THREE

The tribunals gamble

As the role of technology steadily grows in justice systems around the world,[1] the UK Ministry of Justice (MoJ) and HMCTS have taken the step of being global pioneers.[2] They are now in the process of putting many court and tribunal processes – as well as court administration systems – on to a digital footing. Tribunals – which hear many more challenges to the decisions of public authorities than the courts do via judicial review – are a major focus of these changes.[3] Reforms to tribunals are expected to involve tribunal appeals being lodged, and potentially determined, online, with the idea of parties coming into contact with each other and a judge at an earlier stage than before. The spur for these changes is a government drive to cut the running

1 See, for example, Katsh, Ethan and Rabinovich-Einy, Orna (2017) *Digital Justice*, Oxford: Oxford University Press; Barton, Benjamin H. and Bibas, Stephanos (2017) *Rebooting Justice*, New York: Encounter Books.

2 For an overview of the entire reform project, see Rozenberg, Joshua (2018) *The Online Court: Will IT Work?*, Guildford: Legal Education Foundation.

3 Ministry of Justice (2016) *Transforming Our Justice System*, London, p 15. My focus here excludes party-to-party tribunals, such as the Employment Tribunal – the focus is solely on claims concerning administrative decisions.

costs of the justice system.[4] As such, new online procedures are being coupled with court closures and significant reductions in the amount of court staff.[5] While there is hope that online processes may increase access to justice for many, there is also concern that some may be digitally excluded from justice. At the same time, there is a worry that new online processes will not compensate adequately for reduced service provision in respect of traditional processes. Overall, these reforms represent a major policy gamble by a government under pressure to reduce costs: the gamble that technology-based solutions can provide more access to justice for significantly less money.

Tribunal reform is starting in the Social Security and Child Support Tribunal (SSCS) and then moving on to the First-tier Tribunal (Immigration and Asylum) Chamber (FtTIAC).[6] This chapter starts by looking at the role of tribunals in those two contexts. In particular, it is highlighted how the role of tribunals within the wider administrative justice landscape has been significantly reduced in recent years. I then explain different stances – from the enthusiastic to the cynical – on the reforms, before explaining how online processes are likely to change the face of the traditional model of tribunals that many are familiar with at present. The final part of the chapter considers some of the key design issues arising as part of these reforms, before offering some recommendations on the ongoing reform process.

Development of online tribunals

As outlined in Chapter Two, there has been a significant reduction in the amount of public money that the government

4 Ryder, Ernest (2018) 'Assisting Access to Justice', University of Keele.

5 National Audit Office (2018) *Early Progress in Transforming Courts and Tribunals*, HC 1001, Session 2017–2019; House of Commons Committee of Public Accounts (2018) *Transforming Courts and Tribunals*, HC 976.

6 HM Courts & Tribunals Service (2018) *Reform Update: Autumn 2018*.

is willing to spend on the justice system since 2010. There is now a wide concern that the justice system is under-funded, and this has carried the consequence of substantially reduced access to justice for many people, particularly those without means and those who are vulnerable.[7] The court and tribunal reform programme has been developed in response to these budget cuts and austerity more broadly. This modernisation programme – which covers a wide variety of reforms – aims to redesign and modernise the way in which people can access courts and tribunals by introducing online and digital processes. It also seeks to create efficiencies by moving a paper-heavy system of administration on to a new digital basis. The pressure from the Treasury to reduce spending looms large over the reforms.

The reform programme was announced in September 2016 in a joint vision statement entitled *Transforming Our Justice System*, published in the joint names of the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals.[8] This paper highlights the need for radical reform required to modernise and upgrade the justice system through technology. It states that there is a compelling case for reform of tribunals:

> Tribunals will be digital by default, with easy to use and intuitive online processes put in place to help people lodge a claim more easily, but with the right levels of help in place for anyone who needs it, making sure that nobody is denied justice.[9]

The idea is that tribunal users will be placed at the heart of the system, and tribunal judges and members will move towards a more inquisitorial and problem-solving approach.

7 See, for example, JUSTICE (2015) *Delivering Justice in an Age of Austerity*.

8 Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals (2016) *Transforming Our Justice System*, Ministry of Justice.

9 Ibid, p 15.

Documents relevant to appeals can be shared via E-platforms, cutting administration costs and delay – allowing appeals to be determined or otherwise resolved quicker than is possible in any paper-based system. It is also said that there will be the adoption of 'continuous online hearings', where judges are involved much sooner in appeals, are enabled to oversee evidence assimilation and are put in a position to make decisions at an earlier stage in an appeal process where possible. This was the broad vision that served as the starting point: it was light on detail but heavy on ambition.

There are a wide variety of tribunals and they operate in very different contexts – applying different law, dealing with different government bodies, possessing particular cultures of adjudication etc. The *Transforming Our Justice System* paper told us that online appeals processes would be trialled in SSCS. This being the largest tribunal jurisdiction and one where appellants have a wide variety of complex needs, there was a 'if we can do it there, we can do it anywhere' spirit adopted. FtTIAC would be next in the queue. Beyond this, however, little was known about how the reforms would be implemented and what online appeals processes would look like. Even at the time of writing, the full details are yet to emerge (2019). It is still important to understand the context in which tribunals have operated to grasp the potential implications of digitalisation, whatever form it takes. Here, I focus on the recent context of two of the largest tribunals, which are also the first two to be put online: SSCS and FtTIAC.

