**Government Models, Decision-Making, and the Public Law Presumption of Disclosure**

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1. Every day, government officials, from ministers to street-level bureaucrats, make complex decisions with significant implications for individuals, society, and the economy. In recent years, officials have increasingly relied on models to help them make those decisions. This article argues that there is now a strong public law presumption in favour of disclosing such models. We trace the evolution of this presumption in recent case law and suggest a three-stage analysis for understanding its application.
2. At the outset, we provide three caveats. First, principles of judicial review will not provide the optimum means of addressing the underlying issues discussed below. It is important that other modes of managing concerns around the role of models in public decision-making, some of which are already being debated, continue to be explored. Second, there are legitimate questions around whether claimants actually benefit from access to a model. This is often a contextual question, dependent on the nature of model and the claimant’s grievance, but if disclosure is not helpful then distinct issues clearly arise. Third, other legal regimes may go to the issue of model transparency, such as the Freedom of Information Act 2000. Our claim is not that the authorities we examine here conclusively resolve this issue. Our ambition is narrower: to simply elaborate the principles which emerge from this important line of decisions.

**The use of models in public decision-making**

1. What is a model? Ask this question of an economist, a designer, and a physicist and you will get different answers. For our purposes, it suffices to say that a model is a simplified representation of some aspect of the world, *i.e.* the target or subject of the model. The possible targets for a model are virtually endless: the commuting habits of residents of a major city, the number of fish in a river basin, a person’s legal entitlement to certain benefits, the risk that a person will commit a criminal offence*.* A model picks out certain important features of its target and expresses the relationships between them, as well as other possible reference points. It can express these relationships in a variety of ways: physically (*e.g.* a physical model of the different components of a cell), conceptually (*e.g.* an explanation of the relationship between the legislature, the executive and the judiciary in the UK), mathematically (*e.g.* an equation expressing how atmospheric CO2 concentrations affect temperatures), and so on. The essential purpose of a model is to provide insights into its target. A person should therefore be able to examine a model to better understand how different features of the world relate to one another, or apply it to data to generate new inferences about the way the world is or might be.
2. Models are exerting increasing influence on public officials and arguably usurping their functions in some respects.[[1]](#footnote-1) The COVID-19 pandemic provides a high-profile recent example of the influence of models on public officials. In March 2020, the UK Government adopted a national ‘lockdown’ policy to respond to the virus based on modelling from Imperial College London, which forecast catastrophe without such measures.[[2]](#footnote-2) But models have played an important role in public administration for some time, in a broad variety of contexts. Environmental regulators depend on models to develop high-level policies and to make decisions in specific cases, in areas including air and water quality, land contamination, flooding risk, and hazardous substances.[[3]](#footnote-3) Competition authorities use models to define markets, analyse the behaviour of firms and the likely effects of mergers, and assess damages.[[4]](#footnote-4) Models are also commonly used in social care. Many local authorities use a model, known as a Resource Allocation System, to assess a person’s level of need and thus their ‘personal budget’ for care services. A Resource Allocation System generally comprises a set of questions directed to the extent of the person’s need, the answers to which are converted first into a points score and then into an amount of money.[[5]](#footnote-5)
3. It is easy to see why models are appealing to public officials. Models can help officials make decisions under conditions of complexity, uncertainty, and limited time and resources. First, a model can provide insights into aspects of the world which are beyond the reach of ordinary human cognition. It can assimilate vast amounts of information, highlight relevant features, exclude irrelevant ones, and illuminate the important relationships (conceptual, causal, logical, *etc.*) between them. It can be used to generate inferences about matters that would otherwise be shrouded in uncertainty. Second, a model can promote consistency. A model is an external repository of insights about the world. It exists independently of any particular person. In many parts of government, a large number of different officials repeatedly make the same kind of decision: detaining suspects, issuing permits, considering referrals about children at risk of harm, paying benefits, *etc.* If each official makes decisions using the same model, as opposed to their own impressionistic judgments, this may increase the consistency of their decisions as a whole. Third, a model can be used to make decisions quickly and cheaply. Officials can use a model to gain important insights about the world without conducting costly real-world experiments. And officials can use the tools of modern computing to automate the modelling process, producing a large number of outputs quickly and with little or no human labour.
