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ADMINISTRATIVE FAIRNESS LAB

Reforming the UK's Immigration System:
The Case for an Administrative Fairness
Agenda

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Executive summary

There is a crisis of confidence in the ability of the Home Office to administer the immigration and asylum system fairly and efficiently. A programme of systemic procedural innovation is required to make the Home Office's processes fairer. All stakeholders involved in the immigration system recognise the need for real change and improvement.

We advance three exemplar proposals as to how the Home Office could make its systems fairer for those who use its systems while more efficiently pursuing its policy priorities, and typically with minimal investment. Our proposals are:

- improved communication throughout decision-making processes
- better quality decision-making by professional and accredited caseworkers
- better shared understandings of administrative problems

Such changes would yield wider benefits for the overall perceived legitimacy of the immigration system and the long-term effectiveness of public policy.

Acknowledgements

A crisis of administration

Those interested in reforming the UK's immigration and asylum system often focus on substantive law and policy. However, how policy is administered is just as, if not more, important. There is a growing crisis of confidence in the Home Office's ability to implement immigration and asylum policy fairly. Immigration affects millions of people's lives. Everyone who interacts with the Home Office is entitled to be treated fairly. The current lack of fairness contributes significantly to the current crisis.

Public opinion reflects startlingly low confidence in the ability of the government to administer immigration and asylum policy fairly and efficiently (see Figure 1 and Figure 2). The quality of Home Office decisions on people's asylum and immigration applications is notoriously variable. There are also systemic-level errors.[1] The Home Office's attempts to make use of new technologies such as automation have recreated familiar problems.[2] Much of this feeds into a high level of legal challenges.[3] The government's response to the Ukraine mass migration crisis following the Russian Federation's unlawful invasion in 2022—while creative in some respects—shone a new and intense public spotlight on the many systemic problems of bureaucracy in this domain.[4]

All of this aligns with independent reviews of the Home Office's performance that have been deeply critical. Most notable amongst such reports in recent years is the *Lessons Learned* report by Wendy Williams.[5] This report was commissioned following the Windrush scandal, which saw lawful residents of the UK wrongly detained, denied their rights, threatened with deportation, and, in at least 83 instances, deported by the department.[6] The report found, amongst other failings, "a culture of disbelief and carelessness when dealing with applications."[7] It has led to a programme of work within the Home Office that seeks to change its culture.

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[1] R. Thomas, *Administrative Law in Action: Immigration Administration* (Hart 2022); S. York, *The Impact of UK immigration Law: Declining Standards of Public Administration, Legal Probity and Democratic Accountability* (Palgrave Macmillan 2022); C. O'Brien, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (Hart 2017).

[2] J. Maxwell and J. Tomlinson, *Experiments in Automating Immigration Systems* (Bristol University Press 2022).

[3] See e.g. R. Thomas and J. Tomlinson, *Immigration Judicial Reviews: An Empirical Study* (Palgrave Macmillan 2021).

[4] J. Tomlinson, 'Bureaucratic Warfare: Administrative Justice and the Crisis of the 'New Bespokism'' (2022) 36 I.A.N.L. 178.

[5] W. Williams, *Windrush Lessons Learned Review* (HC 93, 19 March 2020).

[6] For an account of the suffering that resulted, see: A Gentleman, *The Windrush Betrayal: Exposing the Hostile Environment* (London: Guardian Faber 2019).
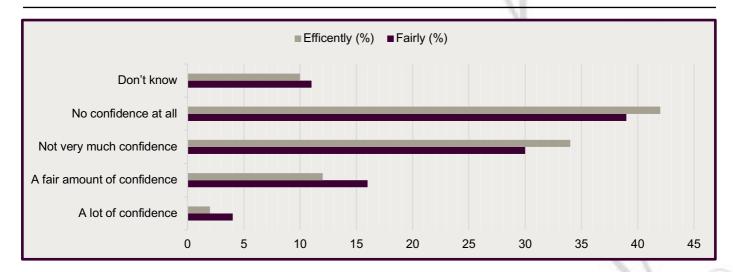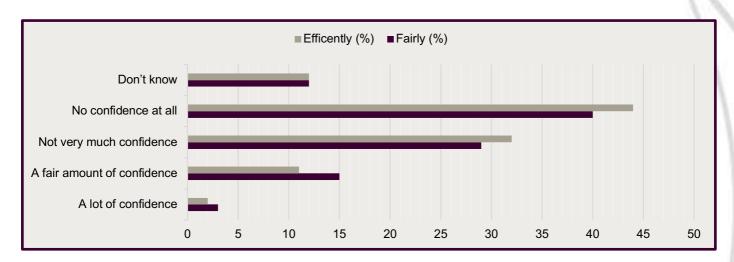
[7] Above (n 5), p. 7.

