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1 **Approx. 13,000 words**

2

3 **A Different Tale of Judicial Power: Administrative Review as a**
4 **Problematic Response to the Judicialisation of Tribunals**

5

6

7 Administrative review involves the reconsideration of an administrative decision by a different
8 official within the same public body. Administrative review has operated in various contexts for
9 years, but the rate of its recent expansion has been remarkable. Two systems have been key to this
10 rapid growth. The introduction of ‘mandatory reconsideration’ in social security decision-making
11 requires that benefit claimants must first seek administrative review before appealing to a tribunal.
12 In immigration, long-established appeal rights have been replaced entirely by administrative review.
13 The volume of disputes channelled through administrative review far exceeds that of tribunals and
14 makes judicial review appear esoteric. This is a radical change to how people access and experience
15 justice in the public law context. For the last fifty years and more, individuals in receipt of a negative
16 administrative decision could appeal directly to independent and judicial tribunals to determine
17 their legal rights and entitlements to social security benefits and immigration status. The rationale
18 for this fundamental shift is clear: the increase in tribunal caseloads, austerity, and political factors
19 (the desire to reduce social security spending and immigration rates) have prompted the
20 Government to reduce the number the cases proceeding to tribunals by greater use of
21 administrative review. Within the longer arc of administrative justice developments, we suggest that
22 administrative review can be conceived as a consequence of the government’s own progressive
23 judicialisation of tribunals—and the related increases in both cost and time. Government
24 departments have argued that administrative review can provide people with an efficient and
25 quicker way of correcting case-working errors and thereby reducing unnecessary appeals. On the
26 other hand, there are concerns about the effectiveness of administrative review as a redress
27 mechanism and whether it weakens the ability of people to challenge decisions.

28 This article argues that administrative review – as it currently operates - is a problematic
29 response to the judicialisation of tribunals in recent decades. The overall effect of the operation of
30 administrative review has been to weaken the ability of people to secure redress against
31 administrative decisions. The first part discusses the need for justice within administrative decision-
32 making and the development of tribunals. The second part turns to the recent expansion of
33 administrative review. The third part considers the practical operation of administrative review in
34 both the social security and immigration contexts. In the fourth part, we assess administrative
35 review and suggest ways of enhancing its effectiveness. We conclude by considering the wider
36 constitutional implications of this development of administrative review. In particular, we suggest
37 this episode of de-judicialisation provides insight into nature of judicial power in the UK public law
38 system. In contrast to the standard, high-profile debate about the growth of judicial power and the
39 rise of “juristocracy”, the recent experience of administrative review tells a different tale. The
40 greater use of administrative review has gone hand-in-hand with a correspondingly smaller role for
41 the judicial control of government.

42

43 **Administrative decision-making and the judicialisation of tribunals**

44 The basic need for administrative justice begins with primary administrative decision-making and its
45 impact upon people. Justice within initial-decision is the most important form of justice in terms of
46 volume. All decision-making starts – and most of it finishes – here. Government departments, such
47 as the Department for Work and Pensions (DWP) and the Home Office make millions of
48 individualised decisions each year to determine people’s entitlements and to implement policy. Such
49 bodies are variants of a particular organisational model: the machine bureaucracy. That is, a large
50 heavily-staffed organisation that undertakes a vast number of repetitive operating tasks through
51 routinized and formalised procedures.¹ The basic legitimating value of this model is the ability to

¹ H. Mintzberg, *The Structuring of Organizations* (Englewood Cliffs, N.J.: Prentice-Hall, 1979), pp.314-347. Cf. Mashaw’s model of ‘bureaucratic rationality’: J. Mashaw, *Bureaucratic Justice: Manging Social Security Disability Claims* (New Haven: Yale University Press, 1983), pp. 25-26.

52 process a massive volume of decisions efficiently and accurately. Given their technical superiority,
53 administrative bureaucracies are often the only viable means of managing large-scale social issues
54 and for implementing democratically-mandated policy goals.²

55 The ideal model of machine bureaucracy assumes the rational, accurate and efficient
56 implementation of policy. In practice, administrative bureaucracies are often afflicted by
57 dysfunctional behaviour, which constrains their capacity to make robust decisions. Government
58 agencies are subject to intense political pressures, overwhelmed with individualised decision-
59 making, and are administratively unstable. These dysfunctional aspects often have tragic
60 consequences for those who interact with government. Caseworkers have to make complex,
61 sensitive, and morally-demanding decisions that are often life-changing for the individuals involved.³
62 For instance, is a benefit claimant unable to work for health or disability reasons? Is a foreign
63 national entitled to leave to enter to join a family member already present in the UK? Yet,
64 government bodies frequently operate in an impersonal, bureaucratic, and rule-bound manner. The
65 often 'byzantine complexity' of administrative rules reflects a hyper-legalism in which their frequent
66 misapplication is inevitable.⁴ Weighed down by the both the volume of decisions they have to make
67 and processing targets, caseworkers often apply the rules not as a means to an end but as an end in
68 themselves. The mechanical application of the rules to a wide variety of citizens and circumstances
69 can result in arbitrary, insensitive, and incorrect decisions. Mistakes and errors may arise either
70 because of unintentional carelessness, oversights, and communication issues or from ill-intentioned
71 bias.

² Government does not have a monopoly of decision-making. Over recent years, government has increasingly outsourced functions to private providers to reduce costs. For instance, health care professional reports used in benefit decision-making are produced by private providers.

³ B. Zacka, *When the State Meets Street* (Harvard University Press, Massachusetts, 2017).

⁴ *Pokhriyal v Secretary of State for the Home Department* [2013] EWCA Civ 1568, [4] (Jackson LJ), on the complexity of the Immigration Rules.

72 The variable or poor quality of administrative decisions and their implications for claimants
73 is a long-standing theme of administrative justice.⁵ Representatives and advocacy groups have
74 frequently criticised the poor quality of government decisions. Recent tribunal decisions illustrate
75 the mix of intense concern and bafflement at chaotic procedures and poor decisions: '[e]very
76 working day, the First-tier Tribunal overturns decisions of the Secretary of State because the
77 decision maker has omitted to consider all the relevant issues;⁶ '[y]et another case in which the
78 removal of an award of the Personal Independence Payment was not dealt with in any sense
79 adequately';⁷ 'yet another case in which the putative appellant and the First-tier Tribunal was misled
80 by HM Revenue & Customs and its defective procedures ... A combination of Kafka and Captain
81 Mainwaring might be thought unlikely to come up with such a sorry state of affairs.'⁸ Similarly,
82 immigration decision letters frequently 'do not sufficiently rely on the law and guidance' relevant to
83 the decision.⁹ Clearly administrative performance varies, but at its worst poor service includes
84 inflexible attitudes, incomprehensible decision letters, aggressive enforcement, and downright
85 incompetence. The need for effective control of machine bureaucracies, and redress for those
86 subject to their decisions, is clear.

87 For the last century and more, the principal remedy for challenging routine administrative
88 decisions has been to allow affected individuals to appeal to tribunals. The overarching ethos of
89 tribunals has long been swift, inexpensive, and uncomplicated access to justice. The task of tribunals
90 is to undertake a full examination of the merits of a claim, whether for benefits or an immigration
91 status. Unlike when courts conduct judicial review, tribunals exercise a fact-finding function and can
92 substitute their own decisions. An equally important feature of tribunals is their emphasis upon

⁵ N. Wikeley, 'Future Directions for Tribunals: A United Kingdom Perspective' in R. Creyke (ed.), *Tribunals in the Common Law World* (Sydney: Federation Press, 2008), pp.175-184; Administrative Justice and Tribunals Council, *Right First Time* (2011).

⁶ *RR v Secretary of State for Work and Pensions* (JSA) [2017] UKUT 50 (AAC), [39].

⁷ *PM v Secretary of State for Work and Pensions* (PIP) [2017] UKUT 37 (AAC), [1].

⁸ *DG v HMRC and EG* (TC) [2016] UKUT 505 (AAC), [1]-[2]. See also *JW v HMRC* (TC) [2015] UKUT 359 (AAC), [1]: 'yet another case that falls into the litany of cases in which the dreadful quality of HMRC's appeal response to the First-tier Tribunal is a central issue'.

⁹ House of Lords Constitution Committee, *The Legislative Process*, 16 November 2016, Oral evidence of Sir Ernest Ryder (Senior President of Tribunals), Q 44.

93 adjudication not just as a procedure, but their cultural insistence on an impartial and judicial state of
94 mind, consistency, and the careful collection and analysis of evidence.¹⁰ Given the impact of
95 decisions upon people, the exercise of sound judgement is at the heart of adjudication. Another
96 crucial feature is the ability of affected persons to participate directly in the decision process.¹¹

97 Tribunals naturally appeal to a different set of values than bureaucratic administration:
98 judicial independence; fair procedures; and better-reasoned decisions. Furthermore, administrative
99 decision-making processes operate in the context of an unequal relationship between claimants and
100 government. ‘One-shotter’ claimants go up directly against ‘repeat-player’ public bodies which
101 operate large, monolithic, and monopolistic processes.¹² The latter benefit not just from experience
102 of the system, but also influence its design.¹³ Given this fundamental inequality, tribunals provide a
103 counterweight to the routinised, rigid, and impersonal processing of decisions. In hearings, tribunals
104 meet claimants face-to-face and use their expertise and inquisitorial procedures to draw out
105 evidence from claimants in order to exercise complex judgment. Just as importantly, given that their
106 vulnerable clientele are often intimidated by the prospect of legal procedures, tribunals try to
107 cultivate an atmosphere in which claimants could feel confident about explaining personal aspects of
108 their lives. It is important to note that tribunals do not themselves dispense uniformly high
109 standards of justice: tribunals are far from perfect. There have been instances of glaring failures by
110 tribunals to act fairly and in accordance with legal principles. Some have a tendency to be highly
111 adversarial and some tribunals hearings are significantly delayed. Moreover, in recent year the
112 courts have been questioning the fairness of some appeals procedures, such as out of country
113 appeals in the immigration context.¹⁴ Nonetheless, generally speaking, adjudication by higher

¹⁰ W.A. Robson, *Justice and Administrative Law* (London: Stevens & Sons, 3rd edn., 1951), pp.360-418; J. Jowell, ‘The Legal Control of Administrative Discretion’ [1973] P.L. 178, 194-200. For the perspective of a tribunal judge, see N. Warren, ‘The Adjudication Gap’ (2006) 13 J.S.S.L. 110.

¹¹ Tribunals, Courts, and Enforcement Act 2007, s 2(3) and the overriding objective in tribunal procedure rules, e.g., The Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules (SI 2008/2685), r 2.

¹² M. Galanter, ‘Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change’ (1974) 9 *Law & Society Review* 95.

¹³ V. Bondy and A. Le Sueur, *Designing Redress: A Study About Grievances Against Public Bodies* (2012).

¹⁴ *R (Kyarie and Byndloss) v Secretary of State for the Home Department* [2017] 1 WLR 2380.

114 qualified tribunal judges results in a higher standard of decision-making compared with that of
115 pressurised front-line, often junior caseworkers.