4. Despite potential advantages, model decision-making can go wrong in a number of ways. First, there may be problems with the model itself. Because a model is, by definition, a simplification, it might not faithfully represent its target. A model may also pick out objectionable features of its target. For example, a model might explain its target in terms of a protected characteristic or its close proxy which should not influence public decision-making (*e.g.* a model which uses a family’s ethnicity or postcode to predict the risk of a child suffering abuse or neglect). Second, there may be problems with the data to which a model is applied. The data might be unrepresentative or error-ridden, or it might reflect existing inequalities or injustices, which will be reproduced in the model’s outputs. Third, there might be problems with how officials interact with the model. Officials might not understand the model or the assumptions and uncertainty within it, causing them to misapply its output. Or they might defer to the model altogether, rather than exercising their own independent judgement based on all available information.[[6]](#footnote-6)
5. Given these and other problems, people subject to model decision-making may, with good reason, wish to closely scrutinise the model itself. From a public law perspective, access to government models seems essential to assess whether a model, and the decisions it facilitates, comply with basic principles, such as rationality. While the proliferation of models in government raises a range of thorny public law questions, an essential preliminary issue is if and when a model ought to be disclosed. But government officials are often reluctant to fully disclose the models they use.[[7]](#footnote-7) There are a range of possible reasons for this. One perceived risk is that people will use this information to abuse or circumvent government decision-making. For instance, local authorities in the UK have refused to disclose their Resource Allocation Systems on the grounds that ‘anyone completing the assessment may be able to answer the questions on the assessment in such a way as to produce a higher personal budget than they need.’[[8]](#footnote-8) Another perceived risk is that disclosure will damage the commercial interests of the private entities which supply models to government. In the United States, developers have refused to disclose models, such as risk assessment tools, to criminal defendants for reasons of commercial confidentiality, despite the fact that these technologies now play crucial roles in the criminal justice system.[[9]](#footnote-9) Government officials in the UK have resisted disclosure of models on similar grounds.[[10]](#footnote-10)
6. There are range of potential responses to the problems of model opacity in government decision-making.[[11]](#footnote-11) However, our concern is the role of public law in this context. In a series of cases, the courts have established a presumption in favour of government disclosing models used in its decision-making. This presumption has developed incrementally, drawing upon basic common law principles of administrative law. In the next part of this article, we trace the evolution of this presumption.

**The development of the presumption of disclosure**

1. The starting point for understanding the presumption of disclosure is *R (Eisai Ltd) v National Institute for Health and Clinical Excellence*.[[12]](#footnote-12) The National Institute for Health and Clinical Excellence (NICE) is responsible for assessing health interventions and making recommendations about their use in the NHS. In *Eisai*¸ the claimant sought judicial review of NICE’s guidance that the claimant’s drugs only be used for patients with quite serious cases of Alzheimer’s disease. In making its decision, NICE used an economic model—contained in an Excel spreadsheet—to assess the drugs’ cost-effectiveness. During its consultation, NICE provided consultees, including the claimant, with a read-only version of the model, but not a fully executable version.
2. The Court of Appeal held that NICE’s refusal to provide the claimant with a fully executable model was a denial of procedural fairness. First, NICE’s decisions had a significant impact on people: they could ‘have a substantial effect on quality of life’ or even ‘save life.’[[13]](#footnote-13) This required ‘a very high degree of transparency in the process.’[[14]](#footnote-14) Second, the model’s estimate of cost-effectiveness was ‘central’ to NICE’s decision-making.[[15]](#footnote-15) The reliability of the model was a ‘key question’ in the consultation and something on ‘which consultees may properly have something to say.’[[16]](#footnote-16) Third, the claimant required a fully executable version of the model to properly test its reliability.[[17]](#footnote-17) NICE had disclosed ‘a great deal of information’ to the claimant which enabled it to make ‘representations of substance’ on the model adopted.[[18]](#footnote-18) But experts agreed that certain tests–namely, sensitivity analyses–could only be carried out with a fully executable version, and that such analyses were important in checking for problems with the model.[[19]](#footnote-19)
