Mapping immigration judicial review litigation: an empirical legal analysis

Robert Thomas*
School of Law, University of Manchester

Immigration has, for many years, been the largest area of mass use of judicial review, regularly accounting for over 80 per cent of all claims lodged. During the 2000s, the number of immigration cases rose dramatically over-burdening the Administrative Court. In 2013, most cases were transferred to the Upper Tribunal (Immigration and Asylum Chamber) (UTIAC), now a *de facto* specialist public law court.[1] Some 90 per cent of immigration judicial reviews - three-quarters of all claims - are currently lodged with the UTIAC. This is a distinctive area of litigation. Immigration judicial reviews are neither sporadic nor peripheral, but recurrent and central. Such challenges arise in the context of the sometimes chronic administrative difficulties within the Home Office and often intense and politically-driven short-term pressures. Immigration decisions concern both intimate aspects of people's lives and the state's ability to regulate immigration. Immigration is also a complex and dynamic area of law, policy, and practice. The wider issue here is how to dispense justice for and manage effectively a high-volume of "bureaucratic" judicial reviews, that is, routine challenges that turn on their own individual facts and circumstances.[2]

This article seeks a better understanding of immigration judicial review litigation. Three themes organise the discussion. The first is whether immigration judicial reviews as a general category possess merit. In 1999, a minister complained that the "large number of unnecessary, vexatious, and useless" immigration judicial reviews created "delay, expense, and [was] counter-productive".[3] More recently, the Coalition Government has stated that there is a "culture of using meritless judicial review applications to delay immigration decisions".[4] Such a wide-ranging statement invites scrutiny of the data to determine levels of success. A second theme is how litigation is conducted in practice. Judicial review litigation should be conducted by the parties on a co-operative basis to assist the court. Yet, the pressures upon litigants can sometimes induce other behaviours. What do such behaviours tell us about how the parties contribute to the judicial process and executive attitudes toward judicial control? A third (longstanding) theme is how judicial review operates alongside other remedies, in particular, appeals. The Government's policy of

* Thanks go to Sarah Craig, Rowena Moffatt, Rick Rawlings, Maurice Sunkin, and the anonymous referee for comments. The usual disclaimer applies.
[1] Crime and Courts Act 2013 s 22.
[2] P. Cane, "Understanding Judicial Review and Impact" in M. Hertogh and S. Halliday (eds), *Judicial Review and Bureaucratic Impact* (Cambridge: Cambridge University Press, 2004), pp.17-19.
[3] House of Commons Special Standing Committee on the Immigration and Asylum Bill 1999 11 May 1999 col 1413 (Mike O'Brien MP). In 2004, the Government sought unsuccessfully to abolish immigration judicial reviews altogether. See R. Rawlings, "Review, Revenge and Retreat" (2005) 68 M.L.R. 378.
[4] Ministry of Justice, "Grayling: No more using judicial review as a cheap delaying tactic" 23 April 2013, available at: https://www.gov.uk/government/news/grayling-no-more-using-judicial-review-as-a-cheap-delaying-tactic. See also Hansard HC Debs vol 589 col 1252 16 December 2014.

gradually restricting appeal rights has been accelerated under the Immigration Act 2014. What was the rationale for restricting appeal rights and does it withstand scrutiny? What are the likely consequences?

This article begins by examining the increased volume of immigration judicial reviews, the subject-matter of such claims, and the causes of the increase. This is followed by an examination of how challenges progress throughout the process and their outcomes through both formal adjudication and settlement. The focus then turns to the conduct of litigation. The final substantive section considers the relationship between appeals and judicial review.

Data sources

Before proceeding further, it is necessary briefly to outline the data presented here. The quantitative data is drawn from the official court and tribunal statistics. Additional statistical data was supplied by the Administrative Court and the Government Legal Department (Treasury Solicitor).[5] Qualitative data included ten interviews with claimant representatives, correspondence with the Government Legal Department, and the observation of 20 judicial review UTIAC hearings.

The overall picture

Since 2000, there has been an exponential growth in immigration judicial reviews. Figure 1 provides an overview of claims lodged accompanied by a timeline of key developments. Figure 2 compares the breakdown between immigration and non-immigration cases and the cases handled by the Administrative Court and UTIAC. Starting in 2000, immigration and non-immigration claims were roughly the same at around 2,000 claims per year.[6] By 2003, the immigration caseload had almost doubled. This coincided with many challenges to stringent asylum support policies.[7] The reduction in claims in 2004 coincided with the introduction of the statutory review process which replaced judicial review of refusal of permission to appeal by the old Immigration Appeal Tribunal (IAT) (1970-2005).[8] These are now "*Cart* judicial reviews". Since 2004 there have been significant year on year growth in immigration claims. The caseload increased seven-fold between 2004 and 2013. By contrast, non-immigration claims have remained static. A number of consequences flowed from this. Given the magnitude of the caseload, the Administrative Court became completely

[5] Available at: https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-january-to-march-2015. Additional data is available here: https://manchester.academia.edu/RobertThomas. The statistics for the Administrative Court cover England & Wales whereas those for the UTIAC cover the UK.

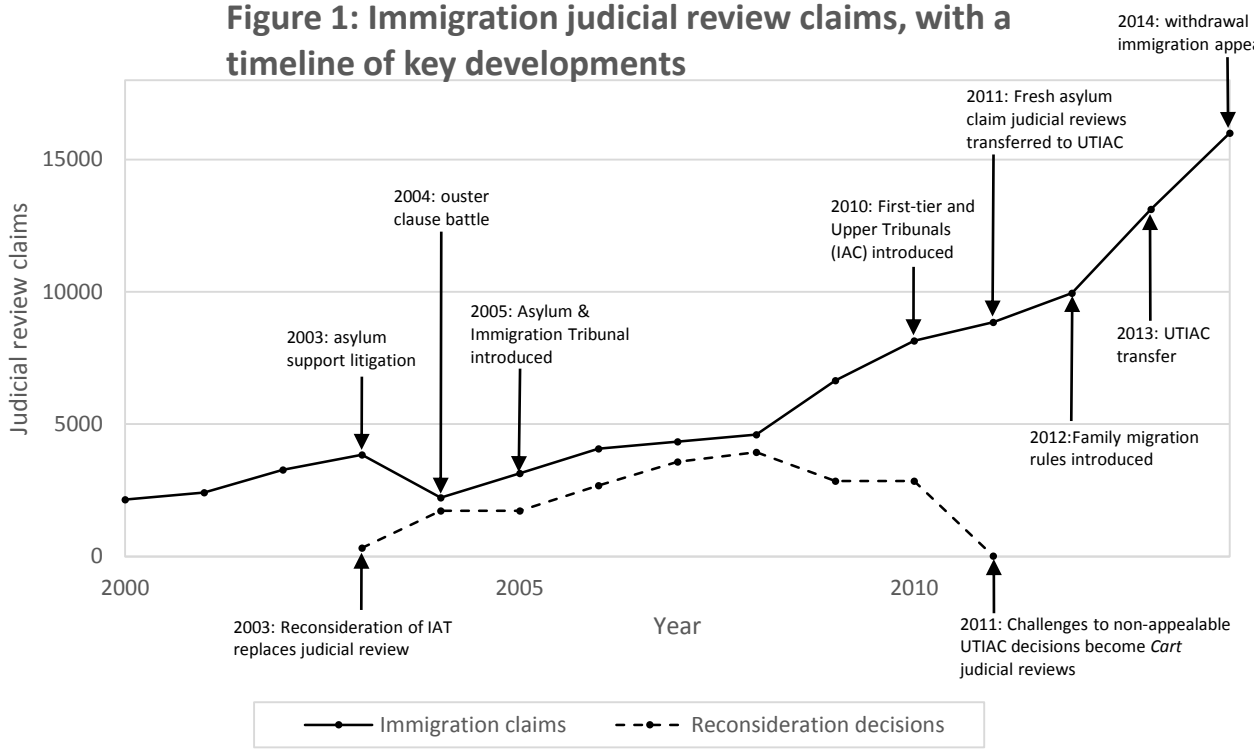
[6] The Administrative Court database categorises judicial review into: "Civil: Immigration & Asylum", "Civil: other", and "Criminal". The last two categories have been combined into "non-immigration". Immigration claims have long been a source of judicial review litigation. See M. Sunkin, "What is Happening to Applications for Judicial Review?" (1987) 50 M.L.R. 432.

[7] C. Harlow and R. Rawlings, *Law and Administration* (Cambridge: Cambridge University Press, 3rd ed, 2009), pp.738-747.

[8] R. Thomas, *Administrative Justice and Asylum Appeals* (Oxford: Hart, 2011), pp.242-248.

overwhelmed. Significant delays in the handling of all claims arose.[9] Deputy judges were drafted in.[10] The purpose of the Upper Tribunal transfer was to reduce the burden on the Administrative Court and enable consideration by specialist tribunal judges.[11] As figure 2 shows, the increase in all judicial review claims can be attributed solely to immigration challenges.

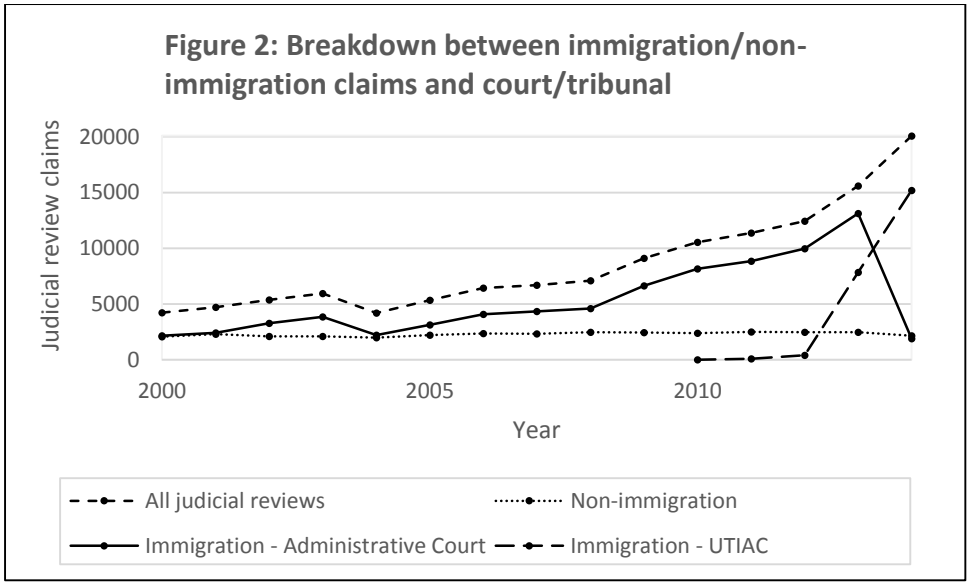
Figure 1: Immigration judicial review claims, with a timeline of key developments



[9] *The Lord Chief Justice's Review of the Administration of Justice in the Courts* (2008), [5.72]; C. Haley, "Action on Administrative Court Delays" [2008] J.R. 69.

