

AN APPEAL TO PRINCIPLE:

**A THEORY OF APPEALS AND REVIEW OF MIGRATION
STATUS DECISION-MAKING IN THE UNITED KINGDOM**

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THESIS SUBMITTED FOR THE DEGREE OF DOCTOR OF PHILOSOPHY

OXFORD UNIVERSITY

JANUARY 2016

ABSTRACT

The question asked by this thesis is when and why, as a matter of principle, should there be judicial scrutiny on the merits of administrative decisions on migration status ('migration status decisions') in the United Kingdom? It argues that this is a moral question, engaging concerns of fair treatment. The first two chapters examine the question theoretically. It is argued that access to justice is not a gift of citizenship and that migration status decision-making should be reviewable on the merits to avoid the appearance and/or occurrence of injustice in the light of the effects of migration control on individual migrants and the nature of migration status decision-making as 'very imperfect procedural justice' (save where a decision is not based on the judgment discretion of an administrator). The latter five chapters apply the normative claims to the United Kingdom constitutional context, including the relevant European regimes (European Convention on Fundamental Rights and European Union). First, as background to the argument, a history of recourse from migration status decision-making in the UK from the initial establishment of a review system in 1905 is sketched out. The history demonstrates the absence of a coherent or principled account of migration status appeals. The history is followed by a three-part critique of the current system of recourse in the UK. First rights of appeal in three case studies (deportation, offshore visitors and students) are examined. Secondly, the three standards of review available under judicial review (rationality, anxious scrutiny and proportionality) are critiqued, and thirdly, the contribution of European and international norms is considered. In general terms the

thesis concludes that the current UK system of recourse is deficient in certain respects and suggests reform to the current appeals system.

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TABLE OF ABBREVIATIONS

CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment 1984
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination 1969
CFREU	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
DFT	Detained Fast Track
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECO	Entry Clearance Officer
ECtHR	European Court of Human Rights
EEA	European Economic Area
EU	European Union
FTT (IAC)	First-tier Tribunal (Immigration and Asylum Chamber)
HMCTS	Her Majesty's Courts and Tribunals Service
IA 2014	Immigration Act 2014
IA 1971	Immigration Act 1971
IAT	Immigration Appeal Tribunal
ICCPR	International Covenant on Civil and Political Rights 1966
ICESCR	International Covenant on Economic, Social and Cultural Rights 1966
MWC	Convention on the Protection of the Rights of All Migrant Workers and Members of their Families 1990
NIAA 2002	Nationality Immigration and Asylum Act 2002
PBS	Points Based System
RC	Convention Relating to the Status of Refugees 1951
SSHD	Secretary of State for the Home Department
TCEA 2007	Tribunals Courts and Enforcement Act 2007
UDHR	Universal Declaration of Human Rights 1948
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNHRC	United Nations Human Rights Committee
UT (IAC)	Upper Tribunal (Immigration and Asylum Chamber)

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INTRODUCTION

1. Recourse from Migration Status Decisions

It is the overarching aim of this thesis to examine whether, why and when judicial scrutiny of the merits of migration status decision-making is required. The questions are addressed initially in the abstract and then in the specific United Kingdom constitutional context. Before turning to the argument, however, it is useful to address some introductory terminological and methodological points and, as a preliminary, to contextualise the subject matter.

Thus, first, it is important to note that from the perspectives of both migrants and the states receiving them,¹ frequently much is at stake in migration status decision-making.² For migrants, a decision on their migration status may, for example, determine interests as fundamental as ‘life and limb’, dictate whether family members are separated

¹ The thesis focuses on the decision-making of receiving states (immigration); cf ‘sending states’ (emigration).

² Migration status decision-making is defined in this chapter as individualised administrative decision-making on a migrant’s migration status, that is, the basis on which an individual who is not a citizen of a state may enter and/or reside in that state. It does not, therefore, include administrative decision-making on the detention of migrants (since decisions to detain are not decisions on migration status but are based on a prior such decision). It also does not include applications made by institutions or enterprises (such as universities or employers) that do not directly involve an administrative decision on an individual’s migration status.

from one another, or entail significant financial consequences.³ For receiving states, it constitutes a sizeable part of administrative functions⁴ as well as, in terms of the outcomes of migration status decision-making, a correspondingly significant portion of public expenditure.⁵ Furthermore, since migration will inevitably affect population size as well as demographic composition, migration status decision-making is socially and politically consequential.⁶

Moreover, as with all forms of administrative regulation, migration status decision-making generates disputes between the government and private parties. These disputes will concern the rejection of an application to confer some form of migration status, the withdrawal of a status, or a regulatory action that may be coercive in nature (most frequently expulsion measures in the migration status decision-making context). It is a premise of this thesis that as a function of the moral requirement that the validity of

³ In the case of asylum and humanitarian protection applications, family migration and economic migration, respectively.

⁴ In the United Kingdom, the UK Visas and Immigration Department of the Home Office 'is responsible for making millions of decisions every year about who has the right to visit or stay in the country', see: <<https://www.gov.uk/government/organisations/uk-visas-and-immigration>> accessed 1 January 2016.

⁵ The net fiscal impact of migrants is difficult to predict accurately due to lack of data, however, it is clear that both expenditure related to migrants and their contribution to GDP are significant for the economies of receiving countries. See, eg, Institute for Public Policy Research data from the fiscal year 2003-2004 comparing real revenues from migrants (GBP 41.2 billion) with the expenditure associated with immigrants (GBP 41.6 billion): Carlos Vargas-Silva, 'The Fiscal Impact of Immigration in the UK' (*The Migration Observatory*, 27 March 2015) <<http://www.migrationobservatory.ox.ac.uk/briefings/fiscal-impact-immigration-uk>> accessed 13 November 2015

⁶ As attested by the rise in anti-migration parties across Europe. UKIP, for example, gained 12.5% of the vote in the UK's 2015 general election. See further, Matthew Karnitschnig, Anton Troianovski and Jenny Gross, 'Europe's anti-immigrant parties start to gain ground in wake of Paris attacks' (*The Wall Street Journal*, 16 January 2015) <<http://www.wsj.com/articles/europes-anti-immigrant-parties-stand-to-gain-ground-in-wake-of-paris-attacks-1421371307>> accessed 13 November 2015; and Alberto Nardelli and George Arnett, 'Why are anti-immigrant parties so strong in the Nordic states?' (*The Guardian*, 19 June 2015) <<http://www.theguardian.com/news/datablog/2015/jun/19/rightwing-anti-immigration-parties-nordic-countries-denmark-sweden-finland-norway>> accessed 13 November 2015.

decisions, acts and omissions, and norms be subject to challenge,⁷ administrative law must provide mechanisms for dispute-resolution that are accurate, fair and efficient.⁸

In terms of dispute-resolution processes, over the course of the Twentieth century, in general terms there was a shift in many advanced, liberal and democratic countries from the exclusion of migration status decision-making from the mainstream judicial process to a general acceptance that some form of recourse from (at least some) migration status decisions was necessary.⁹ In the UK – the legal system that forms the focus of the second part of this thesis – this recalibration in administrative law was manifest in twin developments: first, the broadening of judicial review in the wake of the seminal cases *Ridge v Baldwin*¹⁰ and *CCSU*,¹¹ which found (with exceptions¹²) that all administrative decisions including the prerogative powers were amenable to review; and secondly, the creation of a statutory migration appeals jurisdiction in newly created tribunals. However, although in the UK the establishment of a statutory migration appeals system followed the findings of a commission of inquiry charged with determining whether and why there

⁷ As part of the moral right to fair treatment – see definitions below and see also Lawrence B Solum, ‘Procedural Justice’ (2004) 78 Southern California Law Review 181, 268.

⁸ Michael Asimow, ‘Five Models of Administrative Adjudication’ (2015) 63 American Journal of Comparative Law 3. 3. The focus of this thesis is on fair treatment. Accuracy of outcome is considered as part of the right to fairness. Due to the theoretical nature of the argument, however, practical concerns of efficiency are not examined in any detail. It is recognised that efficiency concerns may contradict, but should not trump, a right to fair treatment. Nonetheless, efficiency would need to be addressed in implementing any procedural reform in practice.

⁹ See Chapter 5 for a detailed exposition of this process in the UK.

¹⁰ *Ridge v Baldwin* [1964] AC 40 (HL).

¹¹ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 375 (HL).

¹² The House of Lords identified certain areas of administrative activity that were non-justiciable (eg foreign policy, defence of the realm). However, the trajectory of case law since the *CCSU* case has been to define the cohort of non-justiciable cases narrowly, see, eg, comments to this effect by the Court of Appeal (Laws LJ giving the judgment of the court) in *Al Rawi v Secretary of State for Foreign and Commonwealth Affairs* [2006] EWCA Civ 1279, [2008] QB 289 [2]-[4].

was a need for migration appeals,¹³ it is a premise of this thesis that the inclusion of migration status decisions within the fold of judicial oversight was not sufficiently explained or justified. There has been no further systematic and comprehensive review of the need for judicial scrutiny of migration status decisions since the initial report of the royal commission in 1967, and as such the UK migration appeals system remains under-theorised.

The importance of understanding the reasons for having a system of migration appeals becomes evident when its existence is threatened. Thus, following the high water mark of state support for judicial scrutiny of migration status decisions in the mid-twentieth century in the UK, there has, in the latter years of the twentieth century and the early years of the twenty first, been a new shift away from judicial oversight. Appeals have been replaced with internal administrative review¹⁴ or a residual review of the legality of the decision-making process.¹⁵ A gradual and piecemeal attrition of appeal rights started in the late 1980s and this has been accelerated and extended dramatically by the Immigration Act 2014.¹⁶ In the light of these developments, in the UK in practice there are currently two central questions that arise in respect of migration appeals: first, when should a migration appeal lie?; and secondly, when should a migration appeal suspend removal? This thesis seeks to answer the first of these by examining why

¹³ The findings of the committee are set out in its report: Wilson Committee, *Report of the Committee on Immigration Appeals* (Cmnd 3387, 1967). See further Chapter 5.

¹⁴ That is, a review undertaken within the administrative body.

¹⁵ See further Chapter 4.

¹⁶ See summary in Chapter 5.

migration appeals are necessary. The second, which is currently the focus of Parliamentary debate, will require further research.¹⁷

2. Thesis Aims and Contributions

Thus, the major objective of this thesis is to propose as a matter of principle why and therefore when there should be a right of appeal from administrative decisions on migration status in the United Kingdom.¹⁸ As noted above, this addresses a question of current relevance to legislators, government, the judiciary and civil society (citizens, migrants and would-be migrants). Whilst, as will be seen in later chapters, there has been some discussion at political levels relating to the justification for rights of appeal, as a matter of legal scholarship this is a novel approach. Although recently appeal rights and review have received greater attention from practitioners,¹⁹ there remains little scholarly attention focused on examining appeals and review in migration law from a theoretical perspective.²⁰ The thesis argues that the question of when there should be a right of appeal engages concerns of fair treatment and is, therefore, moral²¹ (rather than political)²² in nature. In essence, this refers to a distinction between what is right as a

¹⁷ A summary of the central issues arising from non-suspensive appeals is provided in Chapter 4.

¹⁸ The theoretical claims also have wider purchase in that, as explained below, they relate to constitutional, liberal and democratic states generally.

¹⁹ Mark Symes and Peter Jorro, *Immigration Appeals and Remedies Handbook* (Bloomsbury Professional 2015).

²⁰ The Report of the Wilson Committee (n 13 above) remains the only comprehensive theoretical exploration at government level.

²¹ Specifically, political morality, that is the morality of states rather than individuals.

²² ‘Political’, in the sense used in this work refers to the ideas or strategies of a particular party or group in politics. See Oxford English Dictionary definition: ‘(1)[o]f, belonging to, or concerned with the form, organization, and administration of a state, and with the regulation of its relations with other states.... (3) Involved, employed, or interested in politics; that takes a side, promotes, or follows a particular party line in political debate. Also (somewhat derogatory): having regard to or affected by the interests of a party or parties rather than principle; partisan, factious...’

matter of principle rather than as a matter of serving partisan interests. As noted above, this thesis' specific focus on the theory of appeals is important in the light of the implications of the recent reforms. The changes wrought by IA 2014 (and planned by the Immigration Bill 2015)²³ are arguably the most consequential in terms of procedural fairness since the entry into force of the migration appeals system in 1970: not only do they alter the basis on which a right of appeal is conferred but also reduce dramatically the scope of rights of appeal and, therefore, when fully implemented, the volume of appeals. Prior to the entry into force of the 2014 appeals reforms, a high proportion of appeals to the First-tier Tribunal succeeded against the Home Office (50% of entry clearance appeals, 49% of Managed Migration appeals and 32% of deportation appeals in 2012-13).²⁴ As noted by the Joint Committee of Human Rights, this high success rate questions the legitimacy of the Government's case for reform,²⁵ yet, it is argued, without a theory of appeals based in the moral demands of fair treatment, the system is liable to interference based on partisan interests, including those relating to substantive anti-migration policy.²⁶ As will be argued in later chapters, substantive migration control should not be implemented through procedural reforms to the migration appeals system. The conclusions are aimed at legislators in crafting future law, the administration in applying current legal standards and shaping current policy, and the judiciary in applying

²³ HC Bill 74.

²⁴ Home Office, *Impact Assessment of Reforming Immigration Appeal Rights* (15 July 2013). The figures here also underline the importance of rights of appeal for individual migrants. See Asimow, 'Five Models of Administrative Adjudication' 4: '...administrative adjudication is the face of justice for millions of ordinary people everywhere in the world. It is highly deserving of scholarly attention.'

²⁵ Joint Committee on Human Rights, *Eighth Report, Legislative Scrutiny: Immigration Bill* (11 December 2013) paras 36 and 39.

²⁶ In other words, that substantive migration policy aimed at reducing net migration is being, in part, executed through the reduction of fair procedures.

it and interpreting fair trial norms (see further Chapter 8 for a discussion of this). Thus, this thesis aims to contribute practical and timely arguments in the current controversial policy debates concerning migration appeals and review.

Beyond the specific UK context, a broader contribution of this thesis is situated in redefining the position of the migrant vis-à-vis the state and its citizens. It forms part of the growing body of work objecting to ‘migration exceptionalism’: the notion that migrants should receive differential, less protective, treatment than citizens of the host state in areas directly unrelated to migration control.²⁷ It is argued that migration exceptionalism should not impact on migrants’ procedural rights since, whilst they may not have rights of entry and residence, they have rights of procedural fair treatment that cannot properly be excluded by reliance on states’ sovereign powers over migration control. In other words, the aims of fair treatment transcend the exclusions flowing from various national constructions of the migrant-citizen binary. Whilst debates over the purpose of procedural fair treatment (the primary debate being between instrumental and intrinsic accounts)²⁸ are, to a large degree, bracketed out by the work, it is accepted that a

²⁷ See further Chapter 2. In the context of review of migration status decision-making it constitutes the differential treatment of migration cases vis-à-vis other administrative decisions. In the United States, the ‘plenary power doctrine’, the extreme deference (often approaching non-reviewability) adopted by courts to constitutional challenges relating to migration, epitomizes migration exceptionalism: see, eg, Stephen Legomsky, ‘Immigration Exceptionalism: Commentary on Is there a Plenary Power Doctrine?’ (1999-2000) 14 *Georgetown Immigration Law Journal* 307. The doctrine is explained by Kevin R Johnson in the following way: ‘[it] generally immunizes the substantive immigration judgments of Congress about which immigrants to admit into, and deport from, the country. As a consequence, the courts have allowed the US immigration laws to discriminate against noncitizens in ways that would be patently unconstitutional if the rights of U.S. citizens were at stake’: Kevin R Johnson, *Immigration in the Supreme Court 2009-13: A New Era of Immigration Law Unexceptionalism* (UC Davis Legal Studies Research Paper No 388, 2014). cf *ibid* for arguments that the United States Supreme Court has recently moved away from a strict application of the plenary power doctrine.

²⁸ Instrumental accounts emphasise the connection between process and outcome such that the effectiveness of a given procedure is judged by the extent to which it results in the achievement of the desired outcome. By contrast, non-instrumental accounts of procedural justice focus on the value of fair procedures not as vehicles for the attainment of a desired outcome but *per se*, as

primary goal of fair treatment is ensuring that binding standards are properly applied.²⁹

This is because clearly a system of recourse that inexorably resulted in error would be unacceptable.³⁰

3. Terminology, Assumptions and Scope of Thesis

It is important to clarify at the outset certain terms and concepts to which repeated reference is made. It is useful to settle these key terms since they may be employed with different meanings in academic research, governmental publications, judicial writing and public debate, as well as between different legal jurisdictions. It is also necessary to delineate the boundaries of the thesis since there are certain questions with tangential relevance to those specifically considered which cannot be addressed within the confines of the work.

3.1. Terminology

There are two central terminological groupings: those relating to migration and those relating to procedural justice. ‘Migrant’ is defined very broadly as an individual

reflective of the way in which individuals should be treated irrespective of substantive outcome. For an overview of the debate see Michael Adler (ed) *Administrative Justice in Context* (Hart 2010), pp 132-36, and see further Robert S. Summers, ‘Evaluating and Improving Legal Processes - A Plea for ‘Process Values’ (1974) 60 Cornell Law Review 3; Jerry L Mashaw, ‘The Supreme Court’s Due Process Calculus for Administrative Adjudication in *Matthews v Eldridge*: Three Factors in Search of a Theory of Value’ (1976) 44 The University of Chicago Law Review 28; Jerry L Mashaw, ‘Conflict and Compromise among Models of Administrative Justice’ [1981] Duke Law Journal 181; Alon Harel, *Why Law Matters* (Oxford University Press 2014).

²⁹ DJ Galligan, *Due Process and Fair Procedures* (Clarendon Press 1996), p 395. See also Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles and Practice* (3rd edn, Sweet & Maxwell 2013), 1.7, and Timothy Endicott, ‘The Impossibility of the Rule of Law’ (1999) 19 OJLS 1. See also discussion of the Rawlsian concept of the ‘independent criterion of a just result’ in Chapter 2 and John Rawls, *A Theory of Justice* (Harvard University Press 1971).

³⁰ Paul Daly, ‘Administrative Law: A Values-Based Approach’ in Mark Elliott John Bell, Jason Varuhas and Philip Murray (ed), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart 2015), ‘...ineffective decisions sap the legitimacy of administrative decision-making structures established by legislative majorities.’

who is not a citizen of the state into which he or she is seeking entry or in which he or she is territorially present. It includes, therefore, visitors (including holiday makers and those in transit) as well as refugees, victims of human trafficking who do not possess the nationality of the state to which they are trafficked, and those seeking to settle in the receiving state.³¹ The second key concept that requires elucidation is ‘migration status decision.’ As noted earlier, this refers to individualised, administrative decisions that determine an individual’s migration status, that is the ability to enter, reside or remain in an actual or would-be host state. Given the breadth of the definition of ‘migrant’ in this thesis, migration status decisions encompass, therefore, a broad range of migration applications, including applications for entrance from off-shore, would-be migrants (such as visas for tourism, family visits, work or family reunion), and applications to remain from migrants who are already territorially present (including, for example, asylum applications, extensions of existing leave and applications to regularise migration status for those who are present without leave to remain).³² Further, migration status is an incident of ‘migration control’, that is states’ ability to regulate the entry and residence of migrants on their territories. State sovereignty over migration control traditionally refers

³¹ The implications of the very broad definition on the claims made in this thesis are discussed in later chapters, see, eg, Chapters 2 and 3 and, in the specific UK context, Chapter 6. The term ‘migrant’ is preferred over other alternatives, such as ‘alien’ and ‘non-citizen’. The term ‘alien’ appears antiquated and its connotations of otherness sit uneasily with the modern notion of universal human rights, see, eg, Richard Plender, *International Migration Law* (Revised 2nd edn, Martinus Nijhoff 1988), p 470. The term ‘non-citizen’ is similarly unsatisfactory: although it conveys the crucial notion of absence of a particular citizenship, it is inaccurate insofar as it suggests that individuals who cross territorial borders do not possess any nationality, See Rainer Baubock, ‘Boundaries and Birthright: Bosniak’s and Shachar’s Critiques of Liberal Citizenship’ (2011) 9 *Issues in Legal Scholarship* 3, 4).

³² Regulatory actions affecting migration status that are not application-based are also included.

to states' ability to forbid the entry of, expel, or admit on conditions as they see fit, migrants to their territories as incidents of their autonomous power.³³

As regards the second group of terms used in the thesis, the moral right to fair treatment³⁴ is at the heart of the claims of this work since it underlies the more specific constitutional, legal and procedural values examined.³⁵ Fair treatment refers to concerns of process³⁶ as opposed to the substantive justice of a given set of circumstances.³⁷ Or, in very broad terms, fair treatment focuses on relationships between persons, whereas substantive justice focuses on the outcome they get.³⁸ The moral right to fair treatment is

³³ See, eg, United States Supreme Court, *Nishimura Ekiu v United States* 142 US 651 (1892), *per* Gray J at 659: '[i]t is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to its self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.' Cited in Guy Goodwin-Gill, *International Law and the Movement of Persons Between States* (Clarendon Press 1978), pp 95-6. Developments in refugee, human rights and EU law now qualify the absolutist assertion of migration control: see, in the UK context, Chapters 4, 5 and 8.

³⁴ See Galligan, *Due Process and Fair Procedures* (n 29).

³⁵ See definitions of these concepts below.

³⁶ 'Process' refers to a legal or administrative act that involves a decision: Galligan, *Due Process and Fair Procedures* (n 29), pp 6, 8 & 25. Different types of process include adjudication, discretion, agreement, voting, and fiat or decree. Procedures are neutral mechanisms that govern the way in which a decision is reached within a process. They do not inexorably lead to any particular outcome but are 'signposts indicating the direction to take and the issues to consider,' *ibid*, p 6. See also Summers, 'Evaluating and Improving Legal Processes - A Plea for 'Process Values'', p 8; and J Thibault and L Walker, 'A Theory of Procedure' (1978) 66 California Law Review 542, 546.

³⁷ The concept of 'justice' underlies the expression 'fair treatment'. Adler defines 'justice' in broad terms as referring to an essential idea that 'everyone should receive what is due to them' Adler, *Administrative Justice in Context* (Hart 2010), p 129. Adler draws on a distinction drawn by Rawls between the concept of justice and conceptions of justice: 'Rawls distinguishes between the *concept* of justice, which refers to 'a proper balance between competing claims', and competing *conceptions* of justice, each of which expresses a different set of 'principles for identifying those considerations which determine this balance.' *ibid*, M Adler chapter 6 'Understanding and Analysing Administrative Justice', p 130, citing Rawls, *A Theory of Justice*.

³⁸ *ibid*. Adler, *Administrative Justice in Context*, chapter 6 'Understanding and Analysing Administrative Justice', p 131. See further, Galligan's definition of fair treatment in Galligan, *Due Process and Fair Procedures*, pp 56-62 & 392-395. In Galligan's view (drawing on the analysis of John Finnis), fair treatment constitutes four component parts: first, it has to do with the relationship between persons, and secondly, with what is due or owed by one to another. Thirdly, there should be equality (that is, proportionality, equilibrium or balance, and fourthly, compliance

reflected in the more specific concepts considered in this work: the rule of law, procedural justice, access to justice, and the standard of review. The rule of law is a constitutional value whose various meanings are explored in more detail in Chapter 2,³⁹ but even in its ‘thinnest’ sense, the concept comprises formal, procedural requirements including lawful authority for the exercise of power.⁴⁰ Procedural justice is a facet of the rule of law and is a practical application of fair treatment.⁴¹ The expression ‘procedural justice’ is employed on the basis that it is the least jurisdictionally encumbered⁴² label for the concept.⁴³ This is important as whilst the UK legal order is the focus of Chapters 4-8, the focus of Chapters 2 and 3 is not limited to local understandings. In turn, ‘access to justice’ is a specific facet of the right to procedural justice (and the rule of law).⁴⁴ The expression ‘access to justice’ is used in this thesis to mean the ability for individuals to

with certain fundamental standards of right treatment. He notes that ‘the idea at the core’ of fair treatment is that it ‘consist[s] in giving a person his due or entitlement,’ p 57.

³⁹ The competing accounts of Raz and Dworkin are compared. See Chapter 2, pp 28-30.

⁴⁰ See further, Chapter 2. A right to access to justice is derived from the need to enforce the rule of law’s requirement of lawful authority for the exercise of power.

⁴¹ ‘Procedural justice’ is distinguished from ‘procedure’, and ‘procedural rule.’ See n 36 above. The specific content of procedural justice is flexible and sensitive to context but generally it includes a hearing requirement and a stipulation against bias. See further exploration of English natural justice in Chapter 8.

⁴² National and supra-national terminology includes United States’ constitutional ‘due process’, English common law ‘natural justice,’ the notion under the European Convention on Human Rights of ‘fair trial’ and ‘effective remedy’, and the European Union notion of ‘effective remedy’ and the ‘rights of the defence.’

⁴³ Other synonyms such as ‘procedural fairness’ and ‘procedural protection’ might have as well been employed on this basis

⁴⁴ Galligan, *Due Process and Fair Procedures* (n 29), p 392: ‘How then does recourse relate to procedural fairness? It is often said that the right to have a decision reviewed, or to appeal it to a court, is of fundamental importance. Certainly extensive resources are expended in providing recourse in one form or another, yet it is not always obvious why a society should do so, or why we think a right to recourse touches on something fundamental. The answer is simple: recourse from a decision or action by one authority to another is an element of procedural fairness and in turn of fair treatment.’

seek and obtain judicial oversight of an administrative decision.⁴⁵ Where the thesis refers to review that is not necessarily judicial in nature, the generalised term ‘recourse’ is employed.⁴⁶ The terms ‘appeal’ and ‘review’ are employed in examining the specific UK constitutional context. Since in the UK context they are usually applied to refer to a particular ‘standard of review’ (see definitions below), they are not used as overarching terms in this work.⁴⁷ Thus, the constitutional value of the rule of law, procedural justice and its specific articulation in access to justice pursue the moral right to fair treatment.⁴⁸ Further, a ‘procedural right’ exists where procedural justice calls for the application of a certain procedure or procedural rule. Thus, recourse (including access to justice) may constitute a procedural right in certain circumstances. What these circumstances may be is examined in later chapters.

Moreover, concerns of fair treatment are equally relevant to determining the standard of review employed in judicial scrutiny (or other forms of recourse). In broad terms, the ‘standard of review’ refers to the degree of deference accorded by the reviewer to the decision under review. The standard of review may constitute review of the merits of a decision (‘merits review’), and/or review of its legality (‘legality review’). Merits review is substantive review as it asks the question of whether the decision was right or

⁴⁵ Synonyms that are also used include ‘judicial oversight’ and ‘judicial scrutiny’. As far as possible, the term ‘judicial review’ is avoided outside of discussion of the specific UK constitutional framework. This is because, as is explained in Chapter 4, UK judicial review is a term of art, referring specifically to legality review. The access to justice contemplated here, however, does not refer to any particular standard of review, rather, as noted above, it refers more generally to the ability of individuals to challenge decisions before a court or tribunal.

⁴⁶ As Galligan explains, ‘[b]y recourse is meant the re-examination of the primary decision to determine whether it is wrong, whether a mistake has been made, or whether it is simply not as good, wise, or fair as it might have been.’ Galligan, *Due Process and Fair Procedures* (n 29), pp 392-93.

⁴⁷ See definitions in the UK context in Chapter 4.

⁴⁸ Galligan, *Due Process and Fair Procedures* (n 29), p 392.

wrong and refers to the court's ability to make a factual assessment to which legal standards are applied. It examines the correctness of the findings of fact⁴⁹ on which the decision is made. In the UK system of administrative justice, merits review is generally referred to as an 'appeal.'⁵⁰ The second standard of review contemplated above (legality review) is generally procedural in that the relevant question is not the correctness or otherwise of the substance of the decision, but whether the law has been properly applied in making it.⁵¹ Generally, the only point at which legality review may involve itself in the merits of a decision is where it is alleged that the decision on the facts is so wrong as to amount to a mistake of law (i.e. it is perverse) or that it violates some higher norm.⁵² In the UK legal order, 'judicial review' is the paradigm system of legality review.

Judicial merits review as defined in this work comprises three constituent features: i) independence from the executive, ii) *de novo* assessment of the facts, and iii) a substantive remedy (ie the ability for the reviewer to substitute his or her view for the administrator's).⁵³ These are explained in more detail in Chapter 4. The three constituent features are, ontologically, the minimum content of judicial merits review.

Finally, 'discretionary decision-making' requires definition as a phrase that is used repeatedly in the thesis. In Chapter 2, the distinction is drawn between 'strong' and

⁴⁹ A finding of fact has been defined as 'an assertion that a phenomenon exists, has existed or will exist, independently of any assertion as to its legal effect,' S A de Smith *Constitutional and Administrative Law* (4th edn, 1981, H Street and R Brazier), p 128 cited in Stephen Legomsky, *Immigration and the Judiciary* (Clarendon Press 1987).

⁵⁰ See Chapter 4.

⁵¹ See further Chapter 2, p 33.

⁵² See further Chapter 2 and the application of proportionality in practice in Chapter 7. However, the distinction between questions of fact and law is not always straightforward. See further Legomsky, *Immigration and the Judiciary* (n 49), p 13. See also TRS Allan, *Law, Liberty and Justice: The Legal Foundations of the British Constitution* (Oxford University Press 1993), pp 187 & 205.

⁵³ See further Chapter 4.

‘weak’ discretion. The former is ‘standardless’ in the sense that it requires the decision maker to invent standards in coming to a conclusion; whereas the latter presupposes the existence of standards but requires the decision maker to make judgment calls in their application. The latter process is referred to as ‘judgment discretion’ in this work.⁵⁴

3.2. Scope of thesis and assumptions made

In addition to setting out central terminology employed in the thesis, it is also useful to delineate its boundaries and limitations. The thesis makes a number of assumptions which limit its scope. First, the claims made in the work are premised on the existence of background criteria reflecting liberal, democratic values.⁵⁵ This (*inter alia*) assumes democracy to be a politically legitimate form of governance; the existence of some form of division between the legislative, executive and judicial branches of government; some form of the rule of law; the valorization of rational action; and prioritization of the values of liberty and democracy in the allocation of resources. As such, although the arguments in Chapters 2 and 3 are not dependent on any particular constitutional system, it is assumed nonetheless that the concept of the state as discussed operates within the framework of constitutional democracy and public international law.⁵⁶ The claims in this

⁵⁴ See further, Chapter 2, [5.1].

⁵⁵ The phrase ‘liberal, democratic values’ is used in a general sense to refer to the moral principles that inform and justify contemporary legal orders broadly located in Europe, North America, Australia and New Zealand. See analogously the use of ‘democratic principles’ in Joseph H Carens, *The Ethics of Immigration* (Oxford University Press 2013), p 2. For a discussion of alternatives to the liberal view of the nature of the state, see, e.g., the discussion by Bhikhu Parekh of ‘communitarian views’ (state is a group of people united by common understandings, meanings, interests and loyalties) and ‘ethnic views’ (state as a hereditary group of people): Sarah Spencer (ed) *Strangers & Citizens: a positive approach to migrants and refugees* (Rivers Oram Press 1994), pp 93-96.

⁵⁶ ‘State’ as used in this thesis corresponds to the meaning typically ascribed to it by public international law, namely, possessing ‘a) a permanent population; (b) a defined territory; c) government; d) capacity into enter into relations with other states,’ Article 1 Montevideo

thesis are aimed, therefore, primarily at constitutional democratic legal orders. Secondly, the thesis does not engage with debates on the desirability or otherwise of open borders.⁵⁷ Rather, it accepts that current global social, economic and political circumstances explain⁵⁸ some degree of border impermeability and that this is reflected in the international legal order. Thus, the existence of migration control as a matter of fact is not questioned by this thesis. What are questioned and examined, however, are the processes, in particular the review mechanisms, by which migration control is exercised.