3. NICE attempted to resist disclosure on two grounds, both of which the Court rejected. The first ground was confidentiality. The Court held that, as a matter of law, NICE owed no duty of confidentiality in relation to its models, even though in practice it treated them as confidential to the academic centres which produced them. Indeed, the Court suggested that it would be ‘very surprising if a model commissioned and paid for by the Secretary of State for the purposes of NICE’s appraisal process’ were subject to duties of confidentiality that prevented its disclosure to consultees.[[20]](#footnote-20) It would also have been inconsistent with NICE’s past conduct. NICE had readily disclosed read-only versions of its models, subject to confidentiality undertakings, even though it acknowledged that such versions contained ‘all the relevant information’ found in their fully executable counterparts.[[21]](#footnote-21) And on other occasions, NICE had disclosed fully executable versions of models with the consent of the relevant academic centres. There was nothing to suggest that the relevant centre would have withheld its consent in the present case ‘if it had been pressed on the point by NICE.’[[22]](#footnote-22) Finally, the Court noted in *obiter* that NICE would have a public interest defence to any action for breach of confidence if disclosure were necessary to meet the requirements of procedural fairness.[[23]](#footnote-23)
4. NICE’s second ground for resisting disclosure was administrative burden. NICE argued that disclosure of the model and consideration of further tests by applicants would add two to three months to its appraisal process. The Court acknowledged that this was a ‘serious’ concern and that NICE could impose ‘reasonable conditions’ on the disclosure, such as ‘limiting the scale of submissions or laying down an appropriate time limit.’[[24]](#footnote-24) But these administrative concerns did not rebut the presumption of disclosure. The prospect of delay had to be considered in the context of an already lengthy process, which had already taken about two and a half years in the particular context of the case. Ultimately, the Court held that where fairness required a model to be disclosed, the courts should be ‘very slow’ to allow ‘administrative considerations’ to stand in the way.[[25]](#footnote-25)
5. The approach in *Eisai* was applied shortly afterward in *R (Servier Laboratories Ltd) v National Institute for Health & Clinical Excellence,* another judicial review of a NICE guidance for failure to disclose the underlying model.[[26]](#footnote-26) Unlike in *Eisai*, however, the Court in *Servier* found that NICE was under ‘an express duty of confidence’ not to disclose the relevant model: it had given a clear undertaking to that effect to the researcher who had provided them with the model.[[27]](#footnote-27) The Court also rejected the *obiter* suggestion in *Eisai* that NICE could simply break the confidence and rely on a public interest defence.[[28]](#footnote-28) Holman J held that this would violate the ‘[h]igh standards of probity’ expected of a public body, and undermine NICE’s ability to obtain essential scientific information in the future.[[29]](#footnote-29)
6. This forced the Court to squarely confront the tension between fairness and confidentiality in this context. Holman J set out three principles to govern the balance to be struck between these considerations. First,NICE was under ‘a duty and imperative of transparency and fairness’ which normally required disclosure of fully executable versions of its models.[[30]](#footnote-30) Second, when acquiring its models, NICE could only give a confidentiality undertaking in exceptional circumstances. The model had to be sufficiently important for the quality and robustness of NICE’s decisions, and NICE had to have tried sufficiently hard to obtain the right to disclose the model. The scope of any such undertaking also had to be ‘as restricted as possible.’[[31]](#footnote-31) It was for NICE to make a judgment on each of these matters, but those judgments were ‘reviewable by a court in judicial review and NICE must be prepared to justify them.’[[32]](#footnote-32) Third, even where NICE had justifiably given a confidentiality undertaking, it had a positive duty to take ‘all reasonable steps’ to obtain permission to disclose the model, to enable it to comply with the requirements of procedural fairness.[[33]](#footnote-33) Holman J concluded that, in this case, NICE had acted unlawfully by failing to take all reasonable steps to obtain permission to disclose the model. NICE had corresponded intermittently with the relevant researcher, but Holman J held that it should have met with him and explored ways of resolving the problem (*e.g.* by getting the consultees to give their own confidentiality undertakings).[[34]](#footnote-34)
