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## Access to Justice in Administrative Law and Administrative Justice

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### Introduction

This chapter discusses access to justice in the context of administrative law and administrative justice. The focus will be mainly on the United Kingdom and English law dimensions of administrative law and administrative justice, but some account will be taken of developments in other parts of the UK. The meanings of these two expressions overlap substantially but are not identical. Both expressions are generally considered to include within their scope both the substantive principles of administrative law and the different types of remedies—judicial and non-judicial—that citizens<sup>1</sup> may use to seek redress of grievances against the state, for example, courts, tribunals, inquiries, and complaints procedures including ombudsmen. The increasing use of the term ‘administrative justice’ in recent years has been associated with a strong emphasis on the importance of studying initial decision-making by public authorities,<sup>2</sup> as opposed to administrative law scholarship’s traditional emphasis on remedies, and an increasing willingness to analyse the system of remedies as a whole.<sup>3</sup> The term administrative justice is also conventionally regarded as including, not only decisions affecting citizens’ rights and interests, but also other aspects of how citizens are treated by public bodies. Administrative justice can, therefore, encompass the ‘non-decisional’ failings of public bodies such as delay, rudeness and insensitivity in their treatment of citizens.

<sup>1</sup> I use the term ‘citizen’ as convenient shorthand for all the categories of persons who have dealings with public bodies. No nationality limitation is intended.

<sup>2</sup> See, eg, M Adler (ed), *Administrative Justice in Context* (Oxford, Hart Publishing, 2010) particularly chapters by M Adler, R Kagan, S Halliday and C Scott, and M Hertogh.

<sup>3</sup> See, eg, the Final Report of the Administrative Justice Steering Group (AJSJG), *Administrative Justice in Scotland—The Way Forward* (2009), available at: [www.consumerfocus.org.uk/scotland/files/2010/10/Administrative-Justice-in-Scotland-The-Way-Forward-Full-Report.pdf](http://www.consumerfocus.org.uk/scotland/files/2010/10/Administrative-Justice-in-Scotland-The-Way-Forward-Full-Report.pdf) and the publications of the Administrative Justice and Tribunals Council.

The emphasis of this chapter is mainly on remedies rather than on initial decision-making and also on citizens' grievances arising from decisions affecting their rights and interests rather than on grievances concerning 'non-decisional' failings. This fits better with the themes of this book. However, it is informed by the concerns of administrative justice scholarship and the latter term will be used because of its wider connotations. The expression 'access to justice' can be used to mean a variety of things. In this chapter, I assume that the idea access to justice concerns the availability of legal remedies to address wrongs. A person has access to justice when there are effective remedies available to that person to vindicate his or her legal rights and advance his or her legally recognised interests. On a narrow conception of access to justice, what matters is that the remedies exist and that the person is free as a matter of law to use them. However, a broader conception—which I consider is more appropriate—suggests that persons should in practice be able to use those remedies without undue difficulty. This brings in consideration of the cost of using remedies and other possible obstacles to using them effectively.

In the United Kingdom, the primary focus of discussions of access to justice has been on civil litigation between private parties and on the criminal process. Administrative law and administrative justice have not until recently figured as prominently but, given the importance of the rights and interests at stake and the large numbers of citizens affected by decisions taken by state bureaucracies, it too deserves substantial attention. Administrative justice could be subsumed within the other two categories on the assumption that issues of administrative law can be classified as either civil or criminal in nature. There are certainly substantial overlaps between administrative justice on the one hand, and civil and criminal litigation on the other. Thus, in the field of administrative justice, citizens have legal rights against the state and the remedies for failure to respect those rights include litigation in the ordinary courts. However, there are two features of administrative justice which are different from civil and criminal justice which constitute good reasons for treating it as a distinct area of concern for purposes of access to justice analysis. First, administrative justice makes use of a wider range of remedies to resolve disputes between citizen and state than do civil or criminal justice in which dispute resolution is confined mainly to the ordinary courts. These include not only tribunals, but also non-judicial remedies such as ombudsmen, complaints procedures and various hybrids including public inquiry-based decision-making processes. Indeed, the extensive use of non-judicial remedies is largely a reaction to perceived weaknesses and limitations of the courts.

Second, it has been assumed that lawyers and legal aid are not necessary to do justice in those alternative fora and that citizens can use them effectively themselves. Whether this is indeed the case has long been controversial. Questions that have been raised include whether the unrepresented citizen is at a disadvantage in tribunals, whether adequate advice and assistance is in fact available and, if so, how it should be funded. However, the assumption has been an important influence on policy both in relation to legal aid and in the choice of remedies for administrative schemes. It is necessary, therefore, to consider the question whether

there is access to justice in the field of administrative justice in the light of these distinctive features.

This chapter addresses the general question of whether there is adequate access to justice in the field of administrative justice in the context of the developments of the last 15 years, particularly the period since 2010. That general question may be broken down into two further questions:

1. The extent to which there are actually remedies available to the citizen in the sense that there is a right to challenge in an independent forum administrative decisions which deny his or her rights or are adverse to his or her interests.
2. Whether the remedies that exist are truly accessible in the sense that citizens can use those remedies without undue difficulty.

I will consider both in the following pages but, before going further, it is appropriate to explain the nature of administrative decisions and the characteristics of administrative justice remedies.

## **The Nature of Administrative Decisions and the Characteristics of Administrative Justice Remedies**

### **The Nature of Administrative Decisions**

Many areas of public policy require public bodies to make individualised decisions, ie, decisions that affect identifiable individuals. There are two basic reasons why we would want those decisions to be good decisions. First, we want them to respect the rights and interests of the individuals affected by those decisions. Second, we want the policies legitimately adopted by elected and accountable governments to be properly implemented. In many areas of social policy, policies cannot be implemented without taking decisions affecting individuals. Most individualised administrative decisions are intended to be made according to authoritative standards, rather than in any other way, for example, by agreement between the decision-maker and the affected citizen or by random allocation.<sup>4</sup> These standards, therefore, are the criteria by reference to which public bodies and their officials should take decisions. Those standards for decision are often expressed in legislation or case law but also include less formal sources of guidance such as policy statements.

As the standards are often legal standards, we can invoke the rule of law—which requires that decisions made by government authorities affecting individuals

<sup>4</sup> See D Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (Oxford, Clarendon Press, 1996) 24–31 for an analysis of the different modes of decision-making.

should be made in accordance with the relevant laws—as a further reason for requiring decision-makers to follow them. The requirement of legality also implies that decisions should be correct on the facts as laws are made on the assumption that they will be applied to specific cases according to the actual factual circumstances. The basic requirements for a good administrative decision are, therefore, that it is based on a correct understanding of the law, and a correct view of the facts.

However, there is more to good decision-making in public administration than legality. In many contexts, the law gives decision-makers substantial discretion. That discretion ought to be exercised as well as it can be. Not only should the decision be lawful, it should be the best possible decision in the circumstances. By that I mean that the decision should in general advance the purposes of the administrative scheme in question, other generic objectives of public policy such as economy and efficiency, and important decision-making values such as consistency, transparency and respect for human rights. The third requirement of a good administrative decision is, therefore, that the decision reached is an appropriate exercise of any discretion that the decision-maker has. These are essentially substantive requirements to which we can add a requirement of procedural fairness in decision-making.

## The Nature of Remedies for Bad Administrative Decisions

All of this has important implications for citizens' remedies, in particular, how broad the opportunity for citizens to challenge administrative decisions should be. If many administrative decisions have three elements—questions of law, questions of fact and questions of discretion—it follows that a person aggrieved by a decision may wish to challenge any or all of these elements, ie, to argue that the decision is defective because the decision-maker got the law wrong, because she or he got the facts wrong or because she or he exercised the discretion inappropriately. It seems clear that citizens should be able to challenge decisions based on errors of law or errors of fact. It is perhaps less clear that citizens should be able to challenge the discretionary element of the decision, what administrative lawyers would call the merits of the decision. This is because where the decision-maker has discretion there is room for disagreement as to what the 'correct' decision is; the appellate or review authority may be no better placed than the initial decision-maker to decide whether a decision is a good or bad, whether for reasons of relative competence or legitimacy, or for other reasons.

It can certainly be argued that full merits review is inappropriate and that citizens' remedies should be limited to challenging errors of law and errors of fact, and that they should be able to challenge the exercise of discretion only to the extent permitted by the established grounds for judicial review. However, there are strong arguments that can support the provision of an appeal or review on the merits against administrative decisions. They include that discretionary administrative decisions are often very important to the individuals affected (eg, a decision to

deport a person from the UK on the grounds that his removal from the UK is conducive to the public good) and that effective implementation of policies, therefore, requires that officials make the right choices when exercising discretion. Unfortunately, there is not space to consider the arguments in detail in this chapter, but it is worth making the point that appeal or review on the merits is already well established in UK public administration. There is a right of appeal on the merits to an independent tribunal in many areas of public administration including all of the high volume decision-making systems (eg, social security, taxation, and immigration control). From a theoretical perspective it might seem that appeal or review on the merits is the 'gold standard' for citizens' remedies. The development of public policy suggests that it is also the default standard for remedies in UK public administration. Given that, I suggest that the onus should be on those who oppose allowing citizens to challenge decisions on the merits in any particular administrative context to justify that. In the rest of this chapter, I will, therefore, proceed on that assumption that the citizen should have the right to appeal against, or seek review of, an adverse decision on the merits.

## The Characteristics of Administrative Justice Remedies

Before explaining the development of administrative remedies in the UK, it is helpful to compare the characteristics of the different types of citizens' remedy that have been used. I suggest that it is useful to consider five key characteristics when comparing remedies. One is, as noted above, the scope for challenging administrative decisions (fact, law or merits) which I will call the decision criteria. The others are whether the remedy is independent of the administration; whether decisions are binding; the methods used; and the degree of formality. The UK has developed five main types of remedy for citizens in dispute with public bodies each of which has a different mix of the five key characteristics.<sup>5</sup> Those types are:

- Adjudication in the ordinary courts
- Adjudication in tribunals
- public inquiries
- Internal complaints and review processes of public bodies
- Ombudsmen.

The development of public inquiry procedures was an important twentieth-century experiment in dispute resolution but, because their dispute resolution function has been largely confined to planning and other contexts affecting land use, public inquiries will not be discussed further in this chapter.<sup>6</sup>

<sup>5</sup> For a more detailed analysis along these lines, see T Mullen, 'A Holistic Approach to Administrative Justice?' in M Adler (ed), *Administrative Justice in Context* (Oxford, Hart Publishing, 2010).

<sup>6</sup> For a useful discussion of inquiries, see C Harlow and R Rawlings, *Law and Administration*, 3rd edn (Cambridge, Cambridge University Press, 2009) ch 13.

The characteristics of the other four remedies are summarised in Table 1 below.

