Administrative Justice Council Workshop Report:

Administrative Justice Decision-making and Procedures

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The Administrative Justice Council

The Administrative Justice Council oversees the whole of the administrative justice system in the UK and advises government, including the devolved governments, and the judiciary on the development of the system. The purpose of the Administrative Justice Council is to help make the administrative justice system increasingly accessible, fair and effective by: playing a pivotal role in the development and sharing of good practice; promoting understanding, learning and continuous improvement; and ensuring that the needs of users are central.

The Administrative Justice Council aims to keep the operation of the administrative justice system under review; considers how to make the administrative justice system more accessible, fair and efficient; advises the Lord Chancellor, other relevant ministers and the judiciary on the development of the administrative justice system; shares learning and areas of good practice across the UK; to provides a forum for the exchange of information between Government, the judiciary, and those working with users of the administrative justice system; to identifies areas of the administrative justice system that would benefit from research; and makes proposals for reform.

The Council is chaired by the Senior President of Tribunals, Sir Ernest Ryder, a Lord Justice of Appeal. Membership of the Council includes senior representatives from members of the judiciary, civil servants concerned with administrative justice, public service ombudsman and other public sector complaint handling bodies, legal professional bodies, non-governmental organisations or groups representing 'users' of administrative justice and academics and other experts in the field of administrative justice, including those from, and working with, devolved administrations.

November 2018 workshop

In November 2018, the Academic Panel of the Administrative Justice Council organised a workshop held at the Institute for Advanced Legal Studies, London on administrative justice decision-making and procedures. The purpose of the workshop was to bring together stakeholders and people from different parts of the administrative justice system to share perspectives and approaches and to discuss reform proposals. The purpose of this report is to provide an overview of the workshop presentations and discussions.

The event was generously supported by the University of Manchester's Economic and Social Research Council Impact Accelerator Account.

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Executive Summary

This report is based on a workshop organised by the Academic Panel of the Administrative Justice Council. It explored a range of issues concerning administrative justice decision-making and procedures and involved both presentations by leading speakers and discussions. These issues included: tribunals modernisation and reforms; the quality of decision-making and the costs of poor decisions; administrative review systems; the experience of users and non-users; role of ombudsmen and their reform; cognitive biases and decision-making; and case-worker competency frameworks. The following findings and recommendations are based on the workshop presentations and discussions. These findings seek to contribute to the public debate and offer critical reflections on how to develop and improve the development of administrative justice.

Tribunals reform

- Tribunal modernisation and reform will make greater use of online processes to make tribunals more accessible, efficient, and user-friendly. At the same time, reform must also cater for people who do not wish to use online processes.
- Tribunals reform needs to proceed on the basis of consent of those affected.
- Reforms need to be, and will be, piloted carefully and assessed before they are rolled out more widely.

Decision-making

- All decision-making, whether by public bodies, tribunals, or ombuds schemes, should be of high a standard as possible.
- Government should consider evaluating the wider knock-on costs of poor decisions. Such costs go wider than the direct financial costs of appealing to a tribunal. They also include: wider costs in other parts of the public sector; and the delays and emotional costs for the individual concern.
- There is an important debate over to the best means of improving the quality of decision-making. Is a polluter pays principle the way forward? Or would changes to organisational culture be more effective? This is an important issue which the Administrative Justice Council should engage with.
- Decision-making is likely to affected by cognitive biases and heuristics. This is an area that would benefit from more research. There is some awareness of these issues within the judiciary. Incorporating more of this learning within the training will be beneficial.

Ombuds

- The UK Government should proceed with its proposed plans for ombuds reform in England. At the same time, there is a strong case for changes to the proposed Bill. There is a very strong case that the proposed English Public Services Ombuds should have the power to undertake own-initiative investigations.
- The Ombudsman Association's Caseworker Competency Framework should be used as a model that could usefully be adapted to other analogous roles within the administrative justice system.

1. INTRODUCTION

Administrative justice is concerned with enabling people to ensure that they receive justice in decision-making when they interact with government and public bodies. Administrative justice issues arise across the entire range of activities undertaken by all levels of government (central, local and devolved governments). Common areas of administrative justice include, but are no means limited to, the following: benefits; immigration; homelessness; tax; education; special educational needs; healthcare; and many other areas.