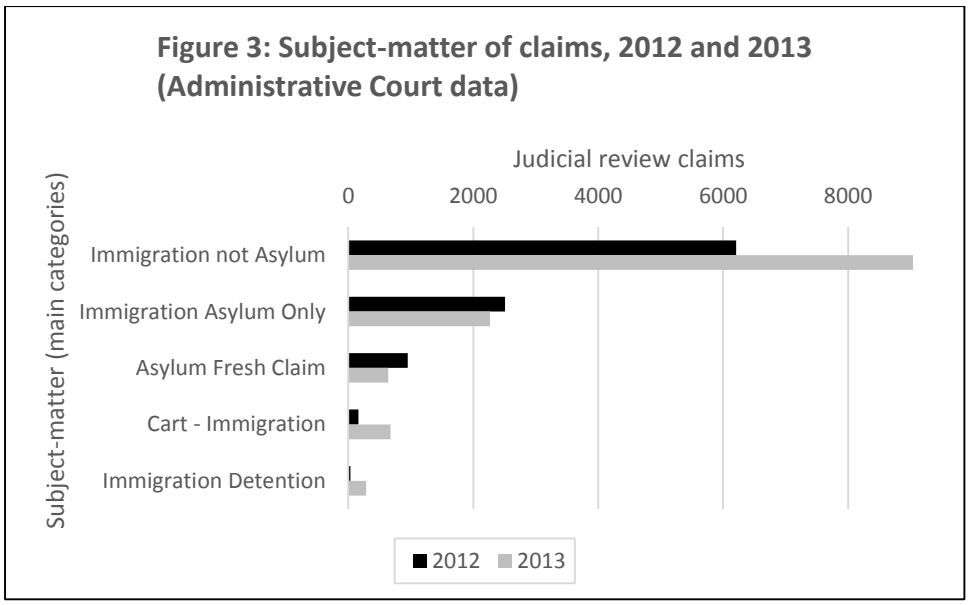
[10] A trend foreshadowed by the transfer of homelessness judicial reviews to County Court judges in the 1990s.

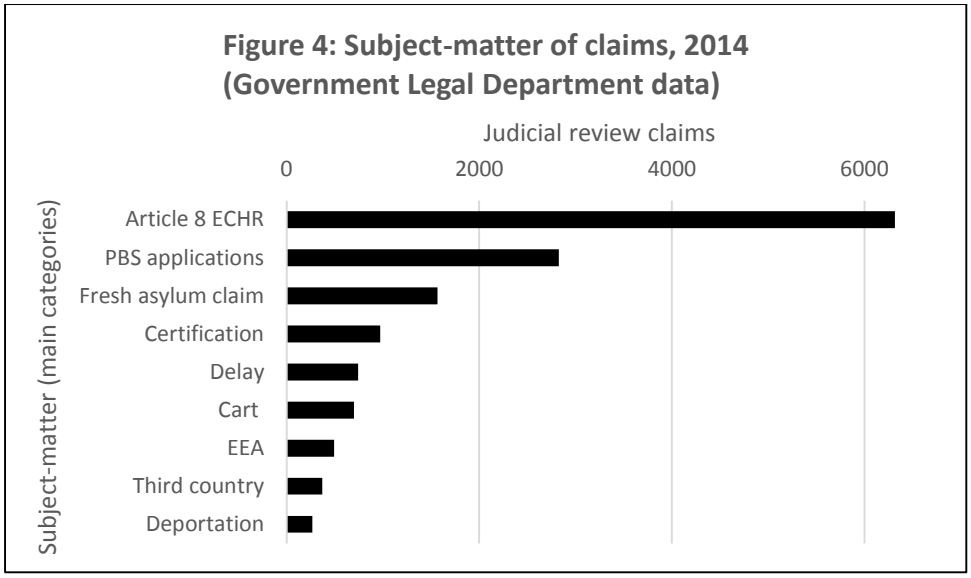
[11] Non-transferred immigration judicial reviews include: challenges to the validity of legislation, the lawfulness of detention, the register of licensed sponsors, nationality decisions, asylum support, *Cart* challenges, Special Immigration Appeals Commission, and declarations of incompatibility under the Human Rights Act 1998. See the *Lord Chief Justice's Practice Direction on Judicial Review in the UTIAC* (21 August 2013).



The subject-matter of challenges

We now consider the subject-matter of challenges. Classifying subject areas of challenges can be difficult because cases may sometimes involve overlapping issues. With that caveat in mind, figures 3 and 4 show the subject-matter of claims lodged in 2012-13 and 2014 by drawing upon two data sources: the Administrative Court database and statistics compiled by the Government Legal Department (Treasury Solicitor). These two sources categorise cases differently and this is useful by way of comparison. The Administrative Court database classifies the subject-matter of challenges into generic categories, including "Civil: Immigration and Asylum". This is then sub-divided into 14 topics. By contrast, in 2013, the Government Legal Department and the Home Office agreed some 44 immigration case types.





Most of the topics relate to discrete decision points of the immigration and asylum process. Figure 3 shows how two general topics - "Immigration Not Asylum" and "Immigration Asylum only" – dominate. "Immigration Not Asylum" covers judicial reviews against non-asylum refusals under the immigration rules to enter or remain in the UK.[12] There were 6,209 such claims in 2012 and 9,060 in 2013. "Immigration Asylum Only" covers a number of types of challenges lodged by asylum claimants against, for instance, removal, the decision to certify a claim as manifestly unfounded, and "legacy" cases. There were 2,510 such claims lodged in 2012 and 2,269 in 2013.The data from the Government Legal Department (figure 4) categorises claims differently. Figure 4 shows the level of challenges concerning family and private life under article 8 ECHR and the points-based scheme. The increase in immigration judicial reviews - hence all judicial review claims – can largely be attributed to article 8 ECHR claims and challenges under the immigration rules. These claims account for the bulk of the cases transferred to the UTIAC. Many of these claims concern the application of the stringent family migration rules introduced in 2012 to limit family migration.

Two other types of challenge are asylum fresh claim and *Cart* challenges. The former concern challenges by failed asylum claimants against the Home Office's refusal to consider new submissions as amounting to a fresh asylum claim.[13] Such submissions are often lodged because of the significant period of time between the conclusion of an asylum claim and removal action during which circumstances can change. Refusal to consider further submissions as a fresh asylum claim attracts judicial review. *Cart* cases challenge the UTIAC's refusal of permission to appeal. By a quirk, the UTIAC both decides judicial review claims

[12] These include: refusals to reside with a partner, marriage with a foreign national, article 8 ECHR challenges, refusals under the points-based system (PBS) (eg students, entrepreneur schemes), EEA (European Economic Area) national family member rights to free movement by their European family member exercising Treaty rights in UK, visit visa refusals, domestic worker, and pure human rights cases.

[13] Immigration Rules, r.353. Fresh asylum claim judicial reviews were transferred to the UTIAC in 2011: Borders, Citizenship and Immigration Act 2009 s 53.

and is itself subject to judicial review. Following *Cart*, non-appealable Upper Tribunal decisions (eg the refusal of permission to appeal) can be challenged through judicial review only if there is an important point of principle or practice or contain some compelling reason.[14] Immigration challenges were clearly at the forefront of the Supreme Court's thinking in *Cart*.[15] *Cart* cases now have an expedited process with compressed time limits and paper-only consideration.[16] A claim will only be granted permission if the second-tier appeals criteria are fulfilled and there are reasonable prospects of success.[17] If permission is granted, then the decision will be remitted back to the UTIAC for consideration.[18] Few challenges succeed. Between 2012 and 2014, there were 1,822 *Cart* claims: 1,518 (83 per cent) were refused permission and 93 (5 per cent) were granted permission.

Another frequent area of challenge is delay or the failure to make a decision. A particular category of case has been "legacy" challenges. In 2006, an unmanageable backlog of 500,000 asylum cases had accumulated in the Home Office. The department decided to process new asylum claims through a new procedure while older "legacy" were assigned to a team of some 950 caseworkers in its Casework Resolution Directorate to clear the backlog within five years. By 2011, some 100,000 cases still awaited a decision. Unsuccessful challenges against the legacy programme have been made on various grounds, for instance, that a more favourable policy should have been applied, legitimate expectations, delay, and that some form of immigration should have been granted. The Home Office's handling of legacy cases has been criticised, but legal challenges have failed on the basis that the programme was merely operational and did not confer substantive rights.[19] Such challenges were "laid to rest" by the Court of Appeal in 2014.[20]

A general aspect of the immigration jurisdiction is the complex interrelationship between judicial review and appeals, which has been governed by "an impenetrable jungle of intertwined statutory provisions and judicial decisions".[21] An out of country appeal

[14] *R (Cart) v Upper Tribunal* [2011] UKSC 28; [2012] 1 A.C. 663. See M. Elliott and R. Thomas, "Tribunal Justice and Proportionate Dispute Resolution" (2012) 71 *Cambridge Law Journal* 297. Under the Tribunals, Courts and Enforcement Act 2007, an appellant challenging a First-tier Tribunal (Ft-T) decision must first apply to that tribunal for permission to appeal to the UTIAC. Renewed applications are determined by a UT judge on the papers.

[15] *R (Cart) v Upper Tribunal* [2011] UKSC 28; [2012] 1 A.C. 663, [47] and [50]-[51] (Baroness Hale).

[16] CPR 54.7A(3) and (8). There is no option of oral renewal, but appeal on the papers to the Court of Appeal remains: CPR 52.15(1A).

[17] Once the Administrative Court has granted permission (applying the second appeals test), that test no longer applies at the substantive hearing: *R (HS) v UTIAC* [2012] EWHC 3126 (Admin); [2013] Imm. A.R. 579.

[18] CPR 54.7A(9); *Senior President of Tribunals' Annual Report* (2014), p.20.

[19] See, eg, *R (Geraldo) v Secretary of State for the Home Department* [2013] EWHC Admin 2763; *R (Jaku) v Secretary of State for the Home Department* [2014] EWHC Admin 605 and the many other cases cited therein.

[20] *SH (Iran) v Secretary of State for the Home Department* [2014] EWCA Civ 1469, [65] (Davis LJ).

[21] *Sapkota v Secretary of State for the Home Department* [2011] EWCA Civ 1320, [127] (Jackson LJ). In *Patel v Secretary of State for the Home Department* [2013] UKSC 72, [35], Lord Carnwarth noted that the drafting of the appeal provisions of the 2002 Act "defies conventional analysis. It is not only obscure in places and lacking in detail, but contains pointers in both directions".

precludes judicial review.[22] Yet, many decisions are non-appealable. For instance, some decisions concerning individuals' right to remain in the UK on the basis of their private and family life cannot be appealed. Such claims may be made by individuals who have either overstayed or are illegal entrants. Overstayers and illegal entrants cannot appeal against the refusal to vary leave.[23] Such individuals must await a decision that they be removed from the UK, which attracts a right of appeal.[24] However, administrative practice has been to segregate decision-making, with the effect that an individual refused leave to remain may not be simultaneously issued with removal directions. The Home Office is not obliged to issue removal directions when refusing leave to remain, and often does not do so.[25] It expects individuals to leave voluntarily. Such people are limbo: they are without leave to remain, but are not to be removed and unable to appeal because of the absence of a removal decision. In such circumstances, individuals may request a removal decision from the Home Office[26] and any refusal can attract judicial review. The courts have recognised the need to make timely decisions where children are involved.[27] Further, the Home Office's frequent failure to apply its own policy on removals attracts judicial review.[28] An obvious concern here is that the combination of legislative design and administrative practice prompts satellite litigation: judicial review claims have often been lodged to generate a right of appeal.