Social security policy is administered by officials within the Department for Work and Pensions (DWP), who take approximately 12 million decisions each year to determine whether or not claimants are eligible for benefits. The two benefits with the largest number of claimants are Employment and Support Allowance (ESA) and Personal Independence Payments (PIPs). After a claim is made, an assessment will be undertaken, usually involving a 'healthcare professional' who

is employed by a private provider under contract with the DWP.[10] Some decisions are refused and some of those refusals are disputed by claimants through mandatory reconsideration (MR) (around 300,000 per year) and tribunal appeals (around 150,000 per year).

There are often concerns with the quality of both the decision process as well as the adverse outcomes for the individuals concerned. In relation to initial decision-making processes and assessments, the contracting out of assessments to private companies, such as ATOS and Maximus, has been widely criticised.[11] Criticism of initial decision-making has also emerged from the senior judiciary. Sir Ernest Ryder, Senior President of Tribunals, has stated that most appeals are based on bad decisions.[12] He found that the quality of evidence offered by the DWP at tribunals would often be 'wholly inadmissible' in any other court, and that 60% of cases were 'no-brainers' where there was nothing in the law or facts that would make the DWP win. This, the Senior President argued, meant poor decision-making led to 'an inappropriate use of judicial resources, it's an inappropriate experience for the users, and the cost is simply not right.' The DWP has defended its decision-making, and regularly attributes decisions overturned at appeal to new evidence – which was not before them – being presented at the tribunal. There have also been legal challenges to benefits decision-making. In 2017, the Administrative Court quashed a regulation relating to PIP decision-making on the basis that

[10] For a general discussion, see Thomas, Robert and Tomlinson, Joe (2017) 'Mapping current issues in administrative justice: Austerity and the "more bureaucratic rationality" approach', *Journal of Social Welfare and Family Law*, 39(3), 380–99, pp 396–7.

[11] House of Commons Work and Pensions Committee (2018) *PIP and ESA Assessments*, HC 829 2017-19.

[12] Dugan, Emily (2017) 'A senior judge has suggested charging the government for every "no-brainer" benefits case it loses in court', *BuzzFeed News*, 9 November.

it was discriminatory.[13] In response, the DWP decided not to appeal the judgment and to review the case of every person receiving PIP – a total of some 1.6 million individuals.

In 2013, the DWP also introduced MR to resolve disputes before they reach tribunals.[14] The justification was to resolve disputes quickly and to reduce the volume of tribunal appeals.[15] Claimants can no longer appeal directly to a tribunal, but must first request a MR.[16] Between 2013 and 2017, some 1.5 million MRs were decided. It transpired that MR was, in practice, very quick: average monthly clearance times did not go above 20 days.[17] However, MR has been criticised on various grounds. It has been suggested that it discourages many people from pursuing their claims before tribunals. There has been a steep drop in the volume of appeals lodged since the introduction of MR. In 2014/15, appeal numbers were 73% lower compared with 2013/14.[18] MR was intended as a filter, but the concern has been that many cases that could succeed before tribunals fall

[13] *R. (on the application of RF) v Secretary of State for Work and Pensions* [2017] EWHC 3375 (Admin). The regulation in question was the Social Security (Personal Independence Payment) (Amendment) Regulations 2017, Reg 2(4).

[14] It has been estimated that this review could cost £3.7 billion by 2023; see BBC News (2018) 'Personal independence payments: All 1.6 million claims to be reviewed', 30 January.

[15] DWP (Department for Work and Pensions) (2012) *Mandatory Consideration of Revision Before Appeal*, London.

[16] Welfare Reform Act 2012, Section 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.

[17] DWP (Department for Work and Pensions) (2017) *Employment and Support Allowance: Work Capability Assessments, Mandatory reconsiderations and appeals*, London, September, p 7.

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

away after the MR stage. This creates the impression that the DWP is gatekeeping the tribunals system and taking advantage of claimant fatigue.[19] Particular concerns have often arisen due to the effect of MR on the behaviour of vulnerable claimants. Among the specific worries are that MR decision notices often simply restate the same reasons as were given for the initial decision without further detail, that the decision-making process is merely a 'rubber stamp' exercise, that tribunals often reach very different conclusions to the MR process, and that officials conducting MRs prefer the evidence of a contracted-in assessor to other legitimate medical evidence.[20] Such concerns are underscored by the fact that MR has the lowest satisfaction rating of any part of the DWP process, and that there have been much lower success rates for claimants in MR compared with tribunal appeals.[21] From 2013 to 2016 there were some one million MR decisions, with 17% being decided in favour of the claimant. Appeals success rates have, by comparison, been around 40%, rising to 65% in recent years.