In addition to these preliminary assumptions, it is also necessary to delineate certain central boundaries of the thesis. First, the focus is on procedural justice rather than what Adler calls ‘social justice’, namely the distribution of benefits and burdens between individuals and groups in society.⁵⁹ Whilst the concepts are certainly interlinked, the primary focus here is procedural.⁶⁰ the thesis does not ask whether substantive laws on migration are just.⁶¹ Secondly, the thesis is confined to administrative law, and in particular the disputes generated by the administration’s decisions on individuals’ migration status.⁶² It does not relate to litigation in private law involving migrants (for

Convention on Rights and Duties of States 1933. See, eg, Malcolm N Shaw, *International Law* (Seventh edn, Cambridge University Press 2014), p 114.

⁵⁷ See, in particular, the works of Joseph Carens, eg, Carens, *The Ethics of Immigration* (n 55) and Joseph H Carens, *Immigrants and the Right to Stay* (The MIT Press 2010). Without adopting any particular view in the permeability of borders debate, however, the work may add to it in positing a link between migration control and access to justice as the thesis argues that the individualized exercise of migration control must be procedurally fair.

⁵⁸ It is not necessary for present purposes to comment on whether or not migration control is justified by present global and local circumstances, or at all.

⁵⁹ Adler, *Administrative Justice in Context* (n 37), chapter 6 ‘Understanding and Analysing Administrative Justice’, p 130.

⁶⁰ See definitions above.

⁶¹ n 57.

⁶² Since the claims apply to the addressee of individual migration status decisions, the thesis is not, therefore, concerned with questions of standing in administrative justice.

example, civil claims for damages for false imprisonment arising out of immigration detention) or migrants' encounters with the state as a matter of criminal law. Thirdly, the thesis examines individualized administrative decision-making.⁶³ It does not, therefore, examine generalized administrative action such as rule-making and it does not examine legislative powers and policy formulation.⁶⁴ Importantly, it is assumed for the purposes of this thesis that the individualized administrative decision-making in question (migration status decision-making) is premised on the application (and interpretation) of legal standards.⁶⁵ Fourthly, since the focus of this thesis is recourse from migration status decision-making, it is premised on an initial administrative decision (a migration status decision) having been made.⁶⁶

Fifthly, whilst there are numerous variables relevant to the availability and procedural fairness of mechanisms of recourse,⁶⁷ as noted earlier, the focus is on the standard of review. Other procedural choices relevant to the scope and effectiveness of recourse are not considered in detail by this work. These include choices relating to the parameters of the judicial challenge mechanism itself such as the scope and nature of any onward appeal; the nature of the rules of evidence governing the treatment of the facts in

⁶³ Denis Galligan defines 'individualised decisions' as 'decisions about how to treat a person or situation', DJ Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Oxford University Press 1986), p 168.

⁶⁴ See further discussion of 'strong' discretion in Chapter 2, at 5.1.

⁶⁵ That is, law and policy, defining what is required to gain entry or leave to remain in a state. As will be seen in Chapter 4, UK migration status decision-making is primarily based on standards (with a residual discretion outside the standards to admit – but not to refuse – an application).

⁶⁶ It does not, therefore, cover disputes that may be routed directly to judicial bodies for an initial decision (eg tort or contract claims against the government). See Asimow, 'Five Models of Administrative Adjudication' (n 8).

⁶⁷ Many of these have been considered elsewhere, see, eg, Ian Macdonald and Nicholas Blake, *Immigration Law and Practice in the United Kingdom* (3rd edn, Butterworths 1991), p 433 (for a critique of the system in 1991).

contention,⁶⁸ including the standard and onus of proof and whether the review is *ex nunc* or *ex tunc*,⁶⁹ whether the hearing is conducted orally or on the papers; the existence or otherwise of a reasoned decision; the constitution and appointment of judges;⁷⁰ and the procedural requirements to mount a challenge, such as a merits threshold, time limits,⁷¹ standing requirements, and court fees. In the context of migration status decision-making, as noted earlier, there is a further important distinction between an appeal at which the appellant is territorially present in the host country and an out-of-country appeal from which the appellant is absent because he or she is not present in the territory of the UK (having either been refused entry to the UK or having been expelled prior to the hearing).⁷² Further, procedural decisions on, in particular, legal funding, representation and interpretation services will affect the scope and effectiveness of a given system of judicial challenge.⁷³ These are important factors in ensuring the effectiveness of access to justice. As this thesis acknowledges further in Chapter 4, they inter-relate and a state's decision on another aspect of the procedures applicable to access to justice from migration status decisions may impact significantly on the effectiveness in practice of a right of appeal. As already noted, in the UK context, this concern is particularly acute in

⁶⁸ This includes the burden and standard of proof, rules of admissibility, as well as the way in which the evidence is presented including whether the system is inquisitorial or adversarial in nature.

⁶⁹ See Chapter 4, at 2.3.1.

⁷⁰ Under the system established in 1970, first instance decision-makers were originally appointed by the Home Office. See further Chapter 5.

⁷¹ In the migration context this refers, in particular, to so-called 'accelerated procedures', see (in the UK context) Chapter 4, n 34.

⁷² See further Chapter 4 at 2.3.2.

⁷³ See, eg, recent cases on the cuts to legal aid in the UK: *R (Gudanaviciene and others) v The Director of Legal Aid Casework and others* [2014] EWCA Civ 1622, [2015] 1 WLR 2247; *R (on the application of Ben Hoare Bell Solicitors) v Lord Chancellor* [2015] EWHC 523 (Admin), [2015] 1 WLR 4175.

relation to non-suspensive appeals.⁷⁴ Further research will be necessary on the question of whether an out-of-country appeal on the merits may constitute an effective remedy in practice.

There is also a geographical and temporal limitation on the scope of this work since, whilst the moral claims in Chapters 2 and 3 are expressed as having purchase broadly in liberal democratic states, the focus of Chapters 4-8 is the UK legal order.⁷⁵ To this end, it should be noted that immigration statutes apply throughout the four parts of the UK (England, Wales, Scotland and Northern Ireland).⁷⁶ Whilst there are separate judicial systems in Scotland and Northern Ireland, migration appeals⁷⁷ and judicial review are broadly available on the same basis as in England and Wales.⁷⁸ The final limitation is

⁷⁴ See further Chapter 4.

⁷⁵ A brief outline of what this entails in the context of migration status decision-making is sketched in Chapter 4. Importantly, generally, the standards adumbrated in the European Convention on Human Rights and European Union law are incorporated into UK law.

⁷⁶ Devolution statutes have conferred legislative powers on devolved parts of the UK in certain areas: see, eg, Scotland Acts 1998 and 2012; Wales Acts 1998, 2006 and 2014; Northern Ireland Acts 1998 and 2006. See further Adam Tomkins, *Public Law* (Oxford University Press 2003), pp 1-2. However, immigration remains an area of reserved competence and Westminster immigration statutes apply throughout the UK. A list of matters is expressly reserved in the Scotland Act (Scotland Act 1998, schedule 5, amended by the Scotland Act 2012). Any matter not listed in the Act is implicitly devolved to the Scottish Parliament. Immigration is classed as an excepted matter under the Northern Irish devolution settlement (Northern Ireland Act 1998, schedule 2, amended by the Northern Ireland Act 2006). In Wales, by contrast, a list of matters is expressly devolved to the National Assembly for Wales and any matter not listed in the Act is implicitly reserved to Westminster. Immigration is not listed (Government of Wales Act 1998 amended by the Government of Wales Act 2006).

⁷⁷ The FTT (IAC) at Eagle Building in Glasgow is the sole body in Scotland hearing immigration and asylum appeals to sit regularly. See, eg, *SSH D v MN and NY* [2014] UKSC 30, [7]: ‘...the jurisdictions of the former AIT and the new IAC Chambers were and are UK-wide. It is accepted that there is and should be no material difference between the principles applicable on either side of the border.’ The legal aid rules are, however, different in Scotland and Northern Ireland.

⁷⁸ HMCTS remains responsible for non-devolved tribunals: <https://www.gov.uk/government/organisations/hm-courts-and-tribunals-service/about>; and judicial review operates on broadly the same principles as in England and Wales. Whilst there are certain procedural differences: see, eg, Aileen McHarg, ‘Access to Judicial Review in Scotland’ (*UK Constitutional Law Blog*, 30 July 2013) <<http://ukconstitutionallaw.org/2013/07/30/aileen-mcharg-access-to-judicial-review-in-scotland/>> accessed 29 July 2015, procedural reforms will

temporal: the work focuses on the modern era of migration control,⁷⁹ although the history of recourse from migration status decision-making in the UK context is sketched by way of background in Chapter 5, the primary focus is on the present day.

4. Methodology and approach

As noted earlier, the long-established logic of immigration law is based in the extensive powers of sovereign states to control immigration.⁸⁰ Thus, traditionally, immigration law was concerned primarily with regulating entry and stay rather than the protection of migrants' rights. However, as is explored in Chapter 5, the development of a number of international instruments protecting migrants, or various groups of migrants, has mitigated the extremity of the traditional 'state sovereignty' approach to migration control. Whilst generally there remains no right of entry to a state other than that of an individual's nationality,⁸¹ it is now recognised that migrants have a number of substantive rights. Of the most important in the migration context are the rights to *non-refoulement*⁸² and the rights to private and family life.⁸³ There has been less attention, however, placed on the procedural rights of migrants and where they have been recognised they have been

align Scottish judicial review more closely with judicial review in England and Wales: Darina Kerr, 'Judicial review - all change in Scotland' (*Scottish Legal News*, 20 March 2015) <<http://www.scottishlegal.com/2015/03/20/blog-judicial-review-all-change-in-scotland/>> accessed 29 July 2015.

⁷⁹ In very broad terms, this refers to the regimes in liberal democratic states from the 1970s.

⁸⁰ See, eg, Brian Opeskin, Richard Perruchoud and Jilly Redpath-Cross, *Foundations of International Migration Law* (Cambridge University Press 2011), p 6.

⁸¹ As noted above, the open borders debate is not addressed in this work.

⁸² See, eg, Article 3 ECHR, Article 3 CAT. Article 14 UDHR recognises the right of persons to seek asylum and *non refoulement* is recognised in Article 33 of the Refugee Convention.

⁸³ See, eg, Article 8 ECHR, Articles 17 and 23 ICCPR.

parasitic on substantive rights.⁸⁴ Access to justice from migration status decisions has been conceived of as within the gift of legislative policy makers rather than in recognition of a moral right to fair treatment.⁸⁵ As noted earlier, one of the aims of this thesis is to consider migration law as part of administrative law, refuting exceptionalist notions that decisions on migration status should not be reviewable on the same conditions as other administrative decisions.⁸⁶

Another persistent feature of migration law in the modern period has been to stratify groups of migrants. Since there is no international instrument outlining the rights of migrants *per se*,⁸⁷ migrants' rights are generally determined by reference to the reasons for which they have migrated (or seek to migrate). Thus, if the reasons relate to international protection, the constellation of rights they hold differs from those held by migrants moving for, for example, economic or family reasons. The stratification of the figure of the migrant has proved conceptually useful in scholarship, permitting focus on, for example, the Refugee Convention or labour migration, yet it has also permitted policy makers to differentiate in terms of procedural rights between various types of migrant.⁸⁸

⁸⁴ Whether this be implied into the substantive right (Articles 8 or 3 ECHR) or operative only where it is arguable that a substantive right has been violated (eg Articles 13 plus 8 or 3 ECHR).

⁸⁵ See further Chapter 5.

⁸⁶ See n 27.

⁸⁷ Although as to initiatives to this effect, see the International Migrant Bill of Rights which seeks to articulate rights applicable to all migrants irrespective of the reason for migration: Georgetown University Law Center International Migrants Bill of Rights Initiative, 'International Migrants Bill of Rights' (*Georgetown Law Student Series*, 2010) <http://scholarship.law.georgetown.edu/spps_papers/7> accessed 29 July 2015. See also, the broad constellation of rights in the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entry into force 1 July 2003) 2220 UNTS 3.

⁸⁸ In procedural terms, in the UK there has been less favourable treatment at various times of, for example, those migrants applying off-shore, those who have overstayed, those seeking international protection, illegal entrants, and economic migration under the Points Based System. See further Chapters 5 and 6.

Whilst it is certainly correct that there are significant differences between various groups of migrants, it is a claim of this thesis that there is merit in considering migrants as a whole in terms of procedural rights or, at least, in terms of access to justice and the standard of review. It is argued that migration control impacts – to varying degrees and with differential effects – on the lives of all migrants and whilst these differences invariably impact on the nature of the rights afforded them, it is argued that the impact of migration control, coupled with the nature of migration status decision-making, entitle them to a certain base level of review.⁸⁹

In terms of the scholarly approach of this thesis, there is a division between Chapters 2 and 3, and 4-9. Chapters 2 and 3 are conceptual in focus⁹⁰ and make the normative claims applied by Chapters 4-9 in practice. The focus of the legal analysis in Chapters 5-9 is doctrinal as the application of the normative conclusions to the United Kingdom are analysed. In order to provide a full picture of migration appeals and review in the UK, Chapter 5 provides an overview of the various predecessor systems.

5. Structure of the analysis

The central arguments of this thesis are developed over seven main chapters. As noted earlier, there is a division between Chapters 2-4, which are normative, and Chapters 5-8, which test the extent to which UK law and practice on appeals and review from migration status decision-making are fair in the light of the normative conclusions. There is a

⁸⁹ See further discussion in Chapter 2.

⁹⁰ They draw, in particular, on Rawlsian ideas of imperfect procedural justice (see Chapter 2); Galligan's theories of fair treatment (see 3.1 above); and the relationship between migration control and coercion theory (see debate between David Miller and Arash Abizadeh summarised in Chapter 2).

further distinction between Chapters 2 and 3, which make theoretical arguments without reference to any particularised legal order, and Chapters 4-9, which situate those theoretical arguments in the UK constitutional context. The structure of the thesis is sketched in outline below.

As already noted, Chapters 2 and 3 make normative claims and examine the questions asked by the thesis within a framework of constitutional democracy but abstracted from the specificities of any particular national legal order. The argument has two central claims: first, it is argued that there is a right to access justice generally in respect of migration status decisions at least in so far as administrative decisions are generally afforded a right to judicial scrutiny. This is because access to justice does not flow from the rights of citizenship but transcends the migration or citizenship status of individuals. The argument draws on the theory of administrative law and argues that procedural justice is not a gift of citizenship. The second stage of the normative argument distinguishes between legality and merits review. It is then argued that generally⁹¹ migration status decisions should benefit from merits review, as a more protective form of judicial scrutiny, in the light of the interference in migrants' lives by migration controls in combination with specific problematic features of migration status decision-making. Chapter 3 addresses the principal anticipated objections to the normative claims. First, objections that take issue with the initial claim relating to judicial oversight of migration status decision-making are examined (migration exceptionalism and administrative authority over migration control); and secondly, objections that respond to the second claim that migration status decisions should generally be judicially reviewable

⁹¹ There are two exceptions to the claim: first, where decision-making is mechanistic in nature and secondly, where the decision-maker has a 'strong' discretion. See Chapter 2 (5.1-2).

on the merits are considered (general objections to merits review of administrative action, an objection that the argument is over-inclusive, and an objection relating to the relevance of discretion to the normative argument). It is concluded that there are flaws in respect of each objection and, as such, none of them is fatal to the argument made in Chapter 2. The normative part of the thesis then shifts in focus from an abstract, theoretical framework to the particular constitutional context of the United Kingdom (including applicable EU and ECHR regimes). It considers what the claims made, and terminology used, in Chapters 2 and 3 mean in this particular legal system and it provide a brief overview of the current system of recourse from migration status decision-making. It then identifies three particular criteria constituting the substantive minimum content of merits review that must be present in order for the abstract definition given in Chapter 2 to function in practice (i) independence from the executive, ii) *de novo* assessment, and iii) substitution of judgment).

Having examined what the normative claims mean in the United Kingdom constitutional context, the second part of the thesis then applies the normative claims to critique the system of judicial scrutiny of migration status decision-making that applies in the United Kingdom. As a preliminary, Chapter 5 provides an overview of mechanisms of challenge since the first system of recourse was established in 1905. The Chapter demonstrates the absence of an embedded commitment to migration status appeals in the United Kingdom, a long-standing stratified and piecemeal approach to the allocation of appeal rights, and the unprincipled approach to the establishment of an appeals system. Having provided a detailed overview of the current and predecessor systems of recourse from migration status decisions in the UK, Chapters 6 - 8 critique the current regimes.

There are three parts to the analysis. Chapter 6 looks at appeals: it examines three case studies to test the normative claims in practice and to propose where adjustments to the current UK appeals system are necessary by reference to the normative argument. Chapter 7 then considers other applicable standards of review and concludes that neither rationality review, anxious scrutiny nor proportionality are able to satisfy the normative claims. The final aspect of the critique – Chapter 8 – considers whether international and European Union fundamental rights norms applicable in the United Kingdom compel a right to merits review of migration status decisions. It concludes that by contrast to general international law and the European Convention on Human Rights, within its scope of application, EU law has articulated a right to merits review of (at least) certain migration status decisions.

The thesis concludes in Chapter 9 with an analysis of why the current systems of recourse in the UK fail to meet the standards of fair treatment advocated. It then makes initial recommendations as to what institutional structures could be adopted so as to comply with the moral right to fair treatment in recourse from migration status decision-making.

THE MORAL CASE FOR ACCESS TO JUSTICE FROM MIGRATION STATUS DECISIONS

As summarised in the introductory overview, the central argument of the thesis is that, as a matter of political morality,¹ merits review² is the proper standard of review of migration status decision-making.³ The argument is made in the following steps in this chapter: first, it sets out the general basis for access to justice⁴ from administrative decision-making. Secondly, the chapter explains how the right to access to justice from administrative decisions includes within it a right to seek judicial oversight of migration status decisions. These two initial stages of the argument are uncontroversial and provide a background for the more contested claims that follow. As such, thirdly, the focus is narrowed to consider the standard of appeal or review that should apply to judicial scrutiny of migration status decision-making. As noted above, the central claim of this thesis is that, in general terms, migration status decision-making should be reviewable on the merits, as a more rigorous form of scrutiny, and a number of reasons for this claim are examined. Finally, two caveats are explored: first, it is accepted that in the absence of

¹ As used here, the term ‘political morality’ is taken to mean the moral principles governing states (as opposed to individuals).

² See definition in Chapter 1. In summary, under merits review the reviewer ‘stands in the primary decision maker’s shoes’ to make a fresh assessment of the case.

³ Chapter 1, n 2.

⁴ Chapter 1, n 45.

judgment discretion,⁵ legality review⁶ is sufficient; and secondly, it is conceded that the argument for merits review does not apply with uniform force across all migration status decision-making. However, whilst account must be taken of the relevant differences between various migration status decisions, and ultimately, the variegation inherent in the figure of the migrant,⁷ it is argued that there are factors common to all decision-making on migration status that make merits review an appropriate base-line in procedural protection.

1. Basic parameters of chapter

Before explaining in detail the normative claims made in outline above, it is useful to set out in some preliminary remarks the general parameters of the chapter. Since it examines the case for rights of access to justice from migration status decisions as a matter of theory, it does not work within the constraints of any particular national constitutional framework. This approach contrasts with that of Chapters 4-9, which focuses on the constitutional and legal framework of the United Kingdom.⁸ Yet, notwithstanding this chapter's liberation from any particular constitutional context, its conclusions are predicated upon two general assumptions. First, the argument is premised on the

⁵ 'Judgment discretion' is taken to mean the exercise of judgment and evaluation in the interpretation and application of standards as opposed to mechanistic applications of standards or the setting of standards. See Chapter 1 at 3.1.

⁶ Legality review is procedural in that the relevant question is not the correctness or otherwise of the substance of the decision, but whether the law has been properly applied in making it. cf merits review and see further definition in Chapter 1 at 3.1.

⁷ As seen in Chapter 1, a broad definition of migrant (and thus migration status decisions) is adopted, however, this must be taken into account and nuanced in advancing the moral argument.

⁸ Whilst there is no express focus on the United Kingdom in this chapter, the focus of Chapters 4-9 means that inevitably the theoretical reasoning will be informed against the backdrop of the UK system.

existence of some degree of control of borders as an incident of statehood.⁹ As explained in Chapter 1, it does not, therefore, engage with debates on the desirability or otherwise of open borders.¹⁰ Secondly, the argument is made by reference to modern, liberal, democratic states and as such the central premises of liberal democracy, as noted in Chapter 1, are assumed.¹¹

2. Access to justice from administrative decision-making

As already noted, today, the initial arguments of this chapter (that the rule of law requires recourse from administrative decisions, including migration status decisions) are generally considered to be uncontentious.¹² For example, in the United Kingdom the Supreme Court has accepted that judicial review of administrative decision-making is a

⁹ See definition of ‘state’ in Chapter 1 (n 56) as the meaning typically ascribed to it by public international law.

¹⁰ See Chapter 1, n 57.

¹¹ See Chapter 1 n 55.

¹² It should be noted, however, that this was not always the case: judicial oversight of migration status decisions in the UK was practically non-existent until 1970 (see further Chapter 5 for the UK history of appeal and review). Moreover, whilst the proposition that there should be judicial oversight of administrative decision-making is generally accepted, it is not entirely free from doubt and there remain two central criticisms of judicial review. First, that it is anti-democratic insofar as it permits the judiciary to make law and secondly, that as a matter of institutional fitness, a court – without access to as much information as the executive – is unsuited to making final decisions on individual cases. Such arguments may be countered by highlighting that judicial oversight of administration decisions fosters good administration, legitimates the decision, and enhances the appearance of justice thereby increasing public confidence in the legal system. See further, for an exposition of the main arguments for and against judicial review of administrative decisions, Legomsky, *Immigration and the Judiciary* (Chapter 1, n 49), pp 273-280. Similarly, for a discussion of finality and judicial review, see Zuckerman, *Zuckerman on Civil Procedure: Principles and Practice* (Chapter 1, n 29), 25.1 and Endicott, ‘The Impossibility of the Rule of Law’ (Chapter 1, n 29). The need for finality in adjudication circumscribes the terms of access to justice. As such, the claim that every migration status decision should be challengeable before a court is not to assert that migrants should be able to go to court indefinitely or have a right to argue the same case twice. Thus, finality is a necessary part of judicial oversight but does not challenge or undermine the demand for access to justice articulated in this thesis.

fundamental aspect of the rule of law.¹³ Thus, the focus of modern debate over judicial review is not to ask whether there should be judicial review of individualised administrative decision-making at all but rather what should be the standard of review.¹⁴ Whilst this latter question is addressed in detail below, the preliminary (less controversial) claim that there should be judicial review from administrative decisions (including migration status decisions) is sketched in brief in the following paragraphs.

The relationship between access to justice, procedural justice, the rule of law and the moral right to fair treatment was addressed in Chapter 1.¹⁵ Access to justice was situated as an element of procedural justice, which in turn is a facet of the rule of law;¹⁶ all of which seek to uphold the moral right to fair treatment.¹⁷ As noted in Chapter 1,¹⁸ the rule of law is an unstable concept as its content and precise meaning are the subject of considerable scholarly debate.¹⁹ A central dichotomy is that between formal or thin conceptions, favoured by Joseph Raz,²⁰ and substantive or thick conceptions, preferred by

¹³ See *R (Evans) v Attorney General* [2015] UKSC 21, [2015] 2 WLR 813, *per* Lord Neuberger at [52]: ‘Secondly, it is also fundamental to the rule of law that decisions and actions of the executive are, subject to necessary well established exceptions (such as declarations of war), and jealously scrutinised statutory exceptions, reviewable by the court at the suit of an interested citizen.’

¹⁴ Legomsky, *Immigration and the Judiciary* (Chapter 1, 49), p 273.

¹⁵ See Chapter 1 at 3.1 and see further Galligan, *Due Process and Fair Procedures* (Chapter 1, n 29), pp 392-93.

¹⁶ See Chapter 1 at 3.1.

¹⁷ As to the goal of fair treatment, see Chapter 1. Whilst debates over the instrumental or intrinsic nature of fair treatment are outside the scope of this thesis, it is accepted that fair treatment is aimed at ensuring binding standards are properly applied.

¹⁸ Chapter 1, at 3.1.

¹⁹ See below and also additional definitions listed in Paul Craig, *Administrative Law* (7th edn, Sweet & Maxwell 2012), p 20, nn 44 – 47. See also, Tom Bingham, *The Rule of Law* (Penguin 2010) and Paul Craig, ‘Formal and Analytical Conceptions of the Rule of Law’ [1997] Public Law 467.

²⁰ Raz bases his reasoning on the necessity for the rule of law to have value independent of any particular social or political philosophy. See further, Joseph Raz, ‘The Rule of Law and its Virtue’ (1977) 93 LQR 195.

Ronald Dworkin.²¹ Raz and Dworkin's accounts are summarised in outline below as they provide a clear articulation of the distinction. Thin Razian accounts separate the rule of law from substantive justice arguing for the rule of law to encompass purely formal criteria (namely, lawful authority for the exercise of power and legal certainty through clear, open and general laws) that can be met irrespective of the particular orientation of the prevailing political philosophy.²² By contrast, thick Dworkinian accounts do not seek to hive off the rule of law from substantive justice but rather make it the central vehicle to enforce moral rights. Thick accounts necessarily depend, therefore, on the rule of law espousing a particular vision of morality and justice.²³

Thus, by definition, thick accounts demand more of the rule of law than is required by thin versions. Yet, the claims made in this thesis are not dependent on preferring any particular account since on any account of the rule of law, including the least substantively demanding thin conception, recourse from administrative decision-making is required.²⁴ This is because recourse from the exercise of administrative power is important primarily in providing protection against unlawful and/or exorbitant

²¹ See further, Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1985).

²² And thus also by non-democratic polities. See summary in Craig, *Administrative Law*, p 10.

²³ Dworkin, *A Matter of Principle*, pp 11-12.

²⁴ See further, Endicott's discussion of the relationship between judicial review and finality as constituents of the rule of law in Endicott, 'The Impossibility of the Rule of Law' (Chapter 1, n 29). Endicott argues that as a matter of pure theory, only finality is required by the rule of law as it is necessary in order to know what the law is (so as to enable decision-makers to conform to it). Judicial oversight, meanwhile, may (if it is good) improve the rule of law, but (if it is bad) may also hinder it. Access to justice is only a requirement of the rule of law insofar as it is good. Thus, is theoretically possible for administrators to conform to the rule of law without it. However, Endicott concedes that the gap between theory and practice means that in reality 'some form of judicial review is a requirement of the rule of law: because of the contingency of infidelity, it is hard to imagine a community ruled by law, with no form of legal remedy against official illegality,' *ibid*, p 11. Therefore, whilst as matter of theory it may be correct to say that administrators' decisions do not strictly need to be scrutinised by the judiciary in order to conform to the law, in practice, in any 'community ruled by law', judicial scrutiny will aid conformity to the law (which Endicott sees as the goal of the rule of law).

administrative decisions and arbitrary power (in Razian terms, it provides a check on lawful authority for the exercise of power).²⁵ Protection against abuse of power is, therefore, present in both thin or formal and thick or substantive versions of the rule of law. The reason for this lies in the moral values underlying the concept. As introduced in Chapter 1, the constitutional value of the rule of law reflects concerns of fair treatment.²⁶ The relevance of fair treatment to procedural justice has been addressed by Denis Galligan. He reasons that questions of fair treatment arise where there exists a relationship of power and control in which one party is able to affect the other (as opposed to a diffused effect on *others*) in a significant way.²⁷ Thus, where an imbalance of power is institutionalised – the archetype being the administrative (or judicial) relationship between the state and individual – the right to fair treatment becomes a right to fair procedures under the rule of law such that ‘anyone affected by a legal decision has a right that it be made properly according to the law’.²⁸ This necessarily includes a right of access to justice in order for individuals to enforce the right to lawful decision-making.²⁹ Thus, as a matter of procedural justice, the rule of law, and ultimately, the

²⁵ See further J Roland Pennock and John W Chapman (eds), *Due Process: Nomos XVIII* (New York University Press 1977). See also Thomas C Grey ‘Procedural Fairness and Substantive Rights’, *ibid*, p 187.

²⁶ See definition in Chapter 1.

²⁷ Galligan, *Due Process and Fair Procedures* (Chapter 1, n 29), p 314. Galligan views this broadly to include indirect effects such as the disadvantage caused by a grant of planning permission to a neighbour and those which are direct, such as the denial of benefit, the imposition of penalty, the loss of an advantage, the tarnishing of reputation, or where the action takes a step closer to a final outcome which may negatively affect interests. See *ibid*, p 317.

²⁸ *ibid*.

²⁹ Thereby ensuring that binding normative standards (including the law) are properly applied: *ibid*, p 395. See also Adrian Zuckerman: ‘Law enforcement, whether civil or criminal, transcends the interests of the immediate parties. In a society governed by the rule of law, we all have an interest in rights being respected and in wrongs being remedied. The surest way of undermining good social order is to allow infringements of rights to go without redress. Where there is no redress for wrongs there is no value to rights and no reason to behave according to the law. It is precisely because the upholding of rights is in the interest of the community as a whole that binding

moral right to fair treatment, generally there should be access to justice from individualised administrative decision-making, that is, decision-making on individual cases,³⁰ because such decisions are the product of an imbalance of power in which the decision-maker is liable to affect the subject of the decision in a significant way and which may – if unchecked – be abused.³¹

3. Access to justice and immigration status: the rule of law is not an incident of citizenship

Thus, as seen above, it is now generally accepted that the rule of law (even on a Razian thin account) requires recourse from administrative decision-making as a matter of the moral right to fair treatment, and specifically, to protect against exorbitant administrative power. The second part of the preliminary claim explains below that the existence of this right to recourse from administrative decision-making is not affected by the fact that the subject matter of the decision relates to migration status or that the subject is not a citizen of the decision-making state. As will be seen in Chapter 5, in the UK this proposition is also now uncontroversial since it is accepted that judicial review

adjudication is a monopoly of the state and is not left to private enterprise. Law enforcement is essentially a public service, delivered by a public authority, with the objective of redressing wrongs.’ Zuckerman, *Zuckerman on Civil Procedure: Principles and Practice* (Ch 1, n 29), at 1.7.

³⁰ See Chapter 1, n 2. There are certain exceptions to the general claim, such as non-justiciable areas of administrative action (Chapter 1, n 12), and importantly, it is noteworthy that there are other non-judicial forms of recourse, such as ombudspersons, that may serve similar ends. See, eg, in the international law and security context, Gavin Sullivan and Marieke de Goede, ‘Between law and the exception: the UN 1267 Ombudsperson as a hybrid model of legal expertise’ [2013] *Leiden Journal of International Law* 833.

³¹ A similar account is proposed by Edward Rubin who focuses on the ‘government’s interaction with the individual, rather than the nature of the nonprocedural right that triggers procedural protection’ (Edward Rubin, ‘Due Process & the Administrative State’ (1984) 72 *Cal L Rev* 1044, 1100). Focusing on the individual, therefore, Rubin argues that there should be a universal application of due process to all government adjudications due to the fixed limits on government power (1094).

lies from every migration status decision.³² The reason for this is that questions of fair treatment (as set out in the previous section) arise in the same way as in other administrative decisions since migration status decision-making is an instance of individualised decision-making, determining whether a person may enter or remain in the decision-making state. Thus, the arguments set out in the previous section apply with equal force to migration status decision-making as they do to other administrative decisions³³ and the right to access to justice is unaffected by the fact that the subject of the decision is not a citizen of the decision-making state.³⁴ In other words, the values procedural justice pursues extend beyond the migrant-citizen binary³⁵ and fair treatment is not the preserve of citizens.

³² Although since the Tribunals Courts and Enforcement Act 2007, it may affect the venue of the challenge, see further Chapter 5.