**Table 1: Key characteristics of redress mechanisms**

	Independent	Decisions binding	Decision criteria	Method/procedure	Formality
Courts	Yes	Yes	Legality	Adversarial Written and oral	High
Tribunals	Yes	Yes	Legality and merits	Adversarial/ inquisitorial Mainly oral	Variable, but tends to be low compared with courts
Internal complaints/ review	No	Yes	Legality, merits and maladministration	Inquisitorial Usually written	Low
Ombudsmen	Yes	No	Maladministration and injustice <sup>7</sup>	Inquisitorial Written	Low

To expand on the table, the ordinary courts have a high degree of independence from the administration, their decisions are binding, they make decisions according to the relevant law and the facts of the case, their methods are adversarial and their proceedings have traditionally exhibited a high degree of formality both in the sense that there are complex procedures to follow and in the sense that the tone of any hearings is formal (wigs, gowns, the style of courtrooms, legal language etc). Most tribunals share the first three characteristics with the difference that they frequently consider the merits of cases as well as questions of fact and law. Where they have tended to differ from the ordinary courts (there are significant exceptions) is in adopting a more inquisitorial approach and their proceedings have been less formal both in the sense that procedures are less complex than in the ordinary courts, and in the sense that the tone of hearings is less formal.

Ombudsmen share only one of the above characteristics with courts and tribunals, namely their independence from the administration. Their decisions are not binding, being merely recommendations to the body complained about. Their decision criteria are different from those used by courts and tribunals. The public sector ombudsmen may uphold a complaint where the complainant has sustained injustice in consequence of ‘maladministration’. This formula does not permit a full-scale inquiry into the merits of decisions,<sup>8</sup> but provided both

<sup>7</sup> Some ombudsmen are also empowered to examine ‘service failure’. See, eg, Scottish Public Services Ombudsman Act 2002, s 5.

<sup>8</sup> For discussion of the meaning of ‘maladministration’, see M Seneviratne, *Ombudsmen: Public Services and Administrative Justice*, 2nd edn (London, Butterworths, 2002) 115–18 and Parliamentary and

maladministration and injustice can be established, an ombudsman may uphold a complaint even though there has been no specific error of fact or law. Moreover, their remit goes beyond challenging decisions (which is all that courts and tribunals can do) and extends into to non-decisional failings in public administration such as rudeness, insensitivity and undue delay. Their methods are thoroughly inquisitorial and are backed by statutory power to compel witnesses and disclosure of documents. They may also be regarded as relatively informal both in the sense that procedures are not complex and that, as there are typically no hearings, information is gathered from complainants and witnesses by interview and correspondence.

Internal review and complaints procedures operated by public bodies are, by definition, not independent. Given that, it makes little sense to ask whether the decisions made are binding; suffice to say that public bodies are generally free to change decisions adverse to the citizens affected provided they do not act unlawfully in so doing. Methods are generally inquisitorial and procedures informal. Most are non-statutory but some are statutory.

In addition to the four main types of citizen's remedy, there are various hybrids (such as the former Independent Review Service for the Social Fund)<sup>9</sup> and other hard to classify arrangements. However, space does not permit discussion of these. Having explained the nature of citizens' remedies against the administration, in the next section I explain how this pattern of remedies developed.

## The Development of Citizens' Remedies

### Historical Development of Remedies

If we go back to the mid-nineteenth century, we find that there were two principal avenues for pursuing grievances against administrative bodies: the courts and elected representatives. Claims might be made in the courts for breach of private law rights or by way of judicial review although that remedy was in England and Wales limited to the High Court.<sup>10</sup> Individuals might also ask their MP to pursue a grievance against a government department. Since then, a variety of alternatives has developed.<sup>11</sup> The first to emerge was the public inquiry which grew out

Health Services Ombudsman, *Principles of Good Administration* (2009), available at: [www.ombudsman.org.uk/\\_data/assets/pdf\\_file/0013/1039/0188-Principles-of-Good-Administration-bookletweb.pdf](http://www.ombudsman.org.uk/_data/assets/pdf_file/0013/1039/0188-Principles-of-Good-Administration-bookletweb.pdf).

<sup>9</sup> The discretionary Social Fund was abolished with effect from April 2013.

<sup>10</sup> The supervisory jurisdiction was exercised by the Court of Session in Scotland and in Northern Ireland by its High Court.

<sup>11</sup> For a brief overview of the development of remedies in general, see *Administrative Justice in Scotland* (n 3) paras 3.1–3.21 and P Craig, *Administrative Law*, 7th edn (London, Sweet & Maxwell, 2012). On the development of tribunals, see R Wraith and P Hutchesson, *Administrative Tribunals*

of private Bill procedure in Parliament. Also, in the nineteenth century, the precursors of tribunals emerged.<sup>12</sup> The modern type of tribunal began to emerge before the First World War and proliferated throughout the twentieth century. From the 1960s onwards, a series of ombudsmen was created to deal with complaints against public bodies. More recently still, public bodies in general have been strongly encouraged to have in-house complaints procedures covering all their functions and in some cases there is a statutory requirement to operate complaints procedures. Also, in a number of contexts, public authorities were given a statutory obligation to review their own decisions.<sup>13</sup>

One of the key drivers of the development of citizens' remedies since the late nineteenth century has been a perception held by government policymakers that courts were not suitable for resolving the disputes that arose from modern schemes of public administration. They were thought to be slow, excessively formal, disproportionately costly, and the judges lacking in relevant expertise and unsympathetic to much regulatory and social welfare legislation and so likely to interpret it contrary to its intent.<sup>14</sup> These concerns were echoed by the trade unions when they were influential in the policy process and by the Labour Party.<sup>15</sup> However, although the desire to bypass the courts was common to many policy areas, the actual development of citizens' remedies was ad hoc and remedies were created in piecemeal fashion. Thus, separate tribunals were created for each area of public administration where an alternative to the courts was desired by policymakers. The main reason for this was that responsibility for tribunals rested with the departments responsible for the relevant area of policy. There was no central point within government for considering policy on tribunals generally, far less administrative justice as a whole. Even after the Franks Committee laid down general principles,<sup>16</sup> tribunals continued to differ from one another in many respects.

This led to the criticism that what had developed was a complex and disorderly landscape of administrative justice with several defects.<sup>17</sup> One was that different

(London, Allen & Unwin/Royal Institute of Public Administration, 1973). On public inquiries, see R Wraith and P Lamb, *Public Inquiries as an Instrument of Government* (London, Allen & Unwin, 1971). On ombudsmen, see Seneviratne (n 8) 40–44.

<sup>12</sup> C Stebbings, *Legal Foundations of Tribunals in Nineteenth Century England* (Cambridge, Cambridge University Press, 2006).

<sup>13</sup> See, eg, s 202 of the Housing Act 1996 which gives an applicant for assistance under the homelessness legislation the right to request a review of any adverse decision by the relevant local authority.

<sup>14</sup> See, eg, *Administrative Justice in Scotland* (n 3) para 3.5; HW Arthur, 'Without the Law': *Administrative Justice and Legal Pluralism in Nineteenth-Century England* (Toronto, University of Toronto Press, 1985) 144–46; Wraith and Hutchesson (n 11) 33.

<sup>15</sup> C Harlow and R Rawlings, *Law and Administration*, 1st edn (London, Weidenfeld & Nicolson, 1984) 71–72.

<sup>16</sup> *Report of the Committee on Administrative Tribunals and Enquiries* (Cmnd 218, 1957).

<sup>17</sup> See, eg, C Harlow and R Rawlings, *Law and Administration*, 2nd edn (London, Butterworths, 1997); Department for Constitutional Affairs, *Transforming Public Services: Complaints Redress and Tribunals* (Cm 6243, 2004). On tribunals specifically, see the Leggatt Report, *Tribunals for Users* (2001), available at: [webarchive.nationalarchives.gov.uk/+/](http://webarchive.nationalarchives.gov.uk/+/); [www.tribunals-review.org.uk/leggatttm/leg-ov.htm](http://www.tribunals-review.org.uk/leggatttm/leg-ov.htm).

decisions were subject to different types of remedy, for example, some decisions were subject to appeals on the merits to a tribunal. Other decisions were only subject to judicial review. For some grievances, no judicial remedy was available but there was a right to complain to an ombudsman. There seemed to be no clear or good rationale for the choice of remedies in different areas. Another criticism was that even where analogous decisions were subject to remedies of the same general type, there were differences in important details of those remedies. Thus, there was no uniform model for tribunals; they differed in their composition, time limits for appealing and procedures. The 2004 White Paper, *Transforming Public Services: Complaints Redress and Tribunals* (2004)<sup>18</sup> summed up the development of citizens' remedies by saying that, 'Administrative justice can be described as a system but it was not created as a system and no coherent design or design principle has ever been applied systematically to it. It is a patchwork.'<sup>19</sup> In fact, a trend towards rationalisation of administrative justice remedies had already begun with the Leggatt inquiry. The recommendations of the Leggatt inquiry in its report, *Tribunals for Users* (2001) which sought to make the tribunal 'system' more coherent and user-friendly, were largely accepted by the Government and enacted by the Tribunals, Courts and Enforcement Act 2007 (TCEA). TCEA replaced many existing specialist tribunals with a unified tribunal structure comprised of a new First-tier Tribunal and a new (mainly appellate) Upper Tribunal. The restructuring affected predominantly tribunals whose jurisdiction covered the whole of the UK or Great Britain or England and Wales. It did not apply to devolved tribunals. However, the Scottish Government is implementing a similar reform with regard to devolved tribunals in Scotland,<sup>20</sup> and rationalisation of devolved tribunals in Northern Ireland is also proposed.<sup>21</sup>

Ombudsmen have also been rationalised. Devolution of government to Scotland, Wales and Northern Ireland provided an opportunity to rethink the existing structure. The Scottish Public Services Ombudsman (SPSO) was created in 2002 as a 'one-stop-shop' for complaints of maladministration in all devolved public services.<sup>22</sup> A similar approach was taken in Wales with the establishment of the Public Services Ombudsman for Wales in 2006<sup>23</sup> and in Northern Ireland with the Northern Ireland Ombudsman.<sup>24</sup> Those reforms left England as the only 'nation' in the UK without a rationalised ombudsman service. However, the Cabinet Office has recently published a consultation proposing a new single Public

<sup>18</sup> *Transforming Public Services: Complaints Redress and Tribunals* (Cm 6243, 2004).

<sup>19</sup> *ibid*, para 4.21.

<sup>20</sup> See Tribunals (Scotland) Act 2014.

<sup>21</sup> Department of Justice NI, *Future Administration and Structure of Tribunals in Northern Ireland—Consultative Document* (2013), available at: [www.dojni.gov.uk/index/public-consultations/archive-consultations/tribunal-reform-in-northern-ireland-consultation.pdf](http://www.dojni.gov.uk/index/public-consultations/archive-consultations/tribunal-reform-in-northern-ireland-consultation.pdf).

