

Tribunal Justice, Brexit, and Digitalisation: Immigration Appeals in the First-tier Tribunal

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At a glance

The First-tier Tribunal (Immigration and Asylum) (FtTIAC) is about to go digital – at least partially – as the HMCTS transformation project turns its attention to the jurisdiction. This is the latest change in a string of major reforms impacting the FtTIAC in recent years. As a result of those reforms, access to the FtTIAC has been restricted in a variety of ways and the tribunal now plays a much less significant role in the wider landscape of immigration administrative justice. However, future expected developments – which include the introduction of online appeals and the prospect of the tribunal handling Brexit-related matters – present an opportunity to revisit the position of the FtTIAC within immigration administrative justice. The argument advanced here is that the core virtues of tribunal justice are still worth defending as the FtTIAC establishes a new role for the digital age. This is because, in the context of the mass administration required to enforce immigration policy, tribunals can dispose a large amount of complex cases at a relatively low cost, while providing the necessary degree of independence required for effective redress.

Introduction

Frontline immigration decision-making is a tough job.¹ It requires (often junior) officials to apply complex law and policy.² The evidence presented by applicants is variable, but often the materials supplied with an application can be far from ideal.³ Home Office decision-making is not a court-like process where the details of claims and supporting evidence are thrashed out fully – decisions are made in very short timeframes to ensure a backlog is not created

1 See generally on the complexity of frontline official decision-making: M Lipsky, *Street Level Bureaucracy: Dilemmas of the Individual in Public Services* (Russell Sage 1980) and B Zacka, *When the State Meets Street* (Harvard University Press 2017).

2 The Law Commission is currently undertaking a law reform project considering the complexity of the immigration rules. See also: M Williams, 'Legislative Language and Judicial Politics: The Effects of Changing Parliamentary Language on UK Immigration Disputes' (2017) 19 *British Journal of Politics and International Relations* 592, 595.

3 There may be numerous reasons for this, including applicants not having access to historic documents or documents from another jurisdiction.

by the millions of immigration applications requiring decisions (c 3.5 million each year).⁴ In such a high volume decision-making environment, the basic aim is for decisions to be made efficiently and with accuracy.⁵ In many ways, this is the only realistic goal where there are large volumes of complex decisions to be made. Within a bureaucracy like the Home Office, errors are inevitably made in the processing of applications, both in individual cases and at a systemic level.⁶ When mistakes are made, they are often reported in the press,⁷ fuelling an already-heated political debate around immigration control.⁸ There are constant pressures on ministers that filter through to the decision-makers that they oversee. To weed out errors and improve initial decision-making, it is perhaps more important to focus on the factors affecting officials operating on the frontline which condition the quality of decision-making.⁹ After all, most applications never leave the initial decision-making stage and the justice (and injustice) dispensed here is, by any general quantitative measure, the most consequential. There is, however, not an ideal administrative decision-making process and, even if present processes were better than they are, there would remain a demand for effective redress against initial immigration decisions. The need for the state to meet this demand can be grounded in various theories or principles of constitutionalism, such as the Rule of Law.¹⁰ But the practical, simple justification is that administrative errors with significant human consequences can be and are made in immigration decision-making, and effective redress is required to protect citizens from those errors. This was at the heart of the policy justification for introducing immigration appeals in the first place.¹¹ The basic idea of tribunals, though they have changed a great deal over the course of their history,¹² is that they are quick, cheap, and accessible

4 Figure from the Independent Chief Inspector of Borders and Immigration (ICIBI) latest report. ICIBI, *Annual Report for the Period 1 April 2017 to 31 March 2018* (June 2018) 15.

5 J L Mashaw, *Bureaucratic Justice: Manging Social Security Disability Claims* (Yale University Press 1983) (discussing the 'bureaucratic rationality' model). Other literature has attempted to identify models within patterns of administrative decision-making. For recent synthesis, see T Buck, R Kirkham, and B Thompson, *The Ombudsman Enterprise and Administrative Justice* (Ashgate 2011) Ch 3; Z Richards, *Responsive Legality: The New Administrative Justice* (Routledge 2018) Ch 1.

6 For an exploration of the types of problems, see: Administrative Justice and Tribunals Council, *Right First Time* (2011). For materials relating to the specific context of immigration see Home Affairs Committee, *The Work of the UK Border Agency*, (HC 587, 2010–11); Amnesty International, *Get it Right: How Home Office Decision Making Fails Refugees* (2004); Amnesty International/Still Human Still Here, *A Question of Credibility* (2013); Independent Chief Inspector of Borders and Immigration, *Entry Clearance Decision-Making* (2011).

7 For example see J Grierson and S Marsh, 'Vital Immigration Papers Lost by UK Home Office: Immigration Status of Hundreds Left in Limbo after Personal Papers go Missing' *The Guardian* (London, 31 May 2018) <<https://www.theguardian.com/uk-news/2018/may/31/vital-immigration-papers-lost-by-uk-home-office>> accessed 1 October 2018.

8 A recent example was the high-profile Windrush scandal, see; Home Affairs Committee, *The Windrush Generation*, HC Paper 990 (Session 2017–19).

9 R Thomas, 'Administrative Justice, Better Decisions, and Organisational Learning' [2015] Public Law 111.

10 For descriptions of the rule of law with a strong procedural justice component see: T Bingham, 'The Rule of Law' (2007) 66 *Cambridge Law Journal* 67, 69 and P Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework [1997] Public Law 467, 469. For a helpful recent overview, see J Tasioulas, 'The Rule of Law' in J Tasioulas (ed), *The Cambridge Companion to the Philosophy of Law* (Cambridge University Press 2019).

11 See Home Office, *Report of the Committee on Immigration Appeals* (Cmnd 3387, 1967) which led to appeal provisions in the Immigration Act 1971.

12 On the history and evolution of tribunals, see: C Stebbings, *Legal Foundations of Tribunals in Nineteenth Century England* (Cambridge University Press, 2006); RE Wraith and P G Hutchesson, *Administrative Tribunals* (Allen & Unwin 1974); G Drewry, 'The Judicialisation of "Administrative" Tribunals in the UK: From Hewart to Leggatt' (2009) 28 *Transylvanian Review of Administrative Sciences* 45; M Adler, 'Tribunal Reform: Proportionate Dispute Resolution and the Pursuit of Administrative Justice' (2006) 69 *Modern Law Review* 958; H Genn, 'Tribunals in Transition' [2007] Public Law 116; R Thomas, 'Current Developments in UK Tribunals: Challenges for Administrative Justice' in S Nason (ed.), *Administrative Justice in Wales and Comparative Perspectives* (University of Wales Press 2017); R Thomas and J Tomlinson,

for appellants – at least relative to the process of judicial review.¹³ They allow claimants to straightforwardly challenge the merits of the decision in question, rather than requiring them to formulate the comparatively narrow legality arguments that are heard on an application for judicial review. Tribunals also provide an opportunity for evidence to be more thoroughly aired and debated than is possible in a bureaucratic process, leading to a binding decision by an independent judge. From an administration of justice perspective, there are benefits to government. Tribunals can handle more cases than courts at much lower running costs.

Though it has long existed in a contested political context,¹⁴ recent years have generated much talk about the FtTIAC being in ‘crisis.’¹⁵ Meg Hillier MP criticised extensive delays in the tribunal as ‘having a devastating impact on people’s lives ... People are coming to my surgery who have not heard when their case will be or have been told to wait months.’¹⁶ There were reports in the legal press on how the ‘rapid decline in the number of immigration tribunal judges could herald a crisis.’¹⁷ Practitioners are also reporting concerns. Christopher Cole, a long-serving immigration solicitor, observed that the ‘most common and frustrating issue has been the late adjourning of hearings due to a lack of judiciary.’¹⁸ At the same time, dishonest and poor-quality representatives have also been a long-standing cause for concern.¹⁹ Furthermore, there has been a significant reduction in the functions of the FtTIAC in terms of the volume of appeals it is determining, principally due to the abolition of tribunal appeal rights. Looking forward, the FtTIAC is expecting more upheaval. Though details about the precise procedures to be used remain hazy at the time of this article being written, Brexit is expected to bring further work to the FtTIAC, as the Home Office undertakes the mammoth task of registering nearly four million EU citizens residing in the UK.²⁰ Meanwhile, Her Majesty’s Courts and Tribunals Service (HMCTS) – the government body responsible for the administration of courts and tribunals – is conducting an extensive digital transformation process, which promises to change the face of tribunals in a variety of ways.²¹

The FtTIAC is, by different hands within government (and sometimes with the acquiescence of Parliament), changed in a variety of ways.²² As a result, it is difficult to

‘A Different Tale of Judicial Power: Administrative Review as a Problematic Response to the Judicialisation of Tribunals’ [2019] Public Law (forthcoming).