The administrative justice system is the overall system by which administrative decisions taken including the procedures for making such decisions, the law under which such decisions are made, and the systems for resolving disputes and airing grievances in relation to such decisions. A major aspect of 'administrative justice' concerns the remedies available to people who want to challenge administrative decisions or to complain about the conduct of public bodies. Such redress systems principally include courts, tribunals, ombuds, and other complaint-handling schemes. Administrative justice, in courts and tribunals, allows individuals to vindicate their rights against the state and is crucial to the maintenance of the rule of law. Administrative justice in the form of ombuds and other complaint-handling schemes enables individuals to secure the redress of grievances and also allows for systemic investigations of aspects of government.

It is a period of change for administrative justice. Major issues include: the accessibility of administrative justice remedies; the quality of decisions; tribunals reform and modernisation; the role and reform of ombuds; and related issues. Accordingly, a workshop was held to consider these matters.

2. THE WORKSHOP

In November 2018, the Academic Panel of the Administrative Justice Council organised a workshop event on administrative justice decision-making and procedures. The purpose of the workshop was to bring together stakeholders and people from different parts of the administrative justice system to share perspectives and approaches and to discuss reform proposals. There were presentations and discussions. By drawing together a range of leading participants and prominent stakeholders, the workshop considered a variety of themes across different contexts. Key themes and issues included: tribunals modernisation and reforms; the quality of decision-making and the costs of poor decisions; administrative review systems; the experience of users and non-users; role of ombudsmen and their reform; cognitive biases and decision-making; and case-worker competency frameworks.

At the workshop, presentations were given by the following leading participants in the administrative justice system:

- Sir Ernest Ryder, Senior President of Tribunals and Chair of the Administrative Justice Council: Opening address
- John Aitken (Chamber President of the First-tier Tribunal (Social Entitlement Chamber): 'Reform of social security tribunals'
- Claire Blades (Citizens Advice): 'Administrative decision making, digital skills and advice'
- Michael Clements (President of the First-tier Tribunal (Immigration and Asylum Chamber)): 'HMCTS reform in the Immigration and Asylum Chamber'
- Daniel Flury (HM Courts and Tribunal Service): 'HMCTS tribunals reform'
- Donal Galligan (Ombudsman Association): 'Caseworker Competency Framework'
- Professor Christopher Hodges (University of Oxford): 'Affecting organisational culture: lessons from behavioural psychology and private sector regulation & compliance'
- Kevonte Mitchell (Behavioural Insights Team): 'Behavioural insights and administrative justice'
- Michael Reed (Free Representation Unit): 'A personal perspective'
- Diane Sechi (Senior Pro Bono Lawyer, Simmons and Simmons, Administrative Justice Council Pro bono panel): 'The costs of poor decision-making'
- Warren Seddon (Parliamentary and Health Service Ombudsman): 'Ombuds'
- Ronan Toal (Barrister, Garden Court Chambers): 'Administrative justice and immigration'

3. TRIBUNALS REFORM

A prominent contemporary theme of administrative justice is tribunals reform and digitisation.[1] This theme was addressed in the presentations and discussions.

Tribunal reform in general

Daniel Flury (HMCTS) gave a wider perspective on tribunal reform noting that the tribunal system is made up of a number of disparate entities (social security, immigration, etc). It has only been brought together over the last 10 years. This process encountered a number of challenges, such as: numerous IT systems; and bringing together the diversity of buildings. The current challenge is how to engage in reform. HMCTS needs to become more efficient, but reform is also required to provide a better service for people. This will involve fewer, shorter hearings and paperless hearings.
What does access to justice look like? In the past, access to justice was sometimes understood as involving a local court or tribunal. Things have now moved on. Access to justice will from now on mean more flexible and online access to justice. A critical aspect of the reform programme is to have online processes in a way that gives people each access and which also supports better management and assembling of and better case management.