<sup>22</sup> See the Scottish Public Services Ombudsman Act 2002.

<sup>23</sup> See the Public Services Ombudsman (Wales) Act 2005.

<sup>24</sup> The offices of the Northern Ireland Commissioner for Complaints and the Assembly Ombudsman for Northern Ireland operate as a single complaints service under this title.

Service Ombudsman to replace the Parliamentary Ombudsman,<sup>25</sup> the Health Service Commissioner, and the Local Government Ombudsman.<sup>26</sup>

The 2004 White Paper, mentioned above was infused with the rationalising spirit. It was the first government document to analyse the field of administrative justice as a whole, and envisaged a broad rethinking of administrative justice encompassing initial decision-making as well as appeals and complaints. The White Paper suggested that the Government wanted to develop a new approach labelled 'proportionate dispute resolution'. This meant adopting a strategy which,<sup>27</sup>

turns on its head the Department's traditional emphasis first on courts, judges and court procedure, and second on legal aid to pay mainly for litigation lawyers. It starts instead with the real world problems people face. The aim is to develop a range of policies and services that, so far as possible, will help people to avoid problems and legal disputes in the first place; and where they cannot, provides tailored solutions to resolve the dispute as quickly and cost-effectively as possible. It can be summed up as 'Proportionate Dispute Resolution'.<sup>28</sup>

The menu of possible options for dispute resolution included adjudication, arbitration, conciliation, early neutral evaluation, mediation, negotiation and ombudsmen. Adjudication and ombudsmen were long-established processes for dispute resolution in the field of administrative justice, but the others were not. The broader vision is discussed further below.

Despite the growth of these alternatives, the courts remain significant administrative justice institutions because of the availability of judicial review and statutory rights of appeal. The courts in England and Wales had already had a major overview following the Woolf report in the 1990s, although judicial review reform was not a major issue in that review. However, procedures for judicial review in England and Wales were reformed in 2000 following the Bowman report.<sup>29</sup> More recently, Lord Gill led a review of the civil courts in Scotland, which included recommendations on judicial review, and many of its recommendations (including on judicial review) are being implemented by the Courts and Tribunals (Scotland) Act 2014.

## Advice, Assistance and Representation

As noted above, much of the development in remedies that took place in the twentieth century was predicated on the assumption that disputes between citizen and

<sup>25</sup> Formally known as the Parliamentary Commissioner for Administration.

<sup>26</sup> Formally known as the Commission for Local Administration in England.

<sup>27</sup> Cm 6243, para 2.2. For discussion, See M Adler, 'Tribunal Reform: Proportionate Dispute Resolution and the Pursuit of Administrative Justice' (2006) 69 *Modern Law Review* 958.

<sup>28</sup> The 'department' referred to was the Department of Constitutional Affairs, previously the Lord Chancellor's Department and now the Ministry of Justice.

<sup>29</sup> Lord Chancellor's Department, *Review of the Crown Office List* (2000).

state were better dealt with by bodies other than the ordinary courts. The second important assumption affecting administrative justice remedies was that citizens who were in dispute with the state could reasonably be expected to use such 'alternative' remedies themselves rather than rely on lawyers or others to present their cases on their behalf. Alternative remedies were in general thought to provide do-it-yourself justice; lawyers were only needed in the courts. In the case of tribunals it was claimed that a combination of informality, freedom from technicality and the ability of the tribunal to take an inquisitorial approach meant that the unrepresented appellant should not be disadvantaged. That explained the fact that, although there were a few exceptions, legal aid was not available for representation at most tribunal hearings and, more generally, the absence of any coordinated programme of public funding for advice and representation for those in dispute with the state. The perception that it was possible to design user-friendly processes which citizens could use to present cases themselves was later applied to the courts as well when the small claims procedure was created for the county court in 1973.<sup>30</sup>

However giving advice, assistance and representation in many areas of administrative law was never a monopoly of lawyers. Trade unions played a significant role in providing representation at industrial tribunals and in tribunals dealing with certain social security benefits. Citizens Advice Bureaux have long been an important source of advice on social security benefits and in other areas. Local authorities developed advice services and in the 1980s local authority welfare rights services became a major source of advice and representation in social security appeal tribunals. A wide variety of third-sector organisations, often concentrating on specific client groups such as the homeless or disabled persons has over time provided advice, guidance and support and sometime also representation.

Having said that much legal advice and much representation is provided by non-lawyers, it is important to note that lawyers have been a substantial source of advice and representation in certain areas, for example, immigration control in which legal representation at tribunals has long been common. There has been significant public funding specifically for advice from lawyers on administrative law matters since legal advice and assistance was added to the legal aid scheme. Thereafter, the key distinction was that between legal advice and general legal help on the one hand, and on the other representation at oral hearings. Representation at hearings was typically funded in the ordinary courts but not in most tribunals. Although there were exceptions and the extent of these varied over time, it remained true that legal aid was widely available for representation at hearings in courts but not in tribunals, and this could be traced back to the assumption that citizens did not in general need representation at tribunals.

<sup>30</sup> Using powers conferred by the County Courts Act 1959, s 59. Analogous procedures were created in the sheriff court in Scotland and the county court in Northern Ireland.

The Leggatt review of tribunals provided an opportunity to reconsider this assumption but Leggatt reaffirmed the established view as did the 2004 White Paper which underpinned the TCEA tribunal reforms. So, into the twenty-first century, the governing assumption has remained that citizens are in general able to represent themselves in tribunals and in small claims in the county court and in various other non-court fora.<sup>31</sup>

## The State of Administrative Justice Before the 2010–15 Coalition

The 2010 General Election represented a significant watershed for administrative justice. Since 2010 the Government's attitude to administrative justice appears to have changed, and the majority of policy developments in administrative justice have decreased rather than improved access to justice. It is, therefore, worth summarising the position that had been arrived at immediately before the 2010 General Election, as regards the availability and use of citizens' remedies.<sup>32</sup>

A right of appeal to a court or to an independent tribunal on the merits was available in many areas of public administration including most of the high volume decision-making functions (eg, immigration control, social security). In some other cases, there was a right of appeal to a court or tribunal restricted to points of law. However, there remained a number of decision-making functions in respect of which there was no right of appeal to a court or tribunal, leaving judicial review as the only judicial remedy.

The great majority of functions could also be made the subject of a complaint to the body which made the decision. Complaints procedures generally allowed citizens to complain about non-decisional matters such as delay, rudeness, and insensitivity, but might also give the opportunity to question the correctness of a decision. Some complaints procedures routed complaints to an independent body or incorporated an independent element; most did not. Many complaints could also be addressed to an ombudsman, but the statutory ombudsmen generally required that lower-level complaints procedures be exhausted first.

The gaps in this system were that some decisions on important matters were not subject to an appeal on the merits to an independent judicial body, for example, community care decisions.<sup>33</sup> In other areas of public administration in

<sup>31</sup> Leggatt Report (n 17) para 4.21; *Transforming Public Services* (n 17) ch 10. Representation has been less of an issue in relation to ombudsmen.

<sup>32</sup> At the time of writing, the Coalition has been replaced by a majority Conservative government following the 2015 General Election.

<sup>33</sup> See also AJTC Scottish Committee, *Right to Appeal* (2012), available at: [ajtc.justice.gov.uk/docs/decisions\\_with\\_no\\_appeal\\_web\\_final.pdf](http://ajtc.justice.gov.uk/docs/decisions_with_no_appeal_web_final.pdf).

which there was an independent tribunal to hear appeals, certain decisions were not appealable (eg, immigration control). Similarly, some rights of appeal were restricted to a point of law (homelessness) whereas others extended to the merits (most tribunals).

Neither the possibility of judicial review nor of complaining to an ombudsman could be considered a satisfactory substitute for appeal or review on the merits. On an application for judicial review, the court can review only the legality of the decision and not its merits. Not only is the court excluded from considering the substantive merits, but also the scope for review of the facts is very limited.<sup>34</sup> These limitations are particularly important as the evidence from tribunal adjudication suggests that many successful appeals result from the introduction of new evidence, the tribunal taking a different view of the facts or the substantive merits from the original decision-maker rather than from identifying errors of law.<sup>35</sup> Moreover, judicial review, being confined to the High Court, is an expensive procedure and this would exclude many people who were neither poor enough to qualify for legal aid nor rich enough to contemplate financing a High Court action.

Complaint to an ombudsman is not equivalent to appeal or review on the merits for two reasons. The first is that ombudsmen's decisions are not binding. The second is that the scope for challenging decisions (ie, the need to prove maladministration causing injustice) is not entirely clear. The term 'maladministration' has never been precisely defined,<sup>36</sup> but it is clear that in practice ombudsmen exercise more restraint in second guessing initial decisions than do tribunals. There may have been good reasons for some of the remaining gaps in the system of remedies, and for the differences between different administrative programmes, but UK governments had never clearly articulated principles for the choice or design of grievance redress institutions.<sup>37</sup> Policy development had certainly become less ad hoc in the first decade of the twenty-first century, but 'ad-hocery' had not been banished. More fundamentally, successive governments had not fully pursued the logic of any model of administrative justice. In the twentieth century, the dominant aim was that of providing informal justice through a series of alternatives to the courts. This was meant to be do-it-yourself justice but we never reached the point where citizens could use remedies effectively themselves across the full spectrum of administrative law. The alternatives were certainly less formal and in some cases less expensive than the courts but they were not user-friendly

<sup>34</sup> *E v Secretary of State for the Home Department* [2004] EWCA Civ 49, [2004] QB 1044.

<sup>35</sup> See the Report by the President of the Social Entitlement Chamber of the First-tier Tribunal, *President's Report 2007/2008* (Tribunals Service, 2008), available at: [www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/president-appeal-tribunals-report-2008-09.pdf](http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/president-appeal-tribunals-report-2008-09.pdf).

<sup>36</sup> Seneviratne (n 8) 40–44.

<sup>37</sup> V Bondy and A Le Sueur, *Designing Redress: A Study about Grievances against Public Bodies* (London, Public Law Project, 2012), available at: [www.publiclawproject.org.uk/resources/123/designing-redress-a-study-about-grievances-against-public-bodies](http://www.publiclawproject.org.uk/resources/123/designing-redress-a-study-about-grievances-against-public-bodies).

enough for citizens to do without advisers and advocates. Either the remedies had to be made even more user-friendly or there had to be a more systematic approach to advice and representation. Neither was forthcoming.