13 *Report of the Committee on Administrative Tribunals and Enquiries* (Cmnd 218, 1957); Report of the Review of Tribunals by Sir Andrew Leggatt, *Tribunals for Users: One System, One Service* (2001); Department for Constitutional Affairs, *Transforming Public Services: Complaints, Redress and Tribunals*, (Cm 6243, 2004).

14 Being statutory creations, tribunals occupy a position at the juncture between law, politics, and administration, see Wraith and P G Hutchesson (n 12) 17.

15 For example R Thomas, Immigration appeals and delays: On the verge of a crisis? (UK Administrative Justice Institute Blog, 18 May 2017) <<https://ukaji.org/2017/05/18/immigration-appeals-and-delays-on-the-verge-of-a-crisis/>> (accessed 8 November 2018).

16 As reported by J Hyde, ‘Immigration Appeal Delays ‘Shocking’ as Backlog Reaches 63,000’ (*The Law Society Gazette*, 22 December 2017) <<https://www.lawgazette.co.uk/practice/immigration-appeal-delays-shocking-as-backlog-reaches-63000/5059191.article>> (accessed 8 November 2018).

17 M Fouzder, ‘Shortage of judges hits immigration tribunals’ (*The Law Society Gazette*, 20 February 2017) <<https://www.lawgazette.co.uk/news/shortage-of-judges-hits-immigration-tribunals/5059890.article>> (accessed 8 November 2018).

18 See Hyde (n 16).

19 M Fouzder, ‘Tribunals Urged to Collect Data on Dishonest Immigration Practitioners’ (*The Law Society Gazette*, 3 July 2018) <<https://www.lawgazette.co.uk/law/tribunals-urged-to-collect-data-on-dishonest-immigration-practitioners/5066734.article>> (accessed 8 November 2018).

20 See M Sumption and Z Kone, ‘Unsettled Status? Which EU Citizens are at Risk of Failing to Secure their Rights after Brexit’ (The Migration Observatory, April 2018) <https://migrationobservatory.ox.ac.uk/wp-content/uploads/2018/04/Report-Unsettled_Status_3.pdf> accessed 1 October 2018.

21 Ministry of Justice, *Transforming Our Justice System* (September 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/553261/joint-vision-statement.pdf> accessed 1 October 2018.

22 *ibid* 15.

predict what the tribunal will look like even a few years from now. At this point in time, it is important to reflect on the key changes implemented in recent years and the developing known unknowns. There has already been some consideration of the changes by various academic commentators and civil society organisations.²³ The contribution of this article is to offer a defence of the work of the FtTIAC and to reassert the core virtues of tribunal justice within the context of immigration redress, at a time when the model is in apparent decline. There are many legitimate criticisms which can be offered of how immigration appeals operate but it should not be forgotten that the basic model of tribunal justice, as represented in the FtTIAC, helps dispose of a large amount of complex cases, at relatively low cost (to both appellants and the taxpayer). It also provides the necessary degree of independence to act as a check on mass administrative decision-making. Overall, tribunals strike a broadly successful balance in the fundamental competition between fairness and efficiency evident in any system.²⁴ The HMCTS digitalisation reforms, together with changes in immigration law and policy being ushered in by Brexit, could mark the beginning of a revitalisation of tribunal justice within the sphere of immigration. At the same time, these same changes could potentially be just another step in the ongoing decline of tribunals.

Recent changes to the FtTIAC

It is important to start by looking at how the role and function of the tribunal has changed in recent years. Our purpose here is to examine major changes in order to sketch a macro-level picture of the how the FtTIAC is being reformed, rather than the production of a detailed sociological account of how the tribunal is experienced by the various constituencies that interact with it. Our focus is on the whole workload of the tribunal, including asylum matters.

In terms of the number of appeals that the FtTIAC receives, it has the second highest number of receipts of any First-tier Tribunal (second only to the Social Entitlement Chamber). Figure 1 shows the total number of receipts received between the first quarter of 2009/10 and the first quarter of the year 2018/19. The data shows that there is a dramatic drop in the total number of receipts across this period. In the first quarter of 2009/10, the FtTIAC received a total of 43,750 receipts. This decreases to just 11,864 receipts in the first quarter of the year 2018/19. This represents a decrease of almost 73% in the total number of receipts of appeals received by the tribunal over the overall period.

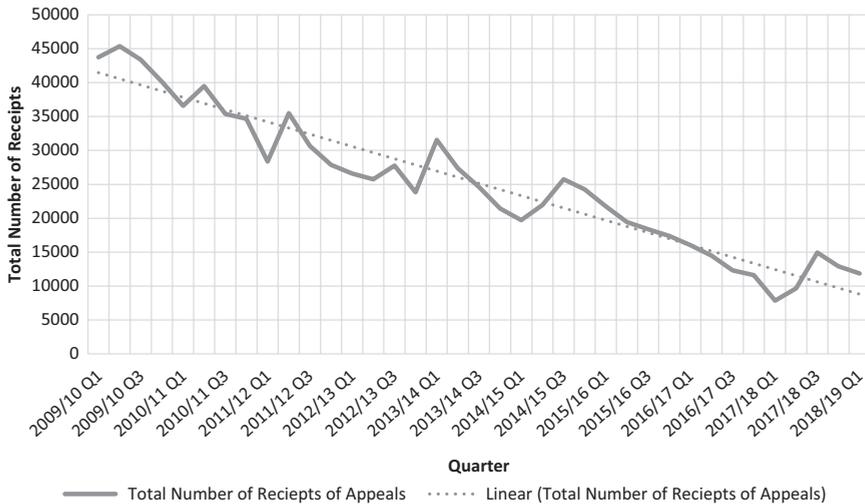
Several factors may be in play in relation to the rapid decrease in the volume of appeals and the trend is best explained by reference to a combination of them. First, the most obvious and main explanation for this trend is the systematic removal of appeal rights from certain categories of immigration decisions.²⁵ In 2014, immigration appeal rights (except those relating to asylum and human rights grounds) were replaced with a system of administrative review. This was part of a wider trend across government departments to internalise disputes within administration, thereby reducing the amount of external redress processes with

23 See JUSTICE, *Immigration and Asylum Appeals – A Fresh Look* (2018). Thomas and Tomlinson (n 12).

24 R Thomas, *Administrative Justice and Asylum Appeals: A Study of Tribunal Adjudication* (Hart 2011) 11–16.

25 Immigration Act 2014, s 15; Immigration Rules, Appendix AR. Family visitor appeals were abolished in 2013: Crime and Courts Act 2013, s 52. For context, see: R Thomas, 'Immigration and Access to Justice' in E Palmer, T Cornford, A Guinchard, and Y Marique, *Access to Justice: Beyond the Policies and Politics of Austerity* (Hart 2016) 105 and Thomas and Tomlinson (n 12).