³³ Indeed, as will be argued later, the imbalance of power is frequently more acute in migration status decision-making than in other areas of administrative law and the stakes are frequently higher. Further, it is clear that migrants not infrequently have rights including legally enforceable rights to enter and/or reside as a matter of international, EU or domestic law or, if not a right to enter and/or reside *per se*, the vast majority of migrants have rights by reference to constitutional or fundamental rights instruments not to have an application rejected on objectionable grounds, such as race. See further, the UN Human Rights Committee, *General Comment No 15: The Position of Aliens Under the Covenant* (1986), para 5: 'The Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory. However, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.' For a more detailed discussion of the limitations imposed by international law on states' sovereign prerogative to control entry and stay in its territory, see Guy Goodwin-Gill's early exposition of the topic: Goodwin-Gill, *International Law and the Movement of Persons Between States* and, recently Francesca Pizzutelli, 'The Human Rights of Migrants as Limitations on States' Control Over Entry and Stay in Their Territory' (*Blog of the European Journal of International Law*, 21 May 2015) <<http://www.ejiltalk.org/the-human-rights-of-migrants-as-limitations-on-states-control-over-entry-and-stay-in-their-territory/>> accessed 21 May 2015).

³⁴ This conclusion is not arrived at as a matter of equal treatment, however, since migration status decisions may only be made in respect of migrants and as such, there is no direct comparator. Arguing that like should be treated alike does not, therefore, take the argument very far. Considerations of equal treatment may arise, however, where migrants seek to judicially challenge other administrative decisions un-related to migration status (for example, housing or planning decisions).

³⁵ This is also clear if the purpose of procedural justice is examined. See further Chapter 1, n 28. Both instrumental and intrinsic accounts of procedural justice are congruent in their rejection of

4. Standard of review: the right to merits review of migration status decision-making

The chapter has thus far focused on access to justice generally and, in particular, the ability of migrants to challenge migration status decisions before a judicial body as a matter of fair treatment. The compass of the remaining sections of this chapter contracts in order to concentrate specifically on one aspect of access to justice, the standard of review. The distinction between merits review and legality review was introduced in Chapter 1.³⁶ There, it was said that merits review differs from legality review in that a reviewer examining the merits of a decision looks at the facts afresh to ask whether or not the decision was right³⁷ as a matter of substance (finding facts and then interpreting and applying binding standards to these findings)³⁸ rather than looking at the way the decision has been made and asking whether the binding standards have been followed in making it (legality review). The following section gives a number of reasons why migration status decisions should be judicially reviewable on the merits. Before turning to the argument, however, it is useful as a preliminary point to expand on the concept of the standard of review and the advantages of merits review from the perspective of procedural protection.

any notion that a right to fair procedures flows from the possession of citizenship. See also Lon Fuller's 'principles of legality', that are constitutive of law's 'inner morality' and which exist prior to any settling of citizenship: Lon Fuller, *The Morality of Law* (Yale University Press 1964).

³⁶ See Chapter 1 at 3.1.

³⁷ This includes both whether a decision was 'correct' in the narrow sense of there being one right answer, and 'preferable' in the sense that there is more than one acceptable answer but one is to be preferred over the others: Michael Asimow and Jeffrey S Lubbers, 'The Merits of 'Merits' Review: A Comparative Look at the Australian Administrative Appeals Tribunal ' (2011) 67 Australian Institute of Administrative Law Forum 58.

³⁸ In the Australian context, the metaphor of the reviewer who 'stands in the shoes' of the administrator is oft-used: *ibid.*

4.1. Advantages of merits review

Why (and how), therefore, is the standard of review relevant to access to justice, and ultimately, fair treatment? In essence, the standard of review is relevant to, and in some cases determines, the effectiveness of access to justice. If, for example, a migration application is refused on grounds of credibility (an asylum seeker's account is not believed, say), legality review will be of little assistance since the reviewer will generally not go behind the administrator's findings of fact. By contrast, review of the decision on the merits provides the applicant/appellant with a new chance to prove the truth of the account. As such, whilst judicial scrutiny is necessarily an instance of what Rawls has termed 'imperfect procedural justice'³⁹ as it is possible to envisage what the desired outcome of judicial scrutiny should be⁴⁰ but it is not possible to devise a procedure that will infallibly arrive at that result, in very general terms (and for the reasons examined in

³⁹ Rawls distinguishes between three models of procedural justice: perfect, imperfect and pure. Perfect and imperfect procedural justice arise where there is an independent criterion of what the just outcome should be. 'Perfect procedural justice' exists where a procedure exists with the ability to track faithfully the desired outcome. Rawls' example of perfect procedural justice is a rule for slicing cake whereby the person who slices selects his or her slice last and where the independent criterion for a fair division is that the cake be divided in equal shares. The slicer picks last rule will reliably ensure the independent criterion for a fair division is achieved. The third form of procedural justice is labelled 'pure' by Rawls. Here, there is no independent criterion of a just outcome. What makes the outcome just is the fairness of the conditions under which the procedure operates. The example given by Rawls is a game of chance (gambling) where what makes the game just is not any particular distribution of gains or losses, but the fairness of its rules and their application. Rawls, *A Theory of Justice* (Chapter 1, n 29). It is acknowledged by Rawls that imperfect procedural justice is the condition of all legal adjudications. As such, it has little practical relevance given that it is rarely – if ever – possible to devise procedures that will inevitably lead to the correct outcome, *ibid* (p 198).

⁴⁰ In Rawls' terminology, the independent criterion of the just result, which in the above example, is determining the truth of the asylum seeker's account. The specific example given by Rawls is the jury trial. The independent criterion for a fair outcome is the ascertainment of guilt and the trial procedure is framed to search for truth in this regard, but it is impossible to design the legal rules so that they will always lead to the desired result. *Ibid*.

detail later⁴¹) merits review is more likely to get closer to the desired outcome than legality review.⁴²

4.1.1. A second determination of facts by an independent reviewer is protective of individual interests and the appearance of justice being done

As such, from the perspective of the individual, merits review is generally preferable to a review of the substantive and procedural lawfulness of an administrative decision since the former is more protective of individuals' rights and interests. As explained in more detail below, under legality review the decision of the administrator (who is a party to the dispute) on the facts is likely to be final unless the decision-maker has made a factual error that is so flagrant and perverse so as to become an error of law.⁴³ In other words, under legality review, absent perversity in decision-making, any factual judgment call will be finally determined by the administrator: who, on appeal, is one of the parties to the legal dispute.

Thus, one of the central differences between the merits and legality standards of review is that generally only review of merits has a positive effect on substantive outcome. Whilst review of legality can inform the administrative decision-maker that his or her decision is unlawful and enforce that finding by requiring the decision maker to re-

⁴¹ See 4.3 below.

⁴² See, in the UK context, eg, the findings of the Wilson Committee: Wilson Committee, *The Wilson Report* (Chapter 1, n 13). Rawls has argued that provided the administrative or judicial procedure comes as close as possible to achieving the independent criterion of a just outcome, the system is not substantively unjust even though it may result in errors and hardship in individual cases. Rawls, *A Theory of Justice* (Chapter 1, n 29).

⁴³ In the UK this is conceptualised in the high threshold of *Wednesbury* unreasonableness in the United Kingdom legal order (a decision is so unreasonable that no reasonable decision-maker could have made it): *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. Although, as explained in Chapters 4 and 7, given the application of human rights (and the concomitant more intrusive proportionality standard) to much migration status decision-making, the rationality standard is now limited in application.

make the decision, there is no jurisdiction to comment on whether the decision maker got the decision right or wrong unless, as noted above, the decision on the facts is perverse. In the absence of perversity, the original decision-maker's view stands even if the reviewing body may not agree with the factual assessment made. Accordingly, generally in reviewing the legality of a decision, a judge cannot substitute his or her own assessment of the facts for that of the administrator. Therefore, the final word on the substantive correctness of the decision will, in review of legality, lie with a government official. Insofar as the facts are in dispute, absent an appeal on the merits, the administrator's assessment of the facts will, in the majority of cases, determine the *outcome* of the case.

As noted earlier, the administrative decision-maker is not an independent, objective and impartial body but a party to the litigation who, moreover, has an interest in securing an outcome that accords with substantive government policy. It is, of course, unobjectionable in terms of procedural justice⁴⁴ for decision-making to comply with the regulatory standards as expressed in law and policy. After all, this too is the paradigmatic task of judicial decision-making.⁴⁵ However, of concern in terms of procedural fairness is the possibility for administrative decision-making to implement government policy through an indirect exercise of discretionary judgment rather than through the direct application of standards.⁴⁶ This may be best explained using a concrete example and

⁴⁴ Objections may, equally obviously, be raised in relation to the substantive justice of law and policy, but this is outside the scope of this work.

⁴⁵ HWR Wade and CF Forsyth, *Administrative Law* (11th edn, Oxford University Press 2014), p 31.

⁴⁶ Of course, insofar as binding standards do not exist, these concerns do not arise since an administrator has complete decisional freedom (or 'strong' discretion – see further 5.1 below), subject only to higher order constitutional or fundamental rights constraints. In such

given the focus of this work, migration status decision-making is used. In the crudest terms, a state's substantive policy on migration is either in favour of increasing or decreasing net migration (or keeping it unchanged). If state policy is to increase net migration, there will need to be more applications overall and/or a higher ratio of successful over unsuccessful decisions on applications. Conversely, if governmental policy is to decrease net migration, there will need to be fewer applications overall and/or a lower ratio of successful over unsuccessful applications. Both variables can be increased or decreased by amending the substantive legal standards: the number of applicants and the number of successful and unsuccessful applications will be adjusted by either relaxing or tightening the substantive requirements for entry and residence. Thus, administrators implementing the law by applying the substantive rules make decisions that accord with overall legislative policy. As noted above, this is entirely unobjectionable.

However, there is another way in which the ratio of successful to unsuccessful decisions may be affected by substantive government policy on migration. This is where the administrative decision-maker is receptive to government policy in an indirect way, without implementing it directly through the application of substantive legal standards, but rather through making discretionary judgment calls in the application of standards that support a result favoured by government policy.⁴⁷ The risk of such indirect (and, it is

circumstances, '[a]n administrator attempts to find what is the most expedient and desirable solution in the public interest... [his or her] approach is empirical, guided by expediency', *ibid*.

⁴⁷ For a leading critique of discretion, see Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (University of Chicago Press 1969). Davis criticised the lack of consistency in discretionary decisions (his paradigm example is police discretionary practice in making arrests which have been shown to be based on illegitimate grounds such as class, gender or race). It should be noted, however, that discretionary decisions are affected legitimately by a range of factors including: the effective and efficient execution of the task; the political and social

argued, illegitimate) implementation of government policy is likely to become particularly acute where there are other targets bearing on administrative decision-makers, such as performance-related refusal rate targets, an overall figure by which the government is committed to reducing net migration or where government policy is articulated through a particular narrative such as, to reprise the earlier example, asylum applicants ‘abusing’ the system.⁴⁸ Whilst it is of course entirely possible that an administrator’s factual evaluation (in the earlier example, this was an asylum credibility assessment) may be unaffected by the existence of such targets, these potential pressures on administrative decision-makers to decide cases favourably to the government⁴⁹ are troubling as it creates a risk (and/or the appearance of a risk) that decisions are taken on illegitimate grounds (or, in Rawlsian terminology, they do not come as close as possible to the independent criterion of a just outcome).⁵⁰

However, the risk or appearance of injustice is offset by an independent and impartial reviewer able to oversee administrative decision-making.⁵¹ Accordingly, merits

environment within which powers are to be exercised; the moral background; economic considerations; and the organisational structure within which decisions are made: Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Chapter 1, n 63), p 113.

⁴⁸ See, eg, specific examples in the UK context in Chapters 5 and 6.

⁴⁹ Whether the policy is pro or anti migration is irrelevant although clearly, there will be greater disquiet insofar as a government’s policy is anti-migration.

⁵⁰ As to comments to this effect in the UK context, see, eg Tony Blair in Parliament in 1992: ‘When a right of appeal is removed, what is removed is a valuable and necessary constraint on those who exercise original jurisdiction. That is true not merely of immigration officers but of anybody. The immigration officer who knows that his decision may be subject to appeal is likely to be a good deal more circumspect, careful and even handed than the officer who knows that his power of decision is absolute. That is simply, I fear, a matter of human nature, quite apart from anything else.’ HC Deb 2 November 1992, vol 213, col 43.

⁵¹ Whilst the focus of this work is on recourse, it is important to note that the risks may also be offset by changes focusing on the independence of the primary decision-maker, see Chapter 9. See further for the development of this view, Rebecca Hamlin, *Let Me Be a Refugee: Administrative Justice and the Politics of Asylum in the United States, Canada, and Australia* (Oxford University Press 2014).

review by a reviewer independent of the administration serves to prevent (at least in theory⁵²) the problems outlined above.⁵³ This is not the case with legality review since, as noted above, the administrator's decision on the facts will not be overturned unless it can be shown that it is so perverse as to amount to an error of law. As such, under legality review, the decision on the facts will be determined by one of the parties to the legal dispute and effectively insulated from challenge in all but the most extreme cases. By contrast, merits review of migration status decisions fosters an appearance of justice as it ensures that the factual merits of a decision will not be determined by a party to the dispute.⁵⁴ Accordingly, irrespective of the actual content of the decisions made by government officials (the majority of which are undoubtedly made on legitimate grounds),⁵⁵ the appearance of an absence of objectivity inherent in decision-making by administrators who have an interest in a particular outcome is, therefore, likely to be offset by a judicial – and therefore independent and impartial – body scrutinising the facts as well as the law applied. In other words, independent and impartial decision-making is likely to (at least) give the impression of a more fair system.⁵⁶

⁵² See n 50. The research is not empirical.

⁵³ cf Davis, *Discretionary Justice: A Preliminary Inquiry* (n 47). Davis' suggested solution is the adoption of binding standards and rules to confine discretion. Rules can be important in reducing unequal treatment and the existence of rules to guide official conduct is a basic feature of the rule of law (see earlier discussion). However, the adoption of standards or rules does not negate the existence of judgment discretion since decision makers are required to assess facts and interpret the standards. Indeed, in appraising Davis' approach to discretionary powers, Denis Galligan acknowledges that whilst rules assist in reducing arbitrary decision-making, 'they are only one of a variety of techniques for ensuring the propriety of decisions, and other methods of scrutiny and control can be equally effective.' Galligan, *Due Process and Fair Procedures* (Chapter 1, n 29), p 146.

⁵⁴ This is not limited to migration status decisions but may be said of *all* administrative decisions. The particular relevance of this in migration status decision-making is examined below.

⁵⁵ Although, see Chapters 5-9 for a critique specific to migration status decision-making in the UK.

⁵⁶ Davis, *Discretionary Justice: A Preliminary Inquiry* (n 47).

4.1.2. Greater consistency in factual determinations

In addition to the greater procedural protection under merits review and its importance for fostering the appearance of fair treatment in the legal system as a whole, a reviewer with jurisdiction to scrutinise merits is also able to promote greater consistency in decision-making.⁵⁷ In the context of multiple administrative decisions, consistency requires that where a decision has been made in certain circumstances, a similar decision should be made on analogous facts.⁵⁸ In liberal democratic legal orders it is generally considered that consistent decision-making is an important value underlying the rule of law since it promotes important values of certainty and predictability.⁵⁹ Fuller emphasises the importance of consistency as a pre-requisite for good (or indeed any) law⁶⁰ and thinner accounts of the rule of law also give importance to ensuring coherence between law and policy and actual decisions.⁶¹ Further, it is intuitive that the treatment of similar cases differently is likely to cause resentment and an impression of discrimination in the mind of the public.⁶²

With this in mind, review of merits is particularly important where the decision is based on the exercise of judgment since in the absence of review of the merits of a decision, it is not possible to supervise the consistency of the outcomes of decisions

⁵⁷ cf Jaya Ramji-Nogales, Andrew I Schoenholtz and Philip G Schrag, *Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform* (New York University Press 2009).

⁵⁸ See further, Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Chapter 1, n 63), pp 150-151. Galligan expresses the imperative of consistency in terms of reasons: 'once a decision has been made for reason *r*, future cases should be decided in accordance with *r*', p 150.

⁵⁹ See further, *ibid*, pp 141 & 151. For Galligan, consistency in decision-making is a requirement of rational action: p 140.

⁶⁰ In Fuller's thesis, the rule of law is violated if the decisions of administrative bodies are chaotic and inconsistent. Fuller, *The Morality of Law* (n 35), p 81.

⁶¹ Raz, 'The Rule of Law and its Virtue' (n 20).

⁶² See, eg, the example of inconsistent police arrest practice given by KC Davis: n 47.

based on judgment discretion. This is because a review of the legality of a decision should only succeed where there is an error of law, rather than an error of judgment (unless, as has been seen, the judgment was perverse). Therefore, in reviewing legality, the existence of two contradictory or inconsistent decisions on a single set of facts is entirely acceptable.

4.1.3. Merits review and migration status decision-making

Judicial merits review is, therefore, preferable over legality review, both for the individual and, in certain respects, such as the promotion of consistency and the appearance of a just system, the state. However, it is also likely to be more resource-intensive as fact-finding involves the consideration of more evidence⁶³ and, as will be clear from the discussion that follows, not all administrative decisions disclose grounds for the application of merits review. How then should it be determined which administrative decisions should benefit? It is argued that determining the appropriate standard of review, engages questions of fair treatment. This is because, as noted in Chapter 1, the standard of review is a specific aspect of the right of access to justice.

As such, it has been established that the moral right to fair treatment requires access to justice where there is an imbalance of power between the decision-maker and the decision's subject and the decision will affect its subject in a significant way. The same reasoning applies, therefore, in relation to the standard of review: the greater the imbalance of power and/or the more significant the effect the decision is liable to have on its subject, the greater the need for a more protective form of recourse. As the standard of

⁶³ It is noteworthy, however, that UK judicial (legality) review entails more delay than appeals, incurring greater financial expenditure: see R Thomas 'Immigration Judicial Reviews in the Upper Tribunal (Immigration and Asylum Chamber): an analysis of statistical data' (April 2016).

review that is more protective of individuals' rights and interests, merits review should thus be applied to administrative decisions where there is a very significant imbalance of power between the individual and the state and/or very significant potential consequences. For the reasons explored below, it is argued that migration status decisions paradigmatically fall into this category.⁶⁴ First, the relevance to determining the standard of review of the two central features distinguishing migrants from citizens (migration controls and the exclusion of migrants from the democratic franchise) is examined. Secondly, the significance of features specific to migration decision-making, and in particular the predominance of administrative discretion, are considered. It is concluded that in combination, these factors point clearly towards the appropriateness of merits review as the proper standard of review in the judicial scrutiny of the generality of migration status decisions.

4.2. Migration control

As noted above, there are two features that conventionally distinguish migrants from citizens and which render them more vulnerable to the coercive powers of the host state than its citizenry, namely the subjection of migrants to the state's control of migration⁶⁵ and the exclusion of migrants from the state's franchise.⁶⁶ Political philosophers have examined the relevance of these two factors distinguishing migrants from citizens in

⁶⁴ Whilst the focus of this work is specifically on migration, this is not to exclude other vulnerable groups. Prisoners, for example, are readily identifiable as another group where there is a significant power imbalance and the stakes, typically concerning liberty, are very high. See further, the example of parole board decision making in Chapter 3.

⁶⁵ As will be explored below, the effect of migration control on different groups of migrants is not uniform. In particular, those seeking admission are less affected than those territorially present (and there are further divisions within the cohort of territorially present migrants). This clearly has an impact on the generality of the claim, which is explored at 5.2 below.

⁶⁶ 4.2.2 below.

relation to the host state's law-making powers, arguing, for example, that the existence of migration control or disenfranchisement makes certain moral demands on law and policy makers.⁶⁷ Moral demands on law-making and policy formulation are, however, not the concern of this thesis. Rather, as is clear from Chapter 1, the focus is on administrative decision-making in individual cases. It will be argued below that notwithstanding the differing planes on which the arguments considered below and the arguments of this thesis operate, the effects of migration control have relevance for the questions of fair treatment implicated in determining the standard of review.

4.2.1. Migration control and moral demands on migration status decision-making

It is uncontroversial to assert that states' control of migration interferes with migrants' lives. Migration control affects both migrants who are territorially present and 'would-be' migrants, that is, those who are off-shore but seeking entry to a would-be host state.⁶⁸ Although would-be migrants are not subject to the full civil and criminal laws of the receiving state, migration control affects would-be migrants by excluding them from entering the territory of the would-be host state, or by placing conditions on entry. Given that interests and rights of significant importance to the individual may be inextricably bound up in the exclusionary power of the receiving state, in effect a would-be migrant's

⁶⁷ Two specific examples, the theories of Arash Abizadeh and David Miller, are considered below.

⁶⁸ It should be noted that migration control also affects citizens, in particular, those who have relationships with migrants such as their citizen family members or employers. It may also have diffuse, but nonetheless far-reaching, effects on the whole of society insofar as laws require migration (and therefore citizenship) status to be verified as a prerequisite to accessing essential services such as health care, housing, benefits and education. See, eg, the potential generalised effects of the requirements on landlords to check the migration/citizenship status of tenants contained in the Immigration Act 2014 in the United Kingdom.

whole ‘life’ may be subject to its decisional thrall.⁶⁹ Further, even if a migration status decision does not affect a migrant’s ‘whole life’, they clearly intervene in the lives of migrants to the extent that, in the very least, they affect the choices and autonomy of migrants to decide the direction of their lives. However, equally as clearly, the degree of intervention varies. At its least intrusive, intervention in a migrant’s life by way of a migration status decision will have minimal effects on autonomy. Thus, for example, in the case of a migrant who applies to enter another country for tourism purposes, the refusal of the application by the would-be host state – whilst an exercise of arm’s length power – is minimally intrusive. Although the migrant is detrimentally affected in that he or she is unable to fulfil a desire and to the extent that resources have been expended in making the unsuccessful application, he or she may remain in the country of origin and/or apply to visit any other state. Crucially, since the migrant is offshore, the would-be host state has no lawful power or practical ability to take any physically coercive acts in relation to him or her. At the other end of the scale, migrants may be at the sharp edge of the host state’s coercive powers, including subjection to its physical control: ‘putting somebody in handcuffs and frog-marching them on to a plane bound for Tehran, say.’⁷⁰

As noted above, as a matter of political theory, it has been argued by some that the exercise of authority, including coercive power, by states over individuals places moral demands on law-making (coercion is generally considered to require justification

⁶⁹ For example, where individuals risk persecution or destitution in their country of origin. Also, family reunion cases may present a limited range of acceptable alternatives as may, to a lesser extent, the refusal of economic applications (eg visas relating to employment, self-employment or the provision of services).

⁷⁰ David Miller, ‘Why Immigration Controls Are Not Coercive: A Reply to Arash Abizadeh’ [2010] 38 Political Theory 111, p 112. The pervasive impact of migration controls within the host state has also been the subject of commentary, see, eg, Bridget Anderson, ‘Migration, immigration controls and the fashioning of precarious workers’ (2010) 24 Work Employment & Society 300

or otherwise, termination).⁷¹ Two divergent justifications (operating, as noted above, at the level of moral demands on law makers) proposed by Arash Abizadeh and David Miller⁷² are summarised below before this section turns to examine the potential for the existence of migration control to place moral demands on administrative decision-making on migration status in individual cases.

First, then, turning to the relevance of migration control on law making, Abizadeh argues that there should be a democratic justification for the existence of migration controls, namely that all foreigners subject to a state's immigration and economic policies must be included within the *demos* (the people 'entitled to participate in the democratic institution that issues the coercive law or policy').⁷³ This is, therefore, a procedural justification based on inclusion within the law or policy-making process. A democratic justification is necessary for Abizadeh as, in his view, border controls are coercive in nature and so it is only the conferral on migrants of a say in constituting that coercive power that will legitimise it. Miller disagrees. He argues that in order for coercion to require a democratic justification it must eliminate the autonomy of the coerced. Accordingly, no democratic justification is required in respect of *all* migration status decisions because the effect of the refusal of entry does not negate the autonomy of the individual migrant to pursue and enjoy adequate alternatives either in his or her own state

⁷¹ As discussed below specifically in relation to migrants through the work of David Miller and Arash Abizadeh, there are competing conceptions of what constitutes justification. For social contract theorists, such as Locke and Hobbes, justification rests on the consent of the governed. By contrast, a Kantian conception of the justification for coercion is founded on the prevention of rights violations.

⁷² Arash Abizadeh, 'Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders' (2008) 36 *Political Theory* 37; Miller, 'Why Immigration Controls Are Not Coercive: A Reply to Arash Abizadeh'.

⁷³ Miller, 'Why Immigration Controls Are Not Coercive: A Reply to Arash Abizadeh' (n 70), p 112. The other option presented by Abizadeh is to end coercion (ie by opening borders), for which, see, generally, Carens, *The Ethics of Immigration* (Chapter 1, n 55).

or by applying to enter other states. In Abizadeh's view, immigration controls constitute coercive power that invades the personal autonomy of both territorially present and would-be migrants. For Abizadeh, migrants beyond the borders of a powerful state are subject to its coercion as they are deprived of their autonomy in relation to their ability to migrate. Miller, however, disagrees that borders are coercive vis-à-vis all migrants. He argues that border controls that prevent a migrant from entering are not 'coercive' in the sense used by Abizadeh, but rather preventive in nature. Notwithstanding this, Miller concedes that certain acts of migration control which amount to physical control are acts of coercion.⁷⁴

Abizadeh's argument that coercive state power applies to all migrants through the medium of immigration control is attractive. As seen earlier, all migration controls interfere to varying degrees in the lives of migrants. However, his argument founders when confronted with the autonomy that (most) migrants retain following a refusal of a right of entry. If, as Miller argues, an absence of autonomy is a condition precedent of the type of coercion that requires democratic justification, the acceptable alternatives that exist in relation to would-be migrants mean that their autonomy is preserved and they cannot be said to be coerced in the sense that they, as a result of the coercion, have a right to be included in the institution which creates the coercion. It is for this reason that Miller's view appears to be the better one.⁷⁵

⁷⁴ Miller appears to agree with Abizadeh to the extent of conceding that there are certain groups of migrants, such as the territorially present, whose refusal to comply with migration status decisions will entail some degree of physical coercion by the host state.

⁷⁵ This is not to assert that border controls may never amount to coercion: n 74. Equally, Miller does not argue that intervention in individual autonomy caused more widely by migration controls does not require justification. The argument with Abizadeh is over the nature of Abizadeh's proposed justification (inclusion of migrants within the franchise).

However, as noted earlier, Miller appears to agree that migration status decisions interfere in the lives of all migrants to varying degrees and that the territorially present are subject to the coercive powers of the host state.⁷⁶ Thus, whilst he does not deem a democratic justification to be warranted by border controls this does not mean that he rejects the notion of the need of justification for border controls. Miller is clear that interference in the form of ‘prevention’ of migrants’ actions requires justification since: ‘preventing someone from doing what she would otherwise do reduces her freedom to act.’⁷⁷ The types of justification that Miller raises are obligations to act reasonably or ‘moral restrictions’ on the right of a host state to control its borders which include ‘an obligation to adopt immigration policies that improve rather than worsen conditions of life in the countries in question’ and ‘an obligation to collaborate with other states on refugee policy.’ Thus, Miller’s proposed justifications, like Abizadeh’s, are aimed at policy or law-making, but, unlike Abizadeh’s, are substantive in nature.

Thus, as a matter of political theory, migration control may well place moral demands at the level of law-making (although what the nature of the demands should be – a right to democratic inclusion or to ethical laws, for example – is contested). What then, about the relevance of migration control on the plane of individualised administrative decision-making? Can the existence of migration controls be said to justify and require specifically the application of a certain standard of review to the administrative decisions that apply them (migration status decisions)? As noted earlier, migration controls may be relevant to the moral demands of fair treatment since questions

⁷⁶ Miller, ‘Why Immigration Controls Are Not Coercive: A Reply to Arash Abizadeh’ (n 70), p 112.

⁷⁷ *ibid*, p 119.

of fair treatment are affected by the degree of power imbalance between the decision's maker and its subject and the nature of the decision's potential consequences. Indeed, outside of the specific context of migration, procedural justice has been cited as one (of a number) of requirements to make the exercise of political power morally acceptable.⁷⁸ Thus, insofar as migration controls create a greater power imbalance and more significant consequences, questions of fair treatment arise as do, by the same logic, grounds for the application of more stringent forms of procedural protection. Arguably, therefore, migration status decisions require more protective forms of fair treatment (including a more protective standard of review)⁷⁹ since migration controls, as set out above, make migrants more vulnerable to interference in their lives by a host state than its citizenry, thereby creating a greater imbalance of power. Likewise, due to the nature of migration controls, determining as they do the ability of a migrant to reside in a certain place (including indirect effects on questions of, for example, with whom migrants may live and the work they may do, as well as, most fundamentally, their physical safety) the

⁷⁸ For example, TM Scanlon has argued that '[t]he requirement of due process is one of the conditions of the moral acceptability of those institutions that give some people power to control or intervene in the lives of others'. On Scanlon's account procedural fairness as a justification for state power is 'something like a right' since it is grounded in the idea of the legitimate claims of individuals against 'institutions which make them subject in important ways to the arbitrary power of others.' TM Scanlon 'Due Process', Pennock and Chapman, *Due Process: Nomos XVIII* (n 25), pp 94 & 98. Scanlon limits his arguments to 'citizens' see, eg, p 98, but given that the moral basis of the account is in the control of the state over individuals, it is applicable more broadly. See also Solum, 'Procedural Justice', at 183: 'procedural justice is deeply entwined with the old and powerful idea that a process that guarantees rights of meaningful participation is an essential prerequisite for the legitimate authority of action-guiding legal norms'; and Wade and Forsyth, *Administrative Law*, p 7: 'Subject as it is to the vast empires of executive power that have been created, the public must be able to rely on the law to ensure that all this power may be used in a way comfortable to its ideas of fair dealing and good administration. As liberty is subtracted, justice must be added. The more power the government wields, the more sensitive is public opinion to any kind of abuse or unfairness.'

⁷⁹ See Chapter 1 at 3.1.

effects of migration status decisions are liable to be very significant for their subjects.⁸⁰ Arguably, therefore, the effects of migration control are relevant to procedural fair treatment (including access to justice and the standard of review), and do place moral demands on administrative decision-making as well as on the plane of law-making. The nature of those demands is, necessarily, very different – the one being concerned with just laws and the other with fair treatment⁸¹ – yet both are concerned with the conditions of moral acceptability of migration control.⁸²

4.2.2. Exclusion from the democratic process: access to justice and accountability

As noted above, the second feature that conventionally distinguishes migrants from citizens is migrants' exclusion from the democratic franchise of the host state.⁸³ Whilst for the reasons Miller gives, explored earlier, border controls *per se* cannot constitute a moral claim for all migrants to inclusion within the franchise of the host state, does exclusion from the democratic process itself generate procedural rights? The argument made on this basis would be that the exclusion of migrants from political accountability mechanisms calls for other means of holding government to account to be accorded greater prominence. As already noted, generally migrants may not access all the political accountability mechanisms that exist in receiving states; the primary exclusion being

⁸⁰ Although, it is of course accepted that some migrants are more seriously affected than others, see 5.2 below).

⁸¹ As such, an individual's right to fair procedures in administrative decision-making is clearly not a substitute for participation in the democratic institutions creating the decisional processes. Whilst fair procedures may mitigate the practical effects of the exercise of intrusive state power through migration control, they cannot make unjust laws just. As Scanlon notes, most procedural justifications are 'limited and conditional,' TM Scanlon 'Due Process', Pennock and Chapman, *Due Process: Nomos XVIII* (n 25), p 94.

⁸² TM Scanlon 'Due Process', *ibid*, pp 94 & 98.

⁸³ It should be noted that in the United Kingdom Commonwealth citizens and Irish nationals may in certain circumstances vote in national elections. Other states include permanent residents within the national franchise, see, eg, New Zealand.

from the foremost political accountability mechanism, the national franchise.⁸⁴ The exclusion of a resident migrant population⁸⁵ from the national electorate creates a moral difficulty that problematizes the legitimacy of legislative and policy decisions taken on the basis of a democratic mandate since the legislative and executive organs of the state are not democratically accountable to the migrant populace.⁸⁶ Thus, as a minority and often – though not at all invariably⁸⁷ – impecunious group, generally excluded from the enfranchised majority, migrants tend to lack the protections of the political process.⁸⁸ As migrants have no stake in the election or re-election of politicians there is no political imperative for them to cleave to migrants’ concerns.⁸⁹

It could be argued that access to justice from migration status decision-making in one sense requires governments to account to the subjects of those decisions.⁹⁰ By

⁸⁴ See n 83.

