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Immigration Judicial Reviews: Resources, Caseload, and ‘System-manageability efficiency’

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Introduction

This paper analyses statistical data concerning immigration judicial reviews (IJRs) since their transfer to the Upper Tribunal (Immigration and Asylum Chamber) (UTIAC). The paper makes the following findings: (i) both the number and proportion of claims certified as Totally Without Merit (TWM) have increased; (ii) very few claims proceed to a substantive hearing; many are settled out of court; and (iii) the length of time claims taken to get to substantive decisions has increased. There is a discussion about caseload, resources, and judicial behaviour.

IJRs account for some 80 per cent of all judicial review claims. In late 2013, 95 per cent of IJRs were transferred from the Administrative Court to the UTIAC.² A 2015 paper provided general background and analysed empirical data on IJRs.³ This paper picks up the story to consider how the transfer has been working in practice. In doing so, it draws primarily upon statistical data.⁴ The data reveals an interesting and developing story about how tribunalised judicial review is working. It also seeks to provide some insight into forces that influence judicial behaviour.

Overall

The table below provides the total number of claims lodged, disposed, determined, and outcomes.

Table 1: UTIAC judicial reviews Totals 2013-14 Q3 – 2015-16 Q4	
IJRs lodged	38,755
Disposed of	36,600 (94%)
Determined	23,734 (61%)
Other	12,003 (31%)
TWM	8,930 (23%)
Total permission allowed (paper and oral renewal combined)	2,469 (6%)
Substantive hearings	250 (0.6%)
Substantive allowed	53 (0.1%)

This is a high caseload. Over the same period, the Administrative Court received only 9,918 JR claims.

Immigration judicial review (IJR) claims lodged and disposed

The best place to start is the number of IJRs lodged with the UTIAC. As figure 1 shows, the number of claims received has been substantial. In four of the ten quarters for which data are available, the

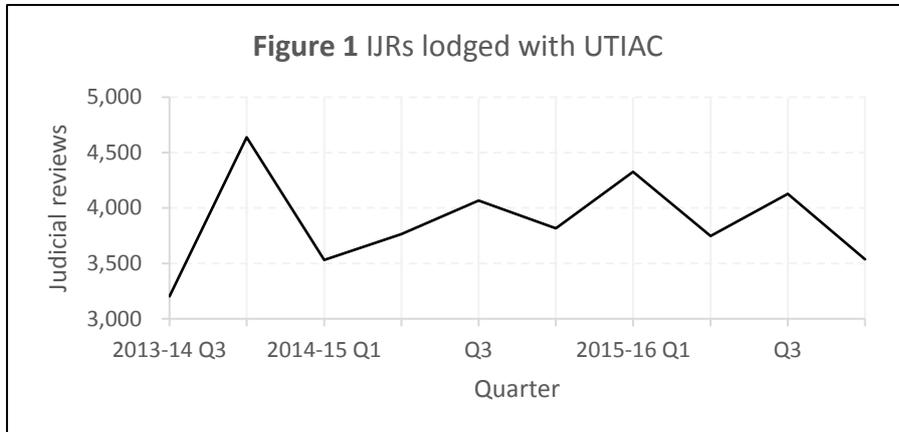
¹ Thanks to Maurice Sunkin for comments.

² Immigration judicial reviews that remain with the Administrative Court include *Cart* JRs and detention cases.

³ Thomas, “Mapping Immigration Judicial Review Litigation: An Empirical Legal Analysis” [2015] *Public Law* 652.

⁴ The data used is drawn from the Ministry of Justice, *Tribunals and gender recognition certificate statistics quarterly* (2016), <https://www.gov.uk/government/collections/tribunals-statistics> and Freedom of Information requests: FOI 99638; FOI 102522; FOI 104623. The data used here is already in the public domain, but for a copy, please email: Robert.Thomas@manchester.ac.uk

number of IJR's exceeded 4,000 claims. In the remaining six quarters, the number did not fall below 3,000. This is a substantial caseload. Part of the rationale for transferring most IJR's to the UTIAC was that the Administrative Court was unable to cope with the caseload. It is quite clear that without the transfer, the Administrative Court would have continued to have been overwhelmed.