116 The development of tribunals both individually and collectively is not easily summarised, but
117 a prominent and sustained theme has been judicialisation.¹⁵ This trend has had various features:
118 increasingly complex substantive rules; the appointment of legally qualified personnel as tribunal
119 judges; greater use of representatives; orderly procedures; reasoned decisions; and onward
120 appeals.¹⁶ This trend culminated in the creation of the First-tier and Upper Tribunals. Designated as a
121 superior court of record, the Upper Tribunal is recognised as a specialist and expert body.¹⁷ The
122 gradual judicialisation of the tribunals system in recent decades has been largely led and approved
123 by successive governments. It is also important to note that judicialisation was not an unmitigated
124 good—indeed it is a ‘profoundly ambiguous device’.¹⁸ Making tribunals more like courts can
125 undermine their distinctive role. Legalistic procedures can limit the degree to which claimants can
126 participate in proceedings. Complex legal rules and Upper Tribunal precedents are often
127 impenetrable. Nonetheless, judicialised procedures have, on the whole, provided advantages for
128 claimants in terms of fair process and legal accuracy.¹⁹

129 Despite being a creature largely of its own creation, judicialisation raises a different set of
130 concerns for the government—namely cost, delay, and the frustration of ultimate political
131 objectives. Since the Franks Report of 1957, the speed and cheapness of tribunals have been their

¹⁵ G. Drewry, ‘The Judicialisation of “Administrative” Tribunals in the UK: From Hewart to Leggatt’ (2008) 28 *Transylvanian Review of Administrative Sciences* 45; R. Thomas, ‘Current Developments in UK Tribunals: Challenges for Administrative Justice’ in S. Nason (ed.), *Administrative Justice in Wales and Comparative Perspectives* (Cardiff: University of Wales Press, 2017).

¹⁶ C. Harlow and R. Rawlings, *Law and Administration* (Cambridge: Cambridge University Press, 3rd edn., 2009), p.490.

¹⁷ Tribunals, Courts and Enforcement Act 2007, s 3(5); *R. (Cart) v The Upper Tribunal* [2012] 1 AC 663 [40]; *AH (Sudan) v Secretary of State for the Home Department* [2008] 1 AC 678; *Jones v First Tier Tribunal and Criminal Injuries Compensation Authority* [2013] 2 AC 48; R. Carnwath, ‘Tribunal Justice—A New Start’ [2009] P.L. 48.

¹⁸ T. Prosser, ‘Poverty, Ideology, and Legality: Supplementary Benefit Appeal Tribunals and Their Predecessors’ (1977) 4 *British Journal of Law and Society* 39, 58.

¹⁹ There is a much wider debate here. See N. Wikeley, ‘Burying Bell: Managing the Judicialisation of Social Security Tribunals’ (2000) 63 M.L.R. 475.

132 principal attractions for government.²⁰ Even before the financial crisis of 2007/08, the Government
133 framed the discussion of tribunals, and administrative justice more broadly, around the concept of
134 ‘proportionate dispute resolution’.²¹ In practice, tribunal procedures, with their (current) heavy
135 reliance on paper documents and hearings, are complex, drawn-out, and inefficient.²² However, as
136 part of its austerity policies, government has imposed large-scale reductions in funding in the justice
137 system. Much of the current crisis in access to justice stems in large part from legal aid restrictions.²³
138 Previously, legal aid had been available for advice (in social security tribunals) or advice and
139 representation (immigration tribunals), but it is now largely unavailable²⁴ prompting the familiar
140 problem of how litigants in person can be expected to navigate and participate in a legal process.²⁵
141 Yet, the Coalition Government (2010-15) and the subsequent Conservative governments have
142 focused on reducing public spending and have viewed tribunals as both overloaded and costly.
143 Appeal fees have been introduced across a range of tribunals, though some have been found to be
144 unlawful and some planned fee increases have been abandoned.²⁶ These restrictions, combined with
145 the abolition of the Administrative Justice and Tribunals Council, have weakened the quality of
146 administrative justice.²⁷ The main response of the Ministry of Justice to such concerns has been to
147 announce a programme of court and tribunal reform that will introduce digital and online dispute

²⁰ *Report of the Committee on Administrative Tribunals and Enquiries* (Cmnd 218,1957) (the Franks report).

²¹ Department for Constitutional Affairs, *Transforming Public Services: Complaints, Redress and Tribunals* (Cm 6243, 2004); M. Adler, ‘Tribunal Reform: Proportionate Dispute Resolution and the Pursuit of Administrative Justice’ (2006) 69 M.L.R. 958.

²² HM Courts and Tribunals Service is currently implementing a digitisation reform programme under which tribunal cases would largely be conducted online. See Ministry of Justice, *Transforming Our Justice System* (2016).

²³ E. Palmer, T. Cornford, A. Guinchard, and Y. Marique (eds.), *Access to Justice: Beyond the Policies and Politics of Austerity* (Oxford: Hart, 2016).

²⁴ Legal Aid, Sentencing and Punishment of Offenders Act 2012. In the immigration context, legal aid remains available only for asylum and bail cases.

²⁵ *The Judicial Working Group on Litigants in Person: Report* (2013); H. Genn, ‘Do-it-yourself Law: Access to Justice and the Challenge of Self-representation’ (2013) 32 C.J.Q. 411; JUSTICE, *Delivering Justice in an Age of Austerity* (2015).

²⁶ Ministry of Justice, *Court and Tribunal Fees* (Cm 9124, 2015); House of Commons Justice Committee, *Courts and Tribunals Fees* (HC 167 2016-17); *R (Unison) v Lord Chancellor* [2017] 3 WLR 409.

²⁷ Administrative Justice and Tribunals Council, *Securing Fairness and Redress: Administrative Justice at Risk?* (2011); M. Adler, ‘The Rise and Fall of Administrative Justice – A Cautionary Tale’ (2012) 8 *Socio-Legal Review* 28; N. O’Brien, ‘Administrative Justice: A Libertarian Cinderella in Search of an Egalitarian Prince’ (2012) 83 *Political Quarterly* 494. A new privately-backed Administrative Justice Council has now been set up between HMCTS and JUSTICE, a non-governmental organisation.

148 resolution methods into tribunals.²⁸ In the meantime, government departments have expanded the
149 use of administrative review.

150

151 **Administrative review**

152 Illustrating the fragmented administrative justice landscape, administrative review schemes have
153 developed on an *ad hoc* basis. Indeed, from one perspective, ‘administrative review’ is a catch-all
154 phrase to cover a wide miscellany of systems. In the context of the Social Fund (abolished in 2013),
155 there operated a distinctive scheme under which initial decisions were reviewed by a functionally
156 separate body, the Independent Review Service. Despite its controversial origins, this scheme
157 developed a strong reputation for providing an independent, expert, timely, and high quality
158 service.²⁹ Since 2009, tax decisions can be challenged either by way of administrative review or
159 tribunal appeal.³⁰ In 2011, school exclusion appeals were downgraded to review panels.³¹
160 Administrative review also operated at the preliminary pre-protocol stages of judicial review
161 litigation in which many claims are settled out of court.³² Tables 1 and 2 provide detail on social
162 security and immigration reviews and appeals.

163

164

²⁸ Ministry of Justice, *Transforming Our Justice System* (2016) 15. For discussion on the progress of these reforms so far, see: National Audit Office, *Early progress in transforming courts and tribunals* (2017-19 HC 1001). For discussion on tribunals reform in particular, see: R. Thomas and J. Tomlinson, *The Digitalisation of Tribunals: What we know and what we need to know* (Public Law Project and UK Administrative Justice Institute, 2018).

²⁹ Social Fund Commissioner, *Annual Report 2012/2013* (2013).

³⁰ The Transfer of Tribunal Functions and Revenue and Customs Appeals Order (SI 2009/56).

³¹ Education Act 2011, s 4.

³² V. Bondy and M. Sunkin, ‘Settlement in Judicial Review Proceedings’ [2009] PL 237.

Table 1: Administrative review schemes

	Social Security	Immigration
Basic design	Administrative review is mandatory before proceeding to a tribunal	Administrative review has replaced most appeal rights
Who reviews?	A different decision-maker	A different decision-maker
Legal basis	Secondary legislation	Immigration Rules and administrative guidance
Time limit for requesting review	30 days, with scope to extend for good reason; can appeal to a tribunal if request to extend is refused ³³	28 days for overseas decisions; 14 days for decisions taken in the UK; 7 days for detainees
Scope of review	Revision on any grounds: to reconsider the decision afresh	To resolve case-working errors
Review procedure	Paper-based. Reviewers may telephone claimants to explain decisions and collect additional evidence	Paper-based
Range of evidence considered	Additional evidence can be submitted	Additional evidence cannot be submitted
Fee	No fee	£80 fee (refundable)
Deadline for public authority to undertake reviews	No formal deadline; straightforward cases expected to be completed within 14 days	No formal deadline; service standard of 28 days to complete reviews
Onward route of challenge	Tribunal appeal on both fact and law	Judicial review
Sporadic inspection	Social Security Advisory Committee (2016)	Independent Chief Inspector of Borders and Immigration (2016) and (2017).
Continuous Independent oversight	None	None

³³ The route to appeal was established by an Upper Tribunal ruling and not the DWP itself: *R(CJ) and SG v Secretary of State for Work and Pensions* [2017] UKUT 324 (AAC).

168 **Table 2: Comparison of social security and immigration administrative reviews and tribunal**
 169 **appeals, 2015-16**³⁴

	Volumes		Unit costs		Average clearance times		Proportion of successful challenges	
	Administrative reviews (2017/18)	Appeals (2015/16)	Administrative reviews	Tribunal appeals	Administrative reviews	Tribunal appeals	Administrative reviews	Tribunal appeals
Social security	317,000	178,818	£80	£592	13 days	125 days	15 per cent	61 per cent
Immigration	7,000 in-country reviews ³⁵	52,514 tribunal appeals; 10,000 judicial reviews	N/A (estimated cost: £80)	£707	15 days	230 days	18 per cent	49 per cent

170
 171 The intention is that, by filtering our clearly wrong decisions, administrative review will
 172 reduce unnecessary tribunal appeals and the associated costs and delays. Furthermore, it is argued
 173 that administrative review will provide a more efficient and user-friendly redress mechanism than
 174 that offered by increasingly legalistic tribunals, especially in areas of mass administration. There are
 175 also arguments for administrative review from the perspective of claimants. Research into user
 176 experiences of administrative justice systems has found that people attach great importance to the
 177 timely resolution of disputes.³⁶ Vulnerable people who may dispute benefit decisions likely have an
 178 acute social need. A legal model that situates claimants and public authorities as adversaries is
 179 unlikely to assist those with urgent social needs. By contrast, a swift review by the public body has
 180 considerable advantages in terms of ease and efficiency and providing a better way to resolve
 181 informally without the anxiety of a hearing. For instance, a student visa appeal may take months to
 182 be heard—and conclude long after the start of the academic year—whereas an administrative
 183 review can take 15 days.

³⁴ Ministry of Justice, *Tribunals Statistics Quarterly* (2017); DWP, *Employment and Support Allowance: Work Capability Assessments, Mandatory Reconsiderations and Appeals* (2017); DWP, *Personal Independence Payments: Official Statistics* (2017); FOI 106180; FOI 106568; FOI 40166.

³⁵ The Home Office does not collect data on administrative reviews submitted by claimants overseas and those in immigration detention.

³⁶ A. Bryson and R. Berthoud, 'Social Security Appeals: What Do the Claimants Want?' (1997) 4 J.S.S.L. 17; G. Richardson and H. Genn, 'Tribunals in Transition' [2007] P.L. 116, 123.