⁸⁵ As noted earlier, would-be migrants are generally less (or not) affected.

⁸⁶ Abizadeh, ‘Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders’ (n 72).

⁸⁷ In the UK, the Government’s managed migration policies overtly seek to permit only the wealthy entry to the UK. See, eg, the financial requirements introduced for spouse visa applications in Appendix FM of the Immigration Rules and changes to the Points Based System (Chapter 6).

⁸⁸ Husain talks of the ‘systemic failure’ of democracy ‘to promote the interests of vulnerable groups such as immigrants’, Nicholas Blake and Raza Husain, *Immigration, Asylum and Human Rights* (Oxford University Press 2003), p 287. See also Ann Dummett (ed) *Towards a Just Immigration Policy* (The Cobden Trust 1986), II ‘The United Kingdom past and present’, p 101: ‘...no... [Member of Parliament] is an ‘immigrant’ in the sense that has been discussed and legislated upon since 1961. Newspaper and broadcast reports of immigration issues have therefore relied almost entirely on arguments in the form: what shall *we* do about *them*? ... In other words, the immigrants themselves usually come into the matter only as objects with which policy must deal, or people who are little less than other people, not having their own individual existences and views, as varied as those of the native majority, or even people who are not really there at all.’

⁸⁹ It should be noted that in states with substantial pre-existing migration and inclusive citizenship laws the families of migrants and sponsors may influence political parties’ policies, however, whilst the citizen relatives of migrants themselves remain a minority group, the political impact will remain minimal.

⁹⁰ In the US constitutional context, a connection has been made between democratic participation and procedural protection. See, in particular, *United States v Carolene Products Company* 304 US 144 (1938) where the Supreme Court held that ‘discrete and insular minorities, who lack the normal protections of the political process’, require a more exacting standard of judicial review.

ensuring that migrants are afforded a right to challenge adverse decisions taken on their right to enter or remain, migrants are guaranteed participation in the decision-making process that directly affects their interests (ie migration control). This, in turn may confer legitimacy on decisional outcomes.⁹¹ It is only with merits review, where the tribunal has jurisdiction over the full facts (replicating the situation of the primary administrative decision-maker)⁹² that this participation can be fully realised since, as has been already noted, otherwise the administrator's decision on the facts will stand (absent an error of fact so perverse as to amount to an error of law).⁹³ Therefore, although migrants generally have no say over the formation of the substantive standards that will affect them (and, therefore, with questions of whether those standards are just), by affording them a right to challenge on the merits the specific applications of these standards to individuals, they may have some form of participation in the decision-making process, which may, in turn put greater pressure on decision-makers to account for the outcomes of individual cases.⁹⁴

However, the argument here can only properly be taken so far. First, as noted above, the democratic exclusion argument does not apply to all migrants.⁹⁵ Secondly, and as also noted earlier, the potential injustice caused by the democratic exclusion of

The principle concerns judicial review of legislative choices, however, rather than the application of those choices in administrative decision-making. It should also be noted that the principle is controversial and by no means a majority view, see, eg, Bruce A Ackerman, 'Beyond *Carolene Products*' (1985) 98 Harvard Law Review 713.

⁹¹ Solum, 'Procedural Justice' (Chapter 1, n 7). See further Solum's legitimacy thesis at pp 275ff, and p 190: 'when we know the outcome to be unjust, the justice of the outcome cannot be the source of its legitimacy. This conceptual point has a crucial corollary: only just procedures can confer legitimate authority on outcomes'

⁹² See Chapter 1 at 3.1.

⁹³ *ibid.*

⁹⁴ The two are not necessarily commensurate, however. See n 98 below.

⁹⁵ In addition to the exclusion of off shore migrants, realistically it only has purchase in relation to certain types of long-term resident migrants. See further 5.2 below.

migrants is a high level constitutional concern and reliance on other accountability mechanisms, such as migrants' participation in judicial challenges to administrative decision-making can have little relevance to the fundamental moral problem in issue.⁹⁶ Thus, arguably, the solution to the problem of democratic exclusion needs to be tackled at the political level.⁹⁷ Moreover, thirdly, care should be taken in using procedural rights as complete answers to the moral problems of migration controls and democratic exclusion since the reversal of the argument – that a right to judicial merits review is no longer necessary if migration controls are relaxed or lifted or if migrants are included within the democratic franchise – would be difficult to defend.⁹⁸ Whilst, therefore, as has been seen, the existence of migration controls is relevant to the standard of review, they are not a complete explanation of the claim that merits review is required. A full explanation, therefore, requires consideration of the second reason noted above: the nature of migration status decision-making. This is examined below.

4.3.Nature of migration status decision-making

In identifying the advantages of merits review above, it was claimed that administrative decision-making involving the exercise of discretionary judgment in fact-

⁹⁶ See Miller's solution, p 47. Although this may depend on the basis of the review – review for consistency with human rights norms, including non-discrimination may afford some protection.

⁹⁷ Cf the proposals of Abizadeh pp 45-46.

⁹⁸ It is not the aim of this work to do so, although it is noteworthy, that certainly the democratic mandate of decision-makers is often used to limit review by courts. See, in the United Kingdom context eg, Michael Fordham, 'The Judge At Your Shoulder: New Principles of Governmental Accountability' [2004] *Judicial Review* 122, 123-4: '...In the words of Lord Hoffmann's 2001 Combar Lecture, "there is a legitimacy about the decisions of elected institutions to which judges, however enlightened, can never lay claim". Whether detaining asylum- seekers for administrative convenience, or going to war without a second UN Resolution, public law's starting-point is that primary accountability lies to the electorate, and judicial sensitivity is called for.'

finding⁹⁹ may be subject to pressures (such as individualised performance-related targets or overall governmental objectives or narratives) to decide the case a certain way external to the objective merits of the case itself. It was argued that this is contrary to the goals of fair treatment since decisions risk being made on illegitimate grounds (in Rawls' terminology, those that do not pursue the independent criterion of a just outcome).¹⁰⁰ However, it was also claimed that merits review resolves this problem since the reviewer makes a fresh decision on the facts and his or her independence from the administration and consequent impartiality provides (in the very least) a corrective to the appearance of illegitimate pressures. For reasons explained below, it is argued below that migration status decision-making is *particularly* vulnerable to the risk of decisions based on illegitimate grounds because its particular features make it 'very imperfect.' The argument is made by reference to Rawlsian theories of procedural justice, applied to migration status decision-making. Thus, as a preliminary, the question of what the Rawlsian idea of an 'independent criterion of a just outcome' means in practice in the specific context of migration status decision-making is addressed.¹⁰¹

4.3.1. Independent criterion of a just outcome in migration status decision-making

As argued previously, what is required for a procedure to be considered fair (or in Rawlsian terminology, to come as close as possible to the independent criterion of a just outcome)¹⁰² is a question that is context-specific and in general terms migration status

⁹⁹ Importantly, however, errors in the application and interpretation of legal standards may be remedied through legality review.

¹⁰⁰ See 4.1 above.

¹⁰¹ See *ibid* for general description of the concept.

¹⁰² *ibid*. The specific question was not addressed by Rawls but the vast majority of administrative and judicial decision-making will fall within the category of imperfect procedural justice.

decision-making should be reviewable on the merits.¹⁰³ As a preliminary, however, it is necessary to establish what the desired outcome (the independent criterion of a just outcome) is in migration status decision-making. In the example given by Rawls (the jury trial), the independent criterion of a just outcome is the search for truth to ascertain guilt (or innocence). Typically, in migration status decision-making there is a search for truth of a different nature. Rather than determining past actions to ascertain culpability,¹⁰⁴ in migration status decision-making the object is to ascertain whether the various standards of migration law and policy are met in a given migrant's case. The standards (law and policy) are interpreted then applied to the facts. As seen above, the independent criterion of a just outcome is undermined where judgment calls are made on grounds other than the search for truth to ascertain whether standards are met.

4.3.2. 'Very imperfect' procedural justice: specific difficulties of migration status decision-making

As such, decision-making that is susceptible to the interference of illegitimate grounds in fact-finding is 'very imperfect'. As outlined earlier, there are features specific to migration law that generate this problem. First, migration status decision-making typically involves significant discretionary judgment in fact-finding due to the nature of the standards it creates. A particularly prevalent example is the assessment of credibility.¹⁰⁵ For example, credibility is central to asylum applications¹⁰⁶ where the

¹⁰³ The exceptions to the general claim are set out at 5.1 below.

¹⁰⁴ Although this can, of course, be a relevant question in migration status decision-making, see, eg, 'Nexus' appeals in the UK context in which factual findings on acquittals and police evidence that has not been brought to criminal trial may be made on the civil standard of truth: Chapter 6, pp 182-83.

¹⁰⁵ See case studies in Chapter 6.

initial stage of the assessment examines the genuineness of the claimant's narrative account relevant to the risk of serious harm if returned to the country of origin before considerations of effective state protection and internal relocation are engaged. Moreover, these types of decision require predictive assessments, which are, by their very nature, imprecise. Further, assessing credibility is also a mainstay of managed migration, in particular, the genuineness of family relations¹⁰⁷ or, for example, intentions to study or visit as a tourist, or – most often – to leave the territory at the end of the stay.¹⁰⁸ Judgment discretion, with its attendant risks as set out above, therefore, abounds in migration status decision-making. This is different from paradigmatic forms of administrative decision-making, such as decisions whether to grant a licence or planning permission, which contemplate the exercise of a more classic form of administrative discretion.

The second reason why migration status decision-making is particularly susceptible to errors in fact-finding is due to the logistics of making decisions about cases where inevitably, due to the very nature of the subject matter, often facts happen and evidence (including witnesses) is located abroad. Not only does the decision-maker frequently face the inability to verify facts objectively¹⁰⁹ but also comprehension difficulties (both linguistic and cultural¹¹⁰) often present further challenges.

¹⁰⁶ For an assessment of the difficulties of credibility determinations in asylum law, see, eg, Robert Thomas, 'Assessing the Credibility of Asylum Claims: EU and UK Approaches Examined' (2006) 8 *European Journal of Migration and Law* 79.

¹⁰⁷ See further Chapter 6. Prior to the advent of DNA testing, this was a serious problem for spouses seeking family reunion.

¹⁰⁸ See Chapter 6 at 2.2.

¹⁰⁹ See, eg, Robert Thomas, 'Evaluating tribunal adjudication: administrative justice and asylum appeals' (2005) 25 *Legal Studies* 462

¹¹⁰ See, eg, Satvinder Juss, *A Guide to the Asylum and Immigration (Treatment of Claimants, Etc) Act 2004* (Routledge 2005), pp 14-15.

And thirdly, the nature of migration itself, which is divisive, emotive and politically sensitive¹¹¹ in a way that may be said to be unparalleled by any other policy area subject to routine administrative decision-making,¹¹² problematises the task of fact-finding. Coupled with its political sensitivity, the stakes are often very high in migration status decision-making; involving as it often does questions of physical safety or the exercise of coercive state powers impinging on physical (and mental) liberty or implicating very ‘human’ concerns of with whom and where we live.¹¹³ In turn, narratives of migrants ‘abusing’ the system¹¹⁴ springing from political desires to halt mass influxes or to pander to resurgent and growing anti-migration political parties leads to a culture of disbelief in migration status decision-making.¹¹⁵

These additional challenges specific to migration status decision making serve both to undermine the achievement of the independent criterion of a just outcome in fact-finding and relatedly, to increase in practice the imbalance in power between the administrative decision-maker and the individual subject of the decision. In these circumstances, for the reasons addressed above, merits review, whilst not an absolute panacea, should be applied to migration status decision making as a more protective standard of review. A reviewer who is independent of the administrative decision-maker will be likely to provide (or at least give the appearance of providing) a better quality decision: one that comes closer to the independent criterion of a just outcome.

¹¹¹ Chapter 9 at 2.2. in the UK context.

¹¹² Criminal justice may be comparable in this regard.

¹¹³ R Thomas [2015] ‘Mapping judicial review litigation: an empirical analysis’ [2015] PL 652.

¹¹⁴ Chapter 9 at 2.2.

¹¹⁵ This in turn adds to the problems of credibility assessment outlined in the first point addressed.

5. Caveats to the right to merits review

Thus, the argument so far claims a right to merits review of migration status decision-making based on the effects of migration control and the very imperfect nature of migration status decision-making, that make it atypical in general public law terms. However, notwithstanding the appeal to generality in the argument above, it has already been noted on a number of occasions that the claim of migration status decision-making to merits review is not without exception. The final section of this chapter identifies and explains two central qualifications to the general claim.¹¹⁶

5.1. Absence of judgment discretion

As seen above, the risk of migration status decisions being determined on illegitimate grounds arises where an administrative decision maker is called upon to make a judgment call (or exercise judgment discretion) in fact finding.¹¹⁷ Where, however, a decision involves no judgment discretion but rather a simple, mechanistic determination,¹¹⁸ the fact that those findings are made by a government official rather than an adjudicator who is independent of government and impartial will have no effect on the ascertainment of the independent criterion of a just outcome. Thus, in relation to mechanistic decision-

¹¹⁶ It will also be clear from the foregoing discussion that legality review will be sufficient in the absence of a dispute of fact. See discussion of ECtHR case law in Chapter 8.

¹¹⁷ See discussion of the term below.

¹¹⁸ In practice, fact-finding that involves judgment discretion (for example, credibility assessment) may be contrasted with that which is purely mechanistic (for example, calculating time periods or ensuring the inclusion of requisite documents in an application). Paul Craig succinctly differentiates between mechanistic and discretionary administrative decisions in contrasting simple and evaluative factual determinations. Whilst the correctness of simple factual determinations can be verified by observation alone, evaluative factual determinations are more complex and their correctness requires evaluation in the light of evidence: Paul Craig, 'Judicial Review and Anxious Scrutiny: Foundations, Evolution and Application' [2015] Public Law 60, p 65.

making legality review is sufficient because all decisions made are objectively verifiable: there is a clear binary answer, that is, the decision is either right or wrong and this can be verified by observation alone.¹¹⁹ A decision based on illegitimate grounds is, therefore, not insulated by the legality review process. For example, if a decision-maker ignored the presence in an application of a mandatory document, the error would be verified by observation and rectifiable either through internal review or external legality review mechanisms.¹²⁰ Merits review, therefore, adds nothing in this scenario.

Likewise, the relevance of merits review depends on the nature of the discretion held by the decision maker. Inherent in the preceding discussion is the notion that the argument for merits review relates specifically to ‘judgment discretion’.¹²¹ However, this is not the only type of ‘discretion’ (if, indeed, it may properly be classed as discretion at all).¹²² Judgment discretion applies to the interpretation and application of standards, but the exercise of discretion may equally require the decision-maker to create his or her own standards in coming to a decision.¹²³ Dworkin labels these two forms of discretion as ‘weak’ and ‘strong’, respectively. In his view, there is a qualitative difference between them since he believes that the task of applying a settled criterion is conceptually distinct from that of settling the criterion itself. This is because Dworkin argues that in the case of the application of standards, in principle there is always a correct interpretation

¹¹⁹ See discussion of the Points Based System, Chapter 6 at 2.1.

¹²⁰ In the latter case, provided that the individual had put before the decision-maker evidence demonstrating that a given mechanistic requirement was met, the decision failing to take that into account or misapplying it would be unlawful because it would not be in accordance with the law.

¹²¹ See Chapter 1 at 3.1.

¹²² See n 125.

¹²³ See Galligan: ‘...the sergeant instructed to choose five men for his patrol without being given criteria upon which to make the choice has strong discretion; but if he is told to choose the five most experienced men he has only weak discretion in the sense that he has to exercise judgment.’ Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Chapter 1, n 63), p 15.

ascertainable and so there is only discretion in its true (strong) sense where the decision-maker is at liberty to choose the standards for him or herself.¹²⁴ In Dworkin's analysis, therefore, 'weak discretion' is in fact the absence of discretion (non-discretion).¹²⁵ This view is challenged by Galligan, who views all decisions, whether settling criteria or applying them as involving assessment and judgment.¹²⁶ For Galligan the difference is quantitative rather than qualitative – there is wider discretion involved in setting standards rather than applying them but the essential task remains the same.¹²⁷

The argument advanced in this thesis does not depend on resolving the competing claims as to whether there is a conceptual difference between strong and weak discretion. However, for the purposes of this thesis, it is useful to employ Dworkin's distinction between 'strong' and 'weak' discretion (although 'weak' discretion is termed 'judgment

¹²⁴ Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977). See also summary in Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Chapter 1, n 63), pp 14-15.

¹²⁵ Dworkin's view has been adopted by Tom Bingham, who differentiates between exercises of judgment and discretion, Bingham, *The Rule of Law* (n 19), p 51.

¹²⁶ In Galligan's view, the difference between strong and weak discretion is a matter of degree subject to the 'relative presence or absence of guiding standards,' Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Chapter 1, n 63), p 14. For Galligan, more discretion may well be present in the wide assessments involved in setting standards than in the application of clear standards, but both are instances of the same concept. He concludes that the premises on which Dworkin's argument hang are unsound as there is no clear conceptual distinction between having standards to apply and having to create one's own; both engage the choices of the decision maker, *ibid*, pp 16-17.

¹²⁷ *ibid* at pp 34-35: 'Initially, it seems odd to talk of discretion as to matters of fact; the decision-maker is not entitled in any way to choose or select the facts since his primary duty is to seek out and arrive at truth. Nevertheless, the facts can be ascertained only by imperfect means, relying on imperfect procedures – the evidence of others, one's own perceptions and understandings, and the classification of those perceptions; also, there are limits to the time that may be spent in the quest for factual accuracy. It makes some sense, therefore, to accept that any decision requires assessment and judgment, both in fixing the methods for eliciting the facts and in deciding how much evidence is sufficient. ... Similarly, in applying a standard to the facts, the decision maker has to settle both the meaning of the standard and the characterization of the facts in terms of that meaning...Again, it is not inapt to detect in this an element of discretion, just in the sense that there is finally no criterion of correctness other than the tutored judgment of reasonable persons. In both matters, finding facts and applying standards, the sense of discretion is somewhat specialized...it is discretion that results from the inherent qualities, and in a sense imperfections, of human decision-making, as well as the elements of subjective judgment and evaluation that are irremovably part of the search for facts and the application of standards.'

discretion' in this work).¹²⁸ As will be clear, the arguments made earlier in this chapter do not extend to the setting of standards¹²⁹ typically implicated in deciding law or policy,¹³⁰ which as has been made plain, is not the focus of this work. In exercising strong discretion, the independent criterion of a just outcome is at large, constrained only by higher order norms, such as constitutional or human rights instruments.¹³¹ It is not, therefore, an illegitimate ground of decision-making (in procedural terms) to decide laws and policies with the aim of reducing (or increasing) migration.¹³²

5.2. Migration status decision-making is heterogeneous

The second qualification to the claim that there should be merits review from migration status decision-making takes into account the heterogeneity of migration status decision-making. The very broad definition of 'migrant' and 'migration status decision'¹³³ in this thesis belies a multiplicity of variants and for this reason it is often an over-simplification to refer to migrants *en masse*.¹³⁴ Clearly, not all migrants have the same rights and

¹²⁸ Galligan calls these 'discretion in application' or 'interpretative discretion,' Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Chapter 1, n 63), p 33 & 109.

¹²⁹ In the migration context standards typically define the categories of person who may enter and remain, and the basis on which persons should be expelled.

¹³⁰ See also Dworkin's distinction between 'principle' (which concerns the scope and content of individual rights) and 'policy' (which concerns the general welfare and public interest). In Dworkin's view, only concerns of principle can be adjudicated upon by courts: Dworkin, *Taking Rights Seriously*. See further, the discussion of the distinction in Allan, *Law, Liberty and Justice: The Legal Foundations of the British Constitution* (Chapter 1, n 52), p 54.

¹³¹ Which depending on the terms of constitutional settlement, may be legally enforceable.

¹³² cf 4.1.1.

¹³³ See Chapter 1.

¹³⁴ Moreover, the practice of referring to migrants as an undifferentiated mass is also a populist device employed by states. See, eg, the UK's Coalition Government's use of the practice in pursuing its aim of lowering net migration to the tens of thousands: The Migration Observatory at the University of Oxford, 'The halfway point: net migration has fallen but can the Government hit its target?' (23 May 2013) <<http://migrationobservatory.ox.ac.uk/commentary/halfway-point-net-migration-has-fallen-can-government-hit-its-target>> accessed 1 January 2016.

interests at stake in migration status decision-making and the consequences of an adverse decision are not the same for all migrants.¹³⁵ It is thus accepted that migrants are by no means a uniform group and that this is relevant to concerns of procedural protection and, ultimately, the moral right to fair treatment: in short, some migrants and migration status decisions have characteristics that require more or less procedural protection. Indeed, it is a ‘demand of justice’ that the degree of procedural protection is commensurate to the nature of the case.¹³⁶

Notwithstanding these differences, however, it is argued that there is purchase in the argument that merits review should apply as a baseline standard of procedural protection from migration status decision-making, with the differences between types of migrant and migration status decision potentially regulated by other procedural variables.¹³⁷ This is because, as outlined in the previous pages, there are factors that affect all migrants and all migration status decision-making that are relevant to determining the proper standard of review. In terms of the two ‘meta-rights’¹³⁸ from which migrants are excluded, although both the rights that any given migrant may enjoy and the extent of his or her vulnerability to the interference of the host state are dictated

¹³⁵ By way of concrete example, see case studies in Chapter 6.

¹³⁶ Zuckerman explains the reasoning behind this: ‘[a]ny adjudicative process carries with it a risk of error, but the magnitude of the harm that an error may cause varies according to the value at stake or the importance of the dispute... The allocation of procedural resources must therefore take into account the harm that insufficient resources could cause.’ Adrian Zuckerman, *Civil Procedure* (2nd edn, Sweet and Maxwell 2006), p 34.

¹³⁷ For example, whether a hearing is oral or on the papers. See Chapter 4 at 2.3.

¹³⁸ Meghan Benton, ‘The tyranny of the enfranchised majority? The accountability of states to their non-citizen population’ [2010] *Res Publica* 397, 400. The concept of ‘meta-rights’ borrows from and is related to Hannah Arendt’s theory of the ‘right to have rights.’ See Hannah Arendt, *The Origins of Totalitarianism* (G Allen and Unwin 1967) in which, inter alia, Arendt argued that statelessness is equivalent to rightlessness. For an extreme version of the argument, see Michael Walzer, *Spheres of Justice: A Defence of Pluralism and Equality* (Basic Books 1983).

by a range of variables, the absence of political democratic rights and the vulnerability to expulsion and exclusion¹³⁹ in some sense inform every aspect of the migrant experience and, as such, as has been argued above, are relevant to the standard of review. In essence, these factors increase the power imbalance between the decision-maker and the individual migrant, creating demand for a more protective standard of review.¹⁴⁰ Further, the second factor explored, the nature of migration status decision-making, equally applies to *all* migration status decisions (save in the absence of judgment discretion – see the first qualification explored above).¹⁴¹ As such, it is argued that there is value in the discussion of the application of merits review to all migration status decision-making. This claim is not undermined by an acceptance – that will be more clearly evident in later chapters – that the need for merits review is not uniform but scalar in nature.¹⁴²

Conclusion

The aim of this chapter was to make the normative claims of the thesis in a non-particularised, theoretical context. A right to access to justice has been advanced in respect of individualised migration status decisions and a right to scrutiny of the merits of these decisions is proposed where the initial decision on the facts is based on the discretionary judgment of the decision-maker. There are factors common to all migrants that justify these claims and their general application and that the goals of procedural

¹³⁹ Expulsion and exclusion both refer to the situation in which migrants' physical presence on the territory of a receiving (or would-be receiving) state is prohibited by an administrative decision taken in relation to them by that state. Expulsion refers to the process of removing migrants who are present on the territory of the expelling state and exclusion refers to the process of denying access to migrants who are offshore.

¹⁴⁰ See 4.2.

¹⁴¹ See 5.1.

¹⁴² See Chapter 9.

justice transcend the distinctions between citizens and migrants. The following chapter considers possible objections to these propositions.

OBJECTIONS TO THE NORMATIVE CLAIMS

As with the previous chapter, the argument here proceeds without reference to any particular national constitutional context and the same overarching assumptions that applied previously also apply here.¹ The aim of this chapter is to consider possible objections to the argument made in the previous chapter (that there should be judicial oversight of migration status decisions and that where the decision rests on an exercise of discretionary judgment, the decision should be reviewable on the merits). The objections explored are specific to judicial scrutiny of migration status decisions, rather than objections to access to justice from administrative decisions generally.² Five possible objections are explored: the first and second examine the idea that the ability of migrants to seek judicial review of adverse migration status decisions is incompatible with migration control. The third – fifth examine objections to the claim that the standard of review of migration status decision-making should be merits review. The third objection examines anti-majoritarian ideas; the fourth considers objections to the breadth of the argument; and finally, possible challenges to the relevance of discretion in the argument are examined. In response to these claims, it is argued that the first and second objections

¹ See Chapter 1.

² As noted in the previous chapter, this should not be taken to assume that a right of access to justice from administrative decisions generally is an uncontroversial proposition. For an exposition of some of these arguments see, eg, Legomsky, *Immigration and the Judiciary* (Chapter 1, n 49), pp 273-280. Although the focus is on migration status decisions, given that migration status decisions are forms of administrative decisions, some of the central objections to judicial review of administrative action are explored later in this chapter.

founder as they are premised on a discredited understanding of procedural justice and migration control. The third relies on an overly narrow understanding of democracy. The fourth and fifth objections take issue with the breadth of the claim rather than the point of principle. None of the objections, therefore, undermines the normative arguments made in Chapter 2.

1. Objections to judicial oversight of migration status decisions

As noted in Chapter 2, the first claim made there (that there should be access to justice from migration status decisions) may well appear uncontroversial since, in general terms, there is now greater acceptance in liberal democratic states that there should be access to justice from migration status decisions on the same basis as other administrative decisions.³ Whilst the counter claim may, therefore, look implausible to modern eyes, it is useful to address it here for two reasons. First, since, as will be clear from the discussion in later chapters, it underlies the original foundations on which adjudicative systems on migration status decision-making were built and as such may still have purchase in less directly obvious ways. And secondly, the current trend in liberal democratic states is regressive and moving away from a general recognition of migrants' procedural rights in migration status decision-making.⁴ Accordingly, the following section considers the claim that the existence of the state's executive control over migration should, in the two ways expressed below, affect the right of the subjects of migration status decisions to access justice.

³ See Chapter 2 at 2.

⁴ See detailed discussion in the UK context in Chapters 4, 5 and 9.

1.1. The migration exceptionalist argument

The first conceptualisation of the argument that migration status should affect the procedural rights of the subjects of migration status decisions is based in what this thesis terms ‘migration exceptionalism.’⁵ The core of the argument is as follows: migration control has in the modern period been associated with wide-ranging executive power and discretion over the entry and residence of migrants⁶ and as such, its premise is an absence of the right on the part of migrants to enter and remain in (or not be excluded or expelled from) receiving states.⁷ In this respect, migration law has traditionally been conceived of as different from other areas of administrative law, which, paradigmatically, regulates relationships between citizens and the state.⁸ On contractarian models of the relationship between the state and its citizens that dominate in liberal democratic states,⁹ administrative law covers the various instances of citizens surrendering certain natural liberties (such as the state’s financial demands on citizens through taxation) in return for a right to protection from the state (such as citizens’ right to social assistance if in

⁵ See definition in Chapter 1, n 27.

⁶ See, eg, Opeskin, Perruchoud and Redpath-Cross, *Foundations of International Migration Law*, p 6.

⁷ The classical, absolutist notion of the principle is epitomised by the eighteenth century political philosopher and diplomat Emmerich de Vattel in *The Law of Nations*: ‘[o]ne of the rights possessed by the supreme power in every state is the right to refuse to permit an alien to enter that state, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the state, at pleasure, even a friendly alien, especially if it is considered that his presence in the state opposed to its peace, order, and good governance, or to its social or material interests.’ Emmerich de Vattel, *Law of Nations*, book 1, s 231; book 2, s 125, cited in John Finnis, ‘Nationality, Alienage and Constitutional Principle’ [2007] LQR 417, p 420. The extremity of the classical Vattelien position has informed the major historical judgments on state sovereignty over migrants. See, eg, in the United States Supreme Court, *Nishimura Ekiu v United States* 142 US 651, 659 (1892) (Chapter 1, n 33) and in United Kingdom Privy Council, *Musgrove v Chun Teeong Toy* [1891] AC 272 at 282 (Chapter 3, n 7).

⁸ See, eg, Wade and Forsyth, *Administrative Law*, Chapter 1 (Chapter 2, n 45).

⁹ See discussion in Chapter 1.

need).¹⁰ Thus, the place of migration law within this logic of reciprocity between the citizen and the state is unclear. The absence of obvious relevance of migration law within the scheme of traditional contractarian conceptions of administrative law may be, for some, evidence for the proposition that migration law should be treated differently. This may entail differences in treatment in relation to substantive rights: for example, unlike citizens, migrants may not expect to claim social assistance from the host state.¹¹ However, in some instances, the argument has been made that the differences in the legal situation of migrants flowing from the existence of migration controls may also justify a difference in treatment in respect of their procedural rights. In other words, the extent of procedural rights is determined by the absence of a substantive right of entry and residence. The English Court of Appeal's decision in the case of *Schmidt v Secretary of State for Home Affairs*¹² is a prominent example of such reasoning. In that case, the Court held that there was no procedural right to be heard in relation to the Secretary of State's decision on the migration status of the claimants (*in casu* a decision to refuse further leave to remain) because the claimants had no corresponding substantive right to remain.¹³ The hinging of procedural rights on the prior existence of substantive rights is

¹⁰ For an exploration of modern ideas of the social contract, see, eg, Amir Paz-Fuchs, 'The Social Contract Revisited: The Modern Welfare State; Overview and Critical Report' (*Foundation for Law, Justice and Society*, 2011) <<http://www.fljs.org/files/publications/Paz-Fuchs-SummaryReport.pdf>> accessed 20 August 2015.

¹¹ Although the application of fundamental rights may attenuate this claim in practice, see, eg, *R (Limbuela) v Secretary of State for the Home Department* [2005] UKHL 66, [2006] 1 AC 396. There may also be exceptions where certain types of migrants are given privileged legal statuses, for example, within the scope of EU law, EU citizens. cf Michael Walzer's arguments on the contingency of social justice on membership: Walzer, *Spheres of Justice: A Defence of Pluralism and Equality*, chapter 2.

¹² See, eg, *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149 (CA) and *Farrakhan* [2002] EWCA Civ 606, [2002] QB 1391.

¹³ See also, Chapter 1, n 27.

not limited to judicial discussion but is espoused by Dworkin¹⁴ who argues that concerns of procedural fairness arise only where there is a risk of infliction of moral harm. Moral harm is defined as injustice, as opposed to bare harm, which is the disadvantage or imposition itself.¹⁵ For Dworkin, the risk of moral harm occurring only arises where substantive rights are at stake, therefore, procedural justice is not required where there are no substantive rights and thus no risk of moral harm.

However, the argument that procedural justice only has a place where there are substantive rights (including a right to enter and remain in a state) is flawed. As set out in Chapter 2, there are good reasons for discretionary decision-making in the absence of any legally enforceable rights to be subject to fair procedures (at least insofar as it affects individuals).¹⁶ Questions of fair treatment (and thus, the rule of law and procedural justice), as explained in Chapter 2, arise where there is an imbalance of power between the decision's maker and its subject and where the decision may significantly affect the interests of its subject.¹⁷ Thus, as explained by Galligan, entirely discretionary individualised administrative decisions may involve important interests that rule out, for example, chance as an appropriate decisional mechanism. Critiquing the Dworkinian view, Galligan uses the example of parole board decision-making: although a decision taken by the parole board is discretionary and there is no individual right to parole, there is a significant imbalance of power and the interests of the prisoner are affected seriously.