## Administrative Justice: Coalition Policies and the Effect of Austerity

We can now consider the approach taken to administrative justice by the Coalition Government of 2010–15 including the effect of austerity policies. This section of the chapter identifies a number of areas in which access to justice has, or may have been, weakened since 2010. The main developments were: (1) the failure to pursue the holistic approach to administrative justice, including failure to attach any attention priority to ‘right first time’; (2) the attempt to weaken judicial review; (3) important rights of appeal have been removed (in immigration cases); (4) a failure to address those areas in which there were not adequate remedies; (5) in areas where there had been satisfactory remedies, new obstacles to their use have been created (in particular mandatory reconsideration in social security); and (6) cuts in legal aid and a decline in the availability of advice, assistance and representation to citizens in dispute with the state. Whilst it is relatively straightforward to identify the adverse effects on access to justice of the changes to citizens’ remedies, it is less easy in some cases to establish that those changes are the product of austerity, as opposed to changes the incoming government might have introduced even if economic circumstances had been more favourable.

### The Holistic Vision of Administrative Justice

As described above, the 2004 White Paper promised a new approach to administrative justice. The only major reform delivered by the time of the change of government in 2010 was the restructuring of tribunals. Little progress was made on the rest of the agenda—experimenting with remedies, improving initial decision-making etc. The only other specific change was the creation of the Administrative Justice and Tribunals Council (AJTC) which replaced the Council on Tribunals. This meant that for the first time there was a body with responsibility for oversight of administrative justice as a whole. The Council did some good work but its influence on government was limited and it was abolished like many other public bodies by the Coalition Government under the Public Bodies Act 2011.<sup>38</sup> More generally, the Coalition Government between 2010 and 2015 showed little interest in the broader agenda of administrative justice reform set out in the 2004 White

<sup>38</sup> With effect from 19 August 2013. For analysis, see M Adler, ‘The Rise and Fall of Administrative Justice: A Cautionary Tale’ (2012) 8 *Socio-Legal Review* 28.

Paper. The Ministry of Justice did publish a strategy document in December 2012, but this has not had substantial consequences.<sup>39</sup>

The abolition of the AJTC, strongly criticised by the Public Administration Committee,<sup>40</sup> was a backward step, not only because it removed the only point in the system of government that considered administrative justice as a whole, but also because it removed an important source of independent scrutiny of administrative justice policy, confirming its status as the ‘Cinderella’ of the justice system.<sup>41</sup> It can be regarded as a consequence of austerity politics as, although the Government stated that its principal objective in cutting the number of quangos was to improve democratic accountability, it also emphasised the benefits of reducing public expenditure<sup>42</sup> and conceded that the decision to abolish the AJTC did not reflect adversely on the work that it had done.

## Undermining Judicial Review

Judicial review is clearly not the most important citizens’ remedy in terms of quantity; the number of judicial reviews in any year is dwarfed by the number of appeals taken to tribunals. Moreover, immigration control is the only area of public administration that generates a large number of judicial reviews every year. Nor is it clear how far it exercises a more diffuse positive effect on public administration by articulating standards of good administration and influencing decision-makers to adopt them. Much of the literature on the impact of judicial review is sceptical of the suggestion that it has much impact on routine decision-making in public administration.<sup>43</sup> However, it is an important part of the administrative justice system because, as an inherent jurisdiction of the court, it can provide a remedy where no other remedy is available, even if that remedy is limited to questions of legality.

Moreover, we must consider the quality as well as the quantity of judicial reviews. Most judicial reviews have no legal implications for anyone other than the parties. However, a significant minority are in effect challenges to policy. Judicial review

<sup>39</sup> Administrative Justice and Tribunals: A Strategic Work Programme 2013–16, available at: [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/217315/admin-justice-tribs-strategic-work-programme.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217315/admin-justice-tribs-strategic-work-programme.pdf).

<sup>40</sup> Public Administration Select Committee, *Future Oversight of Administrative Justice: The Proposed Abolition of The Administrative Justice and Tribunals Council*, Twenty First Report (HC 2010–12, 1621), available at: [www.publications.parliament.uk/pa/cm201012/cmselect/cmpubadm/1621/1621.pdf](http://www.publications.parliament.uk/pa/cm201012/cmselect/cmpubadm/1621/1621.pdf).

<sup>41</sup> Written evidence submitted by the AJTC to the Public Administration Select Committee inquiry into Oversight of Administrative Justice, available at: [www.parliament.uk/documents/commons-committees/public-administration/written-evidence-OAJ.pdf](http://www.parliament.uk/documents/commons-committees/public-administration/written-evidence-OAJ.pdf).

<sup>42</sup> HC Deb 14 October 2010, vol 516, col 506.

<sup>43</sup> See, eg, S Halliday, *Judicial Review and Compliance with Administrative Law* (Oxford, Hart Publishing, 2003) and the essays in M Hertogh and S Halliday (eds), *Judicial Review And Bureaucratic Impact: International and Interdisciplinary Perspectives* (Cambridge, Cambridge University Press, 2004).

has increasingly become a vehicle for challenging policy developments whose legality is unclear. Some of these cases are challenges to one-off policy decisions with no immediate implications for other decisions, for example, the attempt to review the decision by the Director of the Serious Fraud Office not to continue an investigation into corruption in arms sales to Saudi Arabia.<sup>44</sup> Such cases can be regarded as reinforcing the rule of law in the sense of ensuring that the executive governs lawfully. However, other cases have involved policies which govern large numbers of decisions and, therefore, had the potential to affect large numbers of people who were adversely affected by a policy which has been struck down. One recent example is provided by *R (Reilly) v Secretary of State for Work and Pensions*<sup>45</sup> in which applicants for Jobseeker's Allowance successfully challenged the existing approach to compulsory employment training for claimants which required them to undertake an unpaid work experience placement. Another is provided by *R (Alvi) v Secretary of State for the Home Department*<sup>46</sup> in which the Supreme Court effectively invalidated a policy of refusing entry clearances to enter the UK for employment unless the job the applicant was coming to appeared on the list of skilled occupations used by the Home Office on the basis that the list did not appear in the Immigration Rules presented to Parliament. Many others could have been cited.<sup>47</sup> It is important to note that, whereas some of these cases were test cases brought in the name of individuals with a direct interest (although often supported by interest groups), others were brought by public interest advocates with no personal stake in the outcome, an increasingly common phenomenon.

The extent to which the affected section of the public ultimately benefits will, of course, vary. Sometimes, there is no long-term gain, for example, where the executive reconsiders the matter following judicial review but is able to reinstate the original policy. However, this is clearly, in principle, a constitutionally important function for judicial review. We must, therefore be concerned if judicial review becomes less available to citizens both because individuals directly affected by decisions may not have access to a remedy and because challenges to unlawful policies which govern many decisions may become less likely or be delayed.

Judicial review came under sustained attack during the 2010–05 Coalition Government. This was not the first time government ministers had attempted to constrain judicial review. As Thomas reminds us in his chapter,<sup>48</sup> in 2003–04

<sup>44</sup> *Regina (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60, [2009] 1 AC 756. The application for judicial review succeeded in the High Court but failed in the House of Lords.

<sup>45</sup> *R (Reilly) v Secretary of State for Work and Pensions* [2013] UKSC 68, [2014] AC 453.

<sup>46</sup> *R (Alvi) v Secretary of State for the Home Department* [2012] UKSC 33, [2012] 1 WLR 2208.

<sup>47</sup> See, eg, decisions challenging aspects of the Housing Benefit Regulations abolishing the spare room subsidy (popularly known as the 'bedroom tax'): *R. (Cotton) v Secretary of State for Work and Pensions* [2014] EWHC 3437 (Admin); *R (A) v Secretary of State for Work and Pensions* [2015] EWHC 159 (Admin); *R (Hardy) v Sandwell MBC* [2015] EWHC 890 (Admin).

<sup>48</sup> R Thomas, 'Immigration and Access to Justice: A Critical Analysis of Recent Restrictions, chapter 6 in this volume.

David Blunkett, the Home Secretary reacted angrily to judicial reviews overturning Home Office decisions in asylum cases. This led the Government to try to insulate Home Office decision-making from review with an extraordinarily drafted ouster clause in the Asylum and Immigration (Treatment of Claimants, etc) Bill. However, the clause excited widespread opposition and was eventually withdrawn.<sup>49</sup> The key differences between the Coalition's attack on judicial review and earlier examples are that it was conducted across a much wider front and that it has led to significant changes in the judicial review process.

The Coalition Government's concerns were set out in two consultation papers, *Judicial Review: proposals for reform*<sup>50</sup> and *Judicial Review: proposals for further reform*<sup>51</sup> and in the Government's responses to the consultations.<sup>52</sup> The case for reform set out in these documents was that judicial review was being abused in some cases. There were too many weak cases lacking legal merit, and judicial review was being used as a delaying tactic in cases with no reasonable prospect of success. In some cases it was stifling innovation and frustrating reforms, including reforms aimed at stimulating growth and promoting economic recovery. Judicial review was being used inappropriately as a campaign tactic, ie, used merely to generate publicity or express opposition to the policies of the elected government. The Government also emphasised that some weak applications were funded by the taxpayer through the expense incurred by the defendant public authority, the cost of court resources and in some cases legal aid costs. These abuses of judicial review were causing congestion and delay in the courts, adding to the costs of public services and having an adverse impact on economic recovery and growth (ie, when delaying infrastructure proposals).<sup>53</sup> Despite an overwhelmingly negative response from consultees the Government pressed ahead with a number of reforms, some being achieved by secondary legislation and others by provisions of the Criminal Justice and Courts Act 2015 (the 2015 Act).

The reforms consulted on were:

- Reducing the time limits for bringing a judicial review in planning and procurement cases and streamlining the process for handling challenges to planning decisions.

<sup>49</sup> R Rawlings, 'Review, Revenge and Retreat' (2005) 68 *Modern Law Review* 378.

<sup>50</sup> Ministry of Justice, *Judicial Review: proposals for reform* (Cm 8515, 2012), available at: [consult.justice.gov.uk/digital-communications/judicial-review-reform/supporting\\_documents/judicialreviewreform.pdf](http://consult.justice.gov.uk/digital-communications/judicial-review-reform/supporting_documents/judicialreviewreform.pdf).

<sup>51</sup> Ministry of Justice, *Judicial Review: proposals for further reform* (Cm 8703, 2013), available at: [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/264091/8703.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/264091/8703.pdf).

<sup>52</sup> Ministry of Justice, *Reform of Judicial Review: the Government Response* (Cm 8611, 2013), available at: [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/228535/8611.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228535/8611.pdf); and Ministry of Justice, *Judicial Review: Proposals for Further Reform: the Government Response* (Cm 8811, 2014), available at: [consult.justice.gov.uk/digital-communications/judicial-review/results/judicial-review--proposals-for-further-reform-government-response.pdf](http://consult.justice.gov.uk/digital-communications/judicial-review/results/judicial-review--proposals-for-further-reform-government-response.pdf).

<sup>53</sup> These criticisms are summarised in the forewords to the four command papers.