There is also a distinction between a decision to remove and the consequential making of removal directions, which are non-appealable, but challengeable through judicial review. Such claims arise when the Home Office's Operational Support and Certification Unit has commenced removal action by serving the claimant with removal directions, which are then challenged.[29] Such challenges are often urgent and made at the last-minute. The claimant may, for instance, challenge the removal directions on the basis that his individual circumstances have changed, a significant deterioration of country conditions would make the return unsafe, or a challenge may be made to the route of return. Article 8 ECHR is also often raised. From the Home Office's perspective, such challenges frequently frustrate the

[22] *R (Lim) v Secretary of State for the Home Department* [2007] EWCA Civ 773, [13] and [24]; *RK (Nepal) v Secretary of State for the Home Department* [2009] EWCA Civ 359, [33]; *R (Bilal Jan) v Secretary of State for the Home Department (section 10 removal) IJR* [2014] UKUT 00265 (IAC).
[23] Nationality, Immigration and Asylum Act 2002 s 82(2)(d).
[24] Removal directions issued under the Immigration and Asylum Act 1999, s 10 attract a right of appeal: Nationality, Immigration and Asylum Act 2002 s 82(2)(g).
[25] *R (Daley-Murdock) v Secretary of State for the Home Department* [2011] EWCA Civ 161; *Patel and others v Secretary of State for the Home Department* [2013] UKSC 72; [2014] AC 651, [27].
[26] See Home Office policy on "Requests for removal decisions" (20 October 2014). This guidance was challenged unsuccessfully in *R (Oboh) v Secretary of State for the Home Department* [2014] EWHC Admin 967.
[27] *R (Daley-Murdock) v Secretary of State for the Home Department* [2011] EWCA Civ 161, [11] (Sullivan LJ). Cf the duty to have regard to the need to safeguard and protect the welfare of those children under the Borders, Citizenship and Immigration Act 2009 s 55.
[28] See, eg, *R (Vidales) v Secretary of State for the Home Department) IJR* [2015] UKUT 166(IAC).
[29] Immigration and Asylum Act 1999, s.10.

removals process.[30] However, the gap between refusal and removal increases the scope for judicial challenge.

Why has the caseload increased?

Various factors can be identified. First, there is the behaviour of respondent, the Home Office. The longstanding, chronic problems – at times, the fundamentally dysfunctional nature – of the Home Office have been well-publicised: delays; legal complexity; variable decision-making; and reliance upon old IT systems.[31] For many years, this administrative process has been characterised by stresses and strains attributable to the pressure of work leading to errors and delays, which are then compounded by further blunders. In 2012, an "ill-judged" decision to downgrade the status of asylum case-workers prompted the loss of experienced staff.[32] There are long-standing concerns as to the variable quality of initial decisions.[33] Lawyers interviewed variously characterised initial decisions as "appalling", "legally illiterate", "tick-box", and made using "cut and paste" templates. The complexity of the applicable legal principles, rules and policies and the diversity of individuals' circumstances, family situation and immigration history all generate significant opportunity for challenge. Arguable decision-making flaws include procedural errors, such as applying the wrong rules, failing to assess family life properly or to consider the welfare of children, and errors in the proportionality assessment.

A related concern is a perceived Home Office determination to refuse applications rather than make an objective view of the merits of a case. One practitioner noted that decisions certified as manifestly unfounded (and thereby attracting out of country appeal rights) were frequently challenged on the ground that the case was not manifestly unfounded because there were realistic prospects of success before a tribunal. Likewise, the Home Office's approach to returns to Italy under the Dublin Convention prompted many judicial reviews. The Administrative Court would grant interim injunctions against removals to Italy on the ground that asylum claims were not properly considered there. Yet, instead

[30] See, eg, letter from the Home Secretary to the Chair of the Commons Home Affairs Select Committee, 25 March 2015: "Far too many removals are delayed or disrupted because of late claims and judicial review applications. Many of these claims are abusive and designed simply to frustrate the removal process." The Home Office regularly writes to the Administrative Court prior to enforced returns via charter flight noting that "Because of the complexities, practicalities and costs involved … it is essential that these removals are not disrupted or delayed by large numbers of last minute claims for permission to seek judicial review" (Home Office letter to Administrative Court, "Enforced Returns to Pakistan", 29 March 2015).

[31] See the Home Secretary's statement on disbanding the UK Border Agency: Hansard HC Debs vol 560 col 1500 26 March 2013.

[32] House of Commons Public Accounts Committee, *Reforming the UK Border and Immigration System* (HC 854 2014-15), [6].

[33] In *R (Bosomo) v Secretary of State for the Home Department IJR* [2014] UKUT 00492 (IAC) the issue was whether the claimant's case contained any exceptional circumstances to grant leave outside the Immigration Rules on family life grounds; the Home Office's sole consideration of this was: "It has been decided that it does not". See also *Ganesabalan v Secretary of State for the Home Department* [2014] EWHC Admin 2712, [36]: "The decision letter and notice contain no indication or reasoning which demonstrates that the Secretary of State has considered the exercise of discretion or the question of exceptional circumstances or the question of proportionality."

of introducing a moratorium, the Home Office continued to make removal decisions in individual cases, which prompted many unnecessary judicial review claims – unnecessary because the court would routinely grant injunctions preventing removal pending resolution of a lead case.[34]

An increase in decision-making activity prompts increased challenges as does delay. The frequent gap of time between a refusal decision and enforcement action to remove an individual prompting claims on either asylum or article 8 grounds. As regards delay and communication problems with the Home Office, judicial review is often the only way to prompt action: "When all else has failed — writing endless letters, involving the local MP — judicial review is the only way of finally forcing the agency to deal with a particular case".[35] In 2011, the Kafkaesque situation arose in which individuals trying to claim asylum were turned away by the Home Office's Asylum Screening Unit; the only means of securing an appointment to claim asylum was to threaten judicial review.[36]

Other factors influencing the increase in judicial reviews include the gradual erosion of appeals, increased enforcement action, the introduction of more stringent rules, such as the family migration rules in 2012. Following the discovery of widespread fraud in English language tests for student visas in 2014, there was greater enforcement action and a subsequent increase in judicial reviews.[37] Frequent changes to an already complex and detailed set of intricate immigration rules and policies open up areas of legal uncertainty. As regards claimants, frequent recourse to judicial review is understandable as immigration decisions frequently affect fundamental rights. There is also an incentive for some claimants to challenge adverse decisions by dressing up an attack on adverse factual findings as a point of law. Finally, procedural aspects of the judicial review can affect the volume of challenges. For instance, compliance with the pre-action protocol increases the prospects of early settlement of claims whereas non-compliance makes litigation more likely.

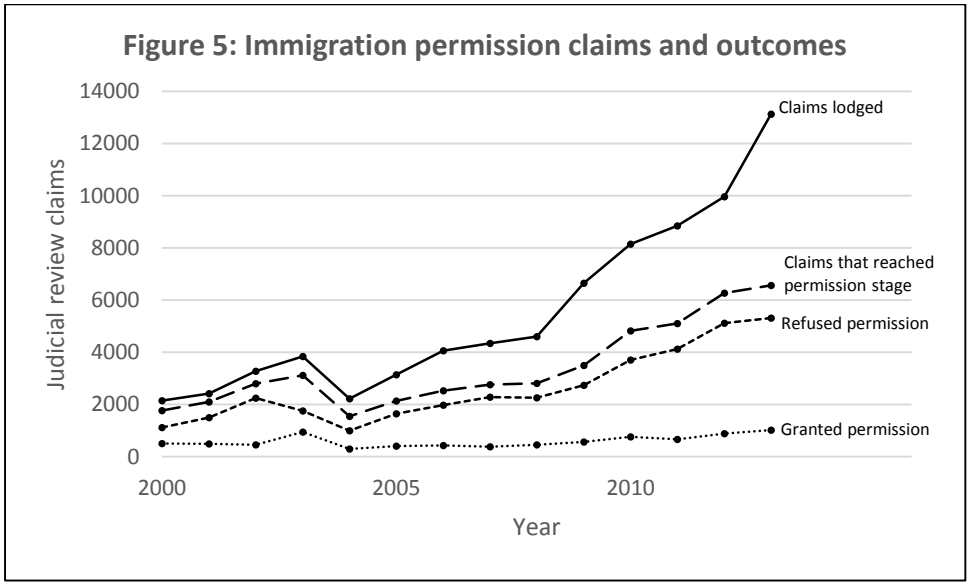
The progress of claims through the judicial review process

Figure 5 shows the number of immigration claims applications and those that reach the permission stage. The following points arise. First, the number of both claims lodged and those reaching the permission stage have increased, but the proportion of claims reaching the permission stage has been steadily declining. Between 2000 and 2003, over 80 per cent of claims reached the permission stage. After 2006, the proportion that reached the permission stage fell to 53-63 per cent per year. In other words, the proportion of claims not reaching the permission stage has increased from less than 20 per cent in the early 2000s to

[34] *R (EM (Eritrea)) v Secretary of State for the Home Department* [2014] UKSC 12, [2014] AC 1321.
[35] F Bawdon, "UKBA and Judicial Review: Let's Make the Link" *The Guardian* 23 November 2012.
[36] "Asylum Seekers Prevented From Lodging Cases" *The Guardian* 29 September 2011. Making an asylum claim as soon as possible is vital: any delay may subsequently be used to undermine the case; and, until an asylum claim is lodged, individuals cannot access benefits or accommodation.
[37] "Student Visa System Fraud Exposed in BBC Investigation" BBC News 10 February 2014 http://www.bbc.co.uk/news/uk-26024375 . See also *R (360 GSP College) v Secretary of State for the Home Department* [2015] EWHC 526 (Admin).

around 40 per cent from 2006 onwards.[38] This trend is indicated by the growing gap in figure 5 between claims lodged and those that proceed to the permission stage. It indicates that a higher number of claims lodged were resolved before the permission stage – either by being withdrawn or settled.

