ADMINISTRATIVE JUSTICE AND ASYLUM APPEALS

A STUDY OF TRIBUNAL ADJUDICATION

Robert Thomas

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ROBERT THOMAS

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ADMINISTRATIVE JUSTICE AND ASYLUM APPEALS

How are we to assess and evaluate the quality of the tribunal systems that do the day-to-day work of adjudicating upon the disputes individuals have with government? This book examines how the idea of adjudicative quality works in practice by presenting a detailed case-study of the tribunal system responsible for determining appeals lodged by foreign nationals who claim that they will be at risk of persecution or ill-treatment on return to their country of origin. Over recent years, the asylum appeal process has become a major area of judicial decision-making and the most frequently restructured tribunal system. Asylum adjudication is also one of the most difficult areas of decision-making in the modern legal system.

Integrating empirical research with legal analysis, this book provides an in-depth study of the development and operation of this tribunal system and of asylum decision-making. The book examines how this particular appeal process seeks to mediate the tension between the competing values under which it operates. There are chapters examining the organisation of the tribunal system, its procedures, the nature of fact-finding in asylum cases and the operation of onward rights of challenge.

An examination as to how the tensions inherent in the idea of administrative justice are manifested in the context of a tribunal system responsible for making potentially life or death decisions, this book fills a gap in the literature and will be of value to those interested in administrative law and asylum adjudication.

PREFACE

This book is the product of an empirical legal research project into the procedure and determination of asylum appeals by the responsible administrative tribunal, the Asylum and Immigration Tribunal (AIT). In undertaking this project I have become indebted in a number of ways. First, the project would not have been possible without the generous financial assistance of the Nuffield Foundation (AJU/00124/G), for which I am extremely grateful. In particular, I would wish to thank Sharon Witherspoon, the Deputy Director of the Foundation, for her enthusiasm, assistance, and support. Secondly, the research grant enabled me to benefit from an excellent research associate, Dr Rute Caldeira, who ably demonstrated her commitment, efficiency, tirelessness, and good humour in undertaking with me the legwork of the empirical research and the analysis. I would also like to thank Rute for our extremely useful, though often inconclusive, discussions over asylum appeals. Thirdly, I would not have been able to undertake the research project without the agreement of the AIT, the Ministry of Justice, and the United Kingdom Border Agency which granted access to undertake the research, in particular, to have access to tribunal determinations which would otherwise had been unavailable and to conduct interviews. I am particularly grateful to Mark Ockelton, Deputy President of the then AIT for his receptiveness, assistance, and guidance when I first approached him with the idea of undertaking empirical research into asylum appeals. Fourthly, thanks also go to the School of Law, University of Manchester for affording me study leave to work on the project.

For some years, I have had an interest in the operation and functioning of administrative appeal systems and in the working of the asylum appellate jurisdiction in particular. This interest has several sources. First, there has, over recent years, been much academic and other debate over administrative justice which has accompanied various reforms to the administrative justice system and the tribunals system in particular. Much of this debate has been supported by institutions such as the Nuffield Foundation, the Economic and Social Research Council, and the Administrative Justice and Tribunals Council.[1] A second source of my interest stemmed from the particular difficulties of organising an effective appellate process for those individuals refused asylum. No other tribunal system has been as frequently reformed as the asylum appeal process. When the Government proposed in 2004 to reform the appeals process, I acted as a specialist adviser to a Parliamentary select committee.[2] The most notable aspect of this

[1] See, eg, M Adler, *Administrative Justice in Context* (Oxford, Hart Publishing, 2010).

[2] House of Commons Constitutional Affairs Committee, *Asylum and Immigration Appeals* (2003–04 HC 211).

set of reforms had been the controversial proposal to enact an ouster clause in order to immunise the tribunal's decisions from challenge in the higher courts. This aroused widespread opposition and focused attention directly upon the appeals process. After the Government backed down and the dust had settled, this interest quickly dissipated. Nonetheless, my own interest remained. Following the establishment of the AIT in 2005, I wanted to examine in detail how the tribunal was working in practice. I also wanted to demonstrate to my fellow administrative lawyers that tribunals are not, as often assumed, peripheral to their discipline, but are instead central to understanding the complex and dynamic relationship between governmental and legal processes. A third source of my interest has arisen from the particular challenge of investigating and researching asylum appeals. After all, most other large-scale tribunal jurisdictions have been the subject of academic study. However, the immigration and asylum appeals system—now the second largest—had, for one reason or another, either often eluded or been overlooked by the few administrative law scholars interested in administrative tribunals. Finally, as I examined the appeals process in more detail, I became interested in and perplexed by the nature of asylum decision-making and its peculiarly difficult demands.

The principal objective of the book is to examine the effectiveness and quality of tribunal adjudication through a case-study of the asylum appeals process. The book is, then, a study of a specific, and slightly unusual, adjudication system, in one geographical setting, over one period of time. It is not, therefore, claimed that the specific findings and analysis presented here on asylum appeals are generally applicable. The book does, though, offer a general way of thinking of about adjudicative quality. In this respect, the book might shed some broader light upon the role and function of administrative tribunals and the difficulties and problems that arise when we seek to assess and evaluate their work.