- Limiting the right of local authorities to challenge decisions on nationally significant infrastructure projects.
- Removing the right to an oral reconsideration of a refusal of permission where the case is assessed by a judge as totally without merit.
- Refusing a remedy where a successful judicial review would be highly likely not to bring any substantive benefit to the claimant (the ‘no difference argument’) and possibly refusing permission to seek judicial review on that basis.
- Revising the rules of standing in public interest cases.
- Considering alternatives to judicial review to enforce the Public Sector Equality Duty (PSED).
- Restricting legal aid payments to cases in which permission is granted and restricting legal aid for planning challenges.
- Changes to the costs rules (relating to wasted costs orders; protective costs orders; awarding costs against third-party interveners and non-parties; costs of oral permission hearings).
- Changing the rules for leapfrog appeals.
- Increasing fees.<sup>54</sup>

In the event the Government decided not to proceed with several of the proposals, including the proposals for a stricter test for standing and limiting the right of local authorities to challenge decisions on national infrastructure projects. It deferred the question of alternative remedies for enforcing the PSED for consideration, along with other issues relating to the PSED, by the Government Equalities Office.<sup>55</sup> However, it did implement most of the other recommendations and I will briefly review a selection of these.

## Planning Cases Etc

The time limits for bringing a judicial review in planning and procurement cases were reduced from three months to six weeks and 30 days respectively.<sup>56</sup> A planning fast track using specialist planning judges was introduced in the Administrative Court on 1 July 2013 designed to identify planning cases as early as possible, to give them priority and ensure they progress swiftly through the system. A permission filter for challenges under the statutory review provisions analogous to that for judicial review was introduced.<sup>57</sup> These changes were designed to address the Government’s concerns about adverse impact of judicial review on economic recovery and growth.

<sup>54</sup> This was the subject of a separate consultation: Ministry of Justice, *Court Fees: Proposals for reform* (Cm 8751, 2013).

<sup>55</sup> Cm 8811 (n 52).

<sup>56</sup> Changes made with effect from 1 July 2013 by amendment of the Civil Procedure Rules.

<sup>57</sup> ss 91 and 92 of the Criminal Justice and Courts Act, amending ss 288 and 289 of the Town and Country Planning Act 1990.

## Weak Cases

Where a judge assesses a claim as totally without merit, the claimant no longer has the right to oral renewal of the application.<sup>58</sup>

## Minor Procedural Defects

Two reforms were made to the process of judicial review to address this concern.<sup>59</sup> First, the court must refuse to grant relief on an application for judicial review if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred. Second, the High Court must refuse to grant leave for judicial review if it appears highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred. It may consider this question of its own motion and must do so if the defendant asks it. However, in either case that requirement may be disregarded for reasons of exceptional public interest, but the court must so certify if it invokes the public interest exception.

## Costs

There have been several changes to the costs regime in judicial review dealing. There are new requirements relating to disclosure of financial resources by applicants<sup>60</sup> and the court may award costs against persons who are not parties to proceedings on the basis that they are providing financial support for the purposes of the proceedings or are likely or able to do so.<sup>61</sup>

There are new restrictions on cost capping.<sup>62</sup> A costs capping order may be made only if leave to apply for judicial review has been granted, and the court may make a costs capping order only if satisfied that: (i) the proceedings are public interest proceedings; (ii) in the absence of the order, the applicant for judicial review would withdraw the application for judicial review or cease to participate in the proceedings; and (iii) it would be reasonable for the applicant for judicial review to do so. The section goes on to define 'public interest proceedings' and to state matters to which the court must have regard when deciding whether proceedings are public interest proceedings. These provisions are largely a restatement of the existing position but, worryingly, the Lord Chancellor may by regulations amend this section by adding, omitting or amending matters to which the court must

<sup>58</sup> Change made with effect from 1 July 2013 by amendment of the Civil Procedure Rules.

<sup>59</sup> Criminal Justice and Courts Act 2015, s 84.

<sup>60</sup> *ibid*, s 85.

<sup>61</sup> *ibid*, s 86.

<sup>62</sup> *ibid*, ss 88, 89.

have regard when determining whether proceedings are public interest proceedings. The Lord Chancellor may also make regulations excluding from this regime environmental cases which are covered by the Aarhus Convention and the EU Public Participation Directive.

The court may not order a party to pay the intervener's costs save in exceptional circumstances which are to be specified by rules of court. However, the court *must* order an intervener to pay a party's costs that the court considers have been incurred by the relevant party as a result of the intervener's involvement in that stage of the proceedings if any one of four conditions is met. These include that the intervener's evidence and representations, taken as a whole, have not been of significant assistance to the court, and that a significant part of the intervener's evidence and representations relates to matters that it is not necessary for the court to consider in order to resolve the issues that are the subject of that stage in the proceedings. The court does not have to make an order if there are exceptional circumstances. Again, the criteria will be specified by rules of court.

The Government has also implemented the proposal to introduce a principle that the costs of an oral permission hearing should usually be recoverable from an unsuccessful claimant.

## Legal Aid

The Government decided to implement the proposal that providers should be paid for work done in relation to an application for permission to seek judicial review only if permission is actually granted by the court. However, the Legal Aid Agency was given discretion to pay providers in some cases concluded prior to a permission decision. This could be done where it considered it is reasonable to do so in the circumstances of the case, taking into account in particular: (i) the reason why the provider did not obtain a costs order or costs agreement in favour of the legally aided person; (ii) the extent to which, and the reason why, the legally aided person obtained the outcome sought in the proceedings; and (iii) the strength of the application for permission at the time it was filed, based on the law and on the facts which the provider knew or ought to have known at that time.<sup>63</sup>

## Fees

The Government proposed various fee increases on the basis that the existing fees did not reflect the costs incurred in proceedings.<sup>64</sup> The various fee proposals are

<sup>63</sup> See the Civil Legal Aid (Remuneration) (Amendment) (No 3) Regulations 2014, SI 2014/607.

<sup>64</sup> Ministry of Justice, *Court Fees: Proposals for Reform Part One Consultation Response: Cost Recovery* (Cm 8845, 2014) paras 62–65.

being considered as part of the wider review of civil court fees that the Government has been undertaking.

## Evaluation of Judicial Review Changes

The Government's attempts to reform the judicial review process have been highly controversial.<sup>65</sup> The first criticism is that the evidence base for its claim that abuse of judicial review is a substantial problem is slight. Neither the first nor the second consultation contained a serious analysis of the supposed problems, far less a convincing case that they were substantial enough to require reform of the process. The second consultation presented two case studies of unsuccessful applications for judicial review chosen to illustrate the adverse effect of judicial review on economic development and its abuse as a tactic in a political campaign, but there was nothing to indicate that these were in any way representative of judicial review applications generally. Some statistical data was presented, including the level of applications, growth over time, rates at which applications for leave are granted and oral hearings. However, there was little by way of analysis to accompany it and it was hard to see that it proved anything. The Public Law Project—with good reason—accused the Government of 'relying on anecdotal and impressionistic evidence' and employing 'misleading and inaccurate statistics'.<sup>66</sup> The analysis of withdrawn applications provides a good example of evidence-free speculation. The paper noted that over 40 per cent of all applications lodged in 2012 were withdrawn before consideration of permission by the court. It went on to say that, although the reasons for withdrawal are not recorded and there was some evidence to suggest that many of these cases may be settled on terms favourable to the claimant, 'The Government wants to be sure that there are not also cases where the respondent concedes simply because they are unwilling to face the delays and costs that a prolonged legal battle can involve'. Yet no evidence whatsoever is offered to support the suggestion that public authorities with arguable cases fail to fight them because of delay and costs. No convincing case was presented that there is a need to reform the judicial review process.

Nonetheless, significant changes have been made to judicial review, some of which are likely to impede access to justice. Thus, for example, the new requirement to consider when granting permission whether the outcome for the applicant would have been substantially different creates a risk that worthwhile cases will be

<sup>65</sup> See, eg, Public Law Project, *Response to the Judicial Review: Proposals for Further Reform Consultation*, available at: [www.publiclawproject.org.uk/resources/147/public-law-project-response-to-judicial-review-proposals-for-further-reform-consultation](http://www.publiclawproject.org.uk/resources/147/public-law-project-response-to-judicial-review-proposals-for-further-reform-consultation). There was a very large number of responses. A summary of responses may be found at: [consult.justice.gov.uk/digital-communications/judicial-review/results/judicial-review---proposals-for-further-reform-government-response---annex-a.pdf](http://consult.justice.gov.uk/digital-communications/judicial-review/results/judicial-review---proposals-for-further-reform-government-response---annex-a.pdf).

<sup>66</sup> Public Law Project (n 65) paras 7 and 10.

refused permission as the ‘no difference’ judgment may be somewhat speculative and when made at permission stage will not be based on full consideration of the issues. However, for that reason, judges may be reluctant to refuse permission on this basis. If that does happen, the reform will not have the effect that the Government hoped for.

The decision to drop the proposal to restrict standing must be welcomed, but it should not have been made in the first place. The second consultation amounted to an attempt to de-legitimise the public interest model of judicial review that has developed in recent years.<sup>67</sup> There was no recognition that the courts have developed this model because it performs the valuable constitutional function of ensuring the rule of law by facilitating challenges to executive decisions where challenges based purely on private interests would not be competent or would be unlikely to be brought.<sup>68</sup> Although public interest standing has not been restricted, the new rules permitting costs to be awarded against third-party interveners may deter some useful public interest interventions by making it less likely that protective costs orders will be obtained. This may reduce access to justice for vulnerable groups as public interest cases are often brought on their behalf. The Lord Chancellor’s power to amend the 2015 Act by secondary legislation raises the possibility that the availability of cost protection may be reduced in future without adequate parliamentary scrutiny.

However, the most worrying changes are to legal aid; they create a risk that good cases will simply not proceed. The policy of not paying solicitors for work done in relation to an application for permission to seek judicial review unless permission is actually granted by the court creates a risk that they will not be paid for doing a substantial amount of work.<sup>69</sup>

Whilst the outcome of the reform process is not as bad as it could have been, certain proposals having been dropped, it would be wrong to assume that the threat to judicial review has been seen off; the new government may return to the theme that judicial review is being abused and propose further reforms.

## Removal of Existing Rights of Appeal

The Coalition Government has drastically reduced rights of appeal to an independent tribunal over large areas of immigration control. Despite its importance, I will

<sup>67</sup> See, eg T Mullen, ‘Protective Expenses Orders and Public Interest Litigation’ (2015) 19 *Edinburgh Law Review* 36.

<sup>68</sup> See, eg, *AXA General Insurance Limited v HM Advocate* [2011] UKSC 46; and J Miles, ‘Standing in a Multi-Layered Constitution’ in N Bamforth and P Leyland, *Public Law in a Multi-Layered Constitution* (Oxford, Hart Publishing, 2003).