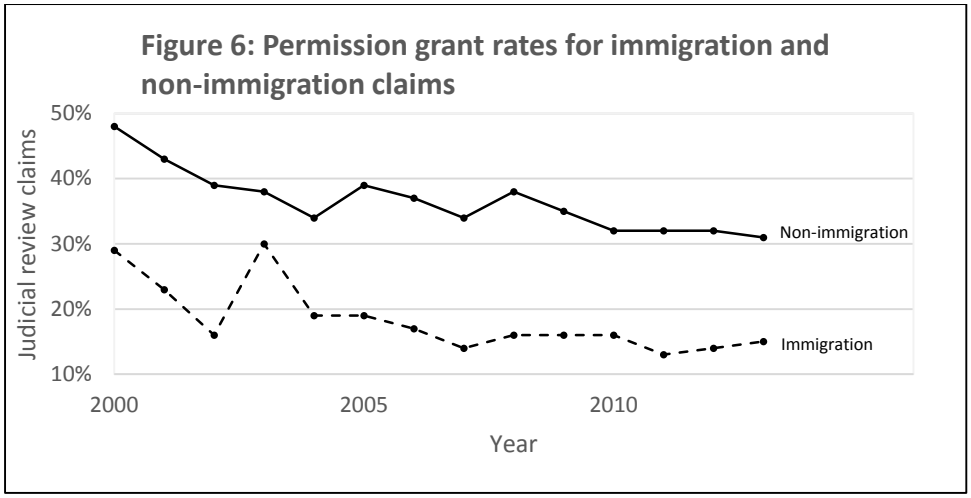
Second, while the number of claims reaching the permission stage has increased, the proportion granted permission to proceed has declined. In 2000, 30 per cent of claims were granted permission; in 2013, it was 15 per cent. As figure 6 shows, the proportion of immigration claims granted permission is lower than non-immigration claims.[39] This raises the intriguing question whether judges have tightened the permission criteria to keep on top of the increasing caseload or whether that caseload contains a higher number of weak claims. Investigating this issue is problematic because of the difficulty of distinguishing between cause and effect.[40]



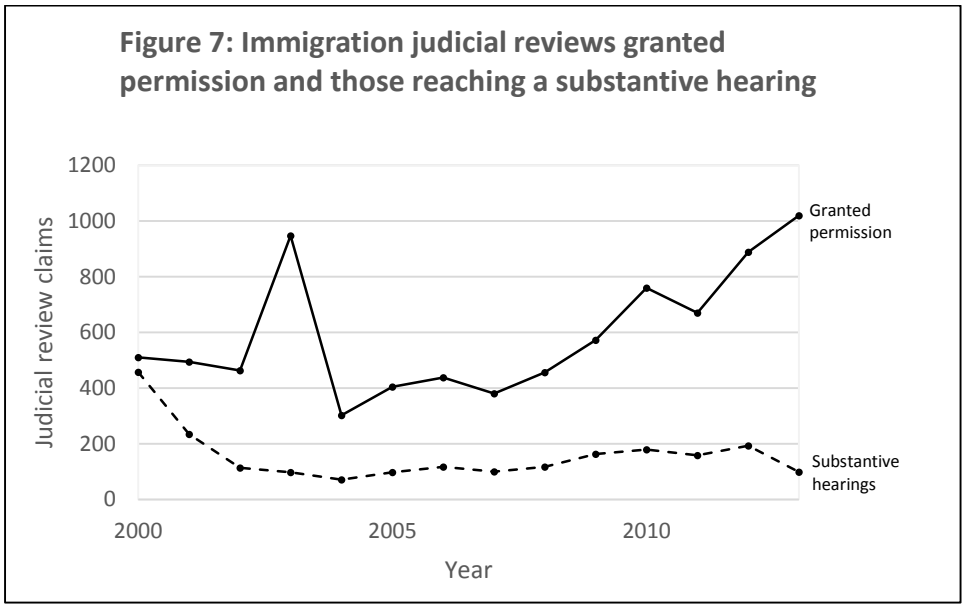
[38] The data presented concerns the annual number of decisions at each stage of the process and not therefore necessarily the same individual claims because of the time delay between lodging a claim, a permission decision, and a substantive hearing.

[39] On the general decline in the permission grant rate, see V. Bondy and M. Sunkin, "Accessing Judicial Review" [2008] P.L. 647.

[40] For a US study indicating that increased immigration challenges reduced the degree of judicial scrutiny afforded in non-immigration cases, see B.I. Huang, "Lightened Scrutiny" (2011) 124 Harvard L.R. 1109.



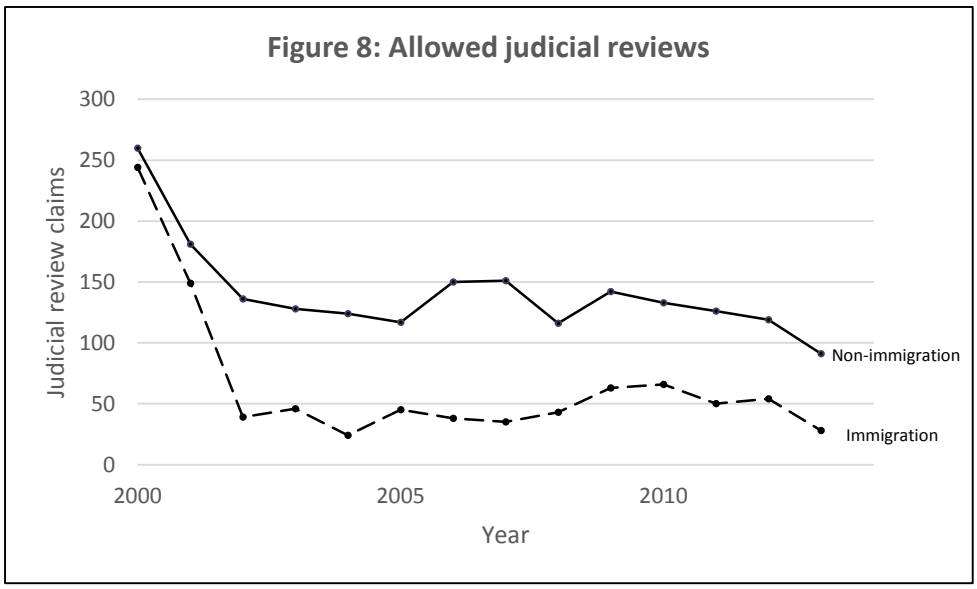
The next stage of the process concerns those claims granted permission and the proportion that then proceed to a substantive hearing (see figure 7). The number of claims granted permission has fluctuated from below 400 to over 1000 per year and has increased since 2004. However, the number of substantive hearings has remained relatively stable and not exceeded 200 since 2001. Since 2004, around 25 per cent of those claims granted permission proceed to a substantive hearing and the remaining three-quarters do not. A significant proportion of claims granted permission do not proceed to a substantive hearing. Take, for instance, the caseload in 2012. Some 888 immigration claims were granted permission. There were 193 substantive hearings; 54 were allowed and 116 were dismissed. This leaves 695 arguable claims (78 per cent) that did not proceed to a substantive hearing. In summary, beneath the high volume of claims lodged, there is significant attrition of claims throughout the process. Claims drop out at the pre-permission stage and between the grant of permission and the substantive hearing. The issue of what happens to such claims is taken up below.



How many challenges succeed?

Given the Government's concern about meritless claims, it is important to consider substantive outcomes. There are three issues to examine here. The first concerns the proportion of permission claims deemed as "totally without merit" (TWM). The power to certify claims as TWM was introduced in 2013 because of the unjustified burden imposed by hopeless claims.[41] A claim refused permission on the papers and certified as TWM cannot be renewed at a hearing. Since 2013, the Administrative Court has deemed 31 per cent of immigration claims as TWM and the UTIAC 27 per cent. The comparable rate for non-immigration claims was 18 per cent. It is not known how many TWM certificates are overturned on appeal.[42]

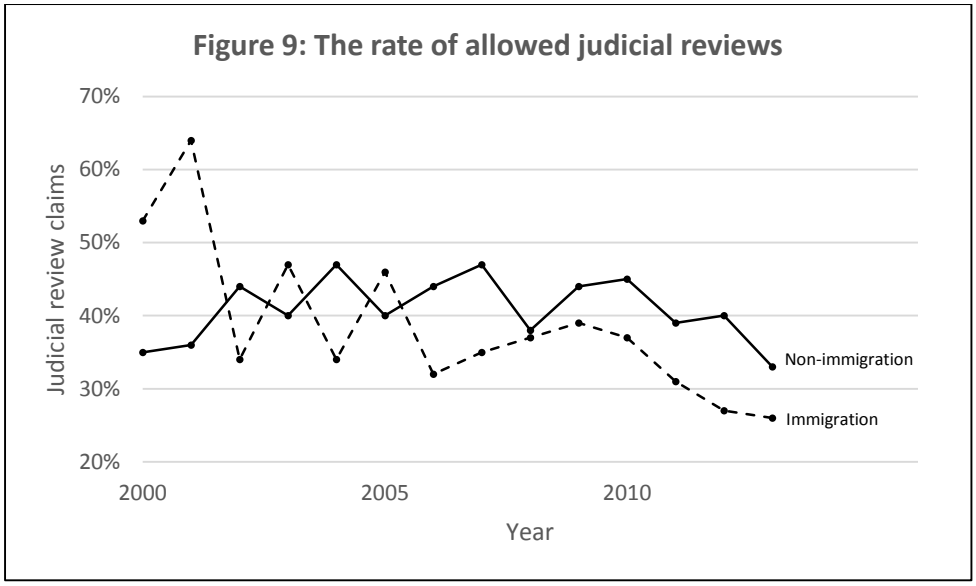
A second issue concerns claims allowed following a substantive hearing. Figure 8 compares the number of allowed immigration and non-immigration claims .Figure 9 compares the proportion of allowed claims. The proportion of immigration cases that ultimately succeed has ranged between 27-64 per cent per year. The comparable success rate for non-immigration cases has ranged between 33-47 per cent.[43] What is important here is the average rate of allowed challenges: 39 per cent of immigration cases were allowed compared with 41 per cent of non-immigration cases. Overall, there is little difference in the average success rate between immigration and non-immigration cases.



[41] CPR 54.12(7); Tribunal Procedure (Upper Tribunal) Rules SI 2698/2008, r.30(4A); *R (Grace) v Secretary of State for the Home Department* [2014] EWCA Civ 1091, [13] (Maurice Kay LJ); J. Maurici, '"Totally Without Merit" and Judicial Review' [2014] J.R. 258.

[42] A claim certified as TWM can be appealed to a Court of Appeal judge. According to the MoJ, there are approximately 1,200 applications to the Court of Appeal per year, but no statistics are collected on outcomes (FOI 96143).