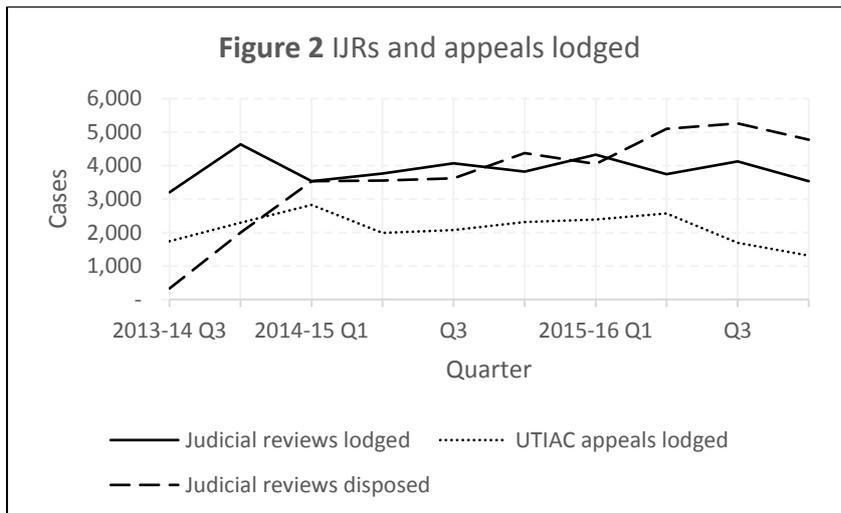


How has the UTIAC coped with the caseload? Unsurprisingly, the volume of claims has presented an immense challenge. According to Sir Bernard McCloskey, the UTIAC President: “while the assumption of the new judicial review jurisdiction roughly doubled the overall workload of this Chamber, *there has been no increase in salaried judicial resource*, albeit a slight increase in fee paid judicial resource was achieved during a limited period.”⁵ There has clearly been a focus on efficiency and expedition within the UTIAC.

Nonetheless, despite the lack of additional judicial resources and the doubling of the workload, since Q4 2014-15, the UTIAC has been able to dispose of more judicial reviews than it has received. Figure 2 shows the number of judicial reviews received, disposed of, and also statutory appeals. For Q3 2015-16, the UTIAC received 4,127 claims and disposed of 5,263 claims. McCloskey J has been “pleased to report that since January 2015, the output of the Chamber in judicial review cases outstripped input for the first time since the historic transfer in November 2013”.⁶

⁵ Senior President of Tribunals Report 2016, p.35 (emphasis added).

⁶ Senior President of Tribunals Report 2016, p.35.



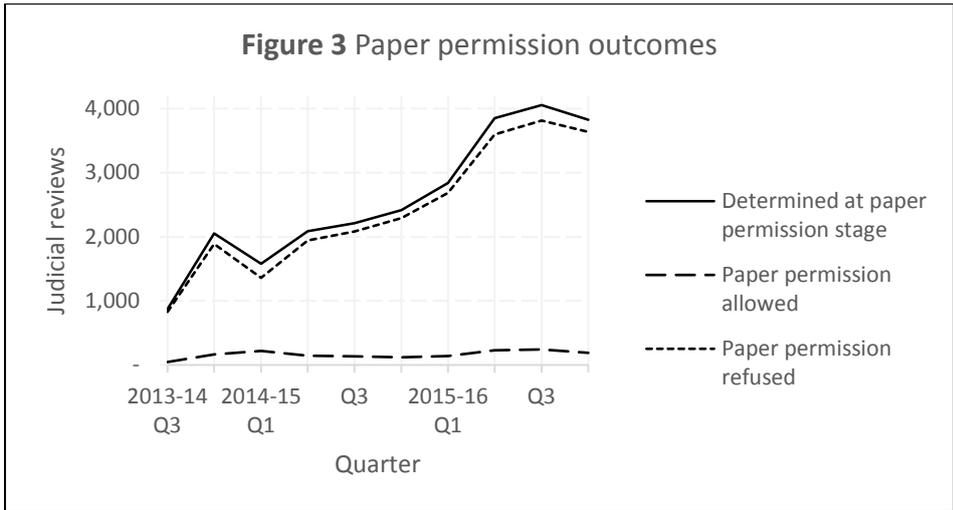
This achievement has been all the greater bearing in mind that not have only judicial resources not been significantly increased, but also that the judicial review work was added onto the UTIAC’s long-standing statutory appeal jurisdiction. But statutory appeals have suffered as a result. As McCloskey J has noted, “The advance in judicial review output required the internal diversion of judicial resources, with a detrimental impact on the statutory appeal stream, particularly permission to appeal applications”.⁷

This raises the following questions. How has the UTIAC managed to do it? If the caseload has doubled and little additional judicial resource has been forthcoming, then what have been the knock-on consequences? Have there been other aspects – not just statutory appeals – that have been affected? And what is the outlook for the future? Will the UTIAC be able to maintain its performance?

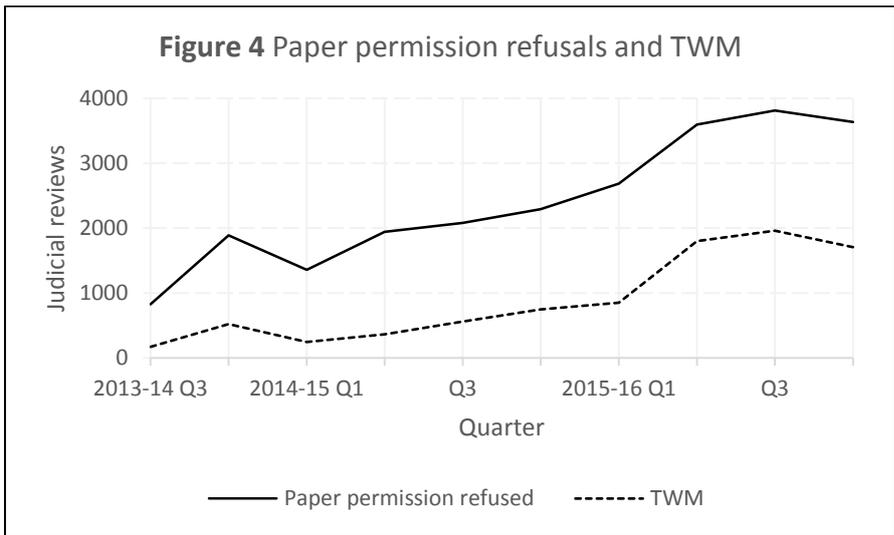
Paper permission decisions and claims certified as Totally Without Merit (TWM)

But first, we need to explore in a little more detail the next stage of the process – the paper permission stage. As figure 3 shows, the number of paper permission decisions has increased significantly from 873 in 2013-14 Q3 to 3,827 in 2015-16 Q4. The vast majority of claims that reach this stage are refused permission. In all but one of the quarters, over 90 per cent of claims were refused.