<sup>69</sup> Initially, the Government’s changes allowed no discretion to make exceptions to this rule. In *R (Ben Hoare Bell Solicitors) v Lord Chancellor* [2015] EWHC 523 (Admin) the High Court upheld a challenge to the legality of this reform on the basis that the relevant regulation extended so far that it conflicted with and frustrated the purpose of the civil legal aid scheme enacted by Part 1 of LASPO.

deal with this issue briefly as it is discussed in more detail in Thomas' chapter.<sup>70</sup> Immigration appeals were first introduced in 1969.<sup>71</sup> Following the Nationality, Immigration and Asylum Act 2002, appeals lay against most of the important decisions concerning a person's immigration status, including refusal of leave to enter the UK, refusal of entry clearance and decisions to remove or deport. In general, it was also possible to appeal decisions relating to asylum claims although these were subject to a variety of complex rules. This remained true up until 2008 when the Labour Government began a process of restricting appeals which the Coalition Government continued. The process culminated in the Immigration Act 2014 which restricts appeals to the First-tier Tribunal to three situations. These are appeals against:

- Refusal of an asylum or humanitarian protection claim
- Refusal of a human rights claim
- Revocation of refugee or humanitarian protection status.

All of the other decisions made in the administration of immigration control are not subject to appeal. The effect of these provisions is that there will be no appeal, for example, against refusal of visa or entry clearance where the applicant seeks to enter the UK for employment, or as a visitor or against refusal of an application for settlement in the UK or an application by a spouse seeking to join a person already here unless there is a convention right, refugee or humanitarian protection argument to be made. Similarly, there will be no appeal against deportation or removal unless one of these arguments can be made. Restrictions of rights of appeal on this scale are dramatic and unprecedented.

All decisions not subject to appeal are subject to administrative review under the immigration rules.<sup>72</sup> The administrative review procedure was formerly restricted to refusal of applications under the points-based system and is now being extended across the board. Reviews are carried out by officials of the Home Office and so are not independent or a judicial remedy, and the evidence suggests that they are not likely to be an adequate substitute.<sup>73</sup> It is also important to note that, in other contexts in which there is a right of administrative review, it merely postpones access to an independent tribunal; it does not replace it.

The only judicial remedy available to most of those aggrieved by adverse immigration decisions will be an application for judicial review which continues to have the limitations described above.

Amendments to cure the invalidity were made by the Civil Legal Aid (Remuneration) (Amendment) Regulations 2015, SI 2015/898, by adding further exceptions to the general rule that legal aid providers are paid for work done before permission only if permission is actually granted by the court.

<sup>70</sup> Above (n 48).

<sup>71</sup> See the Immigration Appeals Act 1969.

<sup>72</sup> Immigration Rules, Appendix AR, available at: [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/364777/Immigration\\_Rules\\_-\\_Appendix\\_AR.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/364777/Immigration_Rules_-_Appendix_AR.pdf).

<sup>73</sup> See R Thomas, above (n 48).

It is worth examining the arguments the Government used to support this change. As Thomas points out in his chapter, the main justification given by government has been that appeal rights are routinely abused by those who have no good case yet seek to prevent or delay their removal from the UK. This claim has not been substantiated. From time to time, the Government has pointed to specific cases which have caused it concern but no systematic analysis of the scale of 'abuse' has ever been presented. Such evidence as there is suggests the contrary, for example, the high rate of success on appeal.<sup>74</sup> If anything, this and other evidence suggests that the most striking defect of this administrative system is the poor quality of initial decision-making.<sup>75</sup> Even if there were evidence that a very large proportion of appeals were groundless, that would not by itself constitute justification for withdrawing appeal rights. The fact that some people abuse a right is hardly a sufficient argument for withdrawing it from all. Withdrawing appeal rights penalises those who have well-founded claims and therefore creates injustice. The argument that some people might abuse the right to an independent determination of a legal claim would not be accepted in any other context. Yet this elementary point has not been addressed by government.

The Government has also failed to explain why it has chosen to withdraw appeal rights rather than to pursue alternative solutions to the 'problem'. These might include improving the gathering of evidence to support the Home Office case and improving the presentation of appeals by the Home Office.

The fact that a convincing case has not been made for such a drastic reduction of appeal rights betrays the real reasons for the measure. Immigration is a politically sensitive matter and removing appeal rights provides a surer way of increasing the proportion of administrative decisions to refuse entry or to remove persons from the UK that are ultimately effective, precisely because those decisions cannot be challenged in an independent forum. It might be objected that aggrieved persons may still seek judicial review which is an independent forum, but given that judicial review is restricted to questions of legality and appeal on the merits will be excluded, it will be likely to correct fewer bad decisions than a right of appeal on the merits. So, although some of those who no longer have rights of appeal will seek judicial review, overall it is likely that far fewer decisions will successfully be challenged than before, thus achieving the Government's goal. So, in this context, political pragmatism has trumped elementary principles of justice.

<sup>74</sup> See AJTC, *Securing Fairness and Redress: Administrative Justice at Risk?* (2011), available at: [http://ajtc.justice.gov.uk/docs/AJTC\\_at\\_risk\\_\(10.11\)\\_web.pdf](http://ajtc.justice.gov.uk/docs/AJTC_at_risk_(10.11)_web.pdf).

<sup>75</sup> See, eg, National Audit Office, *Improving the Speed and Quality of Asylum Decisions* (HC 2003–04, 535); National Audit Office, *Management of Asylum Applications by the UK Border Agency* (HC 2008–09, 124); Home Affairs Committee, *The Work of the Immigration Directorates (April–September 2013)*, Fifteenth Report (HC 2013–14, 820).

## The Failure to Address those Areas in which there were Not Adequate Remedies

As noted above, by 2010, although in many areas of public administration there was a right of appeal to an independent tribunal on the merits against administrative decisions, there remained some decisions in respect of which there was no such appeal. Little progress has been made in addressing this issue since 2010. Examples could be given from several areas, including housing law, but I will illustrate this point by reference to community care policy.

### Community Care

Local authorities make a wide variety of decisions under community care legislation many of which may give rise to citizens' grievances. These decisions have been made under the National Assistance Act 1948, the Chronically Sick and Disabled Persons Act 1970, the National Health Service and Community Care Act 1990 and, most recently, the Care Act 2014. The system of community care is to undergo a major overhaul under the Care Act 2014. However, the types of decision made will continue to be broadly the same as before. They will include:

- Assessing a person's need for community care services
- Assessing the needs of carers
- Deciding which services are to be provided
- Deciding whether any services that are provided qualify as 'free personal care'
- Making financial assessments for those personal and nursing care services that have to be paid for. This last includes assessing any residential care contribution and, in relation to care at home, anything which is not 'free personal care'.

In this area remedies have actually been improved. Before the 2014 Act, there was no independent appeal against these decisions. Where it could plausibly be argued that a decision relating to assessment of need or the provision of services was unlawful, the person aggrieved could seek judicial review. The only statutory remedy was to make a complaint under the relevant regulations.<sup>76</sup> This will be replaced by a new grievance system under the 2014 Act. Section 72 of the Act permits the Secretary of State to make regulations providing for appeals against decisions taken by local authorities under Part 1 of the Act. Although the section is not yet in force, the Government has consulted on draft regulations. It proposes a three stage process: (i) early resolution stage; (ii) independent review; and (iii) local authority decision. During the first stage the local authority attempts to resolve the issue locally and early. At the second stage, the local authority appoints an

<sup>76</sup> The Local Authority Social Services and National Health Service Complaints (England) Regulations 2009, SI 2009/309.

independent reviewer to review the local authority's original decision and to make a recommendation. The Independent Reviewer is required to review the local authority's decision to ensure it was reasonable with reference to relevant regulations and guidance, the facts of the appeal and taking into account local policy. At the third stage, the local authority makes a decision considering the Independent Reviewer's recommendation. The Independent Reviewer's recommendation is not binding on the local authority so it may reaffirm the original decision.<sup>77</sup> If the decision after appeal remains adverse to the appellant, there is no further redress within the appeals system. Any person wishing to take a grievance further would have to seek judicial review or complain to the Local Government Ombudsman.

Whilst this represents an improvement on the previous system, it is not equivalent to the standard appeal to a tribunal found in many other areas of public administration. Whilst there is an independent element, the process as a whole is not independent because the final decision rests with the local authority. The decision criteria for the Independent Reviewer may also be narrower than the usual tribunal criteria as it is not clear that they extend to the merits of the decision appealed against. It seems clear that the reviewer could treat a decision as flawed for error of law or error of fact, but it is not clear whether the reviewer can substitute his or her own view of what a reasonable decision would be on the facts of the case, or whether his or her role is merely to consider whether the local authority decision falls within the range of reasonable responses. The latter is essentially the *Wednesbury* unreasonableness/irrationality standard used in judicial review. If the latter, more restrictive interpretation is adopted, then the Independent Reviewer's scope for classifying decisions as defective is less than that of the typical tribunal.

The obvious question is why some administrative decisions affecting rights or interests are subject to appeal on the merits in an independent forum yet others are not. It is clearly not a question of relative importance. The decisions described above are of vital importance to the persons concerned. One possible answer may be that the decisions concern the allocation of scarce resources and so the exercise of administrative discretion must take account not only of the circumstances of the applicant's case, but of the actual and potential demand on resources from other applicants to the service. However, this is not a wholly satisfactory explanation for the current pattern of citizens' remedies. For one thing, although it almost certainly has influenced government thinking on particular remedies, it has rarely been clearly articulated by government as the rationale for the design of remedies. Second, whilst the relative priority of an application for assistance out of scarce funds will often be a key consideration, it is not the only issue which goes to the merits, as opposed to the legality of a decision. Claims can be and are refused for reasons unrelated to scarcity or only loosely related to scarcity, for example,

<sup>77</sup> This bears a close resemblance to the system already operating in Scotland. See the Social Work (Scotland) Act 1968, s 5B and the Social Work (Representations Procedure) (Scotland) Order 1990, SSI 1990/2519. See also AJTC Scottish Committee, *Right to Appeal* (n 33).

disapproval of the applicant's conduct. Third, some disputes are mainly about the facts, and as we have seen these are commonly allocated to tribunals and the residual remedy judicial review is not particularly well suited to resolving disputes of fact. I am not trying to argue that it makes no difference whether a discretionary decision concerns the allocation of scarce resources. My point is that the fact that a decision involves allocation of scarce resources does not automatically preclude appeal or review on the merits and there may, therefore, be an argument for creating such rights where none currently exist.

