Tribunal Case Workers are the people that are responding to emails and so if you email them directly then you'll get a response. But I have no personal experience of that. … I think you've just got to know them [TCWs' email addresses]. So it wasn't on the direction, so for a litigant in person it seems like that would be an impossible thing to know.' [Interview #14]

Another interviewee noted that there was no indication of a timeframe beyond the appellant and respondent making their submissions in the directions being issued by the Tribunal. The directions make it clear that the appeal will be actively case-managed and a CMR scheduled but offers no timeline for this process.

> 'There's no fixed point in time where the judge would be considering the case after the submissions that have been made, so we don't really know what's going on.' [Interview #30]

The same interviewee, a solicitor, also explained to us how they were normally able to easily call the relevant hearing centre, with whom they have good contacts, to quickly iron out any issues with a case. However, with cases lodged via the online procedure they told us they were unable to do this due to the centralised nature of how appeals were processed.

> 'Because my understanding is that they [a centralised unit] sort of deal with it and then they pass it to the relevant jurisdiction and then they have a handle on it. And with [hearing centre] I can just pick up the phone and speak to a clerk and then we can sort of figure it out … I've got a few cases where I've launched appeals. And I just don't know what's going on with them and they [hearing centre] can't tell me what's going on with them either.' [Interview #30].

Geographical variation in processes

Multiple interviewees highlighted various ways in which the online procedure was being differently implemented across hearing centres, generating an '*inconsistent approach.*' Most significantly, this involved hearing centres issuing different directions.

> '[I]t's just simply not clear, because what they've done is … each hearing centre has come up with basically its own practice directions, it seems, or a set of directions for each hearing centre and if they had made that clear, for instance, then we would all know… And so, not knowing whether it [individual directions] … applies to all different hearing centres or it was just individually discrete directions, that caused a bit of an issue, I think. I mean

> ideally what they would have done is what we did, which is to consolidate and put it all into … one easy document.' [Interview #29]

A key area in which directions differed was in their vision of the ASA. The same interviewee elaborated:

> '[One hearing centre] … said it [ASA] doesn't need to be drafted by counsel, which contradicted everything we knew and then … different directions said that it should be clear, it should be concise, it should include case law.' [Interview #29]

A number of interviewees noted that each hearing centre was also responding differently to non-compliance with the directions.

> 'We got standard directions [from one hearing centre] and there's a note saying, we know you haven't complied with these directions and you may be liable for wasted costs. … [Another hearing centre] on the other hand are agreeing that we don't need to serve a skeleton. So that's good. Different centres, different processes.' [Interview #12]

Another interviewee told us that hearing centres were calculating the date from which the timeframes were calculated from differently. One hearing centre calculated from the date of receiving directions, whilst another calculated from the date that the vacated substantive hearing was scheduled. As they worked across these centres, the interviewee found this unnecessarily confusing.

> '[Hearing centre A's approach] seemed like a far more sensible approach. So I said to [hearing centre B], look at what [A's] doing, maybe you want to do something similar, but they just ignored us.' [Interview #14]

Concerns with the implementation of the online procedure in the pandemic context

A number of interviewees praised the '*drive to try and make it work*' shown by the Tribunal and court staff in their shift to rapidly adopting the online procedure during the COVID-19 pandemic.

However, many interviewees expressed significant concern that implementing the online procedure in the pandemic context created specific challenges. We separate these from the more general concerns outlined above, to draw a distinction between challenges that may continue to present an issue beyond the pandemic, and concerns that are largely confined to the pandemic context.

Lack of consultation on expanded use of online procedure

First, the lack of consultation on expanding the online procedure pilot as a response to the pandemic was viewed by many interviewees as an issue. Without this consultation, interviewees felt they were not given an opportunity to air their views on the implementation of a whole new process in the FtTIAC during a pandemic.

> 'Like why now? Why this level of change? Why no consultation? … It's just been done at a time when everyone has enormous stress anyway, the whole appeal system has been paused, so a lot of people have had next to no work. People are very worried about meeting their overheads. People are working from home, which can be very tricky, looking after their kids, potentially unwell or got people around who are unwell. It is the worst time to do a massive change and I think the profession is just at its wits' end.' [Interview #38]

A number of interviewees felt that familiarizing themselves with the new procedure took a significant amount of work, at a time when they were juggling many other tasks. Some interviewees also expressed confusion as to how all the elements of the online procedure addressed the challenges the pandemic presented.

> '[Y]ou can digitize the process without needing the ASA to be provided and without needing to front load the work. … This is why it's absolute nonsense to claim that this is a response to the pandemic, because it isn't. Things can be done electronically without overhauling the whole process or speeding up a process that had not completed yet.' [Interview #21]

Practical difficulties

Many interviewees were having difficulties taking statements and gathering evidence remotely, particularly within the tight deadlines set by the directions. Some interviewees felt that the challenges this created were compounded by what they described as a lack of understanding from the Tribunal and long delays in getting replies from the Tribunal.

> '[T]here's no real understanding of statement taking or what that involves. I've had to stop. I've recently stopped trying to take a statement from one young person on safety grounds. It was too distressing for him and the risk of self-harm.' [Interview #9]

> 'Our position is that it is not appropriate and not possible to draft statements from witnesses over the phone or remotely. There are far too many issues. Issues about privacy, confidentiality, safety, technology, reliability, expense and various other things. It's really not ideal and most judges, many judges,

> are not accepting that. … It's a failure to engage in the nature of what we do.' [Interview #32]

> 'It's the gathering of the evidence and assembling it in the first place, that's where the challenges have been most acutely felt. … [We] contacted the Tribunal and said … we need more time [to gather evidence]….[B]ut actually it proved to be completely useless because we didn't get anything back from the FT, which meant we were forced to comply with the directions. We didn't want to find ourselves in breach of them, even if we couldn't fully comply, just to say, 'This is where we are, this is the evidence we're still waiting for'.' [Interview #10]

One interviewee was concerned about the consequences of an appeal being refused, after the bundle and the ASA had been submitted without the vital evidence they were unable to produce due to pandemic restrictions.

> 'And then to do a fresh claim you need to obtain all this evidence again. Then the Home Office can take up the objection, "Why didn't you produce this evidence before?".' [Interview #13]

Two interviewees in particular had issues with communications from the Tribunal being posted to their offices, despite them explicitly asking for them to be emailed as the offices were closed. One interviewee also noted that, should their office reopen and they become able to take statements and speak to appellants face to face, the poor provision of legal aid providers in their area would put them at risk of spreading COVID-19.

> '[B]ecause we've got this lack of legal aid lawyers, people travel miles to see me … So I might have someone come and see me from Wiltshire, someone coming to see me from South Wales, and I've got someone coming soon from Plymouth. So I'm worried … about me being vector in all of this.' [Interview #9]

Structural concerns with the online procedure

Beyond the more practical concerns interviewees shared, there was also significant concern about fundamental aspects of the online procedure.

Appellants in person

Firstly, a number of interviewees were concerned about how an online procedure for lodging and case-managing FtTIAC appeals would accommodate the needs of unrepresented appellants. HMCTS have made it clear that a separate channel is in development for appellants in person[61] and Presidential Guidance Note No 2 2020 specifically exempts unrepresented appellants from having to use the online procedure at present. Interviewees were nevertheless concerned that the particular vulnerabilities of

unrepresented appellants often made them unsuitable candidates for any online procedure.

One interviewee also had experience of the separate channel for appellants in person and had specific concerns about this. Their concerns involved the risk of digital exclusion and the role of the TCW when there is no representative to mediate between the appellant and the TCW.

> '[T]he design relies on the use of an email address to access the system. … And we know that the use of email addresses in that system has caused some difficulty for people who are being supported by charity organisations where the advisor or the worker will put in an email address and then the person whose application it is doesn't actually have a record of the email address and does not have access to it. These tend to be quite vulnerable people who won't be necessarily familiar with these kinds of systems or who struggle with kind of being included in these kinds of systems. … [We raised concerns] about the reliance on Tribunal Case Workers to build a case on behalf of appellants, and that's something that we have been worried about throughout and about the need for those Tribunal Case Workers to be independent.' [Interview #27]

Appeal Skeleton Argument

The majority of interviewees expressed significant concern about the Appeal Skeleton Argument (ASA). These concerns are structural challenges, due to the nature of the ASA as a cornerstone of the online procedure.

Firstly, many interviewees felt that the communications from the Tribunal and from individual Resident Judges lacked clarity in how the nature and purpose of the ASA was explained. Interviewees were left unsure whether the ASA needed to be a comprehensive skeleton argument drafted by counsel, as implied by the name, or a more cursory document confirming information and making limited submissions. Many interviewees felt that if it was the former, the legal aid issues already outlined would present an issue, but if it was the latter, it would undermine the purpose of the online procedure in getting parties to engage at an earlier stage.

> '[M]y understanding … is the appeal skeleton argument was supposed to be a comprehensive document and it always troubled me that it was called an appeal skeleton argument because effectively it was an odd stage of the proceedings to have a skeleton argument as we would know it as counsel. I always understood that this would be a comprehensive document because the… way they were selling it was to try and get the Home Office to concede cases and they were sort of trumpeting in the pilot how many concessions there had been.' [Interview #33]

> 'The word "skeleton argument" is completely loaded in this profession .... We've been using skeleton arguments for years and we all know what it is. So then when they come out and say something like "Appeal Skeleton Argument", then instinctively we're just going to go to what we know.' [Interview #29]

One interviewee had ASAs rejected on multiple occasions.

> '[T]he procedure rules for skeletons are not badly drafted, they are appalling. I have skeletons being thrown back at me, rejected and returned to me by the Tribunal saying they are in breach of the procedure rules because there is excessive quoting, citing of case law. I've had them rejected, thrown back at me because they're too long. ... What is the skeleton argument if you're not citing case law? Now that has not happened once or twice. This has happened half a dozen times for me. ... There's also been inconsistency, because sometimes it [the ASA] gets through, sometimes it doesn't.' [Interview #32]

A number of interviewees were also frustrated by what they perceived as a *'u-turn'* on the part of the Tribunal. They highlighted that recent suggestions from the Tribunal that the ASA only needs to be brief document with no engagement from counsel risks undermining the value of meaningful, early engagement of all parties, which was the primary aim of the online procedure.

> 'I suppose it's difficult now because the Tribunal performed this miraculous u-turn and said, "No, no, no. You've all misunderstood what this document was, it doesn't need to be that." And in practice statement number 2 and the model directions certainly in Annex 1, which is the one for digital online appeals, there's that emphasis on brevity and conciseness. But there's an inherent tension there, because if the whole idea is to get the Home Office to concede cases, and these cases have been actively case managed and issues are going to be conceded, if it's supposed to be just a very brief skeleton argument, that's not going to achieve that ultimate aim. So there's an inherent tension there between the sort of stated aim to try and reduce the number of appeals, get things conceded, narrow issues, and then, 'no, no, no, the skeleton argument needs to be very brief'.' [Interview #33]

> 'It's infuriating and obviously you don't assume when you get a set of directions that says you must comply, that actually it doesn't mean that and it's probably alright. Because, I don't know, because that's not the way directions work!' [Interview #9]

> 'Some of them [judges] seem to be starting to roll back on the ASA now. They say "No, actually, it's not a skeleton argument at all". But then the concerns that arise out of that movement is that... this is supposed to be a document that tells the Home Office the decision you have made is unlawful and you should withdraw it now. So I am extremely concerned if the judiciary are now rowing back on that and saying well, actually it doesn't need to be a

> very detailed document at all. For me that flags up immediate access to justice issues.' [Interview #21]

This lack of clarity about the purpose of the ASA and concerns that the appeal may be heard on the papers with no opportunities for further representations, led some interviewees feeling pressured to submit extensive ASAs.

> '[S]ay a solicitor did a brief schedule of issues or skeleton argument at the time before the CMR. … [E]ffectively, once you've submitted your bundle and your ASA, that's your evidence closed.' [Interview #33]

A number of interviewees felt that the early submission of the ASA and the opportunity for the Home Office to respond to it, gave the Home Office an advantage over the appellant.

> 'I think it hinders the appellant, the way that the skeleton is submitted at that point, because you are showing your entire hand to the Home Office.' [Interview #32]

> 'I think one of the problems of the ASA process is that it tends to put the Home Office on the front foot because it requires you to engage specifically with each individual point of the refusal letter … [By] identifying all these individual points and why you disagree with them [it] gives authority to the kinds of reasons that we see in reasons for refusal letters, which are often really just in there without any real thought.' [Interview #41]

> 'In essence it's been giving the Secretary of State a second bite at getting the decision right. And I think when the judiciary is saying the SSHD is going to review the case and is going to take a rational view, that's just not how the Presenting Officers Unit works. They will get the decision and if the skeleton argument is good [and] raises good issues that render the decision unsustainable, they will try and perfect the decision, which I think makes it makes it more difficult in some regards for the appellants and it's really not in the spirit.' [Interview #20]

The staggered timeframe associated with the online procedure and the submission of the ASA led multiple interviewees to suggest that it risked duplicating work.

> 'If you are making work discrete, so if you're saying skeleton arguments and then you're saying a CMR and then you're saying hearing, that's three different discrete [tasks], that you will have to pay for counsel, solicitors or whatever, and there's no guarantee that just because you could do the skeleton argument, you're going to do the hearing or you going to do the CMR. … Now you're separating the work, so there's much more work and money going in.' [Interview #29]

> 'There's a huge delay between the final submission of all evidence and it being listed for hearing. That is a fundamental problem for a protection claim because protection claims are fluid. And the evidence can change up to the date before the hearing if not on the day of the hearing. … So it actually therefore increases the work we have to do because … there needs to be an updated witness statement. … [B]ecause we are submitting these so far in advance they get lost in this huge PDF file of 500 pages. And it doesn't have the same impact on the judge. It's just another document.' [Interview #32]

> 'Also, if this is working the way it supposed to, which it absolutely won't, but if it did and the Home Office was going to properly engage with the stuff you say, it might then produce further written documents to respond to…. And then you're effectively doing 2 skeleton arguments.' [Interview #18]

Role of Tribunal Caseworkers

Interviewees were generally supportive of the role of TCWs, but a small number were concerned about a lack of information on how much discretion they had and the training and supervision they received.

> 'There have to be enough TCWs. How much power will they have? Will they take too much power for themselves? How well trained have they been? Who knows? Who has explained this? I'm sure other practitioners are thinking the same. And where is the consultation? Has anyone heard about these TCWs previously? How are they being recruited? … [W]hen they make decisions they need to come to some kind of conclusion, they need to do some kind of balancing exercise. Have they done that? A Judge would – they have a duty to be impartial. Are these TCWs really going to be impartial? How well trained are they?' [Interview #28]

Scalability of the pilot phase

Some interviewees expressed concern about the ability of HMCTS and the Home Office to support the expansion of the pilot to the majority of FtTIAC appeals. These concerns lay partly in the nature of scaling up the pilot during a pandemic, but also partly in the considerable task scaling up the pilot involves at any time.

> '[T]he Home Office do not appear to be resourced to carry out this work or certainly not to carry it out in the way that the Tribunal thinks that it should be carried out, which is a full and detailed consideration and response.' [Interview #21]

> 'But of course, that's [pilot] a very different situation from applying that generally across all the tribunals and all the cases in the UK and other firms in the UK. I just couldn't see how that could be replicated on a general scale. It seems to be kind of specific to the very specific circumstances of the pilot, which were very few cases and very few kind of hand-picked firms. .. I just

don't think the Home Office has the resources to put that amount of scrutiny back into the system when it is dealing with thousands as opposed to 80 or 100 which it was before.' [Interview #26]

'I suppose the whole point of the front loading is to capture those cases that the Home Office should be reconsidering, and to make sure that they do that. And that only works if it's resourced properly like in terms of time, but also remuneration … I suppose my only hope is that when we're out of a pandemic they [the gains of front loading] can be rebuilt back into the system, so that the status quo isn't the emergency procedure that we've got now… but that quality and that resource can be built in.' [Interview #37]

'It's much more labour intensive, not for us, but both for the Tribunal and for the Home Office. For the Home Office essentially you now have to duplicate the number of caseworkers because it's OK if you're doing a pilot and there's only, say, two appeals a week going in, if you've got one case worker … with responsibility for the reviews. But if you transfer the entire system into this, you're going to have to build a whole new department. Otherwise it's not going to respond within two weeks. It's going to slow down.' [Interview #32]

Part Three – Remote hearings in the FtTIAC

Remote hearings in the FtTIAC have been conducted via telephone link and, more recently, via video link using Cloud Video Platform (CVP).

For the vast majority of the time we were conducting research, no substantive hearings were listed in the FtTIAC. Instead, only immigration bail hearings and Case Management Review Hearings were conducted and were primarily held via telephone link. Towards the end of our research, as per Presidential Guidance Note No 2 2020, some substantive hearings were being listed for face to face and remote hearings, but the vast majority of our interviewees did not have experience of these remote substantive hearings.

Nevertheless, the wider shift to digital ways of working in the FtTIAC, particularly the adjournment of hearings and their relisting as remote Case Management Review Hearings, was an area of significant debate in our interviews.

Empirical evidence

Immigration bail hearings

Bail hearings were prioritised in the FtTIAC throughout the time we conducted this research. They were held almost exclusively via telephone with the appellant generally not present for the hearing and all parties in separate locations. Generally, no-one was in a Tribunal hearing room, although the set-up varied across hearing centres.[62]

The interviewees that we spoke to had mixed experiences of conducting bail hearings via telephone. Some felt that it was an acceptable medium given the high bail grant rate at the time, meaning they felt their chances of success were high regardless of the mode of hearing, whilst others felt audio-only hearings were *'just not the way to do it.'* Our observations too demonstrated a mixed picture of relatively smoothly running telephone bail hearings and those that experienced more difficulty. Overall, our research relating to bail hearings in this period primarily points to a lack of meaningful Home Office engagement with the bail process. This is instructive in the context of the implementation of an online procedure predicated on the active participation of all parties at an early stage.

One interviewee highlighted issues they had had with the Home Office not serving bail summaries before the bail hearing, leaving representatives at a disadvantage during the hearing.

> 'Even without the pandemic the Home Office serve the bail summary on the day, but now they don't submit it at all … and we only receive it afterwards. So it doesn't give me an indication as to where the Home Office stands and why they are using bail.' [Interview #15]

In seven of the bail hearings we observed, the judge had made a provisional decision to grant bail ('minded to grant'), which was served on the Secretary of State prior to the hearing. This was a new process, established in light of the pandemic in order to avoid unnecessary hearings.[63] Despite this, in all of these hearings the Home Office maintained their position to contest a grant of bail. The HOPO then relied solely on the bail summary and the evidence contained in the bundle, both of which the judge would have already used in reaching their provisional decision. The hearings consequently proceeded without any additional relevant submissions from the Home Office.

On a number of occasions, we observed HOPOs making submissions which relied on case law pertaining to the legality of detention, despite this being irrelevant to the judgement in bail hearings. Ultimately, in six of the seven hearings where a provisional decision to grant bail had been made, bail was granted. In the only case that was not granted bail, the application was withdrawn by the appellant. This points to a lack of engagement by the Home Office with the minded to grant process.

Case Management Review Hearings

Case Management Review Hearings are short, administrative hearings held prior to a substantive appeal hearing in order to address practical issues. During our research they were being conducted remotely, almost exclusively by telephone, with all parties in separate locations and generally no-one in a Tribunal hearing room.[64]

There was an almost unanimous agreement from interviewees that conducting Case Management Review Hearings via telephone was sensible if the appellant was represented.[65] Indeed, a number of interviewees pointed to the Tribunal's past use of telephone links to conduct Case Management Review Hearings. Many interviewees also expressed a desire to see remote Case Management Review Hearings continued beyond the pandemic, as they were viewed as primarily administrative hearings that could be efficiently conducted remotely. Many suggested audio-only links were sufficient, but one interviewee, who had experienced a two-hour long Case Management Review Hearing, advocated for them to be conducted via video conferencing.

> 'I mean, they [Case Management Review Hearings] could probably be done by telephone, even in the best of times if someone's represented. Because it's just admin. Effectively it's case management and most tribunals where you've got represented appellants will do those remotely, because what's the point in coming into court for 10 minutes?' [Interview #9]

> 'So I think a CMRH is perfect for a remote hearing, to be quite frank. It's a waste of time and money to travel to the Tribunal, sit around all day like a wally waiting for your slot. So that's great and I think that that could be a really effective use of our time and resources.' [Interview #38]

Some interviewees experienced difficulties with being called for a Case Management Review Hearing at a different time to that scheduled, but nevertheless saw telephone Case Management Review Hearings are ultimately desirable, albeit after these preliminary issues had been addressed.

> 'It's a bit amateur hour with the phone, you know we got called really late. Which didn't happen when they … used to routinely do telephone CMRs.' [Interview #18]

> 'The telephone CMRs are not an issue. The only thing yesterday was my hearing was supposed to be at 12, my CMR. Then I got a call at 10:30 saying, "Can you just do it now?". That's not ideal because you plan your days and you're in the middle of work.' [Interview #29]

A number of interviewees said that the Case Management Review Hearings they had been involved in during the pandemic were taking much longer than usual and even adopted lines of questioning normally reserved for the substantive hearing. Interviewees felt that this was because judges were *'trying to dispose of appeals as…quickly as possible.'*

> '[T]he CMRs are not like the usual CMRs. Usually you walk into court, you could be 10, 20, 30 minutes tops. CMRs at the moment are lasting about an hour. I have to prepare the case like I am preparing for the hearing. I have to go through everything, I have to make arguments, make submissions for these CMRs. … But then in quite a few of them, we are having to make arguments [on] why parts of the account should be taken as credible. And this is the type of thing you'd expect to do in the substantive hearing.' [Interview #25]

Conclusions and recommendations

Many of the challenges surrounding the use of the online procedure during the pandemic mirrored concerns regarding its use during the pilot phase.

We cannot extrapolate our findings from data collected during the pandemic beyond this specific time period. We accept that they were, and continue to be, exceptional circumstances during which many were working hard to allow the Tribunal to continue to function. However, it is clear that many of the issues experienced with the online procedure during the pandemic, in terms of both its implementation and its design, had their antecedents in issues that were not addressed following the pilot phase.

This suggests there are a number of key concerns that need to be tackled for the online procedure to fulfil the potential that many see in it.

1) The results of any evaluation of the online procedure, pertaining to its use either in the pilot phase or during its recent expanded use under presidential Guidance Notes Nos. 1 and 2, should be made publicly available.

2) Frontloading of work in the online procedure needs to be matched by a frontloading of resources. This applies to both the respondent, in terms of Home Office review capacity, and the appellant, in terms of legal aid funding. Without this, the value of the online procedure is undermined.

3) We support the Lord Chancellor's move to make a temporary transitional amendment to the 2018 Standard Civil Contract. This will mean that by September 2020 all immigration and asylum appeals lodged using the online procedure under a legal aid contract will be remunerated on an hourly rates basis pending a full consultation.[66] We suggest that this consultation should commence as soon as possible. It should include in its terms of reference an evaluation of the impact on the legal profession and access to justice of any proposals for a legal aid funding framework for the online procedure.

4) The capacity of the current TCW teams and Home Office review teams should be reviewed by HMCTS and the Home Office respectively. The ratio of the number of staff dedicated to the review

process in these teams to the number of appeals lodged should be maintained, as a minimum, at pilot phase levels.

5) A coherent, systematic approach across all hearing centres is important in order to maintain both procedural fairness and support for the online procedure. The value of a streamlined approach should be communicated by the Chamber President to Resident Judges and facilitated by the provision of model directions and examples wherever possible.

6) We support the publication by HMCTS of a Vulnerability Action Plan[67] and in particular the collection of protected characteristics data on service users. We suggest this good practice can be built upon by urgently conducting research into the impact of the online procedure on especially vulnerable appellants.

7) HMCTS and the FtTIAC Chamber President should provide more publically available information on the powers exercised by TCWs, their level of supervision and the training they receive. The TCW 'Code of Conduct' referenced as a possible future publication in the Senior President of Tribunals' Annual Report 2020[68] would be a welcome step. As a new role with potentially substantial case management powers, the accountability of TCWs is integral to the success of the online procedure.

8) A guidance note about good practice for remote hearings (both telephone and video links) in the FtTIAC should be produced by the Tribunal. The judiciary, user groups, and interested stakeholders could make valuable contributions to this. This note should particularly focus on the technical, financial, and linguistic constraints experienced by appellants in the FtTIAC, both represented and unrepresented, with regard to their ability to engage with digital processes.[69]

Appendices

Appendix A: Pilot Directions

ONLINE APPEALS PILOT IN TAYLOR HOUSE AND MANCHESTER

PILOT DIRECTIONS

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1. Introduction

1.1 These directions are issued to the representatives who have kindly agreed to take part in the Reform Online Pilot at Taylor House and Manchester Piccadilly beginning in January 2019.

1.2 The Pilot marks an important step in the reform of the Tribunal pursuant to various recommendations made in the JUSTICE report entitled *Immigration and Asylum Appeals – a Fresh Look*. The online system has been designed with judicial oversight and is now in its 'Private Beta' (testing and evaluation) phase, during which it will be used by the Tribunal and by the representatives who have agreed to participate in this Pilot. The respondent will not have access to the online system during the Pilot, although the final iteration of the online system will be used by all parties and the Tribunal.

1.3 The Private Beta phase will play a key role in perfecting the online appeals process and it is imperative that users of the system keep a record of any observations they might have about it, since there will be regional meetings at which all participants will be invited to provide their feedback. Those meetings will be held at the end of the Pilot, however, and raising concerns about the operation of the system

during the Pilot is unlikely to be considered to be a good reason for failing to comply with the directions which follow.

1.4 Alongside the development of the online system, the Tribunal has developed a new process for appeals. It is anticipated that this process – which will be facilitated through the online portal – will ultimately yield considerable benefits for appellants and respondents alike, and in turn for the Tribunal and for the public purse. The intention is that those cases which are bound to succeed on appeal will be identified more quickly than at present, and that the focus of those cases which are ultimately to be contested by the respondent will be narrowed considerably. It is pursuant to those goals, and in furtherance of the overriding objective, therefore, that the Tribunal issues these directions, which apply only to cases within the Pilot.

1.5 The parties are expected to comply with the timetable set out below in all Pilot cases. Each appeal will be supervised by a Tribunal Case Officer ("TCO"), however, and there is liberty to apply to a TCO or, on review, a judge, in order to seek variation of a stipulated deadline.

1.6 The directions set out below are issued by the Resident Judges at Taylor House and Manchester Piccadilly under the Case Management powers conferred by rule 4 of the Tribunal Procedure Rules (FtT)(IAC) 2014. These are not Practice Directions issued by the Senior President of Tribunals or the President of the IAC under s23 of the Tribunals, Courts and Enforcement Act 2007.

2. Provision of Documents

2.1 By Rule 12(1)(e) of the Procedure Rules, the Tribunal may identify any means by which a document must be provided to the Tribunal or another person.

2.2 For the purposes of the Pilot, an appellant's representative is required to provide documents to the Tribunal by uploading those documents in legible form to the online portal. Because the respondent will not have access to the system during the Pilot, copies of any such documents must then be served upon the respondent

by conventional means of service, in compliance with rule 12(1)(a)-(d). When the respondent is required to act following service of any such documents, time starts to run from the date of service, not the date on which the document(s) are uploaded.

2.3 Because the respondent will not have access to the online portal during the Pilot, the respondent is required to file and serve documents by conventional means, in accordance with Rule 12(1(a)-(d).

2.4 Any reference below to a document being 'provided' is to be construed with reference to the above.

3. Procedure

3.1 The process which will be followed within the Pilot is set out in the following paragraphs. A timetable appears at the foot of the document for ease of reference.

3.2 Grounds of appeal will not be required when a notice of appeal is provided to the Tribunal online. The appellant provides notification of his appeal online, without further particulars being required at that stage. Insofar as rule 19 requires further particulars to be provided, it will be disapplied (pursuant to the general power conferred by rule 4(1)) for the purposes of this Pilot.

3.3 The respondent will be notified by a TCO that an appeal has been commenced.

3.4 *Respondent's Bundle.* Not later than 14 days after the respondent is notified of the appeal, the respondent must file and serve a bundle which complies with rule 24(1) of the Procedure Rules. The respondent must also include within that bundle, any evidence which was submitted by the appellant in support of the application which led to the decision under appeal.

3.5 *Appellant's Skeleton Argument.* After the respondent has filed and served his bundle of documents, the appellant must provide an Appeal Skeleton Argument ("ASA"). In a protection appeal, the ASA must be provided not later than 28 days after the respondent's bundle is provided, or 42 days after the notice of appeal, whichever

is the later. The intention is that an appellant in a protection claim will always have at least six weeks from lodging their appeal.

3.6 Any advocate who prepares a skeleton argument should have regard to what was said by Jackson LJ (with whom Lewison and Treacy LJJ agreed) at [52]-[57] of Inplayer v Thorogood [2014] EWCA Civ 1511. The Practice Directions to CPR Part 52 do not apply directly to appeals to the FtT(IAC), however, and ASAs in this Chamber must comply with the following.

3.7 The purpose of an ASA is to set out as concisely as practicable the arguments upon which an appellant intends to rely. An ASA must contain three sections: a summary of the appellant's case; a schedule of issues; and the appellant's submissions on those issues. A template is available on the portal.

3.8 An ASA must:

- be concise;
- be set out in numbered paragraphs;
- not include extensive quotations from documents or authorities;
- engage expressly with the decision under challenge;
- be cross-referenced to any relevant document in the appellant's bundle [AB/x] or the respondent's bundle [RB/x]
- not exceed 10 pages and should certainly be no longer than 20 pages of A4.
- be in no less than 12-point type with line spacing of not less than 1.5.

3.8.1 *Summary of the Appellant's Case.* All ASAs must contain a concise summary of the appellant's case. The purpose of this summary is to distill the facts upon which the appellant relies and which, in the appellant's submission, justify the relief sought. This summary should not advance any argument, nor should it contain reference to the law.

3.8.2 *Schedule of Issues.* In all cases, the ASA must contain a schedule of issues, the resolution of which are said by the appellant to be determinative of the appeal in his favour.

3.8.3 The issues must be identified concisely in a sequence of numbered points, for example as follows:

The appellant appeals against the respondent's decision to refuse her human rights claim for entry clearance as the spouse of a settled person. Having regard to the requirements of Appendix FM of the Immigration Rules and the reasons given by the respondent for refusing the application, it is submitted that the issues which arise are as follows, and that resolution of these issues in the appellant's favour should result in a decision to allow the appeal on Article 8 ECHR grounds:

1. *Are the appellant and the sponsor validly married?*
2. *Is their marriage genuine and subsisting?*
3. *Does the sponsor earn in excess of the Minimum Income Requirement?*
4. *If not, are there compelling circumstances which render the appellant's exclusion unlawful under section 6 HRA 1998?*

3.8.4 *Submissions.* Having set out a summary of the appellant's factual case and the schedule of issues, the ASA must set out the appellant's submissions on the issues. Those submissions must comply with the guidance above and representatives must note, in particular, that it is imperative that the ASA engages expressly with each of the grounds upon which the appellant's application was refused.

3.8.5 In an appeal against the refusal of a protection claim, for example, the ASA must engage with questions of credibility, sufficiency of protection and internal relocation where such issues have been raised by the respondent. In an appeal against the refusal of a human rights claim, for example, the ASA should identify the articles of the ECHR relied upon, the manner in which any qualified articles are engaged and the reasons why any decision taken under the Immigration Rules is said to be wrong. It is not possible to provide a more prescriptive template but the submissions must, in summary, provide a reasoned response to each of the grounds of refusal.

3.9 *Appellant's Bundle.* Where the ASA refers to material which is not included in the respondent's bundle, that additional evidence must be provided in an indexed and paginated bundle at the same time as the ASA. There is no need to duplicate material which is already to be found within the respondent's bundle and bundles which contain substantial duplication are likely to be rejected by a TCO.

3.10 *Respondent's Review.* In all cases, the respondent is required to undertake a comprehensive review of the appellant's case, taking into account the ASA and any bundle of documents supplied by the appellant. The respondent must also particularise any additional grounds of refusal. The respondent must provide the Tribunal with the result of that review by way of a response, within fourteen days of the ASA and supporting evidence being provided.

3.11 Pro-forma or standardised response templates will not be accepted by the Tribunal. The Review must engage expressly with the submissions made and the evidence provided to the Tribunal. The respondent will also note that appeals will not be considered for listing unless and until this important stage has been fully and properly completed.