Figure 1: Confidence in government to administer immigration policy (YouGov, 13th - 14th July 2022, weighted, representative sample of the UK public (n= 1791)).

Figure 2: Confidence in government to administer asylum policy (YouGov, 13th - 14th July 2022, weighted, representative sample of the UK public (n= 1791)).

In recent years, the growing realisation of the extent of these administrative shortcomings has increasingly manifested in calls to "abolish the Home Office."[8] Some believe that the Home Office is now inherently incapable of institutional improvement and change that the only viable reform is to abolish and replace it. There is force to these arguments, although institutional change often results in "rearranging the furniture" at great cost.[9] We are not convinced that the case has been properly made out yet. However, the very fact that the argument is gaining traction is a reminder that there must be a greater focus on procedural innovation in the Home Office amongst those committed to seriously reforming the immigration and asylum system. The goal, simply put, must be to make changes that result in interactions with administrative processes becoming fairer for those who use them.

The experience of recent decades cautions against trying to simply legislate the problems away. There are few "quick wins." Instead, real progress involves unglamorous and detailed work to improve the mechanics of bureaucracy and make the process fairer. We think there are significant opportunities for pragmatic, reformist arguments in this respect.

To demonstrate the value of reformers developing a positive agenda for administrative fairness in this context, we set out three exemplar proposals as to how the Home Office is likely to be able to increase experiences of administrative fairness. These are:

- improving communication throughout decision-making processes;
- better quality decision-making by professional and accredited caseworkers; and
- developing better shared understandings of administrative problems.

These proposals are credible insofar as they allow governments to pursue policy priorities and typically require minimal investment. But we also go further than this to suggest that this administrative fairness agenda may yield wider benefits for the overall perceived legitimacy of the system and the long-term effectiveness of public policy more generally.

These proposals are far from comprehensive, and we recognise that our proposals would need specific piloting and evaluation if implemented. Nonetheless, they are examples of a type of reformist thinking that would lead to much-needed progress in this area.

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[8] See *e.g.* J. Elledge, 'Why it's time to abolish the Home Office' (*The New Statesman*, 30 July 2021).
[9] A. White and P. Dunleavy, *Making and Breaking Whitehall Departments* (Institute for Government, 2010).

Improving communication throughout decision-making processes

Immigration and asylum decision-making processes are, understandably, often extremely stressful experiences for those subject to them—all decision-making processes come with an element of uncertainty as to the outcome. But, in many cases, lives can be put entirely on hold while waiting for an immigration or asylum decision. Applicants waiting for a decision may not be able to access the housing or employment they hope to or to travel to visit family and loved ones. The uncertainty is inherent but is also often practically consequential in multiple serious ways.

Realistically, the stress of waiting cannot be eliminated completely in migration systems: there will always be a large amount matters to resolve, and cases can be legally and factually complex. However, the immigration and asylum systems are riddled with backlogs and delays, and waiting periods for decisions are often very long. This has been an ongoing problem for decades. For instance, as of June 2022, there were 127,026 cases in the asylum backlog, including those awaiting an initial decision and "pending further review." Of the cases in the backlog at that time, over 70%—almost 90,000 people—had been waiting over six months. The level of delay in the system means that the length of time spent waiting for a final decision, suspended in uncertainty, is often one of the main aggravators of stress for people using Home Office migration systems, as well as those supporting people through processes.[10]

Excessive delay is a wider administrative fairness problem that warrants a response. One simple innovation that would enhance experiences of migration processes—at a very low cost—would be for the Home Office to improve how they keep people updated on the status of their application. This would give people certainty and keep them informed about the progress of their cases.