7. The courts have applied these principles in a range of contexts beyond NICE decision-making. In *R (Savva) v Royal Borough of Kensington and Chelsea*, the claimant sought judicial review of the local authority’s calculation of her ‘budget’ for community care services.[[35]](#footnote-35) The authority used a Resource Allocation System, discussed above, to help calculate individual community care budgets. In the claimant’s case, however, the authority had simply notified her of her final budget, without explaining how it had arrived at that sum. The High Court, drawing on *Eisai*, held that the authority had failed to give adequate reasons for its decision.[[36]](#footnote-36) The Court of Appeal agreed.[[37]](#footnote-37) Without an explanation of their budget, a person ‘would have no means of satisfying himself or herself that it was properly calculated,’ or of challenging it ‘by way of complaint or by way of litigation.’[[38]](#footnote-38) At the very least, the authority had to provide a person with a list of their services and the assumed hourly cost, and publish the Resource Allocation System online ‘in a user-friendly format.’[[39]](#footnote-39) As in *Eisai*, the authority’s arguments about excessive administrative burdens did not dislodge the presumption. The Court accepted that the cost of providing reasons to the 5000 care recipients in the authority’s area ‘would not be insignificant,’ but concluded that ‘it is what simple fairness requires.’[[40]](#footnote-40)
8. In *R (Ames) v Lord Chancellor*, the claimant sought judicial review of the Legal Aid Agency’s offer in respect of counsel fees for his criminal defence.[[41]](#footnote-41) The Agency had refused to disclose the ‘calculator’ it used to determine the level of fees offered.[[42]](#footnote-42) The High Court found that the Agency’s decision was unlawful. The calculator was only part of the Agency’s decision-making process, but it was nevertheless a ‘very important part’.[[43]](#footnote-43) Without it, the claimant and the Court had no way of knowing whether the Agency had made basic errors in assessing the claimant’s fees, or whether several errors identified by the claimant were immaterial in practice.[[44]](#footnote-44) The Agency resisted disclosure on the ground that the calculator contained ‘confidential information, including the names of the individuals in the Criminal Cases Unit.’[[45]](#footnote-45) But the Court swiftly rejected this, finding that any ‘genuinely confidential information’ could have been redacted.[[46]](#footnote-46) The Court put its conclusion on several different doctrinal bases. The Agency’s refusal to disclose the calculator caused ‘serious procedural unfairness,’ lacked any rational basis, and breached the ‘duty of transparency and clarity’ developed in *R (Lumba) v Secretary of State for the Home Department* and other cases.[[47]](#footnote-47) The Court ordered the Agency to re-make the decision and to disclose the calculator to the claimant.
9. In several other cases, the government’s failure to disclose modelling during consultation on a proposed policy change has rendered its eventual decision unlawful. *British Dental Association v General Dental Council* concerned a decision to increase the annual practising fee for dentists.[[48]](#footnote-48) In *R (London Criminal Courts Solicitors Association) v Lord Chancellor*, the claimant challenged a decision to reduce the number of contracts for criminal legal aid duty work.[[49]](#footnote-49) *R (Law Society) v Lord Chancellor* concerned a decision to reduce fees payable for criminal legal aid work.[[50]](#footnote-50) In each case, during the consultation, the government failed to disclose the modelling that underpinned its proposed decision. This prevented consultees from testing the model and its assumptions, and making an informed and intelligent response.[[51]](#footnote-51) It rendered each consultation so unfair as to be unlawful.
10. Shortly after the judgment in *R (London Criminal Courts Solicitors Association) v Lord Chancellor*, the Lord Chancellor re-made his decision, reducing the number of criminal legal aid contracts by virtually the same amount. By this time, the assumptions underlying the Lord Chancellor’s modelling, although not the model itself, were in the public domain. The claimants’ challenge to the re-made decision was unsuccessful.[[52]](#footnote-52) Relevantly, the Divisional Court rejected the claimants’ argument that, based on *Eisai*, they required an executable version of the model to properly test its reliability.[[53]](#footnote-53) The Lord Chancellor’s assumptions and methodology were clear from the publicly available materials.[[54]](#footnote-54) The claimants did not need an executable version of the model in order ‘to offer critical comment.’[[55]](#footnote-55) This decision illustrates how the presumption of disclosure is tailored to its purposes. There is no hard and fast requirement that government disclose a fully executable version of any model it uses. Rather, the government must disclose enough information about a model to enable people to make meaningful representations about decisions made in reliance on it.