Online submission facilities will include:

- 'Submit your appeal', by which people can submit appeals online. Some 20% of social security appeals – one in five Personal Independence Payment appeals – are now commenced online. HMCTS has commenced with reforming the process for the most vulnerable cohort of users and the most digitally excluded people. The whole spectrum of circumstances involved is huge ranging from people appealing online to someone visiting the tribunal carrying a bag with his medical records. Reforms will have to cater for a variety of different needs. The new online submission facility will to some extent replicating the existing system. If an appellant gets a rejection letter from a government department, then there will be a link they can click on and it comes straight to HMCTS.
- 'Track your appeal'. This is a text messaging service for appellants. It was anticipated that automated text messages would reduce telephone calls to call centre but that has not been proven to be the case: the more information people have, the more they want.
- 'Evidence share'. This is a new way to share papers across HMCTS, with an emphasis on effective evidence management. For instance, in social security appeals, evidence sharing will be more effective through communication between claimants, HMCTS and the Department for Work and Pensions. This will speeds things up. Documents can be scanned into the system and to reduce delays.
- Caseworkers. A greater role for tribunal caseworkers will assist with the exercise of delegated powers and free up judicial time.

[1] Ministry of Justice, Lord Chief Justice and Senior President of Tribunals, *Transforming Our Justice System* (2016).

- Continuous Online Resolution. This is the most radical reform. The idea is that the parties will engage with the tribunal online to narrow down and resolve the issues through asynchronous online dialogue. This is being developed not to replace, but to supplement conventional oral hearings. It will be a means by which the parties will chose how to do their hearing and another avenue by which the appellant can get to a conclusion. There is work going on to decide how appellants will respond to it and how government departments will use it.
- Video hearings. There has been a successful pilot in the tax tribunal.[2] The challenge is whether video hearings can be made scalable and operational.
- Reform is underway in both the Social Entitlement and Immigration and Asylum Chambers. It will be extended to Employment Tribunals and HMCTS is looking to extend to the General Regulatory Chamber and to link with the Upper Tribunal.

Social Security Tribunals

John Aitken, Chamber President of the First-tier Tribunal (Social Entitlement Chamber) spoke about the reform of social security tribunals. He commenced by stating that tribunal reform and modernisation must proceed on the basis of consent, an under-exploited idea in courts and tribunals. If tribunals are to reform, then it must be based on consent of those involved.

Tribunals typically handle appeals lodged by vulnerable people who appear without representation. There is a constant need for tribunals to keep in mind who they are dealing with and what their aim is. At the same time, with high caseload, tribunals need to be efficient. Tribunals must modernise, but also be familiar. People now expect rapid service and digital communications. The Leggatt report (2001) emphasised the need for tribunals to be innovative, informal and expert.[3] Digitisation in the rest of life has raised people's expectation levels.

Accordingly, the move toward digital handling of cases can help ensure cases are handled fairly, properly, and expeditiously. If an appellant is not happy with an online hearing, then the option of a traditional oral physical hearing remains. There are now sufficient examples to support the public's desire for online processes as evidenced by the Traffic Penalty Tribunal and the British Columbia Civil Resolution Tribunal.

With the proposed Continuous Online Resolution procedure for social security appeals, the appeal process can be commenced and undertaken online. A Judge can go straight into a case to check the evidence submitted, identify the main points, discuss with the parties online, and then ask the parties whether want an oral hearing or whether to deal with the case online. This will significantly increase the speed of the process. An individual will still be able to ask for an oral hearing if they wish to have one.

The First-tier Tribunal (Social Entitlement Chamber) is piloting online methods within a secure private forum and getting welfare advice agencies involved. There are also

[2] M. Rossner and M. McCurdy, *Implementing Video hearings (Party-to-State): A Process Evaluation* (2018).
[3] The Leggatt Report, *Tribunals for Users: One System, One Service, Report of the Review of Tribunals* (2001).

advantages to the initial decision-making government department, the Department for Work and Pensions, because it will received immediate feedback on the quality of initial decisions. There are also gains to HM Courts and Tribunals Service in terms of costs and to appellants in terms of speed and convenience. Welfare advice agencies who are having to spread themselves thinly will also be able to make contribute through the online process. Work is underway and assistance is needed in trialling this.

Overall, many people would prefer to have their case considered without the stress and inconvenience of an oral hearing and online is a technical way of doing that through a faster, more frictionless system. Many people are unfamiliar with courts and would prefer not to go to court if possible, but they do require proper engagement and assurance of proper consideration of their case. Accordingly, the tribunal is aiming to deliver to give the public what it wants.