3.12 *Counter schedule*. The respondent must, at the same time as the review, respond to the appellant's schedule of issues. If the appeal is to be contested, the respondent must indicate which issues are conceded and which remain in issue. Where further grounds are to be raised, they must be clearly identified in the respondent's counter schedule. A counter schedule in response to the example above may be as follows:

1. *The validity of the marriage is conceded in light of the further letter from the Registrar at p45 of the appellant's bundle.*
2. *The genuineness and subsistence of the marriage is conceded in light of the additional evidence at pp23-79 of the appellant's bundle.*
3. *The ground of refusal in relation to the Minimum Income Requirement is maintained as the appellant has still not produced the evidence required by Appendix FM-SE.*

4. *The respondent maintains that there are no compelling circumstances which warrant a grant of entry clearance outside the Immigration Rules.*
5. *In addition, and for the reasons given at [3]-[4] of the Review, the respondent submits that the appellant falls for refusal on Suitability grounds due to his conviction.*

3.13 ASAs and responses which do not comply with this Practice Direction will not be accepted by the Tribunal and a compliant replacement will be required.

3.14 Upon completion of the steps above, the appeal will be actively case managed by a TCO and/or by a judge.

3.15 For the avoidance of doubt, any timescale or requirement set out above may be varied by a TCO or a judge but the parties must, in the absence of any such variation, assume that the procedure set out above will be followed.

4. Timetable

4.1 Subject to directions given by a judge or a TCO, the parties will be expected to adhere to the following timetable:

Period within which step is to be taken	**Action**
Day 1	Notice of appeal provided to Tribunal
Not later than 14 days after respondent notified of appeal by Tribunal	Respondent's bundle ("RB") must be provided
28 days after provision of RB or 42 days after notice of appeal, whichever is later.	Appellant must provide: (i) Appeal Skeleton Argument (ii) Bundle of evidence in support
14 days after provision of appellant's ASA, schedule of issues and evidence	Respondent must provide: (i) Response to appellant's case (ii) Particulars of any disagreement with appellant's schedule of issues

Appendix B: Example bulk Case Management Review notice, issued by Resident Judges alongside the Pilot Directions

FIRST-TIER TRIBUNAL (IMMIGRATION AND ASYLUM) CHAMBER HEARINGS

NOTICE

In view of the rapidly changing circumstances created by the Covid-19 pandemic, the President of the First-tier Tribunal (IAC) has directed that all appeals will proceed by way of a Case Management Hearing (CMR) via telephone or Skype which will take place on a date to be notified in a time slot to be allocated. **All current scheduled hearings are vacated.**

1. Within 5 working days of the date of the original substantive dated you must provide direct contact number(s) and email address(es) for the Tribunal to contact you and any members of your organisation having any business with the Tribunal. If members of your organisation have access to Skype for Business, you must inform the Tribunal and provide all necessary information to the Tribunal to enable communication by that medium.

2. You must comply with the following directions.

3. All parties must be available 5 minutes before the allocated time

4. The parties may make an application to the Tribunal at any time. Such application must only be by email Manchesteriac@justice.gov.uk

5. Any witness statements and other evidence upon which the Appellant intends to rely must be sent electronically to the Tribunal and to the Respondent together with an Appeal Skeleton Argument ('ASA') within 15 working days of the original Substantive Hearing Dated to Manchesteriac@justice.gov.uk

6. Within 10 working days of the provision of the ASA the Respondent must serve a response to the ASA by email to the Tribunal and to the Appellant's representatives and if no response is received within the said time limit it will be assumed that the Respondent does not take issue with the submissions contained in the ASA.

7. The ASA and the response together with all the evidence provided will be considered by a Judge who will consider, having given the parties an opportunity to make written representations (rule 25(2)), whether the appeal can be justly determined without a hearing (rule 25(1)(g)).

8. In cases concerning international protection or the revocation of international protection the Appellant, if represented, must set out at the commencement of the ASA a summary of the Appellant's case together with a schedule of issues as if the Pilot on-line Digital Pilot Directions applied (a copy of which is attached) and the Respondent must respond accordingly subject to the time limits set out in this Notice being applicable.

9. Where it is not considered appropriate for the matter to proceed without a hearing, consideration will be given to the hearing of this appeal by remote means. To that end each party must provide at the CMR or before

   (a) the means by which they, the appellant(s) and any witnesses, will engage with the Tribunal (the Tribunal expects all representatives to have access to Skype or Skype for Business);
   (b) the location of the Appellant;
   (c) the location of each witness, if any;
   (d) language of interpreter(s) if not already provided;
   (e) the number of pages in the bundle of documents to be relied upon;
   (f) no bundle may exceed 50 pages without the consent of the Tribunal;
   (g) any documents provided to the Tribunal must be in .pdf format and reduced to the minimum number of documents required, for the avoidance of doubt generic bundles will not be accepted.

Appendix C: Presidential Guidance Note No 1

TRIBUNALS JUDICIARY

FIRST TIER TRIBUNAL IMMIGRATION AND ASYLUM CHAMBER MR MICHAEL CLEMENTS, PRESIDENT

PRESIDENTIAL PRACTICE STATEMENT NOTE No 1 2020: ARRANGEMENTS DURING THE COVID-19 PANDEMIC

In accordance with the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014

And the PILOT PRACTICE DIRECTION: CONTINGENCY ARRANGEMENTS IN THE FIRST-TIER TRIBUNAL AND UPPER TRIBUNAL issued by the Senior President of Tribunals on 19th March 2020

The following Practice Statement is made today by the President of the First-tier Tribunal (Immigration and Asylum Chamber) with the consent of the Senior President of Tribunals. It shall take effect immediately and continue in force for so long as the Practice Direction referred to above is still in force unless it is revoked or amended on an earlier date.

(1) With the exception of HR/EEA appeals, all appeals to the First-tier Tribunal must be commenced using the online procedure unless it is not possible to do so.

(2) If an appellant contends that it is not possible to commence an appeal by using the online procedure, the appellant may commence an appeal without using the online procedure but must at the same time state why it is not possible to do so.

(3) The Tribunal shall consider any reasons provided in support of appeals commenced in accordance with paragraph [2] above and may give such directions as it thinks fit, having regard to the overriding objective, including directing that the appeal must continue using the online procedure, be stayed, be determined by a means to be directed having regard to those reasons or be determined without a hearing.

Michael Clements
President
Date 23 March 2020

Appendix D: Presidential Guidance Note No 2

FIRST TIER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
JUDGE MICHAEL CLEMENTS, PRESIDENT
PRESIDENTIAL PRACTICE STATEMENT No 2 of 2020: ARRANGEMENTS DURING THE COVID-19 PANDEMIC

In accordance with the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 ("the Rules")

And the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and Upper Tribunal issued by the Senior President of Tribunals on 19th March 2020

The following Practice Statement is made today by the President of the First-tier Tribunal (Immigration and Asylum Chamber) with the consent of the Senior President of Tribunals. It shall take effect on Monday 22 June 2020 and continue in force for so long as the Practice Direction referred to above is still in force unless it is revoked or amended on an earlier date. Presidential Practice Statement Note No.1 of 2020 is hereby revoked.

(1) All appeals to the First-tier Tribunal must be started using the reform online procedure* (accessed through MyHMCTS**) unless it is not reasonably practicable to do so.

(2) If an appellant seeks to argue that it is not reasonably practicable to start an appeal by using MyHMCTS, the appellant must at the same time, save where paragraph (3) applies, state why it is not reasonably practicable to do so. If the Tribunal agrees, the appellant may proceed without using MyHMCTS. Where paragraph 3(e) applies the appellant must provide to the Tribunal together with the Notice of Appeal, the reference number or numbers of any linked appeals.

(3) Where an appeal is brought in any of the following circumstances, it shall be deemed not to be reasonably practicable to commence that appeal by using MyHMCTS:
   (a) under The Immigration (Citizens' Rights Appeals)(EU Exit Regulations 2020);
   (b) if the appellant is outside the United Kingdom;
   (c) if the appellant is in detention;
   (d) any appeal brought by a person without representation by a qualified person within the meaning of s.84 of the Immigration and Asylum Act 1999; or
   (e) if the appellant's appeal is linked to another appeal. (This applies where the appeal of one or more appellants is brought at the same time in circumstances in which those appeals raise common issues);

(4) The Tribunal will consider the reasons provided in support of appeals started in accordance with paragraph [2] above and will give such directions as it thinks fit in accordance with the Rules.

(5) Where an appeal is brought online using "MyHMCTS" the Directions which appear at Annex 1 will ordinarily apply. Where an appeal is brought, or case managed online, not using "MyHMCTS" the Directions which appear at Annex 2 will ordinarily apply. Where paragraph 3(d) applies the Directions which appear at Annex 3 will ordinarily apply.

(6) Where an appellant has representation by a qualified person within the meaning of s.84 of the Immigration and Asylum Act 1999 the Tribunal will accept as an Appeal Skeleton Argument ("ASA") a document that answers the following question: "Why does the appellant say that the decision of the respondent is wrong?" In answering this question, the appellant should set out concisely the reasoning in the respondent's decision letter to which objection is taken. Anything that is relevant should be identified and the answer to the question should be given with sufficient particularity to enable the respondent to conduct an effective review of the decision under appeal.

(7) Where an appellant does not have representation by a qualified person within the meaning of s.84 of the Immigration and Asylum Act 1999 the Tribunal will accept in place of an ASA an Appellant's Explanation of Case ("AEC") that answers the following question: "Why does the appellant say that the decision of the respondent is wrong?

(8) Parties are reminded of their obligations pursuant to rule 2(4) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. To that end parties are required to engage constructively with the Tribunal. The Tribunal will respond to any applications properly made on a case by case basis.

(9) Any appeal accepted by the Tribunal and started before 22 June 2020 will be considered by a Tribunal Caseworker or Judge who will decide on a case by case basis what further directions, if any, are to be made in respect of that appeal and whether having regard to the overriding objective the appeal should be listed for a Case Management Review Hearing before a Judge.
***Note: Increased functionality of MyHMCTS has been brought forward to facilitate an increased number of appeals being brought by that method to enable remote engagement. However, some aspects of the system have not yet been completed, which explains why not all appeal types can be brought in this way. Further there will be occasions when parties may still need to communicate with the Tribunal from time to time by email or other online means as directed.**
**** If you have not already done so you will need to register by following this link:** https://www.gov.uk/guidance/hmcts-online-services-for-legal-professionals

Michael Clements
President FtTIAC
Date: 11 June 2020

References

[1] The new Regulations were successfully challenged and a consent order agreed between all parties on 11 August 2020. This followed the lodging of a claim for judicial review in *MT and others* against the Ministry of Justice (LAA) and the Lord Chancellor, and a judicial review in *CRA and others* against the Lord Chancellor. The Defendants conceded that the new Regulations were unlawful on the basis that the requirement to consult and duty of inquiry was inadequate. See: Garden Court North, *Successful challenge of Civil Legal Aid (Remuneration) (Amendment) (Coronavirus) Regulations 2020* (11 August 2020). Available at: https://gcnchambers.co.uk/successful-challenge-of-civil-legal-aid-remuneration-amendment-coronavirus-regulations-2020/ [Accessed 11/08/20]

[2] HMCTS, *Vulnerability Action Plan* (30 July 2020). Available at: https://www.gov.uk/government/publications/hmcts-vulnerability-action-plan [Accessed 12/08/20]

[3] Senior President of Tribunals (2020) *Senior President of Tribunals' Annual Report 2020*. Available at: https://www.judiciary.uk/wp-content/uploads/2020/07/6.6755_The-Senior-President-of-Tribunals-Annual-Report-2020_WEB-CS-amend-1.pdf [Accessed 20/08/20]

[4] Comprehensive and thoughtful examples of good practice guidance have already been produced by the Judicial College Equal Treatment Bench Book Committee (https://www.judiciary.uk/wp-content/uploads/2020/03/Good-Practice-for-Remote-Hearings-May-2020-1.pdf) and the Family Court (https://www.judiciary.uk/wp-content/uploads/2020/04/The-Remote-Access-Family-Court-Version-4-Final-16.04.20.pdf). The Helen Bamber Foundation has also produced a series of recommendations for safeguarding vulnerable people in the context of remote international protection and human trafficking/modern slavery legal casework (http://www.helenbamber.org/wp-content/uploads/2020/05/Tribunals-courts-and-COVID-recommendations-Final.pdf). These three documents would provide a helpful starting point for a FtTIAC good practice guidance note. [Accessed 09/07/20]

[5] Tribunals, Courts and Enforcement Act 2007 s 3(1).

[6] See: Home Office, *National Statistics: Summary of latest statistics* (27 February 2020). Available at: www.gov.uk/government/publications/immigration-statistics-year-ending-december-2019/summary-of-latest-statistics [Accessed 16/07/20]

[7] Ibid.

[8] Ibid.

[9] Since the enactment of the Immigration Act 2014, only a small proportion of Home Office decisions attract a right of appeal to the FtTIAC.

[10] Nationality, Immigration and Asylum Act 2002 s 82.

[11] Immigration (European Economic Area) Regulations 2016 regs 36-39.

[12] British Nationality Act 1981 s 40A.

[13] Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020.

[14] In some areas, legislation limits the grounds on which an appeal may be brought. See, *e.g.*, Nationality, Immigration and Asylum Act 2002 s 84.

[15] See generally First-tier Tribunal (Immigration and Asylum Chamber) Rules.

[16] Immigration Act 2016 sch 10.

[17] The Migration Observatory (2020) *Immigration Detention in the UK*. Available at: https://migrationobservatory.ox.ac.uk/resources/briefings/immigration-detention-in-the-uk/ [Accessed 19/08/20]

[18] Ministry of Justice (2016) *Transforming our Justice System*. Ministry of Justice. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/553261/joint-vision-statement.pdf [Accessed 09/07/20]

[19] JUSTICE (2018) *Immigration and Asylum Appeals – a Fresh Look*. Available at: https://justice.org.uk/wp-content/uploads/2018/06/JUSTICE-Immigration-and-Asylum-Appeals-Report.pdf [Accessed: 17/07/20]

[20] Presidential Practice Statement Note No 1 2020: Arrangements During The Covid-19 Pandemic. Available: https://www.judiciary.uk/wp-content/uploads/2020/03/2020_03_23_FtTIAC-PRESIDENTIAL-PRACTICE-STATEMENT-NOTE-No-1-2020-.pdf [Accessed: 08/07/20]. Reproduced at appendix C; Presidential Practice Statement No 2 of 2020: Arrangements During The Covid-19 Pandemic. Available at: https://www.judiciary.uk/publications/immigration-and-asylum-tribunal-chamber-presidential-practice-statement-note-covid-19-pandemic/ [Accessed: 08/07/20]. Reproduced at appendix D.

[21] HMCTS, *COVID-19: Overview of HMCTS response* (1 July 2020). Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/896779/HMCTS368_recovery_-_COVID-19-_Overview_of_HMCTS_response_A4L_v3.pdf [Accessed: 08/07/20]

[22] In particular see: Tomlinson, J. (2019) *Justice in the Digital State*. Bristol: Policy Press; Rowden, E. (2013). Virtual courts and putting 'Summary' back into 'Summary Justice': Merely brief, or unjust? *Architecture and Justice: Judicial Meanings in the Public Realm* (pp. 101–113). Ashgate.

[23] Burgess, R. (1984) *In the Field: An Introduction to Field Research*. London: Routledge, p 102.

[24] Tribunal Statistics Quarterly. Available at: https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-january-to-march-2020?utm_source=dafd65c2-8f8d-4f8f-81a6-677b8fb4ed70&utm_medium=email&utm_campaign=govuk-notifications&utm_content=daily [Accessed: 16/07/20].

[25] HMCTS weekly management information. Available at: https://www.gov.uk/government/statistical-data-sets/hmcts-weekly-management-information-during-coronavirus-march-to-may-2020?utm_medium=email&utm_source= [Accessed: 16/07/20].

[26] Ministry of Justice (2016) *Transforming our Justice System*. Ministry of Justice. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/553261/joint-vision-statement.pdf [Accessed 09/07/20]

[27] For full details of the process, see: HMCTS Reform Event, 13 November 2019: Immigration & Asylum Appeals. Available at: https://www.gov.uk/guidance/hmcts-reform-event-13-november-2019-immigration-asylum-appeals?utm_medium=email&utm_source [Accessed 09/07/20]

[28] Online Appeals Pilot in Taylor House and Manchester: Pilot Directions. Reproduced at appendix A.

[29] HMCTS, *HMCTS reform update – Tribunals* (11 July 2019). Available at: https://www.gov.uk/guidance/hmcts-reform-update-tribunals#immigration-and-asylum [Accessed: 16/07/20].

[30] HMCTS Reform Event, 13 November 2019: Immigration & Asylum Appeals. Available at: https://www.gov.uk/guidance/hmcts-reform-event-13-november-2019-immigration-asylum-appeals?utm_medium=email&utm_source [Accessed 09/07/20]

[31] HMCTS reform update. Available at: https://www.gov.uk/guidance/hmcts-reform-programme-reform-update [Accessed: 17/07/20].

[32] HMCTS tribunals events. Available at: https://www.gov.uk/guidance/hmcts-reform-events-programme#previous-tribunals-events [Accessed 17/07/20].

[33] HMCTS monthly bulletin. Available at: https://www.gov.uk/guidance/hmcts-reform-programme-monthly-bulletin [Accessed: 17/07/20].

[34] Inside HMCTS blog. Available at: https://insidehmcts.blog.gov.uk [Accessed: 17/07/20].

[35] Letter from Daniel Flury, Deputy Director of Tribunals, HMCTS to Duncan Lewis (3rd June 2020).

[36] Ibid.

[37] Ibid.

[38] HMCTS, *HMCTS reform update – Tribunals* (11 July 2019). Available at: https://www.gov.uk/guidance/hmcts-reform-update-tribunals#immigration-and-asylum [Accessed: 16/07/20].

[39] Data from an FOIA response (FOI 200526007), 22 June 2020. Due to the reporting periods of the data (01/04/2019 - 31/03/2020), the data set does not include the first 3 months of the pilot and *does* include 8 days where Presidential Guidance Note No 1 was in effect and the online procedure was in its expanded form. We consider that this is unlikely to skew the data to a significant degree.

[40] HMCTS Reform Event, 13 November 2019: Immigration & Asylum Appeals. Available at: https://www.gov.uk/guidance/hmcts-reform-event-13-november-2019-immigration-asylum-appeals?utm_medium=email&utm_source [Accessed 09/07/20]

[41] Pilot Practice Direction: Contingency Arrangements In The First-Tier Tribunal and

The Upper Tribunal. Available at: https://www.judiciary.uk/wp-content/uploads/2020/03/General-Pilot-Practice-Direction-Final-For-Publication-CORRECTED-23032020.pdf [Accessed: 08/07/20]

[42] Presidential Practice Statement Note No 1 2020: Arrangements During The Covid-19 Pandemic. Available: https://www.judiciary.uk/wp-content/uploads/2020/03/2020_03_23_FtTIAC-PRESIDENTIAL-PRACTICE-STATEMENT-NOTE-No-1-2020-.pdf [Accessed: 08/07/20]. Reproduced at appendix C.

[43] Although the figures fluctuate over time. According to published government statistics, '[i]n January to March 2020, Human Rights (HR) receipts proportionally represented 43% of all FTTIAC receipts (down from 54% a year ago)'. In the same period, EEA receipts were 27% of the overall number of appeal applications lodged in the FtTIAC, an increase of 13% from the previous year. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/891348/Tribunal_and_GRC_statistics_Q4_201920_accessible.pdf, p6 [Accessed: 16/07/20]

[44] A copy of the 'Bulk Case Management Review Notice' being issued in accordance with Presidential Guidance Note No 1 2020, can be found here: https://www.freemovement.org.uk/wp-content/uploads/2020/03/Bulk-CMR-Notice-JP.pdf [Accessed: 02/07/20]. Reproduced at appendix B.

[45] Presidential Practice Statement No 2 of 2020: Arrangements During The Covid-19 Pandemic. Available at: https://www.judiciary.uk/publications/immigration-and-asylum-tribunal-chamber-presidential-practice-statement-note-covid-19-pandemic/ [Accessed: 08/07/20]. Reproduced at appendix D.

[46] First-tier Tribunal (Immigration and Asylum Chamber) User Guide. Available at: https://www.judiciary.uk/wp-content/uploads/2020/06/FtTIAC-User-Guide-June-2020-Final-12.6.20.pdf [Accessed 09/07/20]

[47] Data taken from HMCTS weekly management information during coronavirus - March to May 2020. Available at: https://www.gov.uk/government/statistical-data-sets/hmcts-weekly-management-information-during-coronavirus-march-to-may-2020?utm_medium=email&utm_source [Accessed: 17/07/20]

[48] Ibid.

[49] Data from letter from Daniel Flury, Deputy Director of Tribunals, HMCTS to Duncan Lewis (3rd June 2020). N.B 369 appeals were received up to 23 March, but 31 dropped out of the digital process and continued as 'business as usual'.

[50] HMCTS Reform Event, 13 November 2019: Immigration & Asylum Appeals. Available at: https://www.gov.uk/guidance/hmcts-reform-event-13-november-2019-immigration-asylum-appeals?utm_medium=email&utm_source [Accessed 09/07/20]

[51] 'Total number of appeals that have been withdrawn to grant by the respondent is 33. This is out of 181 appeals that have been reviewed (18%).' Letter from Daniel Flury, Deputy Director of Tribunals, HMCTS to Duncan Lewis (3rd June 2020).

[52] The Civil Legal Aid (Remuneration) (Amendment) (Coronavirus) Regulations 2020. Available at: http://www.legislation.gov.uk/uksi/2020/515/introduction/made [Accessed 02/07/20]

[53] Since conducting this research, the new Regulations have since been successfully challenged and a consent order agreed between all parties on 11 August 2020. The Defendants conceded that the new Regulations were unlawful on the basis that the requirement to consult and duty of inquiry was inadequate. Consequently, the Lord Chancellor has agreed to make a temporary transitional amendment to the 2018 Standard Civil Contract meaning that all immigration and asylum appeals lodged using CCD will now be remunerated on an hourly rates basis.

[54] Of the 33 interviews we conducted regarding the online procedure since the pilot phase, in 24 of these the interviewee expressed concern about the new Regulations.

[55] ILPA's statement on the new immigration and asylum legal aid fixed fee (18 May 2020). Available at: https://ilpa.org.uk/ilpa-statement-re-new-legal-aid-immigration-and-asylum-fixed-fee/ [Accessed 02/07/20]

[56] 'Escape' fees are paid when work exceeds three times the fixed fee rate. For a detailed breakdown of the new Regulation's fee structure, see: ILPA's statement on the new immigration and asylum legal aid fixed fee (18 May 2020). Available at: https://ilpa.org.uk/ilpa-statement-re-new-legal-aid-immigration-and-asylum-fixed-fee/ [Accessed 02/07/20]

[57] A full list of the barristers' chambers which adopted this position can be accessed here: https://www.freemovement.org.uk/legal-aid-changes-for-online-immigration-appeals-will-do-irreparable-harm/ [Accessed 02/07/20]

[58] Of the 28 interviews we conducted with individuals involved in casework regarding the online procedure since the pilot phase (26 lawyers and 2 legal practitioners), 17 highlighted this issue.

[59] A copy of the 'Bulk CMR Notice' being issued at the time in accordance with Presidential Guidance Note No 1 2020, can be found here: https://www.freemovement.org.uk/wp-content/uploads/2020/03/Bulk-CMR-Notice-JP.pdf [Accessed: 02/07/20]. Reproduced at appendix B. The reference to the Respondent conceding the points raised in the appellant's ASA has since been removed in the latest directions being issued in accordance with Presidential Guidance Note No 2 2020. However, it does direct that '[p]ro-forma or standardised responses will not be accepted by the Tribunal. The Review must engage with the submissions made and the evidence provided to the Tribunal.'

[60] This is the reconsideration team within the Home Office Presenting Officers Unit.

[61] HMCTS Reform Event, 13 November 2019: Immigration & Asylum Appeals. Available at: https://www.gov.uk/guidance/hmcts-reform-event-13-november-2019-immigration-asylum-appeals [Accessed: 03/07/20]. The rollout of the appellants in person channel has since been suspended due to the pandemic.

[62] After our research ended in June 2020, bail hearings began to be conducted via the Cloud Video Platform.

[63] The FtTIAC Help for Users guide outlines this process. Available at: https://www.judiciary.uk/wp-content/uploads/2020/04/14-Apr-20-Immigration-and-Asylum-Chamber-First-Tier-Tribunal-Help-for-Users.pdf?utm_medium=email&utm_source [Accessed: 06/07/20]

[64] After our research ended in June 2020, Case Management Review Hearings began to be conducted via the Cloud Video Platform.

[65] This is in contrast to interviewees' views on conducting substantive hearings remotely, where a majority suggested that this would be inappropriate in this Tribunal. Interviewees' views on remote substantive hearings were largely speculative or based on past experiences as our data collection concluded prior to substantive hearings resuming. As a result, we have not included this data in this report.

[66] The new Regulations were successfully challenged and a consent order agreed between all parties on 11 August 2020. This followed the lodging of a claim for judicial review in *MT and others* against the Ministry of Justice (LAA) and the Lord Chancellor, and a judicial review in *CRA and others* against the Lord Chancellor. The Defendants conceded that the new Regulations were unlawful on the basis that the requirement to consult and duty of inquiry was inadequate. See: Garden Court North, *Successful challenge of Civil Legal Aid (Remuneration) (Amendment) (Coronavirus) Regulations 2020* (11 August 2020). Available at: https://gcnchambers.co.uk/successful-challenge-of-civil-legal-aid-remuneration-amendment-coronavirus-regulations-2020/ [Accessed 11/08/20]

[67] HMCTS, *Vulnerability Action Plan* (30 July 2020). Available at: https://www.gov.uk/government/publications/hmcts-vulnerability-action-plan [Accessed 12/08/20]

[68] Senior President of Tribunals (2020) *Senior President of Tribunals' Annual Report 2020*. Available at: https://www.judiciary.uk/wp-content/uploads/2020/07/6.6755_The-Senior-President-of-Tribunals-Annual-Report-2020_WEB-CS-amend-1.pdf [Accessed 20/08/20]

[69] Comprehensive and thoughtful examples of good practice guidance have already been produced by the Judicial College Equal Treatment Bench Book Committee (https://www.judiciary.uk/wp-content/uploads/2020/03/Good-Practice-for-Remote-Hearings-May-2020-1.pdf) and the Family Court (https://www.judiciary.uk/wp-content/uploads/2020/04/The-Remote-Access-Family-Court-Version-4-Final-16.04.20.pdf). The Helen Bamber Foundation has also produced a series of recommendations for safeguarding vulnerable people in the context of remote international protection and human trafficking/modern slavery legal casework (http://www.helenbamber.org/wp-

content/uploads/2020/05/Tribunals-courts-and-COVID-recommendations-Final.pdf). These three documents would provide a helpful starting point for a FtTIAC good practice guidance note. [Accessed 09/07/20]

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JUDICIAL REVIEW TRENDS AND FORECASTS 2020

Citizens' rights post-Brexit

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Which EU Citizens are at Risk of Failing to Secure their Rights after Brexit?

As the UK moves towards the end of free movement, the government has designed a system to allow EU citizens and their family members who are already living in the UK to retain their residence rights: the EU Settlement Scheme (EUSS), which is based on the EU-UK Withdrawal Agreement. Since it first opened fully in early 2019, the scheme had already received 3.81 million applications of which 3.59 million had been concluded (at the time of writing). Along the report, we will use the 'EU citizens' to refer to EU, EEA (Iceland, Liechtenstein and Norway) and Swiss citizens.

Applying to EUSS is mandatory for all EU citizens (excluding Irish, for whom is voluntary) and their non-EU family members, if they wish to remain in the UK, with a deadline for applying set on 30 June 2021 for those who are resident in the UK by 31 December 2020. The application process is streamlined and more 'user-friendly' than existing Home Office applications, with many able to complete the full process in less than an hour. The eligibility criteria have been simplified so that (almost) all EU citizens living in the UK by the end of the post-Brexit transition period will be eligible.

One challenge facing any large-scale government programme is coverage: how to enable everyone who is eligible to participate. For EU citizens and their non-EU family members to secure status, they will need to (1) know about the programme and the need to apply; (2) be able to navigate the system and make an application; and (3) have identity evidence (passport or ID card in the majority of cases) and residence evidence that they have been living in the UK.

EU citizens living in the UK are on average a young and highly educated population that should not be expected to have problems understanding and navigating a simplified application process. However, securing status will be more difficult for certain groups of people, whether because they lack awareness of the process or the need to apply, are vulnerable for different reasons (social exclusion, abuse or exploitation), have difficulty navigating the application system, or cannot provide evidence of their citizenship (identity evidence), their time spent in the UK (residence evidence) or, in the case of non-EU applicants, their relationship to an EU citizen. It is not possible to know exactly what share of eligible people will fall into these categories but it is possible to analyse some of the characteristics associated with greater risk. This report, which updates a previous Migration Observatory report published in April 2018, examines the factors expected to be associated with a higher risk of falling through the cracks.

First, a potentially significant number of **people may not be aware that the scheme exists and/or, even if they are aware, that they can and need to apply**. In practice many different people could fall into this category, although specific groups include:

- **Very long-term residents,** such as the estimated 139,000 non-Irish EU citizens who arrived at least 30 years ago, who might think that they do not need to apply. These people tend to be older (in 2019, the average age of non-Irish EU citizens with at least 30 years of residence in the UK was 68) and thus might face other difficulties in applying.
- **People with permanent residence**—at least 145,000 non-Irish EU citizens have been granted permanent residence from 2004 to 2019 but are not yet UK citizens.
- **Children of EU citizens** whose parents do not themselves apply, do not realise that children need to apply, or mistakenly believe that their UK-born children are automatically UK citizens. There are an estimated 689,000 children living in the UK with non-Irish EU citizenship. This excludes UK-born children whose parents report that they are UK citizens, although complex citizenship laws mean that in some cases parents will be mistaken about their child's citizenship status.

- **People who have been rejected for permanent residency or who were previously ineligible** may believe that they are not eligible for status and therefore will not apply unless they receive reliable information to the contrary. Other people who were previously ineligible (e.g. due to lack of comprehensive sickness insurance,) might not realise that the criteria to obtain status under the EUSS have been made less restrictive.
- **People with past criminal convictions, who were removed in the past, and people in prison.** People with criminal records and people who have been removed in the past might be reluctant to apply due to fear of being refused status (for not meeting the suitability requirement), even if they are in fact eligible. People in prison are in theory entitled to apply, although they might be unaware of the scheme or unable to submit their application due to practical difficulties. Also, time in prison breaks the continuity of residence, which means that inmates with less than 5 years of residence before they are sentenced will be ineligible if they apply for prison.
- **People without good social networks.** People who feel isolated and have very few close social contacts and/or social interactions might not be aware of the EUSS or might be more likely to miss the deadline to apply. Widowed older homeowners living alone and with long-term health conditions; unmarried, middle-age people with long-term health conditions; younger renters who are not in a partnership with little sense of belonging to their area; and single-parent households.
- **EU citizens born outside the EU.** Non-EU born EU citizens will not necessarily face more problems to secure status to than EU-born EU citizens. However, those lacking English language skills and/or with lower levels of education might not be aware of the EUSS and that they need to apply. In 2019, an estimated 15% (41,000) had no educational qualifications and 15% (30,000) reported English language problems in 2018.
- **People who are expecting to return home** may believe that they do not need to apply because they are expecting to return home before 30 June 2021.

Second, **applications may be more difficult for people who already face social exclusion of some kind or whose independence or autonomy is reduced.** Some of these people might not be aware of the EUSS or might be less likely to apply for some reason. The Government has given £9 million of grant funding to a list of organisations to reach and provide support to vulnerable groups of the population and an additional £8

million of funding for the year 2020-2021 was announced in March 2020. Some groups that can be included in this category are the following:

- **Children in care and recent care leavers**. According to Home Office estimates, there are around 5,000 children in care and 4,000 care leavers who would be eligible to apply to the EUSS, but some local authorities might not have information about their citizenship and hence do not apply on their behalf. In addition, some children might lack a valid ID and/or might not be able to provide evidence of their residence in the UK before coming into care.
- **Victims of domestic abuse** could struggle to complete the process. According to ONS survey data, EU citizens are less likely than UK citizens to be victims of domestic abuse, although an estimated 101,000 male and female EU citizens between the ages of 16 and 74 reported experiencing some form of abuse (either once or repeatedly) in the year ending March 2019. Non-EU victims do not necessarily need to rely on their EU (ex)-partner for evidence and might be able to retain rights of residence if they can provide evidence of domestic violence.
- **Victims of modern slavery**, which includes victims of labour, sexual or criminal exploitation. People in this situation have their freedom restricted by force, threats, coercion or deception. As a consequence, they might not know about the EUSS and, even if they do, they are likely to experience difficulties in applying. According to Home Office data, 1,389 EEA citizens were referred as potential victims in 2018 and 2019 and an additional 1,619 EEA citizens were referred under other legal provisions between 2016 and 2018.
- **People living in poverty**. Eligible citizens living in poverty might not apply to the EUSS because they are under stress and might not be aware of the scheme or the deadline. People in poverty might also be more likely to work informally or in precarious jobs (Williams, 2014) and thus might struggle to provide evidence of their continuous residence in the UK due to their lack of contact with government bodies. In 2017-2019, the share of foreign-born adults with non-Irish EU citizenship living in poverty was 10% when we do not consider housing costs, and 22% when housing costs are considered.
- **Homeless people and rough sleepers** are likely to experience difficulties in providing identity and residence evidence when they apply to EUSS. In the first quarter of 2020, there were 4,250 households with an EEA citizen main applicant who were estimated to be eligible for homelessness assistance. In the autumn of 2019, one estimate suggested that there were 937 rough sleepers with EU citizenship in England, though separate figures using a different methodology produced estimates of 1,000 non-Irish EU citizen rough sleepers in London alone between April and June 2020.
- **Migrant Roma communities** were estimated to be at least 200,000 in 2012 and originated mainly from Romania, Slovakia, the Czech Republic and Poland (Brown et al., 2013). Migrant Roma people may struggle with their applications due to lack of passport/ID card and residence evidence, as well as their average poor IT skills and lack of access to technology.