184 The lower costs of administrative review arise from procedural differences. In tribunals,
185 appellants attend hearings before a legally qualified tribunal judge and, in some appeals, a non-legal
186 member (or members). By discarding costly and lengthy judicial procedures, administrative review
187 can handle a large caseload more quickly and efficiently. Tribunal judges specialise in particular areas
188 of administrative law whereas non-legal members bring other specialist skills, such as medical
189 knowledge. Tribunals draw out evidence actively, through either inquisitorial or ‘enabling’
190 procedures for unrepresented appellants or more adversarial hearings with represented claimants.³⁷
191 They also issue detailed reasons and decisions that can be appealed to the Upper Tribunal. By
192 contrast, administrative review is a predominantly paper-based process typically undertaken by
193 relatively junior officials. The reviewer will typically consider only the evidence previously submitted.
194 In some contexts, such as social security, reviewers may contact claimants over the telephone to
195 explain the initial decision and collect further information. Another difference is that appeals involve
196 a complete assessment whereas administrative review is typically limited to correcting case working
197 errors.³⁸ Beneath these formal differences lie differing cultural orientations and presuppositions
198 between independent tribunal judges and reviewers located firmly within the administration.

199 The debate over whether the expansion of administrative review is positive or not has
200 largely fallen into two camps: traditional scepticism and a more sanguine view. In 1989, the Council
201 on Tribunals stated that where an administrative decision affects a citizen's liberty, livelihood, status
202 or basic rights, then nothing less than an appeal to a properly equipped judicial and independent

³⁷ According to an Upper Tribunal judge, the enabling role of social security tribunals has been described as their ‘unique selling point’: S. Wright, ‘The Impact of Austerity and Structural Reforms on the Accessibility of Tribunal Justice’ in Palmer et al, no 24 above. By contrast, immigration tribunals are more adversarial. See generally R. Thomas, ‘From “Adversarial v Inquisitorial” to “Active, Enabling, and Investigative”’: Developments in UK Tribunals’ in **L. Jacobs and S. Baglay (eds)**, *The Nature of Inquisitorial Processes in Administrative Regimes: Global Perspectives* (Farnham: Ashgate Publishing, 2013), p.51.

³⁸ There is no coherent approach as to the scope and grounds of administrative review. Immigration reviews are concerned with ‘case working error’ (Immigration Rules, AR2.1). Homelessness reviews focus on a ‘deficiency or irregularity in the original decision’ (The Allocation of Housing and Homelessness (Review Procedures) Regulations (SI 1999/71), r 8(2)). Social security mandatory reconsiderations focus on ‘official error’ and ‘mistake of fact’ (The Universal Credit, Personal Independence Payment, Jobseeker’s Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations (SI 2013/381), r 9)). As regards tax reviews, ‘The nature and extent of the review are to be such as appear appropriate to HMRC in the circumstances’ (Taxes Management Act 1970, s 49E(2) as inserted by the Transfer of Tribunal Functions and Revenue and Customs Appeals Order (SI 2009/56)).

203 adjudicative body would suffice.³⁹ On this view, any attempt to compromise the status of appeals in
204 whole or in part on resource grounds would be wrong in principle. Furthermore, given its lack of
205 institutional independence, administrative review could not ‘in any sense be regarded as a proper
206 substitute for a right of appeal’.⁴⁰ By contrast, the 2001 Leggatt review of tribunals argued for the
207 *systematic use of administrative review to ensure that only the right cases would be taken to*
208 *tribunals.* Administrative review could be used to avoid the costs and stress of appeals and enable
209 senior and experienced officers to identify problems in the system.⁴¹ According to Leggatt,
210 administrative review would be a ‘valuable way of improving service to the public’—if public bodies
211 looked at their own decisions critically and adopted the ‘kind of independent-mindedness and
212 impartiality which can be expected from tribunals’.⁴² The critical question is then not one of principle
213 but of effectiveness. In order to assess the recent growth of administrative review, it is necessary to
214 consider the practical operation of administrative review in areas such as social security and
215 immigration. It is this to which we now turn.

216

217 **Administrative review in operation**

218

219 *Social security mandatory reconsiderations*

220 The Department for Work and Pensions (DWP) makes some 12 million benefit decisions per year.
221 Initial claims for benefits are lodged and then decided by officials. For the two principal benefits,
222 Employment and Support Allowance and Personal Independence Payments, a health care
223 assessment will often be undertaken by a ‘healthcare professional’ employed by a contracted-out
224 provider. Refused claims can be appealed to the First-tier Tribunal (Social Entitlement Chamber)

³⁹ Council on Tribunals, *Annual Report 1989/90* (1990), [1.14].

⁴⁰ Council on Tribunals, *Annual Report 1989/90* (1990), [1.9]. See also R. Sainsbury, ‘Internal Reviews and the Weakening of Social Security Claimants’ Rights of Appeal’ in G. Richardson and H. Genn (eds), *Administrative Law & Government Action* (Oxford University Press, 1994).

⁴¹ The Leggatt Report, *Tribunals for Users: One System, One Service* (2001), [9.6].

⁴² *Ibid.*, [9.6] and [9.8].

225 comprised of a tribunal judge and non-legal members.⁴³ In addition to appeals, the DWP has long
226 had the power to review its own decisions.⁴⁴ In this way, administrative review is a fundamental
227 feature of the system given that decision-making is often based on factors – such as an individual’s
228 circumstances, including their health and income – that can change.

229 In 2013 the DWP introduced mandatory reconsideration with the aim of resolving disputes
230 as early as possible and reducing unnecessary demand on tribunals. This major process change made
231 administrative review a distinct and mandatory stage before claimants could proceed to a tribunal.
232 The former position was that claimants seeking to challenge initial refusal decisions could appeal
233 straightaway to the tribunal. On receipt of an appeal, the DWP would routinely review its decision. If
234 the decision was reviewed in the claimant’s favour, then the appeal would lapse; if not, the appeal
235 would proceed to the tribunal. However, with mandatory reconsideration, the review stage is a
236 separate and compulsory stage in the dispute process. Claimants can now only appeal if they first
237 request the department to reconsider its initial decision and then, second, lodge an appeal with the
238 tribunal.⁴⁵ In short, a one-step process has become a two-stage process. Such changes have taken
239 place against a background of austerity and welfare reform to reduce benefit spending through
240 stringent rules and policies, such as benefit sanctions.⁴⁶ A controversial feature has been the
241 outsourcing of health assessments to private companies, such as ATOS and Maximus. Such providers
242 have been subject to criticism concerning the quality of assessments and the resulting high appeal
243 success rates.

⁴³ The First-tier Tribunal (Social Entitlement Chamber) has 1,700 judges and non-legal members.

⁴⁴ Social Security Act 1998, ss 9 and 10.

⁴⁵ Welfare Reform Act 2012, s 102; The Universal Credit, Personal Independence Payment, Jobseeker’s Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations (SI 2013/381). A concurrent change was that whereas previously claimants lodged their appeals with the DWP, appeals are now lodged directly with the tribunal.

⁴⁶ For an overview, see N. Timmins, ‘The Coalition and Society (IV): Welfare’ in A. Seldon and M. Finn (eds), *The Coalition Effect, 2010-2015* (Cambridge: Cambridge University Press, 2015); C. Beatty and S. Fothergill, ‘Welfare Reform in the United Kingdom 2010–16: Expectations, Outcomes, and Local Impacts’ (2017) *Social Policy and Administration* (online pre-publication). On sanctions, see M. Adler, ‘A New Leviathan: Benefit Sanctions in the Twenty-first Century’ (2016) 43 *Journal of Law and Society* 195.

244 Between 2013 and 2017, some 300 officials (mostly at Executive Officer grade) have
245 undertaken some 1.5 million mandatory reconsiderations. The principal advantage of the process is
246 timeliness. Since 2014, the average monthly clearance time for mandatory reconsiderations has not
247 exceeded 20 days.⁴⁷ This compares with an average timeliness of appeals of 20 weeks.⁴⁸ Given that
248 benefits claimants have a significant interest in timely decisions on their entitlements, the shorter
249 time taken by mandatory reconsideration is a considerable advantage. At the same time, there are
250 various concerns with other aspects of the process.

251 A major concern is that the two-stage nature of the process—mandatory reconsideration
252 then appeal—has arguably weakened access to justice by deterring claimants with strong cases from
253 proceeding to tribunals. As Figure 1 demonstrates, there has been a dramatic decline in the number
254 of appeals lodged following the introduction of mandatory reconsideration. In 2014/15, appeal
255 receipts were 73 percent lower compared with 2013/14.⁴⁹ There have been other contributory
256 factors in play here too, such as the early cancellation in 2014 of the contract with ATOS to
257 undertake health assessments and a consequent slowdown in initial decisions.⁵⁰ According to the
258 DWP, the reduction in the volume of appeals is evidence that mandatory reconsideration was
259 successful in its aim of resolving more disputes without the need for appeal.⁵¹

260

261 [Figure 1 here]

262

263 To some extent, a reduction in appeals was to be expected if the new system was working
264 well. Mandatory reconsideration was justified in part as a filtering mechanism to reduce

⁴⁷ DWP, *Employment and Support Allowance: Work Capability Assessments, Mandatory Reconsiderations and Appeals* (2017), p.7.

⁴⁸ Ministry of Justice, *Tribunal Statistics Quarterly* (2017), main tables sheet T.3.

⁴⁹ The subsequent increase is largely accounted for by appeals lodged by claimants being transferred from Disability Living Allowance to Personal Independence Payments.

⁵⁰ J. Warren, K. Garthwaite and C. Bamba, 'After Atos Healthcare: is the Employment and Support Allowance Fit For Purpose and Does the Work Capability Assessment Have a Future?' (2014) 29 *Disability & Society* 1319.

⁵¹ Department for Work and Pensions, *Government Response to the House of Commons Work and Pensions Select Committee's Report on Employment and Support Allowance and Work Capability Assessment* (Cmd 8967, 2014), p.22.

265 unnecessary appeals. Such filtering, common in other redress mechanisms such as judicial review
266 and ombudsmen, is necessary to manage caseloads. Yet, with mandatory reconsideration, the
267 filtering is being undertaken by the same government department whose initial decisions are being
268 challenged, prompting concerns that government may have a self-interest in discouraging claimants
269 from pursuing their cases further.⁵² Furthermore, claimant fatigue often discourages people from
270 challenging decisions and this is likely to be a major factor here. Vulnerable individuals—such as
271 those with a long-term disability or mental illness—often lack the ability and confidence to pursue a
272 challenge to a welfare bureaucracy, especially when their claim has already been rejected twice.⁵³
273 The change with mandatory reconsideration is that an individual must twice decide to challenge in
274 order to appeal. According to Judge Robert Martin, the former Tribunal Chamber President,
275 mandatory reconsideration ‘is of dubious advantage’:

276

277 It builds in an extra step, in that the claimant now has to make two applications: mandatory
278 reconsideration and then appeal. It is bound to take longer. Personally, I am quite concerned that a
279 number of claimants who may have winnable cases drop out between the mandatory reconsideration
280 stage and deciding to make a further appeal. It seems to me to be regressive. The only value would be
281 if mandatory reconsideration ... resulted in a much more rigorous reappraisal by the Department of its
282 decisions than under the old scheme.⁵⁴

283

284 There is also the related impact of taking social security out of scope for legal aid and reductions in
285 advice services.⁵⁵ The Upper Tribunal has expressed scepticism as to whether mandatory
286 reconsideration has any real advantages in reducing unnecessary appeals that have merit; under the

⁵² A previous empirical study found that local authority officers could use administrative review to control claimants' access to tribunals: T. Eardley and R. Sainsbury, 'Managing Appeals: The Control of Housing Benefit Internal Reviews by Local Authority Officers' (1993) 22 *Journal of Social Policy* 461.