11. The presumption of disclosure has also been held to continue once model decision-making reaches the courtroom. In *R (Mott) v Environment Agency*, the defendant had limited the number of salmon which the claimant was permitted to catch, based on modelling which showed that fishing in the claimant’s area would threaten the sustainability of other fisheries.[[56]](#footnote-56) The claimant challenged the defendant’s decision on several grounds, including irrationality. In rejecting the irrationality challenge,[[57]](#footnote-57) the Court of Appeal held that a reviewing court should accord a ‘wide margin of appreciation’ to decisions based on expert scientific, technical or predictive assessments.[[58]](#footnote-58) But the corollary of this judicial deference was a heightened executive duty of candour. As Beatson LJ observed:

[T]he need for a defendant to have its “cards upwards on the table” is particularly important where the context is a technical or scientific one in which the defendant expects the courts to tread warily and accord a wide margin of appreciation to the decision-maker. A reviewing court needs to be given a sufficient explanation by a regulator operating in a technical or scientific area of how the science relates to its decision so that the court can consider whether it embodies an abuse of discretion or an error of law.[[59]](#footnote-59)

Where the government relies on a model to make a decision which is subsequently challenged, it must give the court a full and accurate explanation of how the model works. So much is necessary for the courts to be able to declare and enforce the law in this technical area of public decision-making.

1. The courts have taken a similar approach to applications for disclosure. In *HCA International Ltd v Competition and Markets Authority*, the applicant challenged a decision by the Competition and Markets Authority (CMA) requiring it to sell off two private hospitals.[[60]](#footnote-60) In the course of the proceedings, the applicant applied for disclosure of the modelling underpinning the CMA’s decision. The Competition Appeal Tribunal, chaired by Sales J (as he then was), granted the application.[[61]](#footnote-61) First, the modelling was ‘absolutely critical’ to the CMA’s decision.[[62]](#footnote-62) Without it, the applicant would be ‘practically disabled from making the best case it can,’ which would be unfair.[[63]](#footnote-63) The Tribunal relied on *Eisai* in this respect, noting that the public law principles of procedural fairness and ‘fairness in the course of the conduct of litigation’ have ‘some significant family resemblance.’[[64]](#footnote-64) Second, disclosure was important because the applicant was challenging the CMA’s decision on human rights grounds. To determine whether the CMA’s decision was proportionate, the Tribunal might need to closely examine its justification and evidential basis.[[65]](#footnote-65) Third, the applicant was not engaged in a fishing expedition, as it had already identified several possible flaws in the modelling.[[66]](#footnote-66) Finally, disclosure would not be unduly onerous for the CMA, particularly given the ‘considerable weight and importance’ of the applicant’s interests in the proceedings.[[67]](#footnote-67) It would only take about one month and would not delay the determination of the applicant’s challenge.[[68]](#footnote-68) The CMA could make the modelling accessible through a data room without excessive cost. The risks to confidentiality were also acceptable, as the applicant’s representatives could be put under strict obligations of confidentiality and the data underpinning the model was relatively aged and, to that extent, less sensitive.[[69]](#footnote-69)

**A three-stage analysis**

1. Our review of the authorities establishes that the courts are recognising a clear presumption that the government ought to disclose the models it uses to make decisions. The application of the presumption can be broken down into three stages: threshold; content; and rebuttal.