Remarkably, most processes do not currently provide such updates: applications just go into the system and then people are left to wait, often for long periods, to hear back. Many systems do not even provide an acknowledgement of an application, and few give any guidance on how long people can expect to wait for a decision or an update on their case. Some processes do produce information on average waiting times that are published on the government's website, but this is not usually sent to people waiting in the relevant queues and is done only on a fragmented basis.

The failure to keep people updated causes further inefficiencies downstream. Much time is wasted and many costs are incurred because people simply do not understand where they stand with their applications, so they start to search for information as they wait. They often, quite understandably, end up calling Home Office helplines or trying to communicate with the Department in other ways to chase up their case. However, those picking up calls and messages in the Home Office are not generally able to access

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[10] F. Hattke, D. Hensel, and J. Kalucza, 'Emotional Responses to Bureaucratic Red Tape' (2020) 80 *Public Administration Review* 53.

information about individual cases and can do nothing to help solve the problem. And, for those applicants who are being supported by advice agencies, the lack of information from the Home Office usually causes unnecessary work.

One easy solution to this is to create a dashboard—potentially accessed via an online portal—that makes clear which broad stage a particular application has reached. This would, quite simply, allow people to be able to see that their matter is, first, in the system and, second, what stage it has reached. The dashboard could also make clear the current expected waiting times for the particular process that the person is going through so that there is a frame of reference against which the applicant can understand their own position. It might also provide people with clear instructions for common scenarios, such as in the circumstances when an applicant has managed to be able to secure new evidence that might assist the decision-maker.

While introducing a simple mechanism to allow people to access updates on the status of their case and provide them with information on currently expected waiting times will not remove the stress of waiting, it could reduce it significantly while also decreasing the other inefficiencies that result from people simply not knowing where they stand. Such a reform could have profound effects and is all too easily dismissed as a mundane, bureaucratic issue: it significantly affects perceptions of fairness in Home Office processes. It can be—and ought to be—put right, and it would come at a relatively small cost.

Professionalising decision-making

The Home Office is often criticised for making poor-quality decisions. Poor-quality decisions are, plainly, a significant problem for the administrative fairness experiences of people using Home Office systems. They can incorrectly deny people access to a particular status, and indirectly to employment, housing, being with their loved ones, and so on.

Moreover, poor-quality decisions contribute to the large number of disputes we see arising from this part of government—the immigration and asylum system is consistently one of the primary sources of grievances in the public sector. For instance, each year, approximately 80% of all judicial review cases relate to immigration and asylum matters.[11] Complaints, appeals, and legal challenges not only mean that people incur further delays but that dispute resolution systems, and the courts and tribunals system in particular, have to find a way to support and manage this high caseload—with the taxpayer footing a large part of the bill in this respect. Improving the quality of initial decisions by Home Office officials must therefore be a critical part of any serious plan for reforming the system to make it fairer and more efficient.

Caseworkers have a difficult job. They often work in conditions that are not conducive to good decision-making. Immigration and asylum law is incredibly complex and frequently amended. It has been the subject of various "simplification" exercises in recent years, but it is difficult to suggest that these efforts have yet had a meaningful effect.[12] On top of the legal and policy complexity, the nature of the decisions is such that often can be evidentially difficult, and decision-makers often have to think carefully as to how to exercise their discretion. These is pressure on caseworkers to process a large number of applications at speed.

The reality of being a frontline Home Office decision-maker, therefore, is that it is a demanding role. However, the job is not generally conceptualised—at least in institutional terms—in this way. Often, the people recruited into these roles are very junior, have little or no prior experience of immigration or asylum, and are paid poorly—it has been reported recently that many are now also being recruited on temporary contracts of employment.[13]

Training of decision-makers is widely seen as inadequate, and the internal supervision and support more junior staff receive is variable. The role is also treated as a lower-status role within the civil service more broadly: "decision-making" is not seen as a distinct "profession" in the civil service. Instead, it is rather lumped in under a general

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[11] For a details analysis, see: R. Thomas and J. Tomlinson, above (n 3).

[12] For a recent review of the tensions within the drafting of the Immigration Rules, see: Law Commission, *Simplification of the Immigration Rules: Repo*rt (HC 14, 2020); *Law Commission, Simplification of the Ammigration Rules* (Consultation Paper 242, 2019).