⁷ Senior President of Tribunals Report 2016, p.35.

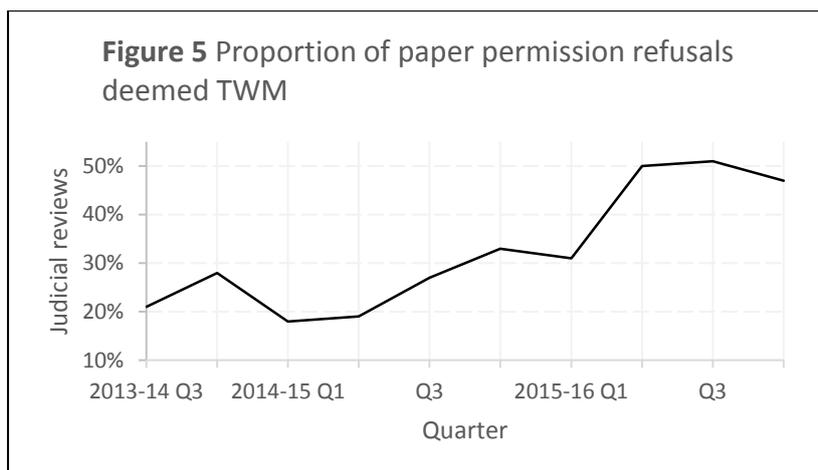


When refusing permission on the papers, the UTIAC may also certify a claim as totally without merit (TWM).⁸ A total of 23 per cent of all IJR lodged have been certified as TWM. In Q3 2015-16 alone, 1,961 claims were deemed TWM. Figure 4 shows the number of claims certified as TWM over time.



Both paper permission refusals and those deemed TWM have increased. But what is not obvious from figure 4 is whether the proportion of refused claims certified as TWM has increased. This data is provided in figure 5.

⁸ For judicial discussion, see *R (Wasif) v Secretary of State for the Home Department* [2016] EWCA Civ 82 in which the Court of Appeal criticised the inadequacy of the UTIAC’s reasons for certifying two judicial review claims as TWM.



What stands out here is the increase in the proportion of claims certified as TWM from an average of 27 per cent for the first four quarters to 50 per cent in 2015-16 Q2 and Q3. In other words, the proportion of claims certified as TWM almost doubled in just over a year. For the year 2015-16, 46 per cent of permission refusals were deemed TWM.

How can we account for this? Without examining a sample of case files, it is impossible to know for certain why this has occurred. But, two theories can be advanced. A straightforward theory is simply that a higher proportion of hopeless claims have been lodged. The purpose of the permission stage is to sort out the wheat from the chaff – and a fair and increasing number of these claims may be so hopeless and lacking in merit that they are TWM.

An alternative theory is that caseload pressures may have induced judges increasingly to certify claims as TWM. Empirical legal research into judicial systems has consistently highlighted the influence of workloads upon courts.⁹ In the US literature, judicial behaviour is seen as being motivated, in part, by “effort aversion” or “leisure preference”: judges have a fondness for those doctrines and procedures that promote economy and efficiency simply because they want, all things being equal, to reduce the effort they have to put into their work.¹⁰ This may be so for two reasons: first, to save time and effort for the individual judge; and, second, to ensure the manageability of the overall system.

Perhaps few UK judges would quite agree with the labels “effort aversion” or “leisure preference”. In the US, judges can delegate substantial amounts of their work to law clerks. UK judges generally lack this type of support. Accordingly, the phrase “system-manageability efficiency” may be more appropriate in the UK context. If a court or tribunal with limited resources is overwhelmed with claims, then it may use mechanisms or tools to reduce the workload or to make it more manageable.

As regards the UTIAC, it is possible that, as caseload pressures have kicked in and combined with the desire to ensure the manageability of the system, judges have sought out ways to manage their workloads downwards. In this context, TWM has obvious attractions and is an easily available tool to

⁹ See, e.g., B. Huang, “Lightened Scrutiny” (2011) 124 *Harvard Law Review* 1109.