2. The first stage is *threshold*: when does the presumption apply? The presumption applies where a model plays an important role in the exercise of an administrative power that might affect people’s rights or interests. This raises further questions of timing and function. In relation to timing, the presumption applies at least from the point at which the government proposes to exercise a power in a particular case.[[70]](#footnote-70) The presumption might in principle apply from the point at which the government creates or acquires a model to guide the exercise of a power. At least some models may be analogous to traditional policies: sets of rules for a decision-maker to follow in exercising a power. If so, the duty of transparency and clarity would require the government to make them public as soon as it adopts them.[[71]](#footnote-71) In relation to function, whether a model plays a sufficiently important role in an administrative decision is a matter of judgement and degree. Broadly speaking, it is enough if the operation or use of the model could affect the outcome of the decision. The model certainly need not be the sole determinant of the decision. In *Savva*, for example, fairness required the local authority to disclose the Resource Allocation System and how it was applied in the particular case, notwithstanding that it was only one step in the process for calculating community case budgets.[[72]](#footnote-72)
3. The second stage is *content*: what does the presumption require? Broadly speaking, the government must disclose enough information to enable those potentially affected by a model to regulate their conduct accordingly and meaningfully challenge (and the courts to meaningfully assess) the lawfulness of government decisions. The presumption is arguably more demanding where more important rights or interests are at stake.[[73]](#footnote-73) A claimant might require expert evidence to give content to the presumption, particularly if the model is highly complex or technical. For example, the outcome in *Eisai* turned on expert evidence that certain tests could only be carried out with a fully executable version of NICE’s model, and that such analyses were important in checking for problems with the model.[[74]](#footnote-74)
4. The third stage is *rebuttal*: how can the presumption be rebutted? In general, it is difficult for the government to resist disclosure on grounds of either administrative burden or confidentiality. In relation to administrative burden, the courts generally conduct a balancing of the competing interests at stake. If the presumption otherwise requires the government to disclose a model, however, the courts will be very slow to allow administrative considerations to stand in the way.[[75]](#footnote-75) In relation to confidentiality, the government must overcome several hurdles. First, the government must owe a legal duty of confidentiality in respect of the model.[[76]](#footnote-76) Second, the duty of confidentiality must be justified (*i.e.* the model was sufficiently important for the quality and robustness of its decisions; the government tried sufficiently hard to obtain the right to disclose the model; and the scope of the duty is as limited as possible).[[77]](#footnote-77) Third, the government must have taken all reasonable steps to obtain permission to disclose the model.[[78]](#footnote-78) Finally, it must be impracticable to address any concerns about confidentiality through redactions, further undertakings, or confidentiality rings.[[79]](#footnote-79)

**Conclusion**

1. Our contention in this article—that a public law presumption in favour of disclosing models exists in the common law—is one part of a wider puzzle of how public law remains effective in the face of new opacities in modern government.[[80]](#footnote-80) Principles of judicial review will not provide the optimum means of addressing this issue and it is important that other modes of managing concerns around the role of models in public decision-making, some of which are already being debated, continue to be explored. However, principles of judicial review can provide a necessary minimum level of protection. Quite simply, the public generally ought to be able to know about government decisions that affect their rights and interests, so they can both understand them and challenge them if appropriate. The courts have already laid the foundations for an approach sensitive to the tensions in this context.
1. M. Veale and I. Brass, ‘Administration by Algorithm? Public Management Meets Public Sector Machine Learning’ in K. Yeung and M. Lodge, *Algorithmic Regulation* (Oxford University Press, 2019). [↑](#footnote-ref-1)