Third, **some people will struggle to navigate an application due to difficulties accessing or using the application**. This could be because of factors such as:

- **Language barriers**. Data on language proficiency are imperfect but, in 2018, 244,000 non-Irish EU citizens age 18 or over reported experiencing language problems language difficulties in education and/or keeping or finding work.
- **Low levels of literacy**. Early school leavers may find the process more difficult to navigate and may also have less knowledge of the EUSS programme**.** In 2019, there were an estimated 78,000 non-Irish EU citizens age 18-64 who left full-time education before age 16, and a further 235,000 who reported having no formal qualifications.
- **Elderly people** may face a range of barriers, including degenerative aging conditions such as dementia, isolation or low digital literacy. EU citizens are a relatively young population but an estimated 58,000 were age 75 or above in 2019.

- **Low digital literacy,** that is, lack of skills required to use information and communications technology, which are necessary to navigate a primarily digital system such as the EUSS. Internet use is high among EU citizens, but in early 2020 an estimated 2% or 42,000 non-Irish EU citizens nonetheless said that they had never used the internet or had not used it in the last 3 months.
- **Conditions involving a cognitive disability.** People who lack mental capacity and whose family members or carers are unaware of the scheme could fail to apply. There are an estimated 1,130,000 adults with a learning disability in the UK and, in the year 2017/2018, there were 150,000 people over age 18 receiving long term social care support due to their learning disability (ONS, 2019; PHE, 2016). It is not known how many of these people may be EU citizens.
  - **Mental health problems.** While some people with these conditions might be able to function at work and at home on their own, others might need constant help from family members or carers. Even when people with mental health disorders are able to live autonomously, some may struggle with the application process, especially if their cases are complex. An estimated 15,000 non-Irish EU citizens between the ages of 16 and 65 reported that they had a mental health problem that limited their daily activity 'a lot'.
  - **Physical health problems and disabilities.** Disabled people may struggle with an application unassisted. This is the case, for example, of people with reduced mobility who need an in-person appointment to process their application, particularly if their case is complex or they do not have internet access.

Fourth**, people who lack evidence proving their eligibility.** Some people may either be refused status or decide not to apply because they do not have a passport or ID card and/or they struggle to provide evidence of their time in the UK. Many EUSS applicants do not need to provide evidence that they are living in the UK and instead can rely on 'automated checks' by providing their National Insurance Number (NINo), which is then checked against of government tax, benefits and pension records by HMRC and DWP. In the early testing phases, a majority of applicants (88%) provided their NINo and 73% did not need to provide any further residence evidence (Home Office, 2019: 7). The people with the greatest difficulty producing identity and/or residence evidence will be those who lack evidence of both residence and economic activity. This could include:

- **People lacking identity evidence** may have difficulty demonstrating their nationality. At the time of the 2011 Census, 100,000 or 5% of EU-born residents of England and Wales reported not holding a passport.
- **People lacking evidence of their relationship to a qualifying EU citizen.** While EU citizens can qualify for EUSS simply because of their citizenship and residence in the UK, non-EU family members need to show that they are in a relationship with a qualifying person, which makes the burden of proof higher for this group
- **People without bank accounts**, who are conducting their daily lives in cash (whether they are working or non-working—such as retirees or people looking after family). An estimated 3% of people age 18 and over did not have bank accounts in 2016-2018, equivalent to 83,000 non-Irish EU citizen adults.
- **People who lack proof of address in their name**, for example, because they were living rent free with parents or friends, may find it difficult to show evidence of continuous residence in the UK if their daily activities have not generated a paper trail.
- **People in precarious or non-standard housing.** People who live in communal establishments (e.g. hostels, B&Bs or caravan parks) may not have a defined address and/or proof of address. At the time of the 2011 Census in England and Wales there were an estimated 45,000 residents or staff of communal establishments who held passports from EU countries other than Ireland (Census table DC2119EWla). The number of such residents is likely to have increased due to further EU migration since 2011.
- **People who have arrived shortly before the cut-off date for eligibility**. People who arrive in the weeks and months preceding the cut-off date (31 December 2020) are more likely not to have bank accounts, leases, or potentially verifiable informal activity such as membership of clubs or contracts for services. Nonetheless, a used travel ticket confirming travel to the UK might still be considered valid evidence to show eligibility to the scheme.

Finally, there are people who might fail to convert from pre-settled to settled status. By the end of July 2020, there had been 1,475,000 grants of pre-settled status, which represented 41% of concluded applications. Anyone with this status who wants to remain permanently in the UK will need to apply again to the EUSS to secure settled status. To qualify for settled status in the future, applicants will need evidence of a full five years of residence, stretching back retrospectively. It is not clear how easily applicants—particularly those in vulnerable groups—will be able to meet this requirement, although organisations and charities will continue receiving outreach funding to support vulnerable applicants. The Home Office has said that it will remind applicants when they need to reapply (Home Office, 2018: 9), something that will be dependent on their contact details remaining the same or being updated.

Simply having one of the characteristics identified in this report does not mean that a person will fail to secure settled status. People are likely to face greater difficulties if there is a combination of factors. For example, barriers to access due to language, disability or lack of digital literacy will be most relevant for people with complex cases because they lack evidence, or for those who are isolated and cannot easily rely on friends and family for help.

The individuals who are most likely to be excluded from the EUSS process are those who are already socially vulnerable. This includes children in care and recent care leavers, victims of modern slavery, or migrant Roma communities. Many of these people might not even be aware of the EUSS and that they need to apply and, even if they do, they are likely to need help completing the process.

Finally, arguably the biggest challenge if the government aims for comprehensive take-up of the EUSS is awareness about the need to apply. There are some large groups of people who would not normally be classified as 'vulnerable' but who may not realise that they need to apply, from children to very long-term residents. In addition, there will be people who simply forget or delay their application until after the deadline expires. There is little clarity about the policy plan for people who miss the deadline and do not have a 'good reason' for doing so. If a significant number of eligible people do not apply, enforcing a strict deadline would increase the illegally resident EU-national population in the UK. As a result, perhaps one of the most important unresolved policy questions affecting the completeness of the EUSS process is what contingency plans will be in place for people who do not apply by the deadline.

JUDICIAL REVIEW TRENDS AND FORECASTS 2020

Judicial Review of the Regulators

Andrew Lidbetter and Jasveer Randhawa,
Herbert Smith Freehills

PLP JUDICIAL REVIEW TRENDS AND FORECASTS 2020

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The following definitions are used throughout:

"A1P1"	**ECHR Article 1 Protocol 1**
"CAT"	**Competition Appeal Tribunal**
"CMA"	**Competition and Markets Authority**
"ECHR"	**European Convention of Human Rights**
"FCA"	**Financial Conduct Authority**
"GDPR"	**General Data Protection Regulation**
"HMRC"	**Her Majesty's Revenue & Customs**
"HRA"	**Human Rights Act 1998**
"OFCOM"	**Office of Communications**
"OFGEM"	**Office of Gas and Electricity Markets**
"OFS"	**Office for Students**
"SCA"	**Senior Courts Act 1981**
"SoS"	**Secretary of State**
"TFEU"	**Treaty on the Functioning of the European Union**
"VAT"	**Value-added-tax**

Irrationality

1. ***R (on the application of (1) National Farmers Union (2) T&G Stone Ltd) (Claimants) v Secretary Of State For Environment, Food And Rural Affairs (Defendant) & Natural England (Interested Party)* [2020] EWHC 1192 (Admin)**

Andrews J

The High Court dismissed a claim for judicial review of a decision by the SoS to issue a direction to Natural England ("**NE**") requiring it not to grant any badger culling licences in Derbyshire before 1 May 2020 (the "**Decision**").

The court rejected the argument that the Decision was an unlawful departure from the SoS's published policy to enable licensed culling or vaccination of badgers to control the spread of TB (the "**Guidance**"), contrary to the principles in *Lumba v Secretary of State for the Home Department* [2011] UKSC 12. The SoS had the power to direct NE in the exercise of its delegated functions under the Natural Environment and Rural Communities Act 2006. This power was plainly wide enough to allow the SoS to decide licences should not be issued in certain circumstances, including for political reasons. Having considered the nature and extent of the Guidance, the court concluded that the Guidance provided no fetter on the exercise of the statutory powers.

The court further rejected the argument that the claimant had a legitimate expectation as the Guidance did not provide a clear and unequivocal promise to any applicant for a culling licence.

The court was not persuaded that the Decision was *Wednesbury* unreasonable. Although there was evidence that the Decision was taken not on purely scientific grounds but also on political grounds, the Decision involved the exercise of complex political and ethical value judgments which are quintessentially matters for the democratically accountable decision-maker. The fact that a scientist may have weighed the factors differently did not make the Decision irrational.

2. *R (on the application of Utilita Energy Ltd) v Secretary of State for Business, Energy & Industrial Strategy* [2019] EWHC 2612 (Admin)

Lewis J

The High Court rejected a claim for judicial review of three decision taken in connection with the government's programme for the provision of smart electricity and gas meters.

The Smart Metering Implementation Programme ("**SMIP**") set out the Government's policy that every British home should have a smart electricity meter by the end of 2020. Unlike first generation smart meters ("**SMETS1**"), second generation meters ("**SMETS2**") are not tied to a particular supplier's operating system, meaning customers can switch suppliers without losing smart functionality. Some SMETS1 meters are eligible to be enrolled in a universal communications system run by the Data Corporation Company ("**DCC**"), which means that they do not require a replacement with SMETS2 to gain interoperability. The Government imposed a roll-out duty requiring energy suppliers to take all reasonable steps to ensure that all SMETS1 meters are either DCC enrolled or upgraded to SMETS2 on or before 31 December 2020. The Government's decision followed the issuing of two consultation papers in April 2018. The first dealt with achieving interoperability via the roll-out-duty whilst the second discussed whether the DCC should offer enrolment services to four of the six brands of SMETS1 meters. The two other SMETS1 brands, which include the 'Secure' meter, were not considered at this point but the Government noted its intention to consult on these once it had sufficient commercial and technical information available.

The claimant, Utilita, is an energy supplier which uses Secure meters. Utilita sought to challenge three Government decisions relating to SMIP on the grounds of irrationality because the Government had left it in a materially different position to suppliers who, by virtue of using the four DCC-eligible brands, knew for a fact that they were not required to replace their SMETS1 meters by the end of 2020. Utilita argued that since the need to replace the SMETS1 meters was contingent on there being no option to enrol with the DCC, all consultations should have occurred simultaneously.

Lewis J rejected Utilita's submissions. Suppliers using eligible brands were in a different factual position by virtue of the level of information the Government had on these brands. The Government had made clear its proposal to consult later on Secure meters once it had the relevant information. The Government's decision to require mandatory SMETS1 enrolment or replacement within a specified timeframe, and to consult on DCC enrolment only when it had sufficient information was neither irrational nor unlawful; it was a regulatory policy decision within the SoS's discretion. As a matter of law consultations on decisions which are linked do not need to proceed at the same time. The court held that the fact that decisions could have been taken differently or in an alternative order did not render them irrational or unlawful.

Utilita's attempt to challenge on the grounds of inadequate consideration of SMIP's environmental impact pursuant to s. 3A(5)(c) Electricity Act 1998 also failed. Lewis J noted that the Government's underlying policy objective was the promotion of more efficient energy use and such a policy objective was sufficient to prove that it had considered its specific duties under the Act.

In relation to the Government's third decision that the DCC should be required to provide services to Secure meters in order to enrol them, Utilita failed to establish that the Government had made material errors of assessment and factored in irrelevant considerations in its calculation of cost-benefits. In any event Lewis J considered, pursuant to s. 31 SCA 1981, that the outcome would not have been substantially different if the costs Utilita wanted had been included, as there was still a calculable net cost-benefit to the policy.

The court further held that there was no arguable basis for contending that the fair-minded observer, knowing the facts, would conclude that there was an appearance of a real possibility of predetermination. The decision-maker is entitled to have a predisposition in favour of a particular policy, provided that the decision-maker considers the issues fairly and on their merits (*R (Lewis) v Redcar and Cleveland Borough Council* [2009] 1 WLR 83). The court found that the SoS did not consider that he had sufficient material to consult at an earlier point.

3. *R (on the application of Critchley) v Financial Ombudsman Service (Defendant) & Bank of Scotland Plc (t/a Halifax) and Financial Conduct Authority (Interested Parties)* [2019] EWHC 3036 (Admin)

Lang J

The High Court dismissed on all grounds a judicial review of a decision made by an Ombudsman in relation to the claimant's complaint against Halifax that she had been mis-sold credit card PPI.

The claimant was sold a PPI insurance policy. She later tried to make a claim under that policy but was found its cover was limited. She complained to the Ombudsman that she would not have purchased PPI if she had known the limitations and its poor value. An adjudicator assessed her complaint and decided the PPI policy had not been mis-sold. The claimant appealed that decision.

The court found that the Ombudsman had not misinterpreted the regulatory regime or his obligations under the FCA Handbook. In relation to suitability, the court noted that the Ombudsman found that Halifax did not act with reasonable care and skill in establishing whether the policy was suitable for her, but that the Ombudsman concluded that the policy was in fact suitable for her. On a fair reading of the Ombudsman's decision as a whole, the Ombudsman took into account the relevant considerations of limitations on cover and the cost, but that he took a different view to the claimant. The court found that the Ombudsman's decision was rational in the exercise of his judgment.

The court found that the Ombudsman was right to give little weight to the claimant's evidence that she would not have wanted the PPI if she had been fully informed of its terms. The weight to be given to the evidence was quintessentially a judgment for the decision-maker and not susceptible to legal challenge in the absence of a public law error. The court found that the Ombudsman took into account all considerations that were relevant to the claimant's purchase of the PPI, applying the regulatory regime in existence at that time. The decision showed that he clearly had regard to the materiality of the flaws identified. His conclusion could not be characterised as irrational and his reasons met the required standard.

The court dismissed the judicial review claim on all grounds.

4. *R (on the application of Cotter) v National Institute for Health And Care Excellence* [2020] EWCA CIV 1037

Bean LJ, Males LJ, Phillips LJ

The Court of Appeal dismissed an appeal brought by the claimant against the High Court's decision to dismiss an application for judicial review of the decision of the National Institute for Health and Care Excellence ("**NICE**") to assess the drug Kuvan under the Health Technology Appraisal ("**HTA**") rather than Highly Specialised Technology ("**HST**") process which the claimant submitted would have significantly increased the prospects of a positive decision being made.

The claimant had challenged the decision on the basis that, firstly, NICE erred in law in that it misunderstood and misapplied its own guidance in failing to make use of an HST process, and secondly that the conclusion reached by NICE was irrational.

The Court of Appeal affirmed the High Court's view that, in relation to intensity of the review, although the relevant criteria do not involve highly technical scientific questions, it is nonetheless appropriate to bear in mind that the decision involved issues of judgement and was vested in a group of people with particular experience and expertise to take it. The views of the decision-makers should be given

proper respect but this does not mean that the court should simply defer to the decision-makers, particularly in light of the significance of this decision and its impact on the claimant. The meaning of each of the criteria had to be determined in accordance with the natural meaning of the words used, read in the light of the relevant context. The central question is whether the decision was irrational or perverse, which is a high threshold.

Applying this threshold, the court agreed with the High Court in finding that the three criteria which were found not to be satisfied by Kuvan had been applied correctly by NICE nor was NICE's application of the guidance in reaching such a conclusion irrational.

5. *R (on application of London School Of Science And Technology) v Pearson Education Limited* [2019] EWHC 3129 (Admin)

Rowena Collins Rice

The High Court partially allowed a judicial review claim brought by the London School of Science and Technology ("**LSST**") (a private college) against Pearson Education Limited, the accrediting body. Although the challenge to the withdrawal of accreditation was rejected, the sanctions imposed on the Head of the Centre were found to be disproportionate and unfair and were set aside.

Pearson found systemic malpractice and maladministration at LSST. A Malpractice Committee withdrew accreditation for LSST's courses and disbarred the Principal from involvement with Pearson qualifications for ten years. After unsuccessfully appealing the decision to the Appeal Panel (albeit that the sanction against the Principal was reduced from ten to five years), LSST brought a judicial review challenge on the basis that Pearson had acted unfairly and unlawfully, that the decision-makers failed to take into account relevant considerations and that the investigations were procedurally unfair.

The court rejected the argument that Pearson considered irrelevant material (wider anonymous allegations) and failed to consider relevant material (a positive Quality Assurance Agency report). The court held that these challenges were unsustainable. Although the allegations were anonymous and related in part to other colleges and other irrelevant allegations, they were relevant for the decision-makers to know how the case had originated and LSST had been given the opportunity to question the origins and motivation of the allegations. In fact the Committee explicitly stated that it made to judgment on the wider allegations. The court found that the QAA report had been considered on appeal and reasoned conclusions given.

Further, the court found that the Malpractice Committee and Appeal Panel had applied the correct standard of proof. The court commented that these were "*decisions the rationality of which is not impugned in these proceedings. They are entrusted to panels whose expertise is not in legal drafting. It is not sustainable to build a challenge of this nature on what are in the end a small number of drafting points*."

Finally, the sanction imposed on LSST was found to be proportionate, subject to the indefinite nature of the bar on re-registering for accreditation.

The court did however uphold the challenge to the sanctions on the Principal personally. It found that no overt explanations were given for the severity of the sanctions (disbarment for an extended period of time). Where sanctions are unusual or particularly severe, it is more important that they are clearly explained and justified. The court accepted that the decision-makers did not materially distinguish the case against LSST from the case against the Principal in their procedures or their findings. The sanctions were found to be disproportionate and inconsistent with published policy and procedure.

EU law

6. ***R (on the application of Friends of Antique Cultural Treasures Ltd) v Secretary of State for the Environment, Food & Rural Affairs*** **[2020] EWCA Civ 649**

Sir Terence Etherton MR, Singh LJ, Green LJ

The Court of Appeal dismissed an appeal that the prohibition on ivory trading under the Ivory Act 2018 was disproportionate.
The court considered the actual evidence before the first instance judge and his evaluation of it, concluding that the judge's analysis was compelling. The court emphasised the context in which the trading bans must be seen, namely the international consensus which recognises the continued and growing threat to the African elephant and the need for more extreme measures. It found that the appellant's criticisms significantly downplayed and underestimated the political and diplomatic dimension to the evidence.
The court rejected the argument that equally effective but less restrictive measures could have been adopted. The judge at first instance applied the principles established in case law (*R (Lumsdon) v Legal Services Board* [2016] AC 697)) with no error of analysis. The Act properly balanced individual rights with the broader political and diplomatic objectives.
The court also concluded that there was no violation of the principle of respect for property due to the absence of a right to compensation. This is a highly qualified and weak right. There is no complete deprivation of possessions here, just on trading in ivory. The judge properly applied the fair balance test (*British American Tobacco and others v Secretary of State for Health* [2016] EWHC 1169 (Admin)) and the court upheld his conclusions.

7. ***(1) Viasat UK Ltd (2) VIASAT Inc (Appellants) v Office of Communications (Respondent) & Inmarsat Ventures Ltd (Intervener)*** **[2020] EWCA Civ 624**

Lewison LJ, Leggatt LJ, Green LJ

The Court of Appeal dismissed an appeal brought by Viasat UK Ltd ("**Viasat**") against a decision of the CAT upholding a decision by Ofcom to authorise Inmarsat Ventures Ltd ("**Inmarsat**") for the use of 2GHz spectrum despite a breach of conditions of eligibility.

Inmarsat had been selected by the European Commission to use the 2GHz spectrum for pan-European mobile satellite services. In order to be eligible, it had to commit to meeting certain conditions and milestones, including launch of a satellite within a prescribed timeframe and certain geographical coverage. Ofcom granted authorisation (the "**Decision**") to Inmarsat for the use of 2GHz spectrum and Complementary Ground Components ("**CGCs**") in the UK. Inmarsat did not in fact launch the MSS as specified by the conditions for eligibility. Viasat challenged the Decision, arguing Ofcom had no power to authorise Inmarsat to use the CGC for different services than it was initially authorised for.

The court rejected this argument and held that the CAT's decision was correct. There is no inexorable connection between a breach of the conditions and authorisation. The sole conditions precedent are set out in Article 8(1) of the Selection Mechanism Decision from the European Commission and, on the facts, were met. Further, the CJEU in *Viasat v BIPT* held that there is no automatic correlation between breach of a condition and the right to continued authorisation. These factors are consistent with a contextual analysis of the relevant provisions. An operator is authorised for 18 years during which time technology evolves. To enforce a permanent commitment would be to hinder innovation during that time and prefer old technology over new.

The court held that the reasoning of the Decision was logical and rational. Ofcom was justified in concluding there was no need to impose an extra condition upon Inmarsat and the CAT had not erred in its conclusion.

8. ***Stagecoach East Midlands Trains Ltd & Ors (Claimants) v Secretary Of State For Transport (Defendant) & (1) Abellio East Midlands Ltd (2) Arriva Rail East Midlands Ltd (Interested Parties) : West Coast Trains Partnership Ltd & Ors (Claimants) v Department For Transport (Defendant) & (1) First Trenitalia West Coast Rail Ltd (2) Mtr West Coast Partnership Ltd (Interested Parties) : Stagecoach South Eastern Trains Ltd & Ors (Claimants) v Secretary Of State For Transport (Defendant) & (1) London & South East Passenger Rail Services Ltd (2) South Eastern Railways Ltd (Interested Parties)*** **[2020] EWHC 1568 (TCC)**

Stuart-Smith J

The High Court dismissed challenges from two bidders (Stagecoach Group plc and West Coast Partnership) who had been disqualified from three rail franchise procurement competitions conducted by the Department for Transport ("**DfT**") as a result of non-compliance with the DfT's pensions requirements. A deficit in the Railway Pensions Scheme and related investigation by the Pensions Regulator had prompted bidders' concerns over the potential level of pensions contributions over the course of the franchise term. The DfT proposed a risk-share, but the claimants did not accept this and proposed an alternative. This resulted in their disqualification, which the claimants subsequently challenged.

The court held that the DfT had lawfully disqualified the claimants. The DfT had not breached its duties of fairness and transparency and proportionality either as regards its approach to the pensions issue and risk allocation in its decision-making, nor as regards its discretion to disqualify and evaluation processes set out in the original invitation to tender ("**ITT**").

In relation to the key argument, that the imposition of potentially enormous pension risks on franchisees breached transparency, proportionality and fairness requirements, the court held that there is no self-contained principle of EU law or English law which limits the size of a risk that may be allocated to one contracting party in a public procurement. Moreover, the DfT had provided clear and sufficient reasons for the decision to disqualify, namely serious non-compliance regarding pension obligations, and therefore did not breach its duty of transparency.

The section of the ITT governing the DfT's discretion as to how to treat non-compliances, including the option to disqualify, was sufficiently transparent. It could only be interpreted in one way, and in any event would be exercised rationally and in accordance with English law. Further, the breadth of the DfT's discretion did not breach the principle that contracting authorities should not reserve an excessive level of discretion in deciding how to award a contract.

The DfT's financial robustness test (used to assess the financial viability of bids over the course of the franchise) did not breach its duty of fairness as that test need not have reliably distinguished between bids. In addition, the DfT's adoption of one set of figures as a basis for the most credible financial outcome was not unreasonable, and the duty of transparency did not in fact even require the DfT to specify its view of the most credible financial outcome.

Other arguments in connection with the evaluation process, including whether the DfT had failed to disclose evaluation criteria and whether the DfT had relied upon a report not contemplated by the ITT in its evaluation of the bids for pensions purposes, were also dismissed.

9. ***Paul Hughes & Ors (Claimants) v Board Of The Pension Protection Fund (Defendant) & (1) Secretary Of State For Work & Pensions (2) 20-20 Trustees Services Ltd & Ors (Interested Parties)*** **[2020] EWHC 1598 (Admin)**

Lewis J

The High Court ordered certain provisions of the method of calculation proposed by the Board of the Pension Protection Fund (the "**Board**"), adopted to ensure compliance with Directive 2008/94 Article 8, to be disapplied and others to be reconsidered.

The Board is responsible for making compensation payments in pension schemes which have insufficient assets to meet protected liabilities. The method proposed for calculating benefits payable involved a cap on compensation.

The court held that the compensation cap constituted unlawful discrimination on the grounds of age contrary to EU law and ordered it to be disapplied. It was accepted that there were legitimate aims pursued, including the protection of pension entitlements through cost cutting and encouraging people to work longer. However the cap was not an appropriate and necessary means of achieving those aims, mainly because it impacted only a small group of pensioners but would result in serious losses to that group. The provisions were not objectively justifiable, the justifications being "*so weak as to be without reasonable foundation*".

The court considered whether the proposed method was compliant with the Directive, stressing the Board's wide discretion as to implementation of the Directive. However the court did direct the Board to reconsider the system, and make any adjustments necessary to ensure the level of compensation required by the Directive was received.

10. *(1) Bayer PLC (2) Novartis Pharmaceuticals UK Limited v NHS Darlington CCG & Ors* [2020] EWCA Civ 449

Underhill LJ, Floyd LJ, Rose LJ

The appellants challenged the lawfulness of a policy adopted by a number of CCGs asking NHS Trusts to use Avastin as the preferred treatment option for a particular medical condition (the "**Policy**"). The use of Avastin (or in its compounded form, CB) was not licensed for use with that condition but was recommended as being a cost effective treatment.

The appellants argued that implementing the Policy would result in a breach of EU legislation. Whipple J at first instance held the Policy to be lawful and the companies appealed. The Court of Appeal rejected the appeal. In doing so, the court considered various potential modes of CB supply under the Policy, including pharmacies and other third parties.

The court disagreed with Whipple J's formulation of the test for the lawfulness of the Policy, namely, whether the Policy was "*realistically capable of implementation by the NHS Trusts in a way which does not lead to, permit or encourage unlawful acts?*" and concluded that the correct formulation, based on *R (Letts) v Lord Chancellor* [2015] EWHC 402, was "*whether the Policy would (when construed objectively and purposively) lead to, permit or encourage unlawful acts*".

In the court's view the Policy would realistically only be implemented with CB either being obtained from a pharmacy on the one hand or from a commercial compounder on the other. The appellants argued that since the Policy could be implemented through other means i.e. supply by third parties, the Policy was unlawful. However, the court concluded that the Policy was not unlawful just because it did not prescribe the lawful alternative and proscribe the unlawful. It was sufficient that there were lawful means of implementing the Policy which were realistic (at least in outline) at the time it was promulgated.

Human Rights

11. *R (on the application of Autonomous Non-Profit Organisation TV-Novosti) v Office Of Communications* [2020] EWHC 689 (Admin)

Dame Victoria Sharp PQBD, Dingemans LJ

The High Court dismissed a judicial review application brought by Autonomous Non-Profit Organisation TV-Novosti ("**RT**"), a Russian corporation which holds a licence to broadcast a television service in the UK, against the decision and sanctions imposed by Ofcom in relation to certain of RT's programmes broadcast in the wake of the Salisbury poisoning and allegations of Russian state involvement. Ofcom found that the majority of RT's broadcast programmes breached the requirements of impartiality.

The High Court dismissed RT's argument that Ofcom should have taken into account the dominant media narrative when assessing whether there has been a breach of the due impartiality provisions in the Communications Act 2003 and the Ofcom Broadcasting Code. RT argued that the UK

Government's position that the Russian state was involved in the Salisbury poisoning was the "*dominant media narrative*" across other broadcasters in this jurisdiction, other than RT, and that RT did not need to reproduce this perspective in its programmes. The court rejected this, noting that the concept of a dominant media narrative would introduce an element of uncertainty likely to inhibit rather than enhance freedom of expression.

The court further held that RT's rights under Article 10 of the ECHR were not infringed. It held that the legitimate objective pursued by the 2003 Act and Code of due impartiality is sufficiently important to justify limiting RT's freedom to broadcast programmes which do not themselves satisfy the due impartiality provisions.

The court found that the sanctions imposed by Ofcom were proportionate. Ofcom also gave proper regard to RT's record as showing a trend of non-compliance.

12. *R (on the application of Cartref Care Home Ltd) v HMRC* [2019] EWHC 3382 (Admin)

Cockerill J

The High Court dismissed a claim from Cartref Care Home Ltd ("**Cartref**") that certain decisions taken by HMRC in its assessment of Cartref's loan charges based on relevant legislation breached the HRA (specifically A1P1 and Article 6).

The High Court rejected HMRC's argument that the All-Party Parliamentary Group Report (the "**Report**") on loan charges was subject to Parliamentary privilege under Article 9 of the Bill of Rights, distinguishing the current case from *Office of Government Commerce v Information Commissioner* [2008] EWHC 774 (Admin), a case in which the document in question was a full select committee report. It found that the Report was the result of a more informal cross party group, expressed as a call to action. The court considered it was not barred from considering the report by way of Parliamentary privilege, but that the weight to be given to it was "extremely limited".

In relation to A1P1 the court considered various factors including the retrospective nature of the legislation but concluded that it could not be said that this approach to tax was illegitimate or lacked a reasonable foundation. The purpose of the legislation was not one which can be sensibly impugned – tax avoidance. The legislation was rationally connected to its objective. In light of the wide margin appreciation, the court was not persuaded that the legislation in question reached the high hurdle of exceeding the margin of appreciation.

On Article 6 the court reiterated that tax matters do not involve a determination of civil rights.

13. *(1) Petrus Jacobus Le Roux Zeeman (2) David Murphy v Revenue & Customs Commissioners* [2020] EWHC 794 (Admin)

Andrews J

The High Court dismissed challenges to certain tax charges on disguised remuneration ("**DR**") loans entered into by the claimants. The challenges were brought on the basis that the retrospective tax charges interfered with the claimants' rights to peaceful enjoyment of their possessions under A1P1.

The court noted the difficulties with identifying the "possession" for the purposes of A1P1 in such cases. It ultimately rejected the argument that the loan charge provisions in question deprived the claimants of a "possession", either in the form of the money constituting the loan or the claim for tax relief or any other asset. Its conclusions were not affected by the timing of the legislation enacted to close the loophole on DR tax avoidance schemes.

Nonetheless the Court considered the substantive arguments on the assumption A1P1 is engaged. Applying the test that legislation should be respected unless it is manifestly without reasonable foundation, the court held that the retrospectivity of the legislation was not unlawful. The legislation was rationally connected with the objective of tackling DR schemes, which are known to be used for tax avoidance. The method of tackling the schemes was well within the generous margin of appreciation afforded to the State and struck a fair balance.

Procedural Fairness

14. *R (on the application of Clarke and others) v Holliday (Chairman of the Magnox Inquiry)* [2019] EWHC 3596 (Admin)

Murray J

In a rolled-up hearing the High Court considered an application for judicial review in relation to a non-statutory public inquiry into the process for awarding the contract for decommissioning the Magnox nuclear sites.

The High Court allowed permission to apply for judicial review on the ground that the chairman of the Magnox inquiry, Mr Holliday, had unlawfully delegated his decision-making functions to members of his staff by permitting them to reach provisional findings. The court found that the potential criticisms formulated by members of staff were a tool for exploring the issues and no decision had been made at that stage. This was entirely within the Terms of Reference of the Inquiry. Sole responsibility for adopting final decisions remained with Mr Holliday. He had not unlawfully delegated his duties and therefore this ground was dismissed. The court did however make some critical comments as to the process followed.

The court refused permission for judicial review on the other grounds of disclosure, information sharing between legal representation, and Article 8 ECHR. The claimants' submission that the defendant provided no evidence of any exculpatory review was rejected as premature, as the claimants had not yet engaged with the representation process through which they would receive the draft report and evidence supporting the provisional findings.