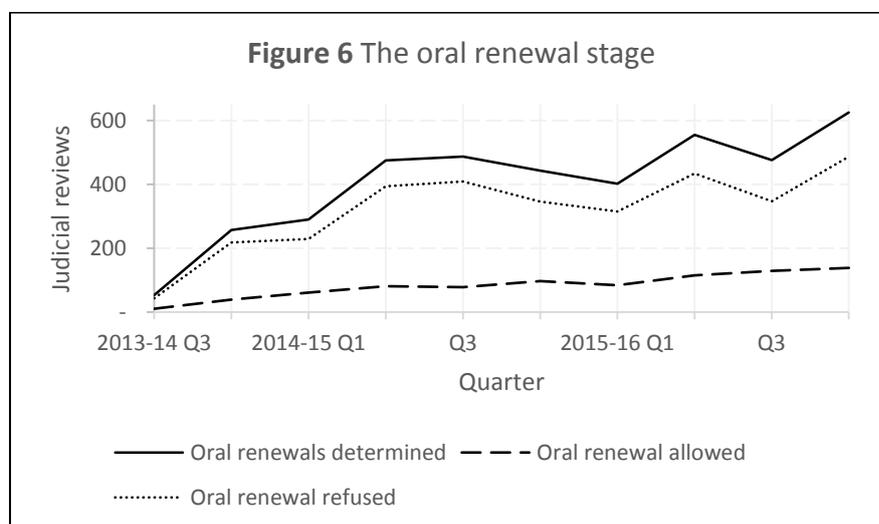
¹⁰ L. Epstein, W. Landes and R. Posner, *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice* (2012), pp.36-41; R. Posner, *How Judges Think* (2008), p.36.

hand. Permission claims deemed TWM cannot be renewed at a hearing. Hearings – even 30 minute oral renewal hearings – take up time, more time than paper decisions. And that time could be used more productively especially when incoming caseloads are high and resources are limited. Certifying claims as TWM not only disposes of cases altogether – it also reduces future judicial workloads by precluding oral renewal hearings.

The data indicates that on average 25 per cent of claims refused on the papers not certified as TWM are renewed at an oral hearing. Fewer claims certified as TWM would increase the number of oral renewals and hence also judicial workloads. This raises an important point. There may be a fine line between a claim being simply without merit and one that is TWM. But where exactly is that line and how is it drawn? It is essentially a matter for judicial discretion, which may be influenced by a range of different considerations.¹¹ Such considerations may include not just the specifics of an individual case, but also system-wide considerations, such as caseload and resources. How is this discretion exercised in practice? And does the exercise of this discretion vary over time as caseloads rise and decline? As noted above, it is difficult to know for certain why the proportion of TWM claims has increased. Nonetheless, resources and caseload pressures cannot be excluded as a possible explanation.

Permission claims renewed at a hearing

After the paper permission stage, those claims refused permission on the papers – but not certified as TWM – can be renewed at a hearing. Figure 6 shows the number of oral renewals and those allowed and dismissed.



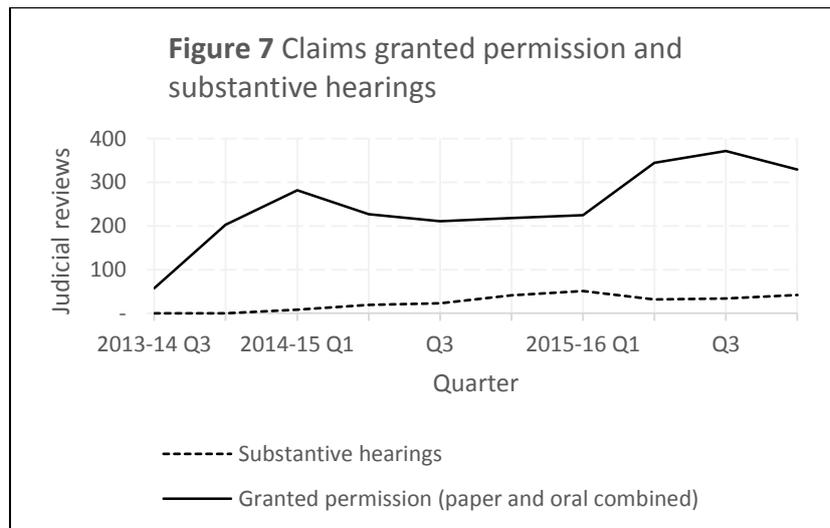
Again, here we can detect a high refusal rate. The vast majority of oral renewals are dismissed. But at the same time, there has been a steady increase in the number of oral renewals that have been allowed. This confirms the importance of the oral hearing as a means for convincing a judge in person that permission ought to be granted.

¹¹ See generally R. Baldwin and K. Hawkins, “Discretionary Justice: Davis Reconsidered” [1984] *Public Law* 570.

Another point to consider is how much in the way of judicial resources is expended through oral renewal hearings. For four quarters (Q4 2014-15 to Q3 2015-16), the UTIAC determined some 1,424 oral renewal hearings. A UTIAC judge will typically have six oral renewal cases in a day's list. Therefore, this amounted to 237 judicial working days.