Figure 1: Total number of receipts



which government departments are engaged.²⁶ The trend shown in Figure 1 is that of policy working as intended. The substitution of appeals to the tribunal for administrative review can cynically be viewed as the use of access to effective administrative redress as a mechanism for immigration control.²⁷ A more sympathetic interpretation would perhaps contend that administrative review is quicker and easier for immigration applicants compared to a tribunal appeal and that as a process internal to administration, administrative review provides a better opportunity for the Home Office to systematically improve the quality of all decisions beyond those which are subject to challenge. While it is true that users may want quick and easy decisions,²⁸ and it is also true that administrative review is quick (typically a matter of a weeks), it would be naïve to see the preference for, and expansion of administrative review within the context of immigration redress, as simply a policy which promotes the interests of the applicants or efficient administration. There is a strong and well-founded concern that administrative reviews ‘are neither independent nor transparent, but merely involve a different caseworker taking another look at the papers.’²⁹

Furthermore, within the context of immigration and asylum, the use of internal review processes has routinely been criticised as ‘superficial’ and ‘ineffective’ by oversight bodies, including by Parliamentary select committees.³⁰ As regards the new system, the Independent

26 Thomas and Tomlinson (n 12). See also D Cowan, A Dymond, S Halliday, and C Hunter, ‘Reconsidering Mandatory Reconsideration’ [2017] Public Law 215.

27 See Thomas (n 25) 127, which speculates on the possibility of ‘the end of appeals’ in immigration redress.

28 A Bryson and R Berthoud, ‘Social Security Appeals: What Do the Claimants Want?’ (1997) 4 Journal of Social Security Law 17; G Richardson and H Genn, ‘Tribunals in Transition’ [2007] Public Law 116.

29 Thomas (n 25) 126.

30 See: Constitutional Affairs Select Committee, *Asylum and Immigration Appeals*, (HC 2003–04, 211) para 107 and in its latest annual report, the ICIBI observed that ‘at the border’ reviews were being done locally, making separation of reviewer and original decision maker harder to evidence’ and furthermore, ‘the Home Office was not yet able to demonstrate that it had delivered an efficient, effective and cost-saving replacement for previous appeals mechanisms’ ICIBI, *Annual Report* (n 4) 25.

Chief Inspector of Borders and Immigration concluded, in his first report, that low-level, untrained, and temporary staff with limited or no experience of immigration law were undertaking reviews.³¹ At the same time, there was little oversight of these officials. Some less good review decisions demonstrated ‘an over-reliance on the initial refusal decision letter.’³² The reasoning in the decisions was also criticised on an application for judicial review as brief and underdeveloped.³³ And, unlike an appeal before the FtTIAC, new evidence cannot be taken into account in a review.³⁴ This unresponsiveness is obviously unsatisfactory in a context like immigration and asylum where there is a high possibility of the circumstances of an applicant changing between the initial adverse decision, and the subsequent appeal or review.

From one viewpoint, the main story in the marginalisation of the FtTIAC through the replacement of appeal rights with administrative review, is that it is just another aspect of a broader ‘political-legal conflict waged by ministers against immigrants, their representatives and the judiciary.’³⁵ It could be understood as part of a drive to reduce costs associated with administrative justice within a prevailing paradigm of austerity.³⁶ It is important to remember, however, that the total number of receipts of appeals, though an important indicator of the scale of decisions being made, is only one data point by which the tribunal and its significance can be assessed. Given the clear dramatic decrease in the total number of appeals shown in Figure 1, it is difficult not reach the conclusion that the policy to restrict access to the FtTIAC is working. The consequence being that the tribunal model of justice with its alleged benefits of ‘fairness’, ‘cheapness’, ‘accessibility’, and ‘freedom from technicality’, is now a diminishing feature of the administrative justice landscape within the context of immigration.³⁷

Figure 2 shows the total number of appeals received by the FtTIAC against the total number of decided and outstanding appeals in each successive quarter between the first quarter of 2009/10 and the first quarter of 2018/19. While the total number of receipts in the FtTIAC has been declining, the total number of decided appeals has not mirrored this trend closely – far fewer cases have been decided than received. Figure 2 also shows that from around the fourth quarter of 2011/12 to the third quarter of 2017/18, the difference between outstanding appeals and decided appeals steadily increased, reaching a peak of 53,804 appeals remaining undecided in the first quarter of 2016/17. However, that difference begins to narrow significantly from around the second quarter of 2016/17, with the total number of outstanding appeals falling to 23,209 in the most recent quarter. It is likely that this development is a result of the overall reduced number of appeals shown in Figure 1 allowing the tribunal to reduce the caseload of outstanding appeals, rather than an increase in the rate at which appeals are determined in the Tribunal. The data is also probably explained by various changes taking effect in a non-linear way, creating a demand/resource mismatch at various junctures.

The length of time it takes to get an appeal decided is an important element of administrative justice. One of the strengths of tribunals is their potential to dispose of

31 ICIBI, *An Inspection of the Administrative Review Processes Introduced Following the Immigration Act 2014* (2016). See also: ICIBI, *A re-inspection of the Administrative Review process* (2017).

32 *ibid* para 2.10.

33 *R (Akturk) v Secretary of State for the Home Department* [2017] 4 WLR 62, [47] per Holam J.

34 Immigration Rules, Appendix AR, para 2.4.

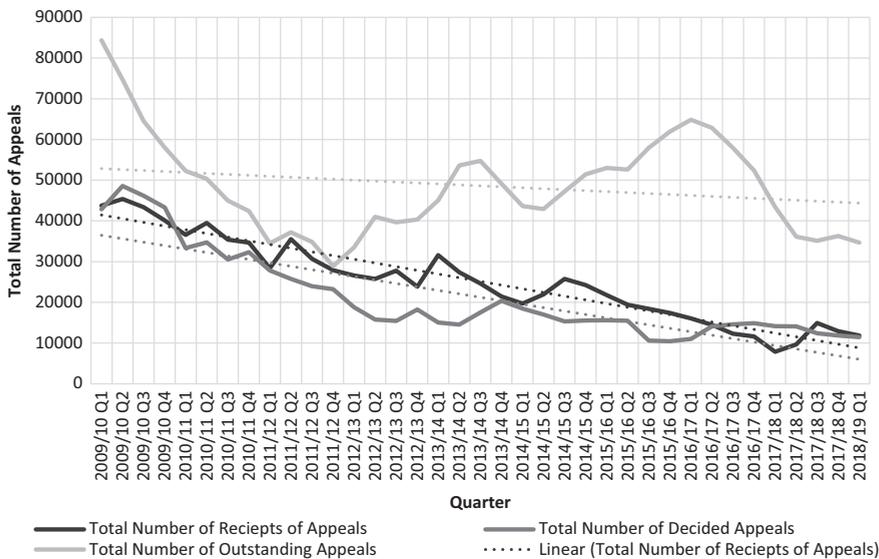
35 Thomas (n 25) 109.

36 T Mullen, ‘Access to Justice in Administrative Law and Administrative Justice’ in E Palmer, T Cornford, A Guinchard and Y Marique, *Access to Justice: Beyond the Policies and Politics of Austerity* (Hart) 69.

37 TCEA, s 2(3)(a)–(d).

cases quickly.³⁸ Figure 3 has been constructed from the quarterly statistics relating to the average age of appeals at the time at which they are disposed. The Ministry of Justice began using this indicator of timeliness from the third quarter of 2012/13. When this metric was introduced, the average age of an appeal at disposal was 21 weeks. As Figure 3 shows, this rises to a peak of 48 weeks in the second quarter of 2015/16. This represents an increase of over 126% in the average time taken to dispose an appeal in the FtTIAC. Between the first and third quarter of 2017/18, the average age of an appeal at the point at which it is disposed exceeded, and stayed above, the 50-week threshold for those three quarters. While timely decision-making has long been held out as an important value of administrative justice, ‘what constitutes reasonable time varies with circumstances, such as the complexity of the matter at stake, its urgency, and the number of persons involved.’³⁹ However, it is incontestable that the trend in the tribunal is towards longer waiting times. There are various possible explanations for why this is the case. It could be that there are more complex cases coming before the tribunal but there appears to be no reason to think that appeals have become significantly more complex. Litigation behaviour could be changing. A possible decrease in representation may also be a factor. As noted in a report by the Justice Committee of the House of Commons, generally, ‘unrepresented appellants in tribunals mean longer hearings.’⁴⁰ Equally, workload changes in the tribunals can be hard to predict and ensuring there are enough judicial resources to meet demand can be difficult. Whatever the explanation, it is remarkable that during a period in which the number of appeals has dropped, the amount of time taken to decide appeals has increased substantially.