Similarly, the court rejected the claimants' argument that it was unlawful to prohibit information-sharing between claimants at the representations stage, having permitted it at the potential criticism stage. It accepted the defendant's submission that the representation stage differs from the potential criticism stage in that it involves disclosure of extracts from the draft report, and there is an important interest in protecting against premature unauthorised disclosure. There was no public law error or unfairness in Mr Holliday's approach, and permission was refused.

As grounds 1-3 were refused or dismissed on the merits, the claimant's argument that the conduct of the defendant breached their Article 8 ECHR rights fell away.

Although (having dismissed all grounds) the court did not make a finding on whether the inquiry was amenable to judicial review, the judge did indicate his view that the inquiry was exercising a public function but emphasised that this is a fact specific question and that, in his view, non-statutory inquiries will not always be amenable to judicial review.

15. *R (on the application of Bramhall) v General Medical Council* [2019] EWHC 3525 (Admin)

Holroyde LJ, Jefford J

The High Court dismissed a judicial review application to quash three decisions of the General Medical Council ("**GMC**") to change the disciplinary action taken in response to a surgeon being convicted of common assault.

Prior to conviction the claimant was given a warning by the GMC. After being convicted and sentenced for common assault the claimant received a letter from the GMC informing him that the outcome of the disciplinary proceedings may be reviewed (the "**First Decision**"). The Assistant Registrar decided to refer the misconduct allegation back to the Case Examiners (the "**Second Decision**") and then subsequently to the Medical Practitioners Tribunal ("**MPT**") to consider fitness to practice (the "**Third Decision**"). The claimant challenged the decisions by judicial review.

The High Court held that the claims to quash the first and second decisions were academic. The course of events followed that prescribed by the GMC guidance in relation to warnings, referrals to the MPT, and exceptions. Any procedural complaints about the decision-making process would not have made any difference to the outcome.

In any event, the court considered that none of the decisions were irrational. The court held that the criminal convictions constituted new information even though the facts underlying the convictions were largely the same as those relied on in the misconduct allegation. It accepted that public confidence in the profession would be affected and that the review was necessary.

The court rejected the allegation that the claimant had a legitimate expectation that the allegations would be referred to the Case Examiners and found that there was no duty to give reasons for referring to the MPT. The Assistant Registrar had simply adopted the default position and the court saw no question of there being inadequate reasons for the Claimant to understand why he had done so.

Consultation

16. *(1) Electronic Collar Manufacturers Association (An Unincorporated Association) (2) Petsafe Ltd v Secretary Of State For Environment, Food & Rural Affairs* [2019] EWHC 2813 (Admin)

Morris J

The High Court rejected a claim for judicial review of a decision of the SoS for Environment, Food and Rural Affairs to ban the use of remote-controlled shock collars for cats and dogs ("**e-collars**").

The previous policy had been that there was insufficient evidence to justify a ban, but a consultation on a proposed ban was then carried out in March/April 2018 which received over 7,000 responses. The SoS's decision, dated 27 August 2018 (the "**Decision**"), was to ban e-collars. The claimants were manufacturers of such e-collars.

The claimants argued that the SoS had pre-determined the merits of the Decision prior to consideration of the consultation responses, and that the Decision was therefore unlawful because the consultation did not take place at a "*formative stage*". The court recognised that there were weaknesses in the consultation document: namely that it was written in terms which favoured the introduction of a ban, narrowly stated certain scientific research, and did not refer to Defra's change of position. Ultimately, whilst recognising that the consultation process was "*far from perfect*", the deficiencies did not cause the process to be so unfair as to be unlawful. The SoS had complied with the four elements of the duty of consultation (*R v North and East Devon HA, ex p Coughlan* [2001] QB 213) and as such the court found that the Decision was not unlawful.

The court further rejected the argument that the Decision was irrational because it was not a reasonable response to any welfare concerns regarding the use of e-collars. The court noted that a ban could not properly be imposed solely because, as a matter of morality or ethics, it is wrong to inflict an electric shock on an animal; there must be evidence that the use of e-collars is detrimental to the purpose of promoting animal welfare. The court found that there was such evidence and that the Decision was not outside the range of reasonable responses open to the SoS, despite the fact he had previously considered the same evidence to not support a ban. The court considered that a change of position did not render irrational an otherwise rational decision: the change related to the sufficiency of evidence, which is a matter of assessment and judgment for the decision-maker.

Finally, the claimant's argument that the ban on e-collars would involve an unlawful interference with their possessions, contrary to A1P1, did not persuade the court. It found that the promotion of animal welfare is a legitimate aim and on the facts justified the restriction of the right to peaceful enjoyment of possessions. The Decision was found not to infringe A1P1 or Article 34 TFEU.

The claim for judicial review was dismissed.

APPEAL OUTSTANDING TO COURT OF APPEAL.

17. ***R (on the application of Bloomsbury Institute Ltd) v Office for Students*** **[2020] EWCA Civ 1074**

Bean LJ, Males LJ, Simler LJ

The Court of Appeal allowed an appeal of the High Court's dismissal of Bloomsbury Institute Ltd's ("**Bloomsbury**") judicial review challenge to the decision by the OfS to refuse Bloomsbury's application for registration.

The OfS had based its decision in part on a confidential internal Decision-Making Guidance document (the "**Guidance**") on which it had not undertaken a consultation. The High Court had found that the requirements in the Guidance did not conflict with the OfS's published "Regulatory Framework". The approach which was actually followed, in accordance with the Guidance, did not differ from the approach put forward in consultation and the consultation had not been misleading. The Court of Appeal agreed with the High Court's conclusion that the OfS was not required to consult on every granular detail of the assessment process. However, the Court of Appeal held that certain aspects of the Guidance could not properly be described as a matter of granular detail, and the failure to publish it, and to consult on it when it was at the formative stage, constituted clear unfairness in Bloomsbury's treatment.

The Court of Appeal further held that the OfS had breached its own scheme of delegation because it did not have authority to set the baselines or thresholds used in the Guidance to assess education providers. Those assessments were policy decisions and could not be described as merely operational under the applicable part of the scheme of delegation.

The Court of Appeal lastly confirmed the High Court's decision that the "demographic group threshold" analysis set out in the Guidance was neither irrational, arbitrary, nor contrary to the statutory purpose.

18. ***R (on the application of British Blind and Shutter Association) v Secretary of State for Housing Communities and Local Government*** **[2019] EWHC 3162 (Admin)**

Steyn J

The High Court allowed a judicial review challenge brought by the British Blind and Shutter Association (the "**Association**") against the decision of the SoS for Housing Communities and Local Government to include external blinds, awnings and shutters in a ban on the use of combustible materials in cladding systems on high-rise residential buildings in response to the Grenfell Tower fire.

The government commenced a consultation following the Grenfell Tower fire and published a Consultation Paper on the proposed ban on combustible materials. The Association did not respond to the Consultation Paper, believing it not to be relevant as the members did not manufacture combustible materials. Following the introduction of secondary legislation (the "**2018 Regulations**"), the Association realised that the 2018 Regulations have the effect of banning the use of external shutters, awnings and blinds on relevant buildings if the materials used do not meet the standard required. The Association's uncontested evidence was that it is not currently possible to manufacture fabrics for various products sold by members of the Association (such as awnings, canopies and roller blinds) which meet the required standard. They sought judicial review claiming that the 2018 Regulations were unlawful as the consultation was unfair.

The court accepted that the Association was a statutory consultee and as such should have been specifically notified of the consultation. The SoS had not taken any steps designed to bring the consultation to the attention of bodies representing the specific interests concerned in the proposed changes. Nevertheless, the court concluded that the steps taken to publicise the consultation –

including publishing on the government website, referring to it in Parliament, and the ongoing media publicity – were in fact sufficient to bring the Consultation Paper to the attention of the Association at the beginning of the consultation period.

In relation to the adequacy of the consultation, the court considered the degree of specificity with which the public authority should conduct its consultation, bearing in mind the fact that "*the demands of fairness are likely to be somewhat higher when an authority contemplates depriving someone of an existing benefit or advantage*" (*R (Moseley) v London Borough of Haringey* [2014] UKSC 56). The Consultation Paper did not tell the Association in clear terms that the proposal was to extend the ban to external blinds, awnings and shutters. The court found that the references to "*similar components, attachments or building elements*" was vague. For these reasons the court concluded that the consultation failed to comply with the requirement to "*let those who have a potential interest in the subject matter know in clear terms what the proposal is*" and that the consultation was so unfair as to be unlawful.

The court rejected the argument that the SoS had failed to take into account material considerations and that the decision was irrational. The claimants argued that the SoS should have taken into account the financial impact of the ban on the Association's members. The court acknowledged that, where it is alleged that the decision-maker failed to take into account a relevant consideration in exercising a discretionary power, it will only be unlawful if the consideration is expressly or impliedly required to be taken into account. The court held that the financial impact on the Association's members cannot be said to have been so obviously material that it was required to be taken into account. The claimants further alleged that there was no evidence that external shutters, blinds and awnings give rise to a fire risk and as such the ban was irrational. The court held that the SoS was entitled to be guided by the view of his technical experts that the materials used in these products could contribute to the risk of fire spread. The decision was therefore rational.

The judicial review claim was allowed on the basis of the consultation being unfair.

19. *R (on the application of British Gas Trading Limited) v The Gas and Electricity Markets Authority* [2019] EWHC 3048 (Admin)

Andrews J

The High Court allowed a judicial review claim brought by British Gas Trading Limited ("**British Gas**") against the decision of Ofgem to cap wholesale costs of energy, on the basis that the consultation was unfair as Ofgem had failed to inform British Gas of a material assumption.

Ofgem carried out a statutory consultation in September 2018 (the "**September consultation**") on introducing a price cap for default tariff customers. The consultation made no mention of the fact that the cap would be calculated using certain assumptions as to the behaviour of a "*typical*" supplier (the "**Continuity Assumption**"). British Gas, with the other five large energy companies as Interested Parties, brought a judicial review challenge arguing that the consultation was unfair.

The court accepted British Gas's argument that Continuity Assumption was undoubtedly material to the assessment of certain calculations within the cap. The Continuity Assumption had not been shared with the suppliers and they had not been provided with a fair opportunity to comment on it or correct it. The Continuity Assumption was not obvious on the face of either consultation papers. The court was guided by *R (Moseley) v Haringey LBC* [2014] UKSC 56 [2014] 1 WLR 3947 and *R (Keep the Horton General) v Oxfordshire Clinical Commissioning Group* [2019] EWCA Civ 646 on the principles of fairness in a consultation process. It noted that a consultation must afford a fair opportunity for those to whom the consultation is directed adequately to address the issue in question. In the present case, Ofgem had failed to provide the energy suppliers with sufficient information, as it did not communicate the Continuity Assumption or the underlying reason for making it when consulting or at any other stage before it made the decision. The court held that, in order to meet the requirement of fairness, it ought to have done so.

The court allowed British Gas's claim and granted declaratory relief.

Procedural issues

20. ***Good Law Project Ltd v Revenue & Customs Commissioners & Uber London Ltd*** **[2019] EWHC 3125 (Admin)**

Lieven J

The High Court considered an application from HMRC regarding the extent of its disclosure obligations in relation to information held by it in connection with its functions.

In judicial review proceedings brought by the Good Law Project ("**GLP**") against HMRC regarding HMRC's alleged failure to make protective VAT assessments against Uber London Limited ("**Uber**"), HMRC made an application under s. 18 Commissioners for Revenue and Customs Act 2005 ("**CRCA**")

seeking to limit its disclosure of information regarding its position in relation to Uber to whether, at the date of such disclosure, there had been a decision to assess Uber for any prescribed accounting period. It also sought to restrain the respondent from disclosing that information and to prevent non-parties from having access to it.

The court found that s. 18 CRCA struck an appropriate balance between the importance of taxpayer confidentiality and open justice. Section 18(2)(c) provides that where a disclosure is made for the purposes of civil proceedings, such as judicial review in the present case, the prohibition against HMRC disclosing taxpayer information in s. 18(1) does not apply. The decision whether or not disclosure is in fact made for those purposes is a matter for HMRC in the first instance. The court rejected Uber's argument that the test under s. 18(2)(c) is one of necessity based on the language of the statute. The court distinguished the case of *R (Ingenious Media) v HMRC* [2016] 1 WLR 4164, on which Uber relied in relation to the importance of the duty of confidentiality, finding that it did not support a test of necessity.

The court added that any intrusion into Uber's Article 8 right to confidentiality was slight, given that HMRC were being asked to disclose only whether a protective assessment had been made.

The court concluded that it was lawful for HMRC to make disclosure of whether it had made a protective assessment. It further stated that it was not necessary for the present application to be made, as this was a question for HMRC to decide in the first instance.

APPEAL OUTSTANDING TO COURT OF APPEAL.

21. ***Secretary of State For Transport (Appellant) v Arriva Rail East Midlands Ltd ("Arriva") (Respondent) & (1) Stagecoach East Midlands Trains Ltd (2) Abellio East Midlands Ltd (Interested Parties) : Secretary of State For Transport (Appellant) v Stagecoach East Midlands Trains Ltd ("SEMTL") (Respondent) & (1) Arriva Rail East Midlands Ltd (2) Abellio East Midlands Ltd (Interested Parties) : Department For Transport (Appellant) v West Coast Trains Partnership Ltd ("WCTP") & Ors (Respondent) & (1) MTR West Coast Partnership Ltd ("MTR") (2) First Trenitalia West Coast Ltd ("First") (Interested Parties): Secretary Of State For Transport (Appellant) v Stagecoach South Eastern Trains Ltd & Ors ("SSETL") (Respondent) & (1) South Eastern Railways Ltd ("SERL") (2) London And South East Passenger Rail Services Ltd ("Govia") (Interested Parties)*** **[2019] EWCA Civ 2259**

Newey LJ, Coulson LJ, Sir Rupert Jackson

The Court of Appeal dismissed an appeal brought by the SoS for Transport against a refusal of a strike out application in the rail franchising litigation, brought on the basis that the three-month time limit for judicial review applies.

The claim in question was founded in tort for breach of statutory duty under s. 2(1) of the European Communities Act 1972. The claimants sought damages for the consequences of the decision, rather

than seeking to overturn the decision itself. The judge at first instance held that there was no requirement that, where a breach of duty may give rise to both public law challenges and private law claims, the claim must be brought exclusively by judicial review proceedings. The SoS appealed.

The court rejected, on the basis that it is unsupported by case law, the appellant's argument that a claim in damages arising out of a public body's decision requires that the claimant pursue a claim for judicial review. It further rejected the argument of procedural exclusivity in situations where the facts give rise to causes of action in both public and private law. The present claim was not an issue of purely public law rights. In any case, the court held that there is clear authority that procedural exclusivity does not apply to a civil case which requires an examination of the validity of a public law decision.

The court did accept that, where a claim is for declaratory relief and/or injunctions, there is the potential that it could be an abuse of process if commenced outside the 3-month limit. However it considered that due to the complexity of the "*interleafing*" factual issues, this was not an issue that could be dealt with at an interlocutory hearing and there was a need to assess the evidence at trial.

In relation to which decision triggers the beginning of the three month time limit, the court was wary of extracting too many specific principles from case law where there is more than one decision which may fall to be challenged, as in the instant case, as the issues are heavily fact-dependant. The court commented in relation to procurement cases that they demonstrate that it is perfectly possible for a cause of action to arise on the issue of an invitation to tender but it may only crystallise when the claimant's tender is refused. In light of the fact-specific considerations, the court upheld the first instance judge's conclusion that the issue would require consideration of the evidence at trial.

22. *Competition & Markets Authority v (1) Flynn Pharma Ltd (2) Flynn Pharma Holdings Ltd (3) Pfizer Inc (4) Pfizer Ltd* [2020] EWCA Civ 617

Lewison LJ, Floyd LJ, Arnold LJ

The Court of Appeal allowed an appeal from the CAT on the appropriate starting point for the award of costs in a competition case.

The court rejected the argument put forward by the CMA that no order for costs should be made against a public body performing its functions unless it has acted unreasonably or in bad faith. The CMA relied on *BT v Ofcom* [2018] EWCA Civ 2542 as authority for this as an established principle. The court found that it had misinterpreted BT. Although the court in *BT* had rejected "*costs follow the event*" as the starting point, it had not unequivocally endorsed the principle that no order for costs be made against a regulator acting in a regulatory capacity, albeit that this is a starting point. The fact that the CMA is a regulator exercising its functions in the public interest is an important factor in the exercise of discretion as to costs, but does not establish a general rule. Apart from unreasonable conduct, there might be additional factors, specific to a particular case, which might also permit a departure from the starting point.

The court was not persuaded that other factors relating to the CMA's infringement decisions – such as its extensive enforcement powers – justified singling out competition infringement cases from the general approach.

Interim Relief

23. *R (on the application of the Governing Body of X) v (1) Office for Standards in Education, Children's Services & Skills (2) Department for Education* [2020] EWCA Civ 594

Sir Geoffrey Vos C, Lindblom LJ, Henderson LJ

The Court of Appeal dealt with an appeal against a refusal of an application for an interim injunction to restrain Ofsted from publishing a report on a school grading it as "*inadequate*", and also, sitting as the Divisional Court, refused permission to apply for judicial review in relation to the same.

In relation to permission to apply for judicial review, the court noted it will be particularly difficult to establish irrationality in the context of an evaluative judgement of a school inspection. The school's argument was that the inspectors placed too much on certain evidence (namely, the unsubstantiated views of a minority of pupils). The aspects of the report which were, in the school's view, "*inconsistent*" and "*contradictory*", were in the court's view the expression of appropriate balancing of all the relevant material. Changes in the moderation process from the draft to final report did not persuade the court that the conclusions reached on the evidence were irrational. The court therefore refused permission.

The court offered some clarification on applying *American Cyanamid* principles in public law proceedings, noting that in the context of publication of Ofsted reports there is a need for a suitably demanding approach. It rejected the school's argument that the threshold for interim relief should not be set too high. It was unpersuaded that the school's reputational damage, due to allegations of widespread and endemic use of racist and homophobic language, would not be in the public interest.

24. *R (on the application of Barking & Dagenham College) v Office for Students* [2019] EWHC 2667 (Admin)

ChamberlainJ

The High Court refused an application for interim relief by the Barking & Dagenham College (the "**College**") to restrain the OfS from publishing its decision to refuse the College's application for registration as a higher education provider in relation to certain regulated courses (the "**Decision**").

After being refused for registration as a higher education provider, the College launched a judicial review challenge against the Decision. Pending the judicial review challenge, it applied for interim relief to prevent the OfS from publishing the Decision. The OfS challenged this on the basis that it affected the freedom of expression (under s. 12 HRA 1998) of a public authority.

The court noted that the case law imposes a high hurdle for the grant of interim relief to restrain publication of a report by a public authority (*R v Advertising Standards Authority ex part Vernons Organisation Ltd* [1992] WLR 1289; *Taveta Investments Ltd v Financial Reporting Council* [2018] EWHC 1662 (Admin)). It found that the arguments of the college fell far short of the "*compelling grounds*", "*most compelling reasons*" or "*exceptional circumstances*" required to justify interim relief to restrain the OfS from publishing its decision. The judge saw no reason why an application to restrain publication pursuant to a power should, as a matter of principle, be easier to sustain than if it were pursuant to a duty. On the facts, certain existing students would be affected by the Decision, as their eligibility for student loans was now more precarious. Similarly, those considering applying to study at the College had an equally strong interest in knowing that the application for registration had been refused. The judge found it difficult to conceive of a case where it would be appropriate to use the coercive powers of the court to shield members of the public from such information on the ground that it might make them anxious. Instead the court considered that the right to receive information in their own interests should carry significant weight in the balancing exercise and fell within the scope of Article 10 ECHR.

While the court accepted the claimant's submission that the public may see the Decision as an indictment of the whole of the College's educational offering, rather than directly relevant only to certain regulated courses, it stated that the fact that information published by a public authority may be misconstrued by some of those who receive it is not a good reason for restraining publication. The court further accepted that publication of the Decision may cause "*considerable reputational harm*" but was not persuaded that the harm would be "*irreparable*".

The court refused the application for interim relief.

Private-Public Law Divide

25. *R (on the application of Liberal Democrat Party) v ITV Broadcasting Ltd; R (on the application of Scottish National Party) v ITV Broadcasting Ltd* [2019] EWHC 3282 (Admin)

Davis LJ, Warby J

The defendant television broadcaster ("**ITV**") scheduled a debate between the leaders of the two main political parties in the run-up to the December 2019 election. The claimant political parties applied for judicial review of ITV's decision to exclude them, arguing that since the debate would include neither of the leaders of their parties, it would be unfair to them and to the electorate and would be unlawful.

The High Court rejected the claimant's argument that ITV was performing a public function and that it should therefore be amenable to judicial review. The court noted that ITV is under no direct statutory obligation under The Communications Act 2003. Following guidance in *YL v Birmingham City Council* [2007] UKHL 7 and *R (Holmcroft Properties Ltd) v KPMG LLP* [2018] EWCA Civ 2093, the court found that the activities undertaken by ITV in this context are purely commercial. In particular in noted the source of its powers being its Memorandum; the function of commercial broadcasting not being quasi-governmental; and there being no obligation to broadcast an election debate. The court did not agree that Brexit constituted "*exceptional circumstances*" to overcome this general approach, even considering Ofcom's policy of not intervening before shows are broadcast and leaving the potential for no practical remedy to be available. The court concluded that ITV is not amenable to judicial review.

The court further expressed an obiter view on the arguable breach of the Broadcasting Code (the "**Code**"). The claimants argued that ITV had acted without "*due impartiality*" required by the Code. The court noted that due impartiality can be achieved over a period by a series of linked programmes, which, it found, was what ITV intended to do. The decision as to the televised debates was based on ITV's editorial judgement which was found to be done "*conscientiously and carefully*". The court found that there was no arguable breach of the Code. ITV had not taken irrelevant or immaterial factors into account or failed to take relevant or material factors into account; the decision could not be regarded as perverse. The fact that the claimants strongly disagreed with ITV's editorial judgment did not give rise to a valid objection in law.

The claim for judicial review was dismissed.

Competition

26. *Virgin Media Limited v Office of Communications* [2020] CAT 5

Falk J, Eamonn Doran, Simon Holmes

The **CAT** dismissed an appeal brought by Virgin Media Limited ("**VM**") against Ofcom's decision (the "**Decision**") that VM had contravened certain regulatory obligations that applied to electronic communications providers ("**CP**").

Under s. 194A CA 2003 the CAT must decide the appeal "*by applying the same principles as would be applied by a court on an application for judicial review*". There was no dispute that this needs to be interpreted compliantly with the requirements of Article 4 of the Framework Directive so that the "merits of the case are duly taken into account and that there is an effective appeal mechanism". The CAT explained that its role is not one of rehearing the case on its merits. Proper respect must be accorded to Ofcom's role as a specialist regulator, and the expertise of Ofcom's staff. The focus is Ofcom's decision and whether Ofcom got their decision materially wrong. The question is not what

decision the appellate body might itself have reached if it had started afresh. It is also not enough to identify some error in the reasoning of a decision. An appeal can only succeed if the decision cannot stand in the light of the error.

In the original Decision, Ofcom found that VM's early disconnection fee contravened an obligation imposed by Ofcom on CPs to ensure conditions or procedures for contract termination do not act as disincentives against changing CP ("**GC 9.3**"). The CAT did not consider that Ofcom had erred in law in finding a contravention of GC 9.3 by interpreting GC 9.3 in this way, nor that it was incompatible with the principle of legal certainty.

The CAT concluded the imposition of the penalty was not arbitrary, unfair or inadequately reasoned. The Decision was sufficiently reasoned and the CAT did not detect that Ofcom "*got something material wrong*". It found that the process was transparent and Ofcom had set out the factors it had considered.

The CAT further held that the quantum of the penalty (£7m) was appropriate and proportionate, taking into account the appropriate margin of appreciation to Ofcom as a specialist regulator. It had not considered irrelevant factors nor failed to consider relevant factors. The CAT did note one issue in the apparent failure to organise matters so that a separate but relevant decision on EE's practices could be considered, but concluded that this was not sufficiently material to call the Decision into question.

27. *TalkTalk Telecom Group plc and Vodafone Limited v Office of Communications (BCMR 2019)* [2020] CAT 8

Peter Freeman QC (Hon), Professor John Cubbin, Professor Anthony Neuberger

The **CAT** dismissed an appeal brought by TalkTalk Telecom Group plc and Vodafone Ltd against the decision by Ofcom (the "**Decision**") that British Telecommunications plc does not have significant market power in the market for contemporary interface access in the Central London Area.

This was a matter to which Article 4 of the Framework Directive applied, meaning the CAT had to ensure the merits of the case were duly taken into account whilst also applying judicial review principles following the amendment to the standard of review in 2017. After considering the recent case law, the CAT concluded that it should "*continue, as before, to scrutinise the Decision for procedural unfairness, illegality and unreasonableness but, in addition, we should form our own assessment of whether the Decision was "wrong" after considering the merits of the case. In doing so, we note that the Decision we are required to assess is a complex one, and only one part of an even more complex assessment, in which the knowledge and experience of a specialised sectoral regulator are heavily engaged. We must therefore "modulate" our approach to fit the circumstances of this case and allow an appropriate degree of respect for the regulator's expert assessment*."

The CAT held that the Decision contained no material errors.

28. *Ecolab Inc. v Competition and Markets Authority* [2020] CAT 12

Roth J, Sir Iain McMillan, Michael Waterson

The CAT)rejected an judicial review application brought by Ecolab against the CMA decision in its Report that Ecolab's merger with Holchem breached competition rules and resulted in a substantial lessening of competition (the "**SLC Decision**"). The CAT rejected all grounds.

The CAT rejected the argument that the SLC Decision was irrational on the basis that any SLC should have been limited to large UK only customers. The evidence in the report was clearly sufficient to support the finding that there was an SLC across the market as defined and the CMA could reasonably have come to that conclusion on the basis of the evidence. The CAT emphasised that this was not a merits appeal.

The CAT also rejected the argument relating to the alternative divestiture proposal ("**ADP**"), holding that it was neither legally erroneous nor disproportionate to seek a remedy that restored the market to pre-merger conditions. Again the CMA was well within its margin of appreciation on the evidence to conclude that the ADP was not an effective remedy. As there was no reason to suppose that further consultation would overcome the ADP's shortcomings, the CAT found there had been no failure to take reasonable steps to investigate whether doubts as to the effectiveness of the ADP could be addressed.

Tax

29. *JJ Management Consulting LLP v The Commissioners For Her Majesty's Revenue And Customs* [2020] EWCA Civ 784

Simler LJ, Popplewell LJ

The Court of Appeal affirmed a decision of the High Court to dismiss a judicial review challenge of a tax investigation led by HMRC. The investigation was informal in that it was not conducted pursuant to HMRC's enquiry powers under s. 9A of the Taxes Management Act 1970 ("**TMA**").

The court rejected the claimant's argument that the High Court had erred in finding that it was lawful for HMRC to conduct informal investigations. Under s. 9(1) of the Commissioners for Revenue and Customs Act 2005, HMRC has ancillary powers to do anything they think is necessary, expedient, incidental or conducive to the exercise of their functions. It was not unreasonable for HMRC to take the view that informal investigations were expedient and conducive to its primary tax collecting function. Informal investigations were also not found to be inconsistent with the TMA, which contemplates checks other than those pursuant to s. 9A TMA.

The court held that the High Court was correct in holding that judicial review of HMRC's power to conduct informal investigations is only available in wholly exceptional circumstances. Following *R v Panel of Takeovers and Mergers ex p Fayed* [1992] BCC, the wholly exceptional threshold was not limited to the criminal context and therefore could be applied in the civil context of investigative decisions of HMRC. The relevant logic behind the threshold applied to this context, including the reluctance of the court to interfere with powers entrusted to HMRC, the balance of public interest and policy investigations involved and the need to avoid satellite litigation. The circumstances of the case failed to meet this threshold due to the absence of any legitimate basis for concluding the investigation was conducted unlawfully.

30. *R (on the application of Aozora Gmac Investment Ltd) v Revenue & Customs Commissioners* [2019] EWCA Civ 1643

Underhill LJ, Rose LJ, Sir Bernard Rix

The Court of Appeal dismissed an appeal in relation to a judicial review claim of HMRC's decision to issue closure notices into Aozora GMAC Investment Ltd's ("**Aozora**") tax returns for 2007-2009.

Aozora made loans to its US subsidiary and received interest income. Relying on a representation in HRMC's international tax manual at the time, Aozora completed its tax returns for the relevant years on the basis that it would receive unilateral credit relief for the tax withheld by the US tax authorities. HMRC subsequently issued closure notices on the basis that the provisions of s. 793A ICTA1988 prevented the availability of unilateral credit relief. Aozora brought a judicial review claim contending that the representation in the manual gave rise to a legitimate expectation.

The court accepted that the representation in the manual was clear, unambiguous and unqualified. Ultimately however, the court found that the representation was weak as it was only a representation as to HMRC's opinion as to the law (which was in fact incorrect). The court also noted that Aozora

had not shown that it had suffered any serious detriment as a result of any reliance on the representation.

The court considered whether it would be conspicuously unfair for HMRC to resile from the representation (*R (Hely-Hutchinson) v HMRC* [2017] EWCA Civ 1075). Noting that this was a "very high hurdle indeed", it found that the degree of unfairness was not sufficiently high to prevent HMRC applying a revised interpretation of the law if their earlier, different interpretation was incorrect. There was a significant public interest in the correct collection of tax by HMRC.

The court dismissed the appeal.

Herbert Smith Freehills LLP

October 2020

JUDICIAL REVIEW TRENDS AND FORECASTS 2020

Judicial Review of the delegated power to legislate

Hanif Mussa, Blackstone Chambers

JUDICIAL REVIEW TRENDS AND FORECASTS 2020

The use and abuse of statutory instruments

Tom de la Mare QC, Blackstone Chambers
Alexandra Sinclair, Public Law Project and LSE

JUDICIAL REVIEW TRENDS AND FORECASTS 2020

The Post-EU Transition Landscape: Trade and Sanctions

Chair: Dr Julinda Beqiraj , Maurice Wohl Senior Research Fellow in European Law, Bingham Centre for the Rule of Law

Zahra Al-Rikabi, Brick Court Chambers
Kate Meakin, Herbert Smith Freehills
Dr Federico Ortino, Kings College London
Naina Patel, Blackstone Chambers

Blackstone
CHAMBERS

The Post-EU Transition Landscape: Trade and Sanctions

Domestic Public Law Challenges

Naina Patel
October 2020

Domestic public law challenges in trade and sanctions

- Relevant legal framework
- Some key areas where challenges are likely
- What we can learn from existing law about how such challenges are likely to be approached

Domestic public law challenges to trade decisions:

- Challenges to the domestic implementation of international trade agreements
- Challenges to decisions to impose/suspend import and/or export duties
- Challenges to enforcement decisions

The Trade Bill provides the domestic framework for the implementation of international trade agreements:

- s.2(1) provides that “an appropriate authority may by regulations make such provision as the authority considers appropriate for the purpose of implementing an international trade agreement to which the UK is a signatory”
- s.2(3)-(4) restrict such regulations to agreements to which the other signatory and the EU were signatories before exit day
- s.2(5) provides that regulations may not make provision that could be made by regulations under section 9 of the Taxation (Cross-border Trade) Act 2018 (preferential rates: arrangements with other countries/territories)

At the time of writing, the Trade Bill has been introduced in the House of Lords where various amendments have been proposed including clauses which prevent regulations which are inconsistent with:

- The UK's obligations in international law in areas such as the environment and labour (and eg. the Sustainable Development Goals)
- The UK's domestic protection in areas such as food standards, animal welfare and a publicly funded heath service
- Various stipulations in relation to process such as human rights and equalities impact assessments
- Various stipulations in relation to dispute resolution (a multilateral investment tribunal, UK courts and tribunals)

One proposed amendment has stated:

- Regulations made under section 1(1) or section 2(1) are revoked if the High Court of England and Wales makes a preliminary determination that they should be revoked on the ground that another signatory to the relevant agreement as committed genocide under Article II of the UN Convention on the Prevention and Punishment of the Crime of Genocide, following an application to revoke the regulations on this ground from a person or group of persons belonging to a national, ethnic, racial or religious group, or an organisation representing such a group, which has been the subject of that genocide
- It has been suggested that the purpose of the amendment is to allow Uighurs and other minorities to petition a High Court judge to require the UK to curtail trade ties with China

The framework for the introduction of homegrown customs regime subject to the provisions of any international agreements given effect in domestic law: the Taxation (Cross-border Trade) Act 2018

- s.8 provides for the introduction of a customs tariff system through secondary legislation which will classify goods according to eg. their nature/origin and specify the rate of duty applicable to them (see tool)
- s.8(5) provides that *"in considering the rate of import duty that ought to be applied to any goods in a standard case, the Treasury must have regard to:*
  (a) the interests of consumers in the UK,
  (b) the interests of producers in the UK of the goods concerned,

(c) the desirability of maintaining and promoting the external trade of the United Kingdom,

(d) the desirability of maintaining and promoting productivity in the United Kingdom, and

(e) The extent to which the goods concerned are subject to competition."