[13] N. Kelly and M. Townsend, 'Supermarket staff recruited to make 'life and death' asylum decisions' (*The Guardian*, 5 November 2022) <https://www.theguardian.com/world/2022/nov/05/revealed-novice-staff-making-life-and-death-asylum-decisions?CMP=Share_AndroidApp_Other>.

banner of "operational" staff.[14] This means there is often a lack of sufficient thought around giving people in these roles the "networking opportunities, career routes, training and development" for the job they are being asked to do.

At the same time, frontline caseworkers often build up valuable knowledge of the issues that occur when applying law and policy at the ground level, but too often find they have no way to share their learning and insights with those officials charged with making policy. Unsurprisingly, these roles see a very high level of personnel churn, and it is a consistent challenge for Home Office to recruit new staff, which further exacerbates the challenge of ensuring well-trained and experienced caseworkers are making high-quality decisions.

Given all of this, it is perhaps unsurprising that the Home Office is so often found to be producing poor-quality decisions in some cases—it is arguably institutionally set up for failure in this respect. This creates problems of both fairness and efficiency. Our view is that major benefits could be secured through changes to how frontline staff are treated, as well as how they are integrated into the wider Home Office structure. There is clearly, in some parts of the system, a plain capacity issue which must be addressed, and there is an ongoing dispute about public sector pay. But our proposal is that there are also other simple improvements that could help improve the operating conditions of decision-making—thus likely driving up the quality of decisions—without major investments.

For instance, better training programmes on good decision-making could be introduced, along with clearer frameworks relating to the knowledge and skills standards caseworkers are expected to meet. Improvements could also be accelerated by adding a distinct "decision-making" profession to the existing range of civil service professions. This could allow Home Office decision-makers to think more often about what constitutes high-quality administrative decisions beyond the boundaries of the immigration and asylum system, and ensure there is focused thinking on how to develop the careers and skills of decision-makers.

Feedback loops could also be improved. Decision-makers should get more and better feedback from issues that have arisen in respect of their own decisions—particularly when their decisions are later overturned—but also that feedback from decision-makers and external review bodies more effectively informs the development of policy. Decision-makers are a key part of the Home Office learning effectively about how to improve as an organisation, and they ought to be more explicitly treated as such.[15]

There are many problems in the institutional configuration of decision-making within the Home Office, but there are also various ways that incremental changes could be implemented that would likely have a meaningful effect on whether people experience

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[14] For analysis of the professions, see: M. Bishop, 'Professions and functions in the civil service' (Institute for Government, 22 February 2022) <https://www.instituteforgovernment.org.uk/explainers/professions-civil-service>.
[15] R. Thomas, 'Administrative Justice, Better Decisions, and Organisational Learning' [2015] *Public Law* 111.

immigration and asylum processes as fair or unfair, while also reducing the many inefficiencies within the current system that result from poor-quality decisions. There is, in our view, no reason not to make the case for such changes: even if there were major changes in substantive policy and law, such reforms would still be required.

Developing better shared understandings of administrative problems

Another major problem with the administration of immigration and asylum is that there has been—in many areas of the system—an almost complete collapse of trust amongst the key actors that work in the system. Charities, community groups, and advisors are scarred from years of experiencing bad decisions, poor communication, and aggressive measures that affect them, their clients, and the people they seek to represent. The Home Office is often concerned that applicants are trying to game the system and that, if they tried to be more open, they risk finding themselves in hot water. Meanwhile, judges sit on the sidelines— appropriately sceptical of both claimants and the Home Office—but are nervous about intervening in substantive debates on account of their constitutional need to maintain their judicial independence. There are, it is apparent, almost clear "battlelines" around various camps concerned with immigration and asylum administration.

The result of this situation is that there are not, routinely, open dialogues between these different groups within the system about their perceptions and experiences of administrative problems within the system. There are different forums and "user groups" around certain systems or issues, but nothing that effectively serves the purpose of developing a shared understanding of problems at an overarching systemic level. This means that there is a basic lack of structured information exchange about the impacts of processes.

But, perhaps even more importantly, there is a lack of a shared understanding of what the problems in the system are and the challenges that are involved in fixing them. This typically impacts the fairness experiences that people using the system have: problems go unresolved when they really ought to be raised and fixed much more quickly. There is, in simple terms, a lack of a shared understanding of what the problems in the system are. It is relatively clear how we got into this situation, but it is much less clear how it is possible, without changes and renewed commitment, to move beyond it.