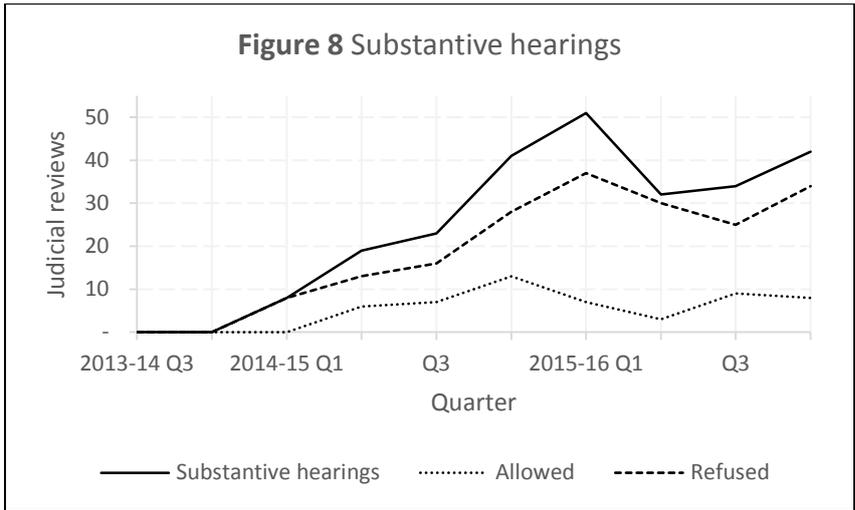
Substantive hearings

How many claims granted permission proceed to a substantive hearing? Figure 7 shows the number of grants of permission (paper and oral grants combined) and the number of substantive hearings. We might assume that most, if not all, claims granted permission result in a substantive hearing. However, many claims granted permission do not proceed to a substantive hearing.



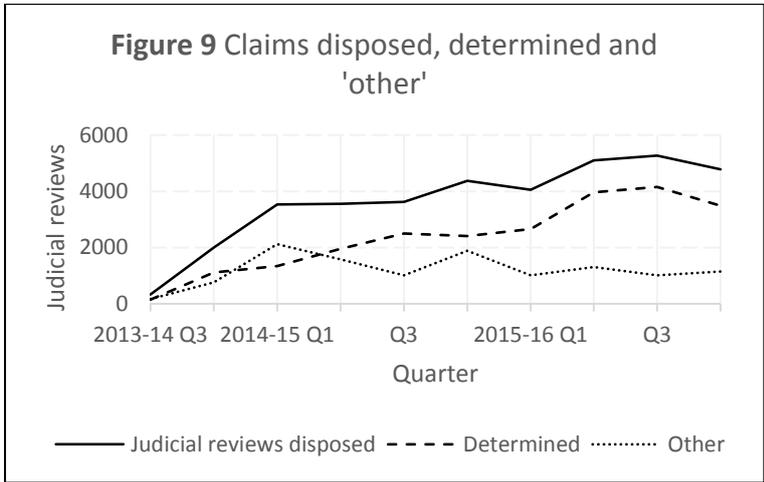
As figure 7 shows, only a tiny handful of cases have so far proceeded to substantive hearings. In 2015-16 Q2, there was a total of 345 claims granted permission (230 on the papers and 115 at a hearing), but only 32 substantive hearings. The most likely explanation for this is that the Home Office and Government Legal Department settle many claims out of court.

The next stage is substantive hearings and outcomes. Figure 8 shows the number of substantive hearings and allowed and dismissed outcomes. The number of allowed claims has mostly remained below 10 whereas the number refused has regularly exceeded 20 or 30 per quarter.



However, it should not be assumed that the vast majority of claims grant permission are hopeless. On the contrary, a fair number of claims are conceded by the Home Office at either an early stage of the process after having been lodged or after the permission stage. This issue was considered in detail in the *Public Law* article referred to in the introduction. It was estimated there that the real success rate for claimants is substantially higher than the 1 per cent figure used by the Government.

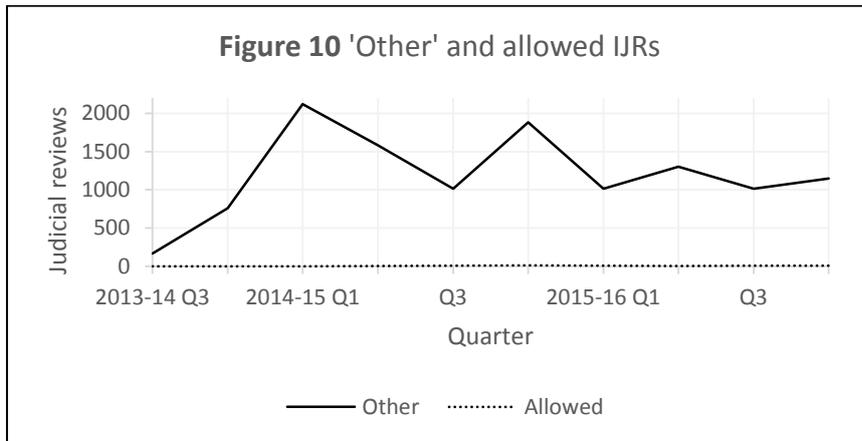
Cases concluded by consent are not specifically identified in the data. However, data obtained from the UTIAC indicates that in 2014, 4,750 claims were withdrawn. In 2015, the figure was 3,311 claims.¹² The MoJ’s tribunal statistics distinguish between those claims that are determined and “other”, that is, those not determined by the Tribunal. This data is presented in figure 9. Conceded cases fall into this “other” category.