¹⁴ Ronald Dworkin, *A Matter of Principle* (Oxford: Clarendon Press 1986), chapter 3. It should be noted that Dworkin's argument is not made specifically in relation to migration status decisions.

¹⁵ *ibid.* Thus imprisonment causes the bare harm of denial of liberty, but wrongful imprisonment causes an additional moral harm because of the injustice done.

¹⁶ This has been accepted on both sides of the Atlantic, see, eg, in the UK, *Ridge v Baldwin* (see further Chapter 5) and in the USA, the 'due process revolution', see, eg, *Goldberg v Kelly* 397 UA 254 (1970).

¹⁷ See Chapter 1 at 3.1.

The importance of the interests involved means that it would be unacceptable for a decision on parole to be taken by, for example, simply tossing a coin,¹⁸ rather the moral right to fair treatment requires the imposition of fair procedures. As has been already examined in detail in Chapter 2, for the reasons set out there, the argument is of equal application to many migration status decisions.¹⁹

Further, as has also been addressed in Chapter 2, by its nature, discretionary decision-making places greater reliance on the decision maker's sound judgment and is more open to abuse thereby making considerations of procedural justice arguably most important in this context.²⁰ Indeed, far from negating the need for judicial review, discretionary decision-making in fact calls for a more protective standard of review (merits review) in order to meet the moral demands of fair treatment. Accordingly, neither the absence of citizen membership nor the existence of administrative discretion over migration control (the absence of a substantive right to enter and reside) are legitimate bases for excluding migration status decision-making from the courts. Any argument to the contrary is misconceived as it is based on a discredited account of access

¹⁸ For an examination of the role of chance in distributions, see Neil Duxbury, *Random Justice: On Lotteries and Legal Decision-Making* (OUP 1999).

¹⁹ See Chapter 2 at 4.2.

²⁰ See further Paul Craig, 'The Human Rights Act, Article 6 and Procedural Rights' [2003] Public Law 753, p 758: '[i]t can indeed be argued that the very fact that the substantive benefit is discretionary renders process considerations even more important in this context.' Craig, therefore, argues that discretionary decisions arguably have a higher need for fair procedures for their very quality as discretions. See also Davis, *Discretionary Justice: A Preliminary Inquiry* pp 172, 176. Davis argues that it is wrong to think that safeguards are less necessary for discretion. Equally, Jeff King's criticisms of the arguments of Lon Fuller on the non-justiciability of polycentric issues recall that discretionary decisions which involve a consideration of the public interest may still have important impacts on individuals and are pervasive aspects of legal decision-making. See Jeff King, 'The pervasiveness of polycentricity' [2008] Public Law 101.

to justice²¹ and, as demonstrated in the previous chapter, the concerns and objectives of the rule of law transcend membership and citizenship status.

1.2. The enjoyment of executive administrative authority over migration control is incompatible with access to justice from migration status decisions

There is, however, another version of the objection to judicial scrutiny of migration status decisions based on executive control over migration. This conceptualisation of the objection considers judicial review to be an illegitimate derogation from the executive's power to restrict migrants' entry and expel them at will. Versions of this argument consider migration status decision-making to be non-justiciable²² and pit the judiciary against the administration. They may be said to have featured in, for example, the United Kingdom Government's attacks on the migration appeal system in recent immigration legislation.²³

As noted above, in its classical formulation, executive sovereignty over migration was not considered to be encumbered by any restriction or limitation. However, as will be argued below, this notion of sovereignty bears little resemblance to what is currently practised by liberal, democratic states.²⁴ The objection is, therefore, rejected on two,

²¹ See n 16 above.

²² See, for a description of non-justiciability in the UK context, Chapter 5.

²³ See Chapters 5 and 9.

²⁴ International legal regulation of certain key areas of state activity has altered the classical, absolutist notion of state sovereignty. Of primary importance in this regard is the legal regulation of the use of force through collective security, thereby outlawing the right of states to go to war save for reasons of self-defence. Equally important is the international regulation of states' treatments of individuals in relation to their most basic rights. See also the effects of supranational legal orders, such as the EU. See further, e.g., Jean L Cohen, 'Sovereignty in the Context of Globalization: A Constitutional Pluralist Perspective' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010), pp 261-280.

linked accounts, first, because judicial oversight does not in reality lessen sovereignty – arguments to the contrary are based on a misconceived idea of sovereignty²⁵ and today, migration control has been constrained by rules and standards that are both external and internal to states, judicial review of administrative action represents just one of these (internal) constraints; and secondly, because judicial oversight is a function of the rule of law it cannot properly be pitted against executive sovereignty over migration. These claims are examined, in turn, below.

1.2.1. Sovereignty accommodates limitation

To assert that the institution of judicial review of a state's administrative power of migration control undermines sovereignty assumes that choosing to subject a power to conditions diminishes it. However, this assumption is misconceived. The point is made at a theoretical level by HLA Hart in *The Concept of Law*.²⁶ Hart was writing in the context of the English doctrine of parliamentary sovereignty,²⁷ but as he acknowledges the principles he elaborates are applicable more broadly.²⁸ Hart draws a distinction between two types of sovereign power: continuing sovereignty and self-embracing sovereignty. Continuing sovereignty requires that the sovereign power is 'free at every moment of its existence as a continuing body, not only from legal limitations imposed ab extra but also

²⁵ For the reasons explained below, absolute sovereignty is an incoherent idea both in theory and in practice in modern, international legal orders.

²⁶ HLA Hart, *The Concept of Law* (Third edn, Oxford University Press 2012).

²⁷ In British constitutional context the notion that sovereign power cannot accommodate any restriction on its power is foreground in a Diceyan conception of parliamentary sovereignty. See further AV Dicey *The Law of the Constitution* (first published 1885).

²⁸ Hart, *The Concept of Law* (n 26), p 149: '...similar doubts can arise in relation to ultimate criteria of legal validity in any system'.

from its own prior legislation'.²⁹ Self-embracing sovereignty, however, is a doctrine of sovereignty that permits the exercise of sovereign power to limit that power for the future.³⁰ Hart is aware that sovereignty as traditionally conceptualised is not considered to accommodate self-binding power, but sees this as a the misapprehension of 'older constitutional theorists' who, 'under the influence of the Austinian doctrine that law is essentially the product of legally untrammelled will' wrote as if continuing sovereign power were 'a logical necessity'.³¹ For Hart 'no necessity of logic, still less of nature' dictates the conclusion that sovereign power must be continuing.³² Rather, Hart saw continuing sovereignty as 'only one arrangement among others, equally conceivable'.³³ Self-embracing sovereignty, in his view, 'might equally well, perhaps better, deserve the name of "sovereignty"'.³⁴ Hart's suggestion that self-limiting sovereignty is the proper definition of sovereignty is indeed logical since where a decision to impose limits on absolute power is a choice, the election is necessarily an incident or feature of the sovereign power to choose.

Accordingly, a view that suggests that sovereignty cannot accommodate any restriction on its power, that it can never be self-limiting, is flawed as it does not take

²⁹ *ibid*, p 149.

³⁰ In Hart's words, this conception of sovereignty requires that the sovereign power 'should *not* be incapable of limiting irrevocably the legislative competence of its successors but, on the contrary it should have this self-limiting power', *ibid*, p 149. Hart compares the two conceptions of sovereignty with two conceptions of divine omnipotence: 'on the one hand, a God who at every moment of his existence enjoys the same powers and so is incapable of cutting down those powers, and, on the other, a God whose powers include the power to destroy for the future his omnipotence', *ibid*, pp 149-150.

³¹ *ibid*, p 149.

³² *ibid*.

³³ *ibid*.

³⁴ *ibid*.

account of a competing ‘self-embracing’ account, which may equally – or perhaps better – explain the concept. Thus, even if it is assumed that the conferral on migrants of a right to review migration status decision-making is a limitation on executive power, this does not necessarily diminish or negate the executive’s control over migration. This is because the subjection to judicial control of administrative decisions on migration status does not diminish administrative sovereignty since it is in the very nature of sovereignty to accommodate its limitation.

The discussion thus far has been at a high level of theory, however, it has practical applications. As noted above, executive sovereignty over migration control is in practice now circumscribed in a number of ways both externally (primarily by developments in public international law since the adoption of the UN Charter in 1945)³⁵ and internally (for example, national constitutional fundamental rights and divisions of power between the various organs of government). Judicial control of administrative action is just one of the ways in which the executive’s control over migration is attenuated. Clearly, in modern democratic legal orders that are subject to the rule of law, executive sovereignty cannot mean the exercise of unfettered or unlawful power.³⁶

1.2.2. Executive control and judicial control over migration are not antagonists

This discussion leads to the second argument: given that the rule of law must be respected, insofar as judicial oversight polices the limits of states’ power it does not

³⁵ See, eg, Goodwin-Gill, *International Law and the Movement of Persons Between States*; Plender, *International Migration Law* (Chapter 1, n 33); and Jean L. Cohen in Besson and Tasioulas, *The Philosophy of International Law*: ‘...the absolutist conception of sovereignty...has long since been abandoned’ (n 24), p 263.

³⁶ Bingham, *The Rule of Law* (Chapter 2, n 19). See also, in the British administrative context, Wade and Forsyth, *Administrative Law*, p 207: ‘All discretionary powers have objective limits of some kind, but the problem lies in identifying them’.

reduce sovereignty, but rather – by ensuring the proper limits of power are respected – judicial oversight is a necessary condition for its exercise. Clearly, executive sovereignty does not mean executive fiat. Rather, executive control and the rule of law are complementary principles since no discretionary power should be totally unfettered:³⁷ sovereignty is constituted as the sum of the interaction of the two branches of government. In liberal democratic states in which the constitutional principle of the separation of powers obtains, there is likely to be some form of balance between three branches of the state: legislative, executive and judiciary.³⁸ In states operating with some form of separation of powers, therefore, sovereignty consists of a combination of a law-making legislature, a law-administering executive and a law-upholding judiciary. In these terms, therefore, it is further inexact to see state sovereignty over migration control and judicial review of migration status decisions as pitted against each other. Judicial oversight by domestic institutions that in constitutional terms themselves form part of the state is distinct from international norms and the oversight of international bodies, which impose external checks.³⁹ Thus, even if the executive's power to exclude and expel migrants at will were unrestricted, 'it does not follow that the courts should refrain from determining whether the exercise of such power in an individual case comports with the legal directives that the nation as a whole has elected to establish.'⁴⁰ In a legal order

³⁷ Of course, there may be some types of executive decision-making are properly immune from judicial scrutiny, the paradigm being decisions to go to war, see Chapter 1 n 12.

³⁸ See, eg, Tomkins, *Public Law* (Chapter 1, n 76), p 36.

³⁹ This thesis does not consider the role of international judicial bodies in providing access to justice from adverse migration status decisions. Insofar as individual petition to such bodies exists, however, the domestic state (including its judiciary) are subject to an external check. Here too, however, it is defensible to argue that there is no attenuation of sovereignty since upholding the law (rule of law) cannot be at odds with its application (sovereignty).

⁴⁰ Legomsky, *Immigration and the Judiciary* (Chapter 1, n 49), pp 316-17.

(including the international legal order) in which the judiciary plays a constitutional role in upholding the law, it is entirely compatible with state sovereignty over migration control that the executive's decisions on migration status are reviewed judicially.

2. Objections to merits review

The objections considered so far have examined the initial claim that there should be access to justice from migration status decisions. As noted earlier, this claim is generally accepted in modern, liberal democratic legal orders but the objections are examined as they underpin some of the debate on procedural reform in relation to migration status decision making. The remainder of this chapter now turns to the second claim made in Chapter 2, namely that there should be judicial merits review from migration status decisions that involve the exercise of discretionary judgment on the part of the decision-maker. Two objections specific to migration status decision-making are considered (and rejected) below. As a preliminary, however, a general objection to merits review *per se* is addressed.

2.1. General objections to merits review of administrative action

As noted in Chapter 2,⁴¹ a central argument against judicial review is that it is incompatible with democratic forms of government. However, typically, those who take issue with judicial review on democratic grounds⁴² are exercised by 'strong' judicial review, that is judicial review of legislative action where the court has the final word on

⁴¹ See Chapter 2, n 12.

⁴² See, eg, Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 Yale Law Journal 1346.

its validity.⁴³ The objection to strong judicial review is held because an unelected body can strike down the actions of a directly elected authority, but this not the case in relation to administrative actions, which seek to apply the rules laid down by a directly elected body but which do not themselves emanate from such a body. What, therefore, is anti-democratic about judicial review of administrative action? In answer to this question, it should first be acknowledged that insofar as administrators are subject to mechanisms that render them indirectly accountable through the legislature, they have democratic legitimacy.⁴⁴ As such, the counter majoritarian argument would be that since judicial scrutiny of merits brings courts into conflict with politically accountable branches of government, it interferes with the legitimate decisions of those bodies.⁴⁵ By contrast, this argument has relatively little traction in relation to judicial review of administrative action on legality grounds, since jurisdictional transgressions are not thought to interfere with a democratic mandate.

There are (at least) two answers to the counter majoritarian objections: the first is to stress that whilst, in formal terms, judicial scrutiny may be conceived of as anti-democratic, in other important ways it enhances the application of democratic

⁴³ See, eg, Mark Tushnet, 'Weak-Form Judicial Review and 'Core' Civil Liberties' (2006) 41 Harvard Civil Rights-Civil Liberties Law Review 1. Strong judicial review is contrasted with weak judicial review of legislative action, which permits judicial rulings to be overridden by the legislature.

⁴⁴ Discretionary decisions taken by the administrative branch of government are politically accountable through the principles of authorisation and ministerial accountability. Courts, by contrast, are not politically accountable in the sense that they do not have to account for their actions to a democratically elected body nor to the democratic process in any other direct way, Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Chapter 1, n 63), p 235.

⁴⁵ A similar and connected argument can be made on the basis that judicial review of the merits of discretionary administrative decisions does not respect the proper separation of powers. See further, *ibid*, pp 228-234.

principles.⁴⁶ The second possible answer is to recognise that democracy may not be an absolute good. In other words, ‘other values are important objects of judicial attention, even where there is potential conflict between them and democratic principles.’⁴⁷ The first counter argument has been conceptualised in a number of ways.⁴⁸ Denis Galligan describes two senses in which judicial merits review can be linked to the democratic process:

...one is that democracy, in the representative sense of individuals and groups being able to bring their interests to bear on decision-making, can be extended into the discretionary process, and that courts might involve themselves in that extension... The other approach is that democracy means more than simply majority rule, that it connotes a relationship between each individual and the majority, within which the individual is guaranteed certain protections, and that these in turn may constitute fetters upon majority rule.⁴⁹

The first sense, is, therefore, based on a broad (and more sophisticated) conceptualisation of democracy, extending beyond majority rule into other forms of protection, participation and representation. The second is based on ideas that it is a role of courts to ensure the minority is not treated unreasonably by the majority.⁵⁰ This bleeds

⁴⁶ This may be of particular importance in migration status decision-making in the light of migrants’ exclusion from the democratic franchise. See Chapter 2 at 4.2.2.

⁴⁷ Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Chapter 1, n 63), p 235.

⁴⁸ It has been particularly dominant in US constitutional theory. See, eg, John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980). Whilst these arguments are specific to the US constitutional context, the substance of the propositions have significance more generally and are touched upon in general terms here. For a survey of the US literature on judicial review and democracy, see Paul Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (Oxford University Press 1991).

⁴⁹ Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Chapter 1, n 63), p 261.

⁵⁰ Tomkins expresses the case in the following way: ‘it is an essential feature of democracy that, whilst the majority should govern, it should not be permitted to govern in such a way as to trample upon the rights or interests of minorities. Politics in a democracy is the vehicle through which the will of the majority is identified and given authority. But as majoritarian politics will always find it difficult to accommodate and to protect the interests of minorities, particularly those minorities that the majority find distasteful or disturbing, such protection as minorities are going to receive may well have to come from sources not under the immediate control of the majority – sources

into the second counter argument, namely that notwithstanding the anti-democratic nature of judicial review, it protects other values. The other values worthy of protection may be a principle that has wide popular support or that is morally justifiable.⁵¹ Thus, although courts are not politically accountable in the sense that they do not have to account directly for their activities, as part of a larger political system they remain responsive to democratic principles.

The other archetypal argument against the review of the merits of administrative decisions by a judicial body is that of non-justiciability, that is to say that they are unsuited to adjudication.⁵² However, as noted in Chapter 1, there are now recognised to be very few areas immune to judicial review, primarily political judgments relating to

such as the courts of law.’ Tomkins, *Public Law* (Chapter 1, n 76), p 210. See further Dworkin, *Taking Rights Seriously* and Allan, *Law, Liberty and Justice: The Legal Foundations of the British Constitution* (Chapter 1, n 52).

⁵¹ Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Chapter 1, n 63). He uses the example of deportation cases to illustrate the argument that courts may properly appeal to principles or values outside the democratic process. In this context, Galligan queries: ‘[w]hy should the tribunal not concern themselves with the moral basis of double punishment or the empirical basis of deterrence?’, p 261.

⁵² Galligan distinguishes between two senses of ‘non-justiciability’: the first is analytical, that is where a decision is more effectively made by a political authority; and the second is political, that is where there is a strong political reason for courts not making a decision. Ibid, p 241. It is the former that is of relevance for present purposes. Another form of the non-justiciable argument exists based on notions of polycentricity. The idea of polycentricity was developed by Lon Fuller as part of his argument that some decisions, the paradigm of which is resource allocation, are inherently unsuitable for adjudication due to the complex and inter-dependent interests implicated within them. For Fuller, the distinguishing characteristic of adjudication is the participation of the affected party through representation in the adjudicative process. His argument went that since the interests implicated in polycentric issues are incapable of representation in any meaningful way, adjudication is, therefore, unsuited to the determination of such issues: See L Fuller ‘The Forms and Limits of Adjudication’ (1978-79) 92 Harvard L Rev 353. However, Jeff King has criticized the claim that polycentricity should properly immunize discretionary allocative decision-making from judicial review. King notes that polycentricity is a pervasive and almost ubiquitous feature of adjudication which cannot, alone, be conclusive of arguments against the justiciability of polycentric issues: J King ‘The Pervasiveness of Polycentricity’ [2008] PL 101 and Jeff King, *Judging Social Rights* (Cambridge University Press 2012), ch 7, p 189. Further, the argument that evaluative discretion is polycentric rendering it non-justiciable has been attacked by Galligan: Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Chapter 1, n 63), pp 244-45.

foreign policy.⁵³ Accordingly, general objections to judicial merits review do not undermine the normative claims in Chapter 2. What then, of arguments specific to migration status decision-making. Two are considered below.

2.2. The argument is over-inclusive – visa lotteries, quotas and national security

It has been accepted in the previous chapter that the normative claim to merits review does not apply to all migration status decisions. Review of the legality of migration status decisions is sufficient where the migration status decision is the result of a mechanistic application of the law (that is, in the absence of the administrator exercising judgment discretion (or where discretion is *de minimis*)). Equally, the figure of the migrant is not homogenous and the moral imperative for merits review is affected by a number of variables relevant to the degree of power imbalance between the administration and the individual (such as, the degree of discretionary judgment) and how much the decision is liable to affect an individual (the stakes and consequences).⁵⁴ Therefore, the proposition that not all migration status decision-making requires merits review as a matter of the moral right to fair treatment is accepted and this objection is, therefore, an objection to the breadth of application of the argument rather than to the principle itself. But where should the line fall? To an extent this question is context-specific and is examined in the UK context in Chapters 4-9,⁵⁵ but a number of generalised

⁵³ See Chapter 1, 12.

⁵⁴ See, in practice, the discussion in Chapters 6 and 9.

⁵⁵ See, in particular figures 2-6 in Chapter 9.

objections to the breadth of the general principle articulated in Chapter 2 are addressed here.

First, as has been outlined above, arguments based on limiting the application of merits review to the existence of substantive rights (whether they be rights to enter or reside or fundamental rights), rely on a discredited account of procedural justice.⁵⁶ Such arguments have already been rejected in this chapter: interests that cannot be crystallised into hard legal rights may still require protection as a matter of fair treatment. In any event, even if it is true that not all migrants have a right to enter and/or reside *per se*,⁵⁷ the vast majority of migrants have rights by reference to constitutional or fundamental rights instruments not to have an application rejected on objectionable grounds, such as race.⁵⁸

But what about administrative decisional processes that determine migration status, so as to fall within the definition of migration status decisions given in Chapter 1,⁵⁹ but which do not employ the usual adjudicative method of assessment? In the migration context prominent examples are visa lotteries and quotas. Visa lotteries and quotas apply the criterion of chance⁶⁰ to determine migration status (following a prior assessment of eligibility against criteria to enter in the lottery). These mechanisms are highly discretionary, there is a substantial imbalance in power between the administration and the individual and, given that they typically concern work and study, have outcomes of considerable importance to their subjects. Should, therefore, they be subject to merits

⁵⁶ See n 16 above.

⁵⁷ Although it is clear that some do as a matter of international, regional or domestic law. See, eg, EU citizen migrants (see Chapter 8).

⁵⁸ See, Chapter 8.

⁵⁹ See Chapter 1, n 2.

⁶⁰ Generally, first come, first serve, or some other sifting mechanism based on random assignment.

review as a more protective standard of review? The answer is clearly no as a matter of logical necessity: insofar as there is no individualised assessment of the merits of a case is undertaken, the question of review on the merits equally does not arise. Consequently, it is not argued in Chapter 2 that there should be merits review from a migration status decision made on the basis of chance or quotas. This is for the simple reason that in these cases there are, in fact, no merits to review.⁶¹ The assessment of eligibility criteria for entrance to the lottery is likely to be mechanistic in nature,⁶² which, on the basis of the exceptions set out in Chapter 2, would equally not necessitate merits review.⁶³

Another version of the ‘over-inclusive’ argument is that there are some migrants who should not have a right to access to justice from administrative decisions on their migration status because their interests are trumped by an overwhelming, countervailing general interest. In this case, it would be argued, the general public interest negates any individual right to judicial oversight. The paradigm example of such an overriding interest is national security.⁶⁴ The question of whether national security concerns may in and of themselves necessarily negate an individual’s access to justice⁶⁵ is too broad to be answered within the limits of the question asked by this thesis. However, for present

⁶¹ The meta question of the moral legitimacy of decisions on migration status based on chance is outside the scope of this thesis. For present purposes, it is assumed here that they are legitimate ways, in certain cases, of determining whether a migrant may enter or remain in the territory of a state. For an examination of the role of chance in decision-making processes, see Duxbury, *Random Justice: On Lotteries and Legal Decision-Making* (n 18).

⁶² This may include requirements of nationality, gender or age, which are objectively verifiable.

⁶³ Chapter 5 at 5.1.

⁶⁴ National security falls outside the remit of this thesis. For an examination of national security in the context of human rights, see, eg, Benjamin Goold and Liora Lazarus (eds), *Security and Human Rights* (Hart 2007).

⁶⁵ See, eg, Allan, *Law, Liberty and Justice: The Legal Foundations of the British Constitution* (Chapter 1, n 52), p 215: ‘...there can be no principle against judicial review where executive action, even in the sphere of ‘high policy’, violates an applicant’s right to fair treatment, where his interests are unjustly sacrificed (given wholly inadequate weight) to the general welfare.’

purposes it is important to note that even if it is accepted that national security should prevent judicial review of some migration status decisions,⁶⁶ this does not negate the case for review as a matter of principle. Rather, the acceptance of the principle that national security concerns may have an impact on the ability of individuals to challenge migration status decisions is the admission of the existence of competing considerations and is, therefore, a positive exception.⁶⁷ Accordingly, limited positive exceptions to the general claims made in this thesis, do not undermine them.

2.3. The relevance of judgment discretion

Finally, the role of judgment discretion in determining when there should be a right to merits review of migration status decision-making is examined. There are two parts to this objection. The first line of opposition is that the existence of administrative discretion cannot alone determine whether or not there should be a right to judicial merits review from a decision because such is the pervasiveness of discretion in administrative decision-making that an appeal would be required in almost every case, preventing government from functioning properly, or at all. This is a compelling critique: clearly, a right to merits review from administrative decision-making cannot, for the reasons contended above, be based on discretion alone. However, the objection misunderstands the argument advanced in the thesis: discretion is not posited as a general trigger for merits review from administrative decision-making. Rather, it is contended that in terms of judicial scrutiny, migration status decisions should receive no less protective treatment

⁶⁶ This is not conceded: the question, as noted above, is too broad to be answered within the confines of this work.

⁶⁷ See, eg, Guy Goodwin-Gill in Dummet, *Towards a Just Immigration Policy* (Chapter 2, n 25), p 24, who calls for restrictive interpretation of the national security exception.

than other administrative decisions and that, in fact, the factors that distinguish migration status decisions from other administrative decisions (migration control and the other specific features of migration status decision-making set out in Chapter 2)⁶⁸ mean that they require a higher standard of procedural protection, and in particular, for the reasons advanced in Chapter 2, merits review.⁶⁹ The absence of judgment discretion is an exception to the general rule proposed of the proper standard of judicial scrutiny in respect of administrative decisions *on migration status*, it is not advanced as a general principle for all administrative decisions. It has been argued in Chapter 2 that judicial merits review of migration status decisions is not necessary in the absence of administrative judgment discretion since then the risks to justice being done and being seen to be done do not arise. It is in this limited respect only that it becomes a threshold criterion for requiring judicial merits review.

The response to this explanation, it might be anticipated, is to disagree that the features identified in Chapter 2 as distinguishing migrants from citizens are capable of justifying a claim to merits review. It would be argued that the normative argument made in the thesis amounts to nothing more than a political value judgment⁷⁰ that migrants have interests more worthy of protection than citizens (or some citizens). This view is defective, however. If the view that migrants have interests worthy of protection were a simple political judgment, then it would certainly follow that it has no more claim on finite resources than any other political standpoint on migrants. If nothing more than a political value judgment, rather than a moral claim, certainly it would be equally valid to

⁶⁸ See Chapter 2 at 4.2-4.3.

⁶⁹ Chapter 2 at 4-5.

⁷⁰ See Chapter 1, n 22.

argue that migrants have no right to merits review at all, or a limited right based on, for example, the presence of fundamental rights. However, the claim migrants have to justice is not merely political, but is based in concerns of fair treatment, principles considered morally significant in liberal democratic states. Outside of the framework set by this thesis, therefore, the objection that the claims are purely political value judgments may have some purchase but it founders if the premises and moral values of liberal democracy are accepted.

Moreover, in any event, discretion is a scalar concept. At one end of the spectrum are broad principles that require a large degree of interpretation and judgment by the administrator and have a plurality of meanings (examples may be standards such as ‘genuine’ or ‘real risk’). At the other end are words that permit little scope for plural understandings (examples are types of documents such as ‘bank statements’, ‘marriage certificate’ or ‘identification card’, or institutions, for example ‘Oxford University’, or ‘university education’). There remain, of course, degrees of discretion even within the more specific category of words, thus ‘identification card’ and ‘university’ give rise to greater uncertainty than the more specific ‘marriage certificate’ and ‘Oxford University’. However, the point being made is that viewing discretion as present in judgment calls does not mean that all migration status decisions involve the exercise of judgment discretion. Insofar as evaluative judgment calls are absent or *de minimis*, judicial merits review is not necessary as the administrative action is mechanistic in nature and the threats to justice being done and being seen to be done are minimised.

The second line of opposition to placing judgment discretion as the threshold criterion for judicial merits review from migration status decisions is that given the

resources required by an appeals system, it is likely that a government would attempt to minimise rights of appeal. On the argument of this thesis, this could apparently be done legitimately by reducing judgment discretion in administrative decision-making. Arguably, the removal of administrative discretion (so as to cut rights of appeal) could create increased rigidity and unfairness in decision-making since it would be unlikely that every eventuality could be accounted for in advance. However, it is not inevitable that reducing discretion will lead to greater unfairness. The flipside of increased rigidity in application criteria is greater clarity for the applicant and increased legal certainty, which are widely recognised as a central aspect of the rule of law.⁷¹ As such arguments against the relevance of discretion to the normative claims cannot stand.

Conclusion

The purpose of this chapter was to evaluate and rebut potential objections to the normative arguments advanced previously. Five objections have been explored: two take issue with the initial claim that there should be access to justice from all migration status decisions, and three respond to the further claim that migration status decisions which involve the exercise of discretion should be judicially reviewable on the merits. It has been argued that there are flaws in respect of each objection and that being so, none of them is fatal to the argument made in the previous chapter. As such, the normative claims, which have so far been made in the abstract, will now be applied in the context of the United Kingdom legal order in subsequent chapters.

⁷¹ See, eg, Fuller, *The Morality of Law* (Chapter 2, n 35). See also Razian and Dworkinian accounts discussed at pp 28-29.

THE RIGHTS OF ACCESS TO JUSTICE AND MERITS REVIEW OF MIGRATION STATUS DECISIONS IN THE UK CONTEXT

This chapter situates the theoretical chapters in the UK constitutional context as it examines how the concepts identified in the abstract are institutionalised in the UK.¹ To this end, it provides an outline of the UK's provision of access to justice from migration status decisions before focusing on the right to merits review. In essence, therefore, this chapter provides a bridge between the generalised claims in Chapters 2 and 3 and the particularised examination of those claims in Chapters 5-9.

1. How are the rights of access to justice and merits review of migration status decision-making institutionalised in the UK?

Different legal orders institutionalise the moral rights expressed in Chapters 2 and 3 in different ways, in line with their constitutional specificities. As Asimow and Lubbers explain:

¹ It is not, however, a general description of migration control in the UK. As to this, the main practitioner text is Ian Macdonald and Ronan Toal, *Macdonald's Immigration Law and Practice* (Lexis Nexis 2015) supplemented by a number of more specialized texts, eg, Nicola Rogers, Rick Scannell and John Walsh, *Free Movement of Persons in the Enlarged European Union* (2nd edn, Sweet and Maxwell 2012); Eric Fripp, Rowena Moffatt and Ellis Wilford (eds), *The Law and Practice of Expulsion and Exclusion from the United Kingdom: Deportation, Removal, Exclusion and Deprivation of Citizenship* (Hart 2014); Laura Dubinsky, *Foreign National Prisoners: law and practice* (LAG 2012); Rory Dunlop and Graham Denholm, *Detention Under the Immigration Acts: Law and Practice* (Oxford University Press 2015). The central student textbook is Gina Clayton, *Textbook on Immigration and Asylum Law* (6th edn, Oxford University Press 2014).

Modern governments have to decide many disputes arising out of regulation or benefit schemes. There are various models of administrative dispute resolution available. The disputes can be adjudicated by a national court system or within the agency that made the initial decision but subject to judicial review. A third way is adjudication by specialized courts or tribunals. The United States relies heavily, but not exclusively, on adjudication within its agencies, while Australia and the United Kingdom rely on national administrative appeal tribunals.²

Asimow and Lubbers point to three general models - adjudication within a national court system, internal review plus residual judicial review, and adjudication within specialist courts or tribunals - and states' varying preferences between these models. Whilst different, all those envisaged, however, involve some form of judicial control of decision-making. This is consistent with the first moral claim made in Chapter 2 (that fair treatment requires access to justice from migration status decision-making (as an instance of administrative decision-making)). As will be clear from Chapters 2 and 3, in respect of migration status decision-making,³ the moral demands of fair treatment place certain limits on the way in which disputes between the administration and individuals should be modelled in practice. In other words, states should not have complete discretion over the way in which dispute resolution from administrative decision-making is institutionalised. It has been argued, in particular, that there should be judicial scrutiny on the merits of the majority of migration status decisions and, as has already been noted, it is questions of the standard of review, rather than the right of access to judicial scrutiny itself, that are more controversial. For this reason, the focus of Chapters 5-9 will be on the nature and breadth of application of merits review in the UK legal order.

² Asimow and Lubbers, 'The Merits of 'Merits' Review: A Comparative Look at the Australian Administrative Appeals Tribunal' (Chapter 2, n 37). See also Asimow, 'Five Models of Administrative Adjudication' (Chapter 1, n 8).