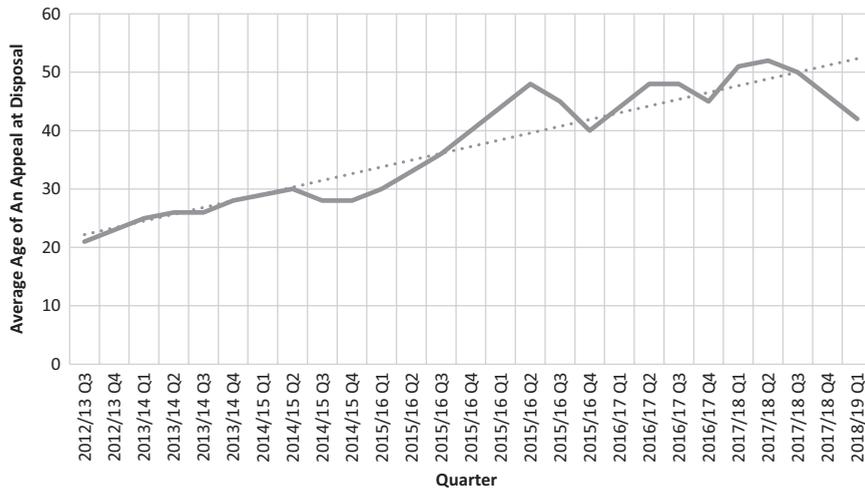
Figure 2: Total number of receipts, decided, and outstanding appeals



38 Committee of JUSTICE, *All Souls Reviews of Administrative Law in the United Kingdom, Administrative Justice: Some Necessary Reforms* (Oxford: Clarendon Press 1988) 221.

39 *ibid* 11.

40 Justice Committee, *Government's Proposed Reform of legal Aid* (HC 2010–12, 681) para 143.

Figure 3: Average timeliness of appeals

The amount of judicial resources available and how judges behave is crucial to understanding how the tribunal functions.⁴¹ There have also been significant changes in the constitution of the FtTIAC judiciary in recent years. Figure 4 shows the number of judges by type from 2012. At the start of April 2012, there were 479 judges overall in the tribunal and the most recent figures show this has decreased to just 299. This is a 38% decrease in the judicial personnel within the tribunal. There has also been an introduction of a new category of judge, the salaried part-time judge. Fee-paid judges account for over 60% of judges working in the tribunal in each of the seven years shown in Figure 4. It would be expected that there would be a decrease in the number of judges working in the FtTIAC with the decrease in the overall amount of appeals being received. However, the decrease in available decision-makers may also go to explaining the delays and the increase in waiting times before an appeal is determined.⁴² The trend from full-time salaried judges to fee-paid immigration judges allows for a flexible judiciary to be deployed as the demands on the tribunal change over time. However, there are also long-term concerns about the effects of this change for the skills and competence of judges in this jurisdiction. For instance, it could be that the effect of the change is ‘the loss of an immense amount of judicial expertise and experience,’ without it being properly replaced like-for-like.⁴³

Furthermore, behind the quantitative data presented in this article, there is the human story of the impact of such major changes in the composition of the judiciary. In recent years, morale amongst judges in the FtTIAC has been reported as particularly low.⁴⁴

41 See C Thomas and H Genn, *Understanding Tribunal Decision-Making: A Foundational Empirical Study* (Nuffield Foundation 2013).

42 See Hyde (n 16).

43 P Erdunast, ‘Annual Report of Tribunals Highlights Urgent Areas for Improvement’ *Free Movement* (9 March 2016) <<https://www.freemovement.org.uk/annual-report-of-tribunals-highlights-urgent-areas-for-improvement/>> (accessed 8 November 2018).

44 O Bowcott and D Gayle, ‘Warning of Huge Backlog of Immigration Cases in UK’ *The Guardian* (London, 10 November 2015) <<https://www.theguardian.com/uk-news/2015/nov/10/warning-of-huge-backlog-of-immigration-cases-in-uk>> accessed 1 October 2018.

In his most recent annual report, Judge Michael Clements, the President of the FtTIAC, acknowledged that immigration judges ‘have to cope with a fast pace of change not only in working practices as reform increasingly takes effect, but also in the changes of the law.’⁴⁵ How changes in the configuration of the judiciary play out in practice will be a key point to monitor in the coming years. There is also the question of judicial behaviour and decision-making in the tribunal. Inconsistency in appeals decision-making and procedure is a concern which pervades jurisdictional boundaries.⁴⁶ A recent study, based on observations of 240 hearings, found that there were major variations in how judges introduced themselves and the other persons present in court; explained the purpose of the hearing; stated their independence; checked that the interpreter and the appellant understood each other; explained how the hearing would proceed, and how they informed appellants what they could say if they did not understand aspects of the proceedings.⁴⁷ The research also found that the likelihood of granting in-session adjournment requests differed significantly between hearing centres. Furthermore, the findings suggested that judicial discretionary behaviour that is either vulnerability-neutral, vulnerability-amplifying outweighed vulnerability-redressing behaviours.⁴⁸ Similar concerns have found their way into the press, where the term ‘lottery’ is often used to describe the administration of appeals by different hearing centres.⁴⁹ There have also been extreme cases of poor judicial conduct, such as the infamous case of Judge Majid. The Upper Tribunal heard a joint appeal against 13 of Judge Majid’s decisions and found that the decisions ‘give the impression that the judge has very little idea of either his own (limited) powers or the content of the law.’⁵⁰ The Upper Tribunal went on to say: ‘whoever wins the case can have no confidence that the legal requirements stipulated by immigration law have been followed at all.’⁵¹ Decisions were ‘full of observations many of which are of dubious correctness, some of which are of dubious relevance, and a few of which are wholly inappropriate.’⁵²

A point must also be made on a subject about which there is only limited evidence: the quality of representatives in the tribunal. There are many qualified and competent representatives appearing in the FtTIAC. However, there are growing concerns about less competent representatives operating in the tribunal.⁵³ This includes the extent to which an appeal is prepared by solicitors before an advocate is instructed to appear in the tribunal.⁵⁴ As JUSTICE have observed, ‘there appears to be a spectrum of behaviour here: from the well-meaning but incompetent to the abusive charlatan.’⁵⁵ In a jurisdiction where decisions have the ability to profoundly affect the lives of, often vulnerable, individuals and their families, the

45 *Senior President of Tribunals’ Annual Report* (2018) <<https://www.judiciary.uk/wp-content/uploads/2018/05/spt-annual-report-2018-v3.pdf>> (accessed 5 October 2018) 36.

46 For instance, see: J Ramji-Nogales, A Schoenholtz and P G Schrag (eds), *Refugee Roulette: Disparities in Asylum Adjudication and Proposal for Reform* (New York University Press 2009).

47 N Gill, R Rotter, A Burridge, and J Allsopp, ‘The Limits of Procedural Discretion: Unequal Treatment and Vulnerability in Britain’s Asylum Appeals’ (2018) 27(1) *Social & Legal Studies* 49.

48 *ibid.*

49 For instance, see: C Nye and L Sands, ‘Asylum seekers face appeals ‘lottery’ BBC News (29 November 2017) <<https://www.bbc.co.uk/news/uk-42153862>> (accessed 5 October 2018).

50 *AA069062014 & Ors* [2017] UKAITUR AA069062014 [22].

51 *ibid* [20].

52 *ibid* [37].