- s.8(6) provides that in making its decision, the Treasury must also have regard to any recommendation about the rate made to them by the Secretary of State.
- s.8(7) provides that in considering what recommendation to make, the Secretary of State must have regard to the matters set out in ss.5(a)-(e).

- s.12 provides for tariff suspension through secondary legislation, securing a lower rate of duty than the customs tariff for specified goods for a specified period
- s.12(2) provides that the regulations must provide that the SoS is obliged to:
  "(a) consider a request made by any person for goods to be specified goods for the purposes of the regulations, and
  (b) To make recommendations to the Treasury about the request."
- s.13 provides for the SoS to accept recommendations from the TRA to impose additional import duty in response to dumping, foreign subsidy and increased imports causing injury to UK industry/producers

- s.3 imposes an obligation to declare goods for a customs procedure (free circulation or special) on import
- s.5 creates a liability to forfeiture in relation to chargeable goods which are imported into the UK and not presented to customs on import where required
- forfeiture is governed by Part IX of the Customs and Excise Management Act 1979: see s.139
- s.6 imposes liability on others besides those in whose name the declaration is made: see s.6(2)-(6)

Challenges to the domestic implementation of international trade agreements:

- On the basis that they are ultra vires s.2(1) of the Trade Bill (note the regs will be such that the authority (Minister) considers appropriate; cf. *Ahmed v HM Treasury* [2010] 2 AC 534 where s.1 of the UN Act 1946 empowered him to make *"such provision as appears to him to be necessary or expedient for enabling those measures to be effectively applied"*
- On the basis that the authority (Minister) has erred in law in its construction of the international trade agreement (standard of review)
- On the basis of the principle of legal certainty (see *R (OJSC Rosneft) v HM Treasury* [2015] EWHC 248 (Admin)

Challenges to decisions to impose import duties :

- Where regulations go beyond the powers conferred by the parent Act eg. s.51 and the Cross-border Trade (Public Notices) (EU Exit) Regulations 2019
- In relation to the imposition of the customs tariff or tariff suspension, in relation to irrational consideration eg. failure to have regard to relevant factors as per s.8(5) (to the FTT: s.7, 13A and 16 of the Finance Act 2003 as amended)
- In relation to additional tariffs, in relation to the treatment of TRA recommendations (to the UT (TCC) on JR principles: reg. 18 of Trade Remedies (Reconsideration and Appeals) (EU Exit) Regulations (cf. Case T132/01 *Euroalliages*)

Challenges to enforcement decisions:

- In *R (First Stop Wholesale Ltd) v Revenue and Customs Commissioners* [2015] AC 1101 two wholesalers appealed the detention of goods under s.139(1) which the Supreme Court held contained a temporary power of detention pending investigations which had previously been held to arise by necessary implication from statutory powers of examination
- S.139(1A) now permits detention where an officer, constable or member of the armed forces or coastguard reasonably suspects that something is liable to forfeiture
- Sch.3, para 3 provides for challenges to seizure to be made within one month of the date of the notice of seizure to the Magistrates' Court

Domestic public law challenges to sanctions decisions:

- Challenges to refusals to designate
- Challenges to decisions to designate
- Challenges to failures to apply exemptions

The framework for designation (focusing on the Global Human Rights Sanctions Regulations 2020):

- Reg. 6(1) states that the SoS may not designate a person unless the SoS:

  (a) "has reasonable grounds to suspect that the person is an involved person; and

  (b) considers that the designation of that person is appropriate, having regard to –

  (i) the purposes stated in regulation 4, and

  (ii) the likely significant effects of the designation on that person (as they appear to the SoS to be on the basis of information that the SoS has)"

- Reg. 6(2) defines an *"involved person"* to include a person who has been *"involved in an activity falling within reg.4(2)"*, namely an activity which, if carried out by or on behalf of a State within the territory of that State would amount to a serious violation of the right to life, the prohibition on torture and CIDT, and the prohibition on slavery, servitude and forced or compulsory labour

- Reg. 6(3) defines a person as being *"involved in an activity falling within regulation 4(2)"* if eg. *"the person is responsible for or engages in such an activity"* but also in a range of other scenarios

The FCO Policy Paper *Global Human Rights Sanctions: considerations of designations* (6 July 2020) aims to highlight factors relevant to whether a person may be designated eg.:

- HMG's human rights priorities including published themes
- The nature of the victim eg. journalists and human rights defenders
- The seriousness of the conduct (the violation and involvement)
- International profile and collective action
- Non-state actors (where significant degree of control acquired)
- The status and connections of the involved person (maximising impact for accountability where eg. links to the UK)
- The effectiveness of other measures including law enforcement

Challenges to refusals to designate:

- The *Information Note for NGOs and Civil Society* (6 July 2020) is said to be to *"support understanding of the regime for those who may wish to submit information to the FCO concerning specific designations"*
- It identifies the information required in considering a designation and provides an email address for the submission of information
- However, it also states that the FCO will be *"unable to provide comments, updates or feedback on proposed designations, evidence or other information that has been submitted"*
- This does not preclude a challenge where eg. information is submitted and no designation is ultimately published

- The *Sanctions and Anti-Money Laundering Act 2018* appears to permit such a challenge:
  - s.38(1)(d) states that it applies to *"any other decision of an appropriate Minister in connection with functions of that Minister under…regulations under this Part"*
  - s.38(2) provides that *"the appropriate person may apply to the High Court…for the decision to be set aside"*
  - s.38(4) provides that *"in determining whether the decision should be set aside, the court must apply the principles applicable on an application for judicial review"*
  - s.38(5) makes provision for any relief that may be given in judicial review

Challenges to decisions to designate:

- The *Sanctions and Anti-Money Laundering Act 2018* makes express provision for such challenges in two stages.
- The first stage:
  - s.23(1) provides for a designated person to request the Minister to vary or revoke the designation while it has effect
  - s.23(2) provides that where such a request has been made, no further request may be made in respect of that designation unless the grounds of the further request are/include that there is a significant matter which has not previously been considered by the Minister
  - s.23(3) provides that the Minister must decide whether to vary, revoke or take no action with respect to the designation

- The *Sanctions Review Procedure (EU Exit) |Regulations 2018* make provision in relation to the procedure for the first stage:
  - reg. 4 provides for the content of requests
  - reg. 6 entitles the Minister to ask the requester for further information which must be provided as soon as reasonably practicable
  - reg. 7 requires the Minister to make the decision on the request as soon as reasonably practicable after receiving the information needed for making the decision
  - reg. 8 provides for notification of the decision and permits exclusion of certain matters from the reasons given on grounds of national security, international relations, the prevention or detection of serious crime or the interests of justice

- The guidance *Making a sanctions challenge: how to seek a variation or revocation of a sanctions designation* (6 July 2020):
  - advises the completion of a Sanctions Challenge Form: Designated Persons
  - envisages challenges in 2 scenarios:
    - where the reasons for the designation or details contained therein are incorrect
    - where the designation is inappropriate having regard to the purpose of the regime or the likely significant effects of the designation
    - explains if not satisfied you can challenge the decision in the courts

- The second stage:
  - s.38(1)(a) states that it applies to *"any decision under section 23(3)"of an appropriate Minister in connection with functions of that Minister under…regulations under this Part"*
  - s.38(1)(d)(i) excludes *"decisions to make or vary, or not to revoke or vary, a designation under a designation power where the designated person has a right to make a request under section 23 or would have but for section 23(2)"* provides that *"the appropriate person may apply to the High Court…for the decision to be set aside"*
  - s.38(2) and (4) make provision for applications for judicial review to the High Court as considered previously
  - s.38(5) on relief is subject to s.39(1)-(4) restricting damages to cases of negligence or bad faith

- The grounds for either designation challenge might include:
  - a failure to make proper inquiries in relation to obtaining relevant information
  - a failure to take into account relevant considerations such as (but not only) those set out in the Policy Paper
  - error of law as to the test for designation
  - irrationality in forming the view that:
    - there are/are no reasonable grounds for suspecting that the person is an involved person
    - the designation of the person is/is not appropriate

Challenges to failures to apply exemptions:

- reg. 20(1) provides that the asset-freeze provisions do not apply to anything done under the authority of a licence issued by HMT
- reg. 20(2) provides that a licence may be general or in relation to acts by a particular person or persons of a particular description
- reg. 20(3) provides that licences may only be issued in relation to particular persons for purposes set out in Schedule 2 eg.
  - To enable the basic needs of a designated person or dependent family member to be met
  - to enable payment of reasonable professional fees for legal services
  - *“to enable anything to be done to deal with an extraordinary situation”*

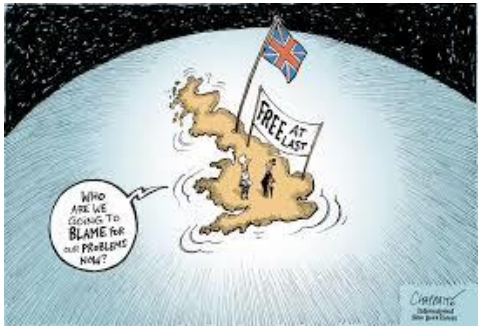
- The recent case of *R (Certain Underwriters at Lloyds London) v HMT Treasury* [2020] EWHC 2189 (Admin), reg. 20(1) concerned access to information about frozen assets to enable an application to be made to rely on the exemption for judgment satisfaction (here found in Article 18 of Consolidated Regulation (EU) No.36/2012))
- The High Court found that the restriction in Article 29 on using information only for the purpose for which it was provided or received ie. to facilitate compliance with the Regulation extended to complying with derogations as well as restrictions
- The judgment records the provision appearing in 25 odd EU regimes
- Interesting questions about application of the ruling to the new regime given eg. the language in reg. 30

Revisiting recent jurisprudence

- No need for the *Bredenkamp* exception to the *Foto-Frost* principle
- Where domestic sanctions mirror or closely track EU sanctions, there is the question of the need for and interplay between domestic and EU challenges which is illustrated by a discussion of recent decisions
- In *R (Melli Bank Plc) v HMT* [2008] EWHC 1661 (Admin) an interim injunction against EU sanctions being enforced in the UK pending an application for interim measures to the CFI was refused on the basis the Court had no serious doubts about the validity of the EU measure upon which the legality of the UK measure depended (see also *R (Rosneft) v HM Treasury* [2014] EWHC 4002 (Admin))

- Traditional arguments of irrationality and disproportionality and procedural fairness as advanced in *Bank Mellat v HM Treasury* [2014] AC 700 (sanctions under Counter-Terrorism Act 2008)
- Burden on HMT to justify the order it has made: *C v HM Treasury* [2016] EWHC 2039 (Admin) (reasonable belief vs. grounds to suspect)
- Closed material procedure may be invoked: *R (Sarkandi) v SSFCO* [2015] EWCA Civ 687
- Licensing exemptions are to be construed restrictively and in light of the aims of the legislation: *R (Ezz) v HM Treasury* [2016] EWHC 1470 (Admin)

- Essential EU principles include effective judicial protection, rights of defence, need to state/substantiate reasons, unjustified/disproportionate restriction of fundamental rights, manifest error of assessment, breach of legitimate expectation and abuse of powers
- EU challenges have also enabled indirect challenge to UN sanctions implemented by the EU since Case C-402/05 P *Kadi cf.* s.25(2) of the Act entitling requests that the SoS use best endeavours to secure de-listing
- Ultimately better or worse off?



QUESTIONS AND DISCUSSION

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CHAMBERS

THE POST-EU TRANSITION LANDSCAPE: TRADE AND SANCTIONS

External and Internal Implications for UK Trade

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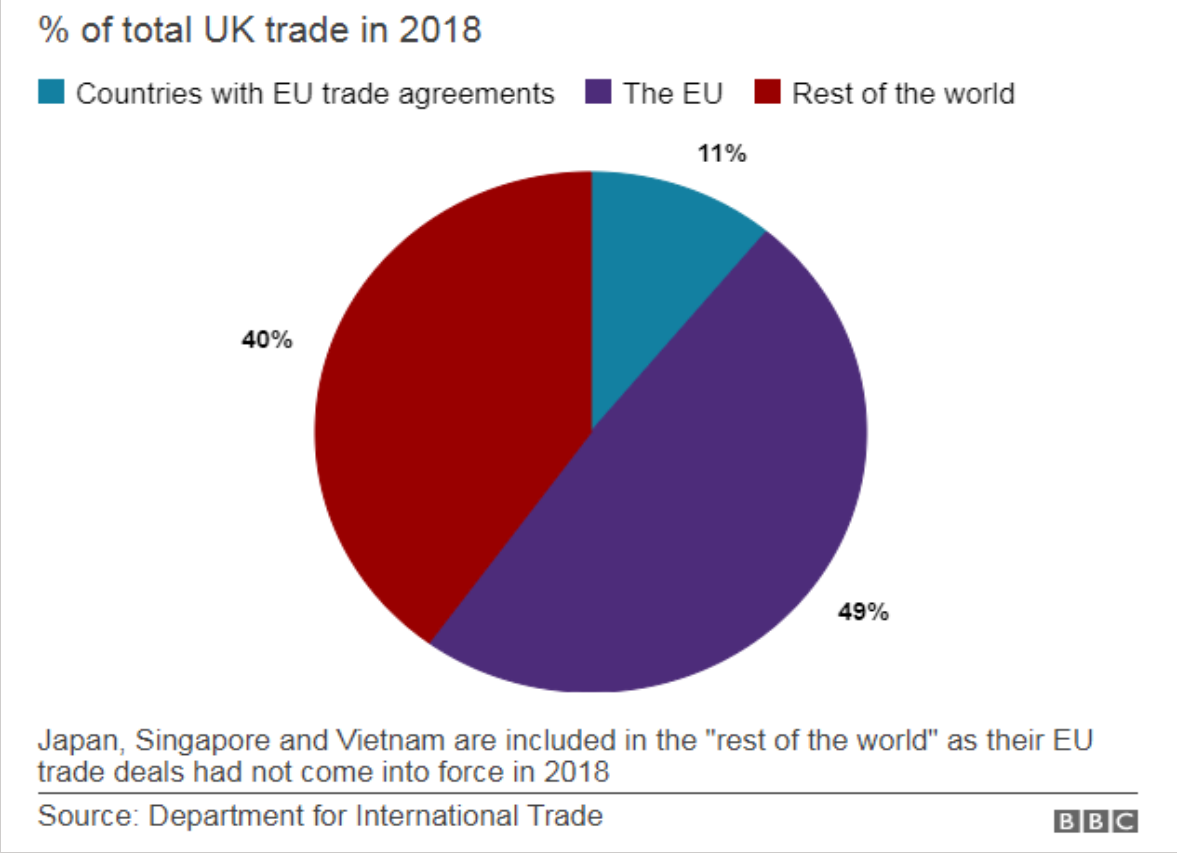
THE IMPACT OF BREXIT ON UK TRADE

Until 31 Dec 2020, the UK is:

- Part of the EU customs union
- Part of the EU single market
- Party to free trade agreements that the EU has concluded
- Bound by the EU's WTO schedules



FROM 1 JANUARY 2021

- In the absence of an agreement, the UK's membership of the customs union and single market comes to an end.
- The UK will cease to be party to FTAs concluded by the EU with third countries. The UK is seeking to reproduce the effects of existing EU agreements.
- If there is no trade agreement between the UK and another WTO member, trade will be under WTO rules.

POST – BREXIT TRADE LEGISLATION

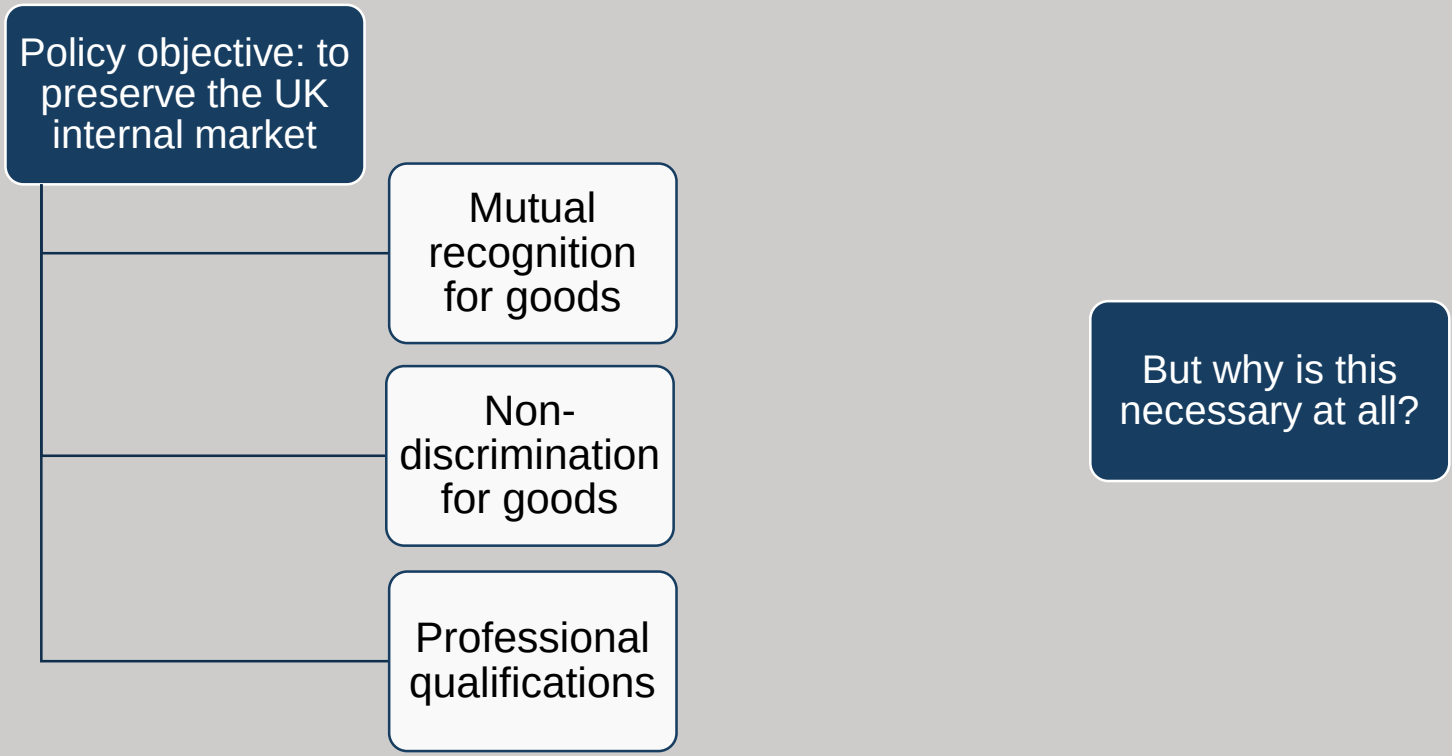
Taxation (Cross-border) Trade Act 2018

- Sets out the legislative framework for a new UK customs regime
- Amends primary legislation on VAT and excise duties
- Delegates wide ranging powers to Ministers to make provision for all three regimes.
- Received Royal Assent on 13 September 2018.

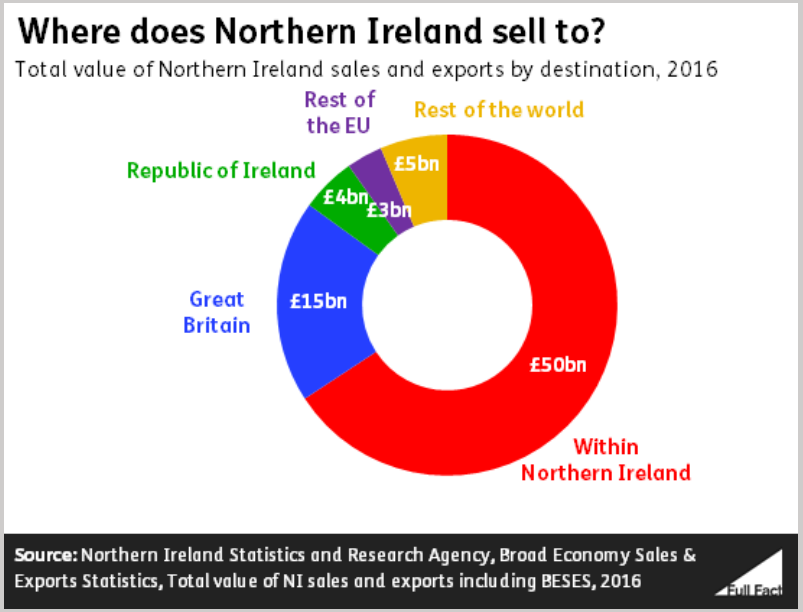
Trade Bill 2019-2021

- Implementation of international trade agreements that correspond to EU trade agreements in place before the end of the transition period
- Implementation of WTO's Government Procurement Agreement as an independent WTO member
- Establishment of the UK Trade Remedies Authority

INTERNAL MARKET BILL



THE NORTHERN IRELAND PROTOCOL



POTENTIAL BREACH OF THE NI PROTOCOL

- Clause 44: enabling provision, giving the Secretary of State the power to make regulations concerning the application of exit procedures to goods, or a description of goods, when moving from NI to GB;
- Clause 45: enabling provision, giving the Secretary of State the power to make regulations concerning Article 10 of the NI Protocol (State aid)
- Clause 47: clauses 44 and 45 and any regulations made thereunder to have effect notwithstanding any relevant international or domestic law with which they may be incompatible or inconsistent.
- On 17 September, the Government issued a statement setting out the circumstances in which it would use the powers provided for under clauses 42 and 43: the Government would

> "ask Parliament to support the use of the provisions in Clauses 42, 43 and 45 of the UKIM Bill, and any similar subsequent provisions, only in the case of, in our view, the EU being engaged in a material breach of its duties of good faith or other obligations, and thereby undermining the fundamental purpose of the Northern Ireland Protocol."

OUSTER CLAUSE

- 47(4) provides:

  > No court or tribunal may entertain any proceedings for questioning the validity or lawfulness of regulations under section 44(1) or 45(1) other than proceedings on a relevant claim or application.

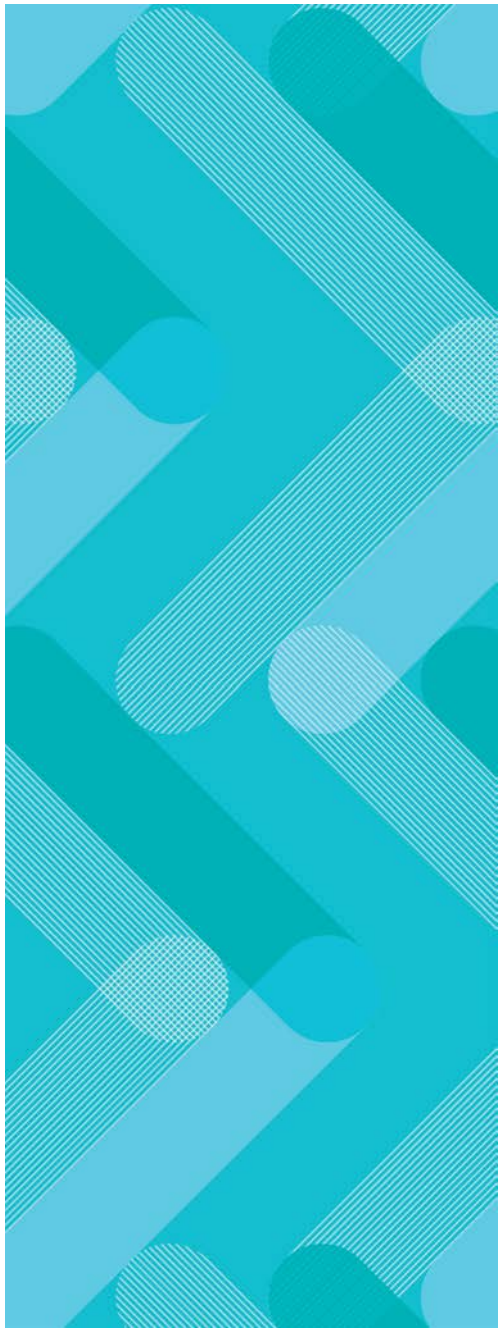
- 47(6) provides that the jurisdiction and powers of a court or tribunal in relation to a relevant claim or application are subject to subsections (1) and (2)
- 47(8) defines relevant claim or application as meaning a claim for JR in relation to England & Wales, an application to the supervisory jurisdiction of the Court of Session in relation to Scotland, or an application for JR in relation to Northern Ireland where the claim or application is for the purpose of questioning the validity or lawfulness of regulations under section 44(1) or 45(1).
- Non-exhaustive definition of “relevant international or domestic law” set out in 47(8).

Sanctions

The Impact of Brexit

Kate Meakin

Herbert Smith Freehills



1. Pre-Brexit Sanctions Framework
2. Position during Transition
3. Position post-Brexit

Position pre-Brexit

International sanctions framework

International sanctions framework: a brief recap

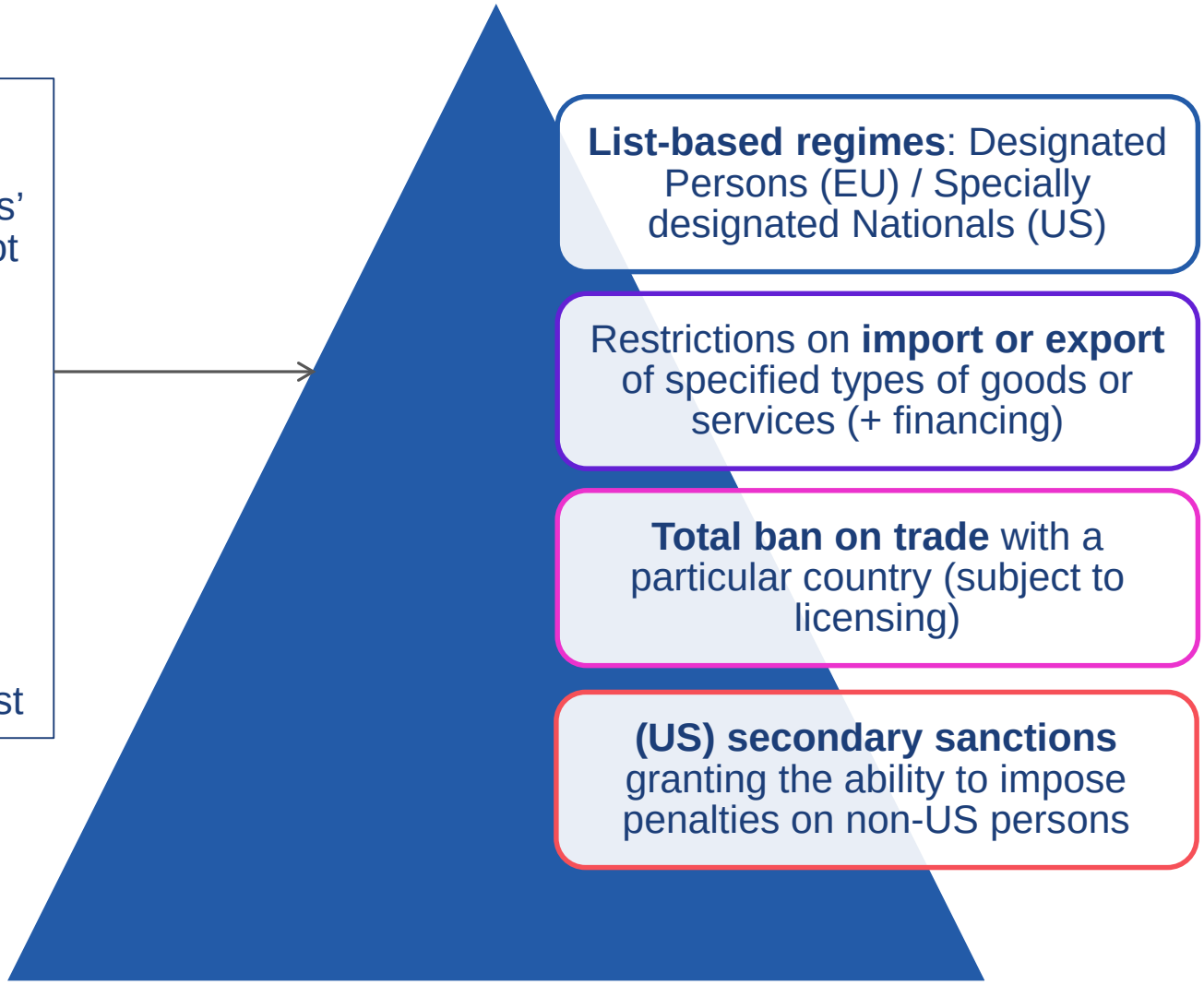
Sanctions – Types

Specific financial sector and related restrictions

- E.g. Russian 'capital markets' sanctions – list-based but not a full asset freeze

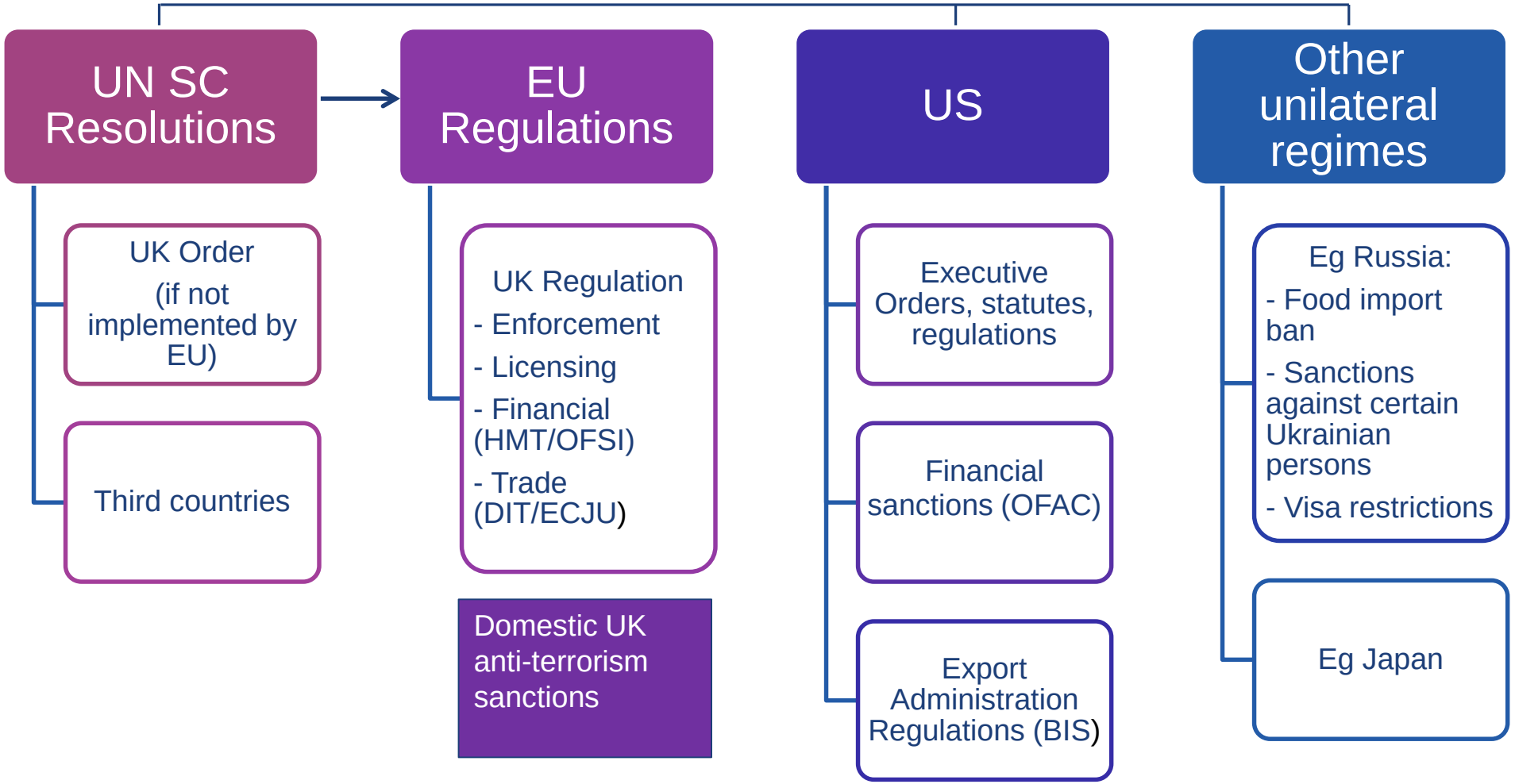
Other historic examples include (since repealed):

- Iran: Financing/bond issuances by GoI
- Iran: Funds transfers – authorisation requirements
- Myanmar: Investment ban list



International sanctions framework: a brief recap

Sanctions - Sources



EU position and transition

Current EU sanctions regime

UK implementation of EU sanctions

- UK's current sanctions regime derived from the EU.
- In the EU:
  - Implementation of UN Security Council Resolutions happens by EU Decision and Regulation.
  - The Regulations have direct effect in member state law including the UK but require member state action to impose penalties and to carry out licensing in accordance with the Regulation.
  - Although the EU routinely implements UN sanctions, it will also impose its own sanctions measures, either going beyond those introduced by the UN or, in the case of Russia for example, introducing its own regimes without a UN precedent.
  - Enforcement of financial sanctions in the UK is the responsibility of the Office of Financial Sanctions Implementation ("**OFSI**").
- **EU sanctions regime will continue to apply throughout the Brexit transition period (end of transition period currently set as 31 December 2020).**

Current EU sanctions regime

Enforcement

- HMT (OFSI) is responsible for **UK financial sanctions licensing and enforcement**:
  - EU asset freezes: Regulations under European Communities Act
  - Domestic asset freezes: Terrorist Asset-Freezing etc. Act 2010, Anti-Terrorism Act 2001 (designations), Counter-Terrorism Act 2008 (directions)
  - OFSI maintains Consolidated List – contains persons subject to EU and UK domestic asset freezes
  - OFSI responsible for licensing in respect of DPs – decisions taken in accordance with licence grounds set out in underlying EU Regulation
  - Reports on sanctions 'hits' and breaches to OFSI (reporting obligation usually set out in schedule to each UK Regulation)
- **During Brexit transition period, OFSI will continue to enforce breaches of those restrictions (via individual UK statutory instruments which criminalise breaches of the provisions in the relevant EU regulation for each regime), and remains responsible for granting licences under EU financial sanctions.**

SAMLA

- The **Sanctions and Anti-Money Laundering Act 2018** received Royal Assent on 23 May 2018.
- SAMLA creates a legal framework for the imposition of sanctions by the UK post-Brexit.
- Sanctions may be imposed under the Act for a broad range of purposes, including the prevention of terrorism, UK national security, international peace and security, protecting human rights, and anti-WMD proliferation.
- The Act allows the UK to impose sanctions for reasons beyond those currently imposed at UN or EU level.
- Impact Assessment indicated there would be no overall policy change in approach to sanctions – but the Foreign Secretary has stated that the Act will give the UK full control of its own sanctions policy.
- Expectation is that, to begin with at least, the UK will mirror the current EU sanctions post-Brexit.
- Potential that, over time, UK sanctions may diverge from EU sanctions.