One proposal is to establish an annual forum where different groups working within the system—policy officials, frontline decision-makers, inspectors, advisors, charities, lawyers, and tribunal judges—can each share a summary of the major procedural and administrative problems that have arisen in the past year from their point of view. This exchange of information and perspectives could allow for a better shared understanding of administrative issues to be developed across the entire system. Moreover, it could identify issues that could perhaps be quickly fixed, as well as catalyse wider improvement work.

All of this could, of course, be done at a very small cost. There are also various bodies that could independently convene such a forum but perhaps the most obvious candidate is the Administrative Justice Council—an independent, non-governmental body chaired by the Senior President of Tribunals. The Council has a mandate to, amongst other aims, keep

the operation of the administrative justice system under review, to consider how to make the administrative justice system more accessible, fair and efficient, to share learning and areas of good practice across the UK, and to provide a forum for the exchange of information between Government, the judiciary, and those working with users of the administrative justice system. While this is essentially a proposal for a forum of key players working in the system, it would most likely—in relatively short order—have positive effects on the fairness of frontline administrative encounters.

From administrative fairness to increased policy effectiveness?

The three proposals we have set out demonstrate the value of developing a positive agenda for improving administrative fairness in the immigration and asylum system. Reformers should, of course, continue to make their arguments about the need to change substantive law and policy relating to immigration and asylum. We do not deny law, policy, and administrative systems are closely interlinked and we do not claim that our proposals will "fix" the system overnight. Our proposals, or similar proposals, would also need to be subject to proper evaluation if implemented. However, they do show that—in what is often perceived to be a field of entrenched policy positions—there is plenty of room for pragmatic, reformist ideas that are feasible and hold significant potential to improve experiences of Home Office administrative processes. This opportunity should not be wasted, but it often is.

It would also be a mistake, for two reasons, to dismiss the type of reformist ideas we have made a case for as merely bureaucratic details or failing to grasp the fundamental nature of the problems in the system. First, it has long been established that how we do bureaucracy has fairness implications as much as substantive law and policy, and we ought to be concerned with them.[16] The lesson ambitious reformers often fail to learn is that procedural reforms that may appear to be "tinkering at the edges" can often have transformative effects on the lives of people interacting with government. While policy revolutions are often politically unfeasible, incremental improvements in the fairness of administration are usually more possible. Reformers should, in our view, always seek to maximise fairness within the limits of the possible.

Second, there is an emerging evidence base that indicates the way in which government treats people in "frontline" interactions with the state shapes the future views and behaviours of people who experience those interactions. This may extend to shaping their wider and behaviours in relation to public policy matters and their behaviours in relation to government going forwards.[17] Put simply, small changes that create fairer experiences of migration systems could well payout at a grander scale in the longer term as they can potentially enhance both the perceived legitimacy of the migration system and government more generally, also paving the way for more effective policy implementation. This type of thinking—often called "procedural justice" theory—has transformed policing in many areas across the world in recent decades, and it is now being tested in other areas of "street-level" government encounters.[18] More evidence is needed to understand the connection between administrative fairness, long-term behaviours and attitudes, and policy

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[16] See e.g. J.L. Mashaw, *Bureaucratic justice: Managing social security disability claims* (Yale University Press, 1983).

[17] For the seminal works in this respect, see: T. Tyler, *Why People Obey the Law* (2nd edn, Princeton University Press, 2006); T.R. Tyler, *Why People Cooperate* (Princeton University Press, 2011). For an example outside of the policing context, see: K. Murphy, 'Regulating more effectively: The relationship between procedural justice, legitimacy, and tax non-compliance' (2005) 32(4) *Journal of Law and Society* 562; D.S. Kirk, A.V. Papachristos, J. Fagan, and T.R. Tyler, 'The Paradox of Law Enforcement in Immigrant Communities: Does tough immigration enforcement undermine public safety?' (2012) 641 AAA 79.

[18] S. Halliday, 'Law and Legitimacy in Administrative Justice Research' (2022) *Social & Legal Studies* (online pre-print).

effectiveness in the migration context, but the link is, in principle, obvious: the way government treats people in migration systems will shape how migrants see the government after that encounter, and how they behave in relation to it. If this link holds in further research, it could open new horizons for reform advocacy.