It is within this changing context of social security adjudication that online tribunals are being introduced by HMCTS. The task of creating an effective online process for social security tribunals also engages a challenging demographic context. Many appellants are vulnerable and have physical and mental health

[19] A previous empirical study found that local authority officers could use administrative review to control claimants' access to tribunals; see Eardley, Tony and Sainsbury, Roy (1993) 'Managing appeals: The control of Housing Benefit internal reviews by local authority officers', *Journal of Social Policy*, 22(4), 461–85. Other evidence suggests that claimant fatigue often discourages people from challenging decisions; see Cowan, David and Halliday, Simon (2003) *The Appeal of Internal Review: Law, Administrative Justice, and the (Non-)Emergence of Disputes*, Oxford: Hart Publishing, pp 138–40.

[20] Social Security Advisory Committee (2016) *Decision Making and Mandatory Reconsideration*.

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

issues. Furthermore, although the fiscal value of disputes in the tribunal may seem small, for many claimants the implications of appeals affect their living arrangements significantly.

Similar trends are visible in recent developments in the FtTIAC, including concerns about the quality of initial decision-making in the Home Office. In terms of the number of appeals that the FtTIAC receives, it has the second highest number of receipts of any First-tier Tribunal (SSCS being the largest tribunal jurisdiction). However, there has been a dramatic drop in the total number of appeals being lodged in the tribunal in recent years. In the first quarter of 2009/10, the FtTIAC received a total of 43,750 receipts. This decreased to just 11,864 receipts in the first quarter of the year 2018/19, representing a decrease of almost 73% in the total number of receipts of appeals received by the tribunal over that period.

Several factors may be in play in relation to the rapid decrease in the volume of appeals, and the trend is best explained by reference to a combination of them. However, the most obvious and main explanation is the systematic removal of appeal rights in certain categories of immigration decisions.[22] In 2014, immigration appeal rights (except those relating to asylum and human rights grounds) were replaced with a system of administrative review. The significant reduction in the tribunal's workload is the policy working as intended. The key motivation of the policy is that high success rates in tribunal appeals and their inconvenience to efficient administration both incurred costs and frustrated political ends.

The substitution of appeals to the tribunal for administrative review can cynically be viewed as limiting access to effective

[22] Immigration Act 2014, Section 15; Immigration Rules, Appendix AR. Family visitor appeals were abolished in 2013: Crime and Courts Act 2013, Section 52.

administrative redress as a mechanism for immigration control.[23] A more sympathetic interpretation would perhaps contend that administrative review is quicker and easier for immigration applicants compared to a tribunal appeal, and that as a process internal to administration, administrative review provides a better opportunity for the Home Office to systematically improve the quality of all decisions. While it is true that users may want quick and easy decisions,[24] and it is also true that administrative review is quick (typically a matter of a weeks), it would be naïve to see the preference for, and expansion of, administrative review within the context of immigration redress as simply a policy that promotes the interests of the applicants or efficient administration. There is a strong and well-founded concern that administrative reviews 'are neither independent nor transparent, but merely involve a different caseworker taking another look at the papers.'[25] Furthermore, within the context of immigration and asylum, the use of internal review processes has routinely been criticised as 'superficial' and 'ineffective' by oversight bodies, including by a parliamentary committee.[26]

As regards the new system of administrative review, the Independent Chief Inspector of Borders and Immigration concluded, in his first report on the system, that low-level, untrained and temporary staff with limited or no experience of

[23] Thomas, Robert (2016) 'Immigration and Access to Justice', in Ellie Palmer, Tom Cornford, Audrey Guinchard and Yseult Marique (eds) *Access to Justice: Beyond the Policies and Politics of Austerity*, Oxford: Hart Publishing, p 127, which speculates on the possibility of 'the end of appeals' in immigration redress.

[24] Berthoud, Richard and Bryson, Alex (1997) 'Social security appeals: What do the claimants want?', *Journal of Social Security Law*, 4, 17–41; Richardson, Genevra and Genn, Hazel (2007) 'Tribunals in transition', *Public Law*, 116.

[25] Thomas, p 126 (note 23 above).

[26] See, for example, House of Commons Constitutional Affairs Committee (2004) *Asylum and Immigration Appeals: Second Report of Session 2003–04*, HC 211-I.

immigration law were undertaking reviews.[27] At the same time, there was little oversight of these officials. Some less good review decisions demonstrated 'an over-reliance on the initial refusal decision letter.'[28] The reasoning of decisions was often brief and underdeveloped.[29] And unlike appeals before the FtTIAC, new evidence cannot be taken into account in a review.[30] This unresponsiveness is unsatisfactory in a context like immigration and asylum where there is a high possibility of the circumstances of an applicant changing between the initial adverse decision and the subsequent appeal or review.