It seems highly likely that most of the cases in this “other category” are claims that have been conceded by the Government Legal Department on behalf of the Home Office. The data is not entirely robust: no doubt there are other types of cases that may fall under the generic “other” category, such as those cases withdrawn by claimants. Nonetheless, with that caveat in mind, the data provide a reasonable picture of what is happening. A comparison of the number of “other”

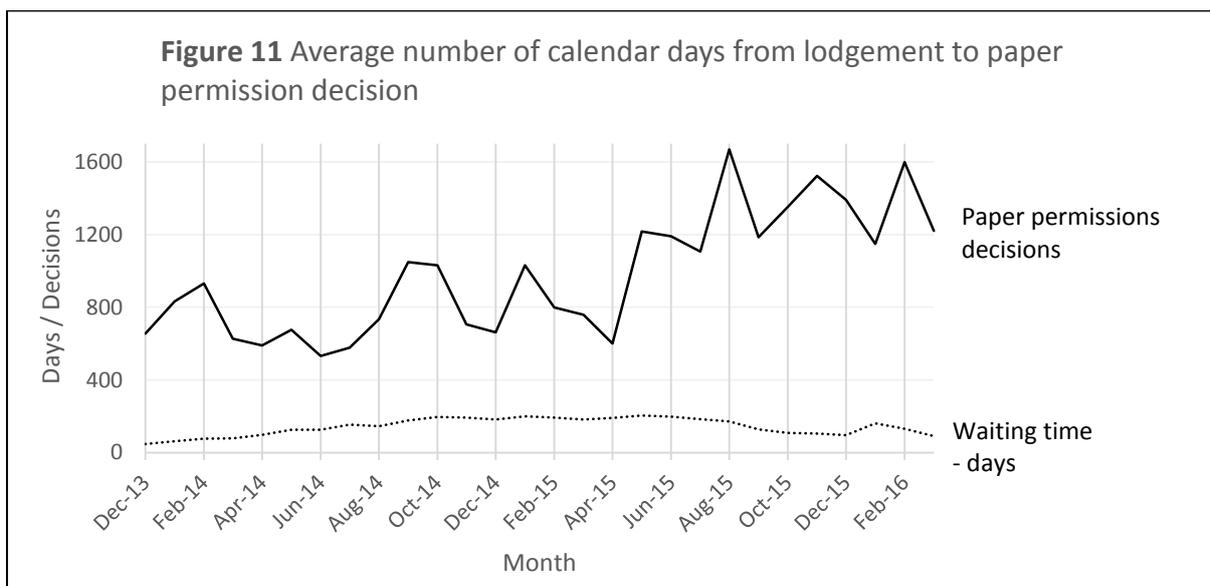
¹² FOI 104623, 11 May 2016.

cases with the number of allowed substantive hearings shows that the former is several times greater than the latter (figure 10).



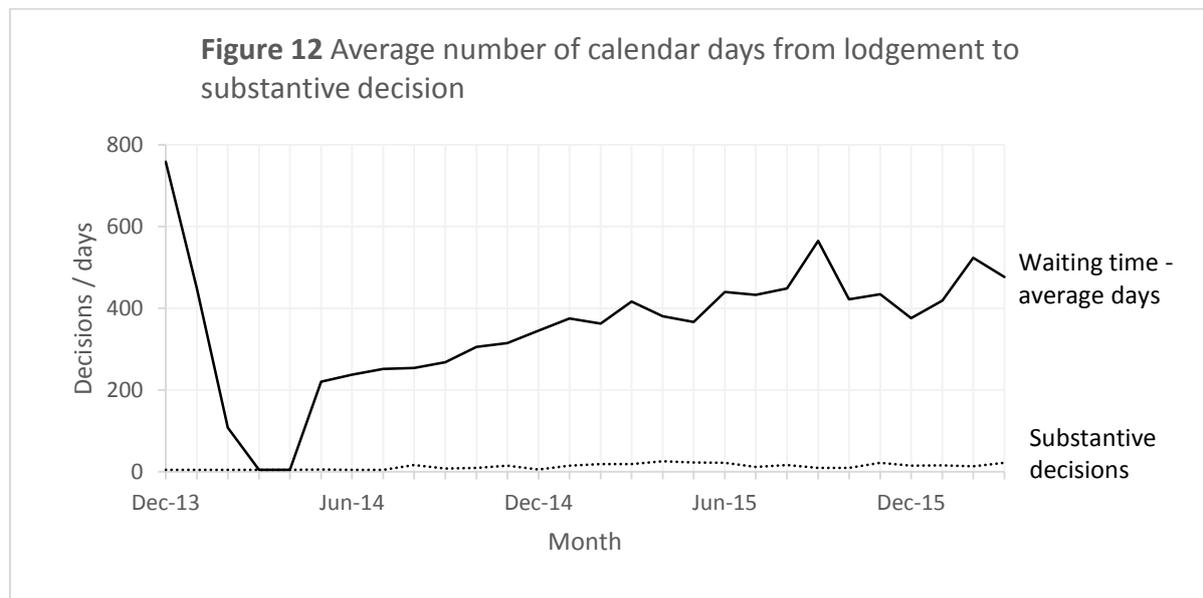
Timeliness

The amount of time taken to determine cases is an important feature of any judicial process. Figure 11 shows the average number of days taken by the UTIAC from the lodgement of claims to paper permission decisions.