Recent UK developments and looking ahead

Signs of divergence?

UK sanctions developments: Magnitsky regime

Human rights focus:

Targeting individuals and entities deemed to be responsible for or involved in certain high profile human rights abuses, including relating to the right to life, the right to be free from torture and other cruel and degrading treatment, and the right to be free from slavery and forced labour.

UK regime already in force:

6 July 2020: UK imposed an asset freeze on 49 individuals and entities

25 individuals linked to the Magnitsky case, 20 individuals linked to the Khashoggi case, two generals of the Myanmar Armed Forces and two entities involved in prison camps in North Korea.

29 September 2020: eight individuals added to the consolidated list including President Lukashenko, and a number of other Belarussian individuals.

Divergence from EU:

- EU Magnitsky regime not yet in place.
- Development shows that UK are willing to diverge from EU before the end of the transition period.
- Could this signal closer alignment with the US sanctions regime? Almost all of the designated persons on this UK list also appear on the equivalent US SDN list.

EU/UK sanctions developments: cyber sanctions

Cyber sanctions

- In force from 30 July 2020
- Currently apply to six individuals and three entities (China, Russia, North Korea) responsible for or involved in **cyberattacks** – focus on **attacks affecting EU/Member States**
- UK Cyber (Sanctions) (EU Exit) Regulations 2020 contain **broader designation grounds** including **cyber-activity** undermining the **integrity, prosperity or security** of the UK or another country

UK sanctions – what does the future hold?

Short-term impact

- Broadly the same as EU

Medium-term impact

- Divergence from EU pre-Brexit
- Potential for differences in interpretation and licensing approach

Long-term impact (no crystal ball but…)

- Closer alignment to US?
- How will UK use its new broader designation powers?

Further resources

HSF CCI and FSR Blog

https://hsfnotes.com/fsrandcorpcrime/

JUDICIAL REVIEW TRENDS AND FORECASTS 2020

Using the law to protect the vulnerable during COVID-19

Chair: Rosa Curling, Leigh Day
Ayesha Christie, Matrix Chambers
Deborah Gellner, ASAP
Khatija Hafesji, Monckton Chambers
Julian Milford QC, 11 Kings Bench Walk

JUDICIAL REVIEW TRENDS AND FORECASTS 2020

Access to justice: Challenging unlawful systems and obtaining redress

Charlotte Kilroy QC, Blackstone Chambers
Jacqui McKenzie, Centre for Migration Advice and Research and Mckenzie Beute Pope
Chai Patel, Joint Council for the Welfare of Immigrants
Harriet Wistrich, Birnberg Peirce and Centre for Women's Justice

JUDICIAL REVIEW TRENDS AND FORECASTS 2020

Race discrimination claims

Chanel Dolcy, Bhatt Murphy
Sara Lomri, Public Law Project
Denisa Gannon, Coventry Law Centre
Allison Munroe QC, Garden Court Chambers
Farhana Patel, Bindmans

JR Trends + Forecasts 2020
Tackling Systemic Race Discrimination

Chanel Dolcy
Bhatt Murphy

Summary

- Civil claims v Public Law proceedings
- Equality Act 2010 (discrimination)
- The Public Sector Equality Duty (s.149 Equality Act 2010)
- Article 14 ECHR
- Case Studies
  - Hostile Environment
  - Automatic Facial Recognition

Civil Claims v Public Law

- Judicial Reviews are often a more appropriate mechanism than civil claims to achieve accountability where the case raises a particular point of law and there are no major factual disputes.
- In some situations the only appropriate remedy is judicial review (eg to quash a caution).

Equality Act 2010

Discrimination – Prohibited Conduct

- 13.Direct discrimination
- 14.Combined discrimination: dual characteristics
- 15.Discrimination arising from disability
- 16.Gender reassignment discrimination: cases of absence from work
- 17.Pregnancy and maternity discrimination: non-work cases
- 18.Pregnancy and maternity discrimination: work cases
- 19.Indirect discrimination

Public Sector Equality Duty (PSED)

- s. 149 outlines the public sector equality duty which provides that a public authority must, in the exercise of its functions, have due regard to the need to—

  (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

  (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

  (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it. (s. 149(1))

- Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

  (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

  (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

  (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low. (s.149(3)).

- The relevant protected characteristics are: age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation (s.149 (7))

Background to the PSED

- The background to the PSED can be found in the Stephen Lawrence Inquiry Report in 1999, which led to the Race Relations (Amendment) Act 2000.
- That Act introduced a new section 71 into the Race Relations Act 1976 , to replace an earlier version which had applied only to local authorities. The provision has since been expanded to embrace other protected characteristics and now finds its place in section 149 of the Equality Act 2010 .

Article 14 ECHR

Article 14 ECHR provides

> *"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."*

Article 14 is not a free-standing anti-discrimination provision but relates only to the enjoyment of the other Convention rights set out in the ECHR. A violation of, or interference with, the other rights does not need to be established, but the facts must fall within the "ambit" of one of those rights. [Ghaidan v Godin-Mendoza [2004] 2AC 557; Bah v United Kingdom (2012) 54 EHRR 21]

Hostile Environment Challenge I

R (On the Application Of) v Secretary of State for the Home Department [2019] EWHC 452 (Admin) (01 March 2019)

The Facts

- The case concerns one aspect of the "hostile environment" established by the Government to encourage irregular migrants to leave the UK.
- By the relevant sections of the Immigration Act 2014, a scheme was set up in a pilot area imposing obligations on landlords to take measures to ensure that they do not provide private accommodation to disqualified persons.
- A landlord is forbidden to rent a property to a disqualified person, namely a person other than a British, EEA or Swiss national who needs but does not have leave to enter or remain in the UK. The landlord must (to ensure he avoids a civil penalty) either request, obtain, check and copy the relevant identity documents before renting the property.
- The aim of the Scheme is that persons who are in the UK illegally should not be able to obtain residential tenancies from landlords.

The Challenge

- The challenge is that the scheme casts the net cast too wide and the effect has been to cause landlords to commit nationality and/or race discrimination against those who are perfectly entitled to rent with the result that they are less able to find homes than (white) British citizens.
- The Scheme has had an unintended effect of landlords acting in a way that is discriminatory on grounds of both nationality and race, not because they want to be discriminatory but because the Scheme causes them to be discriminatory as a result of market forces.

Hostile Environment Challenge II

The Claimant sought:

1. A declaration pursuant to s.4 Human Rights Act 1998 that sections 20-37 Immigration Act 2014 (i.e. the Scheme) are incompatible with Articles 8 and 14 ECHR; and

2. An order:
    i. Quashing the Defendant's decision to extend the Scheme across the UK on the grounds that the Scheme gives rise to an inherent and unacceptable risk of illegality and because the decision breached s.149 Equality Act 2010 (the public-sector equality duty); alternatively
    ii. Declaring that a decision by the Defendant to commence the Scheme in the rest of the UK without further evaluation of its discriminatory impact would be irrational and a breach of s.149 Equality Act 2010.

Hostile Environment Challenge III

Mr Justice Spencer opens his judgement at paragraph 1 by quoting Lord Nicholls of Birkenhead, in Ghaidan v Godin-Mondoza [2004] 2 AC 557:

> *"**Discrimination is an insidious practice. Discriminatory law undermines the rule of law because it is the antithesis of fairness. It brings the law into disrepute. It breeds resentment. It fosters an inequality of outlook which is demeaning alike to those unfairly benefited and those unfairly prejudiced.**"*

Mr Justice Spencer adds that for legislation to be castigated as discriminatory is therefore a serious accusation, and is to be treated seriously by any court before which such an accusation is made.

Hostile Environment Challenge IV

The Divisional Court Held:

- Article 8 - did not give anyone the right to a home, but it gave everyone the right to seek to obtain a home for themselves and their family. Where the state interfered with the process of seeking to obtain a home, it had to do so without causing discrimination. The way the scheme operated impaired the ability of an individual to acquire settled accommodation in which to enjoy a private and family life and was enough to bring it within the scope of art.8 (see para.68 of judgment).
- Causation - The evidence strongly showed not only that landlords were discriminating against potential tenants on grounds of nationality and ethnicity but also that they were doing so because of the scheme. The causal link with the scheme was not only asserted by the landlords but was a logical consequence of the scheme (para.93).
- Justification - The secretary of state had failed to justify the scheme. Even if the scheme had been shown to be efficacious in controlling immigration, that would be significantly outweighed by the discriminatory effect. In addition the evidence showed that the scheme had little or no effect. (paras.123-124).
- PSED - any decision to further roll-out the Scheme without such further evaluation would be irrational and a breach of Section 149 of the Equality Act 2010

Hostile Environment Challenge V

R. (on the application of Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department [2020] EWCA Civ 542

- The Secretary of State appealed the Divisional Court decision to the Court of Appeal which held:
    - The Admin court had been correct in determining the scope of Article 8, 14 and causation. However, the Scheme was justified on the usual balancing exercise inherent in the assessment of proportionality.
    - The Court of Appeal held first that, since the challenge brought was to the operation of the Scheme as a whole (rather than to discrimination in a specific case), it needed to be shown that the Scheme was not capable of operating lawfully, and operated unlawfully in all or almost all cases. This was not the case.
    - Second, it held that the Scheme was a proportionate means of meeting the legitimate aim of discouraging illegal immigration (balancing the nature and level of discrimination and the benefits to the immigration system and taking into account the respect to be accorded to Parliament's expertise and judgment in this area)

Automatic Facial Recognition Challenge I

R (on the application of Edward Bridges) v The Chief Constable of South Wales Police [2020] EWCA Civ 1058

The Facts

- The Court was presented with its first opportunity to consider the deployment by the state of AFR technology. This is being used by several forces across the UK. The challenge in this case was to a pilot being run in South Wales.
- At the time of challenge there had been over fifty deployments resulting in around half a million faces being scanned. The data was processed by the software to apply a number of identifiers, the total effect of which was to provide a data set that created a unique identifier for an individual.
- This was then checked against three watchlists containing images of individuals whose data was held by SWP and who were of interest.

The Challenge

- The central issue is whether the current legal regime in the United Kingdom is adequate to ensure the appropriate and non-arbitrary use of AFR in a free and civilized society. At the heart of this case lies a dispute about the privacy and data protection implications of AFR.
- The Claimant challenged the use of AFR on three basis: breach of Article 8, under the Data Protection Acts 1998 and 2018 and for breach of the public sector equality duty ("PSED").

Automatic Facial Recognition Challenge II

The PSED Challenge

- The Claimant brought this challenge on the basis that the police had not considered the possibility that AFR might produce results that were indirectly discriminatory on grounds of sex and/or race because it produced a higher rate of false positive matches for female and/or black and minority ethnic faces.
- That failure meant that SWP failed to have the required due regard for any of the relevant considerations prescribed at section 149(1)(a) – (c) of the 2010 Act.

The Divisional Court Held:

- There was no suggestion that, when the AFR trial started, the police force had, or should have, recognised that the software might operate in an indirectly discriminatory way. There was still no firm evidence suggesting indirect discrimination.
- The possibility of future investigation identifying possible indirect discrimination did not make good the argument that, to date, the police force had failed to comply with its duty. The police force had continued to review events against the relevant criteria and that was the approach required by the public-sector equality duty in the context of a trial process (paras 149-158).

Automatic Facial Recognition Challenge III

R (on the application of Edward Bridges) v The Chief Constable of South Wales Police [2020] EWCA Civ 1058

- The Claimant appealed to the Court of Appeal who held:
  - The court had been wrong to find that the force had done all it reasonably could to fulfil the duty [R. (on the application of Bracking) v Secretary of State for Work and Pensions [2013] EWCA Civ 1345]
  - Bracking had held that the PSED:

    (1) Must be fulfilled before and at the time when a particular policy is being considered.

    (2) Must be exercised in substance, with rigour, and with an open mind. It is not a question of ticking boxes.

    (3) is non-delegable.

    (4) is a continuing one.

    (5) If the relevant material is not available, there will be a duty to acquire it and this will frequently mean that some further consultation with appropriate groups is required.

    (6) Provided the court is satisfied that there has been a rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them, then it is for the decision-maker to decide how much weight should be given to the various factors informing the decision.

Automatic Facial Recognition Challenge IV

- Divisional Court was wrong to find that there was no evidence before it that there is any reason to think that the AFR technology used in this case had any bias on racial or gender grounds.
- That rationale put the cart before the horse. The whole purpose of the positive duty (as opposed to the negative duties in the Equality Act 2010) is to ensure that a public authority does not inadvertently overlook information which it should take into account.

Automatic Facial Recognition Challenge V

- Public concern about the relationship between the police and BAME communities has not diminished and the duty was important to ensure that a public authority did not inadvertently overlook the potential discriminatory impact of a new, seemingly neutral, policy.
- The police force had never investigated whether AFR had an unacceptable bias on grounds of race or gender. The fact that the technology was being piloted made no difference to the duty (paras 167, 173-175, 179-182, 191, 198-200).

Automatic Facial Recognition Challenge VI

Final thoughts

*"We accept (as is common ground) that the PSED is a duty of process and not outcome. That does not, however, diminish its importance. Public law is often concerned with the process by which a decision is taken and not with the substance of that decision. This is for at least two reasons. First, good processes are more likely to lead to better informed, and therefore better, decisions. Secondly, whatever the outcome, good processes help to make public authorities accountable to the public. We would add, in the particular context of the PSED, that the duty helps to reassure members of the public, whatever their race or sex, that their interests have been properly taken into account before policies are formulated or brought into effect." [*R (on the application of Edward Bridges) v The Chief Constable of South Wales Police [2020] EWCA Civ 1058; 176]

JUDICIAL REVIEW TRENDS AND FORECASTS 2020

Procurement and commissioning

Chair: Jonathan Blunden, DLA Piper
Jason Coppel QC, 11KBW
Zoe Leventhal, Matrix Chambers
David Lock QC, Landmark Chambers
Parishil Patel QC, 39 Essex Chambers

JUDICIAL REVIEW TRENDS AND FORECASTS 2020

Executive Power and the pandemic

Chair: **Prof Jeff King**, UCL

Tom Hickman QC, Blackstone Chambers
Jeremy Miles AM, Counsel General for Wales and Welsh Minister for European Transition
Kate O'Regan, Director, Bonavero Institute of Human Rights and South Africa's COVID-19 Designated Judge
Arianna Vedaschi, Full Professor of Comparative Public Law, Bocconi University and Trinity College Dublin COVID-19 Law and Human Rights Observatory

The use and misuse of guidance during the UK's coronavirus lockdown

T. R. Hickman

15 June 2020

I. Introduction

This paper elucidates and subjects to close examination a central feature of the United Kingdom Government's response to the early stages of the coronavirus pandemic, namely, the manner that the Government coordinated individual behaviour though a potent fusion of public health advice and criminal law. It did so principally through the creation and publication of a set of guidance documents on the government website which evolved as the crisis unfolded.[1] The coronavirus webpage was initially a source of information about the virus, sanitary good practice and travel advice, but it developed into the central repository of instructions for people in England[2] informing them what they should and should not do during the pandemic. Following the lockdown on 23 March 2020, the coronavirus webpage was used to set out detailed public health advice on social distancing as well as an authoritative source of information about the new legal rules. Yet, rather than distinguishing between these two functions, the coronavirus guidance elided them, obscuring the *nature* of the instructions that the guidance contained. I describe this phenomenon as the creation of normative ambiguity.

In the context of the coronavirus guidance, normative ambiguity refers to the way that the guidance created uncertainty as to whether the instructions that were presented in the guidance reflect rules of criminal law, which people must comply with, or recommended behaviour based on public health advice, compliance with which is ultimately optional. The fusion of law and advice meant that the criminal law aspect of the regulatory scheme had a radiating effect, creating the implication that public health norms were (or may have been)

[1] https://www.gov.uk/coronavirus.

[2] The guidance was initially expressed as advice applicable to the whole of the UK but it was soon limited to England and each regional government now publishes separate own advice on its own webpage. To begin with, the guidance published by the devolved Governments mirrored the UK Government advice, but it has diverged in important respects over time.

rules backed by criminal sanctions.[3] The effect of this was to create a situation of over-deterrence because the legal restrictions appeared to be more extensive than they in fact were. As we shall see, from an examination of the periods from 23 March 2020 to 10 May 2020 and from 11 May 2020 to 1 June 2020 which represented the first and second phases of the coronavirus lockdown in England, the normative ambiguity in the coronavirus guidance was exploited (although not necessarily deliberately[4]) by the Government to tighten and relax the lockdown, by influencing peoples' perceptions of the degree of individual choice and liberty that they had at different times. Whilst the way that the guidance was drafted was driven by well-intentioned public health objectives, this phenomenon resulted in a real lack of clarity as to what the law required and, more seriously still, by misrepresenting information that framed the choices people made about how to conduct their day-to-day lives during the emergency the coronavirus guidance failed to respect individual autonomy in a fundamental way.

This paper shows that during the first lockdown phase from 23 March 2020 to 10 May 2020, the normative ambiguity in the coronavirus guidance powerfully reinforced the Government's "stay at home" message by suggesting the legal prohibitions were stricter than they were and that the scope for individual discretion was correspondingly narrower than it in fact was. It will be seen that this approach shifted on 10 May 2020 when the Prime Minister announced in a televised address a policy change from "stay at home" to "stay alert" which was accompanied by the publication of amended coronavirus guidance that had different headline messages. These headline messages were more open-textured and emphasised individual judgment and discretion. Whilst some important changes to the rules were made a few days later, the core legal rules nonetheless remained the same. This important change to the Government's instructions is not therefore explained by any change in the legal rules that the guidance described. Rather, the Government sought to encourage a more permissive attitude to the legal rules. This traded-off the normative ambiguity in the coronavirus guidance in a different way, by emphasising the advisory aspect of guidance and the responsibility of individuals to judge for themselves whether their conduct was appropriate. This potent brew of normative froth exploded spectacularly in the last week in May, when the Prime Minister's chief adviser Dominic Cummings admitted to having left his London residence during the early

[3] In this paper I refer to public health advice. The public health advice promulgated by the Government is obviously a balance of health risks and wider social and economic considerations.

[4] At times, Ministers seemed to be as confused as others as to the distinction between law and advice. Examples of Ministerial statements from the Prime Minister and the Environment Secretary are referred to below.

phase of lockdown for reasons that departed from the coronavirus guidance, but he was quickly backed by the Prime Minister on the basis that he had acted legally and responsibly.[5] For many people it was incomprehensible how Mr Cummings' actions could be characterised as having been consistent with the law given the stringent instructions that the Government had communicated during the first phase of the lockdown, which set out limited and finite reasons for leaving home. It reflected the confusion created by the conflation of criminal law rules and public health advice coming home to roost.

The paper goes on to suggest that during the period under examination the Government used the fusion of criminal law and public health advice in the coronavirus guidance as a *sui generis* form of regulatory intervention that sits outside the regime of emergency governance established by Parliament. It shows how this form of emergency regulation failed to conform to basic principles of transparency and clarity and it sets out six principles to which such guidance should conform to ensure transparency and clarity in the future.

This paper proceeds in the following way. Part II explains the phenomenon under discussion taking the headline messages during the first to the second lockdown phase as an example. The paper then goes on in Part III to examine in more detail the various dimensions of the fusion of law and public health advice embodied in the coronavirus guidance in the period between 23 March 2020 and 1 June 2020. Parts IV and V examine the implications of this method of emergency government and makes recommendations for the future.

II. The exploitation of normative ambiguity and the first lockdown relaxation

On 23 March 2020 the Prime Minister in a televised address announced the most stringent restrictions on liberty probably ever imposed in the United Kingdom. He said that the measures came into effect immediately and that the police would have power to enforce the rules. Following the Prime Minister's address, the UK Government's website was changed to include the following headline rules, reproduced at the head of each page of the coronavirus guidance thereafter:

Stay at home

[5] A. Tolhurst and J. Johnston, "Boris Johnson says Dominic Cummings 'acted legally, responsibly and with integrity' in lockdown row", Politics Home, 24 May 2020 (available at https://www.politicshome.com/news/article/boris-johnson-says-dominic-cummings-acted-legally-responsibly-and-with-integrity-in-lockdown-row [Accessed 4 June 2020]). See discussion below in Part IV.

- Only go outside for food, health reasons or work (but only if you cannot work from home)
- If you go out, stay 2 metres (6ft) away from other people at all times
- Wash your hands as soon as you get home

It then instructed people not to meet others, even friends or family.

On one level this was extremely clear. The instructions to the population were simple and straightforward. But there was a serious ambiguity lurking not far beneath the surface. The first instruction referred to a legal obligation, breach of which was a criminal offence.[6] The second and third instructions were not legal obligations but public health advice. In terms of the 2 metre guidance, a clear statement of the status of that guidance as public health advice was later to be found buried in the Government's published coronavirus documentation. It stated that the Government, "recommends trying to keep two metres away from people as a precaution."[7] This, it says, "is not a rule" rather, the "key thing is not to be too close to people for more than a short period of time, as much as you can."[8] In other words, the 2 metre guidance was public health advice to be taken into account, rather than a rule to be followed.

Yet by setting the instructions side by side without distinction, the fundamentally different nature of the instructions was obscured. People well understood that the lockdown was enforced by law. There was thus an obvious implication that the instructions were each backed by law.[9] This was accentuated by the fact that each of the instructions were framed as rules, whereas as we shall see at other times the Government chose to frame parts of the guidance explicitly as "advice".[10] From the perspective of the ordinary citizen, there was no reason to think that the 2 metre guidance was not a rule of law. In New Zealand, for example,

[6] I address later the fact that the criminal offence was not in created until 26 March 2020.

[7] *HM Government, "Our Plan to Rebuild: The UK Government's COVID-19 recovery strategy"* (2020) 11 May 2020 CP 239, 5.8.

[8] *HM Government, "Our Plan to Rebuild: The UK Government's COVID-19 recovery strategy" (*2020) 11 May 2020 CP 239, Annex A.

[9] The impression was not dispelled, indeed was reinforced, by the body of the guidance as explained in Part III Bi.

[10] A note on rules: It is sometimes said that a rule embodies an additional reason for compliance beyond its perceived intrinsic merit, namely that it is an injunction that has been expressed by an authoritative source. However, the same could be said of public health advice. For present purposes, I take the difference between rules and advice to be that advice, unlike a rule, permits a person to exercise judgment as to whether or not to follow it or whether it is inappropriate in the circumstance or outweighed by other considerations, whereas a (legal) rule is mandatory and must be followed. As Lord Clarke stated in *R (Alvi) v SSHD* [2012] UKSC 33, [2012] 1 WLR 2208, at [120]: "as a matter of ordinary language, there is a clear distinction between guidance and a rule. Guidance is advisory in character; it assists the decision maker but does not compel a particular outcome. By contrast a rule is mandatory in nature; it compels the decision maker to reach a particular result."

the lockdown rules that came into effect on 24 March 2020, the day after the Prime Minister's televised address in the UK, included a 2 metre distance requirement when people were outside their homes.[11] This was an enforceable part of the criminal law prohibitions in New Zealand.[12] The limited empirical evidence currently available indicates that this was in fact what most people thought the law was in the UK as well. A study by Halliday, Meers and Tomlinson has found that whilst 99% of the people surveyed claimed to know mostly or exactly what activities were permitted under the law during the first phase of lockdown, 94% of them erroneously thought that intentionally coming within 2 metres of someone outside the home was prohibited by law.[13] This is a staggeringly high percentage of people who confused public health advice for a legal rule, more especially given that it occurred amongst people who claimed to have a high degree of confidence that they knew what the law was.

The fusion of law and guidance thus gave the criminal law a radiating effect on surrounding public health advice. Whilst the messaging *appeared* to be clear it in fact conveyed highly imperfect information as to the true nature of the instruction being given.[14] The result of such imperfect information being conveyed is that it results in overdeterrence, which in the present context means people restricting their activities and social contact believing the legal risks to be different to or greater than they in fact are. At one level such effects might be relatively minor. Consider for example a person who, thinking it to be a legal requirement, stops and steps aside in the street to ensure they keep a distance of 2 metres from a passer-by although they recognise that the public health risk of such fleeting proximity to be negligible. This is clear example of overdeterrence. Whilst the consequences of this particular example

[11] Section 70(1)(f) Health Act Order dated 3 April 2020 provided that persons are required "to maintain physical distancing" outside their residences (para 1(b)), and this is defined as meaning not being within 2 metres of other people (or if within 2 metres being there for less than 15 minutes) (available at https://www.health.govt.nz/our-work/diseases-and-conditions/covid-19-novel-coronavirus/covid-19-current-situation/covid-19-epidemic-notice-and-health-act-orders [Accessed 4 June 2020]).

[12] Businesses in Scotland, certain businesses in Wales and burial grounds in Northern Ireland are also required to take reasonable measures to ensure that a distance of 2 metres is maintained between persons on the premises and waiting to enter: Health Protection (Coronavirus, Restrictions) (Scotland) Regulations 2020 (Scottish S.I. 2020/103), regulation 4; Health Protection (Coronavirus, Restrictions) (Wales) Regulations 2020 (Wales S.I. 2020/353 (W. 80)), regulations 4 and 6; Health Protection (Coronavirus, Restrictions) (Northern Ireland) Regulations 2020, regulation 4A (Northern Irish S.I. 2020/55).

[13] S. Halliday, J. Meers and J. Tomlinson, "Public Attitudes on Compliance with COVID-19 Lockdown Restrictions", U.K. Const. L. Blog, 8th May 2020 (available at https://ukconstitutionallaw.org/2020/05/08/simon-halliday-jed-meers-and-joe-tomlinson-public-attitudes-on-compliance-with-covid-19-lockdown-restrictions/ [Accessed 4 June 2020]).

[14] It is possible to dissect the phenomenon of normative ambiguity more precisely to identify two forms of rule contamination of the surrounding public health advice that can occur. This further aspect of the phenomenon depends upon the possibility that a conceptually meaningful distinction can be drawn between public health guidance which takes the form of a public health rule, the advice in respect of which being that the rule should be followed, and public health guidance that is framed as being advisory only (a distinction that resembles the contested rule/principle distinction in jurisprudence). Assuming such a distinction is meaningful, normative ambiguity can also imply that, whether or not law, public health advice is in fact a rule. I leave this further dimension aside in the analysis that follows.

are trivial, the difficulty in maintaining 2 metres social distancing in situations concerning work or travel to work, means that overdeterrence is likely to have an extremely significant impact on social life and economic activity. Indeed, by the end of May 2020 calls were growing from some quarters for the 2 metre "rule" to be changed to a 1 metre rule on the basis of its impacts on the economy.[15]

There is however a second form of normative ambiguity in play which can be illustrated by reference to the same example. The third of the three instructions is less obviously a rule of law since it is far less likely that there would be a law against neglecting to wash your hands when you get home. To a well informed and reflective person who thought seriously about the matter the unenforceability of such a rule would point to it being public health advice rather than a legal requirement. This of course compounds rather than relieves the overall lack of clarity in the three instructions. But just as the legal nature of a norm can have a radiating effect on associated non-legal norms, so the phenomenon can operate in the other direction. By presenting advisory norms alongside instructions based on legal rules, without distinguishing between the two, an implication can be generated that the legal rules are in fact public health advice.

This is illustrated by the changes made to the coronavirus guidance and associated messaging following the Prime Minister's second televised address to the country on 10 May 2020. In that address, the Prime minister signalled a relaxation of some of the rules and encouraged people to return to work and to leave their house to spend time outside. After the address, and before any changes were made to the underlying law, the Government removed the three-point headline instruction set out above and replaced it with the following text:

> **Stay alert**
>
> We can all help control the virus if we all stay alert. This means you must:
>
> - Stay at home as much as possible
> - Work from home if you can
> - Limit contact with other people
> - Keep your distance if you go out (2 metres apart where possible)
> - Wash your hands regularly

[15] L. Buchan, "Coronavirus: 2 metre distance rule should be reviewed to save hospitality sector, senior Tories tell government", Independent, 30 May 2020 (available at https://www.independent.co.uk/news/uk/politics/coronavirus-2-metre-distance-restaurant-pubs-tory-mps-a9540021.html [Accessed 4 June 2020]); A. Hancock, "UK Pubs call for 2-metre social-distancing rule to be halved", Financial Times, 18 May 2020 (available at https://www.ft.com/content/aa9c043c-61f4-4ad3-b68c-ff34d738e2e6 [Accessed 4 June 2020]).

Underneath these instructions it was stated that people should not leave their home if a person in the household has symptoms.

The first of the two bullet point instructions reflected legal requirements, the other three reflected public health advice. The emphasis shifted from clear firm injunctions to rules that involved personal discretion and which were framed in far more advisory terms. The overall message was also much more complex, suggesting a greater role for individual assessment. Rather than being told to stay at home apart from limited exceptions, people were told to stay at home "as much as possible". Compared to the previous instruction this represented a widening of the circumstances in which you could leave home and certainly one that conferred greater discretion on individuals to judge. Rather than people keeping 2 metres apart "at all times" the Government also adopted the more open textured and less emphatic requirement keep 2 metres apart "where possible". The references to following the guidance "where possible" also emphasised an aspirational aspect: and that people ultimately had to judge how strenuously to attempt to comply with the rules and the extent to which they were applicable in the particular circumstances. A very vague instruction was also introduced, namely, to "limit contact with other people". Not only was this extremely imprecise but it implied that some contact with other people *was acceptable* (particularly when contrasted with the previous instruction not to meet anyone, even friends or family). The clear injunction to wash hands as soon as you get home also became the unspecific and advisory "wash hands regularly".

Each of these changes taken on their own would have been of little significance. But taken together the changes transformed the impression given of the instructions. Now the instructions appeared to be very much in the nature of recommendations or advisory norms. This exploited normative ambiguity in the coronavirus guidance in a different way, by creating the implication, in these headline messages, that even legal rules were advisory. Previously public health advice had been hardened by its juxtaposition with legal rules, subsequently legal rules were softened by their juxtaposition with public health advice. The difference was created by the subtly different ways the rules and advice were described and presented. Since it is the nature of advice that it places responsibility on individuals to exercise judgement as to whether they consider it appropriate to follow the advice in the circumstances, this change would have had an enabling and empowering effect on individuals. Importantly, these changes to the instructions are not explained by or reflected in any material change to the criminal law. The marked change in instructions communicated to the population resulted from a change in the Government's public health advice and not from any change in the law.