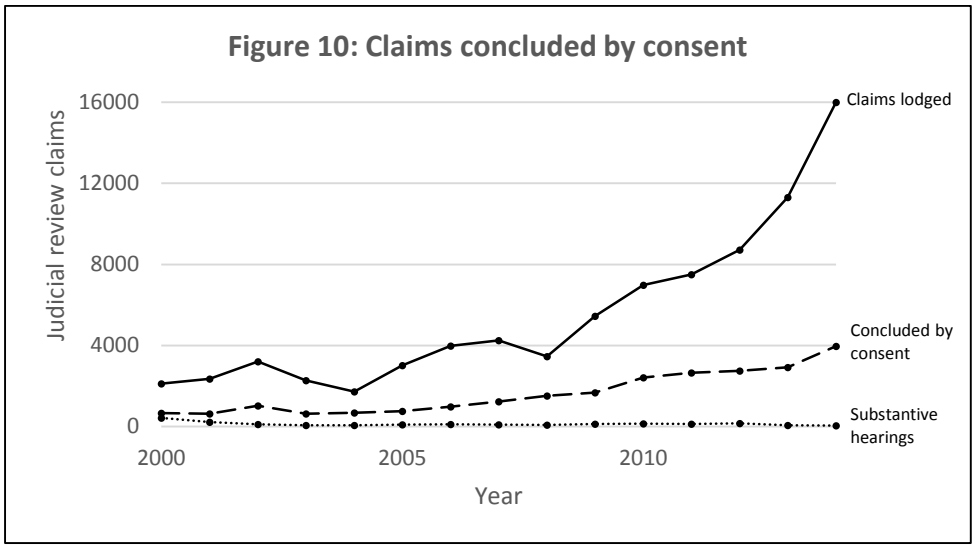
[43] This has been calculated as the proportion of substantive hearings that have been allowed.

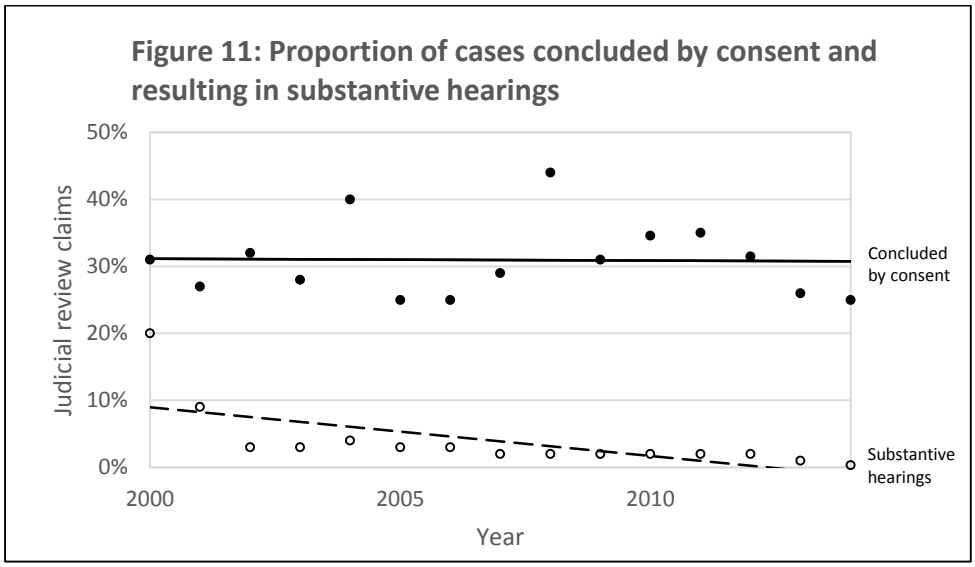


Third, focusing solely upon claims allowed after formal adjudication overlooks other ways of winning, in particular those claims settled or conceded out of court. The Government's preferred metric has been to calculate the proportion of all claims that are allowed following a substantive hearing. On this approach, the proportion of successful claims does indeed seem small. In 2013, 13,130 claims were lodged and 36 claims (0.3 per cent) were allowed. However, research by Sunkin and Bondy found that the majority of non-immigration claims settle without adjudication and that a significant proportion result in favourable outcomes for claimants.[44] For all practical purposes, claims conceded by the respondent can be as much an indicator of success as a court giving judgment for a claimant.[45] It is therefore essential not to exclude such outcomes when considering success rates.

Figure 10 shows that the number of immigration claims concluded by consent.[46] In 2000, 661 claims (31 per cent of the claims lodged in that year) were resolved without formal adjudication. By 2007, the number was 1,230 (29 per cent) and in 2013 it was 2,921 (26 per cent). Figure 11 shows that the proportion of cases concluded by consent has fluctuated between 25 and 44 per cent. On average, 31 per cent of cases have been concluded by consent. It might be thought that the proportion of claims concluded by consent would decrease with the increase in claims (more weaker claims would mean fewer concluded by consent), but, as the linear trendline in figure 11 shows, the overall trend has remained static, indicating a consistent rate of settlement of claims.

[44] M. Sunkin and V. Bondy, "Settlement in Judicial Review Proceedings" [2009] P.L. 237.
[45] See generally T. Eisenberg and C. Lanvers, "What is the Settlement Rate and Why Should We Care?" (2009) 6 *Journal of Empirical Legal Studies* 111.
[46] The statistics were supplied by the Administrative Court and cover the two largest immigration categories, "Immigration Asylum Only" and "Immigration Not Asylum". In the cognate area of statutory appeals, concession of appeals is also common. In 2011-12, approximately 60 per cent of onward appeals from the UTIAC to the Court of Appeal were settled: *AL (Albania) v Secretary of State for the Home Department* [2012] EWCA Civ 710, [3].





These statistics do not distinguish between those claims withdrawn by the Home Office and those withdrawn or discontinued by the claimant, but, with this caveat in mind, the evidence strongly suggests that the vast majority are conceded by the Home Office. Such concession of claims occurs by way of consent order: the Home Office agrees to reconsider its decision (usually within three months) conditional upon the claimant withdrawing. In 2010, the Administrative Court stated that "it is practically an everyday occurrence" for the Home Office, "having given preliminary consideration to a claimant's challenge to a decision by way of judicial review, to withdraw the challenged decision, with a view to reconsideration."[47] More recently, Beatson LJ has noted that respondents - most commonly the Home Office - "withdraw the decision under challenge in a non-trivial

[47] *R (Chichvarkin) v Secretary of State for the Home Department* [2010] EWHC 1858 (Admin), [46] (Kenneth Parker J).

number of cases".[48] Withdrawal is often notified for the first time in the Acknowledgement of Service with a request, again commonly by the Home Office, that permission be refused because the challenge is academic. Such requests are almost always granted.[49]

To investigate further, interviews were conducted with practitioners. A common theme was that a large number of judicial reviews are conceded both before and after the permission stage. Another was that the more meritorious the claim, then the more likely it will be conceded at the pre-permission stage.[50] As one barrister put it, "strong cases with good facts get picked off and conceded by the Home Office". An immigration solicitor noted that his firm won "around 90 per cent of our judicial reviews, the vast majority of which are conceded by the Home Office." In many instances, the Home Office will make a further refusal decision that, taking advantage of the reconsideration, deals more fully and/or accurately with the facts and matters advanced by the claimant. One practitioner noted that it is quite common for the Home Office to concede a judicial review, then take months to make a new refusal decision (with the same or similar wording as the original refusal decision), which would then prompt a second judicial review. In other cases, the Home Office's reconsideration will produce a decision in the claimant's favour. Either way, the claimant's legal challenge will have been successful in the sense that it prompted the Home Office to reconsider the impugned decision.

Given the asymmetry of resources between it and claimants, why does the Home Office concede? Recognising the factors involved - legal advice and operational and cost considerations - the Government Legal Department has advanced the following reasons.[51] First, if the Home Office accepts that its initial decision was flawed, then the prospects of successfully defending a challenge will be (ie the Home Office at some fault). Internal guidance instructs case-workers to examine challenges with a view to settlement: "it is important that if an error has been made or there is some other reason for settling a case that decision is taken as quickly as possible to reduce cost."[52] The inevitable lack of reported instances hides what happens, but consider *Muwonge*.[53] Here, a litigant in person challenged the refusal of leave to remain, a non-appealable decision, but the decision had failed to take account of the Home Office's own published policy under which individuals with children (such as the claimant) were entitled to an appealable removal decision. In effect, the purpose of the challenge was to generate a right of appeal. Months later, the

[48] In *R (Ben Hoare Bell) v Lord Chancellor* [2015] EWHC 523 (Admin), [45].

[49] One consequence of refusing permission of conceded claims is to cast doubt how representative the refusal permission rate is - because most conceded claims represent a "win" for claimants. In other words, the refusal permission rate is being inflated.

[50] See also J. Packer, "Judicial Review: The Wrong Steps for the Wrong Reasons" (2012), available at: http://www.lawgazette.co.uk/68844.article; J. Norman, "Judicial Review in Immigration Cases" (2013), available at: http://www.onepaper.co.uk/wp-content/uploads/2013/07/N10_Judicial_review_JN.pdf; T. Buley, "The Early Stages of Judicial Review: the Changing Landscape" (2013), available at: http://www.adminlaw.org.uk/docs/ALBA%20Seminar%20June%202013%20by%20Buley.pdf

[51] Letter from the Government Legal Department, 21 April 2015.

[52] Home Office, *Immigration Directorate Instructions: Judicial Review Guidance* (2013), section 3.4.

[53] *R (Jowanski Muwonge) v Secretary of State for the Home Department (consent orders: costs: guidance) IJR* [2014] UKUT 00514 (IAC).

Home Office acknowledged service with an accompanying consent order recognising its error. The Home Office's surrender demonstrated that the claimant had been fully vindicated in lodging proceedings.

Other reasons for conceding include a change of circumstances that renders a challenge academic or the submission of new evidence that strengthens a claimant's case (ie Home Office not at fault). Alternatively, the claimant may pursue an alternative remedy, eg, an appeal right. There may often be "pragmatic reasons" for conceding. It is often quicker and cheaper to make a new decision than to defend a challenge. Pragmatic concession is the potentially all-encompassing residual category ranging from caseload management pressures to other reasons. Finally, while not advanced by the Government Legal Department, the suspicion sometimes arises that the Home Office tactically concedes some challenges that raise wider substantive issues on which its position is difficult or uncertain.

In summary, there is little difference between the average success rates in immigration and non-immigration cases. Many more challenges are conceded at an early stage of the process. The data presented here strongly indicates that a significant number of cases are conceded and then reconsidered by the Home Office. It is estimated here that the true success rate of immigration challenges is nearer to 30 per cent than the less than one per cent figure that arises from the Government's preferred and misleading metric. The number of cases concluded by consent also helps to explain the high attrition rate throughout the process and the low permission grant rate. Bondy and Sunkin found that a low permission grant rate does not necessarily mean that claimants are becoming less successful. A higher rate settlement of strong cases prior to permission will lower the permission grant rate and thereby conceal the true success rate.[54] Overall, this casts doubt on the Government's view that immigration judicial review are, in general, without merit.

How is litigation conducted?

Judicial review litigation prioritises the role of the court in adjudicating to vindicate individuals' rights and to uphold the public interest in both legality and finality. Litigants should not seek to win at all costs, but co-operate with each other to assist the court.[55] The respondent must lay before the court all relevant facts and reasoning underlying the challenged decision.[56] The duty of candour weighs most heavily on respondents, but it also applies to claimants. Much of the time, litigant behaviour is simply mundane conformity with normal court procedures. However, workload pressures, time constraints, and the interests of clients can mean that corners are sometimes cut. Home Office officials are

[54] V. Bondy and M. Sunkin, "Accessing Judicial Review" [2008] P.L. 647, 656-657.