As for the tribunal itself, recent years have been characterised by delays and high success rates. The length of time it takes to get an appeal decided is an important element of access to justice. One of the possible strengths of tribunals, relative to ordinary courts, is their potential to dispose of cases quickly. Across the tribunal, between the first and third quarter of 2017/18, the average age of an appeal at the time at which it is disposed exceeded, and stayed above, the 50-week threshold for those three quarters. The clear trend in the tribunal in recent years is towards longer waiting times. There are various possible explanations for why this is the case. It could be that there are more complex cases coming before the tribunal, but there appears to be no reason to think that appeals have become significantly more complex. Litigation behaviour could be changing. A possible decrease in representation may also be a factor. Equally, workload changes in the tribunals can be hard to predict, and ensuring there are sufficient judicial resource to

27 ICIBI (Independent Chief Inspector of Borders and Immigration) (2016) *An Inspection of the Administrative Review Processes Introduced Following the Immigration Act 2014*. See also ICIBI (2017) *A Re-inspection of the Administrative Review Process*.

28 Ibid, para 2.10.

29 *R (Akturk) v Secretary of State for the Home Department* [2017] 4 WLR 62, [47] (Holamn J).

30 Immigration Rules, Appendix AR [2.4].

meet demand can be difficult. Whatever the explanation, it is remarkable that during a period in which the number of appeals has dropped, the amount of time taken to decide appeals has increased substantially.

Success rates in the tribunal remain high and appear to be increasing further – close to 50% across the jurisdiction. The present success rates in the FtTIAC essentially create a situation where getting a tribunal hearing means that the chances of a favourable decision are almost 50/50. It is difficult to infer too much from basic outcomes data, but it likely shows that errors in Home Office decision-making are not uncommon. However, success rates could be explained by reference to tribunals having more evidence than initial decision-makers, or other differences in the two decision-making processes. Any blanket claim that all successful appeals reveal an avoidable mistake by the Home Office would therefore be incorrect. What is perhaps more noteworthy is the vast difference in success rates between administrative review and tribunal appeals. Under the old system, around 49% of appeals were successful, whereas in 2015/16, the success rate for administrative reviews conducted in the UK was 8%, falling to just 3.4% the year after.[31]

In a further reform with implications for the tribunal, there has been the introduction of the so-called 'deport first, appeal later' policy in human rights and asylum appeals. Provisions in the Immigration Act 2014 gave the Home Office the power to deport foreign nationals with criminal convictions without allowing them to appeal the deportation in the UK.[32] The Immigration Act 2016 then widened these powers to affect all

[31] For detailed analysis of recent evidence and data, see Thomas, Robert and Tomlinson, Joe (2019: forthcoming) 'A different tale of judicial power: Administrative review as a problematic response to the judicialisation of tribunals', *Public Law*.

[32] Nationality, Immigration and Asylum Act 2002, Section 94B, an amendment introduced by the Immigration Act 2014, Section 17(3).

migrants wishing to appeal on human rights grounds.[33] If an out-of-country appeal succeeds, the appellant may be able to return to the UK. Out-of-country appeals allow for speedier deportations and reduce the amount of detained immigration applicants. This reduces costs for the state. At the same time, the geographic separation of the applicant from the tribunal has a number of important consequences. Applicants are less likely to appeal. Establishing access to a tribunal may prove difficult from certain locations, including because of the expense of realising the right to appeal. It could also be more difficult to find and secure representation. For video-linked out-of-country appeal hearings, the hearing will be qualitatively different from a traditional oral hearing. Furthermore, it is highly likely that the applicant would have already experienced material harm from the administrative error as a consequence of the act of deportation. For example, the applicant may experience loss of employment or suffer detriment through remoteness from relations in the UK. Since the expansion of this policy, the Supreme Court has held that the out-of-country appeals process can be effectively fair for human rights purposes in the context of general criminal deportations.[34] However, if an appeal from abroad is not effective, then the public interest in removal would be outweighed and an application should not be certified.[35]

Overall, the move to online tribunals has to be understood as part of a series of important changes in recent years. Reforms have, broadly, led to tribunals having a diminished role within the wider system of administrative justice. This provides the context in which a politics around online tribunals has emerged.

33 Immigration Act 2016, Section 63.

34 *R (on the application of Kiarie) v Secretary of State for the Home Department* [2017] 1 WLR 2380.

35 In a recent case, the Upper Tribunal gave guidance on the questions to be addressed in this respect; see *AJ (s 94B: Kiarie and Byndloss questions) Nigeria* [2018] UKUT 115 (IAC); [2018] Imm AR 976.

Politics of online tribunals

The politics of online tribunals largely spans a spectrum from cynics to enthusiasts. The core question in the digitalisation of tribunals is whether the reforms will, in time, improve both access to and the quality of administrative justice, or leave citizens in a worse-off position. Many hold strong views on the use of technology in the justice system, but great caution is required here: there is very little evidence on the impact of digital procedures in public justice systems, and many views are therefore heavily grounded in speculation. To think about the emerging politics around these reforms, it is helpful to imagine two broad views on the prospects of digitalisation: one where traditional tribunal justice is enhanced and another where digitalisation is just another step toward a weakened tribunal system. There are, of course, many increments between these two positions, but most commentators tend to lean towards one or the other viewpoint.