This shift in approach was reflected in the change in message from "stay home", designed to render the population inert, to the more active and empowering "stay alert". This enabling message was graphically reinforced from a vivid colour change in the Government's visuals from red (= stop) to green (= go).[16]

Fig: The UK Government's coronavirus message before and after 10 May 2020

The televised address given by the Prime Minister on Sunday 10 May 2020 also exploited the normative ambiguity in the guidance in several respects, to suggest that bonds were being untied and freedoms gradually restored. Thus, the Prime Minister announced that as of 13 May 2020, "we want to encourage people to take more and *even unlimited* amounts of outdoor exercise" and stated that, "you can drive to other destinations" to take such exercise. He also stated, "you can play [outdoor] sports but only with members of your own household". These statements exploited normative ambiguity because they implied that the legal rules were being changed when in fact each of these activities was already permitted. Many people would have thought these activities to have been prohibited (or at least been sufficiently unclear as to whether or not they were prohibited to have been deterred from such activities). It is quite possible that this and other Ministerial statements themselves reflected a muddled understanding of the relationship between public health advice and legal rules.

Consider the first of the quoted statements of the Prime Minister. The coronavirus guidance had stated that only one form of exercise could be taken per day. But this was public health advice not law. Many people, of course, would have assumed that this was law because

[16] My analysis of the messaging draws on insights of Mike Galsworthy in a video published on Twitter (available at https://twitter.com/mikegalsworthy/status/1259496040522186753 [Accessed 4 June 2020]).

it was commingled with information about the criminal law.[17] So whilst the Prime Minister's statement that people were being encouraged to take unlimited exercise accurately alluded to the fact that previously this had been *discouraged*, most people would have understood this to have been a change in the legal rules. The second and third statements were presented as changes in what persons were *entitled* to do but there had in fact been no restriction on driving to take exercise or playing sport outside with your household, such as football in the park.[18] It later became clear that the Government would be allowing outdoor sports courts and venues to reopen and for people to engage in "recreation" for health reasons as well as "exercise", genuine changes, but even taking this into account the Prime Minister's statement suggested the rule relaxations were more extensive than they in fact were.[19]

The purpose of the change in the guidance on 11 May 2020 was clearly to encourage people to exercise greater freedom of action and to take greater personal responsibility for assessing whether their actions are appropriate. Within two weeks of the changes being made it was apparent that people were taking a far more flexible view of the rules, meeting in parks and gardens and exercising their discretion in making what they regarded as appropriate socially distanced contact with other people.[20]

Let us now turn to examine the respects in which normative ambiguity was present in the guidance in more detail.

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[17] For inexplicable reasons, it *was* part of the legal prohibitions in Wales (Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020, regulation 8(2)(b)) and was later replaced by a requirement to exercise in the local area on 11 May 2020 (Health Protection (Coronavirus Restrictions) (Wales) (Amendment) (No. 3) Regulations 2020, regulation 2(4)(b)).

[18] The absence of a law prohibiting driving to take exercise was reflected in guidance published by the National Police Chief's Council on reasonable excuse, published after some police forces were reported as discouraging people from travelling to open spaces. The guidance is no longer published but see D. Shaw, "Coronavirus lockdown: Police guidelines give reasonable excuses to go out", BBC News, 16 April 2020 (available at https://www.bbc.co.uk/news/uk-england-52312560 [Accessed 4 June 2020]).

[19] The Prime Minister then emphasised that in enjoying these new freedoms "you *must* obey the rules on social distancing. And to enforce those rules we will enforce the fines on those who break them." What however are the "rules on social distancing" that the Prime Minister was referring to? The most obvious "rule" on social distancing is the 2 metres guidance and this was clearly what the reference was to, as well as possibly the prohibition on gatherings. However, as explained, the 2 metres guidance is not an enforceable rule.

[20] T. Ball et al, "Easing lockdown: UK rushes back to work and play", The Times, 13 May 2020 (available at https://www.thetimes.co.uk/article/coronavirus-britain-rushes-back-to-business-jfrdzf79t [Accessed 7 June 2020]); S. Morris et al, "Crowds return to beauty spots in England as coronavirus lockdown eases", The Guardian, 13 May 2020 (available at https://www.theguardian.com/world/2020/may/13/crowds-return-england-coronavirus-lockdown-eases [Accessed 7 June 2020]); R. Wright, A. Bounds and W. Wallis, "Workers stoical as easing spurs fears of overcrowding", Financial Times, 13 May 2020 (available at https://www.ft.com/content/ef57d543-22aa-4a68-9122-6287caef1a74 [Accessed 7 June 2020]).

III. The fusion of law and pubic health advice in the coronavirus guidance

A. Information, advice and law

Until 23 March 2020, the Government pursued an explicitly advisory approach to tackling the coronavirus pandemic. The Government response took the form of travel advisory notices issued by the Foreign Office and advice on personal hygiene issued by NHS England. In the early stages such information was published on the Government coronavirus webpage together with information on the number of confirmed UK cases. On 12 March 2020 advice was added on what to do if you developed symptoms.[21] As events unfolded in subsequent days, more extensive travel advice and information on consular assistance was added as well as specific guidance for increasing numbers of organisations.[22] On 16 March 2020 the Government published more wide-ranging advice addressing social distancing, particularly for persons over seventy years old and those with certain underlying health conditions. Everyone was advised to work at home where possible, avoid gatherings, including with friends or family, avoid pubs and restaurants and vulnerable people were advised to withdraw from social contact altogether. The guidance confidently stated that the "advice is likely to be in place for some weeks".

At this point, it appeared as if the Government would seek to navigate the emergency without resort to legal compulsion, a model followed in Sweden. But that abruptly changed on 23 March 2020 when the lockdown measures were announced by the Prime Minister and the nation was instructed to stay at home under compulsion of law. The coronavirus guidance was updated to include "guidance on staying at home and away from others". The guidance gradually became more extensive, covering a range of topics. A FAQs section was created on 29 March 2020 and has been frequently updated. By 31 May 2020 the coronavirus guidance addressed topics such as self-isolation for persons with symptoms of coronavirus, employment and financial support as well as schools and childcare. The lockdown rules on that date were presented in the section on "Stay alert and safe: social distancing guidance for everyone" an evolved version of the original guidance on staying at home, and in the section entitled "Stay alert: what you can and can't do", a development of the FAQ section. Whilst the guidance was initially UK-wide, on 28 March 2020 it provided links to the websites of the three regional

[21] The self-isolation guidance was initially called the "stay at home" guidance but this was later changed when stay at home became the general message.

[22] Eg 13 March 2020.

governments which contain separate guidance applicable in Wales, Northern Ireland and Scotland.

The legal basis for the promulgation of the coronavirus advice was not mentioned on the website but the Secretary of State for Health has power to provide "information and advice" to the public for the purpose of "protecting the public in England from disease".[23] The legal status of such information and advice is that it is non-binding. It does not have the force of law and therefore is not enforceable in the courts. No sanctions attach to a failure to follow information or advice issued under statutory powers. The framing of information or advice as "guidance" does not change its character. In *Laker Airways Ltd v Department of Trade*, Roskill LJ stated that, "guidance is assistance in reaching a decision proffered to him who has to make that decision, but that guidance does not compel any particular decision"[24] and Lawton LJ noted that guidance "has the implication of leading, pointing the way…".[25]

The increasing use of advice and guidance as a method of governance has resulted in increased jurisprudence on the topic. The promulgation of advice or guidance is to be distinguished from the situation where government publishes a policy with the objective of regulating how public officials will exercise discretionary powers.[26] Guidance and advice is, by contrast, promulgated not to regulate a public authority's exercise of its own power, but for the benefit of external bodies or private individuals.[27] The cases establish that a public authority can in an appropriate case provide guidance to "explain, amplify or supplement" the law, but it cannot contradict the objectives of a statute or misstate the law.[28] If it does so, this will be an error of law that the courts will declare to be erroneous if a claim is brought before them by an interested citizen. In *BAPIO Action*, the House of Lords went further and ruled that guidance

[23] National Health Service Act 2006 section 2A. It is not known if this was the power that the Government has relied upon in promulgating the coronavirus guidance but it is the most likely candidate.

[24] [1977] QB 643, 714.

[25] [1977] QB 643, 725; *R (Alvi) v SSHD* [2012] UKSC 33, [2012] 1 WLR 2208 at [120] ; *R v Director of Passenger Rail Franchising, ex p. Save Our railways,* [1996] CLC 589, 597 (Macpherson J): "Guidance is advice which the recipient should heed and respect; it should ordinarily be followed but need not if there are special reasons for hot doing so."

[26] As to which see *Madalia v Secretary of State for the Home Department* [2015] UKSC 59, [2015] 1 WLR 4546; *R (Lumba) v Secretary of State for Home Department* [2011] UKSC 12, [2012] 1 AC 245.

[27] In practice the distinction between policy and guidance is often blurred.

[28] [1977] QB 643, 699 (Lord Denning MR). Lord Bridge in *Gillick v West Norfolk and Wisbech Area HA* [1986] AC 112, 193 stated: "We must now say that if a government department, in a field of administration in which it exercises responsibility, promulgates in a public document, albeit non statutory in form, advice which is erroneous in law, then the court, in proceedings in appropriate form commenced by an applicant or plaintiff who possesses the necessary locus standi, has jurisdiction to correct the' error of law by an appropriate declaration."

published by the Department of Health seeking to persuade NHS trusts to impose conditions on the recruitment of international medical graduates was unlawful essentially because it was being used to restrict immigration status without going through the formal process of changing the immigration rules.[29] By comparison with the jurisprudence on polices, the law on published guidance nonetheless remains underdeveloped.

The Secretary of State for Health has a separate and distinct power to issue regulations to combat outbreaks of disease under the Public Health (Control of Disease) Act 1984. Pursuant to this power, the Secretary of State issued the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, S.I. 2020/350 ("the Regulations"), requiring certain businesses, premises and facilities to close or restrict their operations, and requiring people to stay at home.[30] The Regulations also prohibited gatherings in public places of more than two people from different households.

The Regulations came into effect at 1pm on 26 March 2020 and very similar regulations came into effect in other parts of the United Kingdom shortly thereafter.[31] The legal rules set out in the Regulations were backed by fines and enforcement powers, including the power of arrest and the power for the police to return people by force if necessary to their homes. The Regulations had to be approved by Parliament (in the case of the Welsh, Northern Irish and Scottish regulations, by the relevant devolved legislature), although since the urgency procedures in the 1984 Act were used such approval occurred well after the regulations were made.[32] The Regulations were first substantially amended on 13 May 2020, most notably to allow people to leave home to engage in recreation for their physical or mental wellbeing rather than just to take exercise.[33] A further substantial amendment occurred on 1 June 2020 when

[29] Because for instance international medical graduates were not debarred from work in private hospitals at whom the guidance was not directed. See *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2008] UKHL 27, [2008] 1 AC 1003.

[30] For a discussion of the Regulations see T. Hickman, E. Dixon and R. Jones, "Coronavirus and Civil Liberties in the UK", Blackstone Chambers COVID-19: Legal Insights, 6 April 2020 (available at https://coronavirus.blackstonechambers.com/coronavirus-and-civil-liberties-uk/ [Accessed 4 June 2020]) and T. Hickman, 'Eight ways to reinforce and revise the lockdown law', U.K. Const. L. Blog, 15 April 2020 (available at https://ukconstitutionallaw.org/2020/04/16/tom-hickman-eight-ways-to-reinforce-and-revise-the-lockdown-law/ [Accessed 4 June 2020]).

[31] See above note 11 for the references. The Northern Ireland regulations were made pursuant to the Public Health Act (Northern Ireland) 1967 and the Scottish regulations pursuant to Schedule 19 of the Coronavirus Act 2020. The Welsh regulations came into effect at 4pm on 26 March 2020, the Scottish regulations at 7.15pm on 26 March 2020 and the Northern Irish regulations at 11pm on 28 March 2020.

[32] Since Parliament had risen for recess before the Regulations were laid, a motion for their approval was not debated by the Commons until 4 May 2020 and was not approved by the Lords on 14 May 2020.

[33] Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 2) Regulations 2020/500 regulation 2(3)(a).

the Regulations were changed to remove the requirement that people stay in their home (but to prohibit people staying overnight outside their home) and allowing gatherings of up to six people.[34] The present analysis is concerned with the period up to the change on 1 June 2020 although much of the analysis is pertinent to the subsequent period as well.

The core provisions enforcing the stay at home rules were contained in regulation 6 of the Regulations. Regulation 6 provided, as enacted, that: "6.—(1) During the emergency period, no person may leave the place where they are living without reasonable excuse." Subsection (2) then provided that "a reasonable excuse includes the need" to "obtain basic necessities, including food and medical supplies for those in the same household (including any pets or animals in the household) or for vulnerable persons and supplies for the essential upkeep, maintenance and functioning of the household, or the household of a vulnerable person, or to obtain money, …" (6(2)(a)). It also included the need: "to take exercise either alone or with other members of their household". A number of other specific excuses were also listed, including to seek medical assistance, to travel for work or provide voluntary services where this was not reasonably practicable to be done from home.

There are therefore two entirely separate power sources that underpinned the coronavirus guidance: a power for the Secretary of State to issue regulations setting out new criminal laws and a power to issue non-binding information and advice. Neither of these powers are specifically emergency powers.

The decision to make some requirements set out in the coronavirus guidance a matter of law and others advice was probably in part influenced by limits on the Secretary of State's powers to make regulations under the 1984 Act. So, for example, the Secretary of State is expressly prevented from using regulations to impose quarantine obligations on people thought to be infected with disease: quarantine must be imposed by a magistrate, so the rules on self-quarantine for 7 or 14 days where persons exhibit symptoms of Covid-19 could not be made enforceable under the 1984 Act and therefore had to be advisory.[35] But this is not a complete explanation for why some rules were advisory and some were founded in law, even in relation

[34] Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 3) Regulations 2020/558 regulation 2(8), although it did introduce reasonable excuses for doing so, for example to attend the funeral of a close family member (regulation 2(6)).

[35] 1984 Act, ss.45F and 45D(3). The Government would have needed to enact primary legislation for the more general self isolation rules directed at infected or symptomatic persons to be enforced by the criminal law, or to have used the Civil Contingencies Act 2004. Notably, when the Government introduced a fourteen day quarantine for persons entering England, on 8 June 2020, the quarantine provisions were set out in law (The Health Protection (Coronavirus, International Travel) (England) Regulations 2020) reflecting the fact that the Secretary of State had power enact criminal law provisions enforcing self-isolation and quarantine under s.45B of the 1984 Act when this concerned a danger to public health from aircraft, vessels or vehicles arriving in the country.

to the core social distancing rules. The 2 metre guidance, for instance, probably could have been made a legal condition on persons being outside their home.[36]

Having identified the underlying power sources for the coronavirus guidance we now look more closely at the coronavirus guidance itself.

B. The exploitation of law/advice ambiguity in the coronavirus guidance

It is possible to identify at least three different types of instruction contained in the coronavirus guidance. First, the guidance set out public health advice. This, as has been explained, had no legal force and at most could have given rise to social opprobrium for those who chose not to follow it.[37] Secondly, the coronavirus guidance contained information about the legal rules imposed by the Regulations. This information constituted (or purported to constitute) descriptive statements of the law. For example, it recorded legal rules requiring restaurants and cafes to close. Such statements might of course be simplified descriptions of the legal rules. Thirdly, the coronavirus guidance contained statements which represented the Government's interpretation of the law or its view as to how the law should be applied. Examples included what constituted "exercise".

This third aspect of the guidance is more controversial than the first two because the interpretation of the criminal law is not a matter for the government. Under the UK's constitutional arrangements, the Government has no role in interpreting or enforcing the law – those functions belong to bodies independent of government: the courts and the police and prosecution authorities respectively. Indeed, it is central to our constitution that the Government cannot either purport to dispense with criminal laws, including by committing to not enforcing them in certain situations, or introduce new ones without the sanction of

[36] On the government's broad interpretation of section 45G(2)(j) of the 1984 Act a prohibition on persons being within 2 metres of each other would seemingly have been possible as a restriction on where a person goes and with whom he has contact. The New Zealand rule is cited above at note 10.

[37] This statement requires some qualification, particularly in the context of employers and other persons who owe a duty of care to others. In such a context, public health advice can have important indirect legal effects by framing judgements about what constitutes reasonable steps to take to comply with a duty of care. A person or business that follows public health advice is likely to be able to make out a good defence in fact to a charge of negligence. Compliance with government guidance is also likely to be required or prudent to ensure compliance with business and premises insurance policies. This aspect of the fusion of law and guidance and the ability for guidance to have indirect legal effects represents a very important part of the way that guidance can in practice enforce social distancing measures. The correlation between guidance and legal liability is not, however, direct and many businesses in the UK had taken steps going beyond the government guidance well before there was any advice or direct legal compulsion to do so. Since my focus is on the aspects of the Regulations applicable to private individuals, I leave aside this issue.

Parliament.[38] The Government's statements on what the law requires are therefore opinions which cannot provide a defence to prosecution, still less widen the ambit of a criminal prohibition. Nor are they binding on the police of the Crown Prosecution Service. In practice, however, the government's guidance is likely to be taken into account when enforcement and prosecutorial decisions are made.[39]

Let us now unpick in more detail the various ways in which the coronavirus guidance generated normative ambiguity in the period up to 1 June 2020.

i. Elision of information about the law, legal advice and public health guidance

The principal source of the normative ambiguity created by the coronavirus guidance was the juxtaposition and in places complete elision of information about legal rules on the one hand and public health advice on the other. No clear lines were maintained between these different types of instruction. It was not possible for people to know, without a high level of sophisticated legal knowledge, whether statements contained in the coronavirus guidance were statements of law, interpretations of the law or public health advice.

Some examples of this have already been provided in Part II. A further example of a pure piece of public health advice in the section "what you can and can't do" was the statement that when using a vehicle to use a journey that is permitted, you should only travel with members of your household.[40] There were however no legal rules that materially governed the use of private vehicles by two people from different households, e.g. a car share. Despite being presented in emphatic terms, the section of guidance was pure public health advice.

In some instances law and public health advice were interwoven not only in the same section of guidance but in the same sentence. Take the guidance on leaving home to go shopping. Up to 10 May 2020 the coronavirus guidance stated that a person could leave home to go "shopping for basic necessities, for example food or medicine, which must be as

[38] See *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2015] A.C. 657 and *R (Purdy) v Director of Public Prosecutions*, [2010] 1 A.C. 34 considering the proper constitutional limits on the Director of Public Prosecutions use of guidance in the enforcement of the criminal law and the impact of the Bill of Rights 1688 which prohibits the Crown from suspending the operation of the criminal laws.

[39] The College of Policing published separate guidance for police forces in England and Wales in an "Understanding the Law" section of its Coronavirus information on its website, including a useful publication on its views as to the meaning of reasonable excuse (no longer published, see note 17). A collection of advice and guidance is to be found at https://www.college.police.uk/What-we-do/COVID-19/understanding-the-law/Pages/default.aspx [Accessed 4 June 2020].

[40] Coronavirus Guidance as at 12 May 2020: "**1.8 Can I share a private vehicle with someone from another household?** No. You can only travel in a private vehicle alone, or with members of your household."

infrequent as possible". The statement that a person could leave home for shopping for basic necessities, for example food or medicine, was a statement of the law. But the subsequent statement that this must be as infrequent as possible was not a statement of law it was public health advice.

This elision of law and public health advice was not offset by any clear statement as to what aspects of the guidance were legally enforceable and which were not. On the contrary, the position was quite the reverse. In the section of the guidance setting out the rules requiring persons to stay at home,[41] after stating that people must be 2 metres apart from anyone outside their household, it stated: "These measures must be followed by everyone". The introductory section of the guidance had also made clear that the police "will be given powers to enforce" the staying at home rules, business closures and prohibition on gatherings. This clearly implied that all of the instructions in the social distancing and stay at home guidance at that time were enforceable despite the fact they included instructions that have never been subject to legal restriction: the 2 metre guidance, the stated limit on exercising only once per day, and the requirement that shopping be as infrequently as possible, were never backed by law.

One particularly striking and significant feature of the coronavirus guidance was that although the lockdown was announced and the guidance was published on 23 March 2020, until 1pm on 26 March 2020 there were no regulations in place to underpin them. For several critical days, the entire regime was advisory. The Regulations were not even published in draft form before they were made so nobody outside government had any idea what legal regime underpinned, or was going to underpin, the guidance. Public lawyers and criminal lawyers spent the period between 23 March and 26 March 2020 perplexed as to what laws the Government could be using to enforce the rules. On 26 March 2020 it became clear that there had been none. The UK lockdown was based on a gigantic bluff.

A cynical and sophisticated reader of the guidance might have picked up the deliberate nuance in the words quoted above, in the first post-lockdown form of the guidance. By stating that police "will be given" power to enforce the rules, the guidance nodded to the fact that they did not, at that time, have such power. Most people would however simply have taken this to be making clear that the instructions, although based on law, would be subject to greater police powers. After all, the coronavirus guidance also stated that the "measures are effective immediately" and the "measures must be followed by everyone". The reality, however, was very different. Nobody was required to follow them.

[41] Eg 25 March 2020.

After the Regulations were published and came into effect the task of seeking to relate them to the instructions in the coronavirus guidance represented a complex and technical exercise.[42] There was no alteration to the structure or wording of the coronavirus guidance to separate or identify those parts that were enforceable under the Regulations.[43] The clear impression given was that the rules set out in the guidance on staying at home were backed by law, when in fact important aspects of the instructions were not and reflected public health advice. This is how the coronavirus guidance remained throughout the critical period of late March and April.[44]

On 2 May 2020 a change was made to the section addressing police enforcement which represented the first effort to draw attention to the fact that not all of the rules were backed by law. It stated that police authorities "have the power to enforce the requirements set out in law if people do not comply with them." More significantly, it introduced a more prominent statement in the first section of the rules on staying at home which stated that "[k]ey parts" of the measures are "underpinned by law, which sets out clearly what you must and must not do". This at least indicated that not all of the coronavirus guidance was underpinned by law. The reference to "law" included a hyperlink to the government's legislation database (as to which more below).

Even at this late stage, neither statement actually identified *which* of the instructions were backed by law and which were not and the guidance itself continued to refer

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[42] See Hickman, Dixon and Jones "Coronavirus and Civil Liberties in the UK", Blackstone Chambers COVID-19: Legal Insights, 6 April 2020 (available at https://coronavirus.blackstonechambers.com/coronavirus-and-civil-liberties-uk/ [Accessed 4 June 2020]) for an analysis published more than a week after the Regulations were published. There was not much else published analysing the Regulations, but see Lord Sandhurst QC, Anthony Speaight QC, "Pardonable in the Heart of the Crisis – But we must urgently return to the Rule of law" Society of Conservative Lawyers, 4 April 2020 (available at https://e1a359c7-7583-4e55-8088-a1c763d8c9d1.usrfiles.com/ugd/e1a359_017552492cac41868ee7eed2a53fe99d.pdf [Accessed 4 June 2020]).

[43] On 26 March 2020, the final section of coronavirus social distancing guidelines *was* changed to include a statement that if a person leaves home or gathers in a public space "for any reason other than those specified", the police may take action. The purpose of this section appears to have been to warn people that police had powers to disperse gatherings and return people home, rather than being any effort to distinguish laws from advice, which it did not do (it was for example clear that other parts of the guidance other than those referred to were backed by law, such as that relating to the closure of businesses). The reference was actually highly misleading as the guidance only "specified" four reasons for leaving the home when the Regulations listed thirteen in addition to the catch-all "reasonable excuse".

[44] In the question and answer section of the guidance introduced on 29 March 2010 stated:

> **"15. What will happen to me if I break the rules?**
> We appreciate all the effort people are putting into containing the spread of coronavirus which will help protect our NHS and save lives.
> If you breach the regulations, the police may:…."

The regulations and their contents were not specified. Most people would have taken the reference to the "rules" and the "regulations" be to the coronavirus guidance itself.

indiscriminately to law and public health advice. The exercise of seeking to unpick one from the other was left to individuals to undertake. It is however obvious that the vast majority of people, even if they ventured beyond the news media to read the coronavirus guidance in the first place, would have gone no further and certainly would not have spent time seeking to examine primary legal provisions in their unfamiliar native form in an effort to establish which parts were backed by law. Whilst the references introduced on 2 May may have raised doubts in peoples' minds about whether instructions in the guidance were reflective of the criminal law, they were very far from adequate to make clear to the ordinary reader of the guidance which instructions reflected legal obligations and which did not.

There was also a further problem. The coronavirus guidance did not identify the relevant law. The coronavirus guidance referred somewhat cryptically to "law" and "regulations" but the regulations were not identified by name. For an unskilled person to seek to find the relevant regulations would itself be a significant task, more especially as they were amended from time to time. Unfortunately, this difficulty was aggravated by the fact that the two hyperlinked references to "law" (and a further hyperlinked reference to "regulations" introduced in mid-May) hyperlinked to the wrong coronavirus public health regulations. The link was to regulations concerned with detention, isolation and screening of persons suspected of being infected.[45] This was no doubt mere negligence but the result was that the references to the "law" and to "regulations" in the guidance were utter gobbledygook. It is perhaps telling that no one appears to have picked up on the error (suggesting nobody followed the links or if they did they soon gave up in despair) as the wrong law was hyperlinked until 13 May 2020.[46]

The net effect was that for a person without specialist legal knowledge and a good deal of time, there was simply no way of countering the incorrect messaging within the guidance by cross-checking the coronavirus guidance with the operative legal provisions.

ii. Exploiting ambiguity in legal terms including the "reasonable excuse" exception to the prohibition on leaving home

As we have seen, the coronavirus guidance included the Government's interpretation of the law as well as information as to what the law was. This took on a particularly important

[45] Health Protection (Coronavirus) Regulations 2020, S.I. 2020/129.

[46] The change may or may not have been prompted by a tweet by the author on 11 May 2020 pointing out that the post-10 May 2020 regulations included a hyperlink to the wrong regulations.

dimension in relation to the core prohibition on people leaving their home because this legal rule was subject to an ambiguous open-ended exception: people could leave and be outside their home if they had a "reasonable excuse".[47] Whilst the law itself specified certain reasons for leaving home that constituted "reasonable excuses", such as food shopping or going to work, these provisions themselves embodied terms with broad scope for interpretation, perhaps most obviously, the meaning of "exercise", and later "recreation" for reasons of health and wellbeing. But since the list was not exhaustive the overriding legal requirement and therefore the boundary of individual liberty between 26 March 2020 and 1 June 2020 was the concept of "reasonable excuse".

The concept of reasonable excuse admitted a very broad range of possible meanings. It could have been understood to permit only very limited situations in which a person might lawfully be outside their home, such as technical and fleeting instances beyond the list set out in the regulations – stepping off a doorstep to clap the NHS or retrieving an item left in a car parked in the street might be examples – or situations where there is some clear necessity that required a person to leave the house. Alternatively, it could have been understood broadly and by reference to the underlying public health rationale, to allow any non-frivolous activity outside the home that did not give rise to a public health concern, for example, sitting with an easel in the park painting a picture of the sunrise or taking the kids to feed the ducks. Such could be "reasonable" reasons for being outside the house in the context of a pandemic since they allow social distancing to be observed. The concept admitted of a range of interpretations between such outer limits.

Added to these issues of vagueness, the concept was capable of changing over time. This is because the list of permitted activities was relevant to understanding the general exception. The more restrictively the permitted exceptions were framed the more restrictively the concept of reasonable excuse was likely to be understood. As the list of permitted reasonable excuses was adjusted, so the wider concept of "reasonable excuse" was capable of taking on a new form. Thus, after the 13 May 2020 amendments to the regulations permitted people to leave their home for recreation to further their physical or mental wellbeing. Given that people could leave the house for such purposes, it was more obviously reasonable to engage in other activities outside, such as leaving the house to borrow an item from a neighbour or go and sing happy birthday outside a friend's house.

[47] Regulation 6 of the Regulations.

The vagueness of the concept of reasonable excuse and the ambiguity present in other terms thus provided a platform for the Government to provide an overlay of guidance by which it effectively widened or narrowed the exception. Thus, the coronavirus guidance originally portrayed the exception as both finite and exceptionally limited. On 23 March 2020 the coronavirus guidance stated:[48] "You should only leave the house of one of four reasons". It then listed shopping for basic necessities which "must be as infrequently as possible", one form of exercise per day, medical need, and work. That was all.

The statement was inaccurate for a number of reasons. Most fundamentally, as we have seen, at this time there were in fact no legal restrictions in place that could have reflected these four reasons for leaving the house. But even when the regulations came into force several days later, they listed *thirteen* specific reasons for leaving home as well as the general exception of reasonable excuse. The guidance at this point was changed to state that people, "should only be away from [their] home for very limited purposes". But it then listed the same four purposes and did not refer either to the fact that many other reasons for leaving home were allowed or that any other reasonable excuse was permitted.[49] Worse, the section of the guidance which posed the question "What will happen to me if I break the rules?" stated that if a person left home "for any reason other than those specified" the police could take action including imposing fines. The guidance was clear: there were four reasons for leaving home and it was an offence to leave home for other reasons.

Indeed, the coronavirus guidance in the relevant period did not use the words "reasonable" or "excuse" at any point. The reason was because the Government wanted to ensure that people stayed at home. That might have been entirely sensible public health advice but the coronavirus guidance created the impression that the law was far more stringent than it was and limited the scope of individual autonomy and liberty to a much greater extent than it actually did.

It was only on 2 May 2020, almost *six weeks* after lockdown, that the guidance first informed individuals (in the FAQs section) that the four reasons were exceptions "and a fuller list is set out in the regulations." This was however a short and delphic statement. The reference to "the regulations" was unexplained and it was not mentioned that the stated exceptions were examples of a broader exception of reasonable excuse. Moreover, as noted above, this reference was linked to the wrong regulations, namely those concerning the detention, isolation and

[48] Under the guidance on staying at home and away from others, "1. Staying at home".

[49] This was also reflected in the pages headed "Staying at home: what you can and can't do" and "Coronavirus FAQs: what you can and can't do" that were added on 29 March 2020.

screening of persons suspected of being infected. So whilst the guidance was less misleading, it was no more informative.

The guidance also provided a narrow and inaccurate description of several of the individual exceptions listed in the Regulations, as has already been touched upon. Thus, in relation to exercise it stated that a person could take "one form of exercise a day, for example a run, walk, or cycle - alone or with members of your household". The messaging was reinforced by Government statements in the media, such as Environment Secretary Michael Gove MP who stated that a walk of up to an hour, a run of 30 mins or a cycle of 30-60 minutes was what the rules envisaged.[50] This was a very restrictive interpretation of the Regulations, indeed an inaccurate interpretation of them. There was no prohibition on playing games such as golf, football or tennis, doing yoga or stretching in the park, or many other forms of exercise, as long as they were with members of the same household. There was no limit on the length of time a person could exercise or how many times per day they could do so. Despite the breadth of the exception, the Government guidance portrayed it in a very different way. Again, this may have been good public health advice but it departed from the requirements of the law.

It was not only the exercise exception that was subject to glossing by government guidance. Another example is provided by the guidance on leaving home to go shopping. From 23 March 2020 to 10 May 2020 this stated:[51]

> "You should only leave or be away from your home for very limited purposes:
>
> - shopping for basic necessities, for example food and medicine, which must be as infrequent as possible"

This gave the impression of very restrictive rule and indeed that unnecessary trips to the shops would be a criminal offence.[52] However, in truth the first sentence that follows the bullet point

[50] J. Johnston, "Michael Gove tells joggers to limit exercise stints to 20 minutes amid coronavirus lockdown", PoliticsHome, 29 March 2020 (available at https://www.politicshome.com/news/article/michael-gove-tells-joggers-to-limit-exercise-stints-to-30-minutes-amid-coronavirus-lockdown [Accessed 4 June 2020]).

[51] "Coronavirus outbreak FAQs: what you can and can't do", No. 1.

[52] Cambridge Police announced it had been patrolling a supermarket for shoppers buying non-essential items and the Chief Constable of Northamptonshire Police said that his force would start checking shopping baskets: D. Chipakupaku, "Coronavirus: Cambridge Police checks no one is in non-essential aisles at supermarket", Sky News, 10 April 2020 (available at https://news.sky.com/story/coronavirus-cambridge-police-checks-no-one-is-in-non-essential-aisles-at-supermarket-11971517 [Accessed 4 June 2020]); A. Bienkov, "A police chief threatened to start checking shopping trolleys for 'unnecessary' items during the UK coronavirus lockdown', Business Insider, 9 April 2020 (available at https://www.businessinsider.com/coronavirus-uk-police-chief-threatened-to-check-shopping-trolleys-2020-4?r=US&IR=T [Accessed 4 June 2020]).

included both a statement of the law (in the first clause) and then a statement of public health advice (in the second). The introductory statement before the bullet point was (a very narrow) interpretation of the exception. This example thus embodies each of the three different types of statement that have been identified above - descriptions of the law, interpretation of the law and public health advice – woven together *within the same sentence*.