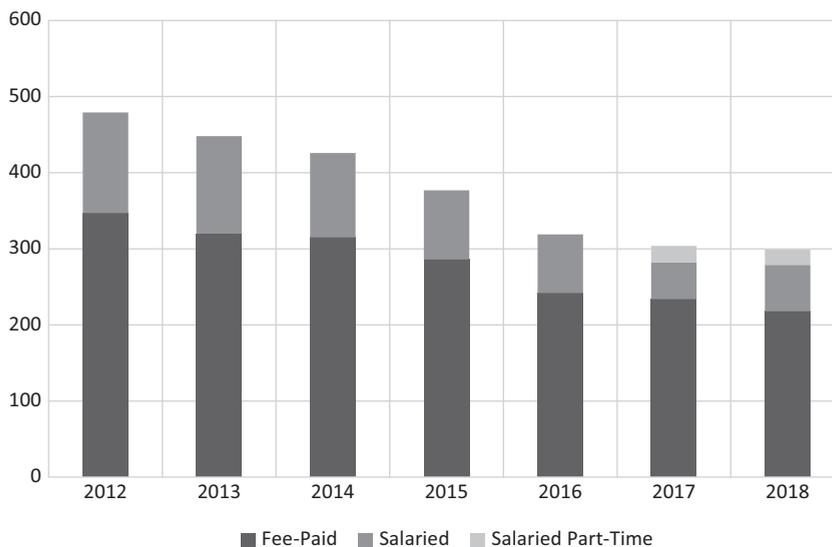
53 JUSTICE, *Immigration and Asylum Appeals* (n 23) 40–42. See also C Hutton and S Lukes, *Trusting the Dice: Immigration Advice in Tower Hamlets* (Toynbee Hall 2015).

54 JUSTICE, *Immigration and Asylum Appeals – A Fresh Look* (n 23) paras 3.52–3.56.

55 *ibid* 40–42.

conduct of judges and legal representatives in immigration matters a great deal. Though the issues may be uncomfortable in various ways for the legal community – and care must be taken not to make generalisations which risk compromising the effectiveness of the many excellent representatives – the concerns here must be confronted squarely if the legitimacy and reputation of tribunal justice is to be maintained.

Figure 4: Total number judges

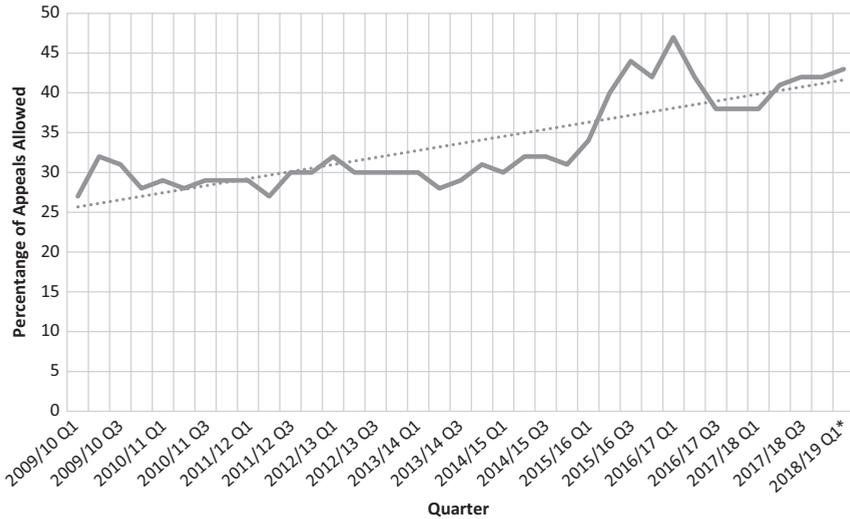


There is also the essential issue of what the outcomes of appeals are. In this respect, the key trend is that success rates remain high and appear to be increasing further.⁵⁶ It is difficult to infer too much from basic outcomes data, but it shows that errors in Home Office decision-making are not uncommon. The high success rates could be explained by reference to tribunals having more evidence than initial decision-makers, or other procedural differences in the two decision-making processes such as the availability of legal expertise in the tribunal. Any blanket claim that successful appeals reveal an avoidable mistake by the Home Office would therefore be incorrect. What is noteworthy is the vast difference in success rates between administrative review and tribunal appeals. Under the old system, around 49% of appeals were successful, whereas, in 2015/16, the success rate for administrative reviews conducted in the UK was 8%, falling to just 3.4% the year after.⁵⁷ The present success rates in the FtTIAC essentially create a situation where getting a tribunal hearing means that the chances of a favourable decision are almost 50/50. From one perspective, this makes getting a matter before the tribunal a strategic objective in immigration litigation. In practice, lots of immigration judicial review claimants and their representatives will likely define success in their judicial review claim as being given the opportunity of a tribunal appeal.

56 For the most recent quarter available in the series of statistics published by the Ministry of Justice (April–June 2018), 52% of appeals were allowed/granted in the FtTIAC see Ministry of Justice, ‘Tribunals and Gender Recognition Certificate Statistics Quarterly: April to June 2018’ (13 September 2018) <<https://www.gov.uk/government/statistics/tribunals-and-gender-recognition-certificate-statistics-quarterly-april-to-june-2018>> accessed 1 October 2018.

57 Thomas and Tomlinson (n 12).

Figure 5: Appeals granted/allowed



In a further restriction on access to the tribunal, there has been the introduction of the so-called ‘deport first, appeal later’ policy in human rights and asylum appeals. Provisions in the Immigration Act 2014 gave the Home Office the power to deport foreign nationals with criminal convictions without allowing them to appeal the deportation in the UK.⁵⁸ The Immigration Act 2016 then widened these powers to affect all migrants wishing to appeal on human rights grounds.⁵⁹ If an out of country appeal succeeds, then the appellant may be able to return to the UK. Out of country appeals allow for speedier deportations and reduce the amount of detained immigration applicants. This reduces costs for the state. At the same time, the geographic separation of the applicant from the tribunal has a number of important consequences. Applicants are less likely to appeal. It has been noted by the ICIBI that establishing access to a tribunal can prove difficult from certain locations.⁶⁰ It could also be more difficult to secure representation. For video-linked out of country appeal hearings, a hearing will be qualitatively different from a traditional oral hearing. Furthermore, it is highly likely that the applicant would have already experienced material harm from any administrative error as a consequence of the act of deportation. For example, the applicant may experience loss of employment or suffer detriment through remoteness from relations in the UK. Since the expansion of this policy, the Supreme Court has since held that the out of country appeals process can be effectively fair for human rights purposes in the context of general criminal deportations.⁶¹ However, if an appeal from abroad will not be effective, then the public interest in removal would be outweighed and an application should not be certified.⁶²

58 Nationality, Immigration and Asylum Act 2002, s 94B an amendment introduced by Immigration Act 2014, s 17(3).

59 Immigration Act 2016, s 63.

60 See ICIBI, *An Inspection of the Non-Suspensive Appeals Process for ‘Clearly Unfounded’ Asylum and Human Rights Claims: October 2013 – February 2014* (July 2014) paras 7.1–7.12.

61 *R (on the application of Kiarie and Byndloss) v Secretary of State for the Home Department* [2017] 1 WLR 2380.

62 In a recent case, the Upper Tribunal gave guidance on the questions to be addressed in this respect, see: *AJ* (s 94B: *Kiarie and Byndloss questions*) *Nigeria* [2018] UKUT 115 (IAC); [2018] Imm AR 976.