³ As explained in earlier chapters, other areas of administrative decision-making are not specifically considered in this work.

As noted earlier, the UK's procedural choices in relation to the resolution of the disputes arising from migration status decision-making form the focus of the remainder of this thesis.⁴ As again acknowledged by Asimow, in the UK⁵ adjudication in specialised tribunals is the preferred model.⁶ This system is described below.

1.1. Terminology and institutional equivalences: what the terms defined in Chapter 1 mean in the UK context

In order to consider properly whether, and if so how, the UK meets the moral demands of fair treatment in its adjudication of migration status decisions, it is necessary as a preliminary to explain what the central terms introduced in Chapter 1 mean in the specific context of the UK. To this end, the central concepts are given their specific UK meanings below.

1.1.1. Migration status decision-making

Migration status decision-making in the UK encompasses the administration of leave to enter and remain (including variations to such leave), the administrative removal and deportation of those without a right of abode,⁷ and the administrative removal and

⁴ The thesis is not comparative in focus. For a comparative study of administrative adjudication, see, Asimow, 'Five Models of Administrative Adjudication' (Chapter 1, n 8).

⁵ Australia is also cited as a proponent of this model.

⁶ Asimow, 'Five Models of Administrative Adjudication' (Chapter 1, n 8): 'The UK and Australia invest most of their adjudicatory resources in the reconsideration process provided by tribunals. That is the level that private parties regard as providing the best chance to win a favorable outcome. At the initial agency decision level, there are few procedural requirements; at the judicial review level, the narrow scope of review precludes courts from affording relief in most cases involving disputes of fact or discretion.'

⁷ The right of abode in UK immigration and nationality law refers to the right to enter and remain in the UK without restriction. It was initially a common law concept which was made statutory in the Immigration Act 1971. See further, Macdonald and Toal, *Macdonald's Immigration Law and Practice* (n 1), 2.3-2.26.

deportation of those subject to the EU free-movement regime.⁸ From this, it will be seen that there are two preliminary distinctions to be drawn between i) those with and those without a right of abode⁹; and ii) migrants who are citizens of the European Union (EU) (and their family members) and non-EU citizen migrants (who are not the family members of EU citizens). Those without a right of abode who are not EU citizens are subject to immigration control.¹⁰ Non-EU migration in the UK is controlled generally under the Immigration Acts. These are a series of statutes dealing with migration control, of which the foundational piece of legislation is the Immigration Act 1971.¹¹ The Immigration Acts empower the Secretary of State to make administrative rules¹² (the Immigration Rules)¹³ which set out, in detail, the requirements for leave to enter and remain in the United Kingdom under a number of migration routes.¹⁴ The Secretary of

⁸ This is regulated by the fundamental freedoms provided for in the EU Treaties and secondary legislation. It provides EU citizens who satisfy specified criteria with a right to enter and reside in the UK, and be expelled only on certain grounds.

⁹ The distinction is drawn in Immigration Act 1971, s 1(1) & (2): ‘All those who are in this Act expressed to have the right of abode in the United Kingdom shall be free to live in, and to come and go into and from, the United Kingdom without let or hindrance except such as may be required under and in accordance with this Act to enable their right to be established or as may be otherwise lawfully imposed on any person. Those not having that right may live, work and settle in the United Kingdom by permission and subject to such regulation and control of their entry into, stay in and departure from the United Kingdom as is imposed by this Act.’

¹⁰ Immigration Act 1971, s 1(2).

¹¹ The various immigration statutes are set out in Chapter 4.

¹² By reference to the discussion of discretion in Chapter 2 above, this is an exercise of strong discretion.

¹³ Immigration Act 1971, s 3(2). The rules are ‘very difficult to categorise or classify’ (Lane LJ) being ‘a curious amalgam of information and description of executive procedures’ (Cumming-Bruce LJ): *R v Home Secretary, ex p Hosenball* [1977] 1 WLR 766. See also, *Odelola v Secretary of State for the Home Department* [2009] UKHL 25, [2009] 1 WLR 1230 [6] ‘the rules are not subordinate legislation but detailed statements by a minister of the crown as to how the crown proposes to exercise its executive power to control immigration’ (Lord Hope).

¹⁴ Originally, statements of Rules did not set out specific standards (see, eg, in *Singh (Bakhtaur) v Immigration Appeal Tribunal* [1986] 2 All ER 721 where the Rules were found to be ‘discursive in style and, on their face, frequently offer no more than broad guidance as to how discretion is to be exercised.’ However, this cannot be said of modern versions of the Rules which are now a

State maintains a discretion outside of the Immigration Rules as a matter of the royal prerogative over migration control to grant leave where an individual does not satisfy the requirements of the Rules.¹⁵ She makes policy on the exercise of this discretion as well as the administration of the Immigration Rules.¹⁶ In applying the various standards of the Rules, and primary and secondary legislation, decision-makers exercise their judgment discretion (as defined in Chapter 2) to determine whether or not defined criteria are met.

By contrast with the regime applicable to non-EU migrants, EU citizens (and additionally, the citizens of countries included within the European Economic Area (EEA)¹⁷) have a right of freedom of movement within the EU, subject to certain limitations,¹⁸ and so do not require leave to enter or remain.¹⁹ They are not subject to the Immigration Rules but are regulated by a separate regime, deriving from primary and secondary EU law.²⁰ The non-EU family members of EU citizens also have rights under

complex, lengthy and elaborate code. Indeed, the complexity of the Rules has been frequently criticised: see, eg, *Singh v Secretary of State for the Home Department* [2015] EWCA Civ 630 [59]; *Pokhriyal v Secretary of State for the Home Department* [2013] EWCA Civ 1568, [2014] Imm AR 711 [4]; and Beatson LJ in *R (Global Vision College Ltd) v Secretary of State for the Home Department* [2014] EWCA Civ 659, [2014] Imm AR 1109 [11].

¹⁵ Immigration Act 1971, s 33(5). This exercise of discretion is reviewable both under judicial review and, traditionally, in the tribunal: see Chapter 4.

¹⁶ See recent treatment of the relationship between policy and the Immigration Rules in *R (Alvi) v Secretary of State for the Home Department* [2012] UKSC 33; [2012] 1 WLR 2208.

¹⁷ The European Economic Area refers to a single market that provides for the free movement of persons, goods, services and capital through the Member States of the European Union and additionally, three of the four member states of the European Free Trade Association (EFTA) – Iceland, Liechtenstein and Norway (but not Switzerland).

¹⁸ Those set out in Directive 2004/38/EC OJ L 158/77 transposed into domestic law by the Immigration (European Economic Area) Regulations 2006, SI 1003/2006.

¹⁹ They must, however, satisfy substantive criteria laid down in the Treaties and secondary legislation.

²⁰ The central provisions regulating the free movement of EU citizens are found in the Treaty of the Functioning of the European Union (Articles 45 – free movement of workers, 49 – right of establishment, 56 – right to provide and receive services, 21 – free movement of EU citizens) and in Directive 2004/38.

EU law and are subject to the EU regime. The Secretary of State and entry clearance officers (ECOs)²¹ may take administrative decisions relating to the migration status of both EU and non-EU migrants, either following an application or, in the case of the Secretary of State (but not ECOs), on her own initiative in respect of decisions to expel a migrant from the territory of the UK.

1.1.2. Access to justice: judicial review of legality and appeal on the merits

The rule of law has long been a constituent part of the UK's unwritten constitution²² and, as noted in Chapter 2, it is accepted that the rule of law includes right of access to justice.²³ Similarly a right to be heard (not necessarily before a judicial body) has been recognised as part of the right to procedural justice, termed 'natural justice' or 'fair treatment',²⁴ in the UK context.²⁵ As will be examined in more detail in Chapter 5 and those chapters following, the right of access to justice from migration status decisions in the UK legal order is institutionalised by the right to seek permission to apply for

²¹ Traditionally, Entry Clearance Officers formed part of the Foreign and Commonwealth Office. They are now under the control of the Home Office but the distinction in decision-making is retained. See Gina Clayton, *Textbook on Immigration and Asylum Law* (Fifth edn, OUP 2012), p 43. In practice, decisions on the majority of individual cases are delegated to case workers under the *Carltona* principle: *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560 (CA).

²² The Bill of Rights 1689 subjected the monarch's powers to the rule of law. See also AV Dicey, *Introduction to the Study of the Law of the Constitution* (1885). See further, discussion in A Bradley, K Ewing and C Knight, *Constitutional and Administrative Law* (16th edn, Pearson 2015).

²³ See *R (Evans) v Attorney General* (Chapter 2 n 13). This is consistent with the British tradition that under government according to law, remedies are to be sought from the courts.

²⁴ For a detailed examination of common law principles of natural justice and fairness, see, eg, Wade and Forsyth, *Administrative Law* (Chapter 2, n 45), and Michael Fordham, *Judicial Review Handbook* (Sixth edn, Hart 2013), Richard Clayton and Hugh Tomlinson, *The Law of Human Rights*, vol 1 (Second edn, Oxford University Press 2009), and Harry Woolf and others, *DeSmith's Judicial Review* (Sweet & Maxwell 2013).

²⁵ See, eg, *Cooper v Board of Works for the Wandsworth District* (1863) 14 CB (NS) 180 and *Ridge v Baldwin*.

judicial review.²⁶ In general terms, the remedy of judicial review lies (with permission from the court) from any administrative decision, including all migration status decisions.²⁷ Access to the remedy is determined primarily by standards developed at common law, codified and amended by procedural rules²⁸ and lately, by primary legislation.²⁹ However, there are a number of restrictions on the remedy, which ultimately lies within the discretion of the court. These limitations include standing requirements, a permission threshold based on the merits of the claim, and an obligation of timeliness.³⁰ Traditionally, judicial review was undertaken by the Administrative Court (a specialised administrative court within the Queens Bench Division of the High Court) but now in the majority of migration status judicial reviews, the Upper Tribunal (with appeal to the ordinary appellate courts) will have jurisdiction.³¹ In terms of the standard of review, judicial review constitutes review of the legality of administrative decisions (not merits review).³²

Judicial oversight of the merits³³ of migration status decisions takes place by way of appeal from an initial migration status decision to the Immigration and Asylum

²⁶ ‘Judicial review’ is a term of art in the UK context: Chapter 1 at 3.1.

²⁷ See further Chapter 5.

²⁸ Civil Procedure Rules, Part 54 and the Tribunal Procedure (Upper Tribunal) Rules 2008 SI/2008/2698).

²⁹ Primarily, the Tribunals, Courts and Enforcement Act 2007 and the Criminal Justice and Courts Act 2015.

³⁰ See further, eg, Fordham, *Judicial Review Handbook* (n 24).

³¹ See further Chapter 4 and Tribunals, Courts and Enforcement Act ss 15-21. Appeals from the Administrative Court and the Upper Tribunal lie, with permission, to the Court of Appeal and the Supreme Court.

³² See further discussion in Chapter 7.

³³ The FTT also has jurisdiction over questions of law.

Chamber of the First Tier Tribunal (FTT)³⁴ (and, in respect of appeals involving national security, the Special Immigration Appeals Commission (SIAC))³⁵ with avenues of appeal (with permission from the FTT or UT) on a material point of law³⁶ to the Immigration and Asylum Chamber of the Upper Tribunal (UT) and ordinary appellate courts.³⁷ There

³⁴ Before 2 July 2015, there was a further distinction within the FTT between the ‘normal’ regime and an accelerated regime (the Detained Fast Track) which significantly shortened time limits, contains stricter tests for adjournment and detains those subject to it. The DFT regime was suspended by the Home Office on 2 July 2015 following the Court of Appeal’s upholding of Nicol J’s findings that the procedural rules of the Detained Fast Track regime operated with ‘structural unfairness’ due to the ‘serious procedural disadvantage which comes from the abbreviated timetable and curtailed case management powers together with the imposition of this disadvantage on the appellant by the respondent to the appeal’ [61]: *R (Detention Action) v First-tier Tribunal (IAC), Upper Tribunal (IAC), Lord Chancellor and SSHD* [2015] EWHC 11689 (Admin); upheld in [2015] EWCA Civ 840.

³⁵ A migrant may appeal to the SIAC if he or she would be able to appeal against the decision under s 82(1) NIAA 2002 but for a certificate under s 97 NIAA 2002 (Special Immigration Appeals Commission Act 1997, s 2(1)(a)). Section 97 NIAA 2002 provides for the Secretary of State to certify a decision on the basis that it is or was taken wholly or partly: on the ground that the person’s exclusion or removal from the United Kingdom is in the interests of national security or the interests of the relationship between the United Kingdom and another country; or in reliance on information which in his opinion should not be made public in either of those interests or otherwise in the public interest. See also equivalent provisions for deprivation of citizenship: British Nationality Act 1981, s 40A and Special Immigration Appeals Commission Act 1997, s 2B. The central difference between the SIAC regime and the normal regime is that it allows for a closed material procedure (CMP) whereby security-sensitive evidence can be relied on by the Government but not disclosed to the appellant or his or her lawyers or the public (r 4 SIAC Procedural Rules (Special Immigration Appeals Commission (Procedure) Rules SI 2003/1034)). A Special Advocate, a security cleared lawyer who is able to see the closed evidence, will represent the interests of the appellant in the ‘closed’ hearings, however, having seen the closed material is unable in practice to take instructions from the appellant. Review on the merits is available in theory in the SIAC, however, this is problematized in practice by the nature of the CMP process, and also by the nature of the decisions made (national security) which results in a light-touch review of executive decisions: see *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, [2003] 1 AC 153, Lord Hoffmann at [54] and *per* Lord Slynn at [26]: ‘...even though [the SIAC] has powers to review both of fact and of the exercise of discretion, [the SIAC] must give due weight to the assessment and conclusions of the Secretary of State. He is undoubtedly in the best position to judge what national security requires even if his decision is open to review.’ See also discussion of national security in Chapter 3.

³⁶ See The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (SI 2604/2014), r 33.

³⁷ Court of Appeal and Supreme Court of the United Kingdom. See further Tribunals, Courts and Enforcement Act s 13. In addition to onward appeal domestically, in certain circumstances, migration appeals and judicial reviews may come before supranational courts, namely, the Court of Justice of the European Union (in particular under the preliminary reference procedure, for which see further Richard Gordon and Rowena Moffatt, *EU Law in Judicial Review* (Oxford University Press 2014)) and the European Court of Human Rights (either as a court of last instance, having exhausted domestic remedies or as a matter of interim relief against expulsion –

has never been a general right of appeal from all migration status decisions.³⁸ Rather, the grant of a right of appeal is dependent on certain triggers, defined by statute. The precise constellation of appealable decisions has been the subject of frequent legislative change, but the general framework based on an appeal right being triggered by the making of a migration status decision defined by statute as appealable, remained constant between 1970 - 2014.³⁹ Where a right of appeal exists, the FTT has jurisdiction to review both facts and law, subject to limitations on the admissibility of evidence post-dating the application or decision in certain defined circumstances⁴⁰ and subject also to the subject matter being deemed to be justiciable.⁴¹ Prior to the amendments brought about by the Immigration Act 2014 (IA 2014), a migrant could appeal to the FTT where an ‘immigration decision’, as defined by the central appeals statute, the Nationality Immigration and Asylum Act 2002 (NIAA 2002), was made by the Secretary of State.⁴² The IA 2014 has swept away the previous regime such that following its entry into force,

see further, Fripp, Moffatt and Wilford, *The Law and Practice of Expulsion and Exclusion from the United Kingdom: Deportation, Removal, Exclusion and Deprivation of Citizenship* (n 1).

³⁸ See further Chapter 5.

³⁹ A notable exception is the short-lived, free-standing human rights appeal right conferred by the Immigration and Asylum Act 1999. Under the 1999 Act, the allegation that a decision-maker breached an applicant’s fundamental rights attracted a right of appeal, not the decision. The Immigration Act 2014, described in detail in chapter 5, also departs from this scheme.

⁴⁰ See, eg, Nationality Immigration and Asylum Act s 85 and s 85A, excluding post-decision evidence in some circumstances. This does not apply under the Immigration Act 2014 appeals regime. See also discussion of *ex nunc* and *ex tunc* review below.

⁴¹ This refers to certain areas of ‘strong’ executive discretion that are considered in the UK context to be immune from review. See *Secretary of State for the Home Department v Rehman* (n 35). See also *Council of Civil Service Unions v Minister for the Civil Service* (Chapter 1, n 11) in which it was found that whilst it was the subject matter of the norm – and not its source – that determined the application of judicial review, there were some areas of the state’s competence, such as national security, which could not be scrutinised for compliance with due process.

⁴² See s 82 Nationality, Immigration and Asylum Act 2002 (NIAA 2002). There are certain other decisions in respect of which an applicant may appeal to the FTT which are listed exhaustively in the NIAA 2002. See Ian Macdonald and Ronan Toal, *Macdonald's Immigration Law & Practice* (Lexis Nexis 2010).

appeals only lie from an asylum or humanitarian protection claim, a human rights claim or an EEA claim, as defined by amendments to NIAA and the other Immigration Acts undertaken by IA 2014.⁴³ When the appeals regime was first established in 1970 it was envisaged that generally, appeals would automatically suspend expulsion until the migrant had exhausted all statutory rights of redress. However, certain appeals were anticipated as taking place off-shore; primarily appeals from decisions to refuse entry clearance where the migrant was already outside the territory of the UK. Amendments to the appeals scheme have also increased the incidence of appeals that are non-suspensive of removal.⁴⁴ Where an appeal does not suspend expulsion, the only available remedy against removal prior to the hearing of the appeal is to seek an injunction by way of judicial review.⁴⁵ The impact of non-suspensivity on the practical effectiveness of a right of appeal is considered later in this chapter.⁴⁶

Thus, there is a clear distinction in the UK between an appeal (to the FTT, as of right, on the facts and the law, as set out in statute) and judicial review (to the Administrative Court/UT, with permission of the court, on the law only, as a matter of the court's inherent jurisdiction and latterly, as set out in statute). Equally clearly, the principle that there should be some form of access to justice from migration status

⁴³ See further Chapter 5.

⁴⁴ See, in particular, ss 94-97A NIAA 2002. The Immigration Bill 2015 envisages extending this to all appeals insofar as removal would not violate the HRA 1998.

⁴⁵ If an injunction is obtained, removal must be suspended immediately. Judicial review is not automatically suspensive of removal but it does, however, generally suspend removal. See, eg, Home Office, *Enforcement Instructions and Guidance, Chapter 60: Judicial Review and Injunctions* p 16.

⁴⁶ As is clear, however, non-suspensivity is bracketed out in this work as a subject requiring further research.

decisions is now generally accepted in the United Kingdom legal system.⁴⁷ Despite the immaturity of this consensus (it has emerged only over the course of the past thirty to forty years),⁴⁸ it is now well-established that judicial review lies from every administrative decision on migration status, subject to jurisdictional requirements. By contrast, there is less agreement regarding appeals. As will be seen in the history of appeals documented in Chapter 5, before 1970 there were no judicial appeals afforded to migrants dissatisfied with an administrative decision taken against them and from the inauguration of an appeals system in 1970, there have been various limitations placed on the right of appeal from migration status decisions and the extent and nature of the appeals provided has been often questioned.⁴⁹ However, despite equivocation over the extent of appeal rights to be afforded, since their establishment in 1970, no Government has proposed completely discarding migration appeals. Indeed, in 1967, the Wilson

⁴⁷ Indeed, there is recognition in the case law of a need to provide enhanced procedural protection in relation to certain migration cases. See, for example, the development of the doctrine of anxious scrutiny – an enhanced standard of review – in judicial review. This was developed in the migration (asylum) context and applied for the most part to migration cases. Paul Craig notes that some 70% of cases employing anxious scrutiny are migration cases: Craig, ‘Judicial Review and Anxious Scrutiny: Foundations, Evolution and Application’, pp 68 and 73. As noted by the Court of Appeal in *R (on the application of YH (Iraq)) v Secretary of State for the Home Department* [2010] EWCA Civ 116, [2010] 4 All ER 448 at [24], the appreciation that enhanced procedural protection is necessary in relation to migration cases may be linked to ‘the very special human context in which [migration] cases are brought.’ Or, in the words of Robert Thomas, ‘immigration decisions concern ... intimate aspects of people’s lives,’ Robert Thomas, ‘Mapping judicial review litigation: an empirical analysis’ [2015] Public Law 652, 652.

⁴⁸ See further the discussion of the Crown’s prerogative and judicial review in Chapter 5.

⁴⁹ The obvious site of disagreement is that between migrants and those working for them – who desire more extensive rights of appeal – and the state – which seeks to curtail appeal rights in order to uphold its administrative decisions. However, policy papers and appeals reforms since 1970s demonstrate that there has been no constant view on the extent and nature of appeals within government. The variance of the stands taken by successive governments may be explained by a number of factors; it may be party political, responsive to changing patterns of migration, and/or sensitive to economic concerns. It could, however, also reflect the inherent difficulty in establishing an appeals system in the absence of a cogent theory of appeals.

Committee, created to gauge the need for a system of immigration appeals,⁵⁰ noted that the opinion of its witnesses (which included both government officials and those working for migrants) was ‘virtually unanimous’ in favour of establishing some kind of system of appeals.⁵¹ Moreover, all reforms since the institution of appeals from migration status decisions in 1970⁵² have assented to the notion that some appeals are necessary, although the composition of the cohort of appeals deemed necessary, and thus the reasons for requiring appeals, have not remained constant.⁵³

1.2. Appeals and judicial review compared

Thus, there are significant differences between migration appeals and judicial review that make appeals the more favourable remedy for migrants challenging adverse migration status decisions.⁵⁴ As Macdonald and Toal summarise:

⁵⁰ The Committee on Immigration Appeals was appointed by warrant of the Home Secretary (the Rt Hon Roy Jenkins MP) dated 23 February 1966 ‘to consider whether any, and if so what, rights of appeal or other remedies should be available to aliens and to Commonwealth citizens who are refused admissions to, or are required to leave, the country’. See further, Chapter 5.

⁵¹ Wilson Committee, *The Wilson Report* (Chapter 1, n 13), p 21.

⁵² The Immigration Appeals Act 1969 conferred rights of appeal on Commonwealth citizens subject to immigration control. The appeals provisions entered into force on 1 July 1970. Corresponding appeal rights were conferred on aliens by the Aliens (Appeal) Order 1970 (SI 1970/151) made under s 14 of the 1969 Act. These provisions were repealed and replaced by the appeals provisions of the Immigration Act 1971, which entered into force on 1 January 1973, consolidating the appeals regime with some modifications.

⁵³ See further Chapter 5.

⁵⁴ The benefits for applicants are summarized by Thomas, ‘Evaluating tribunal adjudication: administrative justice and asylum appeals’ (Chapter 2, n 109), 465-66: ‘For applicants the establishment of appeal rights had clear advantages as it entitled them to an independent de novo merits appeal which afforded them a greater degree of participation in the decision-making process. As in other tribunal systems, a right of appeal provides appellants with the opportunity of presenting a well-prepared claim and adducing additional evidence in support of a favourable decision. In light of the difficult and uncertain fact-finding exercise involved in asylum decision-making and the possibility that initial decision-making may be inadequate, appeal rights have been of considerable importance to appellants.’ Thomas also acknowledges the benefits of appeal rights to the Government in ‘legitimizing executive decision-making by having external legal control without incurring the expense and delay of judicial review proceedings’, 466.

it allows there to be a reconsideration by the Tribunal of the facts by calling witnesses to give live evidence and to produce fresh documentary evidence within certain limits set out in the immigration laws. A Tribunal appeal is, therefore, quite different and more far reaching than judicial review.⁵⁵

Traditionally, appeals and judicial review are contrasted in terms of the type of review they permit: unlike appeals, the full facts underlying a decision may not be challenged on judicial review.⁵⁶ A preliminary distinction between merits and legality review was made in Chapter 2 in a general theoretical context. There, merits review, in which the reviewer re-examines the facts underlying an administrative decision and the relevant question is the correctness of the decision, was contrasted with legality or procedural review, in which the reviewer examines the process under which the decision was taken and the relevant question is the propriety of the decision's process. Thus, the role of the Tribunal in hearing appeals was summarized by Woolf LJ in *R v IAT, ex p Zaman*⁵⁷ as follows:

... the right of appeal is equivalent to that which was to be enjoyed where there is the right to a rehearing; that is to say, the Tribunal must consider the matter de novo on the material before it and not restrict itself to the form of review which this court embarks upon when it is considering an application for judicial review. That the Tribunal should recognise that this is its function can be of great importance to the appellants before it...

By contrast, the traditional conception of judicial review is described by Lord Brightman in *The Chief Constable of North Wales Police v Evans*⁵⁸

Judicial review is concerned, not with the decision, but with the decision making procedure. Unless that restriction on the power of the

⁵⁵ Macdonald and Toal, *Macdonald's Immigration Law and Practice* (2015) (n 1), Preface, p ix.

⁵⁶ Although, as will be seen below, judicial review does entail a limited review of merits. See also discussion of rationality review, anxious scrutiny and proportionality in Chapter 6.

⁵⁷ *ex parte Zaman* [1982] Imm AR 61 (QBD), 64.

⁵⁸ *The Chief Constable of North Wales Police v Evans* (1982) 1 WLR 1155.

court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made⁵⁹

However, as also recognized in Chapter 2 and developed in Chapter 7, legality review may also be substantive in nature in certain circumstances, such as where it is alleged that the decision on the facts is so wrong as to amount to a mistake of law or that it violates some higher norm. In UK judicial review, legality and merits review overlap in this way as the judge is required to test the rationality of a decision⁶⁰ and latterly, in some circumstances, its proportionality.⁶¹ It is argued in Chapter 7 that judicial review does not entail adequate merits review for the purposes of satisfying the moral right to fair treatment.

Thus, judicial review and statutory appeals interact and overlap to some degree. In general terms, judicial review is a residual remedy and so lies only where a right of appeal is not provided.⁶² Where all appeal rights have been exhausted, an application may be made for judicial review, although it is unlikely to pass the merits threshold if the case has already been determined on appeal.⁶³ An out-of-country right of appeal generally

⁵⁹ *ibid*, 1173-74. See also per Lord Hailsham at 1160: 'But it is important to remember in every case that the purpose of the remedies (of judicial review) is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is not part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question.'

⁶⁰ See *per* Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* (Chapter 1, n 11).

⁶¹ The more searching form of substantive review, proportionality, has applied in judicial review in EU and ECHR cases since, respectively, the entry into force of the European Communities Act 1972 and the Human Rights Act 1998. See further discussion in Chapters 5 and 7.

⁶² See, recently, *R (on the application of Khan) v Secretary of State for the Home Department (right of appeal – alternative remedy)* IJR [2015] UKUT 00353 (IAC).

⁶³ *ibid*.

precludes an in-country judicial review, save in special or exceptional circumstances.⁶⁴ There is also satellite litigation, that is, litigation of one type to facilitate litigation of another type (in particular, a challenge by way of judicial review with the object of generating an (in-country) right of appeal). Prior to IA 2014, a large portion of satellite judicial reviews were by overstayers who had no right of appeal from a refusal of leave to remain and who had not had a removal decision (that would have generated an appeal right) made in relation to them.⁶⁵ They would apply for judicial review in order to challenge the refusal of leave to remain and, if the case were to settle, a right of appeal. IA 2014 regime has prevented this specific form of satellite litigation but arguably has otherwise generally increased it, in particular in relation to deportation cases by rendering appeals non-suspensive save where there is a risk of serious irreversible harm.⁶⁶ Satellite litigation also exists in relation to fresh claims⁶⁷ and other forms of non-suspensive certification.⁶⁸

The interaction of the appeals and judicial review system is also existential in nature since pressure on the judicial review system may, in practice, explain the provision

⁶⁴ See *R (Bilal Mahmood) v SSHD* [2014] UKUT 00439 (IAC) [10]-[13]); *R (Khan) v SSHD* [2014] EWHC 2494 (Admin), [2015] 1 All ER 1057 (Green J at [70]). It has not always been thought that an out-of-country appeal precluded an in-country judicial review, however. For example in *Bugdaycay v SSHD* [1987] AC 514, the House of Lords was clear that judicial review would lie such that an out-of-country appeal is not considered to be an 'alternative remedy'.

⁶⁵ See further Chapter 5.

⁶⁶ NIAA 2002, s 94B as amended by IA 2014.

⁶⁷ Paragraph 353 of the Immigration Rules provides: 'When a human rights or protection claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content: (i) had not already been considered; and (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection.'

⁶⁸ NIAA 2002, ss 92-97A.

of appeal rights since they exist in a relationship of inverse proportion: as appeal rights are limited, the need for judicial review increases.⁶⁹ Thus, for example, the pressure on the judicial review system in the late 1980s and early 1990s due to the absence of a right of appeal from adverse asylum decisions may in part explain the move to grant rejected asylum seekers a right of appeal.⁷⁰

1.3. Non-judicial mechanisms of review

In addition, or in some cases as an alternative, to judicial remedies, there are a number of non-judicial mechanisms whereby migration status decisions may be challenged. Internal review is the foremost amongst case-specific, non-judicial forms of review. There has been a long-standing system of internal review in entry clearance cases. Where requested by the refused applicant, the Entry Clearance Officer's decision would be reviewed by a senior colleague, an Entry Clearance Manager, who – if he or she disagreed with the original decision – could overturn it. The system has, however, been criticised as ineffective.⁷¹ The Administrative Review system established by the IA 2014

⁶⁹ See, eg, Home Affairs Committee, *The Fifth Report from the Home Affairs Committee Session 2005-06* (HC 775, 2006) p 43: '[t]here is a danger that removing appeal rights will result in dissatisfied applicants seeking judicial review instead. To reduce the likelihood of this, the Government must be in a position to show that initial decisions are high quality and that there is an effective avenue of internal review, before further appeal rights are removed'; Home Office, *Review of Appeals under the Immigration Act 1971: a discussion document* (1981): in discussing the proposal to extend appeal right to removal of illegal entrants, it was stated that 'it might ... be hoped that the existence of a right of appeal before removal of illegal entrants would reduce the number of applications before the High court for review of decisions in this area' (para 19).

⁷⁰ Rowena Moffatt and Carita Thomas, 'And then they came for judicial review: proposals for further reform' (2014) 28 *Journal of Immigration, Asylum and Nationality Law* 237. Although, the existence of a right of appeal may not reduce volumes of judicial reviews given that judicial review may be sought after and additional to an immigration appeal right has been exercised. See, eg, Home Office and Lord Chancellor's Department, *Review of Appeals* (Joint Consultation Document, 13 July 1998) p 9.

⁷¹ See, eg, National Audit Office, *Visa Entry to the United Kingdom: The Entry Clearance Operation* (HC 367, 2004) p 27; John Vine Independent Chief Inspector of the UK Border Agency, *Entry Clearance Decision-Making: A Global Review* (2010-2011).

is mirrored on the entry clearance internal review system. Its efficacy as an alternative to appeals is examined in Chapter 7. Additionally, migrants may seek the assistance from their MPs to ask questions of the Home Office in relation to specific cases.⁷² Other than case-specific mechanisms, monitoring of the Home Office also takes place through the investigations and reports of the Chief Inspector of Borders and Immigration.⁷³ However, as Clayton notes ‘monitoring is not a substitute for appeal rights. Only a small sample of decisions is examined and there is no power to overturn poor decisions.’⁷⁴

2. What *should* be the content of the UK rights of access to justice and merits review from migration status decision-making?

2.1. The focus on merits review

The chapter has thus far been descriptive of the UK’s preferred model of institutionalising recourse from migration status decision-making. The question asked by the chapters that follow is whether this incumbent system of appeals and review satisfies the moral right to fair treatment identified in Chapters 2 and 3. As noted above, the

⁷² See discussion of the practice in Satvinder Juss, *Immigration, Nationality and Citizenship* (Mansell 1993).