On 11 May 2020 this guidance was changed to read:[53]

> "You should stay at home as much as possible. The reasons you may leave home include:
>
> - Going to shops that are permitted to be open – to get things like food and medicine.

This change, though subtle, was significant. The public health advice was still present: it had become "stay at home as much as possible". This was more obviously public health advice.[54] Reference to the legal rule was also made, but this had changed significantly, so that it presented the law in much more permissive terms, emphasising that the reasons for leaving home "include" shopping and is not limited to "basic necessities". These changes were made without there being any change to the underlying legal provisions. It is an example of how the coronavirus guidance at different times presented the same legal provisions in different ways. The reason for the change in presentation was to reflect the Prime Minister's upbeat message in his 10 May 2020 televised address to the nation and to encourage people to take a more permissive view of the rules. Whilst changes to the rules were made a few days later, no changes were made to the law that justified the rephrasing set out above.

An interesting example of the Government adopting the opposite technique – i.e. portraying an exception more broadly than it actually was – is provided by an amendment that was made to the guidance following the threat of legal challenge by parents of children with autism and learning disabilities. The proposed claimants made the point that it was not realistic for them and their children to stay inside other than for exercise once per day. This resulted in a change to the guidance on 8 April 2020.[55] The FAQs added the question, "Can I exercise

[53] "Coronavirus outbreak FAQs: what you can and can't do", No. 1.2.

[54] As indicated by the words "as much as possible" and by the separation with the following sentence which sets out a clear statement of a rule and exception.

[55] "Coronavirus outbreak FAQs: what you can and can't do", No. 15 corresponding to regulation 6(2)(b) of the Regulations.

more than once a day if I need to due to a significant health condition?" to which the answer was given that you could. If a health condition routinely required a person to be outside their home more than once per day to "maintain [their] health" then that person could continue to leave the house for this purpose. It continued: "This could, for example, include where individuals with learning disabilities or autism require specific exercise in an open space two or three times each day - ideally in line with a formal care plan agreed with a medical professional."

The effect of this use of guidance was to expand the concept of "exercise" beyond any sensible understanding of that concept. The object of the change to the guidance was to permit people with children with health needs to take recreation outside (and probably for the parent's benefit as well as the child's). This was an entirely laudable objective. But it was achieved in a manner that manipulated the role of the guidance by allowing outside activity as exercise that was not in truth within the exercise exception.[56] Rather than utilise the concept of reasonable excuse, which might have suggested other more wide-ranging exceptions, or amend the Regulations to add a clear and self-standing exception, the Government essentially used the guidance to create an exception that did not exist. This is another example of the Government's presentation of the law being distorted by public health advice.

iii. The portrayal of public health advice as rules

Another feature of the coronavirus guidance that contributed to the blurring of the relationship between legal obligation and public health guidance was that public health advice was sometimes presented as a recommendation and sometimes presented as a rule. This exacerbated the ambiguity as to the status of the instruction in question because rules are generally, at least in this context, the product of law and certainly give the impression that they must be followed.[57]

[56] It might have been better expressed as falling within the exception "to avoid injury or illness" (regulation 6(2)(m)) but this would also require some degree of reinvention as the exception is not directed at avoiding illness but managing long-term existing conditions.

[57] For example, the Coronavirus Guidance 11 April 2020 stated:

> Rule: "if you live alone and have symptoms of coronavirus illness (COVID-19), however mild, stay home for **7 days**…"
> Rule: "If you go out, stay 2 metres away from other people at all times…"
> Advice: "We advise you to stay local and use open spaces near to your home were possible…"

IV. Implications of the fusion of law and guidance

The previous discussion has shown how in the critical period between 23 March 2020 and 1 June 2020 the coronavirus guidance elided the criminal law and public health advice, obscuring the nature of the instructions given to the population. This was not a unique feature of the English coronavirus guidance and was seen in the relevant guidance in other parts of the UK. This is partly a reflection of the fact that the regional governments adopted the central UK guidance and extremely similar lockdown regulations were introduced at the same time in each region. Many of the examples discussed in this paper are therefore also found in the guidance promulgated by the regional governments. For example, the Scottish Government also stated in its guidance that exercise could only be taken once a day, whereas this was no more a legal requirement in Scotland than in England. On 11 May 2020 the Scottish Government announced an easing of the lockdown and changed its guidance to state that exercise could be taken "as often as you like, as long as you observe social distancing rules". This appeared under the statement that you should only leave home "for very limited purposes", a carry-over from the UK Government guidance. For most people, this would have appeared to be a change in the law, a view reflected in the headline of The Scotsman newspaper which read, "First Minister lifts exercise rule in Scotland's lockdown" with the strapline, "Scots will now be allowed to go out more than once a day".[58] But the law had not changed, only the public health advice. Scots had always been allowed to go out more than once per day to exercise. Similarly, the reference to "social distancing rules" (and an accompanying video showing individuals outside the house with 2 metres radius circles around them) suggested that compliance with the 2 metres guidance was a condition of the law. As in England, this was not the case.

This method of governance through a fusion of public health advice and criminal laws has several benefits from the perspectives of the UK Government and regional executives. It provides scope for governments to afford greater potency to their public health advice through the suggestion that it is backed by the force of law. Correspondingly, when it suits the government, in enables them to emphasise individual discretion and responsibility as part of a more permissive public health situation. Achieving this through changes to guidance rather than law has the benefit of versatility by enabling a considerable degree of rule-modification without incurring the political and logistical costs of formal amendment to the underlying law.

[58] C. Salmond, "First Minister lifts exercise rule in Scotland's lockdown", The Scotsman, 10 May 2020 (available at https://www.scotsman.com/news/politics/first-minister-lifts-exercise-rule-scotlands-lockdown-2848321 [Accessed 4 June 2020]).

The overlay of guidance also enabled the Government to communicate and present messages in the manner thought to be most effective to achieve the public health goals, informed by insights from behavioural science, which is an opportunity not afforded by the techniques of legislative drafting.

There is also a deeper more fundamental aspect of the advantage gained by governments in adopting this technique. The fusion of law and guidance operates a mechanism for centralising power in the hands of the executive that would otherwise be more widely dispersed within our constitutional arrangements. Thus, as we have seen, the Government has no constitutional role in interpreting the criminal law. Only the courts can pronounce on the meaning of the criminal law. Other public authorities whose responsibility it is to enforce the criminal law can and do sometimes produce guidance on their understanding and approach to the criminal law, namely, the police and prosecuting authorities. But the Government has no role in enforcing the law either under the general law or under the regulations. The separate and prior task of making law, especially criminal law, is one which rests primarily with Parliament (and regional legislatures in the context of the regional governments). Whilst the Government does have powers delegated by Parliament to make law, these must still be laid before and approved by Parliament.[59] Even the promulgation of public health advice is not something that central government would ordinarily do. Public health advice is ordinarily provided by the health service at a national or local level. The NHS has a website that sets out detailed advice on a very wide range of public health issues and indeed this was a resource that was initially used by the Government to provide public health advice in response to the coronavirus pandemic, before public health advice and legal regulation became folded together. The coronavirus guidance has therefore operated as a method of concentrating these ordinarily diffuse sources of authority – interpreting the law, making the law and promulgating public health guidance – in the hands of central government. This enabled the government to promulgate a *sui generis* system of rules and exceptions to fit the prevailing public health situation. Whilst not necessarily illegitimate, this distinctive and highly potent form of emergency rule sits outside the legal regime established by Parliament for emergency governance contained in the Civil Contingencies Act 2004. It represents the creation of a new form of emergency regulatory intervention.

[59] For an excellent account on the marginalisation of Parliament during the pandemic see K. Ewing "Covid-19: government by Decree" Kings Law Journal, Vol. 31 No 1, 1-14 (2020); and also on the increased role of Parliament that would have been entailed by the use of the Civil Contingencies Act 2004: A. Block and C. Walker, "Why did government not use the Civil Contingencies Act?" Law Gazette, 2 April 2020.

Governance through guidance even in normal conditions raises significant question marks. Judicial consideration of the use of guidance as a form of regulatory intervention is, as has been noted, still relatively nascent and the principles remain underdeveloped. Strikingly however in *BAPIO Action*, the House of Lords was critical of the informal way that the Government had sought, through the use of guidance, to impact people's rights and opportunities, in that case the employment and training opportunities of international medical practitioners. Lord Bingham pointed out that the guidance at issue in that case had not been "issued" in any formal sense. It had been published on the NHS website and no official draft, record or statement had been identified. Lord Bingham observed that it "is for others to judge whether this is a satisfactory way of publishing important governmental decisions with a direct effect on people's lives."[60] Whilst the court did not suggest that the lack of formality affected the lawfulness of the guidance, the criticism was clear. It is criticism that applies with even greater force in the context of the coronavirus guidance because its impact on individual freedom was far more extensive. The publication of an official text, recording amendments, would enhance transparency and facilitate scrutiny by Parliament, by society and by courts. But this point can be pressed further.

One of the impacts of the use of the coronavirus guidance to manage the coronavirus pandemic more generally that it has marginalised the role of Parliament in scrutinising the rules and holding Government to account. Parliament's role was already reduced by the Government's use of emergency procedure in making and amending the Regulations, which meant that prior Parliamentary approval for the criminal laws introduced was not obtained.[61] However, it was not the Regulations but the coronavirus guidance that was the primary source of the instructions given to the population and since it was published informally on the government website it was not even laid before Parliament. Only one of the associated documents, the Government's recovery strategy, was laid before Parliament as a Command Paper. There are many examples of statutes requiring documents to be laid before Parliament (known as "Act Papers") and the use of guidance in an emergency to regulate people's lives is a context in which, if guidance is appropriate at all for such a role, it should be subject to

[60] *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2008] UKHL 27, [2008] 1 AC 1003, paragraph 10.

[61] See above note 32 above.

statutory conditions including a requirement that an official version, approved at Ministerial level, should at least be laid.[62]

Perhaps the most immediate and visible consequence Government's use of guidance containing a fusion of public health advice and criminal laws to manage the coronavirus crisis has been the resultant confusion and misunderstanding about the rules and their status. This is reflected in the numerous examples, particularly in the early stages of the lockdown, of police forces enforcing public health advice rather than law, such as the actions of Derbyshire police publishing drone footage on Twitter seeking to prevent people driving to take exercise.[63] The level of misunderstanding of the nature of the instructions being promulgated by the Government in the general population is reflected in the results of the survey conducted by Halliday, Meers and Tomlinson, which, in addition to the results already mention, found that 56% of the people surveyed thought that driving to open spaces was banned, when it was not, and 76% thought shopping more than once per day was banned, when it was not.[64]

The biggest casualty of the Government's approach has, however, been respect for individual autonomy. Since respect for individual autonomy is central to the legitimacy of government action this should be of particular concern. It has been shown that the Government used the coronavirus guidance as a means of communicating a particular perspective and interpretation of the legal rules and their relationship to public health advice to the population at large. In this way the Government sought to "frame" individual choice. But it has been shown that this framing failed to make clear the respects in which individual choice was restricted by law and the respects in which individuals remained free to choose how to act. People were therefore unable to make properly informed decisions with a clear understanding of what the law said, what it did not say and what the public health guidance was. The vast majority of the population took their instructions either directly from the coronavirus guidance or the reporting of the guidance in the media. People cannot be expected to engage in the complex and time-consuming task of consulting other sources to identify and clarify the Government's

[62] On Act Papers and Command Papers see *Erskine May online*, paragraph 7.30 (available at https://erskinemay.parliament.uk) [Accessed 15 June 2020]. Ordinarily Act Papers are approved by Department, Command Papers are approved by Ministers.

[63] H. Shearing, "Stay local to exercise, says government" BBC News, 27 March 2020 (available at https://www.bbc.com/news/uk-52062209 [Accessed 4 June 2020]); and see J. Ames, "Lord Sumption warms against police overstepping limits" The Times, 31 March 2020 (available at https://www.thetimes.co.uk/article/lord-sumption-warns-against-police-overstepping-limits-6wk2k335k [Accessed 4 June 2020]). See also the examples above note 52.

[64] Halliday, Meers and Tomlinson, "Public Attitudes on Compliance with COVID-19 Lockdown Restrictions", U.K. Const. L. Blog, 8th May 2020 (available at https://ukconstitutionallaw.org/2020/05/08/simon-halliday-jed-meers-and-joe-tomlinson-public-attitudes-on-compliance-with-covid-19-lockdown-restrictions/ [Accessed 4 June 2020]).

instructions, in particular legal rules in their native format. This is more especially the case in the context of a hugely stressful public health emergency when the population was attempting to adapt to unprecedented upheavals and crises in their day-to-day lives with the ever-present overriding fear of coronavirus itself. In such a context clarity and transparency are especially important. We have seen that in certain respects the messages conveyed to the public were clear; but there was a real and problematic ambiguity as to the nature of the instructions being conveyed not far beneath the surface.

Of course, this impact on individual autonomy occurred in an effort to combat a major public health crisis and it might be argued that it is therefore justified.[65] There can however be no justification for providing inaccurate or misleading information to the population, even in an emergency. We have seen that at least some important aspects of the coronavirus guidance merit this description. The Government has itself emphasised the desirability of transparency and clarity in responding to emergencies. In 2013, for instance, a Cabinet Office publication on responding to emergencies emphasised that policies, plans and practices should be explained to the public "comprehensively, clearly and consistently, in a transparent and open way."[66] Some of the errors in the coronavirus guidance were sufficiently misleading and inaccurate that the courts would probably had stepped in correct the way that the law was being portrayed had they been invited to do so.[67]

We must also briefly consider one further aspect of the phenomenon under consideration: its relationship to the concept of nudging, which has received a considerable amount of public attention during the coronavirus emergency given the Government's reliance on experts in behavioural science.[68] As anyone familiar with the concept of nudging will know, there *are* circumstances in which governments can legitimately choose to present information in a manner that frames individual choice knowing and intending that it will influence behaviour in a predictable and desired way even where this is intended to lead people to

[65] That does not take away from the fact that it is important to appreciate that there has been a substantial impact on individual autonomy which requires justification.

[66] *Cabinet Office, Responding to Emergencies, The UK Central Government Response, Concept of Operations (2013) Ch. 6, para. 2.5*.

[67] See *Gillick v West Norfolk and Wisbech Area HA* [1986] AC 112.

[68] The Government's reliance on behavioural science insights in its response to the coronavirus outbreak became controversial in later March when it was reported that the delay in imposing lockdown measures was based on advice that people would suffer "behavioural fatigue". This led to a number of behavioural scientists writing an open letter in protest. See R. Chataway, "Can we 'nudge' away Coronavirus?" BVA Nudge Unit, 20 March 2020 (available at https://bvanudgeunit.com/can-we-nudge-away-coronavirus/ [Accessed 4 June 2020]).

overestimate or underestimate risks. This can occur, for example, when producers of foodstuffs are required to present information in a certain way, e.g. the fat content of products as 10% fat rather than 90% fat free, or where the government presents the risk of death from a certain behaviour as increasing tenfold rather than increasing from 0.001% to 0.01%, or the use of vivid unpleasant imagery on packaging.[69] Such techniques are some of the techniques known as "nudges".[70] Nudging is a recognised form of governance in the UK and elsewhere.[71]

The Government's approach to the coronavirus guidance, including the manner that information and instructions were portrayed, was no doubt influenced by insights of behavioural science, the same insights that inform nudges.[72] However, the phenomenon under examination in this paper is fundamentally different from nudging. A nudge leaves a choice open.[73] It is distinct from a regulatory intervention which prohibits conduct or imposes disincentives on certain behaviour.[74] Changing the individual's scope of free choice to forbid or restrict choice is in fact the antithesis of a nudge. The imposition of a criminal law framework under the Regulations creates a regulatory intervention that prohibits certain activities through deterrence. By obscuring the scope of the relevant rules through normative ambiguity and authoritative statements by the Government on the content of these rules, the Government has extended the deterrence effect associated with the criminal sanctions underlying the Regulations to encompass pieces of public health advice. These, too, control people's perception of their scope for individual choice and thus cannot be described as

[69] C. R. Sunstein, "The Ethics of Nudging" (2015) 32 Yale Law Journal 414.

[70] The concept was popularised by *R. Thaler and C. Sunstein, Nudge (New Haven: Yale University Press, 2008)*.

[71] See for a good summary, *House of Lords Science and Technology Committee, Behavioural Change Report (TSO, 2011) HL 179, Ch. 2*, including a reference to the Government's view that nudging excludes information and promotional forms of non-regulatory interventions as these do not involve promoted choice.

[72] A key lesson learnt from the swine flu pandemic was identified in Government contingency plans as "the potential to use insights from behavioural science better." *Department of Health, England and Health Departments of the Devolved Administrations of Scotland, Wales and Northern Ireland, UK Pandemic Influenza Communications Strategy 2012 (2012), p. 16*. See more generally, Public Health England, *Improving people's health: Applying behavioural social sciences to improve population health and wellbeing in England* (Crown Copyright September 2008, gateway number 2018478).

[73] *Thaler and Sunstein, Nudge (New Haven: Yale University Press, 2008)*: Thaler and Sunstein's well known definition, which is wider than is now commonly accepted, is: "…any aspect of the choice architecture that alters people's behaviour in a predictable way without forbidding any options or significantly changing their economic incentives." (*p.6*).

[74] *House of Lords Science and Technology Committee, Behavioural Change Report (TSO, 2011) HL 179, 2.3*, helpfully distinguishes between the following interventions: regulatory governance (restrict/eliminate choice); fiscal measures (incentives/disincentives); other incentives and persuasion; and choice architecture (nudges). This builds on the Nuffield Ladder of Interventions (*Nuffield Council of Bioethics, Public health: the ethical issues, (Nuffield Council of Bioethics: London 2007)*). A more comprehensive description of behavioural change interventions is the Behavioural Change Wheel: S. Michie, M.M. van Stralen, R. West, "The behaviour change wheel: a new method for characterising and designing behaviour change interventions" (2011) 42 Implementation Science 6.1.

nudging. The Government is consequently engaging in a complex form of regulatory governance, not a form of nudging.[75]

At the end of May 2020 this issue took an unexpected turn when the Prime Minister's chief adviser, Dominic Cummings, was revealed to have left London with his wife and child shortly after the lockdown was imposed, and indeed the day after the Regulations came into effect, on 27 March 2020, to travel to Durham to stay close to his parents on their estate. In an unprecedented televised public statement made in an effort to explain his actions, Mr Cummings also admitted to having travelled to Barnard Castle on 12 April in a car with his wife and young child, a journey he said was an effort to test his eyesight following his recovery from Covid-19. The revelations provoked a media storm and there was an enormous amount of public anger when the Prime Minister announced that he was satisfied Mr Cummings had not broken the law and had exercised his judgment appropriately.[76] He said that the trip to Durham had been motivated by a concern about childcare as Mr Cummings' wife had been unwell and Mr Cummings himself feared he might succumb to coronavirus. Mr Johnson stated that Mr Cummings "followed the instinct of every father and every parent". For the population at large it appeared that a different law was being applied to Mr Cummings than had been applied to everybody else. But the intensity of public anger was in large part a reflection of the manner that the coronavirus guidance had presented the legal rules, overstating their stringency. In the early phase of the lockdown the coronavirus guidelines had been clear that there were four reasons only for leaving home, shopping, working, exercise and medical need and that leaving home other than for the specified reasons would be unlawful. The population had taken the guidance at its word and had followed it, often at the cost of huge personal sacrifice. The guidelines had given no indication that there was room for an element of individual discretion or judgement and by suggesting that it had been open to Mr Cummings to exercise his judgement as a parent, the Prime Minister's position seemed incomprehensible. The root issue exposed by the Cummings affair was therefore not the unequal application of the law but the fact that the Government's response to the pandemic had failed to respect

[75] Public health guidance published to assist people to avoid contracting or transmitting disease, which sets outs out an authoritative non-legal normative framework, backed by health incentives, is also not well characterised as a nudge (although it strictly satisfies Thaler and Sunstein's definition). The manner that public health advice is *presented* would fall within the concept. On the boundaries of nudging and controversies surrounding the concept, see R. Baldwin, "From Regulation to Behavioural Change: Giving Nudge the Third Degree" (2014) 77 Modern Law Review 831 and in the context of health care, C. Perry, K. Chhatralia, D. Domesick, S. Hobden, L. Volpe, "Behavioural insights in health care, Nudging to reduce inefficiency and waste" (The Health Foundation, December 2015).

[76] See eg Johnston, "Boris Johnson says Dominic Cummings 'acted legally, responsibly and with integrity' in lockdown row", Politics Home, 24 May 2020 (available at https://www.politicshome.com/news/article/boris-johnson-says-dominic-cummings-acted-legally-responsibly-and-with-integrity-in-lockdown-row [Accessed 4 June 2020]).

individual autonomy by overstating the stringency of the criminal law restrictions on personal freedom.

V. Conclusion

This paper has explained how the United Kingdom Government's response to the coronavirus pandemic during the critical lockdown phase between 23 March 2020 and 1 June 2020 involved the coordination of individual behaviour through a potent fusion of public health advice and the criminal law in the form of the coronavirus guidance. The coronavirus guidance was used by the Government as the principal tool for controlling the public understanding of the restrictions on individual freedom that were in place. However, the guidance was extremely ambiguous and unclear as to the nature of the instructions that it communicated. Some aspects of this resulting ambiguity were subtle and unobjectionable but other aspects, highlighted in this paper, misrepresented the scope of the criminal law restrictions. This may well have been the product of oversight, error, or a well-intentioned effort by officials to produce clear messages, but the result was that people were relying on information that was in fact unreliable. It was unreliable because it failed to accurately and clearly set out what the true limits on individual liberty were. The coronavirus guidance developed into a powerful new, *sui generis* form of emergency regulatory intervention outside the system of emergency government set out by Parliament. Whether this is an appropriate way to govern in an emergency at all is a larger question than this paper can address, although it is hoped that the analysis here will inform and possibly kickstart an examination of that question. It is after all an urgent question. At the time of writing, the coronavirus guidance continues to perform the central role of communicating instructions to the population in England and similar guidance applies in other parts of the United Kingdom.

The analysis of the coronavirus guidance set out in this paper suggests that if guidance is to be used as a form of emergency regulation it should at the very least be firmly and expressly located in a statutory framework that sets out conditions on the use of the power, including a requirement that the guidance and any amendments are approved at Ministerial level and laid before Parliament. Moreover, at a minimum, such guidance should conform to the following substantive principles of transparency to enable people accurately to understand the rules that they live by during a public health emergency: (1) guidance should clearly distinguish information about the law from public health advice; (2) all underlying or associated legal instruments should be clearly and accurately identified and an accurate link to

a copy of the up-to-date law should be provided; (3) information about the law should be accurate and complete; (4) where the law is too complex to be set out in full the fact that the account is partial should be made clear and key parts of the law (such as in the present case, the "reasonable excuse" exception) should not be omitted; (5) guidance should make clear when opinions are offered about the interpretation of the law and the status of such opinions; (6) guidance should not suggest that instructions are based on law when they are not.

These six principles might be thought to be rather obvious. If that is so, then it is even more concerning, perhaps even alarming, that in the critical early period of the coronavirus lockdown in England, when the most severe restrictions on individual liberty in modern times were in place, the coronavirus guidance failed to comply with every one of them.

JUDICIAL REVIEW TRENDS AND FORECASTS 2020

The dynamics of Judicial Review litigation

Chair: Alison Pickup, Public Law Project

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The Dynamics of Judicial Review (non-) Litigation

At Child Poverty Action Group (CPAG), the legal/welfare rights team engages in legal challenges against a range of welfare benefits decisions by way of judicial review and statutory appeals. Some of those challenges are of an overtly strategic nature, challenging the policy or legislation underpinning the decision e.g. the 2 child policy which limits the additional payments for children in means tested benefits to the first two children. Others are primarily of an individual nature e.g. delay by DWP in making a decision on a specific benefit claim.

Judicial review litigation: the tip of the iceberg

CPAG's current strategic litigation work consists of seven judicial review cases before the courts[1]: 1 appeal before the Supreme Court; 1 appeal before the Court of Appeal; 2 SSWP's permission to appeal applications before the Supreme Court and the Court of Appeal respectively; 1 case awaiting High Court judgment following substantive hearing; 1 case at High Court permission stage; and 1 appeal against refusal of permission to apply for judicial review at Court of Appeal. We also have two cases where we are working on implementation of successful judgments.

Where CPAG acts on behalf of individual clients, our paid judicial review work is all legally aided.[2] For this we have a public law legal aid contract which requires us to complete around 30 legal help cases a year i.e. cases where we provide initial advice and assistance at the pre-litigation stage, including engaging in pre-action correspondence. If all of those legal help cases were, following the pre-action stage, to progress to litigation, our active caseload would quadruple in the space of a year, something we simply do not have the capacity for. In fact, only 2 or 3 of those legal help cases will be test cases which we know in advance are unlikely to settle at pre-action stage. Instead, the vast majority of our legal help cases concern relatively straightforward matters which will be resolved without the need for litigation e.g. where DWP are simply failing to apply the law correctly or follow their own guidance.

In addition to the pre-action matters we take on our ourselves, we have some 90 pre-action protocol letter templates openly available on our website as part of our Judicial Review project specifically directed at encouraging welfare rights advisers to engage in the pre-action protocol process as a means of ensuring correct benefit decisions for their clients where the more familiar benefits appeal process is not an effective remedy. Of those templates, we know that in all but a handful the matter will be resolved at the pre-action stage. This is for the same reasons that the majority of our legal help cases do not progress to litigation: they 'simply' concern poor administrative decision making.

[1] As the focus of the discussion is judicial review, I do not include reference to our statutory appeal work here.
[2] We do a number of pre-action matters pro-bono due to issues of urgency or the client being unable to evidence means.

Since the beginning of this year, we are aware of at least 40 pre-action template letters being used and resulting in positive outcomes for benefit claimants. However, as our templates are freely accessible (there have been over 3,300 downloads of templates so far this year), knowledge of their successful use is entirely dependent on those who use them taking the time to feed back to us.[3]

Pre-action: the Cinderella of judicial review

It is the court victories which invariably get media coverage – the four single mothers who each saw their universal credit payments oscillate dramatically throughout the year despite being in regular paying work purely because of a 'clash' between their monthly pay date and the start and end dates of their monthly universal credit assessment period (*R (Johnson and others) v SSWP* [2020] EWCA Civ 778) or the family who are benefit capped by up to £480 per month even though the mother works 16 hours a week at national living wage rate, which would mean she was exempt if she were paid monthly but she happens to be paid 4 weekly (*R (Pantellerisco and others)* v SSWP [2020] EWHC 1944 (Admin)).

Less headline grabbing are those cases which we know will be resolved at pre-action stage because we are not challenging the legislation, but the failure to apply it, follow it or complete inaction. These are cases about straightforwardly getting the law wrong (e.g. requiring a woman to satisfy a residence test to qualify for universal credit despite regulations expressly exempting her from that test because she has been granted leave to remain under the destitution domestic violence concession); fettering discretion/operation of a blanket policy (e.g. automatic recovery of overpayments even where caused by official error); failure to follow own guidance (e.g. subjecting a terminally ill person to work search and work availability requirements as part of the conditions for receiving a benefit despite the provision of the relevant form evidencing his terminal illness and confirming that he is not expected to live more than 6 months); undue delay (especially around making a mandatory reconsideration decision in the absence of which a claimant cannot start the appeal process); and failure to provide sufficient reasons (e.g. where generic reasons are provided which fail to enable a claimant to know the actual basis on which she is said not to meet the relevant criteria for a disability benefit).

Such 'bread and butter' cases are not about challenging the lawfulness of policy or legislation but about ensuring basic standards of good administrative decision making.[4] They usually result in a speedy and straightforward resolution of the situation for the individual concerned. This can often be against the backdrop of months spent by the individual claimant or welfare rights adviser trying

[3] Since the start of our Judicial Review project in January 2019, we know that at least 63 different welfare rights advisers across 54 advice agencies have successfully used one of our pre-action templates.

[4] This role of judicial review is recognised in the sub-title for the Government Legal Department's Judge Over Your Shoulder – a guide to good decision making https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/746170/JOYS-OCT-2018.pdf

to resolve the issue through other channels – correspondence with DWP, official complaints, involving the MP, as illustrated by this feedback to CPAG's JR project:

> *I just wanted to say thank you - I used one of your JR templates and have received an excellent result in just under a week. The one to get a paper assessment for PIP. The legal team emailed this morning to say they carried out the paper assessment, made an award, and will pay the backdate on 4th December. This is after weeks of nothing from the complaints team and no help from an MP who didn't seem interested. I was at a loss at what to do next so thank you so much!*

Strategic litigation versus non-strategic pre-action cases: a false dichotomy?

Engaging in pre-action correspondence on an individual matter that we know will settle because it concerns basic poor decision making may not, in isolation, be strategic. However, doing this repeatedly or being able to refer to other situations in which the same issue has arisen can be strategic in terms of exposing a general pattern of poor practice, inadequate training, misconceptions of the legal position etc. and getting those underlying problems, rather than just the individual decisions, addressed.

Sometimes, we do see very concrete changes as a result of pre-action engagement. For example, putting in a place a fast track route for issuing national insurance numbers to those who have claimed universal credit without one, where the universal credit automated payment system will not allow payment without such a number. Then when problems with the insistence on having an actual national insurance numbers rather than simply having applied for one started reoccuring during the pandemic, a series of referrals to the same contact in DWP Legal of universal credit encountering difficulties resulted in resolution of the individual cases but also the following:

> *Adjustments have been made to the referral forms and the role of team leader checks in the process has been strengthened. There have been nationwide communications with operational leads and communications to highlight some examples of non-compliance that have been identified to avoid other staff making similar mistakes.*

More generally though, from our side of the pre-action fence, it is not entirely clear what monitoring or evaluation goes on inside bodies such as the DWP to ensure that issues are not only addressed on an individual basis but systems are put in place to prevent the same issue occurring again e.g. through amending or reissuing guidance, provision of issue specific training.[5] In an ideal world, having been used several times, most of our pre-action template letters would become otiose as systems would have been put in place to prevent the same misapplication of the law or guidance occurring again.

[5] The Judge Over Your Shoulder makes no reference to these opportunities for learning or pro-actively addressing the issue to prevent it occurring again as part of the good decision making process.

Our real world experience is that such internal feedback loops, particularly between departmental lawyers and administrative decision makers, are not readily apparent even in actual litigation, let alone at the pre-action stage. For example, having won at the High Court on the unlawfulness of universal credit claimants being treated as earning two lots of monthly wages in one monthly assessment period when they were paid a day or two early by their employer to avoid being paid on a non-banking day, we requested the reconsideration of the relevant universal credit payment decisions for one of our clients where two lots of monthly wages had been used in calculating the amount of her universal credit. We received the following response:

> *'…judicial reviews are a challenge to the way in which a decision has been made, rather than the rights and wrongs of the conclusion reached. It is not really concerned with the conclusions of that process and whether those were correct, as long as the right procedures have been followed. The court will not substitute what it thinks is the 'correct' decision. This means that we can remake the same decision again ie to take both payments into account in the one AP in which they were received.'*

But the whole issue was that the right or lawful process or procedure did not allow for both monthly wages to be taken into account. Whoever had written the above response, appears to have taken it straight from the judiciary website, save for the final and critical underlined section:

> *' … judicial reviews are a challenge to the way in which a decision has been made, rather than the rights and wrongs of the conclusion reached.*
>
> *It is not really concerned with the conclusions of that process and whether those were 'right', as long as the right procedures have been followed. The court will not substitute what it thinks is the 'correct' decision.*
>
> *This may mean that the public body will be able to make the same decision again, so long as it does so in a lawful way.'*[6]

Conclusion

The importance of the pre-action protocol stage is too often overlooked in discussions about judicial review. It enables ordinary individuals to hold public bodies to basic standards of decision making, often, at least in the experience of CPAG's JR project, with minimal or no involvement of lawyers.[7] Perhaps if it was used more, rather than less, its strategic value in ensuring decision making was improved more generally would also increase, as addressing individual situations without addressing the underlying issue ceased to be a viable trade off .

Child Poverty Action Group, 30 September 2020

[6] https://www.judiciary.uk/you-and-the-judiciary/judicial-review/

[7] Before being posted on the website, pre-action template letters are checked internally by a lawyer or a very experienced welfare rights adviser. After that there is usually no involvement by lawyers in their actual use.

JUDICIAL REVIEW TRENDS AND FORECASTS 2020

Algorithmic decision making and data discrimination

Chair: Dr Joe Tomlinson, Public Law Project and University of York
Professor Jeremias Adams-Prassl, University of Oxford
Cori Crider, Foxglove
Kevin de Liban, Legal Aid of Arkansas
Ravi Naik, AWO

JUDICIAL REVIEW TRENDS AND FORECASTS 2020

Closing conversation

Elizabeth Prochaska, Chair of Public Law Project
and barrister, 11KBW
Paul Craig, Emeritus Professor of English Law,
Oxford University.