[55] *R v Lancashire County Council, ex parte Huddleston* [1986] 2 All ER 941; *Belize Alliance of Conservation Non-Governmental Organizations v The Department of the Environment* [2004] UKPC 6, [2004] Env LR 761, [86]; Treasury Solicitor's Department, *Guidance on Discharging the Duty of Candour and Disclosure in Judicial Review Proceedings* (2010).

[56] *Tweed v Parades Commission for Northern Ireland* [2007] 1 AC 650, [31] and [54]; *R (Quark Fishing Limited) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1409, [50].

under colossal pressure to make decisions and clear backlogs whereas practitioners deal with high volumes of cases and often face funding difficulties. As the UTIAC has noted, there is a constant battle against the "unholy trinity" of avoidable delay, excessive cost, and unnecessary complexity.[57]

The Home Office as a litigant

Concerns about the Home Office's litigation conduct include: failure to disclose relevant evidence; failure (or delay) to engage in the pre-litigation stages by responding to claimants' letters before claim; and delays in filing acknowledgements of service. A common departmental practice to issue supplementary decision letters once proceedings are issued or after the grant of permission thereby making the impugned decision a "moving target". Yet, the judicial review process does not incorporate any opportunity to rectify a decision or add different refusal reasons. Further, this practice might be thought to discourage officials from getting it right first time as any shortcomings in initial decisions can be corrected if challenged. The Tribunal has though adopted a flexible approach to avoid prolonged and further litigation.[58] At times, the Home Office's institutional attitude has seemed to invert ordinary administrative law logic: because of the volume of work, failures regularly arise; consequently, the Home Office should not be held culpable for them.[59] Detention cases provide much evidence of poor conduct. In one instance, the Home Office had failed to file any evidence despite a serious allegation of unlawful detention and being obliged to disclose relevant evidence. This "very concerning state of affairs" was "far from being the first occasion when the judges have had to complain about deficiencies in the Secretary of State's response to claims such as the one which is before us".[60] In future, the court could draw adverse inferences. In 2012, Theresa May became the second Home Secretary to be found guilty of contempt of court. Having unlawfully detained an individual with mental health problems, the Home Office then refused to release him despite undertaking to do so. The Home Office's "outrageous" and "wilful" disregard of the court was "arbitrary" and "unconstitutional" and resulted in an award of exemplary damages.[61]

The issue of costs has increasingly loomed large. The normal position is that costs are borne by the losing party unless there is some good reason to the contrary.[62] Yet, as a

[57] *R (Bilal Mahmood) v Secretary of State for the Home Department (continuing duty to reassess)* IJR [2014] UKUT 00439 (IAC), [15].

[58] *R (Natalia Heritage) v Secretary of State for the Home Department and First-tier Tribunal IJR* [2014] UKUT 00441 (IAC), [12]-[14].

[59] Cf. evidence of the Parliamentary Ombudsman to the House of Commons Public Administration Select Committee, *Ombudsman Issues* (2002-03 HC 448), [27] in which it was noted that the Home Office had regularly (and unsuccessfully) advanced the argument that because delay was so commonplace, it should not be considered to comprise maladministration.

[60] *I and others v Secretary of State for the Home Department* [2010] EWCA Civ 727, [55] (Munby LJ).

[61] *R (Lamari) v Secretary of State for the Home Department* [2012] EWHC Admin 1630; "Theresa May Accused of Unacceptable and Regrettable Behaviour by Judge" *Daily Telegraph* 20 June 2012; "Foreign Criminal Awarded £25,000 Damages" *Daily Telegraph* 16 October 2013.

[62] CPR 44.2(2); *M v Mayor and Burgesses of the London Borough of Croydon* [2012] EWCA Civ 595, [61].

matter of practice, the Home Office has often sought costs for conceding challenges.[63] A familiar pattern has been the Home Office's failure to respond to preliminary stages of a challenge, such as a letter before claim. This prompts the claimant to file for judicial review. The Home Office subsequently concedes the challenge and seeks costs claiming that the case was conceded simply for "pragmatic reasons" – not because the challenge had merit. Costs also have wider implications. Given the contraction in legal aid funding and the withdrawal of law firms from this field of practice, the withholding of funds to a successful party could further reduce the availability of competent legal advice and hence access to justice.

In *Bahta*, the Court of Appeal held that the when relief is granted or conceded, the Home Office will bear the burden of justifying a departure from the general rule that costs follow the event. The court criticised the Home Office's "state of mind" - in which it regularly failed to respond to properly formulated grounds of challenge – as unacceptable.[64] Neither the Home Office's heavy workload nor the financial burden of costs could justify depriving successful claimants of their costs. The court also rejected the Home Office's argument that it was impractical for it to comply with the pre-action protocol because of the large number of challenges. Serious misgivings were expressed about the Home Office seeking to avoid costs when conceding challenges for "purely pragmatic reasons". From the judicial perspective, the making of consent orders assumes an error of law. It is odd for a court to approve the *de facto* invalidation of a lawful decision.[65] Further, there is a risk that the Home Office may use "purely pragmatic reasons" as "a device for avoiding an order for costs that ought to be made".[66] Renewed Home Office attempts to seek costs were rightly stamped upon in *Muwonge*. Both the late agreement of consent orders[67] and the Home Office's "relatively entrenched" and "totally unjustified" practice of seeking costs when conceding were unacceptable.[68]

Conceding challenges goes wider than just costs. Claimants naturally focus upon immediate outcomes and are highly likely to accept the Home Office's offer to reconsider. By contrast, as a repeat-player, the Home Office can be expected to play the litigation game differently - with a view to wider possible repercussions. This raises the possibility – if not the certainty - that the Home Office may tactically concede some challenges to prevent the creation of precedent unfavourable to its wider interests likely to benefit a wider number of

[63] P. Nathan and T. Buley, "Case Comment: *R (Bahta) v Secretary of State for the Home Department*" (2012) 26 *Journal of Immigration Asylum and Nationality Law* 78, 79.
[64] *R (Bahta) v Secretary of State for the Home Department* [2011] EWCA Civ 895, [59] (Pill LJ).
[65] *AL (Albania) v Secretary of State for the Home Department* [2012] EWCA Civ 710, [11] (Maurice Kay LJ).
[66] *R (Bahta) v Secretary of State for the Home Department* [2011] EWCA Civ 895, [63] (Pill LJ).
[67] For the UTIAC, the late agreement of consent orders on the day before a hearing wastes "the increasingly beleaguered and threatened resource of judicial preparation time": *R (Jowanski Muwonge) v Secretary of State for the Home Department (consent orders: costs: guidance) IJR* [2014] UKUT 00514 (IAC), [17].
[68] Ibid., [13]-[14]. As the UTIAC noted, at [9]: "On any rational analysis, Mr Muwonge could not have expected that he would, literally, have to pay a price for exercising his constitutional right of access to a court and securing a surrender by the Secretary of State."

individuals. A long-standing practice in immigration litigation,[69] tactical concession enables the executive to remove a challenge to legally vulnerable rules and policies from judicial scrutiny by rendering the specific case academic. It is not forum-shopping, but forum-avoidance: judicial findings that would otherwise be binding in other cases can thereby be evaded. The courts have held that the Home Office is entitled to withdraw decisions with a view to reconsideration.[70] They also are averse to adjudicating upon academic issues. In this context, tactical concession can enable the Home Office to prevent the courts from assessing the legality of policies (which may be doubtful). Repeat-players are able to "trade off symbolic defeats for tangible gains".[71] By contrast, poorly advised parties will not be in a position to challenge. Further, forcing individuals to commence legal proceedings which are then conceded at a late stage wastes judicial resources.

Tactical concession also raises a wider issue: what are courts and tribunals for? Should the judicial process be narrowly focused upon dispute resolution or does it serve a wider social function of determining legality beyond the needs of the parties? Pushed to the extreme, the practice could stem the flow of those cases that make new law. To some extent, targeted public interest litigation can ameliorate some of the ill-effects. Interest groups have won notable successes: ensuring access to judicial review in removal cases and convincing the courts of the structural unfairness of the detained fast-track asylum process.[72] Their resources are, though, limited and many other legal issues remain. In *Salem*, the House of Lords recognised the theoretical possibility of a public law court exceptionally determining a hypothetical question if the public interest so required, a large number of similar cases existed or were anticipated, and the issues were not fact-sensitive.[73] Judges have, however, been reluctant to exercise this jurisdiction: they have been "completely overrun with immigration, asylum and other cases".[74] Further, there are inherent risks in a court or tribunal expressing views on a wide-ranging legal issue that does not arise for decision if the public body refuses to engage or if the facts do not support it.[75] A court or tribunal must also proceed extremely carefully before second-guessing the respondent's real (though undisclosed) motivation.

Nonetheless, judicial impatience with the Home Office has, on occasion, prompted the courts to put *Salem* into action. Consider *Osman Omar,* a challenge to regulations imposing a fee for those applying for immigration status who were entitled to remain on

[69] See R. Thomas, *Administrative Justice and Asylum Appeals* (Oxford: Hart, 2011), p.204 on Home Office concession of potential country guidance cases in the UTIAC.
[70] *R (Chichvarkin) v Secretary of State for the Home Department* [2011] EWCA Civ 91, [39].
[71] M. Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change" (1974) 9 *Law and Society Review* 95, 103.
[72] *R (Medical Justice) v Secretary of State for the Home Department* [2011] EWCA Civ 1710; *Detention Action v Secretary of State for the Home Department* [2014] EWHC Admin 2245; *Detention Action v First-Tier Tribunal (Immigration and Asylum Chamber)* [2015] EWHC Admin 1689.
[73] *R v Secretary of State for the Home Department, ex parte Salem* [1999] 1 AC 450, 457 (Lord Slynn).
[74] *R (Zoolife International Ltd) v Secretary of State for Environment, Food and Rural Affairs* [2007] EWHC 2995 (Admin), [37]. See also *R (Francis) v Secretary of State for the Home Department* [2010] EWHC Admin 1122; *R (PE) v Secretary of State for the Home Department* [2015] UKUT00139 (IAC).
[75] See, eg, *Secretary of State for Defence v Lance Corporal Duncan* [2009] EWCA Civ 1043, [125] (Carnwath LJ).

human rights grounds but unable to pay because they were destitute.[76] The substantive issue affected many individuals, but had been kept from the court's door through concession. Nevertheless, the court proceeded to scrutinise, and then quash, the regulations.[77] Beatson J queried whether it was right that important points of principle should be "continuously kicked into touch by decisions made after proceedings are instituted."[78] If *ad hoc* decisions were being made by the Home Office to preclude the determination of important questions on which its position was difficult, then the court could proceed to adjudicate.[79] Recognising the need for restraint, the UTIAC has also acknowledged that it may, despite the Home Office's withdrawal of a challenged decision, proceed to substantively determine a case if it raises broader issues requiring general guidance.[80] These are important, albeit limited, in-roads against cynical litigation tactics.