Immigration and Asylum

Michael Clements, President of the First-tier Tribunal (Immigration and Asylum Chamber), spoke about reforms to the Immigration and Asylum Chamber. He noted that reform of immigration appeals needs to take account of their distinctive features. Appellants before immigration tribunals typically do not have English as a first language. It can be hard for them to understand what is going on in the process. There are also some very vulnerable people, such as torture survivors seeking asylum. Many appellants do not feel that they can trust any authority because in their country they have not had justice. Accordingly, they need to be treated as people who will need help to get through the process.

It is important that the tribunals identify pivotal issues in an appeal at the beginning of the process. On the other hand, some appellants wish to prolong the appeal process for as long as possible. Key reform principles are: simple, fair, and accessible. The Tribunal has been engaged with stakeholders and using agile delivery methods across a range of different pilots and projects. Appellants will be able to initiate appeals. The information sought from appellants will be greatly reduced; if they have already given information once before, e.g. to Home Office, then they will not be asked for it again. Appellants will not therefore need to complete a long appeal form.

It is hoped that the Home Office will be able to transfer details to tribunals to be uploaded directly. The Home Office is working with the Immigration and Asylum Chamber to create processes. The initial Home Office's decision will link with evidence and country guidance. This will, in effect, form the Home Office's bundle, which will come over in its entirety to the Immigration and Asylum Chamber. The appellant's representatives will be able to reply to say what they do and do not agree with.

The idea is to narrow down the issues at an earlier stage of the process. Tribunal case workers will case manage the hearings. An appeal will only get a hearing date when appeal is set down by the case workers. The Legal Aid Agency has acknowledged that there might need for front loading of work and payment. Some appeals may be disposed of by way of consent between the parties. The tribunal will be looking to streamline the process so that it is only dealing with matters relevant to an appeal. Another possible change will be to have

recording of hearings. Hearings in immigration tribunals are not currently recorded. However, they do need to be recorded. This would also enable the recording of oral decisions given by judges. In-country video link hearings will only be used if they enable appellants to give evidence in the best possible way.

However, video link hearings will be used in out of country appeals, known as section 94B appeals, in which the appellant gives evidence overseas at the British Embassy. The use of video-link in such appeals has been successful and of good quality: there is no delay and good quality. Video link in this context works well as it is the only remedy available as the appellant is removed before being able to appeal and it is not possible for the tribunal to order that the appellant be brought back to UK to give evidence. Online hearings will not necessarily be used for in-country appeals. However, much of the preliminary stages of the process could be done online.

4. DECISION-MAKING

Decision-making is at the centre of administrative justice. Key themes here concerned: the quality of decisions; how to improve decision-making; and cognitive biases that affect decision-making.

<u>The costs of poor decisions</u>

Diane Sechi, Senior Pro Bono Lawyer (Simmons and Simmons, AJC Pro Bono panel) gave a detailed case-study of one case that illustrates how the costs of just one incorrect decision can quickly stack up over time. An EEA national, escaping domestic violence, had ended up in rent arrears. Having developed a severe health condition that led to anxiety, she had been dismissed from her job and sought welfare benefits. Having had Housing Benefit, she moved address to a location in a full Universal Credit area, which she then claimed. Being computer illiterate, she got some help making a claim online. The DWP said she was not entitled. The claimant's pro bono adviser asked for a late mandatory reconsideration, but it was too late and the claimant lost her right of appeal. The advisor then told the DWP that the deadline could be extended up to 13 months and they can look at late reconsideration cases. The DWP official did not know about this, but an appeal was lodged anyway. The claimant's physical and mental health deteriorated. The appeal was deemed invalid as the wrong postcode had been entered and the DWP said they could not access the records. Things then escalated. The claimant still had the delayed repossession proceedings. She was going more frequently to her GP and to hospital. Social services became involved. But she could not get housing benefit, only Universal Credit. She lost faith in the system. She had no hot water and stopped eating. The claimant did not understand the transition to Universal Credit or why she was not getting letters. By this time the arrears had gone up to £8,000. The claimant then received a letter from DWP saying she was entitled to employment allowance and the right to reside. She was though still vulnerable and distrustful of the system.

Adding it all up, the total costs of the incorrect decision – the costs of DWP, the housing association, social services, the law centre, the Legal Aid Agency, the tribunal, the NHS, the GP and a psychiatric report – amounted to £18,200 for one incorrect decision. However, this

did not include the unquantifiable costs, emotional distress and loss of faith in system. The wider point is that poor administrative decision-making carries a wide range of financial and non-financial costs.