Finally, it must be mentioned that the changes outlined above are the ones that have stayed in effect. There was an aborted attempt to raise tribunal fees, which are payable by appellants hoping to challenge a decision.⁶³ In 2016, the fee was increased for an application for decision on the papers in the tribunal from £80 to £490, and for an application for an oral hearing from £140 to £800. The change in the fee for the paper-based application would have represented an increase of almost 513%. If it had not been scrapped shortly after its introduction, the impact of this fee would have likely resulted in further reduction of the overall number of appeals made to the FtTIAC. As one commentator suggested at the time, possible ‘litigants, many of whom might well have won cases, will simply not bother and will instead reapply or go underground.’⁶⁴ Since this episode, the UK Supreme Court has expressed clear hostility to substantial tribunal fees of this kind, ruling similar fees imposed in employment tribunals as unlawful and contrary to the constitutional principle of access to justice.⁶⁵

The position of the FtTIAC before Brexit and digitalisation

The President of the FtTIAC, in the latest *Annual Report on Tribunals*, captured the current changing state of the jurisdiction in simple terms: ‘reform is now underway.’⁶⁶ One major theme increasingly apparent when examining recent changes to the tribunal in the wider context of immigration administrative justice is that there is now greater emphasis on bureaucratic-type processing within the Home Office.⁶⁷ At the same time, another likely consequence of recent changes to the FtTIAC is that those cases that would have ended up in the tribunals system previously are now finding their way into the judicial review process, as that is the only avenue of challenge open.⁶⁸ This means that many immigration applicants seeking redress now confront a sharper divide between the bureaucratic processes within the Home Office and the narrow legalistic process of judicial review. At a practical level, this could also mean that more pressure is being exerted on the judicial review process. Immigration judicial reviews have, for a long time, constituted the clear majority of all judicial reviews and managing this caseload has been a concern for successive governments.⁶⁹ A few years ago, the Upper Tribunal took on immigration judicial reviews as the Administrative Court was creaking under the pressure of the volume of cases.⁷⁰ How practices in this new immigration judicial review process are taking shape is an area which requires further research.⁷¹ An important question there would be the nature and extent of any downstream effects of

63 The First-tier Tribunal (Immigration and Asylum Chamber) Fees (Amendment) Order 2016 (SI No. 928 (L. 16)).

64 C Yeo, ‘Fees for EU Nationals and Others Appealing Immigration Decisions Increase Over 500% Today’ Free Movement (10 October 2016) <<https://www.freemovement.org.uk/government-confirms-fees-immigration-tribunal-hearings-will-skyrocket/>> (accessed 1 October 2018).

65 *R (UNISON) v Lord Chancellor* [2017] 3 WLR 409.

66 *Senior President of Tribunals’ Annual Report* (n 45) 33.

67 This is part of a wider trend, see: R Thomas and J Tomlinson, ‘Mapping Current Issues in Administrative Justice: Austerity and the ‘More Bureaucratic Rationality Approach’ (2017) 39 *Journal of Social Welfare and Family Law* 380.

68 See Thomas (n 25) 127–128.

69 R Thomas, ‘Mapping Immigration Judicial Review Litigation: An Empirical Legal Analysis’ [2015] *Public Law* 652; R Thomas, ‘Immigration Judicial Reviews: Resources, Caseload, and “System-Manageability Efficiency”’ [2016] *Judicial Review* 209.

70 For wider context, see: R Rawlings, ‘Modelling Judicial Review’ (2008) 61(1) *Current Legal Problems* 95; 6 S Nason, ‘Regionalisation of the Administrative Court and the Tribunalisation of Judicial Review’ [2009] *Public Law* 440.

71 R Thomas and J Tomlinson, ‘A Design Problem for Judicial Review: What We Know and What We Need to Know about Immigration Judicial Reviews’ (*UK Constitutional Law Blog*, 16 March 2017) <<https://ukconstitutionallaw.org/2017/03/16/robert-thomas-and-joe-tomlinson-a-design-problem-for-judicial-review-what-we-know-and-what-we-need-to-know-about-immigration-judicial-reviews/>> (accessed 8 November 2018).

the changes to the FtTIAC. It is likely that many immigration judicial reviews are effectively attempts to establish a right to appeal to the tribunal, rather than the judicial review being an end in itself.

The overall picture of the FtTIAC is one of an institution with a greatly diminished role in the wider immigration administrative justice system. In many ways, the rationale for abolishing tribunal appeal rights in the majority of cases, and adopting administrative review in its place, can be read as indicators of the tribunal's success as a redress mechanism. The more cases are brought to the tribunal and the more often those appeals are successful, the more frustrating and expensive that can be for administration and the political objectives it is pursuing. Tribunals, as creatures of statute, are more readily available for reform by an executive that *de facto* controls the legislature than the judicial review system.⁷² The multiple hats government wears in respect of the tribunals systems – designer of the system, party to cases, administrator of the tribunals – perhaps increases susceptibility of the jurisdiction to changes based on short-term policy objectives.⁷³ The model of tribunal justice is seemingly out of political fashion in recent years and, although there was some resistance to the abolition of appeal rights in Parliament, restrictions on access to the FtTIAC found their way into law.⁷⁴ There are legitimate reasons to be critical of tribunals. Immigration appeals have long been suggested to be lack on various fronts, including that they are still too inaccessible, are intimidating, and produce inconsistent decisions.⁷⁵ Yet these factors do not override the achievements of tribunals as a means of securing administrative justice in relation to mass bureaucratic processes, such as those which exist in relation to immigration and asylum. Tribunals have proven effective in disposing a large amount of complex cases, at relatively low cost (to both appellants and the taxpayer), and providing the necessary degree of independence to act as a check on mass administrative decision-making. These basic virtues of tribunal justice, however imperfectly they are delivered, have now been lost in many areas of immigration decision-making, and that trajectory should be a cause for concern. The remainder of the article considers the extent to which the substantive changes to immigration law and policy as a result of Brexit and the digitalisation of tribunal processes could affect the future development of FtTIAC. We will first consider the possible role of the tribunal within the context of Brexit, thereafter, the opportunities which may arise from the digitalisation programme.

Brexit and the digital future

The core virtues of tribunal justice may be brought back to the fore as a consequence of the changes in immigration law and policy after Brexit. The Home Office will have to make decisions concerning over 3 million expected applications to the 'settled scheme,' which is currently being implemented to replace the residence rights derived from the EU Treaties.⁷⁶

72 Though judicial review is not excluded from this dynamic, see C Harlow and R Rawlings, 'Striking Back' and 'Clamping Down': An Alternative Perspective on Judicial Review' in J Bell, M Elliott, JNE Varuhas, P Murray (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart 2016); C Harlow, 'Administrative Reaction to Judicial Review' [1976] *Public Law* 116.

73 On reform of 'justice institutions' including tribunals, see A Le Sueur, 'The Foundations Justice' in J Jowell, D Oliver, and C O'Cinneide, *The Changing Constitution* (8th Edition, Oxford University Press 2015) 225.

74 For example HL Deb, 5 March 2014, Vol 752, col 353 (Lord Avebury); HC Deb 22 October 2013, Vol 569, col 199 (Barry Gardiner MP); and HC Deb 22 October 2013, Vol 569, col 18 (Fiona MacTaggart MP).

75 For instance, see: N Gill, R Rotter, A Burrige, and J Allsopp (n 47).

76 Treaty on the Functioning of the European Union Articles 20 and 21, substantive provisions implemented through Directive 2004/38 'Citizens' Rights Directive.'

This is a massive and complex administrative challenge.⁷⁷ There is no register of EU citizens resident in the UK at present. It has been estimated by the Oxford Migration Observatory that the complexities of the current paper-based processing system, which includes completing an 85-page form, mean it could take 140 years to register all EU citizens currently in Britain.⁷⁸

To manage this challenge, the Home Office has set up the settled status scheme referred to above.⁷⁹ The scheme will open fully on 30 March 2019 and the deadline for submitting applications for those resident in the UK by 31 December 2020 is currently stipulated as 30 June 2021.⁸⁰ After registration, EU citizens and their family members with settled status will have the right to remain in the UK indefinitely. Applications will cost £65 for those aged 16 or over and £32.50 for children under 16.⁸¹ The process for registering for the settled status scheme has allegedly been designed to be ‘quick’ and ‘easy,’ making use of extant government data to avoid requesting documents from applicants.⁸² Furthermore, the Home Office has been at pains to emphasise that a ‘principle of evidential flexibility will apply, enabling caseworkers to exercise discretion in favour of the applicant where appropriate, to minimise administrative burdens.’⁸³ Individuals who already have a valid permanent residence or an indefinite leave to remain document will be able to transfer to the settled status free of charge.⁸⁴ Amidst the policy wrangling and concerns about the accessibility of the scheme to different categories of EU citizens and their family members,⁸⁵ questions regarding redress against decisions made by the Home Office in this context have largely been neglected. Redress is a consequential aspect of administrative justice; decision-making under the scheme will inevitably have flaws in places.⁸⁶ The Statement of Intent published by the Home Office in June 2018 promised that:

‘[T]hose applying under the scheme will be given a statutory right of appeal if their application is refused. This will allow the UK courts to examine the decision to refuse status under the scheme and the facts or circumstances on which the decision was based.’⁸⁷

77 Institute for Government, *Implementing Brexit: Immigration* (2017). For analysis of the nature of the challenge Brexit presents for administration generally, see: J Tomlinson and L Lovdahl Gormsen, ‘Stumbling Towards the UK’s New Administrative Settlement: A Study of Competition Law Enforcement After Brexit’ (2018) *Cambridge Yearbook of European Legal Studies* (online pre-publication).