Another possible rationale is that the decisions concerned are made by local authorities. Where individualised decisions are made by central departments, there is very frequently a right of appeal on the merits to a tribunal. By contrast, it is more common to find that there is no such right of appeal to a tribunal in the case of local authority decisions. The argument may be that decisions rest in part on local conditions of which the local authority is presumed to have knowledge. However, this is not necessarily a strong argument against review on the merits as it may be possible to incorporate local knowledge into a tribunal system through a regional structure. The objections to treating this as a convincing rationale for the current pattern of remedies are similar to those for the scarce resources rationale: it has rarely been clearly articulated and does not apply equally to all local authority services. A third argument is that local authorities are accountable to the public because councilors are elected and have a democratic mandate but this rationale would exclude some decisions which are currently subject to appeal.

## Conclusions on Existence of Remedies

There is room for improvement as regards the availability of citizens' remedies in certain areas of social policy. There have been some limited improvements since 2010, notably in community care, but on a purely ad hoc basis. However, I would not argue that the lack of consistency in the availability of remedies against the administration and the nature of the remedies provided is a product of austerity politics. It is a consequence of the unsystematic approach to administrative justice that has prevailed over many decades. Having said that, times of austerity are not good times to be proposing new remedies which potentially add to the costs of government. So, the prospects for eliminating the anomalies that currently disadvantage citizens in some contexts are not good.

## New Obstacles to Using Remedies

Immigration control provides an example of simply removing remedies. By contrast, in our largest administrative system, social security, what has happened is that new obstacles have been placed in the way of citizens using remedies which had long existed and had been generally operated in a fairly satisfactory manner.

In most years, appeals against social security benefits are the most numerous category of appeal to tribunals. Appeals relating to many categories of benefit have also had notably high success rates in recent years.<sup>78</sup> This is arguably the most important administrative appeal system. Yet the last two years has seen a dramatic drop in the number of appeals. In 2009–10 there were 339,213 appeals relating to social security and child support decisions (the vast majority relating to social security). By 2012–13 this had increased to 507,131. However, in the first quarter of 2014–15 (April to June 2014), the First-tier Tribunal received only 22,699 appeals relating to such decisions, a decrease of 86 per cent compared with the same period in 2013–14.<sup>79</sup> In the next quarter (July to September 2014) 24,969 appeals were received, a decrease of 81 per cent when compared with the same period in 2013–14.<sup>80</sup> Numbers rose in the quarter from October to December 2014 (the most recent quarter for which statistics are available) to 28,142 appeals but this was still a decrease of 65 per cent compared with the same period in 2013.<sup>81</sup> The decline is not, therefore, a purely short-term aberration.

What might explain this dramatic decline in the use of a well-established remedy? It would be implausible to suggest that there has been a swift and dramatic improvement in the quality of initial decision-making which has removed the incentive for most claimants to appeal, especially in the light of the well-documented deficiencies of decision-making in the Department for Work and Pensions (DWP) and the long-term failure of the DWP to improve matters.<sup>82</sup> There has been a long-term problem with the quality of initial decision-making and this has been reflected in very high volumes of appeals and very high success rates on appeal.<sup>83</sup> A more intuitively plausible explanation is that this is an effect of recent changes to the systems for decision-making and remedies in social security.

For many years, the position had been that a claimant dissatisfied with a decision could appeal it to a tribunal. The DWP would usually review the relevant decision

<sup>78</sup> See AJTC, *Securing Fairness and Redress* (n 74).

<sup>79</sup> Ministry of Justice, *Tribunals Statistics Quarterly: April to June 2013*, available at: [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/239257/tribunal-stats-quarterly-april-june-2013.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/239257/tribunal-stats-quarterly-april-june-2013.pdf) and *Tribunal Statistics Quarterly: April to June 2014*, available at: [www.gov.uk/government/statistics/tribunal-statistics-quarterly-april-to-june-2014](http://www.gov.uk/government/statistics/tribunal-statistics-quarterly-april-to-june-2014).

<sup>80</sup> Ministry of Justice, *Tribunal and Gender Recognition Certificate Statistics Quarterly: July to September 2014*, available at: [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/385759/tribunal-grc-statistics-quarterly-jul-sep-2014.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/385759/tribunal-grc-statistics-quarterly-jul-sep-2014.pdf).

<sup>81</sup> Ministry of Justice, *Tribunal and Gender Recognition Certificate Statistics Quarterly: October to December 2014*, available at: [www.gov.uk/government/statistics/tribunal-and-gender-recognition-statistics-quarterly-october-to-december-2014](http://www.gov.uk/government/statistics/tribunal-and-gender-recognition-statistics-quarterly-october-to-december-2014).

<sup>82</sup> See, eg, J Baldwin, N Wikely and R Young, *Judging Social Security* (Oxford, Clarendon Press, 1992); *President's Report 2007/2008* (Tribunals Service, 2008), Foreword, available at: [www.appeals-service.gov.uk/Documents/SSCSA\\_PresRep07\\_08FINAL.pdf](http://www.appeals-service.gov.uk/Documents/SSCSA_PresRep07_08FINAL.pdf) and numerous reports from parliamentary committees, including the Pensions Committee, First Special Report of Session 2009–10, *Decision Making and Appeals in the Benefits System* (HC 313), and Work and Pensions Committee, *Employment and Support Allowance and Work Capability Assessments*, First Report (HC 2014–15, 302).

<sup>83</sup> For analysis, see AJTC, *Securing Fairness and Redress* (n 74).

after receiving the appeal and this might result in the decision being revised before the appeal hearing. Section 102 of the Welfare Reform Act 2012 introduced mandatory review of decisions as the initial remedy for claimants aggrieved by decisions of the DWP.<sup>84</sup> Since October 2013 all benefit decisions must be reviewed by the DWP before an appeal can be lodged.<sup>85</sup> At the same time claimants have been required to lodge their appeals directly with HM Courts & Tribunals Service (HMCTS) ('direct lodgement'). Under the previous system, claimants had submitted their appeals to the DWP which then transmitted them to HMCTS.

The Government's stated reasons for introducing mandatory reconsideration were to resolve disputes as early as possible, reduce unnecessary demand on HMCTS by resolving more disputes internally, consider revising decisions where appropriate, provide a full explanation of decisions, and encourage claimants to identify and provide any additional evidence that may affect the decision, so that they receive a correct decision at the earliest opportunity.<sup>86</sup>

The reasons given for introducing direct lodgement of appeals were to align the appeals process for social security and child maintenance appeals with other major jurisdictions handled by HMCTS; to make sure that DWP was no longer involved in the administration of appeals, and could focus on its key role as a party to appeals; and to speed up and clarify the appeals process.<sup>87</sup> The DWP stated that the previous system whereby appeals were submitted to the DWP and then transferred to HMCTS could cause delay in arranging tribunals, and confusion for claimants who might not realise which organisation was responsible for an appeal at any given point.

It would require in-depth empirical research to be sure what are the reasons for the drop in the number of appeals. No such research has yet been completed but we have data from two recent surveys. The first is research carried out by Citizens Advice.<sup>88</sup> This was a small-scale study based on in-depth qualitative diaries and semi-structured qualitative interviews with 20 Citizens Advice Bureaux clients beginning in April 2014. The report makes the point that the process has become far more complex as a result of the changes:

Prior to the introduction of mandatory reconsideration ... For the claimant, the process was straightforward. If they disagreed with a decision, they could fill out an appeal form and would not need to engage with the process again until the date of their appeal hearing was confirmed. The introduction of mandatory reconsideration (as shown in figure 1) requires significant engagement with the process and steps two through to eight

<sup>84</sup> See also The Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013, SI 2013/381.

<sup>85</sup> *ibid.*, Reg 7.

<sup>86</sup> Department for Work & Pensions, *Appeals Reform: An introduction* (August 2013), available at: [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/236733/appeals-reform-introduction.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/236733/appeals-reform-introduction.pdf).

<sup>87</sup> *ibid.*

<sup>88</sup> Citizens Advice, *The cost of a second opinion* (July 2014), available at: [www.citizensadvice.org.uk/global/migrated\\_documents/corporate/the-cost-of-a-second-opinion-report-july-2014final2.pdf](http://www.citizensadvice.org.uk/global/migrated_documents/corporate/the-cost-of-a-second-opinion-report-july-2014final2.pdf).

now apply. Claimants must now contact the DWP to ask for a mandatory reconsideration, receive an explanation of the decision by telephone, clarify points of issue, identify if further evidence is needed and submit further evidence (if applicable). If the original decision is unchanged, and they wish to appeal, they must then submit an appeal form with the attached reconsideration notice attached directly to HMCTS.

To impose a more complex process with an additional stage creates a greater risk that claimants will not pursue appeals because of confusion or process fatigue. This is borne out by the findings of the research, which identifies cause for concern in three areas:

- Communications from DWP to claimants were inconsistent and information was unclear
- Claiming Jobseeker's Allowance was problematic for clients
- Claimants faced long delays before receiving a decision.

The CAB study was a very small-scale study but its findings are consistent with those of a much larger study carried out by the Low Commission. The Commission carried out a survey of 436 welfare rights advisers.<sup>89</sup> Respondents were asked how often in their experience the DWP got decisions right first time. Only 13 per cent of those who responded thought that decisions were mostly right first time. Of those who responded, 48 per cent thought that around 50 per cent of decisions were right first time, and 38 per cent thought they were rarely right first time. As for mandatory reconsideration, only 35 per cent of respondents thought that their clients were more likely to receive the right outcome without having to appeal as a consequence of mandatory reconsideration, and 65 per cent considered that their clients were *less likely* to receive the right outcome.

When asked to estimate the average waiting time for a decision following mandatory reconsideration, 2 per cent said two weeks, 51 per cent said 4–6 weeks and 47 per cent said eight weeks or more. Seventy per cent of advisers said that their clients' understanding of challenging a DWP decision was less clear than before. Advisers were also asked how they would describe the impact on the welfare of claimants during mandatory reconsideration. Only 4 per cent referred to satisfaction that a review was taking place, whereas 89 per cent referred to increased stress, 95 per cent to financial hardship and 49 per cent to being deterred from claiming other benefits.

These findings support each of the main findings of the CAB research and are also at odds with the Government's stated reasons for the reforms of the appeal system. Both reports suggest that there has been increased delay, poorer communication and considerable hardship for claimants. The Low Commission research also suggests that initial decisions are frequently inaccurate and that claimants are less likely than before to receive the right outcome without having to appeal.

<sup>89</sup> Low Commission on the Future of Legal Advice and Support, *Getting it Right in Social Welfare Law* (2014), available at: [www.lowcommission.org.uk/dyn/1425469623929/Low-Commission-Report-Text-Proof-207050-.pdf](http://www.lowcommission.org.uk/dyn/1425469623929/Low-Commission-Report-Text-Proof-207050-.pdf).