2. Health Protection (Coronavirus Restrictions) (England) Regulations 2020, SI 2020/350; N.M. Ferguson et al, *Impact of non-pharmaceutical interventions (NPIs) to reduce COVID-19 mortality and healthcare demand* (MRC Centre for Global Infectious Disease Analysis, Report No. 9, 2020). [↑](#footnote-ref-2)
3. E. Fisher, P. Pascual and W. Wagner, ‘Understanding Environmental Models in Their Legal and Regulatory Context’ (2010) 22 *Journal of Environmental Law* 251. [↑](#footnote-ref-3)
4. P. Davis and E. Garcés, *Quantitative Techniques for Competition and Antitrust Analysis* (Princeton University Press, 2010). [↑](#footnote-ref-4)
5. L. Series and L. Clements, ‘Putting the Cart before the Horse: Resource Allocation Systems and Community Care’ (2013) 2 *Journal of Social Welfare and Family Law* 207, pp.208–209. [↑](#footnote-ref-5)
6. See, *e.g.*, K. L. Mosier and other, ‘Automation Bias: Decision Making and Performance in High-Tech Cockpits’ (1998) 8(1) *International Journal of Aviation Psychology* 47. [↑](#footnote-ref-6)
7. Committee on Standards in Public Life, *Artificial Intelligence and Public Standards: A Review by the Committee on Standards in Public Life* (February 2020) pp.17–19. [↑](#footnote-ref-7)
8. L. Series and L. Clements, ‘Putting the cart before the horse: resource allocation systems and community care’ (2013) 35(2) *Journal of Social Welfare and Family Law* 207, p.212. [↑](#footnote-ref-8)
9. R. Wexler, ‘Life, Liberty, and Trade Secrets: Intellectual Property in the Criminal Justice System’ (2018) 70 *Stanford Law Review* 1343. [↑](#footnote-ref-9)
10. House of Commons Science and Technology Committee, *Algorithms in decision-making: Fourth Report of Session 2017-19* (HC351, 2018), pp.27–29. [↑](#footnote-ref-10)
11. One proposal is for a centralised public record of government models. See, *e.g.*, House of Commons Science and Technology Committee, *Algorithms in decision-making: Fourth Report of Session 2017-19* (HC351, 2018), p.18. [↑](#footnote-ref-11)
12. *R (Eisai Ltd) v National Institute for Health and Clinical Excellence* [2008] EWCA Civ 438. [↑](#footnote-ref-12)
13. Ibid [34]. [↑](#footnote-ref-13)
14. Ibid [34]. [↑](#footnote-ref-14)
15. Ibid [35]. [↑](#footnote-ref-15)
16. Ibid [45]. [↑](#footnote-ref-16)
17. Ibid [36]–[37]. [↑](#footnote-ref-17)
18. Ibid [49]. [↑](#footnote-ref-18)
19. Ibid [44]. [↑](#footnote-ref-19)
20. Ibid [56]. [↑](#footnote-ref-20)
21. Ibid [57]. [↑](#footnote-ref-21)
22. Ibid [58]. [↑](#footnote-ref-22)
23. Ibid [59]. [↑](#footnote-ref-23)
24. Ibid [64]–[65]. [↑](#footnote-ref-24)
25. Ibid [65]. [↑](#footnote-ref-25)
26. *R (Servier Laboratories Ltd) v National Institute for Health & Clinical Excellence* [2009] EWHC 281 (Admin). Holman J rejected several of the claimant’s other grounds of review, but an appeal against these aspects of the decision was successful: *Servier Laboratories Ltd v National Institute for Health and Clinical Excellence* [2010] EWCA Civ 346. [↑](#footnote-ref-26)
27. *R (Servier Laboratories Ltd) v National Institute for Health & Clinical Excellence* [2009] EWHC 281 (Admin) [108]. [↑](#footnote-ref-27)
28. Ibid [109]–[111]. [↑](#footnote-ref-28)
29. Ibid [58]–[59]. [↑](#footnote-ref-29)
30. Ibid [115]. [↑](#footnote-ref-30)
31. Ibid [115]. [↑](#footnote-ref-31)
32. Ibid [116]. [↑](#footnote-ref-32)
33. Ibid [118]–[123]. [↑](#footnote-ref-33)
34. Ibid [124]–[139]. [↑](#footnote-ref-34)
35. *R (Savva) v Royal Borough of Kensington and Chelsea* [2010] EWCA Civ 1209*.* [↑](#footnote-ref-35)
36. *R (Savva) v Royal Borough of Kensington and Chelsea* [2010] EWHC 414 (Admin). [↑](#footnote-ref-36)
37. *R (Savva) v Royal Borough of Kensington and Chelsea* [2010] EWCA Civ 1209. [↑](#footnote-ref-37)
38. Ibid [20]. [↑](#footnote-ref-38)
39. Ibid [21]. [↑](#footnote-ref-39)
40. Ibid [20]. [↑](#footnote-ref-40)
41. *R (Ames) v Lord Chancellor* [2018] EWHC 2250 (Admin). [↑](#footnote-ref-41)
42. Ibid [30], [32]–[33]. [↑](#footnote-ref-42)
43. Ibid [75]. [↑](#footnote-ref-43)
44. Ibid [76]. [↑](#footnote-ref-44)
45. Ibid [33]. [↑](#footnote-ref-45)
46. Ibid [75]. [↑](#footnote-ref-46)