An important feature here is the comparison between the number of paper permission decisions and the average number of days taken to make such decisions. There has been a considerable variation in the number of decisions, but there is a general trend upwards. However, despite increases in the number of paper decisions, the amount of time between lodgement and decision has remained relatively consistent. The average number of days to make permission decisions has not exceeded 204 days per month. On average, it has taken 143 days for claims from lodgement to receive a permission decision on the papers. The relative constancy in the timeliness of permission decisions strongly suggests that the UTIAC has devoted its resources on this aspect of the process, i.e. it has front-loaded by focusing judicial resources on clearing paper permission decisions.

By contrast, the data on the length of time from initial lodgement - not to paper permission decisions - but to a substantive decision tells a different story (figure 12).



As figure 12 shows, the number of substantive decisions has been consistently small, but the length of time taken from lodgement to a substantive decision has varied dramatically over time. In December 2013, there were 5 substantive decisions which took an average of 759 days to proceed from lodgement to a substantive decision. However, this figure may be explicable on the basis of the system settling down. The average number of days then reduced significantly, but it has subsequently increased. By January 2015, the time taken from lodgement to a substantive decision was 375 days. In September 2015, it reached an average of 565 days – a year and a half – to proceed from lodgement to a substantive decision for those 10 cases. Since then, the length of time has reduced somewhat. But in February 2016, it took an average of 524 days to reach a substantive decision.

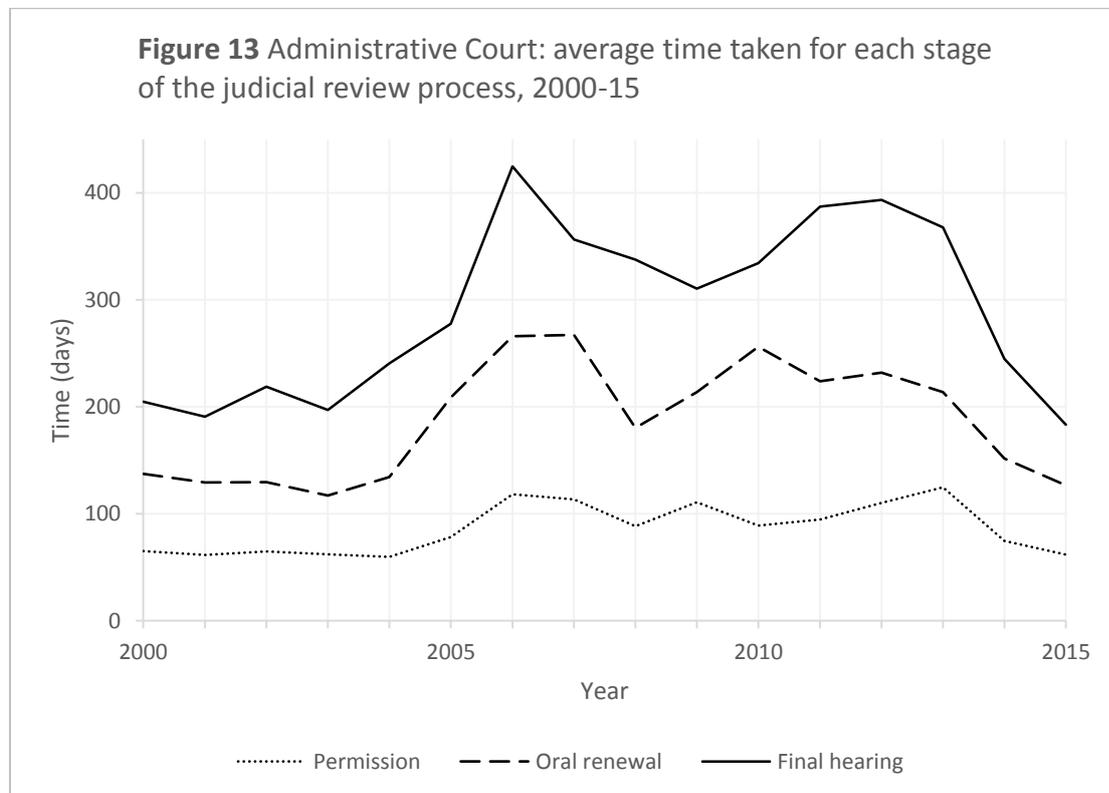
These figures are based on averages for a small number of cases; the overall average number of days per month may be distorted by an exceptional outlier. There may also be good explanations for the length of time taken from lodgement to a substantive decision: the complexity of cases and the legal issues raised; adjournments; and the need to re-convene the hearing may all increase the period of time. There may also be legal aid issues and delays associated with the payment of fees. Furthermore, applications to reopen cases can affect waiting time figures.

Two counter-factual questions arise. How would the UTIAC fare if the number of substantive hearings increased? What if the Home Office and the Government Legal Department did not concede so often and more cases proceeded to substantive hearings? It is impossible to say, but it seems reasonable to suppose that the UTIAC would be put under yet more pressure.