⁵³ S. Halliday and D. Cowan, *The Appeal of Internal Review: Law, administrative justice, and the (non-) emergence of disputes* (Oxford: Hart, 2003), pp.138-140.

⁵⁴ Oral evidence of HH Judge Robert Martin to the House of Commons Work and Pensions Committee inquiry, *Employment and Support Allowance and Work Capacity Benefits* HC 1212 7 May 2014, Q96.

⁵⁵ Legal Aid, Sentencing and Punishment of Offenders Act 2012.

287 previous system, the department would treat an appeal as a request for a revision and review the
288 decision before it reached the tribunal.⁵⁶ Determined claimants can still appeal. Nonetheless, the
289 need to make two applications to access the tribunal rather than the previous single application may
290 well discourage vulnerable claimants with winnable cases from appealing because they find the
291 process too onerous. As the Supreme Court recognised in *Unison*, impediments to access to justice
292 can constitute a serious hindrance even if they do not make access completely impossible.⁵⁷

293 Such access to justice concerns have arisen in part because of the effect of mandatory
294 reconsideration upon the behaviour of a vulnerable group of claimants. They have also arisen by the
295 DWP adopting the position that applications for mandatory reconsideration made out time did not
296 generate a right of appeal to the tribunal. Instead, the Department contended, the appropriate
297 remedy was to seek judicial review of the DWP's decision not to allow a mandatory reconsideration
298 out of time. However, in *R (CJ) and SG v Secretary of State for Work and Pensions* the Upper Tribunal
299 ruled against the DWP holding that there was a high risk that vulnerable claimants with good claims
300 could miss the time limits, a risk exacerbated by the reduction in advice services. According to the
301 Upper Tribunal, the consequence of the Department's approach was that it had improperly assumed
302 the role of gatekeeper to the tribunal system. To deny the right of appeal to claimants who made
303 out of time applications for reconsideration would remove the right of appeal and result in a
304 significant number of claimants entitled to benefits not receiving them.⁵⁸

305 What then of the quality of reconsideration decision-making? Shortcomings had been
306 identified in the pre-2013 reconsideration system by the then President of Appeal Tribunals. There
307 was little consistent evidence that the DWP had been effectively reconsidering decisions before they
308 came to the tribunal; 'often the appeal papers show an unwillingness on the part of the decision-
309 maker to reconsider the decision in the absence of the appellant supplying fresh medical or other

⁵⁶ *R (CJ) and SG v Secretary of State for Work and Pensions* (ESA) [2017] UKUT 0324 (AAC), [26].

⁵⁷ *R (Unison) v Lord Chancellor* [2017] 3 WLR 409, [78] (Lord Reed).

⁵⁸ *R (CJ) and SG v Secretary of State for Work and Pensions* (ESA) [2017] UKUT 0324 (AAC).

310 third party evidence'.⁵⁹ With mandatory reconsideration, the Department stated that it would
311 ensure its decisions would go through a 'robust reconsideration' by which decisions would be
312 checked thoroughly and be accompanied by detailed reasons.⁶⁰ Nevertheless, the quality of
313 reconsideration decisions has been criticised.⁶¹ Tribunal Judges have expressed scepticism about the
314 thoroughness of mandatory reconsideration and view the process as an additional administrative
315 barrier for claimants who wish to challenge their decision rather than a substantive re-examination
316 of the evidence.⁶² Advisers have stated that decision notices often repeat initial refusal reasons
317 without providing any further elaboration. There is also a widely held perception that the 'chances
318 of a claimant actually having their decision revised at mandatory reconsideration stage are almost
319 negligible to the point where most advisers and claimants view mandatory reconsideration as a
320 formality and expect a negative decision.'⁶³

321 As regards claimants, of all the transactions claimants have with DWP, mandatory
322 reconsideration has the lowest satisfaction rating.⁶⁴ Claimants have felt that new evidence
323 submitted for a reconsideration is often ignored and that the process is more of a 'rubber stamp'
324 than a thorough audit of the original decision.⁶⁵ This in turn prompts some claimants to lodge
325 appeals against poor decisions that could have been properly resolved earlier. For instance, it is
326 common for claimants to be awarded no entitlement points initially, to submit additional
327 information at the reconsideration, which then confirms the initial decision, for the tribunal to then
328 award maximum points.⁶⁶ There are also concerns that reviewers routinely accept health care

⁵⁹ President of the Social Entitlement Chamber of the First-tier Tribunal, *Report on the Standards of Decision-making by the Secretary of State and Child Maintenance and Enforcement Commissioner 2007-08* (2008), [1.7].

⁶⁰ Department for Work and Pensions, *Mandatory Consideration of Revision Before Appeal* (2012), p.11.

⁶¹ See, e.g., *MD v HMRC* (TC) [2017] UKUT 0106 (AAC) at [11] in which the Upper Tribunal found the reconsideration to be 'woefully inadequate ... [without] any meaningful reasoning'.

⁶² P. Gray, *The Second Independent Review of the Personal Independence Payment Assessment* (DWP, 2017) 45.

⁶³ National Association of Welfare Rights Advisors, *Response to Social Security Advisory Committee Consultation Review into Decision Making and Mandatory Reconsideration* (2016) 11.

⁶⁴ Department for Work and Pensions, *DWP Claimant Service and Experience Survey 2014/15* (2016) 85.

⁶⁵ Gray, above no 64, p.45.

⁶⁶ *Ibid.*, 29. Tribunal judges have noted that they often see appellants awarded no entitlement points initially, who are then given the maximum award possible: 'Why I went to court for my disability payments' BBC News

329 reports from the DWP’s contracted-out supplier, the quality of which has been criticised,⁶⁷ and
330 disregard other evidence such as a medical report by a General Practitioner, the quality of such
331 reports has been subject to sustained criticism. Tribunal judges have noted that they regularly see
332 decision letters and health assessment reports at appeal hearings that have used standard or
333 repetitive language for different functions, which in turn undermines confidence in the rigour of the
334 original assessment.⁶⁸

335 Such features are, in turn, reflected in the noticeably lower success rates for claimants at
336 mandatory reconsideration compared with appeals (Figures 2 and 3). Of the 1.4 million
337 reconsiderations decided between 2013-18, 20 per cent were allowed. By contrast, appeal success
338 rates have been substantially higher: 40per cent rising to 65 per cent. What is striking here is that
339 while mandatory reconsideration was introduced to reduce unnecessary appeals, the proportion of
340 initial decisions overturned by tribunals has increased.

341

342 [Insert Figures 2 and 3]

343

344 Comparing review and tribunal outcomes is not necessarily comparing like with like because
345 of the different cohorts of claimants. Furthermore, the wider issue as to why tribunals allow appeals
346 is contested. The DWP has argued that appeals are often allowed because claimants submit new
347 evidence not previously considered.⁶⁹ Accordingly, the rate of allowed appeals is not a perfect
348 measure of the quality of initial decisions. Nonetheless, it is one such measure. Furthermore, the
349 high and unprecedented rate of allowed appeals – 65 per cent – confirms that the mandatory

2 May 2017. Claims for both Employment and Support Allowance and Personal Independence Payments are decided on the basis of a graded scale of points scored against health conditions and living abilities.

⁶⁷ House of Commons Public Accounts Committee, *Department for Work and Pensions: Contract Management of Medical Services* HC 744 (2012-13); House of Commons Public Accounts Committee, *Contracted Out Health and Disability Assessments* HC 727 (2015-16).

⁶⁸ Gray, above no 64, p.45.

⁶⁹ For debate, see: House of Commons, *Fourth Delegated Legislation Committee* (2013-14); Hansard HC Debs vol 624 cols 308-335 29 March 2017, with reference to Personal Independence Payments and Gray, above no 64, pp.46-47.

350 reconsideration process is not being used to filter out appeals likely to be allowed by tribunals. On
351 the contrary, the success rate indicates that significant improvements are required to the
352 reconsideration process so that it can capture similar information as tribunals. At present, the
353 mandatory reconsideration process results in a significant number of claimants not receiving
354 benefits to which they are entitled if they do not pursue their cases to the tribunal. Further, the high
355 proportion of allowed appeals erodes the trust of claimants and stakeholders in the system. As the
356 Senior President of Tribunals has noted, the DWP frequently provides no justiciable defence against
357 challenges to its decisions resulting in unnecessary appeals; the mandatory reconsideration process
358 does nothing to improve the situation.⁷⁰

359 A further area of concern relates to the wider public goods of litigation which may be
360 obscured by the expansion of administrative review.⁷¹ One of the principal social purposes of
361 administrative law litigation should be to identify ways of improving the quality of government
362 decision-making more widely.⁷² Ideally, a redress system should have feedback-loops built in
363 throughout to improve front-line decisions.⁷³ However, there is a mismatch between the
364 Department's ambitions and administrative reality. While the DWP aspires to a 'right first time'
365 approach, it has struggled to raise the quality of decision-making. Staff undertaking mandatory
366 reconsiderations are not routinely notified if their decisions are overturned by tribunals.⁷⁴ Previous
367 research has found that the most effective influence of tribunals was through direct practical
368 experience by individual officials in seeing how tribunals adjudicated upon cases.⁷⁵ The department
369 is increasing the previously low attendance by presenting officers, but the role of tribunals has
370 overall been diminished.

⁷⁰ E. Dugan, 'A Senior Judge Has Suggested Charging the Government for Every "No-Brainer" Benefits Cases It Loses in Court' BuzzFeed News 9 November 2017, available at: https://www.buzzfeed.com/emilydugan/most-dwp-benefits-cases-which-reach-court-are-based-on-bad?utm_term=.faAjD3GQz#.kcX6rE30n (last accessed 23/11/17).

⁷¹ *R (Unison) v Lord Chancellor* [2017] 3 WLR 409, [69]-[72] (Lord Reed).

⁷² R. Thomas, 'Administrative Justice, Better Decisions, and Organisational Learning' [2015] PL 111.

⁷³ Administrative Justice and Tribunals Council, no 5 above.

⁷⁴ Social Security Advisory Committee, *Decision Making and Mandatory Reconsideration* (2016), p.50.

⁷⁵ N. Wikeley and R. Young, 'The Administration of Benefits in Britain: Adjudication Officers and the Influence of Social Security Appeal Tribunals' [1992] PL 238, 250-259.

371 Elsewhere in the benefits system, the problems have been more acute. The contracting-out
372 of tax credit compliance checks to a private company, Concentrix, was marked by widespread
373 failures in decision-making, such as official error and incorrect allegations of fraud. Vulnerable
374 people lost benefits to which they were entitled, causing hardship. In this context, there was a 90
375 per cent success rate through mandatory reconsideration. This was accepted by both HM Revenue
376 and Customs and Concentrix as a routine feature of the system, but there was no focus on improving
377 initial decisions for those people who did not seek a mandatory reconsideration.⁷⁶

378 Overall, the underlying idea of having a quick and informal reconsideration of social security
379 decisions is unobjectionable, but has been highly problematic in practice. The Social Security
380 Advisory Committee raised concerns that mandatory reconsideration is not working as it should and
381 made detailed recommendations.⁷⁷ In response, the DWP has sought to improve the gathering of
382 evidence and the quality of decision-making.⁷⁸ In 2018, the Work and Pensions Committee, noting
383 the renewed focus on quality, recognised that mandatory reconsideration decision making had not
384 always been characterised by thoroughness, consistency and an emphasis on quality and that not all
385 claimants, perhaps wrongly, been turned down at this stage, will have had the strength and
386 resources to appeal.⁷⁹

387

388 *Immigration administrative reviews*

389 The Home Office decides some 3.5 million immigration applications per year to determine the
390 immigration status of individuals against the requirements of the Immigration Rules and
391 supplementary policies. Immigration appeals were introduced in 1971 on the basis that it was
392 ‘fundamentally wrong and inconsistent with the rule of law that power to take decisions affecting a
393 man’s whole future should be vested in officers of the executive, from whose findings there is no

⁷⁶ House of Commons Work and Pensions Committee, *Concentrix* (HC 720 2016-17).