This case-study was described as a paradigm example of government failure to measure and save costs. Government rarely, if ever, considers the wider costs of incorrect decisions. If this one case were multiplied by the total number of incorrect decisions, then the costs are likely to be considerable, but government does not engage in this type of assessment.

How to improve decision-making

A general theme of administrative justice concerns improving the quality of initial decision-making. A challenge exists in that the quality of initial decision-making by front-line officials is often perceived to be variable. This in turn leads to a high volume of appeals to tribunals and complaints to public bodies and ombuds. Further, many initial decisions are over-turned by tribunals.

Can this issue be addressed effectively? There have been calls for better feedback mechanisms, and for recipient departments in central and local government to react and improve. But can feedback from Tribunals, judicial review and ombuds in fact affect initial decision-making? How does feedback affect initial decision-making? What affects initial decision-making?

The following points were discussed:

- Appeals are often allowed not because initial decisions were wrong, but because new evidence is presented at the tribunal hearing that was not before the initial decision-maker. In social security appeals, a hearing before the tribunal panel is usually the first time that a claimant has met the decision-maker in person to give oral evidence. Also, fact-finding and applying legal tests often involves discretion.
- It is necessary to understand that initial decision-makers are often under pressure to clear decisions quickly and their status is often a junior one.
- There are structural problems in the short-term and siloed nature of budgets within government. For instance, budgets in one area (e.g. the Department for Work and Pensions) are often constrained thereby leading to poor decision-making. This, in turn can have significant implications in other budget streams (e.g. the Ministry of Justice's budgets for tribunals) as tribunals are used to resolve clear instances of bad decisions that should not have been taken in the first place. A wider recognition within government of the interlinked nature of different budget streams would be an initial step to revolving some of these issues. Further, HM Treasury should be more involved in such matters.
- Further consideration should be given to introducing some form of 'polluter pays' principle by which initial decision-makers must contribute to the cost of redress mechanisms. This could introduce an incentive for raising the quality of initial decisions.
- Government ministers in the Ministry of Justice and government departments that take initial decisions (e.g. the Department for Work and Pensions) are aware of the

issues. It is recognised that there is merit in further considering the relationship between quality of decision-making and budgetary incentives. This is an issue that government needs to consider in detail.

- Speed of decision-making is the essence as regards social security entitlement. At the same time, there could be channels to cross refer issues between ombuds and courts/tribunals and also routes to avoid judicial reviews. Systemic issues can be picked up with ombudsman rather than overturning one or two decisions. Every individual mistake has the potential for systemic review by ombuds.

Professor Chris Hodges (Oxford University) offered a perspective by drawing upon learning and practice from the worlds of business and regulation, and regulatory mechanisms to affect behaviour and culture. Basically, the issues here concern an organisation's culture.[4]

Hodges distinguished between a legal paradigm and a cultural paradigm. A legal paradigm is based upon: setting rules; identifying breaches; enforcing breaches. It assumes that such enforcement will prevent all future breaches by the perpetrator and everyone else. By contrast, in a cultural paradigm, everyone engages in a common enterprise of 'doing the right thing' all the time. This needs constant awareness by all involved of what they are doing, openly questioning it, discussing what the right thing is in particular circumstances, and then acting.

The legal paradigm is based on deterrence theory. It is an ex post mechanism that assumes that enforcement will have (perfect) future ex ante effect. Perhaps it would be better to start with an ex ante approach from the start, e.g. prevention is better than cure. Deterrence assumes that the effect increases with (a) increasing the penalty and (b) increasing the likelihood of a penalty being applied. These theories have been undermined by the scientific findings of behavioural psychology and of empirical evidence on what works in achieving compliance and regulation.

By contrast, the cultural paradigm is: built on human biology (the ability to distinguish right and wrong) and behavioural science;[5] and segments people into those who think they are trying to do the right thing (most) and some who act out of criminal intent (only a few). It is also essential to use the right enforcement tools on the relevant people: using hard enforcement on people who are trying to do the right thing will *reduce* compliance.