As matters stand, it appears that the timeliness of cases in the UTIAC is dependent upon at least two factors: (i) the concession of claims by the Home Office and Government Legal Department; and (ii) using TWM to reduce the number of claims that proceed to the oral renewal stage. The former is

outside the UTIAC's control, but the latter is within its control. This highlights the point made earlier as to precisely why the proportion of claims certified as TWM has increased so significantly.

By way of comparison, it is interesting to look at the timeliness of judicial review claims in the Administrative Court (Figure 13).¹³



Two points stand out from a comparison of the data concerning the Administrative Court and the UTIAC. First, the Administrative Court has been quicker than the UTIAC in determining paper permission decisions. Over the period 2000-15, the Administrative Court took an average of 86 days to make permission decisions. This contrasts with an average of 143 days by the UTIAC. Second, there is the comparison between the average length of time taken by the Administrative Court to have a substantive hearing and the average length of time taken by the UTIAC from lodgement to a substantive decision. This is not comparing like with like. Nonetheless, the Administrative Court has taken less time than the UTIAC.

Discussion

The key issue was stated at the outset: the UTIAC's caseload has doubled, but it has not received much in the way of additional judicial resources. Nonetheless, the Tribunal has managed to keep on top of its IJR caseload and in particular paper permission decisions. This has been a significant accomplishment. However, it has been achieved to the detriment of ordinary immigration appeals. The Tribunal's focus seems to have been largely upon clearing the enormous volume of paper

¹³ MoJ, *Civil Justice Statistics Quarterly January to March 2016, and The Royal Courts of Justice 2015* (June 2016), <https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-january-to-march-2016-and-the-royal-courts-of-justice-2015>

claims. It is possible that this may also have impacted adversely upon other aspects of the judicial review process – in particular, an increase in the number and proportion of claims deemed TWM and the length of time taken to reach substantive decisions. There are important rule of law implications regarding the discretionary nature of the TWM test and possibly adverse implications for access to justice and administration according to law. As regards timeliness, justice delayed is justice denied.

Part of the rationale for transferring most IJR's to the UTIAC was the Tribunal's specialist expertise in immigration law. That seems perfectly sensible. What, however, seems very far from sensible has been the doubling of the UTIAC's workload without any allocating it any additional salaried judicial resource. The caseload has simply been shifted from an inadequately resourced court to an inadequately resourced tribunal. Unsurprisingly, this may well have affected judicial behaviour.

The workloads and resources pressure may potentially become more acute if we factor in two other developments. First, there is the significant reduction in immigration appeal rights under the Immigration Act 2014. The Home Office has replaced appeals with an administrative review system, has been sharply criticised.¹⁴ A certain proportion of cases that were formerly handled through the appeals process in the First-tier Tribunal may simply re-materialise as judicial reviews. Second, the Immigration Act 2016 extends the use of non-suspensive appeals in human rights appeals. This seems likely to increase satellite judicial review litigation concerning the Home Office's decision to certify such appeals. There may also be more operational reasons for increasing IJR's, such as more refusal decisions and more enforcement action. Overall, the system has been changed and modified for short-term political reasons with little in the way of strategic planning: such is the history of immigration appeals and judicial review.

Looking at the matter more widely, there are three institutions – with very different perspectives – in play here. First, there is the Home Office with its focus upon maintaining immigration control. Second, there is the HM Treasury which, ultimately, allocates funding for the judicial process. And third, there is the Upper Tribunal. The Home Office has an interest in timeliness and finality, but, well, the Home Office is the Home Office. The Treasury holds the purse strings and has not allocated more judicial resources. As for the Tribunal, workload and timeliness is clearly linked to the availability of judicial resources.

The role of HM Treasury in judicial and administrative justice policy more generally is something of a dark corner: often overlooked, but absolutely crucial. Consider, for instance, the recent agreement between the Treasury and the Judiciary for £700 million to invest in online dispute resolution. The wider policy is to reform the judicial process to make it more efficient. The issue is directly linked to UTIAC because fees for IJR's have increased. As a former President of Tribunals, Sullivan LJ, has noted in the past, tribunal fees should, like student tuition fees, provide a driver for a better quality of service.

¹⁴ Independent Chief Inspector of Borders and Immigration, *An inspection of the Administrative Review processes introduced following the 2014 Immigration Act* (2016).

The analysis presented here highlights the influence of caseload, resources, and prioritisation within the judicial process. It is difficult methodologically to assess the degree to which the increased number and proportion of claims deemed TWM can be attributed to the increased number of claims. Nonetheless, given the circumstances, the need for “system-manageability efficiency” has become an increasingly powerful pressure upon the judiciary. Caseload and resources are mundane, but very important influences, upon judicial behaviour.

Looking ahead, it will be important to see how current and future developments impact upon the UTIAC’s caseload. The obvious solution - appointing more judges - costs money and is ultimately a matter for the MoJ and HM Treasury. As Thomas Sowell once noted, “there are no solutions, only trade-offs”.¹⁵ It would be unfortunate, but unsurprising, if similar pressures and delays that have affected the Administrative Court continue to be replicated in the UTIAC.

¹⁵ https://www.youtube.com/watch?v=3_EtIWmja-4