⁷⁷ Social Security Advisory Committee, above no 76.

⁷⁸ Department for Work and Pensions, *DWP Response to SSAC Report on Mandatory Reconsideration Processes* (2017).

⁷⁹ House of Commons Work and Pensions Committee, *PIP and ESA assessments* (2017-19 HC 829), [66].

394 appeal.⁸⁰ Given the exceptionally sensitive nature of this jurisdiction and the risks of illegitimate
395 executive pressure, great importance has been attached to the safeguards provided by tribunals: a
396 full re-hearing of the evidence by an independent and judicial decision-maker; adversarial hearings;
397 detailed reasoned decisions; and onward rights of appeal. However, as pressures on the system has
398 grown with the increase in immigration, so have the volume of appeals and associated costs.⁸¹ The
399 Home Office has long seen the appeals process as an impediment to its task of enforcing
400 immigration controls. The deeply-embedded culture within the Home Office is that vexatious
401 appeals are often lodged by people to postpone their removal from the UK and the more delay they
402 can induce, then the better their chances of being ultimately able to stay. Yet, the appeals process
403 has been successful in terms of providing individuals with an effective remedy. Some 40 per cent of
404 immigration appeals were routinely allowed. Furthermore, the courts have increasingly intervened
405 to enhance the role of appeals.⁸²

406 Acutely aware of the obstacle to limiting overall immigration presented by tribunals, the
407 Home Office has then endeavoured to curtail appeals as part of its drive to create a ‘hostile
408 environment’ for immigrants. In 2013, the then Home Secretary described the appeals process as ‘a
409 never-ending game of snakes and ladders’ open to exploitation by foreign criminals, immigrants, and
410 their lawyers to delay the enforcement of immigration law.⁸³ In 2014, all existing and long-standing

⁸⁰ Home Office, *Report of the Committee on Immigration Appeals* Cmnd 3387 (1967); Immigration Act 1971.

⁸¹ R. Thomas, ‘Immigration and Access to Justice: A Critical Analysis of Recent Restrictions’ in Palmer et al, no 23 above.

⁸² See, e.g., *Lord Chancellor v Detention Action* [2015] 1 WLR 5341 (fast-track detained process for asylum appeals was systemically unfair and unjust); *R (Mohibullah) v Secretary of State for the Home Department (TOEIC – ETS – judicial review principles)* [2016] UKUT 00561 (IAC) (the Home Office had abused its power by not using a decision-making mechanism that attracted a right of appeal); *R (Kiarie and Byndloss) v Secretary of State for the Home Department* [2017] 1 WLR 2380 (out of country appeal process was unfair); *Khan v Secretary of State for the Home Department* [2017] EWCA Civ 1755 (overturning the UTIAC, the Court of Appeal held that, under the European Economic Area, extended family members regulations have a right of appeal).

⁸³ Theresa May, Home Secretary, speech at the Conservative Party conference, Manchester, September 2013, <http://www.ukpol.co.uk/theresa-may-2013-speech-to-conservative-party-conference/>; Immigration Act 2014, s 15. Family visitor appeals had already been abolished: Crime and Courts Act 2013, s 52.

411 immigration appeal rights (except on asylum and human rights grounds) were replaced with
412 administrative review.⁸⁴ This was estimated to save £261 million over 10 years.⁸⁵

413 Given the toxic politics of immigration, replacing appeals with administrative review was
414 widely viewed by immigration lawyers as another way of undermining fairness for applicants,
415 reinforcing a deep-seated mutual distrust between them and the Home Office. Intense concerns
416 were also raised in Parliament. It was argued that administrative review was not being introduced to
417 secure fairness and justice for refused immigrants, but to reduce the number who would have
418 succeeded had they been able to put their case to a tribunal.⁸⁶ The Joint Committee on Human
419 Rights invoked the well-known dictum of Hale LJ: '[i]n this day and age a right of access to a tribunal
420 or other adjudicative mechanism established by the state is just as important and fundamental as a
421 right of access to the ordinary courts.'⁸⁷ Accordingly, withdrawing appeals would undermine the
422 common law right of access to justice.⁸⁸ The Home Office was implacable: only fundamental rights
423 cases justified the expense and delay of an appeal. Immigration decisions did not fall within the right
424 to a fair trial (Article 6 ECHR).⁸⁹ The Home Office did not recognise the notion of an overarching
425 common law right of access to justice over and above primary legislation. The result is that only
426 around 12 per cent of the 3.5 million immigration decisions per year now attract a right of appeal.
427 Nonetheless, the Home Office had admitted that the high appeal success rate was largely
428 attributable to its own errors: approximately 60 per cent of appeals were allowed due to casework
429 errors.⁹⁰ As one MP noted, 'the Government's response to this high margin of error is not to seek to
430 improve the quality of their decision making, but rather to reduce the opportunities for challenge'.⁹¹

⁸⁴ Immigration Act 2014, s 15; Immigration Rules, Appendix AR.

⁸⁵ Home Office, *Impact Assessment of Reforming Immigration Appeal Rights* (2013) 2.

⁸⁶ Hansard HL Debs Vol 752 col 1353 5 March 2014 (Lord Avebury).

⁸⁷ *R v Secretary of State for the Home Department, ex parte Saleem* [2001] 1 WLR 443, 458 (Hale LJ).

⁸⁸ Joint Committee on Human Rights, *Legislative Scrutiny: Immigration Bill* HL 102 HC 935 (2013-14), [39]. See also House of Lords Constitution Committee, *Immigration Bill* HL 148 (2013-14), [3]-[5].

⁸⁹ Home Office, *Government Response to the Joint Committee on Human Rights, Eighth Report of Session 2013-14* (2014) 2; Home Office, *Immigration Bill: ECHR Memorandum* (London: Home Office, 2013) 14-16.

⁹⁰ Home Office, *Impact Assessment of Reforming Immigration Appeal Rights* (London: Home Office, 2013), p.7.

⁹¹ HC Deb vol 569, col 199 22 October 2013 (Barry Gardiner MP). See also HC Deb vol 569 col 189 22 October 2013 (Fiona MacTaggart MP).

431 This made little difference to the political juggernaut. Indeed, the Home Office had thechutzpah to
432 argue that the delays and costs of appeals were ‘not fair to applicants’.⁹²

433 Previous administrative review processes in the immigration context have been widely
434 criticised. Reviews had been characterised by boilerplate reasons, inconsistencies, and carelessness
435 and were ineffective in identifying errors.⁹³ In 2004, only one per cent of reviews succeeded for
436 claimants compared with 40 per cent of appeals.⁹⁴ According to the then Independent Monitor, the
437 Home Office needed to improve the quality of reviews.⁹⁵ Unsurprisingly, the Home Office
438 subsequently gave its administrative review system a clean bill of health.⁹⁶ Despite such concerns,
439 reviews operated largely against the safety-net of appeals. By contrast, the 2014 changes marked a
440 clean break with appeals and the withdrawal of this safeguard. Remaining appeals on human rights
441 grounds will, in future, increasingly take place out of country.⁹⁷

442 To meet concerns over the abolition of appeals, ministers gave assurances.⁹⁸ Administrative
443 reviews would be undertaken by fully trained and experienced staff who would be independent of
444 the original decision-maker and located in a separate operational unit. Feedback mechanisms would
445 be established. The Home Office would also monitor the overturn rate on administrative review and
446 investigate any discrepancy with the appeal success rate.⁹⁹ In practice, none of these assurances
447 were kept. The Chief Inspector of Borders and Immigration found that administrative reviews were
448 being undertaken by low-level, untrained, and temporary staff with limited or no experience of

⁹² Home Office, *Immigration Bill Factsheet: Appeals (clauses 11-13)* (London: Home Office, 2013), p.1.

⁹³ House of Commons Constitutional Affairs Committee, *Asylum and Immigration Appeals* HC 211 (2003-04), [107]; Independent Chief Inspector of Borders and Immigration, *An Inspection of Family Reunion Applications* (2016), [6.61].

⁹⁴ National Audit Office, *Visa Entry to the UK: The Entry Clearance Operation* HC 367 (2003-04), [2.24].

⁹⁵ Independent Monitor for Entry Clearance Refusals, *Report for 2005* (London: Home Office, 2006).

⁹⁶ Home Office, *Report on Removal of Full Appeal Rights Against Refusal of Entry Clearance Decisions Under the Points-Based System* (London: Home Office, 2011). By 2008, the points-based scheme for work and study routes had replaced discretion with objective decision criteria and with this various appeal rights had been replaced with administrative review: Immigration, Nationality and Asylum Act 2006, s 4.

⁹⁷ Immigration Act 2016, s 63. See P. Jorro, ‘The Enhanced Non-suspensive Appeals Regime in Immigration Cases’ (2016) 30 *Journal of Immigration, Asylum and Nationality Law* 111.

⁹⁸ Hansard HL Debs Vol 752 cols 1357-1358 5 March 2014 (Lord Wallace of Tankerness, Advocate General for Scotland).

⁹⁹ Home Office, *Statement of Intent: Administrative Review* (London: Home Office, 2013) 4.

449 immigration law, a notoriously complex area.¹⁰⁰ Quality assurance was minimal and ineffectual. Valid
450 applications had been incorrectly rejected and this had not been picked up. To ensure a degree of
451 independence, in-country reviewers had been organised into a functionally separate unit from initial
452 decision-makers, but the unit had been staffed with junior and inexperienced officials. Complex
453 cases were not referred upwards to more senior caseworkers. By contrast, overseas reviewers
454 worked alongside primary decision-makers; although there was no evidence of bias, it was more
455 difficult to demonstrate that reviewers were truly independent.

456 As regards the quality of review decisions, administrative reasons must be proper, adequate,
457 intelligible, and deal with the substantial points raised.¹⁰¹ In practice, review decisions have been
458 characterised by ‘an over-reliance on the initial refusal decision letter’ without addressing the
459 applicant’s points of challenge.¹⁰² Perfunctory review notices that merely reiterate initial refusal
460 reasons do not comprise an effective review.¹⁰³ Another constraining factor is that fresh evidence
461 will normally be disregarded irrespective of its importance.¹⁰⁴ Success rates have been lower - far
462 lower - than those of appeals. Some 49 per cent of appeals allowed under the former regime. The
463 Home Office had concluded that 60 per cent of allowed appeals succeeded due to case-working
464 errors. By contrast, in 2015-16, the success rate was eight per cent for in-country reviews and 22 per
465 cent for at the border reviews.¹⁰⁵ In 2016/17, the success rate was 3.4 per cent for in-country
466 reviews and 6.8 per cent for border reviews.¹⁰⁶ Assurances that such discrepancies would be
467 investigated were unfulfilled - as were promises of feedback loops to improve initial decision-
468 making. The only assurance met was that reviews would be processed within 28 days.