For the digitalisation enthusiasts, the prospect of online appeals presents the opportunity to resolve easy cases quickly and, in doing so, to reduce stress caused to appellants who are currently forced to endure long waiting times ahead of hearings. Digitalisation could also reduce the cost of administering tribunal appeals and reduce backlogs that build up over time. Evidence may be easy to submit and assimilate for both appellants and government bodies, while being easier to manage for judges. Communication about evidence between all parties could also be quicker, cheaper and more convenient. Appellants could save money by not travelling and taking time out of work, while government can save administration costs. Technology could also permit judicial resources to be flexibly deployed – allowing judges to work as efficiently as possible, in a way that most adds value to an appeal. It may even transpire that online appeals are cheaper than internal review systems and may make use of the tribunals appeals system more attractive

to government departments. In redesigning tribunal processes for digitalisation, there is also the opportunity to do away with needless complexity and to provide accessible online processes. Online processes may be less intimidating for appellants. With the use of assisted digital services, there could be the creation of a wider support environment around tribunals that may not be present in the current process.[36]

At the other end of the optimism spectrum, a cynic may view the digitalisation of tribunals as having numerous significant pitfalls that could weaken administrative justice. At a basic level, it may be thought that hearings will not be as effective when managed online. They could, for instance, not be developed in a way that makes them useful for making (often complex) decisions of law and fact.[37] This could lead to more mistakes that have serious effects on the lives of citizens. There is also the risk that online appeals will lead to lower success rates than traditional appeals. Success rates between paper and oral appeals differ significantly, and online appeals could have similar consequences.[38] Use of video links and other remote communication methods may see appellants not participate

[36] Ministry of Justice (2017) *Transforming Our Justice System: Assisted Digital Strategy, Automatic Online Conviction and Statutory Standard Penalty, and Panel Composition in Tribunals: Government Response*. The government has contracted this job out to the Good Things Foundation. For the context on assisted digital, see JUSTICE (2018) *Preventing Digital Exclusion from Online Justice*.

[37] See the comments, for instance, in *R (Mohibullah) v Secretary of State for the Home Department* [2016] UKUT 561 (IAC) at [90]; *R (Kiarie and Byndloss)* (n 63) at [67]; and *Secretary of State for the Home Department v Nare* (evidence by electronic means) Zimbabwe [2011] UKUT 00443 (IAC) [17].

[38] For a discussion, see Thomas, Cheryl and Genn, Hazel (2013) *Understanding Tribunal Decision-making: A Foundational Empirical Study*, London: Nuffield Foundation.

as effectively in their cases.[39] At the same time, despite the possibility of savings through digitalisation, costs may ultimately rise overall. For appellants, they may, for instance, have to visit assisted digital centres multiple times. For those using a traditional oral hearing, journey times and costs may be increased by hearing centre closures. For government, if many appellants do not make use of the new online process, they may not see significant cost savings. Instead, there may just be another appeal mode with additional running costs incurred. Online appeals, hosted on the gov.uk website, may also risk losing the appearance of independence from the government departments that are the subject of appeals. In relation to assisted digital services, the uptake could be low or they could provide another gap in the tribunal appeal process where meritorious appeals fall out of the system. There is also the possibility that 'digital assistance' strays into giving inappropriate and unregulated legal advice.[40]

A new model of tribunal justice

The full details of online appeal procedures across different tribunal jurisdictions are yet to be seen. Moreover, the impacts of digitalisation will not be known without rigorous and extensive empirical research. However, on the basis of what is known so far, it is clear that digitalisation will see the creation of a *new online model* of tribunal which will, at first at least, sit alongside the present *traditional model*.[41]

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39 Federman, Mark (2006) 'On the media effects of immigration and Refugee Board hearings via videoconference', *Journal of Refugee Studies*, 19(4), 433; Eagly, Ingrid V. (2015) 'Remote adjudication in immigration', *Northwestern University Law Review*, 109(4), 933–1019.

40 See the concerns set out in JUSTICE (2018) *Immigration and Asylum Appeals – A Fresh Look*, London: JUSTICE.

41 For a fuller analysis of the changing models of tribunals in the UK, see Thomas, Robert (2017) 'Current Developments in UK Tribunals: Challenges for Administrative Justice', in Sarah Nason (ed) *Administrative Justice in*

The *traditional model* of tribunals has certain features that can be contrasted with the likely post-digitalisation model. The first obvious feature to note is that, at present, tribunals and their administration are paper-heavy. Some appeals are determined via an oral hearing, where appellants can put their case and judges can ask questions, and some are determined by a judge reviewing papers and evidence. Parties correspond over evidence – which, including between HMCTS and government bodies, is shared manually. A second key feature is that the process is designed around the hearing or determination. Evidence is gathered in time for the determination and the determination is then made in a form of a – typically very short – binding decision. Although there are important differences of detail, this is the broad traditional model of tribunal operating in SSCS and FtTIAC.