78 The Migration Observatory, *Here Today, Gone Tomorrow? The Status of EU citizens Already Living in the UK* (Oxford 2016) 2.

79 As agreed between the United Kingdom and the European Union. See Department for Exiting the European Union, *The Draft Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Agency* (19 March 2018) Part Two – Citizens’ Rights. See also Home Office, *EU Settlement Scheme: Statement of Intent* (21 June 2018).

80 Home Office, *Statement of Intent* (n 79) para 1.12.

81 *ibid* para 4.6.

82 As emphasised in a report on the ‘first private beta phase’ – a pilot of the scheme run in the North West of England see Home Office, ‘EU Settlement Scheme – Private Beta Testing Phase 1 Report’ (2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/752872/181031_PB1_Report_Final.pdf> accessed 5 November 2018.

83 Home Office, *Statement of Intent* (n 79) para 5.15.

84 *ibid* para 5.3.

85 As discussed by M Sumption, ‘The EU Citizens at Risk of Failing to Secure ‘Settled Status’ after Brexit’ *The Conversation* (London, 13 April 2018) <<https://theconversation.com/the-eu-citizens-at-risk-of-failing-to-secure-settled-status-after-brex-94947>> accessed 1 October 2018.

86 See the concerns elaborated in: Home Affairs Committee, *Home Office delivery of Brexit: immigration* (HC Paper 421, 2017–19).

87 Home Office, *Statement of Intent* para 5.19.

Although the extract above refers to ‘UK courts,’ it is expected an appeal right to FtTIAC will be included in the forthcoming Immigration Bill. It is unlikely that administrative review alone will be seen as an effective remedy from the EU’s perspective, and the UK will seek to control administrative costs under the scheme. An appeal to the tribunal may thus emerge as the satisfactory mode of redress. The current President of the FtTIAC recognises that Brexit may well have impacts on the jurisdiction. According to Judge Clements:

‘Brexit is coming although we are still not informed fully as to what this will mean or the implications for the FtTIAC in terms of workload. We will, however, be ready to meet the exciting challenges that the next year will undoubtedly bring forward.’⁸⁸

If the FtTIAC does have a role in resolving disputes arising from the settled status scheme, the downward trend in the total number receipts of appeals shown in Figure 1 may be halted.

Brexit comes at a time when the role of technology in justice is increasing,⁸⁹ including in administrative justice.⁹⁰ HMCTS and the Ministry of Justice are implementing a wide-ranging court reform and digitalisation programme across the justice system.⁹¹ The digitalisation of tribunals is a central component of this agenda. This programme of reform seeks to implement:

‘[E]asy to use and intuitive online processes put in place to help people lodge a claim more easily, but with the right levels of help in place for anyone who needs it, making sure that nobody is denied justice. Once a claim is made, automatic sharing of digital documents with relevant government departments will mean that the tribunals and the parties will have all the right information to allow them to deal with claims promptly and effectively, saving time for both tribunal panels and claimants.’⁹²

The hope is that greater use of digital technology will facilitate judges engaging with the parties together earlier – perhaps through an online exchange – to avoid unnecessary hearings and long delays. The intention is to widen access to justice and to make tribunal systems significantly more efficient in terms of time and resources.⁹³ The Senior President of Tribunals has set out six principles which will guide the reforms. These are: ensuring justice is accessible to those who need it to improve access to justice; design systems around the people who use them; create a system that is financially viable using a more cost-effective infrastructure (ie better IT, new working practices and decent estate); eliminate the most common causes of delay; retain our national and international standing as a world-class provider of legal services and in the delivery of justice; and maintain the constitutional independence of the judiciary.⁹⁴

88 *Senior President of Tribunals’ Annual Report* (n 45) 36.

89 For example, see: E Katsh and O Rabinovich-Einy, *Digital Justice* (Oxford University Press 2017); B Barton and S Bibas, *Rebooting Justice* (Encounter Books 2017).

90 J Tomlinson, *Justice in the Digital State* (Bristol University Press 2019).

91 Ministry of Justice, *Transforming Our Justice System* (2016). For context, see generally: J Rozenberg, *The Online Court: Will IT Work?* (Legal Education Foundation 2018).

92 Ministry of Justice, *Transforming Our Justice System* (2016) section 5.1.ii.

93 Sir E Ryder, ‘Assisting Access to Justice’ (University of Keele, 2018) <<https://www.judiciary.gov.uk/wp-content/uploads/2018/03/speech-ryder-spt-keele-uni-march2018.pdf>> (accessed 22.03.2018) para 8.

94 Sir E Ryder, ‘What’s Happening in Justice? A View from England and Wales’ (UCL, 14 May 2018) 2.

The starting place for the tribunals reform project is the social security chamber and the roll out of that work has already begun.⁹⁵ The FtTIAC is next in the queue and the project is already underway, having started in December 2017.⁹⁶ The latest estimate is that the project will be fully concluded by the end of November 2019.⁹⁷ The aim is to develop the tribunal ‘so that it can adapt to the different needs of users.’⁹⁸ This will include some appeals being resolved both online and by video hearings.⁹⁹ The President of the FtTIAC, in his latest annual report, wrote of his ‘vision for the Immigration and Asylum Chamber in the digital world.’¹⁰⁰ As part of this, he noted there will be the introduction of ‘paperless’ appeals, whilst the tribunal will be ‘continuing to press ahead with the working towards extempore decisions being the norm.’¹⁰¹ Tribunal forms are being re-designed and tribunal administration will be made more efficient. There was also mention of a number of pilots that are underway. This includes a pilot of virtual hearings at Taylor House.¹⁰² In Manchester, there was a pilot of extended hearing hours. While in Newport, the Home Office have started to issue ‘minded to refuse’ letters which allow applicants to provide further documentation to enable the Home Office to further consider an application.¹⁰³ Birmingham and Newport hearing centres are also piloting digital production of Home Office bundles.¹⁰⁴ A further announced feature of the reforms to the FtTIAC is that there will be greater use of tribunal caseworkers in the procedural management of appeals.¹⁰⁵ The details of where the reforms are heading are still unclear but it is clear that digitalisation will not just be a simple process of putting existing systems online. Instead, substantive and structural process changes will also be part of the move towards a new digital process.

The central question which both of these major developments poses, in the wider context of the tribunal, is whether the HMCTS reforms will transpire to be a part of the continued decline of the FtTIAC, or the beginning of a revitalisation of the role of tribunal justice in immigration. There is no answer to this question yet. While bold positions about the future of technology in justice are not difficult to find,¹⁰⁶ the unavoidable reality of the present situation is that there is very little by way of clear evidence on the impacts of technology on justice systems, especially in the administrative justice context. The primary task at the outset for research must be to understand the nature and impacts of these developments.¹⁰⁷ HMCTS and the Ministry of Justice also need to capture more granular and better quality data on key points of tribunal performance than they have previously done. However, empirical evidence alone will not give us complete answers about the impacts of digitalisation – we cannot hope

95 R Thomas and J Tomlinson, ‘Remodelling Social Security Appeals (Again): The Advent of Online Tribunals’ (2018) 25(2) *Journal of Social Security Law* 84.

96 HM Courts and Tribunals Service, *Reform update: Autumn 2018* (2018) 24. The Upper Tribunal is within a different stream of the reform project.

97 *ibid.*

98 *ibid.*

99 *ibid.*

100 *Senior President of Tribunals’ Annual Report* (n 45) 34.

101 *ibid.*

102 *ibid* 34. See also the findings of the testing undertaken in the context of the tax tribunal: M Rossner and M McCurdy, *Implementing Video hearings (Party-to-State): A Process Evaluation* (Ministry of Justice 2018).