The line of thinking emanating from current learning on behaviour and cultures of organisations would seem to point in the public sector to working on the following aspects: (a) cultural change accepted at highest levels and applied throughout an organisation: i.e. removing blame culture; (b) the collection of data, through linking advice and complaint systems, with a unified evaluation function; this will need revision of the architecture to perform the functions of data collection, aggregation and feedback; and (c) external assistance to public bodies in identifying and supporting actual change in culture and

[4] See C Hodges and R Steinholtz, *Ethical Business Practice and Regulation: A Behavioural and Values-Based Approach to Compliance and Enforcement* (Hart, 2017); C Hodges, *Law and Corporate Behaviour: Integrating Theories of Regulation, Enforcement, Culture and Ethics* (Hart, 2015).

[5] Accessible books are D Kahneman, *Thinking, Fast and Slow* (Allen Lane 2011); J Haidt, *The Righteous Mind. Why Good People are Divided by Politics and Religion* (Penguin Books, 2012).

behaviour including: (i) not 'enforcing', polluter pays penalties, naming and shaming, shouting, or doing nothing much; and (ii) a refocused role for the Public Ombudsman and the National Audit Office.

Behavioural Insights and Administrative Justice

A different perspective on decision-making was provided by Kevonte Mitchell (Behavioural Insights Team) who addressed the issue of how behavioural insights apply to administrative justice decision-making.

Human thinking is often influenced by cognitive biases and heuristics or short-cuts.[6] There are two modes of thinking: system 1 and system 2. System 1 is automatic, fast thinking. It is intuitive, effortless, and used for routine decisions. For instance, it includes decisions we take throughout the day like a daily commute. It also includes various biases that affect the way we think about people. Automatic thinking makes our thoughts for us. It uses mental shortcuts or heuristics that might be correct, but might equally be wrong. Emotions can also affect decisions. By contrast, the second type of thinking – system 2 – is effortful and slow thinking. It is reflective, deliberative, and analytic. It takes time, effort, and concentration. People would prefer to think that they use system 2 thinking all of the time, especially in a professional context. However, in practice, the human mind often slips into system 1 because system 2 requires hard work and concentration. Does this also apply in the justice context? Can such biases and heuristics affect justice decisions?

The answer is yes: administrative justice decision-making can be equally affected as other types of decision-making by various biases and heuristics. For instance, the outcomes of subjective decisions taken by a large number of decision-makers can vary widely. Research into US asylum decisions has revealed wide variation in outcomes between different court regions. Individual asylum judges' decisions vary widely from the mean.[7] The order in which decisions are taken can also affect the outcomes of those decisions. Previous decisions taken by a person can significantly affect their current decisions. Research has found that US asylum judges were 0.5 – 1.0 percentage points less likely to grant the current claim if they had granted the previous claim.[8] Further, the layout of courtrooms and how someone is presented in court can also affect decisions. Research has found that juries are influenced by whether or not a defendant appears within an enclosed dock.[9] Defendants in an enclosed dock were more likely to be convicted those who were physically present sitting at the side of their representative.

How can these features of decision-making be addressed? There are some options. It is possible to use data science to understand which factors influence decisions. For instance, research into referrals made by social care workers of children using data science has found

[6] D. Kahneman, *Thinking, Fast and Slow* (Allen Lane 2011). See also: https://www.verywellmind.com/what-is-a-cognitive-bias-2794963

[7] J. Ramji-Nojales, A. Schoenholtz and P.G. Schrag, 'Refugee roulette: Disparities in asylum adjudication' (2007) 60 *Stanford Law Review* 295.

[8] D.L. Chen, T.J. Moskowitz and K. Shue, 'Decision making under the gambler's fallacy: Evidence from asylum judges, loan officers, and baseball umpires' (2016) 131 *The Quarterly Journal of Economics* 1181.

[9] M. Rossner, D. Tait, B. McKimmie and R. Sarre, 'The dock on trial: Courtroom design and the presumption of innocence' (2017) 44 *Journal of Law and Society* 317.

that several extraneous factors affected social worker referral decisions, such as: the day of the week referral was received; the format in which referral was received (e.g., email, phone call or personal visit); and the language used in the referral. Other options include: vignettes and mock cases can be used to test real-world decisions. High cognitive load can be reduced by using decision aids when making decisions. Confirmation bias can be reduced by using review process (e.g. second part of eyes). Unconscious bias or associations can be reduced by blinding decisions.