The traditional model of tribunals is now firmly established within the legal system. It has been broadly successful in dealing with a large caseload in a just and proportionate manner. It does, however, have multiple limitations. As the traditional model is designed around the formal determination, anticipation for the hearing can create stress for appellants over long periods of time. For cases with clear problems in the decision being appealed, this seems unnecessary. All of this can make tribunal appeals inefficient and inconvenient. There is typically little or no communication between the parties before the hearing. The hearing will usually be the first and only opportunity for the parties to exchange views and engage with the tribunal. Given the volume of cases and the need to list oral hearings, appeals can take some time to be heard and decided. For instance, in 2017, social security appeals took on average 20 weeks to be

Wales and Comparative Perspectives, Cardiff: University of Wales Press, Chapter 7.

decided whereas immigration appeals took 51 weeks.[42] Many weeks of 'downtime' pass in which nothing is happening to an appeal other than delay. A major issue for many appellants is not knowing how their appeal is progressing through the tribunal process. Weeks can go by without any sort of update. The consequent risk is that claimants disengage, miss deadlines or do not turn up to their hearings. This can lead to adjournments and further delays, which can further increase stress and anxiety for appellants.[43]Another drawback is that the demand on HMCTS to manage an enormous number of paper files by itself generates complications, such as lost and mislaid documents, thereby prompting complaints.[44]

The new online model moves away from the traditional model in a range of important ways – offering features that may offset some of the main limitations of the traditional model. Instead of paper-based appeals, appeals will originate online. The internal tribunal processes will also be based on automatically shared paperwork. These new processes will likely extend to the government departments that are the subject of the appeal, making information-sharing and hearing preparation quickly. As part of the move to a digital system, users will get updates via SMS and email on the progress of their appeal. All online processes and updates will use non-legal language. Perhaps the most significant change in the model will be the move to continuous online dispute resolution. As outlined above, this aims to bring all of the parties to an appeal as early as possible,[45]

[42] Ministry of Justice (2017) *Tribunals and Gender Recognition Statistics Quarterly, April to June 2017*, Table T3.

[43] Marchant, Robin (2017) 'Sometimes it makes sense to start in the middle', *Inside HMCTS,* 3 February.

[44] Parliamentary and Health Service Ombudsman (2016) *Complaints about UK Government Departments and Agencies, and Some UK Public Organisations 2015–16*, p 17.

[45] This model has been pioneered by the Traffic Penalty Tribunal and is to be piloted in social security appeals. The Traffic Penalty Tribunal also uses telephone hearings and, to a lesser degree, traditional physical hearings.

allowing the key issues to be identified quickly and for 'easy' cases to be determined without the need to wait for a traditional hearing. This removes the 'hearing-centric' component of the traditional tribunal model, replacing it with a more conversation mode of decision-making that allows the parties to informally consider issues.

How the new online model of tribunals will work in practice is presently unclear and it will likely vary across different tribunal jurisdictions. What is clear is that operationalising this new model of tribunals presents multiple important questions of design. The next part of this chapter turns to map some of the key design issues.

Key design issues

As online tribunal processes are still in development, it is not yet possible to map the issues that have arisen with their design. It is possible, however, to highlight some of the key issues arising in the ongoing design process. I cover eight of the most important issues here.

First, there is the question of which appeals should be channelled through online processes and which should not. Are there some types of cases that would not be appropriate for online dispute resolution? If so, which types of cases? How precisely would those cases be identified? Through a blanket policy or on a case-by-case basis? What approach will be taken when cases raise issues of the appellant's credibility? It is clear, and the government understands, that many cases will simply not be suitable for online procedures. It is also suggested by the government that appellant consent to use of online processes will be a key principle, and that appellants will not be forced into online processes. How and when such channelling decisions are made will be an essential design question.

Second, there is the key design issue of how traditional values of legal process and good administration – such as

transparency, fairness, participation, judicial independence and open justice – are transferred to the digital sphere.[46] How will these values be effectively respected in the digital sphere? For instance, how will the value of open justice be secured through an online process? These values – loaded with varied concerns and preferences about what a good justice system looks like – will animate views on online appeals, and process designs must consider them and develop appropriate responses. This may raise some difficult trade-offs between different value preferences, but also straightforwardly tricky questions of how to operationalise certain values in the digital context. For instance, the implementation of effective open justice in an online tribunal process will require practical design innovation.[47]

Third, there is the design of communication platforms. It is expected that online messaging systems will be used. Experience in the Traffic Penalty Tribunal – an early pioneer of online appeals – has found that online messaging has considerable advantages in terms of quickly narrowing down the issues and enabling a focused exchange of views. Online messaging can significantly lower the costs, delays and constraints that come with physical hearings. Having all the information and evidence together in a single online file as opposed to a paper-based file makes it far more easily accessible. An online system could also widen the accessibility of the tribunal process. It is envisaged that continuous online hearings will radically reduce the length of the appeals process in most cases, from an average of 20 weeks to one to two weeks. However, it is yet to be seen the extent

[46] For a discussion of administrative justice values, see Partington, Martin (1999) 'Restructuring administrative justice? The redress of citizens' grievances', *Current Legal Problems*, 53, 173; Tomlinson, Joe (2017) 'The grammar of administrative justice values', *Journal of Social Welfare and Family Law*, 39(4), 524–37.