Claimants and their representatives

What then of claimants? The UTIAC has emphasised the duty of representatives to the court and the necessity of providing a fair and comprehensive account of all the relevant facts, including those adverse to the claimant.[81] This duty is particularly important in urgent challenges against removal: a claimant's immigration history may be a decisive factor in the legality of removal directions.[82] The failure to disclose all relevant facts and the immigration history can itself result in permission being refused and the award of costs.[83] It is fundamental to access to justice that claimants be able to advance their cases and have them adjudicated upon, but there is a wealth of difference between a weak case and advancing an unarguable case in a professionally improper manner. Representatives must also continuously assess the viability and propriety of their client's case throughout the judicial review process.[84] Claims should be withdrawn if the Home Office's response renders them unsustainable.

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[76] *R (Osman Omar) v Secretary of State for the Home Department* [2012] EWHC Admin 3448.

[77] For other examples, see *R v Secretary of State for the Home Department, ex parte Mersin* [2000] INLR 511; *R v Secretary of State for the Home Department, ex parte Nigatu* [2004] EWHC 1806 (Admin); *R (Williams) v Secretary of State for the Home Department* [2015] EWHC 1268 (Admin).

[78] *R (Osman Omar) v Secretary of State for the Home Department* [2012] EWHC Admin 3448, [45] (Beatson J).

[79] Ibid., [45]-[46] (Beatson J): "It cannot be an efficient use of resources to create situations in which individuals are forced, often at public expense, to institute legal proceedings and take up the time of a grossly overworked Administrative Court, only to find at a late stage in the proceedings that the Secretary of State has made a decision which arguably makes the issue moot."

[80] *SM v Secretary of State for the Home Department (withdrawal of appealed decision: effect) Pakistan* [2014] UKUT 00064 (IAC).

[81] *R (Okondo and Abdussalam) v Secretary of State for the Home Department (wasted costs; SRA referrals; Hamid)* IJR [2014] UKUT 00377 (IAC).

[82] CPR Practice Direction 54, Section II, "Applications for permission to apply for judicial review in immigration and asylum cases – challenging removal".

[83] *Madan and Kapoor v Secretary of State for the Home Department* [2007] EWCA Civ 770; [2007] 1 W.L.R. 2891; [17]; *R (MS (A Child)) v Secretary of State for the Home Department* [2010] EWHC Admin 2400; *R (I) v Secretary of State for the Home Department* [2007] EWHC Admin 3103, [11] (Collins J).

[84] *R (Bilal Mahmood) v Secretary of State for the Home Department (continuing duty to reassess)* IJR [2014] UKUT 00439 (IAC).

In practice, there have long been concerns about the variable quality of claims, especially last-minute claims challenging removal. Orders directing that the renewal of a judicial review claim does not bar removal are made often because "there are, not infrequently, cases where groundless applications totally without merit are made to the Administrative Court by those facing removal or deportation."[85] The courts have also introduced measures to punish any abuse of process. In *Hamid*, the Administrative Court warned that it will take firm action against representatives lodging late meritless challenges against removal said to be urgent.[86] The court inferred that many last minute claims are made simply to defer removal, a waste of public money, and a strain on court resources. *Hamid* was intended as "a stern reminder" that judges will deal firmly with incompetent lawyers putting forward legal arguments that do not just have little merit, but are "actually fundamentally nonsensical."[87] The courts have proceeded to be highly critical of incompetent representatives. They have sanctioned poor litigation conduct by: striking out a claim because of non-compliance;[88] making wasted costs orders; convening *Hamid* hearings to name and shame practitioners; and referring practitioners to the appropriate professional body.[89]

There are some incompetent representatives. In common with non-immigration litigation, many claims are unarguable. At the same time, practitioners note the problems posed by securing legal aid funding. They also describe the sometimes frantic scramble of preparing very urgent claims against removal. The need for such claims is evidenced by the frequency of last-minute injunctions against removal[90] and orders requiring the return of those unlawfully removed.[91] As for the Home Office, it has on occasion simply ignored court rulings.[92]

Home Office delay in filing acknowledgements of service

The sheer volume of challenges and the need to engage in preliminary stages of judicial review have often imposed strains upon the system. Consider the obligation of respondents

[85] *I and others v Secretary of State for the Home Department* [2010] EWCA Civ 727, [39] (Munby LJ).
[86] *R (Hamid) v Secretary of State for the Home Department* [2012] EWHC Admin 3070.
[87] *Lord Chief Justice's Report* (2013), p.36.
[88] *R (SN) v Secretary of State for the Home Department (striking out – principles) IJR* [2015] UKUT 227 (IAC).
[89] *R (Awuku) v Secretary of State for the Home Department* [2012] EWHC Admin 3298 and [2012] EWHC Admin 3690; *R (Gassama) v Secretary of State for the Home Department* [2012] EWHC Admin 3049; *R (B & J) v Secretary of State for the Home Department* [2012] EWHC Admin 3770; *R (Butt) v Secretary of State for the Home Department* [2014] EWHC Admin 264.
[90] "Sri Lankan Asylum Seekers Removed From Deportation Flight at Last Minute After Judge Accepts There is Risk of Torture" *The Independent* 19 September 2012; "Sri Lankan Asylum Seekers' Deportation Halted at Last Minute" *The Guardian* 23 October 2012; "Court Stops Tamil Asylum seekers Being Sent Back to Sri Lanka" *The Guardian* 28 February 2013; "Judge Prevents Theresa May Sending Asylum-seeker Back to Lawless Somalia" *The Independent* 3 June 2014; "Afghanistan Deportation Flight Grounded by Court of Appeal" BBC News 22 April 2015 http://www.bbc.co.uk/news/uk-32411757
[91] "Nigerian Mother and Son Unlawfully Deported by Home Office Set to Return to the UK" *The Independent* 22 April 2015; *R (RA) v Secretary of State for the Home Department* 13 April 2015 (JR/2277/2015).
[92] See, eg, "Theresa May Rebuked Over Illegally Deported Asylum Seeker" *The Guardian* 30 April 2012.

to file an acknowledgement of service within 21 days.[93] The purpose is to provide a summary of the grounds of defence to assist the judge deciding considering permission.[94] By 2013, it had become a "notorious fact" that the Home Office, flooded with claims, was routinely unable to file acknowledgements of service within time for the majority of claims.[95] The systemic problem was the inability of Home Office caseworkers in both its Litigation Operations Team (North) and Older Live Cases Unit (OLCU) to give timeous instructions to the Treasury Solicitor in a large number of temporary and family migration and asylum legacy cases.[96] Such a situation has obvious adverse consequences for the claimants, the courts, and the public interest in the finality of administrative decisions and the need for challenges to be determined with reasonable promptness. In *Singh*, Hickinbottom J held that the Home Office must aim to comply with the 21 day time limit; there was a "heavy procedural obligation" to acknowledge service promptly to assist the court.[97] Initial Home Office applications for extension did not require a full explanation, but the court should scrutinise the reasons for the delay in second and subsequent applications for extension. Further, the court should not hesitate to impose sanctions on the Home Office, including costs sanctions, if there is no good reason for the delay.

By contrast, in *Kumar*, the UTIAC took a softer line. It would regard acknowledgements of service filed within six weeks as falling routinely for consideration and not therefore undertake an initial consideration within those six weeks (except for urgent claims).[98] The Home Office would then have to provide compelling reasons for an extension. Further, the UTIAC saw little need to impose sanctions. The Home Office did subsequently take remedial action by: increasing decision-making capabilities; assigning more staff at the Treasury Solicitors to provide instructions in temporary migration cases; and using standard summary grounds in claims lacking merit. Further, cases to be conceded were sifted out at an early stage and consent orders drafted.[99] In practice, extending the time-limit makes little difference. However, concerns have been raised about the UTIAC re-writing the procedure rules and conferring "favoured litigant" status upon the Home Office.[100] The Home Office invariably takes a firm stance on delay by claimants and it has been questioned whether the Tribunal would consider generally extending time limits for claimants and their

[93] CPR 54.8.; Upper Tribunal Procedure Rules, r.29(1).
[94] *R (Ewing) v Office of the Deputy Prime Minister* [2005] EWCA Civ 1583, [43]; *R (Davy) v Aylesbury Vale District Council* [2007] EWCA Civ 1116, [32].
[95] *R (Kadyamarunga) v Secretary of State for the Home Department* [2014] EWHC 301 (Admin) [20]. Ironically, many judicial review claims have concerned Home Office delay in making an initial decision, which was followed by further delay in filing acknowledgements of service.
[96] The Home Office asserted that it was coping well with certain other judicial review categories.
[97] *R (Singh) v Secretary of State for the Home Department* [2013] EWHC 2873 (Admin), [5].
[98] *R (Kumar) v Secretary of State for the Home Department (acknowledgement of service; Tribunal arrangements) IJR* [2014] UKUT 00104 (IAC).
[99] Letter from UK Visas & Immigration to Duncan Lewis Solicitors, 12 September 2013.
[100] J. Packer, "New Judgment on Delays by the Home Office in Judicial Review Cases" (Free movement blog, 3 March 2014) available at: https://www.freemovement.org.uk/new-judgment-on-delays-by-home-office-in-judicial-review-cases/

representatives because of, for instance, legal aid issues.[101] Following *Kumar*, one lawyer noted that the Home Office was "doling out" pro forma consent orders pressing applicants to withdraw their claims on the basis that the Home Office would reconsider the claim within three months of the sealing of the consent order.[102]

Appeals and judicial review

We now turn to the relationship between appeals and judicial review. There have been various swings of the pendulum between the two. A familiar story is that appeals are a buffer for the courts. In the immigration context, there has been a struggle to limit leakage of cases out of appeals and into judicial review.[103] Often this has been because of the limited scope of appeals (as illustrated by overstayers seeking judicial review to generate a right of appeal). The recent trend is to curtail and limit appeals even though many cases could be more effectively through this route. After all, appeals incorporate fact-finding and produce substantive decisions. Timeliness is also relevant. In 2012, it took on average one year for judicial review claims to proceed from the permission stage to a substantive hearing.[104] By contrast, the First-tier Tribunal (IAC) determined almost 70,000 appeals in an average of 20 weeks in 2012/13 and 26 weeks in 2013/14. Further, successful judicial reviews require further administrative action to reconsider or implement decisions, which, given the Home Office's track record, opens up the prospect for further delay.

Yet, politics exerts considerable influence over the design of the appeals process, especially given the Coalition Government's desire to create a hostile environment for immigrants. Now "normal" concerns over appeal fees and legal aid restrictions have been put into the shade by the hollowing-out of appeals. Under the Immigration Act 2014, all of the appeals for which the tribunal system was originally established in 1970 – appeals against refusal of leave to enter and remain – have been withdrawn. Remaining appeal rights are limited to refugee and human rights grounds and the revocation of refugee status.[105] Criminal deportees may only appeal out of country, though judicial review can bite at the ancillary stage when a case is certified as free from serious irreversible harm on return.[106]

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[101] Ibid.