5. PERSPECTIVES FROM THE ADVICE SECTOR AND REPRESENTATIVES

People working within the advice sector made a number of important points. Clare Blades (Citizens Advice) noted that clients often have a limited overall appreciation of how the system works. They do not look at individual parts of the justice system in isolation. People do not realise the Department for Work and Pensions is making the final decision. The just want their decision made as quickly as possible and that it is the correct decision. Claimants often struggle with the process of making claims. They do not necessarily understand the questions that are being asked or how to put down their experiences and feelings on paper. This impacts upon clients. The digital process could help in this respect.

There have been huge numbers coming though the advice sector doors at all stages of the process. Some parts of the advice sector have a broad view of where and how the system can work better together. For instance, Citizens Advice sees massive benefits in digitising processes. There are also huge benefits across the advice sector in getting right decisions from decision makers within the right period of time.

However, many people are digitally excluded. The numbers of such people tend to be linked to those people with low incomes and/or disability. Digitally excluded people often lack basic skills, for instance, not being able to use a computer. Many people needed help with those claim processes before digitisation. The crucial part is ensuring people get the right information at the right time. You can give people access or give them computers but they need to know what to put on the claim form and understand where they are in the process. Claimants often lack confidence. Even though they might use social media, they may not want to submit a claim form if they are not confident that they have completed it correctly.

There is huge potential for digital procedures if done well and consideration is given for the needs of its users. But more vulnerable people will end up using the old system which may not be as effective for their needs. There is also much potential injustice that does not surface at all. People may receive a decision and decide not to challenge it. In the social security context, if people disagree with a decision, they must ask for Mandatory Reconsideration. However, many people do not do this if they have lost trust in the system.

A key message is that the advice sector will continue to provide support where capacity allows. It can also provide information and evidence as to the types of issues people seek advice about. There is scope for pilot projects to see how new processes are used by claimants. In terms of research, Citizens Advice has access to a huge amount of data and it is available publically. It is also important to look at clusters of problems that people have and how these can be resolved.

Michael Reed (Free Representation Unit) noted that the Free Representation Unit takes on some 300-400 law students at end of their training before they qualify as solicitors and barristers. They find it challenging to get their head around relevant law to advise their client. About a third of students are filtered out through a test. Yet, litigants in person are expected to navigate this system. According to Michael Reed, tribunals do a remarkable job. Most of time they are getting the right answers and giving people a fair hearing. Advisors are often impressed with the level of care, attention, and diligence that cases are dealt with.

Ronan Toal (Garden Court Chambers), a barrister specialising in immigration law, gave his perspective on immigration appeals and administrative justice. Ronan started by noting that one test of a humane society is how its treats immigrants. Ronan also quoted Hale LJ (as she then was):

> 'There are now a large number of tribunals operating in a large number of specialist fields. Their subject matter is often just as important to the citizen as that determined in the ordinary courts. … In disputes between citizen and state they are established because of the perceived need for independent adjudication of the merits and to reduce resort to judicial review. … In this day and age a right of access to a tribunal or other adjudicative mechanism established by the state is just as important and fundamental as a right of access to the ordinary courts.'[10]

However, immigration appeal rights have been significantly curtailed under the Immigration Act 2014. Previously, many immigration decisions could be appealed on the merits. Following the 2014 Act, an individual can only appeal on refugee and human rights grounds. The limiting of appeal rights was deeply concerning bearing in mind criticisms of the quality of initial decision-making.

Since 2013, most immigration judicial reviews had been transferred from the Administrative Court to the Upper Tribunal (Immigration and Asylum Chamber). It is arguable that judicial review is not as effective a remedy as an appeal before a tribunal. There are also some issues as to how such challenges are handled in practice. For instance, when the Home Office offers to reconsider a decision, then the judicial review becomes academic. In practice, this removes cases from the Upper Tribunal. There is no acknowledgement by the Home Office that its decision was faulty in some way. Further, when the Home Office reconsiders a decision subject to judicial review, the second decision is barely different from the original decision. There were suggestions for making procedural changes to immigration judicial reviews.

6. OMBUDS

The workshop also raised issues concerning the work and reform of ombuds.

<u>Ombuds reform</u>

[10] *R v Secretary of State for the Home Department, ex parte Saleem* [2001] 1 WLR 441, 457-458 (Hale LJ).