¹⁰⁰ Independent Chief Inspector of Borders and Immigration, *An Inspection of the Administrative Review Processes Introduced Following the Immigration Act 2014* (London: ICIBI, 2016).

¹⁰¹ *In Re Poyser and Mills’ Arbitration* [1964] 2 QB 467, 478; *MK v Secretary of State for the Home Department (duty to give reasons) Pakistan* [2013] UKUT 00641 (IAC).

¹⁰² Independent Chief Inspector of Borders and Immigration, no 99 above, 5.

¹⁰³ *R (Akturk) v Secretary of State for the Home Department* [2017] EWHC Admin 297 at [47].

¹⁰⁴ Immigration Rules, Appendix AR 2.4

¹⁰⁵ Independent Chief Inspector of Borders and Immigration, no 99 above, 8.

¹⁰⁶ Independent Chief Inspector of Borders and Immigration, *A Re-inspection of the Administrative Review Process* (London: ICIBI, 2017), para 2.6.

469 On top of this, the replacement of appeals with reviews reveals a wider flawed design.
470 Without appeals, recourse to judicial review becomes more likely. However, for challenging
471 individualised decisions, judicial review does not provide as effective a remedy as an appeal.¹⁰⁷
472 Tribunals undertake a full examination of the factual and legal basis of an individual’s case. Their
473 decisions are final, subject to any onward challenge. The inability of the judicial review court to
474 engage in fact-finding or to substitute decisions renders it an ‘entirely unsatisfactory’ mechanism for
475 determining individual fact-sensitive issues.¹⁰⁸ Judicial review only enables the court to quash a
476 decision on relatively narrow grounds. It is also more costly, takes longer than appeals, and the
477 Upper Tribunal currently has a high caseload.¹⁰⁹

478 The suspicions of immigration lawyers—that the Home Office cannot be trusted to mark its
479 own homework—have effectively been confirmed by poor implementation. The Chief Inspector of
480 Borders and Immigration has concluded that there was ‘there was significant room for improvement
481 in respect of the effectiveness of administrative review in identifying and correcting case working
482 errors, and in communicating decisions to applicants’.¹¹⁰ Even the normally defensive Home Office
483 accepted that ‘quality has not consistently been of the standard to which we aspire’ and largely
484 accepted the recommendations made.¹¹¹ A subsequent investigation found some improvements by
485 the Home Office.¹¹² Yet, it also found that the Home Office had been unable to demonstrate that it
486 had delivered an efficient, effective, and cost-saving replacement for the previous appeals
487 mechanisms.¹¹³ There continue to be serious weaknesses remaining in respect of reason-giving, the

¹⁰⁷ *R v Secretary of State for the Home Department, ex parte Saleem* [2001] 1 WLR 443, 451 (Roch LJ); *Khan v Secretary of State for the Home Department* [2017] EWCA Civ 1755 at [46] (Irwin LJ).

¹⁰⁸ *R (Gazi) v Secretary of State for the Home Department (ETS – judicial review) IJR* [2015] UKUT 00327 (IAC) at [36]-[40]; *SM and Qadir v Secretary of State for the Home Department (ETS – Evidence – Burden of Proof)* [2016] UKUT 00229 (IAC) at [102].

¹⁰⁹ R. Thomas, ‘Mapping Immigration Judicial Review Litigation: An Empirical Legal Analysis’ [2015] PL 652; R. Thomas, ‘Immigration Judicial Reviews: Resources, Caseload, and “System-manageability Efficiency”’ (2016) 21 *Judicial Review* 209.

¹¹⁰ Independent Chief Inspector of Borders and Immigration, no 99 above, 2.

¹¹¹ Home Office, *Response to the Independent Chief Inspector’s Report: An Inspection of the Administrative Review Processes Introduced Following the 2014 Immigration Act* (London: Home Office, 2016) 1.

¹¹² Independent Chief Inspector of Borders and Immigration, no 105 above.

¹¹³ *Ibid.*, 2

488 lack of a dedicated team for overseas reviews, and the variable level of quality assurance for
489 overseas and border reviews. In its response to the report, the Home Office, noting that in-country
490 reviews have improved, accepted that progress has been slower for reviews undertaken overseas
491 and at the border.

492

493 **Does administrative review enhance or weaken administrative justice?**

494 The basic test of administrative justice is whether the qualities of a decision-making process provide
495 arguments for the acceptability of its decisions.¹¹⁴ Acceptability implies trust and confidence.¹¹⁵ The
496 above examination of different administrative review schemes presents a highly mixed picture.
497 There are pockets of good practice. It is also apparent that some individual claimants may well feel
498 that their particular cases were handled satisfactorily regardless of weaknesses in the wider
499 administrative review system. Nonetheless, there are serious concerns concerning the operation of
500 some administrative review schemes, in particular mandatory reconsideration and immigration
501 reviews. In principle, administrative review could provide a swift and effective review of a decision,
502 but in practice, the quality of review procedures and decision outcomes is highly variable. Success
503 rates are substantially lower than those of tribunals. Mandatory reconsideration seems to deter
504 many benefit claimants from pursuing their case to a tribunal. Immigration appeals have been
505 largely abolished. There is little evidence that administrative review has raised the quality of initial
506 decisions. Many of the legitimising qualities of tribunals—judicial procedures; independent, judicial
507 and specialist decision-makers; and better reasoned decisions—have effectively been jettisoned for
508 little in return. In light of such features, it is unlikely that many claimants would have confidence in
509 administrative review as an adequate remedy. It might be objected that this analysis is misplaced:
510 administrative review will inevitably be seen as inferior when compared with tribunals. But, given
511 the relative importance of decisions, everyone ought to be able to expect a good decision to

¹¹⁴ Mashaw, no 1 above, 24-25.

¹¹⁵ R. Kagan, 'The Organisation of Administrative Justice Systems: The Role of Political Mistrust' in M. Adler (ed.), *Administrative Justice in Context* (Oxford: Hart, 2010).

512 determine their entitlements. It is important not to allow the search for the best to defeat the good
513 but, to be effective, redress procedures must achieve minimum standards.

514 Even from a more sanguine view of the new administrative review, the practical effect of
515 administrative review has still been to weaken the ability of people to secure effective redress.
516 Process does not wholly determine outcome. Nevertheless, procedural restrictions are likely to have
517 substantive effects thereby worsening the position for claimants.¹¹⁶ The risk is that fewer claimants
518 now qualify because of the shift from tribunals to administrative review. Administrative review has
519 also weakened public accountability of government. The transparency and openness of independent
520 tribunal scrutiny has been significantly reduced. Indeed, it has been argued that the real attraction
521 of administrative review is that it enables government to conceal from public view the full
522 inadequacies of initial decision-making.¹¹⁷ Another wider consequence is that the proliferation of
523 different administrative review schemes represents another likely source of confusion to the public
524 in its understanding of the administrative justice system: the subtle though crucial dichotomy
525 between appeals and complaints is not widely appreciated by the public and liable to confuse.¹¹⁸
526 Administrative review adds a further set of distinctions likely to exacerbate the problem. On the
527 basis of the way the systems have been implemented, the recent expansion of administrative review
528 is, in essence, a problematic response to the judicialisation of tribunals.

529 Enhancing the quality of administrative review is then required. Indeed, the Law Commission
530 is to undertake a law reform project on administrative review.¹¹⁹ We suggest that the following
531 reforms are worthy of consideration. First, to ensure their independence and to insulate them from
532 political and administrative pressures, administrative review systems need to be separate and
533 autonomous from initial decision-making institutions. Second, reviews should be undertaken by

¹¹⁶ M. Adler, 'Understanding and Analysing Administrative Justice' in M. Adler (ed.), *Administrative Justice in Context* (Oxford: Hart, 2010) 132-136; *R (Parmak) v Secretary of State for the Home Department* [2006] EWHC 244 (Admin) at [27] (Sullivan J).

¹¹⁷ T.G. Ison, "'Administrative Justice": Is It Such a Good Idea?' in M. Harris and M. Partington (eds), *Administrative Justice in the 21st Century* (Oxford: Hart, 1999) 39.

¹¹⁸ P. Dunleavy, S. Bastow, J. Tinkler, S. Goldchuck and E. Towers, 'Joining Up Citizen Redress in UK Central Government' in M. Adler (ed.), *Administrative Justice in Context* (Oxford: Hart, 2010) 422-428.

¹¹⁹ Law Commission, *Thirteenth Programme of Law Reform* (2017-18 HC 640), pp.13-14.

534 specialist and expert reviewers with experience of initial decision-making. Such reviewers need
535 specialist training in the essential aspects of decision-making: fact-gathering and assessment; using
536 inquisitorial procedures effectively; and reason-giving. At present, government departments have
537 complete control of both initial and review decisions and procedures. In this respect, the refusal of
538 both the DWP and the Home Office to allow continuous independent and external oversight of the
539 operation of their review procedures is an unfortunate missed opportunity to promote public
540 confidence.¹²⁰ Third, government bodies need to take more responsibility for promoting the quality
541 of both procedures and decision outcomes. At present, some claimants experience unnecessary
542 difficulty in attaining their entitlements. This is self-defeating as it undermines the legitimacy of
543 government. Government must ensure that the quality of procedures and decisions has equal
544 priority as speed and cost. To this end, government needs to invest in developing adjudication as a
545 decision-making technique and embed a culture of adjudication within the administrative review
546 process in order to raise and maintain the quality of decision-making. Another option would be to
547 make government departments themselves to pay the costs of allowed appeals. More generally,
548 there needs to be commitment to the principle of systematic improvement to enhance the quality of
549 both review processes and decisions. The flaw of current review processes is that it is possible to
550 replicate the same quality as tribunals on the cheap. The fate of such proposals of course rests with
551 government itself taking the initiative.¹²¹

552

553 **Administrative review, judicial power and the separation of powers**

554 In this final part of the article, we consider the implications of the expansion of administrative review
555 and the corresponding displacement of tribunals for the wider understanding of the public law

¹²⁰ Social Security Advisory Committee, above no 73, 50; Department for Work and Pensions, *Government Response: SSAC report on decision making and mandatory reconsideration* (2017). The Home Office did consider establishing an external quality assurance panel to review a random anonymised sample of decisions, only to then reject it: Home Office, above no 108, [11.6].

¹²¹ E.A. Posner and A. Vermeule, 'Inside or Outside the System?' (2013) 80 *University of Chicago Law Review* 1743.

556 system. In particular, we consider what insights this experience offers in respect of the debate on
557 judicial power and the separation of powers within the UK constitution.

558 In recent years, public law scholars in the UK have observed how the power of judges to
559 review government decisions has increased.¹²² There are many examples commonly offered in
560 support of observations, such as the development of common law rights jurisprudence and the
561 enactment of the Human Rights Act 1998. The fear of some is that the courts are progressively
562 trespassing beyond their appropriate constitutional and institutional boundaries, and becoming too
563 involve in what are essentially ‘policy’ decisions that ought to be taken by other decision-makers.¹²³
564 This broad concern has been given even greater prominence voice by the Judicial Power Project.¹²⁴
565 The founders of the Project, and those who have expressed similar concerns, have regularly based
566 their arguments up a reconstruction of JAG Griffith’s political constitution thesis, claiming that the
567 UK’s traditional constitutional arrangement, which placed emphasis on political controls on power,
568 are being supplanted by an emphasis on legal constitutionalism.¹²⁵ The concern is that judicial power
569 is usurping political and democratic power—breaching the separation of powers¹²⁶ and creating a
570 “juristocracy.”¹²⁷ While there have been volumes written on the topic of judicial power in the past
571 few years alone, the significant dismantling of judicial control of government effected through the
572 expansion of administrative review and the displacement of tribunals has been entirely absent from
573 this debate.