[47] Prince, Sue (2019) '"Fine words butter no parsnips": Can the principle of open justice survive the introduction of an online court?', *Civil Justice Quarterly*, 38(1), 111.

to which appellants in jurisdictions such as SSCS and FtTIAC are able to effectively use such a platform. Another related issue is how video-link communication is implemented fairly.[48] Tribunals spend most of their time looking at evidence trying to establish facts. There is a widely held assumption that this task is best undertaken by hearing the evidence in person through an oral hearing.[49] This may be because other means of providing oral evidence may be inadequate and thereby risk unfairness for appellants or reduce the ability of the other parties to test such evidence. It could also be because the judicial task of collecting and evaluating facts – especially the credibility of a witness – will often depend not just on the content of the oral evidence, but also on non-verbal forms of communication, such as the way in which the evidence has been presented and the appellant's demeanour.[50] Alternatively, there are the ways in which live evidence at an oral hearing is subject to a degree of formality and supervision by the tribunal. The tribunal can control the procedure to ensure that there is no misuse of the judicial process. At the same time, video-link hearings have been used for some time in social security, immigration bail hearings and Upper Tribunal error of law hearings. Other jurisdictions, such as in the US and Canada, have made increasing use of video links for live evidence.[51] Furthermore, using video links in error of law hearings is relatively uncontroversial because the proceedings typically take the form of a dialogue or conversation between representatives and the judge, with the appellant making little, if any, active contribution. How video-link hearings can be

48 For recent government testing on this, see Rossner, Meredith and McCurdy, Martha (2018) *Implementing Video hearings (Party-to-State): A Process Evaluation*, London: HM Courts & Tribunals Service.

49 *Secretary of State for the Home Department v Nare (evidence by electronic means) Zimbabwe* [2011] UKUT 00443 (IAC), [17].

50 *R (Mohibullah) v Secretary of State for the Home Department* [2016] UKUT 561 (IAC), [90].

51 Federman (note 39 above); Eagly (note 39 above).

effective in tribunals that have an important fact-finding function presents a design challenge: the need to develop platforms where evidence can be given effectively and in a way that judges can have confidence in.

Fourth, and linked to the questions of the implementation of traditional values and effective communication between parties, there are multiple design questions concerning how fair procedures are ensured in online tribunals.[52] The online process promises huge changes in the tribunal process. This raises a host of questions. As noted above, one prominent example is the possible use of video-link technology in evidence-gathering. There is a range of questions about how these developments may be seen through the prism of the legal principles of procedural fairness, as well as how the use of technology may impact claimants' perceived sense of procedural justice.[53] Beyond what is legally considered to be procedurally fair, there is an important 'human element' in play here. The physical architecture of a courtroom, for example, can often condition people's experiences and perceptions of their treatment.[54] How online processes can be designed to maintain and maybe even enhance procedural fairness – both in the legal sense and the perception of appellants – presents varied design issues.

Fifth, there is the issue of how online processes – and surrounding systems – are designed to ensure appellants are not digitally excluded. While some appellants may find online processes more accessible, some groups are either unable or unwilling to use the internet for important issues such as a

52 In legal terms, it is important to keep in mind the common law principles of procedural fairness and the right to a fair trial under Article 6 of the European Convention on Human Rights.

53 For an example in a different context, see Wells, Helen (2008) 'The techno-fix versus the fair cop: Procedural (in)justice and automated speed limit enforcement', *The British Journal of Criminology*, 48(6), 798–817.

54 Mulcahy, Linda (2010) *Legal Architecture: Justice, Due Process and the Place of Law*, Abingdon: Routledge.

tribunal case. Some people cannot afford internet access (or good internet access).[55] Some of those people may have access at a library or some other place, but their access – in terms of privacy, time and convenience – is likely to be less than those who have their own at-home connection. Beyond this, connection quality and coverage varies drastically across the UK.[56] Some people quite reasonably may not wish to have an important matter such as their entitlement to social security benefits or immigration determined online. The MoJ and HMCTS have recognised the need to support people who have difficulty using technology, particularly older people, children, people with disabilities, those without digital skills and those with poor literacy or English skills. In February 2017, the MoJ published its general approach to 'assisted digital' services. It promised support for people who have trouble with using technology: 'we will ensure that our assisted digital support takes into account the needs of those who are elderly or have disabilities, those with poor literacy or English skills, and those who lack access to technology because of cost or geography.'[57] The stated intention is to ensure that assisted digital services are designed to meet the needs of the end user of a digital service, mainly unrepresented appellants, litigants in person and professional users. An 'assisted digital' support programme is being developed to help those who need support to use online systems. There is a team within HMCTS investigating this issue and piloting new processes. This involves

55 In 2015, of the 14% of households in Great Britain with no internet access, some explained this on the basis of equipment costs being too high (14%) and access costs being too high (12%); see ONS (Office for National Statistics) (2015) 'Statistical bulletin: Internet access – Households and individuals'.