⁷³ The office of the Chief Inspector of Borders and Immigration was established by ss 48-56 of the UK Borders Act 2007. The Chief Inspector is appointed by the Home Secretary and reports directly to her. John Vine took up the office in July 2008. He resigned with effect from 31 December 2014, six months before the end of his term. There has been media speculation that the decision to resign is related to his belief that his work had been compromised by the Home Office’s decision to take control of the publication of reports and the subsequent delay in publication of a number of reports: see further, BBC News, ‘Chief inspector of borders and immigration resigns’ (1 August 2014) <<http://www.bbc.co.uk/news/uk-28603557>> accessed 1 January 2016; Home Affairs Select Committee, *The work of the Immigration Directorates January - June 2014* (2014) paras 25-30.

⁷⁴ Clayton, *Textbook on Immigration and Asylum Law*, 5th edn (n 1), p 347. The conclusions of the Select Committee on Home Affairs, *Fifth Report of Sessions 2007-08* (HC 425, 2008) recommended that the Chief Inspector should be given the power to investigate individual cases and provide appropriate remedies.

availability of judicial review as a remedy from all administrative decisions means that the first moral claim made in Chapter 2 is uncontroversial in the UK context.⁷⁵ This cannot be said in relation to the second moral claim of Chapter 2, the right to merits review, since judicial review involves only residual and limited review of the merits,⁷⁶ statutory appeals have never provided for merits review of every migration status decision and IA 2014 has dramatically reduced the availability of rights of appeal. For this reason, the focus of the remaining chapters will be on whether and how the moral right to merits review is met in the UK.

2.2. The content of the right to merits review

Whilst it is accepted that a range of different possible institutionalisations of the abstract criteria set up in Chapter 2 exist,⁷⁷ it is argued that in ontological terms three core criteria must be present in the right to (judicial) merits review as has been described. The first flows from the prescription encapsulated in the first moral claim that the scrutiny must be judicial in nature. The second and third attributes are necessary constituents of the right to merits review in order that it be effective in practice. If the reviewer is not given the powers of the primary decision maker, any such merits review becomes, in practice, a more rigorous form of substantive legality review. The three criteria are as follows:

⁷⁵ There are, of course, relevant questions arising relating to the availability of the remedy in practice in the light of the jurisdictional thresholds and, in particular, in relation to constraints on funding the litigation. See, eg, Moffatt and Thomas, 'And then they came for judicial review: proposals for further reform' (n 70). This work's focus on merits review in the UK context is based, however, on the pressing concerns arising from the drastic reduction in merits review effected by the Immigration Act 2014.

⁷⁶ See further Chapter 7.

⁷⁷ See further Asimow, 'Five Models of Administrative Adjudication' (Chapter 1, n 8). Further, it is not necessary, for example, for merits review to be only available on appeal. Arguably, judicial review is also capable of developing to include the remedy.

i) Independence and impartiality: the reviewing body must be independent of the executive (the latter must not control the review and must not be held politically accountable for the judicial decision)⁷⁸ and the reviewer must be objective in the sense that he or she has no interest in any outcome save the proper application of the law to facts.⁷⁹

ii) *De novo* assessment: the reviewer must undertake a full review of the facts so as to decide the case anew.⁸⁰ This includes the ability of the reviewer to establish relevant facts for him or herself (and not rely on the factual findings of the primary decision maker) and to test evidence (and not necessarily accept the view of the primary decision maker - this includes the ability to examine the credibility of statements made by the appellant and other witnesses). It also means that the grounds of appeal from the administrative decision must be full and permit the reviewer to examine all available bases for the primary decision.

iii) Substantive remedy: in terms of remedy, the reviewer should be able to substitute his or her judgment for that of the administrator. This latter point is important as without it, the reviewer has little control over the ultimate decision on the merits of a case. Thus, in UK judicial review, where the court has no ability to substitute its view on the merits for that of the administrator, but rather may only quash the decision and demand that another

⁷⁸ See also Dana Baldinger, *Rigorous Scrutiny versus Marginal Review* (Wolf Legal Publishers 2013), pp 218-19. Baldinger defines 'full jurisdiction' as meaning 'that a national court does not rely automatically on, and draw inferences from, an advice or opinion given by an organ of the executive' (p 219). She also includes within its definition, independent determination by the court of whether or not past facts took place and the credibility of the applicant (pp 218-219).

⁷⁹ See further similar reasoning by the CJEU in *Case C-506/04 Wilson v Ordre des avocats du barreau de Luxembourg* [2006] ECR I-8613.

⁸⁰ This is similar to, but not co-extensive with the date of assessment of evidence (whether review is *ex nunc* or *ex tunc*). A review may be *de novo* but if based on the original evidence, not *ex nunc*. See further discussion of the date of evidence at 2.3.1 below.

(lawful) decision is made, the administrator may legitimately take a further decision which on the merits is at odds with the view of the court.⁸¹

In the chapters that follow, the question of whether these three components (independence, *de novo* assessment and substantive remedy) are present in the UK system is examined. Chapter 5 first presents a description of the migration appeals and review system from its inception to its present incarnation. Chapter 6 then questions whether the current provision of appeals and review in the UK satisfies the definition in Chapters 2 and 4 in the light of, in particular, the attrition of rights of appeal under the Immigration Act 2014. Chapter 7 then examines three specific instances of migration control in the UK. The case studies are chosen to test the case made in Chapters 2 and 3. Finally, Chapter 8 examines whether fundamental rights norms applicable in the UK compel a right to merits review from all or any migration status decisions. The thesis concludes with possible explanations of why there is not a right to merits review from all migration status decisions provided in the UK legal order and makes tentative recommendations.

Before moving to the analysis in the remaining chapters, however, it is important to note as an aside that providing the three components of merits review as described earlier does not in and of itself exhaust the moral demands of fair treatment in relation to access to justice. This is because there are other variables that may render an appeal on the merits less effective or possibly entirely ineffective. Limitations on space do not

⁸¹ See further, Thomas, 'Mapping judicial review litigation: an empirical analysis' (Ch 2, n 115) 667: '[i]n some instances, the Home Office will make a further refusal decision that, taking advantage of the reconsideration, deals more fully and/or accurately with the facts and matters advanced by the claimant. One practitioner noted that it is quite common for the Home Office to concede a judicial review, then take months to make a new refusal decision (with the same or similar wording as the original refusal decision), which would then prompt a second judicial review.'

permit a thorough examination of these factors for present purposes, however, the following section briefly alludes to some of the most important additional factors influencing the effectiveness of merits review that should be taken into account in the design of a system of access to justice from migration status decisions.

2.3. Other factors relevant to the effectiveness of merits review

Thus, whilst the focus of this thesis is on the proper standard of review and the intrinsic value of a right of access to court, as acknowledged in Chapter 1, there are other parameters determining the form of access to justice that may undermine the scope and effectiveness of the remedy.⁸² Since the date at which the evidence is assessed and whether or not the appellant is present at the hearing are particularly important to the effectiveness of an appeal, brief, separate consideration is afforded them below.

2.3.1. *Date of assessment of evidence*

The date at which the evidence is assessed is often crucial to the outcome of a review. Generally, there is a distinction between *ex tunc* review, where the evidence is limited to that which was before the original decision maker, and *ex nunc* review where the reviewer may take into account evidence that did not inform the original decision, whether it post-dates the decision or was unavailable at the time. In the UK system, judicial review is *ex tunc* and with certain exceptions, appeals to the tribunal are *ex nunc*.⁸³ The three criteria of merits review set out above do not include a right to an *ex nunc* review of the evidence since review that is not *ex nunc* is still review of the

⁸² See Chapter 1, 3.2.

⁸³ See earlier. The exceptions include appeal from the decisions of entry clearance officers and Points Based System appeals (sections 85 and 85A NIAA 2002).

substance of a decision as it puts the reviewer in the same position as the primary decision maker. However, *ex tunc* review is procedurally less protective as the judicial remedy may be useless if success depends on evidence that was not available to the primary decision-maker. As will be seen in Chapter 8, *ex nunc* review is required by EU law in cases involving the fundamental freedoms and asylum and, in certain situations under Article 13 plus 3 ECHR.⁸⁴

2.3.2. *Non-suspensive appeals*

Arguably even more significant than the date of assessment of the evidence, is the effect of removing an individual prior to the hearing of an appeal or review. The claim that non-suspensive review is ineffective has been made forcefully by Sedley LJ in *BA (Nigeria) v SSHD*.⁸⁵ He said (at [21]):

The fact is that, especially but not only where credibility is in issue, the pursuit of an appeal from outside the United Kingdom has a degree of unreality about it. Such appeals have been known to succeed, but in the rarest of cases. The reason why the Home Office is insistent on removal pending appeal wherever the law permits it is that in the great majority of cases it is the end of the appeal.⁸⁶

This impacts on the effectiveness of merits review (far more than legality review) since, as noted by Sedley LJ, courts face difficulties, in particular, in determining disputed questions of fact in the appellant's absence. Insofar as the disputed factual questions depend on the testimony of the appellant, the views of the sponsor (who may be present

⁸⁴ See Chapter 8 at 3.3 and 4.

⁸⁵ [2009] EWCA Civ 119, [2009] QB 686.

⁸⁶ See also the comments of Sullivan LJ in *R (on the application of E (Russia)) v Secretary of State for the Home Department* [2012] EWCA Civ 357, [2012] 1 WLR 3198: '...an appellant who has to pursue an appeal while he is out of the country faces considerable disadvantages...'.

at the hearing) will only ever be of limited relevance.⁸⁷ The absence of the appellant is particularly serious where, as is frequently the case, appeals turn on credibility.⁸⁸ Although witness statements can be obtained from individuals who are not territorially present, this evidence will inherently have less impact than oral evidence which may be tested on cross examination.⁸⁹ Further, where the issues contested on appeal relate to a claim of risk of ill treatment in the country of origin, non-suspensive appeals (as opposed to those denied entry clearance to contest their appeal) threaten the very rights that the appeal aims to protect.⁹⁰ If a mistake has been made in a migration status decision ‘an appeal after removal is useless’⁹¹ where, for example, the migrant claimed a right to remain on the basis of the Refugee Convention or Article 3 ECHR. The famous dictum of Megarry J in *John v Rees*⁹² of ‘fixed and unalterable determinations that, by discussion,

⁸⁷ Although clearly in cases in which the disputed facts may be proven by the testimony of the sponsor and/or evidence readily available in the UK, the absence of the appellant is less detrimental. This may account at least in part for the success rate of 25% of out of country appeals are successful (see Geoffrey Care, *Migrants and the Courts* (Ashgate 2013), p 30) and may suggest that a right of appeal (even if out-of-country) has some inherent value. See also R Thomas ‘Immigration appeals for family visitors refused entry clearance’ [2004] PL 612.

⁸⁸ See comments in *ex p Auranazeb Khan* [1989] Imm AR 524.

⁸⁹ In a line of cases it was held there must be compelling reasons for immigration judges to substitute their view of the credibility of a witness whom they have not heard or seen for that of the entry clearance officer who has had the opportunity to test a witness in person: *Alam Bi* [1979-80] Imm AR 146 (CA); *ex p Kwok on Tong* [1981] Imm AR 214 (SC); *Mahendra Singh* [1984] Imm AR 1 (QBD).

⁹⁰ Arguably there should be a right to suspensive appeal insofar as it is claimed that the removal will violate substantive rights. See further, discussion in Thomas Spijkerboer, ‘Subsidiarity and ‘Arguability’: the European Court of Human Rights’ Case Law on Judicial Review in Asylum Cases’ (2009) 21 International Journal of Refugee Law 48.

⁹¹ Macdonald and Blake, *Immigration Law and Practice in the United Kingdom 3rd edn*, p 440. See further per Lord Denning MR in *R v Governor of Pentonville Prison, ex p Azam* [1973] 2 All ER 741, 750: ‘He can only appeal after he has been removed, that is, presumably when he has got back to his homeland. Such an appeal would not seem to be a very beneficial remedy if a mistake has been made.’

⁹² *John v Rees* [1970] Ch 345 (HC).

suffered a change' recalls the importance of the hearing process itself in the determination of outcomes.⁹³

Thus, non-suspensive appeals pose significant impediments to the effective judicial determination of migration status decisions that are challenged and an appeal on the merits may not, therefore, discharge the obligations of fair treatment discussed in Chapters 2 and 3 if it is non-suspensive of removal. This is relevant in the UK context as the current legislative intention is to increase vastly the use of non-suspensive appeals: the IA 2014 has increased the number of non-suspensive appeals by applying them generally to deportation cases and the Immigration Bill 2015 commits the Government to making all immigration rights of appeal non-suspensive apart from asylum cases.⁹⁴ Further, there is no right to attend the UK to contest an adverse entry clearance decision.⁹⁵ The case law of the ECtHR shows that Article 13 ECHR requires a suspensive remedy where it has been claimed that removal will violate Article 3 ECHR.⁹⁶ However, the ECtHR has distinguished between Articles 2/3 and 8, holding that in the latter case, generally a suspensive remedy was only required insofar as removal would cause 'serious

⁹³ *ibid*, 402.

⁹⁴ David Cameron, Speech 21 May 2015: 'We've already introduced a "deport first; appeal later" rule for foreign criminals claiming a so-called right to family life. It means if you've committed a crime and you're not meant to be here, you have to go home before you can appeal. Next we will extend that to all immigration appeals, except asylum cases. That's a big step: preventing people from staying on and on with appeal after appeal.' <<https://www.gov.uk/government/speeches/pm-speech-on-immigration>> accessed on 1 January 2016.

⁹⁵ The Immigration Rules do not expressly exclude this, however, and migrants may in theory be admitted as visitors for this purpose. However, in these circumstances entry clearance officers are unlikely to accept that someone who has been denied leave to remain will leave at end of his or her appeal. Macdonald, writing in 1995 argued against this: 'it is wrong for entry clearance officers not to accept that someone who has applied to remain permanently will leave at the conclusion of the appeal, if the facts justify such a conclusion.' Ian Macdonald and Nicholas Blake, *Immigration Law and Practice in the United Kingdom* (4th edn, Butterworths 1995), p 568-9.

⁹⁶ *IM v France* App no 9152/09 (ECHR, 2 February 2012); *De Souza Ribeiro* App no 22689/07 (ECHR, 13 December 2012).

irreversible harm’.⁹⁷ This standard has been applied by the IA 2014.⁹⁸ Although the Court of Appeal has recalled that the ultimate test is whether removal would violate fundamental rights (rather than a test of ‘serious irreversible harm *per se*), it has found non-suspensive appeals to satisfy the requirements of the right to an effective remedy.⁹⁹ Whilst not the focus of this research, therefore, the question of compatibility of suspensive appeals with procedural justice requires further research.

⁹⁷ *De Souza Ribeiro*, para 83.

⁹⁸ See the new s 94B NIAA 2002.

⁹⁹ *R (on the application of Byndloss) v Secretary of State for the Home Department* [2015] EWCA Civ 1020.

ACCESS TO JUSTICE FROM MIGRATION STATUS DECISIONS IN THE UNITED KINGDOM: 1905 - 2015

As seen from the brief overview in the previous chapter, the United Kingdom's current system of legal recourse from migration status decisions combines an apparatus of statutory appeals providing for *de novo* assessments of the merits of administrative decisions in the tribunals and a separate review of legality mechanism by way of judicial review. In relative terms, the existence of judicial oversight of migration status decisions is a modern development: until the end of the 1960s, it was either non-existent or haphazard. There are (at least) four observations to be made in relation to the historical portrait of access to justice from migration status decisions in the United Kingdom that are relevant to the claims made in the following chapters. First, it demonstrates the existence of a long-standing piecemeal, fragmented and stratified approach to access to justice from migration status decisions. Secondly, it demonstrates the absence from the outset of a full, embedded commitment to the provision of an appeals system from all migration status decisions. Thirdly, it discloses an absence of principle in the establishment and maintenance of a migration appeals system. And finally - and perhaps as a consequence of the third observation - the historical portrait shows that the distribution of migration appeal rights has been subjected to a process of almost constant amendment. What these themes mean for the compatibility of the United Kingdom's system of legal recourse from migration status decisions with the moral claims made in

Chapters 2 and 3 is explored in later chapters. Before moving to that, this chapter provides a history of the mechanisms of judicial scrutiny available to migrants seeking to challenge migration status decisions. It first considers the developing availability of the remedy of judicial review before turning to appeals.

1. Judicial review

In the first half of the twentieth century, judicial review¹ of migration status decisions was not a remedy available to migrants. This was for two main reasons. First, as seen above, migration status decisions were considered to be non-justiciable as they lay within the prerogative powers of the Executive. Secondly, in the first half of the twentieth century judicial review was of little use as a remedy for anyone (not only migrants) seeking to challenge administrative decision-making since it was generally considered to fall outwith the court's inherent review jurisdiction. These reasons are examined below, in turn.

1.1. The royal prerogative and judicial review

As noted earlier, in the first half of the twentieth century, migration status decisions were deemed to be immune from judicial challenge. This was because historically, migration control in the UK was governed by the Crown's² prerogative under common law³ and the

¹ The meaning of judicial review in the UK context is addressed in Chapter 4.

² The Crown is taken to mean the monarch acting in a constitutional capacity and not merely as a private individual, see Wade and Forsyth, *Administrative Law* (Chapter 2, n 45), p 179.

³ The royal prerogative has been variously expressed as legal power that appertains to the Crown but not its subjects, or to executive power that is not statutory: *ibid*, p 179. See also, Lord Hope in *R (Alvi) v Secretary of State for the Home Department* [2012] UKSC 33, [2012] 1 WLR 2208: '[prior to 1971] the Secretary of State had unfettered control over aliens in the exercise of the prerogative'. However, Lord Dyson in *R (Munir) v Secretary of State for the Home Department*

prerogative powers were thought to be non-justiciable.⁴ Lord Bingham summarised the historical position in *R (European Roma Rights Centre) v Immigration Officer at Prague Airport*:⁵

The power to admit, exclude and expel aliens was among the earliest and most widely recognised powers of the sovereign state. In England, it was a prerogative power of the crown. Sir William Holdsworth (*A History of English Law*, vol x, pp 395-396) considered Jeffreys CJ undoubtedly correct when he said in *The East India Company v Sandys* (1684) 10 ST 371, at pp 530-531: "I conceive the King had an absolute power to forbid foreigners, whether merchants or others, from coming within his dominions, both in times of war and in times of peace, according to his royal will and pleasure; and therefore gave safe-conducts to merchants strangers, to come in, at all ages, and at his pleasure commanded them out again."⁶

Thus, as legal historian Holdsworth describes, the prerogative was believed to confer absolute power over migration in the classical Vattelian⁷ sense. But whilst historically it was thought that prerogative powers were immune from judicial challenge,⁸ twin

[2012] UKSC 32, [2012] 1 WLR 2192 does not find it necessary to determine the existence or otherwise prior to the Immigration Act 1971 of the prerogative over alien friends.

⁴ Wade and Forsyth, *Administrative Law*, p 289. See also discussion later in this chapter on judicial review before the High Court. Clearly, not all contestations between migrants and the state fell into this category, however. Paradigm examples of situations in which migrants have had unfettered access to courts are tortious actions for *habeas corpus*, damages for false imprisonment, and criminal prosecution. Lord Bingham's dictum in *R v Bentley* [1999] Crim LR 330 that a fair trial is 'the birthright of every British citizen' also, therefore, included migrants present in the UK.

⁵ *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2004] UKHL 55, [2005] 2 AC 1, para 11.

⁶ See also the 1891 Privy Council case *Musgrove v Chun Teeong Toy* cited in Goodwin-Gill, *International Law and the Movement of Persons Between States*, p 97 (Chapter 1, n 33); *Johnstone v Pedlar* [1921] 2 AC 262; and *Schmidt v Secretary of State for Home Affairs* (Chapter 3, n 12).

⁷ See Emmerich de Vattel, *The Law of Nations* (1758) book 1, s 231; book 2, s 125: 'One of the rights possessed by the supreme power in every state is the right to refuse to permit an alien to enter that state, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the state, at pleasure, even a friendly alien, especially if it is considered that his presence in the state opposed to its peace, order, and good governance, or to its social or material interests'.

⁸ Wade and Forsyth, *Administrative Law*, p 289. See also discussion later in this chapter on judicial review before the High Court. Clearly, not all contestations between migrants and the state fell into this category, however. Paradigm examples of situations in which migrants have had

developments have since undermined this position. The first relates to the abrogation of the royal prerogative by statute and the second to the assertion of jurisdiction by the courts over the prerogative. As to the first, from the early twentieth century there was uncertainty over the extent to which legislation regulating migrants had superseded the prerogative in respect of migration control.⁹ Thus, as Lord Bingham continued in the *Roma Rights* case:

...the crown's prerogative power over aliens was increasingly questioned, and since 1793 the power to exclude aliens has in this country been authorised by statute, whether temporary in effect ... or permanent (for example, the Aliens Act 1905, the Aliens Restriction Act 1914).¹⁰

None of the early statutes referred to by Lord Bingham contained a reservation of the Crown's prerogative, but upon the outbreak of World War I, the Aliens Restriction Act 1914 contained a reservation to preserve the Crown's prerogative power in relation to enemy aliens.¹¹ This reservation was reprised in the Immigration Act 1971, the central consolidating statute regulating migration,¹² and was recently considered by the Supreme

unfettered access to courts are tortious actions for *habeas corpus*, damages for false imprisonment, and criminal prosecution. Lord Bingham's dictum in *R v Bentley* that a fair trial is 'the birthright of every British citizen' also, therefore, included migrants present in the UK.

⁹ In *Attorney General v De Keyser's Royal Hotel Ltd* [1920] AC 508 (HL) the House of Lords determined that the royal prerogative is placed in abeyance insofar as statute provides a legal basis for action.

¹⁰ *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* (n 5). See also Macdonald and Toal, *Macdonald's Immigration Law and Practice* p 3. The authors note the distinction between alien friends and alien enemies and that since 1770s the prerogative has not been used in relation to alien friends, but rather statute enabled the control of migrants.

¹¹ As noted in *R (Munir) v Secretary of State for the Home Department* (n 3).

¹² The essential regulation of migration control is carried out through the Immigration Rules. Section 3 of the Immigration Act 1971 sets out the Secretary of State's immigration rule making power. The Immigration Rules are not subordinate legislation but a statement of how the Secretary of State's powers over the entry and stay of foreign nationals will normally be exercised: *Odelola v Secretary of State for the Home Department* (Chapter 4, n 13).

Court in the joined cases of *Munir*¹³ and *Alvi*.¹⁴ In its judgments in those cases, the Supreme Court considered the 1971 Act to be a ‘constitutional landmark, which, for all practical purposes, gave statutory force to all the powers previously exercisable in the field of immigration control under the prerogative.’¹⁵ Thus, it concluded that: ‘Parliament must have intended that, subject to the saving in section 33(5), all powers of immigration control were to be exercised pursuant to the statute.’¹⁶ *Munir* and *Alvi* make clear, therefore, that as a matter of statutory interpretation, the system of immigration control as established by the 1971 Act is exhaustive of the power to control the entry, residence and expulsion of aliens¹⁷ subject to the reservation in section 33(5) of the 1971 Act¹⁸ which applies only to enemy aliens,¹⁹ and subject to the prerogative over concessionary policy that fall outwith the ambit of the 1971 Act.²⁰

¹³ *R (Munir) v Secretary of State for the Home Department* (n 3).

¹⁴ *R (Alvi) v Secretary of State for the Home Department* (n 3).

¹⁵ *ibid* [31] (Lord Hope).

¹⁶ *R (Munir) v Secretary of State for the Home Department* (n 3), [25] (Lord Dyson).

¹⁷ See also, *ibid* [23]. Lord Dyson also finds that the prerogative has never and does not apply to Commonwealth citizens (who may or may not have a right of abode under the 1971 Act depending on whether they satisfy the partiality provisions of that Act). This is because the prerogative has only ever applied to aliens and Commonwealth citizens are not aliens.

¹⁸ Section 33(5) of the Immigration Act 1971 provides ‘This Act shall not be taken to supersede or impair any power exercisable by Her Majesty in relation to aliens by virtue of Her prerogative.’

¹⁹ See *R (Munir) v Secretary of State for the Home Department* (n 3), [25] in which Lord Dyson cites the passages in *Hansard* in which the government confirms that the reservation applies only to enemy aliens (‘[w]e are talking about residuary prerogative powers for the kind of exceptional circumstances which have arisen in this century only on the occasions of the two World wars.’). See also Lord Hope giving the lead judgment in *R (Alvi) v Secretary of State for the Home Department* (n 3) who says of section 33(5) of the 1971 Act: ‘But it is hard to see how that provision, which may have been thought appropriate 40 years ago, can have any practical effect today. One has only to think of the possibility of a challenge under article 5 of the European Convention on Human Rights, which declares that no one shall be deprived of his liberty save in accordance with a procedure prescribed by law. The old order, under which such a sweeping power could be exercised at will by the executive, is now long gone.’ ([30]).

²⁰ *R (Munir) v Secretary of State for the Home Department* (n 3), [45].

Accordingly, given that the regulation of migration is now predominantly a matter of statute, the question of amenability to review before the courts no longer arises. In any event, even if migration control had remained a prerogative power, it would be unlikely to still be considered to be non-justiciable. As will be explored in more detail below, the second reason why migration status decisions are no longer considered to be immune from judicial scrutiny relates to the increasing breadth of judicial review. Since the early 1980s, and in particular the seminal House of Lords' judgment in *CCSU*,²¹ which held that judicial review and the principles of natural justice applied to the prerogative powers, it is evident that the prerogative itself is not insulated from judicial review.²²

1.2. Judicial review and migration status decisions

As noted above, the second reason why judicial review of migration status decisions was not considered to lie as an available remedy was because of the restrictive ambit of the review itself. This meant that migration status decisions were thought to fall outside the court's inherent review jurisdiction which was considered to be reserved for the acts and omissions of decision-makers under a duty to 'act judicially'.²³ For example, in *ex p Venicoff*²⁴ the court held that the Home Secretary's expulsion power was an administrative function and accordingly there was no corresponding right for a migrant

²¹ *Council of Civil Service Unions v Minister for the Civil Service* (Chapter 1, n 11).

²² There remains uncertainty over the extent to which the prerogative powers are subjected to judicial review. Whilst the cohort of excluded powers has been constricted, some powers remain insulated, such as the power to make treaties and defend the realm: *ibid* and Chapter 1, n 12.

²³ See, eg, Clayton and Tomlinson, *The Law of Human Rights* (Chapter 4, n 24), pp 710-711. Clayton contrasts the position in the nineteenth century, where the principles of natural justice were applied broadly to 'every tribunal or body of persons invested with the authority to adjudicate on matters involving civil consequences to individuals.' By the first half of the twentieth century the court had developed a less expansive approach to the application of natural justice.

²⁴ *R v Leman Street Police Station Inspector, ex p Venicoff* [1920] 3 KB 72.

subject to an expulsion order to be heard. However, developments in the twentieth century opened up judicial review as a remedy from adverse migration status decisions.²⁵ First, in the mid 1960s the imprecise distinction between the exercise of administrative powers and ‘acting judicially’ was collapsed by the House of Lords in the seminal case of *Ridge v Baldwin*.²⁶ The case held (in relation to a chief constable’s right to be heard in the context of a decision concerning his dismissal) that any decision affecting an individual’s rights or interests was subject to the principles of natural justice.

Yet, despite the expansive trend in judicial review of administrative decision-making that *Ridge v Baldwin* heralded, the assumption remained that migration cases should be treated differently²⁷ and thus, it was not readily accepted that the *Ridge v Baldwin* principles should be applied to migration control. The development of the remedy in challenging migration status decisions was, therefore, fitful. For example, the Committee established to consider the need for immigration appeals said in 1967 that: ‘[it] is well settled that the courts are unable to question the proper exercise by the Home Secretary of his discretion’ in immigration control.²⁸ Similarly, in *Schmidt*,²⁹ a case decided by the Court of Appeal in 1968, it was found that the absence of a right to enter or remain meant that migrants (*in casu* Scientology students denied further leave to remain in the UK) had no corresponding right to procedural protection in relation to

²⁵ For a summary of the modernising cases, see further Tomkins, *Public Law* (Ch 1, n 76) pp 171-2. Tomkins notes that before the 1960s, judicial review was ‘little more than perfunctory’ p 170.

²⁶ *Ridge v Baldwin* (Chapter 1, n 10).

²⁷ As seen earlier, it is possible that this is due to a retained belief that migration control fell within the royal prerogative (and so was not justiciable). The debunking of this belief came later. See above.

²⁸ Wilson Committee, *The Wilson Report* (Chapter 1, n 13). The Wilson Report then gave examples of the situation in which a Court would have jurisdiction, such as the purported exercise of migration powers against an individual who is not a migrant or on grounds of bad faith (para 55).

²⁹ *Schmidt v Secretary of State for Home Affairs* (Chapter 3, n 12).

migration status decisions.³⁰ But, faced with an absence of adequate or any alternative statutory remedies,³¹ the subjects of adverse migration status decisions increasingly petitioned the High Court. By the time of the House of Lords' decision in the *CCSU*³² case in 1984, which, as seen above, established the amenability to review of the royal prerogative, it had become more accepted that migrants seeking redress in relation to migration status decisions had a remedy in the High Court. Indeed, recourse to judicial review was prolific: between 1981-1986, challenges to migration status decisions accounted for 40 per cent of judicial review applications in the High Court.³³ In this context there came increasing momentum to create, and then expand, statutory appeal rights.³⁴ Pressure on the High Court has also led to institutional changes in the administration of judicial review of migration status decisions. As seen in Chapter 4,

³⁰ See *ibid*, per Lord Denning at 170: '[aliens] have no right to be here except by licence of the Crown and it has been held that the Home Secretary is not bound to hear representations on their behalf, even in the case of a deportation order, though, in practice he usually does so. It was so held in *R v Leman Street Police Station Inspector and Secretary of State for Home Affairs, Ex parte Venicoff* [1920] 3 K.B. 72, which was followed by this court in Soblen's case [1963] 2 Q.B. 243. Some of the judgments in those cases were based on the fact that the Home Secretary was exercising an administrative power and not doing a judicial act. But that distinction is no longer valid. The speeches in *Ridge v Baldwin* [1964] AC 40 show that an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest, or, I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say.' By contrast, a more protective approach was taken in *Re K (H) (an infant)* [1967] 2 WLR 962 where the Divisional Court held in 1966 that immigration officers had a duty to act fairly in the discharge of their powers. Although the Court agreed that 'an immigration officer...is not under any duty to hold a full-scale enquiry or to adopt judicial process and procedure.'

³¹ As will be seen below, a statutory appeals system did not enter into force until 1970.

³² *Council of Civil Service Unions v Minister for the Civil Service* (Chapter 1, n 11).

³³ Maurice Sunkin, 'What is happening to applications for Judicial Review?' (1987) 50 MLR 432.

³⁴ It has been suggested that the increased recourse of migrants to judicial review has in part explained the movement to legislate to grant of rights of appeal from migration status decisions. See further Robert Thomas, *Administrative Justice and Asylum Appeals* (Hart 2011) and Moffatt and Thomas, 'And then they came for judicial review: proposals for further reform', p 238. The pressure for expansion of appeal rights came primarily from increasing numbers of judicial reviews of asylum refusals (from which, until 1993, there was no in-country right of appeal).

following the changes brought about by the Tribunals Courts and Enforcement Act 2007, the majority of migration judicial reviews now do not take place in the High Court.³⁵

2. Appeals

The following section entitled ‘appeals’ covers any system of review of migration status decisions other than the remedy of judicial review outlined above. It includes, therefore, an examination of the review mechanisms in force before the establishment of the statutory tribunals appeal system in 1970. The appeals section is divided into three parts: 1905-1967, 1967-2002, and 2002-2014. The division reflects the various stages of development of scrutiny of migration status decisions in the United Kingdom. The first (1905-1967) is characterised by minimal review and saw the establishment for the first time of a formal review mechanism at a time in which migration status decisions were considered non-justiciable; and the second (1967-2002) and third (2002-2014) mark both the establishment of an inclusive system of statutory appeals and then the gradual reduction of appeal rights. As will be examined in the two following chapters, the Immigration Act 2014 intensifies the attrition of appeal rights significantly.