¹²² This has been an international trend, see *e.g.* M. Shapiro and A. Stone-Sweet, *On Law, Politics and Judicialization* (OUP, Oxford 2002); A. Stone-Sweet, *Governing with Judges: Constitutional Politics in Europe* (OUP, Oxford 2000).

¹²³ See *e.g.* J. Sumption QC, ‘Judicial and Political Decision-Making: The Uncertain Boundary’ (FA Mann Lecture, 2011); Lord Sumption, ‘The Limits of Law’ in NW Barber, Richard Ekins and Paul Yowell (eds), *Lord Sumption and the Limits of the Law* (Hart, Oxford 2016),

¹²⁴ Judicial Power Project, “About” available at: <<http://judicialpowerproject.org.uk/about>> [accessed 6 July 2018]. Far from all are convinced by the mission of the Project, see P. Craig, ‘Judicial Power, the Judicial Power Project and the UK’ (2018) 36(2) *University of Queensland Law Journal* 355.

¹²⁵ J.A.G. Griffith, ‘The Political Constitution’ (1979) 43 M.L.R. 1; G. Gee, ‘The political constitutionalism of JAG Griffith’ (2008) 28 *Legal Studies* 20.

¹²⁶ See *e.g.* R. Ekins (ed.), *Judicial Power and the Balance of Our Constitution* (Policy Exchange, London 2018).

¹²⁷ R. Hirschl, *Toward Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press, Massachusetts 2007).

574 The growth of administrative review is a clear demonstration of how judicial power has
575 changed in *multiple* directions in recent years. While there has no doubt been an expansion of legal
576 principle in some areas of public law, developments with administrative review shows how effective
577 judicial control has also been removed and marginalised in other areas. This prompts questions
578 about how *power* is understood in the debate around judicial power. The mainstream debate often
579 takes power to mean the contours of legal doctrine as explained by judges, usually those judges
580 sitting in appellate courts. This is an important metric. Yet, judicial power can also, and should also,
581 be understood on the basis of what power is actually exercised over government. On this approach,
582 the growth of administrative review is one of the most significant developments in judicial power in
583 recent years. Far from being part of a rising “juristocracy,” the powers of some parts of the tribunal
584 judiciary—those that have been effectively or legally displaced by administrative review—occupy a
585 relatively precarious position within the UK’s constitutional framework. That is to say, they are a
586 form of judicial control on administrative power that is insecure and subject to being significantly
587 affected by the political and economic pressures that influence government policy.

588 The rise of administrative review also provokes reflection on the nature of the separation of
589 powers more generally. Increasingly, the principle is held out as significant within the UK
590 constitution.¹²⁸ In contrast to the idea of “checks and balances” under the separation of powers,
591 recent changes to administrative review stand as a clear example of the ability of government to
592 reshape fundamentally—in both design and effect—its own procedures and external dispute
593 mechanisms, with little input or oversight from Parliament. Indeed, it underlines the huge amount of
594 power inherent in positions occupied by government as designer, operator, and participant of the
595 administrative justice system. From this perspective, the growth of administrative review in social
596 security and immigration represents a form of capture of the justice system by which government

¹²⁸ See e.g. R. Masterman, *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom* (CUP, Cambridge 2010); N. Barber, ‘The Separation of Powers in the British Constitution’ (2012) *Law: The Journal of the Higher School of Economics* 3.

597 departments have extended their own dispute resolution systems at the expense of public justice
598 systems.

599 The performance of administrative review systems continues to receive insufficient
600 attention from Parliament. The main external check on the performance of the administrative
601 review systems have been reports by the Social Security Advisory Committee and the Independent
602 Chief Inspector of Borders and Immigration, which recommended detailed reforms. Some, though
603 far from all, of proposed reforms have been accepted. Such a state of affairs provides further
604 support to Rubin’s thesis that, in the context of the modern administrative state, the account of
605 government we derive from the classic separation of powers metaphor of “three branches” checking
606 and balancing seems out of place and out of time.¹²⁹ Instead, it reminds us that it is vital to move
607 beyond conceptualisations of state based on a tripartite separation of powers mode and think more
608 closely about the complex “networks” of accountability that give shape to the state and the justice
609 system.

610 Finally, despite much discussion concerning the growth of judicial power, the courts appear
611 reluctant to intervene meaningfully in the operation of administrative review systems. The courts
612 have recognised that administrative review is a markedly less favourable remedy than tribunal
613 appeals.¹³⁰ The courts have also undertaken wide-ranging interventions in the operation of *judicial*
614 procedures on the ground of systemic inherent unfairness.¹³¹ However, they appear reluctant to
615 inquire into how an *administrative* process handles a mass caseload.¹³² Article 6 ECHR right to a fair
616 trial offers no scope for intervention in the immigration context, but has some potential bite in the

¹²⁹ E. Rubin, *Beyond Camelot: Rethinking Politics and Law for the Modern State* (Princeton University Press, New Jersey 2007), chapter 2.

¹³⁰ *R (Akturk) v Secretary of State for the Home Department* [2017] EWHC Admin 297 at [71].

¹³¹ See, e.g., *Osborn v Parole Board* [2013] UKSC 61; *Detention Action v Secretary of State for the Home Department* [2015] EWCA Civ 840; *R (Howard League for Penal Reform) v Lord Chancellor* [2017] EWCA Civ 244; F. Powell, ‘Structural Procedural Review: An Emerging Trend in Public Law’ (2017) 22 J.R. 83.

¹³² *R (Edwards) v. Birmingham City Council* [2016] EWHC 173 (Admin) at [129]; *Hossain & Others v Secretary of State for the Home Department* [2016] EWHC 1331 (Admin) at [144]-[146].

617 social security context.¹³³ The long-established curative principle, that access to judicial review—as
618 opposed to an appeal—is sufficient to remedy administrative unfairness, has increasingly been
619 doubted. The Upper Tribunal and the higher courts have emphasised the advantages of appeals over
620 judicial review when expanding immigration appeals and, in the social security context, to prevent
621 the mandatory reconsideration time limit from reducing access to tribunals.¹³⁴ There are also
622 indications that a putative common law jurisprudence on access to justice could provide a basis for
623 judicial intervention, though this is only ever likely to shave off some particularly sharp edges.¹³⁵

624 Overall, the recent experience with administrative review exposes a very different side to
625 recent debates about judicial power and the separation of powers within the UK constitution.
626 Instead of the expanded powers wielded by a juristocracy, this is evidence of significant curtailing of
627 judicial control of government. Instead of effective Parliamentary oversight and control of
628 administrative power, we see administration redesigning and controlling its own redress system
629 while being subject to minimal scrutiny from the legislature. Finally, we see that the courts have only
630 limited power to influence the operation of administrative review system which, on examination,
631 can have adverse consequences for administrative justice.

632

633 **Conclusions**

634 This article has considered the recent rapid growth of administrative review through detailed studies
635 of social security and immigration review processes. This experience reflects a wider and inherent
636 predicament of contemporary justice systems. All justice processes face a fundamental trade-off

¹³³ Immigration decisions fall outside the scope of Article 6 ECHR: *Maaouia v France* (2001) 33 EHRR 42. Rights to social security benefits are ‘civil rights’ for the purposes of Article 6 ECHR: *Schuler-Zraggen v Switzerland* (1993) 16 EHRR 405. In *MM v Secretary of State for Work and Pensions* [2016] UKUT 36 (AAC), the Upper Tribunal held that the six months taken by the DWP to reconsider its decision breached the ‘equality of arms’ principle under Article 6 ECHR by placing the appellant at a substantial disadvantage.

¹³⁴ *R (Mohibullah) v Secretary of State for the Home Department (TOEIC – ETS – judicial review principles)* [2016] UKUT 00561 (IAC); *Khan v Secretary of State for the Home Department* [2017] EWCA Civ 1755; *R (CJ) and SG v Secretary of State for Work and Pensions* [2017] UKUT 324 (AAC).

¹³⁵ *R (UNISON) v Lord Chancellor* [2017] 3 WLR 409.

637 between the need for fairness and efficiency.¹³⁶ People want an authentic and credible means for
638 resolving their disputes which are of high-quality, effective, timely, and use fair procedures. In
639 practice, formal legal procedures tend to be costly. Increases in cases produce backlogs and delays,
640 and ultimately often frustrate the immediate political ends governments is striving for. In response,
641 the government has been seeking to formulate policy responses to cost and delay. One response has
642 been to attempt reduce demand on formal legal procedures. Other responses include streamlining
643 formal legal procedures or diverting disputes into ancillary alternative processes. The basic problem
644 is that such alternative processes typically, though not necessarily, lack the authenticity and
645 effectiveness of formal legal procedures and tend to weaken public confidence.

646 In principle, administrative review could be an advantageous way of seeking to resolve
647 disputes quickly, at lower cost, and with less anxiety for individuals than appearing before tribunals.
648 However, drawing upon a range of empirical evidence, we have demonstrated that the operation of
649 administrative review in practice—at least in the contexts we have discussed—is characterised by
650 multiple problems. It has found that the expansion of administrative review tends to reduce both
651 access to justice and the quality of decision-making. Overall, there is a lack of independence and
652 impartiality in how reviews are undertaken. There is variation in the way evidence is handled and in
653 how review decisions are made. Administrative review success rates of administrative review are far
654 lower than those of tribunals. There is a considerable difference between a review as a quick check
655 as to whether the initial decision was wrong compared with a full de novo judicial fact-finding
656 assessment. The insertion of administrative review has either withdrawn access to tribunals or made
657 such access more difficult—displacing tribunals and curtailing judicial control of government. These
658 shortcomings severely limit the effectiveness of administrative review. The overall outcome is a
659 negative one for individuals in terms seeking access to justice to obtain their legal entitlements. At

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D. Cowan, A. Dymond, S. Halliday and C. Hunter, 'Reconsidering mandatory reconsideration' [2017] P.L.
215.

660 least in its present form, the development of administrative review represents a significant
661 deterioration in the quality of administrative justice system.

662 Placed within the wider context of the UK's constitutional arrangements, the tale of
663 administrative review told here offer a contrasting narrative to that at the centre of recent debates
664 on judicial power and the separation of powers. This is a tale of de-judicialisation at a time when the
665 dominant focus is on the expansion of judicial power that is placed in the hands of an elite class of
666 judge. The growth of administrative review and the corresponding displacement of tribunals is
667 highlight how some parts of the judiciary occupy a position that is liable to being heavily affected by
668 economic and policy changes.