Whilst we cannot be sure given the limited data, it seems more likely than not that well-founded grievances are not proceeding to appeal because of the introduction of mandatory reconsideration and the other changes to decision-making mentioned above. This is not because internal review by public bodies is inherently problematic, but because of the particular form that it has taken in social security administration. There are also concerns about mandatory reconsideration which go beyond its effect in obstructing access to appeal tribunals. There is no time limit on mandatory reconsideration which raises the possibility of justice being slower than under the previous system rather than quicker. Another change in policy is that no benefit is paid during the reconsideration stage which only serves to increase the injustice suffered from an adverse decision.<sup>90</sup>

Appeal rights have not been removed wholesale as they have in immigration control, but there is evidence that mandatory internal review and other changes to existing appeal systems are functioning as obstacles to effective access to the social security appeal systems. Confidence in access to justice has, therefore, been undermined in a key area of public administration which affects millions of people.

## Declining Availability of Advice, Assistance and Representation

I have argued elsewhere that the UK has evolved two contrasting styles of adjudication: a formal, adversarial style and an informal, enabling style.<sup>91</sup> The former presupposes, and in fact requires, litigants to be represented by lawyers in order to participate in the legal process effectively. The latter is intended to permit citizens to use the legal process unrepresented. The former has been the traditional model of litigation in the ordinary courts. The latter has been the preferred approach in most tribunals and in simplified procedures introduced for the ordinary courts since the late 1960s such as small claims procedure in the county court.

As noted above, UK government policy has long proceeded on the assumption that citizens can effectively represent themselves in disputes with the state. This line was first taken in the case of appeals to tribunals, and although the Franks Committee thought that there were good arguments for extending legal aid to at least some tribunals,<sup>92</sup> this suggestion was not taken up except for the one or two particularly formal tribunals. The assumption was repeated, this time more emphatically, by the Leggatt review<sup>93</sup> and Leggatt's view was in turn endorsed by the 2004 White Paper. So, the general approach has consistently been that citizens

<sup>90</sup> Serious concern about the hardship experienced by claimants denied benefits has also been expressed in the context of sanctions for failing to observe job search requirements, which have been applied to an increasing proportion of claimants in recent years. See, eg, M Adler, 'Conditionality, Sanctions and the Weakness of Redress' in in EZ Brodtkin and G Marston (eds), *Work and the Welfare State* (Copenhagen, Djøf Publishing, 2013).

<sup>91</sup> Mullen, 'A Holistic Approach to Administrative Justice?' (n 5).

<sup>92</sup> *Report of the Committee on Administrative Tribunals and Enquiries* (n 16) para 89.

<sup>93</sup> See, eg, Leggatt Report (n 17) para 4.21.

in dispute with the state do not in general need lawyers to operate their remedies against the administration effectively except where the remedy is litigation in the ordinary courts, for example, judicial review and statutory appeals. As a corollary, civil legal aid has not been available for funding representation at most tribunals. Where appeals lie to bodies which are neither courts nor conventional tribunals, for example, education appeal committees, the assumption that lawyers and legal aid are not necessary has also applied.

Whether citizens can effectively represent themselves when making use of rights of appeal to tribunals has been a contested question. Until a few years ago, the academic consensus was that representation was valuable, most importantly because it was likely to enhance the appellant's prospects of success. There was a substantial body of research which appeared to support this view.<sup>94</sup> More recent research by Adler deviates from the academic orthodoxy.<sup>95</sup> His study of five tribunals found much smaller 'representation premiums' than in earlier studies. However, it also found that success rates varied according to two factors: whether the applicant/appellant was represented, and whether the applicant/appellant had received pre-hearing advice. Those who had neither of these advantages were less likely to succeed in their appeal than those who had either representation or pre-hearing advice or both. Adler suggests two reasons for the difference between his results and those of earlier studies. First, that pre-hearing advice is important and helpful to applicants/appellants and this dimension may have been neglected in previous studies. Second, that the tribunals in question have, in the intervening years, become much better at implementing the enabling approach to adjudication.

There remains room for doubt as to whether representation (as opposed to pre-hearing advice) makes a marked difference to appellants' prospects of success. What we can say is that there is limited evidence to support the view that citizens can in general operate redress mechanisms effectively wholly without assistance; even the informal/enabling model requires, in order for it to work effectively, that citizens have access to advice or representation (although not necessarily from lawyers).

Accordingly, we may conclude that it is not reasonable to make policy on the assumption that citizens can operate the redress mechanisms that take the form of adjudication entirely unaided. They need help and if we are serious about access to justice that help ought to be provided. That help should take a variety of forms according to circumstances. In some contexts, it will require public funding for legal representation; in others, it will be sufficiently effective to provide funds for lay representation. In some contexts, pre-hearing advice should be sufficient. The only context in which it can reasonably be expected that citizens can operate

<sup>94</sup> See, eg, H Genn and Y Genn, *The Effectiveness of Representation at Tribunals: Report to the Lord Chancellor* (London, Lord Chancellor's Department, 1989); L Dickens, *Dismissed: A Study of Unfair Dismissal and the Industrial Tribunal System* (Oxford, Blackwell, 1985); Baldwin, Wikely and Young (n 82); and R Sainsbury, *Survey and Report into the Working of Medical Appeal Tribunals* (London, The Stationery Office, 1992).

<sup>95</sup> M Adler, 'Tribunals Ain't What They Used to Be' *Adjust Newsletter* (March 2009), available at: [ajtc.justice.gov.uk/adjust/articles/AdlerTribunalsUsedToBe.pdf](http://ajtc.justice.gov.uk/adjust/articles/AdlerTribunalsUsedToBe.pdf).

redress mechanisms unaided is when they are truly inquisitorial as in the case of the statutory ombudsmen. Conversely, where the remedy is in the courts they will usually need a lawyer.

There are two problems with current arrangements. First, research has suggested that in at least some tribunal contexts representation may enhance the prospects of success,<sup>96</sup> yet legal aid is not available or is available only on a restricted basis and availability of non-lawyer representation is patchy. The other is that following the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), legal aid availability in England and Wales has been further restricted.<sup>97</sup>

LASPO cut backs most obviously affect court-based remedies, ie, judicial review and those appeals against administrative decisions heard by the courts. The restrictions on legal aid for judicial review brought in under LASPO have been described above. The availability of legal aid to challenge decisions in other fora, for example, tribunals, has always been more limited. In most tribunals, full civil legal aid has never been available. However, it would be a mistake to think that no help was provided under the legal aid scheme in those areas in which the principal remedy is appeal to a tribunal and restrictions in legal aid have had an effect here as well. Immigration control had been an area in which there was substantial provision for legal aid but, as Thomas' chapter explains, LASPO has severely restricted legal aid in immigration cases.<sup>98</sup> There was substantial provision of legal help under legal aid contracts by way of advice and representation at tribunals. This was typically provided by specialist welfare benefits advisers rather than by lawyers. Representation was not directly funded but the funding of advice facilitated the provision of representation. However, LASPO removed welfare benefits from the scope of the legal aid scheme<sup>99</sup> and this appears to have led to a reduction in the availability of advice. In the Low Commission survey, advisers were asked what had been the impact of the legal aid reforms on their ability to support clients through the appeals process: 62 per cent reported a negative or substantial impact and 28 per cent limited or no impact.

Whilst it is difficult to quantify, it is likely that LASPO has had a significantly adverse effect on the availability of legal help not only on immigration appeals and welfare benefits, but also in other areas of administrative law. To that effect, we must add the broader effect of public sector funding cuts. In recent decades, much advice has been provided by the voluntary sector. Much of this is supported by public funds and much of that is channelled through local authorities. We know that thus far local authorities have borne the brunt of public spending cuts,<sup>100</sup>

<sup>96</sup> See sources at n 80 above.

<sup>97</sup> The legal aid reforms do not extend to Scotland or Northern Ireland where eligibility is substantially different.

<sup>98</sup> Above (n 48).

<sup>99</sup> Ministry of Justice, *Proposals for the Reform of Legal Aid in England and Wales* (Cm 7967, 2010).

<sup>100</sup> A Hastings, N Bailey, G Bramley, M Gannon and D Watkins, findings: *The Cost of the Cuts: their impact on local government and poorer communities* (York, Joseph Rowntree Foundation, 2015), available at: [www.jrf.org.uk/sites/files/jrf/CostofCuts-Full.pdf](http://www.jrf.org.uk/sites/files/jrf/CostofCuts-Full.pdf).

so although it would be extremely difficult to quantify the effects, it is likely that advice services provided by the voluntary sector have suffered.<sup>101</sup> Taking these two effects together, it is likely that less advice and help is now available than before LASPO in a number of areas in which the principal means of challenging and administrative decision is an appeal to a tribunal.

## The Future of Access to Justice within Administrative Justice

Policies pursued since 2010 have reduced access to justice within the field of administrative justice by removing remedies altogether (eg, immigration control); placing restrictive conditions on the granting of remedies (legal aid); cutting the availability of legal aid for advice and representation; cutting other public funding streams which have been used to support advice to individuals in dispute with public bodies (eg, support for the voluntary sector); increasing the financial disincentives to using existing remedies (costs rules in judicial review); and creating administrative obstacles to using remedies (social security). The attempt to develop a holistic vision of administrative justice and to reshape the system in the light of that vision has been abandoned.

Instead, administrative justice policy has been shaped by the political considerations of particular policy areas. Established principles of administrative justice have been sacrificed to the political imperatives of restricting immigration and cutting expenditure on social security benefits. More generally, the value of citizens being able to enforce their rights against the state, for which they need advice and sometimes representation, has been heavily discounted.

The manner in which new policies have been developed and presented since 2010 suggests a government which is not seriously committed to administrative justice.

A new single party government (Conservative) has just taken office at the time of writing. Although there is no particular reason to expect a change of approach, here is what I suggest it ought to do to secure access to justice in the sense that remedies for administrative injustice actually exist and citizens can use those remedies effectively. First, it ought to stop promoting the notion that existing remedies are being abused by individuals with weak cases and pressure groups with a political agenda. Second, it ought to restore the appeal rights it has taken away in immigration control. Third, it ought to reconsider some of the reforms it has made to the judicial review process. Fourth, it needs to undertake a thorough review of the recent changes to social security appeals to understand why the number of

<sup>101</sup> Ch 6 of Hastings et al (ibid), describes the general impact of spending cuts on the voluntary sector.

appeals has dropped so dramatically and what role those changes have played, reversing them if they are, as suggested here, operating as obstacles to access to justice. Fifth, it needs to develop a comprehensive strategy for ensuring access to justice in the field of administrative justice that encompasses not just provision of legal aid, but the whole network of funding streams and other policies that directly affect advice, support and representation for citizens. Sixth, it needs to reinstate the holistic approach to administrative justice that the 2004 White Paper promised so that it can consider initial decision-making alongside remedies,<sup>102</sup> what is the best possible mix of citizens' remedies and the implications of choice of remedies for advice, support and representation.

<sup>102</sup> The single most important thing the Government should do to enhance administrative justice is to improve the quality of initial decision-making in certain key public services.