The study of immigration and asylum appeals, the legal rules, and their administration can be a challenging endeavour at the best of times, partly because of the incessant outpouring of judicial decision-making—tribunal determinations and court judgments—as well as policy and legislative changes, and new rules and regulations. Indeed, during the progress of the empirical component of the research project, there was a consultation on a further restructuring of the immigration and asylum appeals system to transfer the AIT into the new, two-tier tribunal system, the First-tier Tribunal and the Upper Tribunal (Immigration and Asylum Chamber). This transfer occurred in early 2010 and represents an important change to the organisation of the tribunal, particularly as regards onward appeals against initial tribunal decisions and the role of the higher courts in the decision-making process. The transfer is certainly an important reform, but it does not radically affect the handling of initial appeals; even less, does it alter the nature of the decision-making task involved in determining asylum appeals. The transfer does not, therefore, represent a wholesale reform of the tribunal, but another step in its evolution. For this reason, the analysis presented in this book remains valid and is not undermined by the transfer. Despite this structural change, I have, however,

referred to the tribunal as the AIT at various sections throughout the book, where it has been appropriate to do so; for the most part, I have referred to it simply as the Tribunal.

In addition to keeping up with constant legal and policy developments, the empirical project involved the collection of masses of empirical data about the appeals process. The empirical component of the research involved three principal forms of data collection: the observation of appeal hearings; analysis of tribunal determinations; and interviews with participants in the appeals process. Some of the chapters draw upon this data, but it is neither possible nor desirable to present all of it. The book, therefore, draws selectively upon the data collected to illustrate how the asylum appeals process functions and to support the analysis presented here.

It is commonplace to note that people are more likely to come into contact with the legal system by appearing before a tribunal than a court of law. The task of observing tribunals at work and watching them operate in practice brings home their prosaic character as they discharge their quotidian task of delivering justice to people. Asylum appeals are, though, distinctive because of the nature of the issues involved. Appellants often give personal evidence of a kind that does not feature as regularly in other legal proceedings. The consequences of wrong decisions can have drastic consequences and the decisional task is highly challenging. As this book seeks to argue, decisional accuracy is one of the key values informing an adjudication system, but also one of the most imponderable. In the asylum context, it is virtually impossible to pin down something as elusive as decisional accuracy. Having observed around 200 or so asylum appeals, and having had access to the same documentary evidence as the judge, and heard the same oral evidence as the judge, I cannot really claim to be any the wiser as to whether the decisions were right or wrong. From personal experience, it seemed to me that, in a handful of cases, the decision reached was questionable—either because asylum might have been either wrongfully refused or granted—but whenever I felt this, it just seemed to be my own subjective point of view and that I was certainly in no better position to decide. In most of the appeals that I observed, the decision reached seemed to me to be within the bounds of what was reasonable and that some decision one way or the other was required—otherwise the adjudication process would fail in its primary mission: to adjudicate.

In undertaking this project, I have been fortunate enough to have received considerable assistance from a number of different institutions and people. The empirical component of this project involved immersion in the world of asylum appeals and I was able to speak with people holding positions at all levels within this world. Immigration Judges, Senior Immigration Judges, representatives, Home Office presenting officers and caseworkers, medical and country expert witnesses, tribunal interpreters, and Tribunal Service staff all generously spared their time to speak about their work and to provide the kind of insights that cannot be gleaned either from observing appeal hearings or reading appeal determinations. I am grateful to them.

Thanks also go to my academic colleagues at Manchester and elsewhere who provided guidance, assistance, and encouragement during the project. In particular, I would like to thank Charles Blake, Tom Gibbons, Andrew Sanders, and Hugo Storey. At an early stage of the project, I received valuable assistance from Alex Hermon, Jo Shaw, and Maurice Sunkin. I would also like to thank Sarah Craig, Richard Rawlings, Genevra Richardson, Neville Harris, and William Lucy for their comments on drafts. Thanks also go to Richard Hart and his team at Hart Publishing. Of course, despite the assistance provided to me, I assume sole responsibility for the book's shortcomings.

Earlier versions of some of the chapters have been presented in a number of academic conferences and seminars and I have benefited from the comments received. An early version of chapter seven was presented at a conference on the best practices for refugee status determination hosted by Monash University at its conference centre in Prato, Italy in 2008. A revised version of the conference paper appeared as 'Consistency in Asylum Adjudication: Country Guidance and the Asylum Process in the United Kingdom' (2008) 20 *International Journal of Refugee Law* 489. A different and extended version is included here. I have also drawn upon a chapter, 'Refugee Roulette—a UK Perspective' in J Ramji-Nogales, AI Schoenholtz, and PG Schrag (eds), *Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform* (New York, New York University Press, 2009), that offered a UK perspective on empirical research by Ramji-Nogales, Schoenholtz, and Schrag which revealed striking disparities in asylum adjudication in the United States. An amalgamation of chapters five and six was presented at a conference on asylum and refugees hosted by the Centre of African Studies, SOAS, University of London in 2009. Presentations based on other parts of the book have been given to the Administrative Justice and Tribunals Council, the Nuffield Foundation, and the Sussex Centre for Migration, University of Sussex. Furthermore, together with the Nuffield Foundation and the International Association of Refugee Law Judges, I organised a roundtable discussion on the topic of country guidance in asylum decision-making systems in the UK and elsewhere, which took place in the summer of 2009, from which I learnt much.

Finally, I need to thank my family: my wife, Nicola, and our children, Penelope, Rosamund, Constanza, Edward, and Gwendolyn, for their support and forbearance.

Robert Thomas
Hartford
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