669 A final, forward-looking word is needed on the digital transformation programme being
670 implemented by the Ministry of Justice and the status of administrative review in light of those
671 reforms.¹³⁷ The board intention is to transform tribunals by making them digital by default, in order
672 to improve both efficiency and access to justice. In the social security context, physical tribunal
673 hearings are to be largely, though not fully, replaced by continuous online hearings in which
674 appellants interact with the tribunal through an online messaging service. Appeals handled online
675 would be resolved much more quickly than the current average of 20 weeks. In the immigration
676 context, greater use will be made of video link hearings. With the advent of online tribunal
677 procedures, the distinction between administrative review and tribunal procedures may again be
678 reconsidered: it makes little sense to operate paper-based administrative review procedures while
679 simultaneously introducing online tribunal hearings. There are many questions and concerns about
680 these reforms¹³⁸ and reintroducing appeals via a new online approach would likely increase the
681 caseload of tribunals, but doing so would also likely enable swifter and better quality decisions than
682 that currently provided by administrative review. Such a step would follow a logic that pursues the
683 enhancement of administrative justice. However, as highlighted above, the digitalisation of tribunals

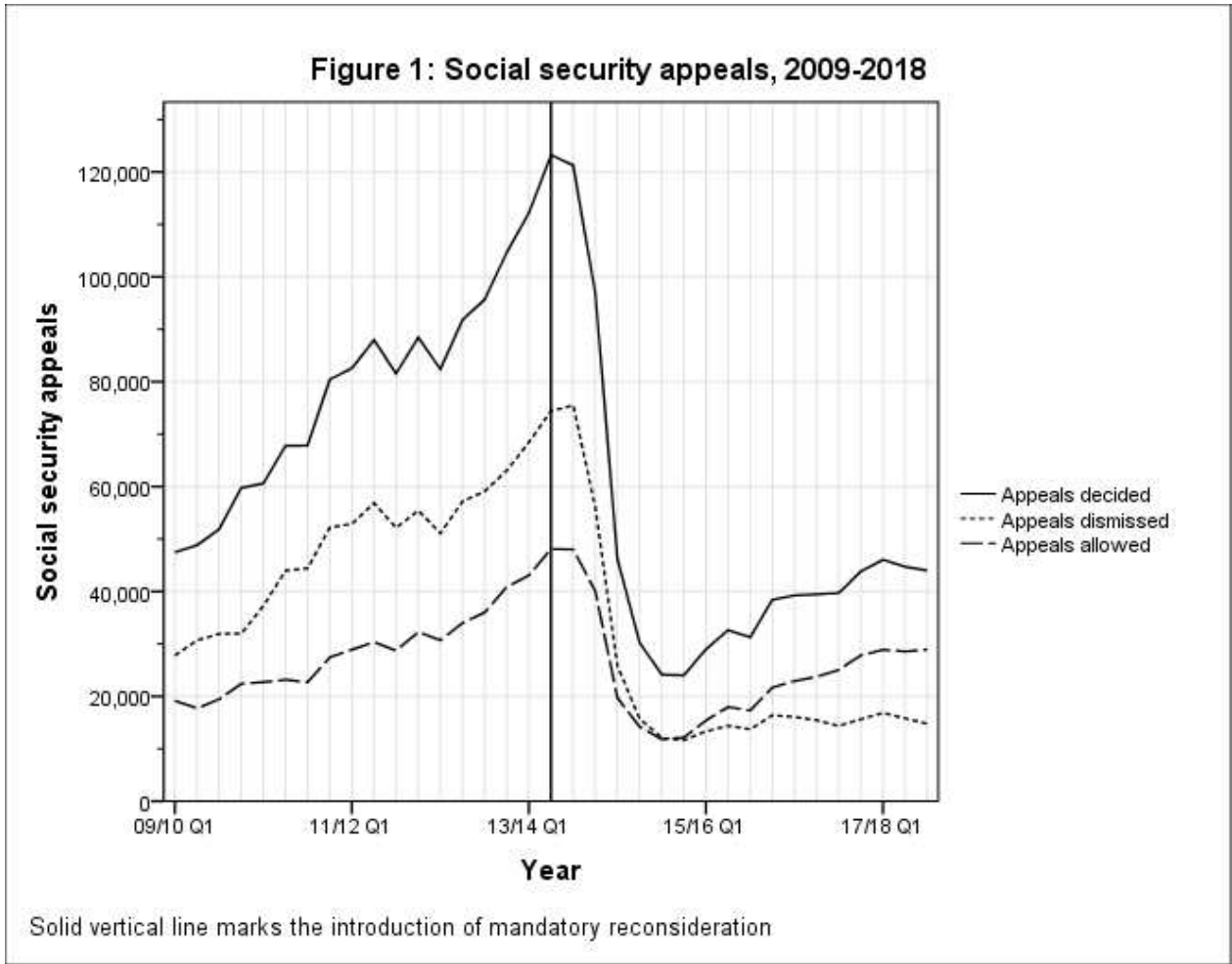
¹³⁷ Sir Ernest Ryder, Senior President of Tribunals, 'The Modernisation of Access to Justice in Times of Austerity' (*5th Annual Ryder Lecture*, University of Bolton, 3 March 2016).

¹³⁸ R. Thomas and J. Tomlinson, *The Digitalisation of Tribunals: What we know and what we need to know* (Public Law Project and UK Administrative Justice Institute, 2018).

684 is the Ministry of Justice’s response to the economic and political circumstances in which its finds
685 itself, while administrative review was the response of other departments—namely, the Home
686 Office and DWP. It would be naïve to suggest the Ministry of Justice ongoing reform project will be
687 the breakthrough moment where a joined-up approach to administrative justice system-design is
688 deployed, when that has not been the case so far. Nevertheless, it does indicate that there is a need
689 to reform the effectiveness of justice processes and this should be focused exclusively on tribunals
690 and courts. Given the increasing prominence of administrative review as either a substitute to or a
691 mandatory stage prior to appeals and the concerns raised, the effectiveness and quality of review
692 processes also require improvement.

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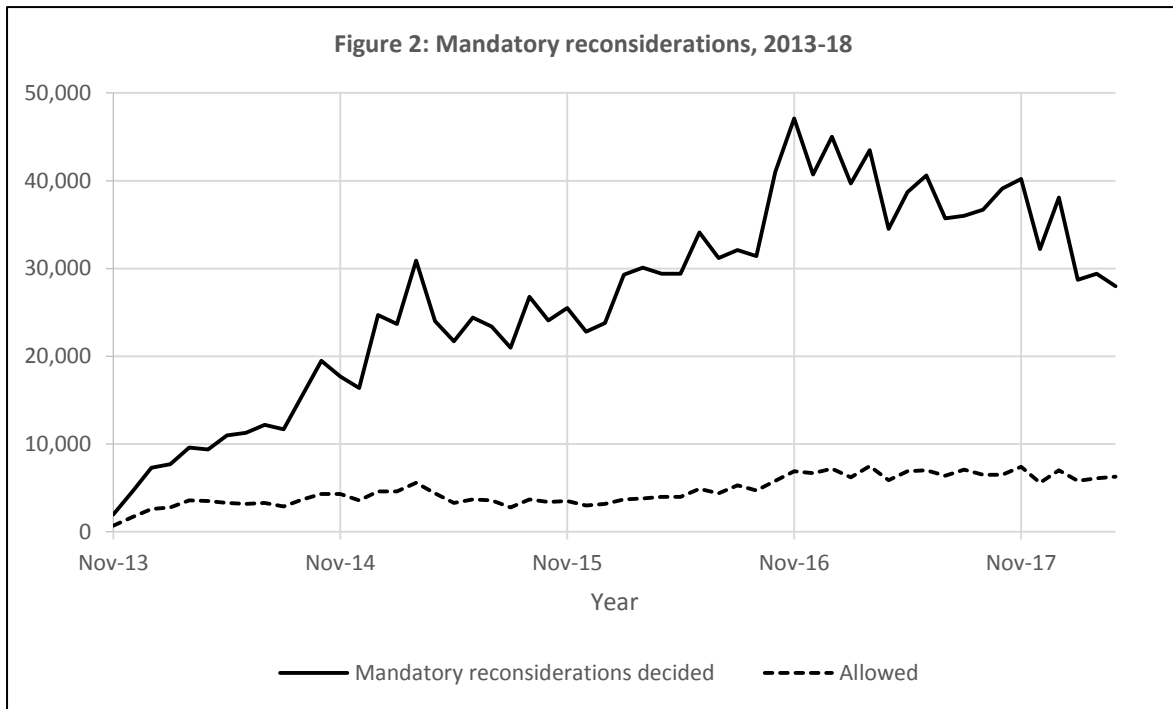
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699 Note: this Figure shows the number of social security appeals decided, allowed, and dismissed. Source: Ministry

700 of Justice, *Tribunals and Gender Recognition Statistics Quarterly* (2018).

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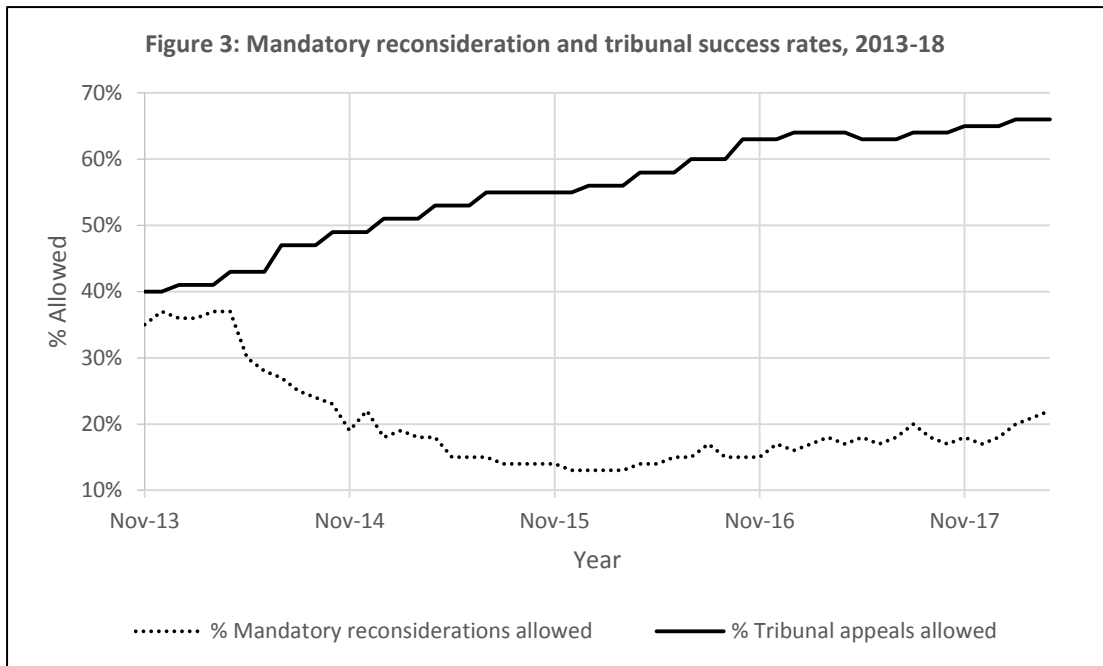
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705 Note: this figure shows the number of mandatory reconsiderations decided and those allowed in favour of
 706 claimants. The data is taken from: Source: DWP, *Employment and Support Allowance: Work Capability*
 707 *Assessments, Mandatory Reconsiderations and Appeals* (2018); DWP, *Personal Independence Payments:*
 708 *Official Statistics* (2018).

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712 Note: this Figure shows the proportion of social security appeals allowed by the First-tier Tribunal (Social
 713 Entitlement) Chamber and the proportion of mandatory reconsiderations allowed in favour of claimants.

714 Sources: DWP, *Employment and Support Allowance: Work Capability Assessments, Mandatory*
 715 *Reconsiderations and Appeals* (2018); DWP, *Personal Independence Payments: Official Statistics* (2018);
 716 Ministry of Justice, *Tribunals and Gender Recognition Statistics Quarterly* (2018).

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