47. *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12. In *Lumba*, the Supreme Court held that, if the government creates a policy to guide the exercise of its powers, it must generally make that policy public, so that people can make representations in relation to, and challenge, decisions made under it. See also: *R (Salih) v Secretary of State for the Home Department* [2003] EWHC 2273 (Admin) [52]; *B v Secretary of State for Work and Pensions* [2005] EWCA Civ 929 [43]; *R (Reilly) v Secretary of State for Work and Pensions* [2013] UKSC 68 [58]–[76]; *R (Justice for Health Ltd) v Secretary of State for Health* [2016] EWHC 2338 [141]; *R (Hutchinson) v Secretary of State for Health and Social Care* [2018] EWHC 1698 [126]–[127]. [↑](#footnote-ref-47)
48. *British Dental Association v General Dental Council* [2014] EWHC 4311 (Admin). [↑](#footnote-ref-48)
49. *R (London Criminal Courts Solicitors Association) v Lord Chancellor* [2014] EWHC 3020 (Admin). [↑](#footnote-ref-49)
50. *R (Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin). [↑](#footnote-ref-50)
51. *British Dental Association v General Dental Council* [2014] EWHC 4311 (Admin) [36]–[40]; *R (London Criminal Courts Solicitors Association) v Lord Chancellor* [2014] EWHC 3020 (Admin) [37]–[50]; *R (Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin) [75]–[97]. [↑](#footnote-ref-51)
52. *R (London Criminal Courts Solicitors Association) v Lord Chancellor* [2015] EWHC 295 (Admin). [↑](#footnote-ref-52)
53. Ibid [75]. [↑](#footnote-ref-53)
54. The Court also held that the argument was out of time, because the claimants should have raised it in the original proceeding discussed above: ibid [76]. [↑](#footnote-ref-54)
55. Ibid [77]. [↑](#footnote-ref-55)
56. *R (Mott) v Environment Agency* [2016] EWCA Civ 564. [↑](#footnote-ref-56)
57. The Court of Appeal accepted the claimant’s argument that the defendant’s decision violated Article 1 of Protocol 1 to the European Convention on Human Rights, which protects property rights. This finding was upheld on appeal: *R (Mott) v Environment Agency* [2018] UKSC 10. [↑](#footnote-ref-57)
58. *R (Mott) v Environment Agency* [2016] EWCA Civ 564 [64], [78]. [↑](#footnote-ref-58)
59. Ibid [64]. [↑](#footnote-ref-59)
60. *HCA International Ltd v Competition and Markets Authority* [2014] CAT 11. [↑](#footnote-ref-60)
61. In such proceedings, the Tribunal applies the same principles as in an ordinary judicial review: Enterprise Act 2002, s 179(4). [↑](#footnote-ref-61)
62. *HCA International Ltd v Competition and Markets Authority* [2014] CAT 11 [31]. [↑](#footnote-ref-62)
63. Ibid [31]. [↑](#footnote-ref-63)
64. Ibid [35]. [↑](#footnote-ref-64)
65. Ibid [36]–[37]. [↑](#footnote-ref-65)
66. Ibid [30]–[31]. [↑](#footnote-ref-66)
67. Ibid [22]. [↑](#footnote-ref-67)
68. Ibid [20]–[21]. [↑](#footnote-ref-68)
69. Ibid [23]. [↑](#footnote-ref-69)
70. *R (Eisai Ltd) v National Institute for Health and Clinical Excellence* [2008] EWCA Civ 438. [↑](#footnote-ref-70)
71. See the authorities cited at n 53 above. [↑](#footnote-ref-71)
72. *R (Savva) v Royal Borough of Kensington and Chelsea* [2010] EWCA Civ 1209; *R (Ames) v Lord Chancellor* [2018] EWHC 2250 (Admin). [↑](#footnote-ref-72)
73. See: *R (Eisai Ltd) v National Institute for Health and Clinical Excellence* [2008] EWCA Civ 438; *HCA International Ltd v Competition and Markets Authority* [2014] CAT 11; *R (London Criminal Courts Solicitors Association) v Lord Chancellor* [2014] EWHC 3020 (Admin). [↑](#footnote-ref-73)
74. *R (Eisai Ltd) v National Institute for Health and Clinical Excellence* [2008] EWCA Civ 438. [↑](#footnote-ref-74)
75. *R (Eisai Ltd) v National Institute for Health and Clinical Excellence* [2008] EWCA Civ 438; *R (Savva) v Royal Borough of Kensington and Chelsea* [2010] EWCA Civ 1209. [↑](#footnote-ref-75)
76. *R (Eisai Ltd) v National Institute for Health and Clinical Excellence* [2008] EWCA Civ 438; *R (Servier Laboratories Ltd) v National Institute for Health & Clinical Excellence* [2009] EWHC 281 (Admin). [↑](#footnote-ref-76)
77. *R (Servier Laboratories Ltd) v National Institute for Health & Clinical Excellence* [2009] EWHC 281 (Admin). [↑](#footnote-ref-77)
78. *R (Servier Laboratories Ltd) v National Institute for Health & Clinical Excellence* [2009] EWHC 281 (Admin). [↑](#footnote-ref-78)
79. *R (Ames) v Lord Chancellor* [2018] EWHC 2250 (Admin); *R (Servier Laboratories Ltd) v National Institute for Health & Clinical Excellence* [2009] EWHC 281 (Admin); *HCA International Ltd v Competition and Markets Authority* [2014] CAT 11. [↑](#footnote-ref-79)
80. J. Tomlinson, K. Sheridan, and A. Harkens, ‘Judicial Review Evidence in the Era of the Digital State’ [2020] P.L. 740. [↑](#footnote-ref-80)