[102] J. Luqmani, "Judicial Review Procedure in the Upper Tribunal" (LT&P Solicitors blog, 18 March 2014) available at: http://www.luqmanithompson.com/News-Comment-Cases/Judicial-review-procedure-in-the-Upper-Tribunal.shtml

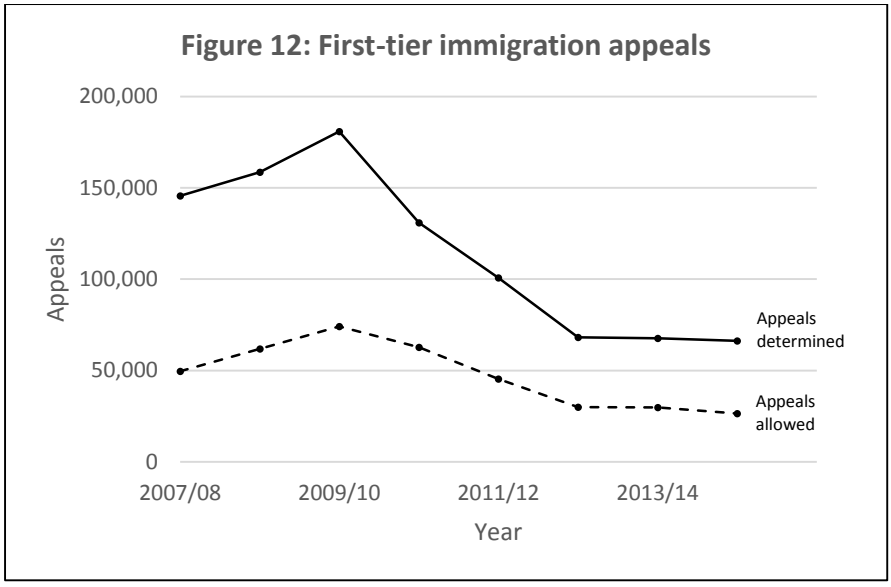
[103] Since the late 1990s, the Home Office has sought to simplify appeals by introducing "one-stop" appeals: Immigration and Asylum Act 1999 s 77. By contrast, over recent years social security tribunals have handled some 450,000 appeals per year, but there have only been 763 social security judicial reviews lodged between 2000 and 2014. Between 2012 and 2014, there have been 132 non-immigration *Cart* claims compared with 1,822 immigration *Cart* claims.

[104] In 2012, the average time from permission to a substantive hearing was 361 days for the 500 cases concerned. In 2013, the average time was 276 days.

[105] Immigration Act 2014 s 15.

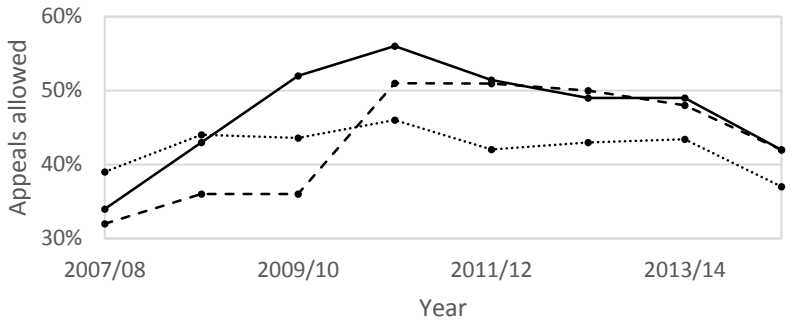
[106] Immigration Act 2014 s 17.

The Government's rationale was that elaborate, complex, and costly appeal processes afford individuals multiple opportunities to delay decision-making.[107] According to the Home Secretary, only foreign criminals benefitted from appeals.[108] In reality, most appellants have been business people, students, and family members. Criminal deportees accounted for 2.6 per cent of appellants in 2013/14. The Government also claimed that "with almost 70,000 appeals heard each year", the appeal system was "not fair to applicants – who face delays and costs".[109] As figure 12 below indicates, the caseload already had fallen from 180,000 appeals in 2009/10. As regards outcomes, adopting the perspective of party capability theory,[110] it might be expected that the Home Office would, as the better-resourced and more capable repeat-player, win much of the time. In practice, appellants have experienced some of the highest success rates across all tribunal jurisdictions. The average overall rate of allowed appeals since 2007/08 has been 42 per cent (the comparable figure for social security appeals is 40 per cent). The breakdown for (now withdrawn) appeal rights has been as follows: entry clearance - 34 per cent allowed; family visitor - 42 per cent allowed; and managed migration - 47 per cent allowed (figure 13).[111]



[107] See, eg, Hansard HC Debs vol 569 cols 158 and 161 (Theresa May, Home Secretary) (22 October 2013).
[108] Theresa May, speech at the Conservative Party conference, Manchester, 30 September 2013.
[109] Home Office, *Immigration Bill Factsheet: Appeals* (2013).
[110] See D. Robertson, "Appellate Courts" in P. Cane and H.M. Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford: Oxford University Press, 2010), pp.589-591.
[111] Entry clearance appeals were lodged overseas against the refusal of permanent settlement. Managed migration appeals were against refusals under the points-based scheme. Family visitor appeals concerned visits to see UK based family members and were withdrawn in 2013: Crime and Courts Act 2013 s 52.

Figure 13: Rates of allowed appeals by appeal type (now withdrawn)



Unable to win at appeals, the governmental alternative has been to change the rules of the game. "Party capability" clearly includes the Home Office's ability to refashion the system to its own ends and to deprive individuals of a longstanding remedy. Alongside social security and tax, immigration is one of the larger decision processes, but is inherently unstable because of the political forces in play. In the absence of appeals, some disputes may be resolved through administrative review, but the proportion of allowed appeals (figure 13) is likely to generate increased judicial review claims. There is an additional complexity: the 2014 Act retains human rights appeals. It is therefore possible to envisage a single impugned decision generating both a human rights appeal and judicial review on public law grounds. Also, which facts are binding: those found by the First-tier Tribunal or those before the judicial review tribunal? These issues require resolution, but the inexorable conclusion is that short-term political pressures have weakened an effective appeals process.

Conclusion

This article has provided some insights into the dynamic, high-pressure, and high-volume world of immigration judicial review litigation. Three points are made by way of conclusion.

First, outcomes and success rates. The analysis presented here demonstrates that governmental concerns about weak and meritless judicial review challenges overlook important aspects of the process. The number of claims lodged has increased markedly, but there is significant attrition of cases throughout the process. A superficial glance may generate the impression that the caseload is little more than procedural noise, but a detailed analysis uncovers issues of substantive legality. It is true that many claims are considered to be unarguable, but so what? The permission requirement is there to filter. At the same time, judicial review is often used to correct errors and flaws in government decisions. The Home Office's poor administration and decision-making invites scrutiny through judicial review. This article has highlighted deficient aspects of the administrative process: delay; poor decisions; and the failure to apply guidance and policies; the "ill-

judged" loss of experienced staff; and unlawful detention. There are significant levels of success in immigration litigation. The proportion of judicial reviews allowed following substantive hearings averaged 39 per cent between 2000 and 2013. There is little difference between this and the success rate of non-immigration judicial reviews. Further, the data presented here has down that a significant proportion of cases – 30 per cent – are settled out of court. Claims are frequently conceded by the Home Office at both the pre- and post-permission stage, with the upshot that the claimant is, in substance, the victor. The success rate is far higher than normally assumed and certainly higher than the statistics presented by the Government. Overall, the evidence does not support the Government's assertion that immigration claims in general lack merit.

Second, resources and judicial scrutiny. The rise in immigration claims has revealed the severe resource constraints of the Administrative Court. From one perspective, this surge can be viewed as a natural experiment as to how the judicial system responds when caseload outstrips judicial resources. The outcome is clear. Courts become completely overwhelmed and put under pressure: "don't get it right, get it *writ*!".[112] Delays arise. The bulk of cases are then off-loaded to the Upper Tribunal. Caseload can also be seen to have impacted upon both procedure and substance. Home Office delays in responding to claims prompted the UTIAC in *Kumar* to modify the procedural rules governing the filing of acknowledgements of service. Increased concession of cases may be efficient for the Home Office and also reduces the tribunal's caseload, but it moves cases out of the formal open adjudication process into the realm of private justice. Tactical concession may weaken the court's ability to develop the law. Another issue is whether the Upper Tribunal transfer will result in a qualitative difference in judicial scrutiny. Judicial review was formerly the exclusive province of High Court judges, but most cases are now considered by deputies and tribunal judges. Given the limited resource of High Court judge time, the transfer seems sensible. Indeed, further extension is possible. The UTIAC has an established role in issuing country guidance: should it also have jurisdiction to scrutinise whether a designated country is safe for asylum purposes?[113] The flexibility of the tribunal structure enables senior judges to be brought in when necessary. There is also scope for further empirical investigation: how will the UTIAC's handling of cases compare with that of the Administrative Court over time? The withdrawal of appeal rights also highlights an acute inconsistency: much of the appeal caseload may simply re-emerge as judicial reviews before the UTIAC - potentially over-stretching tribunal resources. Given its hostility toward judicial review, it is ironic that the Government itself may largely be responsible for increasing resort to judicial review.

Third, reducing disputes in the first place. This should be a key focus, but in practice the Government has preferred to seek quick wins by trying to restrict access to judicial review than undertake the hard grind of improving administration. The Conservative

[112] The exhortation of an Administrative Court manager to judges as quoted in P. Darbyshire, *Sitting in Judgment* (Oxford: Hart, 2011), p.295.
[113] See, eg, *R (Brown (Jamaica)) v Secretary of State for the Home Department* [2015] UKSC 8, [2015] 1 W.L.R. 1060.

Government has pledged to extend the "deport first, appeal later" rule to all challenges other than asylum claims.[114] Instead, the root problems require sustained attention. There is a long-standing crisis of confidence in the quality of both initial immigration decisions and Home Office administration. The courts have become increasingly exasperated with the Byzantine complexity of the immigration rules and repeatedly highlighted the need to simplify and update the statutory framework.[115] Recommending improved decisions and simpler rules is certainly easier said than done. In reality, it is exceedingly challenging, especially given the political pressures. Nonetheless, these should be priority areas – not just to minimise otherwise unnecessary challenges, but to provide better outcomes for individuals and the public. It remains the Government's responsibility to raise the overall quality of administrative agencies that administer complex and important areas of social life, such as immigration. Beyond this, the courts and the tribunal have experienced considerable difficulty in seeking to exert effective legal control in this area of administration. Given the Home Office's state of mind – a combination of political pressures and administrative difficulties – legal compliance takes a low priority and it would be highly optimistic to expect this to change. There remains a compelling need for judicial review of immigration decisions.

[114] *The Conservative Party Manifesto* (2015), p.30.

[115] *Pokhriyal v Secretary of State for the Home Department* [2013] EWCA Civ 1568, [4] (Jackson LJ); *R (New College London) v Secretary of State for the Home Department* [2013] UKSC 51; [2013] 1 W.L.R. 2358, [1] (Lord Sumption); *Singh v Secretary of State for the Home Department* [2015] EWCA Civ 74, [59] (Underhill LJ); *Hossain v Secretary of State for the Home Department* [2015] EWCA Civ 207, [30] (Beatson LJ).