103 *ibid* 34.

104 *ibid.*

105 JUSTICE (n 23) 45–46.

106 See R Susskind, *Tomorrow’s Lawyers: An Introduction to Your Future* (2nd Edition, Oxford University Press 2017).

107 For an overview of questions which need to be addressed, see: R Thomas and J Tomlinson, *The Digitalisation of Tribunals: What we know and what we need to know* (Public Law Project 2018). See also: Sir E Ryder, ‘Securing Open Justice’ (Max Planck Institute Luxembourg, 2018).

to measure our way out of making value judgments about new online tribunal processes – but a better evidence base could provide a firmer platform upon which to judge how best to pursue the stated aims of the reforms.

While developments and evidence must be waited upon in order to offer a fuller assessment on the impacts of digitalisation, some general observations can be made about the nature of these reforms.¹⁰⁸ Administrative justice processes, such as the FtTIAC, present multiple issues concerning institutional design.¹⁰⁹ Such questions range from the layout of an appeal form and how many judges are on a tribunal panel, to the way in which decisions are issued. The HMCTS reforms will require many of these basic design issues to be thought out again. With technology, there is the risk that critical questions of process design are passed to technologists, extracting them from the conventional government design processes.¹¹⁰ Yet technologists have no special authority on questions of administrative justice design. The social or human project of government is still the essential nature of the administrative justice system and the increasing use of technology should not make us lose sight of this.¹¹¹ Moreover, at least for the foreseeable future, humans will still be operating digital systems, and they will certainly be designing them.¹¹² Technology is no more than a tool through which normative visions of administrative justice can be implemented. For the FtTIAC, this means that whether new digital processes are successful is not just a question of good technology and implementation, but also a question of the operative normative vision and commitments animating the design.

As we wait to see what the impact of future development maybe, it is perhaps helpful to imagine two broad pathways forward for digitalisation in the FtTIAC: one where the core virtues of tribunal justice are enhanced and another where digitalisation is just another step towards a weakened tribunal process. In the first eventuality, it is possible to imagine online processes filtering out unnecessary appeals more quickly.¹¹³ This could reduce the very long wait times in the tribunal and reduce backlogs, perhaps preventing the accumulation seen in recent years. They could also allow complex evidence to be better assimilated and communicated between parties, including by the use of video-link.¹¹⁴ At the same time, online appeals could be cheaper for appellants. For instance, they may not have to travel or take time off work to engage in their appeal. They may have to also invest less time overall if decisions are made more quickly, also likely reducing stress. The government could also save money here too. Lots of expense could be cut through quicker digital administration of files and automatic communication between the tribunal and the Home Office. Judicial resources may also be less strained if cases are dealt with more quickly and at an earlier stage. It could even be the case that the cost of an online tribunal appeal is cheaper than an administrative review, adding substantial weight to the argument to restore appeal rights that have been abolished in recent years. Online processes may be easier to find and easier to navigate for

108 For a wider framework in which these changes can be understood, see: J Tomlinson (n 90) Ch 1.

109 On institutional design in the administrative justice in the UK context, see: V Bondy and A Le Sueur, *Designing Redress: A Study About Grievances Against Public Bodies* (Public Law Project 2012). For a helpful US perspective, see: J L Mashaw, 'Structuring a Dense Complexity: Accountability and the Project of Administrative Law' (2005) 5(1) *Issues in Legal Scholarship* 1, 14.

110 D K Mulligan and K A Bamberger, 'Saving Governance-By-Design' (2018) 106(3) *California Law Review* 697.

111 E Broad, *Made by Humans: The AI Condition* (Melbourne University Press 2018).

112 J Raso, 'Displacement as Regulation: New Regulatory Technologies and Front-Line Decision-Making in Ontario Works' (2017) 32(1) *Canadian Journal of Law and Society* 75.

113 This process has been pioneered by the Traffic Penalty Tribunal and developed by the BC Civil Resolution Tribunal.

114 *R (Kiarie and Byndloss)* (n 61) [103].

many, improving the accessibility and overall effectiveness of the tribunal. An online tribunal may also be less intimidating for appellants, creating a greater sense of procedural justice. It could also be the case that the assisted digital services being set up by HMCTS – to help those appellants with limited digital capability – provide an effective service and create an environment of support which may not be there in the current process.¹¹⁵ For those appealing out of country, the online process may also perhaps serve to make the process better than the present situation where there are difficulties communicating with the tribunal and the technology available in the tribunal is *ad hoc*.

If the second broad eventuality unfolds, we could imagine numerous problems being created by digitalisation in the FtTIAC. Online processes could struggle to be a forum for effective consideration of complex evidence and law.¹¹⁶ Mistakes could be made in digital processes that may not occur in traditional processes. This could lead to lower success rates through digital routes overall.¹¹⁷ Costs could be increased for appellants who may have to, for instance, make multiple journeys to assisted digital centres for support or take longer journeys to traditional hearing centres.¹¹⁸ They may also incur costs for accessing technology which may exceed the costs of a traditional tribunal appeal. The cost on the taxpayer could also rise. If appellants have a choice as to whether to use an online process (as it has been claimed by HMCTS), uptake could be very low in practice. As a result, savings could be lower than expected while the government now has to bear the cost of maintaining new digital processes. It could also transpire that the online aspects of tribunals, particularly as they will be hosted on gov.uk (the government's website), may make them appear less independent. Remote processes, such as video link hearings, may also make appellants have a diminished sense of participation and procedural justice.¹¹⁹ Assisted digital services could further affect the perception of this process if, for instance, they are unavailable, difficult to engage with, or stray into given unregulated legal advice.¹²⁰

These are two broad sketches, effectively offering two caricatures, of what the future of digital procedures in the FtTIAC may hold. It is hoped that the introduction of new digital processes in the FtTIAC is part of the beginning of a revitalisation of tribunal justice for the digital age. Whether that will be the path taken in reality it yet to be seen.

Conclusion

This article has, in the context of a diminished role for the FtTIAC, sought to reassert the core virtues of tribunal justice in the context of immigration. Appeals processes have been

115 Ministry of Justice, *Transforming Our Justice System: Assisted Digital Strategy, Automatic Online Conviction and Statutory Standard Penalty, and Panel Composition in Tribunals: Government Response* (2017). The government has contracted this job out to the GoodThings Foundation. For critical analysis of assisted digital, see JUSTICE, *Preventing Digital Exclusion from Online Justice* (JUSTICE 2018).

116 See the comments, for instance, in: *R (Mohibullah) v Secretary of State for the Home Department* [2016] UKUT 561 (IAC) at [90]; *R (Kiarie and Byndloss)* (n 60) at [67]; and *Secretary of State for the Home Department v Nare* (evidence by electronic means) Zimbabwe [2011] UKUT 00443 (IAC) [17].

117 Success rates between paper and oral appeals differ dramatically. For discussion, see C.Thomas and H Genn, *Understanding tribunal decision-making: A foundational empirical study* (Nuffield Foundation 2013).

118 Court and tribunal hearing centre closures are also a part of the reform process.

119 M Federman, 'On the Media Effects of Immigration and Refugee Board Hearings via Videoconference' (2006) 19 *Journal of Refugee Studies* 433; IV Eagly, 'Remote Adjudication in Immigration' (2015) 109 *Northwestern University Law Review* 933.

120 See the concerns set out in JUSTICE, *Preventing Digital Exclusion from Online Justice* (JUSTICE 2018).

and remain imperfect, yet the loss of appeal rights in many areas of immigration is a matter of regret. While seemingly out of political fashion in recent years, tribunal justice may once again become more politically attractive in the context of the settled status scheme being implemented to regularise the immigration status of EU citizens and their families after the rights derived from the EU Treaties are extinguished. In the longer term, the HMCTS digital reforms present the opportunity for the delivery of tribunal justice to be improved and, perhaps once again, become more attractive in the general context of immigration administrative justice. It is clear that more changes are to come and the impacts of such changes on the FtTIAC, and the users of the administrative justice system who rely upon it, will need to be monitored carefully.

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