56 British Infrastructure Group (2016) *Broadband: A New Study into Broadband Investment and the Role of BT and Openreach*.

57 Ministry of Justice (2017) *Transforming Our Justice System: Assisted Digital Strategy, Automatic Online Conviction and Statutory Standard Penalty, and Panel Composition in Tribunals: Government Response*, p 11.

government working with an independent, contracted-in supplier with the aim of providing a network of accessible assistance. It is expected that '[t]elephone and webchat services will also be available and clearly signposted for those who already have access to IT but require extra support, and paper channels will be maintained for those who need them.'[58] How appellants at risk of digital exclusion are managed appropriately and fairly, without undermining the wider purposes of digitalisation, will require appeal and assisted digital processes to be carefully designed.

Sixth, online appeals must be designed to fit into the wider administrative justice landscape. Administrative justice is both a fragmented and integrated landscape. It is comprised of a range of different systems (internal review, tribunals, judicial review) and different policy areas (social security, immigration, tax). Changes to one part of the wider landscape can have implications for another part. The introduction of digital tribunals prompts multiple questions in this respect. For instance, in the context of social security, there is a possibility that – next to an online tribunal procedure – MR looks obsolete. How will the two systems – one paper-based and the other online – work together? Good online tribunals designs would be sensitive to the wider administrative justice system in which they exist, such as processes like MR. There is plenty of room for creative improvements here too. It is widely argued that government should learn from tribunal decisions to improve initial decision-making.[59] The prospect of digitalisation presents the opportunity to build in better and quicker feedback loops that consume less time, effort and money.

Seventh, there is the question of data collection. Digital systems collect massive amounts of data. They can do this

[58] Ibid, p 27.

[59] See, generally, Thomas, Robert (2015) 'Administrative justice, better decisions, and organisational learning', *Public Law*, 111.

consciously through, for instance, asking for specific information on a form. But digital systems also create data through their operation (often in the form of metadata). Digitalising a tribunals system historically reliant on paper raises questions in relation to data collection and protection. From a research and system improvement perspective, there is a potential bounty here too: the collection of mass data that is easily searchable opens clear gateways for new research, at a much faster rate. What data is collected is a central question. So is what data will be published.

Finally, there is the need to design an efficient process. As noted at the outset of this chapter, efficiency is a key driver in the HMCTS reforms. Technology-based reforms tend to be based on the idea of frontloading investment and gaining long-term savings. That seems to be the case with *Transforming Our Justice System* too. At the same time, systems often work in unpredictable ways and contain hidden costs. If the value of efficiency is to be a key driver, we must understand what efficiencies are actually generated and at what cost to other values, such as access to justice. There is also a need to understand false efficiencies. In March 2016 Sir Ernest Ryder explained how Money Claims Online:

> … has been in operation since 2001 and has over 180,000 users annually. But once the "submit" button is pressed by the user or their representative, a civil servant at the other end has to print the e-form, and make up a paper file. From that point on, we are back to square one: almost back to the Dickensian model of justice via the quill pen.[60]

There are two major 'risks' in respect of efficiency. The first is that the online system makes appealing so easy that there is an upsurge in cases that cannot be easily handled. The second is

[60] Ryder, Ernest (2016) 'The Modernisation of Access to Justice in Times of Austerity', The Ryder Lecture, University of Bolton.

that the use of online systems will not be as broad as is predicted as there will be two systems – online and traditional – that inefficiently co-exist. This second 'risk' may lead to some appellants being pressed into using the online tribunal.

I have provided only a broad overview of some key issues that designing online tribunal processes presents, yet it is clear that the design challenges are many and varied. Digitalisation essentially requires us to examine the justice system we have at present and to recreate a new system on the basis of what we have learned so far. This is no easy task and is made more difficult by the fact that seemingly small details may have significant effects on how online tribunals operate in practice.

Recommendations

The introduction of online tribunal processes marks another key turning point in the long history of tribunals. Digitalisation also represents the latest in a number of significant changes to tribunals in just recent years. The introduction of online tribunals must be understood in the wider context of these changes. From that wider perspective, the introduction of online tribunals could lead to the continued marginalisation of the role of tribunals or go some way to making them more effective as an administrative justice process. The outcome of the government's gamble to get more for less by using technology in tribunals will only be seen once all of the reforms are completed – something that is expected within the next few years.

As there is little in the way of detailed evidence available as to how online tribunal appeals will work in practice, the most important recommendations that can be offered at this stage go to monitoring and design. The issues of design are addressed in more detail in the next chapter. As for monitoring of online appeals, at least two elements are critical. First, a coherent scheme of data collection on online appeals and assisted digital – which is in line with data ethics and privacy considerations

– must be developed. Furthermore, such data should be made publicly available for review by external stakeholders and researchers. Second, the government should not only conduct research for the development of online processes, but also pursue, commission and enable detailed empirical research that examines how online processes are working in practice – as part of a wider commitment to continued evaluation of new online systems. This will provide detailed insights into whether online appeals are proving effective or whether they have weakened administrative justice in the way some fear they might.