Warren Seddon (Parliamentary and Health Service Ombudsman) spoke on ombuds reform. The UK Government is committed to ombuds reform. Nevertheless, there are arguably problems and gaps in the Public Services Ombudsman Bill as currently drafted, including an outdated 'MP filter' that denies access to justice, gaps in jurisdiction and the lack of a 'complaint standards authority' role to replicate the equivalent powers in Scotland.

A particularly major issue is whether the proposed English Public Services Ombuds will have own-initiative powers to investigate matters of concern despite the absence of a grievance raised by a complainant. To reinforce this point, the Windrush scandal was raised from the floor as an example of a major administrative justice issue which could have justified the exercise of own-initiative powers. The Parliamentary and Health Service Ombudsman has previously undertaken systemic investigations, such as helping secure compensation for service men detained during the Second World War in Japanese concentration camps and also, in the health context, in raising the profile of sepsis. Both investigations led to new guidance being introduced. Own-initiative powers would give the ombudsman the opportunity to undertake similar investigations and ensure that the voice of vulnerable people who may not be able to bring a complaint could be heard.

Further, the lack of own-initiative powers puts the proposed English Public Services Ombuds out of step internationally and also behind other UK ombuds. Greater attention to reports of the Parliamentary and Health Service Ombudsman can highlight where things are going systemically wrong – as can greater partnership with other organisations.

<u>The ombuds caseworker competency framework</u>

Donal Galligan of the Ombudsman Association highlighted the importance of ombuds. For many people, going to an ombuds is often the only practical option: it is free whereas the potential costs of going to court for a judicial review are often prohibitively expensive and fraught with risk. A key component of ombuds scheme is public trust in how they work and how effective they are.
Donal highlighted an important piece of work by the Ombudsman Association in devising a Service Standards Framework and also a Caseworker Competency Framework. Both have been developed with input from civil society and consumer organisations. Key values of ombuds schemes include: accessibility, good communication, fairness and transparency. These points highlight ombuds schemes members should be doing to provide a good service.

People appointed to be ombuds have typically not been lawyers, but people who have worked in public services. The rationale for this is that ombuds focus upon fairness and maladministration rather than legality. However, this raises an issue about how qualified office-holders are as ombuds to investigate and make decisions. To fill this gap, the Ombudsman Association drew up its Caseworker Competency Framework, following input from stakeholders and public consultation including responses from government departments. The framework sets out the key capabilities required to work effectively as an

ombuds caseworker. The core competencies are: (1) analytical; (2) impactful; (3) constructive; (4) approachable; (5) open-minded; and (6) professional.[11]

In the following discussion, it was noted that the Ombudsmen Association's competency framework has been fed back into a larger HMCTS project of looking at registrars and caseworkers in courts and tribunals, who have been give delegated powers to make certain judicial decisions.

7. CONCLUSION

The workshop and the discussion suggest the following points.

Tribunals reform

- Tribunal modernisation and reform will make greater use of online processes to make tribunals more accessible, efficient, and user-friendly. At the same time, reform must also cater for people who do not wish to use online processes.
- Tribunals reform needs to proceed on the basis of consent of those affected.
- Reforms need to be, and will be, piloted carefully and assessed before they are rolled out more widely.

Decision-making

- All decision-making, whether by public bodies, tribunals, or ombuds schemes, should be of high a standard as possible.
- Government should consider evaluating the wider knock-on costs of poor decisions. Such costs go wider than the direct financial costs of appealing to a tribunal. They also include: wider costs in other parts of the public sector; and the delays and emotional costs for the individual concern.
- There is an important debate over to the best means of improving the quality of decision-making. Is a polluter pays principle the way forward? Or would changes to organisational culture be more effective? This is an important issue which the Administrative Justice Council should engage with.
- Decision-making is likely to affected by cognitive biases and heuristics. This is an area that would benefit from more research. There is some awareness of these issues within the judiciary. Incorporating more of this learning within the training will be beneficial.

Ombuds

- The UK Government should proceed with its proposed plans for ombuds reform in England. At the same time, there is a strong case for changes to the proposed Bill. There is a very strong case that the proposed English Public Services Ombuds should have the power to undertake own-initiative investigations.
- The Ombudsman Association's Caseworker Competency Framework should be used as a model that could usefully be adapted to other analogous roles within the administrative justice system.

[11] http://www.ombudsmanassociation.org/ma/blog/wp-content/uploads/2018/10/Caseworker-Competency-Framework-2018.pdf