2.1. 1905-1967

2.1.1 Aliens Act 1905

Prior to the entry into force of the Aliens Act 1905 there had been no opportunity for migrants to challenge, judicially or administratively, any administrative decision taken in relation to migration status. As noted earlier, the question of whether or not a

³⁵

See 2.3.3.

migrant could remain in the United Kingdom was considered to be a matter for the Royal Prerogative which was, at that time, considered not to be justiciable before courts.³⁶ It should also be noted, however, that prior to the adoption of the Aliens Act 1905, there had been little practical need for an apparatus to challenge decisions on migration status since few barriers to the entry of migrants (at least those unsuspected of any criminal offence) into the territory of the United Kingdom existed. There had been some restrictions during the Napoleonic Wars of the early nineteenth century but following peace in 1815 these were removed, leaving only some atrophied registration provisions that were allowed to fall into disuse.³⁷ However, the last two decades of the nineteenth century saw a rapid increase in immigration, primarily of Jews from Eastern Europe, many of whom were fleeing persecution under the Russian Empire.³⁸ Faced with this greater influx of migrants, in the late 1880s and early 1890s several (unsuccessful) moves

³⁶ See, eg, *Musgrove v Chun Teeong Toy* (Chapter 3, n 7) in which the Privy Council held that a Chinese migrant had no legal right enforceable in the courts to enter British territory. Similarly in *Poll v Lord Advocate* [1899] 1 F (Ct of Sess) 823, 827-828 the Court of Session in Scotland held that aliens were not permitted to question in the court the administrative acts of the Crown. And in Blackstone *Commentaries* I, 252 it was said that friendly aliens were 'liable to be sent home whenever the King sees occasion See also See Care, *Migrants and the Courts*, pp 6-7. The doctrine of non-justiciability persisted beyond 1905 in relation to judicial challenges to migration status decisions in the ordinary courts outside the statutory scheme (see, eg, *Schmidt v Secretary of State for Home Affairs* (Chapter 3, n 12)).

³⁷ The Registration of Aliens Act 1836 had been so little implemented that by 1900 it had been more or less forgotten: Alison Bashford and Jane McAdam, 'The Right to Asylum: Britain's 1905 Aliens Act and the Evolution of Refugee Law' (2014) 32 *Law and History Review* 309, 314. The Aliens Act 1905 repealed and replaced the Aliens Registration Act 1836, under which migrants were required to register their presence upon arrival, with a sanction for failure to do so and criminal penalties for fraud. The 1836 legislation did not, however, establish an administrative structure to control or restrict entry and presence and there was no provision for appeal. For a summary of the history of migration control in the UK prior to 1905, see Care, *Migrants and the Courts*, pp 2-4. For a more detailed account, see Sir William Searle Holdsworth, *History of English Law vols 1-9* (Methuen & Company Limited 1932), vol 9, pp 90ff; R Plender *International Migration Law* (1972) pp 42ff.

³⁸ See further, John Garrard, *The English and Immigration: A Comparative Study of the Jewish Influx 1880-1910* (Oxford University Press 1971); Bernard Gainer, *The Alien Invasion: The Origins of the Aliens Act 1905* (Heinemann Education 1972). For an analysis of the 1905 Aliens Act in terms of British anti-semitism, see, eg, Lloyd P Gartner, *The Jewish Immigrant in England, 1870 – 1914* (Allen & Unwin 1960).

were made to legislate on the subject of migration.³⁹ The Conservative Government of 1895 – 1905 introduced three aliens bills (January 1897, February 1898, April 1904) but was defeated, largely by the Liberals, who were opposed to the regulation of migration.⁴⁰ In the last days of the Conservative administration, however, an Aliens Act was passed which received royal assent in August 1905 and entered into force on 1 January 1906, under a Liberal government.

The exclusionary provisions of the 1905 Aliens Act were class-based. They were primarily aimed at the indigent⁴¹ and also sought to exclude the mentally and physically unwell and criminals. An administrative machinery was established under the Act. The primary decision on a migrant's case was to be taken by an immigration officer,⁴² and the Act provided for a form of appeal against an immigration officer's refusal of 'leave to land' (i.e. authorised entry into the UK) to an immigration board, which was to be established at the fourteen main migration ports. By section 1(2) of the Aliens Act 1905, the right of appeal applied automatically to every decision to refuse leave to land and if the immigration board was 'satisfied that leave to land should not be withheld under [the] Act', it was required to give leave to land itself 'and leave so given shall operate as leave

³⁹ The lack of success in progressing legislation has been attributed (in part) to the perception of the proposed legislation as anti-semitic: see, Bashford and McAdam, 'The Right to Asylum: Britain's 1905 Aliens Act and the Evolution of Refugee Law', 316. It was also opposed by the Liberal Party as protectionist in nature.

⁴⁰ For a detailed account of the political progression of the Aliens Bill and Aliens Act, see Gainer, *The Alien Invasion: The Origins of the Aliens Act 1905* (n 38).

⁴¹ The Aliens Act 1905 only applied immigration controls to 'immigrants', defined as 'alien steerage passengers.' Thus, wealthy migrants able to travel other than by steerage were exempt from the controls of the Act. If an 'immigrant' was designated as 'undesirable', leave to enter should not be granted. An 'immigrant' was considered to be an 'undesirable immigrant' where s/he could not show that s/he had or was able to obtain the means of supporting him or herself without recourse to public funds. Sections 1 and 8 Aliens Act 1905.

⁴² Immigration officers were chosen from customs officers. They were assisted by an interpreter, appointed by the Secretary of State for the Home Department and a medical inspector.

of the immigration officer.’ Accordingly, under s 1(2) the boards were required to conduct a review of the merits of the immigration officer’s decision and, if they disagreed with his decision, grant leave themselves. Although the establishment and function of the boards was provided for in the Act, the detail of the boards’ procedure was set out in regulations.⁴³ The boards consisted of local people with ‘magisterial, business or administrative experience,’⁴⁴ who were appointed for life.⁴⁵ Each ‘immigration port’ would have an Immigration Board Clerk, responsible for convening the boards and taking minutes of their proceedings.⁴⁶ It was considered desirable, but not essential, for a magistrate to be present on a board and where present, a magistrate would be chairman.⁴⁷ Decision was by simple majority.⁴⁸ ‘Immigrants’ subject to the controls of the Act were examined on board the ship on which they had arrived and, if rejected, detained on that ship or, later, ashore in ‘receiving houses’ in the legal custody of the master of the ship pending a board hearing, if the right to appeal had been exercised. Once notice of an appeal had been given by a rejected ‘immigrant,’ the board of the relevant port would be convened by the Immigration Board Clerk if practicable within 24 hours on working days and hearings would typically be completed before the ship departed for the return voyage.⁴⁹ The migrant would be present at the hearing, as well as the immigration officer

⁴³ Rules, dated 19 December 1905, made by the Secretary of State for the Home Department under the Aliens Act 1905, Cd 2879.

⁴⁴ s 2(1) Aliens Act 1905.

⁴⁵ HC Deb, 17 March 1908, cols 412-413.

⁴⁶ rr 11-13, Rules, dated 19 December 1905, made by the Secretary of State for the Home Department under the Aliens Act 1905, Cd 2879.

⁴⁷ rr 15 & 17, *ibid*.

⁴⁸ r 18, *ibid*.

⁴⁹ Wilson Committee, *The Wilson Report* (Chapter 1, n 13), Appendix II, p 72. The desire to efficiently return aliens with the ship on which they had arrived led to some instances of procedural unfairness. In (at least) one case, an alien was denied the right to put his case fully in

who had refused leave to land and, if rejected on medical grounds, the medical officer in the case.⁵⁰ The rejected ‘immigrant’ was entitled to be heard, but special leave of the board was required to enable any other witness to give evidence.⁵¹ If special leave was granted, adjournments were sometimes permitted to permit witnesses to attend.⁵² The process was inquisitorial; the board asking questions and/or making enquiries as it thought fit.⁵³

The boards were directly appointed by the Home Secretary and were administrative, rather than judicial, in nature.⁵⁴ Amendments to the effect that there should be appeal to a court of law, rather than administrative immigration boards, had been proposed in Parliament on the grounds that the gravity and intricacy of the questions on which the boards would be required to decide called for judicial decision (these included the ‘very nice questions’ of whether offences migrants were alleged to have committed were of a political character and whether an individual sought entry to avoid

order to permit the boat which was to return him to leave before family members could attend to give evidence: see Helena Wray, ‘The Aliens Act 1905 and the Immigration Dilemma’ (2006) 33 *Journal of Law and Society* 302, p 317.

⁵⁰ rr 22-23, Rules, dated 19 December 1905, made by the Secretary of State for the Home Department under the Aliens Act 1905, Cd 2879.

⁵¹ r 23, *ibid.*

⁵² r 19, *ibid.* Adjournments for this reason were not granted as a matter of course, however, and the absence of a duty on immigration officers to inform relatives and friends of appellants that a hearing would take place lead to accusations of unfairness. See, eg, HC Deb 20 December 1906, vol 167, cols 1677-8.

⁵³ *ibid.*

⁵⁴ This was the clear view of H J Gladstone, the first Home Secretary to administer the Act: see Prakash Shah, *Refugees, Race and the Concept of Asylum in Britain* (Routledge-Cavandish 2000), p 39. Before his appointment as Home Secretary in 1910 Churchill had promised to support appeal from the Boards to the High Court but upon taking office this was not carried out: Jill Pellew, ‘The Home Office and the Aliens Act 1905’ (1989) 32 *The Historical Journal* 369, p 376.

persecution on religious or political grounds).⁵⁵ These amendments were, however, rejected. It was argued in opposition to the amendment that the boards would have to deal with questions unsuited to judicial determination ('questions of fact, of which absolute legal proof might be impossible').⁵⁶ Accordingly, faced with difficulties of evidencing persecution or other requirements under the bill, the Government's response was to prefer a non-judicial, 'simple and rough-and-ready' approach based on 'common sense and business experience.'⁵⁷ It was added that affording a right of appeal, with its attendant delays of weeks and months would make the Act unworkable since it was premised on the removal of those migrants refused leave to land on the return leg of the ship that had brought them.⁵⁸

In response to questions in Parliament in 1906 as to potential unfairness in the procedure of the London Immigration Board⁵⁹ and a request to establish a Departmental Committee to inquire into the working of the boards, Secretary of State Herbert Gladstone said the following:

⁵⁵ See, eg, HL Deb, 3 August 1905, vol 151, cols 8-22. See also HC Deb 5 Mar 1906, vol 153, col 136.

⁵⁶ HL Deb 3 August 1905, vol 151, col 10. It was also suggested – clearly incorrectly – that there would be no questions of law for the boards to deal with.

⁵⁷ HL Deb 3 August 1905, vol 151, col 20: 'The Secretary of State for Foreign Affairs (The Marquess of Lansdowne):... in some of the great Continental ports there had existed during the last ten years boards of this description, established, he believed, at the instance of the shipowners themselves, which had been entirely successful in a simple and rough-and-ready manner in distinguishing between those immigrants who were fit to be taken on board their ships and carried to America, and those who were not.

⁵⁸ HL Deb 3 August 1905, vol 151, col 10: 'If the Amendment of the noble and learned Lord were carried, it would make the Bill practically unworkable. In the first instance the matter would have to go to a Court of summary jurisdiction, but if there was to be an appeal to quarter sessions, as in all cases of dispute there would be, that might mean a delay of two or three months. What was to be done with the alien who was landed for the purpose of this inquiry during that time? It would make the Bill unworkable if the decision in his case were to be delayed for any such length of time as that.'

⁵⁹ The Board served the Port of London and sat in the Immigration Board Room, Great Tower Street, EC.

An immigration board is not a court, and has no power to administer an oath. The Board has an absolute discretion as to the persons whom it will hear; but there are obvious objections to establishing anything like court proceedings, e.g., counsel, legal evidence, etc., before a body which has not the powers of a court. It is no part of the immigration officers' duty to secure that relatives attend the Board meetings, and at the time when preliminary inquiries are being made the day and hour of the meeting is often not known. When they are known they are communicated on application, and in any case any person who is really interested in an alien immigrant can always obtain the necessary information, by inquiries of the master of the ship on which the immigrant is or otherwise. Attention is paid to the working of the regulations which govern the procedure of immigration boards, and they can be altered if experience shows it to be necessary, but full information on that subject is always at my disposal, and I have no need to appoint a committee in order to collect it.⁶⁰

The boards, were, therefore, not intended to serve a judicial role and had extensive discretion over their decisions; they were 'practically uncontrolled in the decisions at which they arrived.'⁶¹ Further, there was no onward right of appeal to a court.⁶² Secretaries of State equally refused to interfere with the decisions of immigration boards. Facing questions in Parliament as to potential unfairness in individual cases, they confirmed on multiple occasions that the boards were the 'sovereign authorit(ies)', thus refusing to override their decisions.⁶³ There was, however, provision in the Aliens Act requiring boards to refer certain questions to the Secretary of State. These included whether an individual fell within the scope of the Act (ie whether he or she was an 'immigrant', 'passenger' or 'steerage passenger' as defined) and whether an offence was

⁶⁰ HC Deb 20 December 1906, vol 167, col 1678.

⁶¹ HC Deb 5 Mar 1906, vol 153, col 134.

⁶² In May 1910, under Churchill as Home Secretary, legal representation before the Boards was permitted but the possibility of appeal to the High Court was excluded: Hansard HC 3 July 1905, 4th series, vol 148, col 794. See further Shah, *Refugees, Race and the Concept of Asylum in Britain* and Wray, 'The Aliens Act 1905 and the Immigration Dilemma'.

⁶³ See eg, HC Deb 13 June 1907, Vol 175, Col 1602: Gladstone: 'the decision vests not with me, but with the Immigration Board.' See also, HC Deb 4 December 1906, vol 166 and HC Deb 13 February 1911, vol 21, col 695.

of a political character. The board was bound to follow the decision of the Secretary of State following a reference.⁶⁴

Contemporary sources reveal⁶⁵ that there were serious failings in the administration of the 1905 Act. Decisions by immigration officers and, on appeal, the boards were frequently taken for extra-statutory reasons.⁶⁶ It was reported, for example, in 1906 that a Russian tailor who had sufficient funds to maintain himself was refused entry on the ground that there were already sufficient tailors in England.⁶⁷ Market saturation was not a ground of refusal under the Act. There was also an absence of fair process during board hearings, including defective translation, poor administration, the absence of witnesses and hostile treatment of those who did attend, and reliance upon uncorroborated hearsay evidence.⁶⁸ Indeed, it was alleged in the House of Commons in 1906 that the Boards, composed of members appointed by the out-going Conservative Government, 'had been stretching their powers to the utmost to keep out these

⁶⁴ Section 8(4) provides: 'If any question arises under this Act on an appeal to an immigration board whether any ship is an immigrant ship within the meaning of the Act, or whether any person is an immigrant, a passenger or a steerage passenger, within the meaning of this Act, or whether any offence is of a political character, or whether a crime is an extradition crime, that question shall be referred to the Secretary of State in accordance with the rules made under this Act, and the board shall act in accordance with his decision.'

⁶⁵ From March 1906 the press were permitted to attend board hearings: Pellew, 'The Home Office and the Aliens Act 1905', p 376.

⁶⁶ Wray, 'The Aliens Act 1905 and the Immigration Dilemma', pp 316-7.

⁶⁷ HC Deb 5 Mar 1906, vol 153, col 135.

⁶⁸ Wray, 'The Aliens Act 1905 and the Immigration Dilemma', pp 316-7. See also, HC Deb 5 Mar 1906, vol 153, col 134: 'For some time past there had been important communications in various newspapers which indicated that the Immigration Boards that had the administration of the Act had been conducting their inquiries, and had been arriving at their conclusions with an exhibition of considerable prejudice, if not actual illegality.' HC Deb 20 December 1906, vol 167, col 1677-78.

immigrants.’⁶⁹ Originally, the proceedings of the immigration boards took place in camera, however, press were permitted to attend in 1906.⁷⁰

The Aliens Act 1905 remained in force until 1913. During the period of its operation, the appeals system yielded an overall 38% success rate.⁷¹ The comparatively high success rate appears to be at odds with contemporary charges of unfairness. However, the rate of migrants’ success in the boards may well be explained by a phenomenon unrelated to the decisional competence of the boards: a common accusation against the boards from those seeking to protect the interests of the indigenous working classes was that they had become in effect migrant ‘employment agencies.’ This referred to a practice whereby exploitative employers would attend hearings in order to recruit workers from the migrant appellants. Thus, migrants who upon initial inspection by an immigration officer could not demonstrate that they already had sufficient funds to maintain themselves and any dependants were promised a (very low) wage and thereby provided with the means of meeting the Act’s requirement for entry.⁷²

⁶⁹ HC Deb 5 Mar 1906 vol 153, col 136.

⁷⁰ The Secretary of State, Gladstone, deemed admittance of press desirable in the hope of thereby preventing the frequent appeals in Parliament for inquiry in respect of the boards: HC Deb 4th Series, Vol 153, Cols 154-160.

⁷¹ Wilson Committee, *The Wilson Report* (Chapter 1, n 13) Appendix II, p 73. The Report also notes shocking variations between ports. For example, at Grimsby and Hull 90% of the immigrants rejected for want of means appealed but in Grimsby 40% were successful whilst in Hull all were dismissed (p 73).

⁷² HL Deb 2 April 1962, vol 239, col 14: The Lord Chancellor... ‘I am told that the practice was that some undesirable sweat shops in the East End used to send emissaries to the hearing of appeals, in particular those held by the London Immigration Board. These persons offered immediate employment to anyone who had been refused admission on the ground of insufficient means: and the Board then allowed the appeal, so that in practice it tended to become a sort of minor employment agency of a not very desirable kind.’

2.1.2 Aliens Restriction Acts 1914 & 1919 and Aliens Deportation Advisory Committee (1932-36)

The immigration boards were ultimately short-lived. In 1914 emergency legislation, the Aliens Restriction Act 1914, was passed upon the declaration of war against Germany. The Act was aimed at controlling and expelling German nationals and other ‘enemy aliens’ present in the UK. It repealed the 1905 administrative mechanisms and did not provide for any alternative form of review of executive decisions on migration status. The Aliens Restriction (Amendment) Act 1919 continued the emergency powers instituted by the 1914 Act into peacetime. As noted above, there was no statutory appeal system from the various controls imposed by the 1914 and 1919 Acts, however, between 1932-1936 a form of extra-statutory review was initiated for those migrants already established in the UK (but not those who had landed without permission or failed to observe conditions of entry) facing deportation on the grounds that the Secretary of State ‘deem[ed] it conducive to the public good to make a deportation order’. Such cases were referred automatically to the non-statutory Aliens Deportation Advisory Committee who would hear the case.⁷³ Generally, the proceedings before the Advisory Committee would open with a statement by a police officer of the case against the migrant and the migrant or his or her legal representative was then permitted to cross-examine the police officer, call further evidence and address the Committee.⁷⁴ During the

⁷³ Upon its establishment in 1932, the composition of the Committee included former civil servants, barristers, and business people. R Vaughan Williams KC was appointed Chairman of the Committee: Jewish Telegraphic Agency, ‘Aliens in England: Sir Herbert Samuel Sets Up Advisory Committee on Deportation’ (3 March 1932) <<http://www.jta.org/1932/03/03/archive/aliens-in-england-sir-herbert-samuel-sets-up-advisory-committee-on-deportation-colonel-samuel-and#ixzz3EymaWRYT>> accessed 1 January 2016.

⁷⁴ Wilson Committee, *The Wilson Report* (Chapter 1, n 13) Appendix III, p 74.

four years of its existence, the Committee heard 33 cases, of which it recommended deportation in 19 and advised against it in 14. In 1936 due to difference of view between the Home Office and the Committee, the practice of automatic reference to the Committee was discontinued and the Home Secretary announced that only cases of special difficulty would be referred. In the event no cases were referred subsequently and by the outbreak of war in 1939 the appeal procedure was effectively dissolved. There was no replacement procedure instituted following the end of the Second World War in 1945.

2.1.3. 1956 Chief Metropolitan Magistrate's review

From 2 August 1956, another system was established in order to satisfy, it has been suggested, the European Convention on Establishment 1955.⁷⁵ It applied to migrants facing expulsion (otherwise than on security grounds or on the recommendation of a court) who had been lawfully present in the United Kingdom for more than two years and in respect of whom an expulsion decision had been made.⁷⁶ These migrants were given the opportunity to make representations to the Chief Metropolitan Magistrate either in writing or orally and in person or through legal representation. Migrants under this process could call witnesses or rely on documentary evidence to rebut the Home Office statement of facts or in mitigation. Following the hearing, the Chief Magistrate would

⁷⁵ Article 3(2) of the European Convention on Establishment 1955 provides: 'Except where imperative considerations of national security otherwise require, a national of any Contracting Party who has been so lawfully residing for more than two years in the territory of any other Party shall not be expelled without first being allowed to submit reasons against his expulsion and to appeal to, and be represented for the purpose before, a competent authority or a person or persons specially designated by the competent authority.' However, the United Kingdom did not ratify the Convention until 14 October 1969 and accordingly was under no obligation under it until that later date:
<<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=019&CM=8&DF=19/05/2015&CL=ENG>> accessed 1 January 2016.

⁷⁶ Wilson Committee, *The Wilson Report* (Chapter 1, n 13).

convey his recommendations to the Home Secretary in combination with the record of proceedings.⁷⁷ What considerations were taken into account by the Chief Magistrate were not, however, communicated to the individual.⁷⁸ Whilst not formally binding, recommendations were generally followed in practice: for example, in the period between 1956-1967 all recommendations were accepted.⁷⁹ To this effect the Home Secretary in 1960 declared in Parliament (in response to calls that migrants should have an appeal to a court of law whose decision is binding on the executive) that ‘whatever is the constitutional and statutory position about this opportunity to apply to the Chief Magistrate, in effect it has been regarded by us as a form of appeal against deportation and respected as such.’⁸⁰ Migrants recommended by a court for deportation who had been in the UK for more than two years and those not eligible to be heard by the Chief Metropolitan Magistrate because they had not been lawfully resident for more than two years but were protected by the 1951 Convention relating to the Status of Refugees (Refugee Convention)⁸¹ were also given an opportunity to make representations prior to expulsion.⁸² These representations could be made to an officer of the Immigration and Nationality Department whose report was put before the Home Secretary prior to the

⁷⁷ *ibid*, pp 16-17.

⁷⁸ HC Deb 16th November 1960, 1960-61 vol 630, col 408.

⁷⁹ *ibid*. See also HC Deb 16th November 1960, 1960-61, vol 630, col 403 and 422: Mr Renton... ‘67 aliens have been eligible to make representations and of those only 34-just half-have availed themselves of the opportunity; 31 cases have actually been heard by the Chief Magistrate, and in 26 of them he confirmed the proposal to deport. That means that there have been five cases in which reference to the Chief Magistrate prevented deportation. There is no case in which deportation has taken place where the Chief Magistrate did not recommend it.’

⁸⁰ HC Deb 16th November 1960, 1960-61, vol 630, col 422.

⁸¹ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.

⁸² Wilson Committee, *The Wilson Report* (Chapter 1, n 13) p 17. Different provisions existed for Commonwealth citizens (*ibid*, p 18).

execution of the expulsion order. Further, by the 1960s, an informal review process suspensive of removal had developed for those subject to expulsion for overstaying. Expulsion action was ‘normally delayed pending consideration of any representations made by the alien or by others on his behalf’.⁸³ However, there was little protection where the Chief Metropolitan Magistrate confirmed the Secretary of State’s deportation decision. As recorded in debate in the House of Commons, an individual whose request for review had failed was not informed of this but summarily detained and deported.⁸⁴

2.1.4 Analysis

The appeal or review procedures in the UK since 1905 were predominantly administrative (rather than judicial) arrangements and, save the Aliens Act 1905, extra statutory and ad hoc. ‘Appeals’ to the immigration boards were not really appeals (in the modern sense of the word)⁸⁵ at all. Although the immigration boards reviewed the merits of the initial administrative decision, they were themselves administrative bodies that were not entirely independent of the Home Office, given that they were appointed by the Secretary of State and were required to refer certain questions for his decision. They were, therefore, excluded from ordinary judicial process, in favour of ‘rough and ready’, practical decision-making, with extensive discretion over their own process and decisions, and complete insulation from challenge. The result appears to have been significant disquiet in relation to their fairness. Indeed, the boards’ practice of hearing a number of appeals at a time, thereby gathering migrants in one place, appears to have led

⁸³ ibid, p 16.

⁸⁴ HC Deb 10 March 1966, vol 725, col 612-13

⁸⁵ Nor, for that matter, in the sense defined in Chapter 4.

to their exploitation by the owners of sweat shops who used them as ‘a sort of minor employment agency of a not very desirable kind.’⁸⁶ The period including the two World Wars (starting with the outbreak of the First World War in 1914 and extending beyond the Allied victory in 1945), is remarkable for the strength of executive control over migration. Although this might be expected during times of emergency rule during the duration of the wars themselves, the dissolution in peace-time of a weak form of review of expulsion decisions just four years after its inception demonstrates that the locus of power during this time lay unmistakably with the Executive. However, by 1956 the consolidation of executive power appeared to be loosening: first, it appears that the form of review of domestic migration status decisions was influenced by the requirements of an international convention.⁸⁷ Further, over and above the influence of international law, the extension of the review scheme reflected an acceptance on the part of the executive that migrants have some form of right to be heard prior to expulsion (and to be informed of the reasons for their expulsion). And finally, the Chief Metropolitan Magistrate’s review had certain hallmarks of judicial procedure in its adoption of an adversarial process, although crucially it remained advisory in nature.⁸⁸

⁸⁶ HL Deb, 2 April 1962, vol 239, col 14.

⁸⁷ See n 75.

⁸⁸ There were a number of calls in the House of Commons for review of deportation decisions to be undertaken by a court of law: HC Deb 16th November 1960, vol 630, col 408; HC Deb 9 December 1958, vol 213, cols 129 and 136-138.

2.2. 1967-2002

2.2.1. *The Wilson Report*

As seen above, since the abolition of the previous statutory scheme in 1914, there had been no rights of appeal or review of migration status decisions provided by Act of Parliament. Control of immigration had been by order in council under the Aliens Restriction Acts 1914 and 1919, which were renewed annually. The Immigration Appeals Act 1969 remedied this deficit for Commonwealth citizens⁸⁹ and corresponding appeal rights were provided to other migrants by an Order in Council.⁹⁰ The appeals provisions entered into force on 1 July 1970 but were short lived as this legislation was repealed and replaced by the Immigration Act 1971 (entering into force on 1 January 1973).⁹¹ There was little modification of the scheme introduced in 1970, however, and both the 1969 and 1971 legislation (and the order in council) broadly followed the recommendations of the Report of a government-appointed Committee chaired by Sir Roy Wilson QC (the Wilson Report).⁹² The Committee was commissioned ‘to consider whether any, and if so what, rights of appeal or other remedies should be available to aliens and to Commonwealth citizens who are refused admission to or required to leave, the country.’⁹³ It recommended the establishment of a system of appeals. As the Report makes clear, the

⁸⁹ The Commonwealth Immigrants Act 1962 imposed immigration controls for the first time on citizens of the British Commonwealth.

⁹⁰ Aliens (Appeals) Order 1970 SI 151/1970. Section 14 of the Immigration Appeals Act 1969 provided for appeals in connection with the admission and removal of aliens to be made under the Aliens Registration Act 1914.

⁹¹ The Immigration Act 1971 not only established appeal rights but consolidated and extended immigration controls generally, assimilating Commonwealth citizens to the position of ‘aliens’.

⁹² Wilson Committee, *The Wilson Report* (Chapter 1, n 13).

⁹³ *ibid*, p 1.

impetus for the establishment of an appeals system for Commonwealth citizens was grounded in alleviating fears of racial discrimination created by the imposition of immigration controls on them in 1962.⁹⁴ In relation to other migrants, designated in the Report as ‘aliens’, it again focused on the value for public confidence that an appeals system would bring, rather than any particular failure of justice in the current system.⁹⁵ The Report included the following recommendations: i) appeal rights should be provided for both Commonwealth citizens and ‘aliens’ in relation to: exclusion at the port of entry, exclusion prior to entry, expulsion following entry, refusals to revoke exclusion orders, destination of expulsion, and conditions of entry;⁹⁶ ii) notice and the reasons for the decision would be given to the refused migrant;⁹⁷ iii) notice of appeal should then be given with a specified timeframe and grounds of appeal lodged;⁹⁸ iv) no fees should be due for the lodging of an appeal;⁹⁹ v) a migrant should be entitled to assistance (not necessarily legal) in the preparation of his or her case but there is no entitlement to legal funding, except in the case of deportation appeals;¹⁰⁰ vi) there should be a two-tier system of appeal with adjudicators appointed by the Home Office conducting the initial appeal, with onward appeal to an Immigration Appeal Tribunal (with the leave of adjudicators or

⁹⁴ *ibid*, pp 27-28. There had been proposals for judicial appeals to be introduced into the Commonwealth Immigrants Bill 1962 but these had been rejected in Parliament: HL Deb 2 April 1962, vol 239, cols 6-15. It has been suggested that the move towards the acceptance of a migration appeals system is connected with the change in attitude to administrative law more generally driven by the Franks Report on *Administrative Tribunals and Enquiries* Cmnd 218: see Juss, *Immigration, Nationality and Citizenship* (Mansell 1993), p 125.

⁹⁵ Wilson Committee, *The Wilson Report* (Chapter 1, n 13) p 28. See further, critique of the Report’s conclusions in Chapter 9.

⁹⁶ See *ibid*, Part IX.

⁹⁷ *ibid*, para 160

⁹⁸ *ibid*, paras 161-162

⁹⁹ *ibid*, para 163

¹⁰⁰ *ibid*, paras 161, 177-178.

the Tribunal); vii) there may be an oral hearing before the adjudicator if it is desired that oral representations should be made on behalf of the appellant; viii) in all cases interpretation should be provided; ix) deportation appeals other than those relating to failure to comply with conditions of entry should go directly to the Tribunal, otherwise, leave to appeal to the Tribunal should be granted where an appellant has extant entry clearance, where an adjudicator believes there is a genuine asylum claim, or on a point of law; x) where an appellant is unsuccessful before an adjudicator, an appeal to the Tribunal should not be suspensive of expulsion; xi) there should be no onward appeal to the ordinary courts but judicial review lies in respect of the decisions of the adjudicators and the Tribunal.¹⁰¹

2.2.3 The Immigration Appeals Act 1969 and IA 1971

As noted earlier, the legislation following the Wilson Report¹⁰² was largely modeled on the scheme it had proposed.¹⁰³ Macdonald writing in 1983 comments on the ‘narrow compass’ of the appellate system inherited from the Wilson Report.¹⁰⁴ In his view, the new appeals system did not ‘impose substantial checks on the power of immigration officers and the Home Secretary. The Committee’s emphasis was not on justice being done, but on justice being seen to be done.’¹⁰⁵ That said, the majority of

¹⁰¹ ibid, para 174.

¹⁰² The Immigration Appeals Act 1969 (as repealed and replaced by IA 1971). The rules of procedure for adjudicators and Tribunal were contained in the Immigration Appeals (Procedure) Rules 1972 (SI 1972/1784) and rules regarding the service of notices were contained in the Immigration Appeals (Notices) Regulations 1972 (SI 1972/1683).

¹⁰³ This was acknowledged by the Home Office: Home Office, *Review of Appeals under the Immigration Act 1971: a discussion document*.

¹⁰⁴ Ian Macdonald, *Immigration Law and Practice* (1st edn, Butterworths 1983), p 269.

¹⁰⁵ ibid. For further criticism of the system see, eg, Juss, *Immigration, Nationality and Citizenship* (n 94), ch 5.

migration status decisions originally carried a right of appeal,¹⁰⁶ although not all appeals were held in the UK or suspended removal.¹⁰⁷ Appeal was only permitted from outside of the UK for those refused entry clearance, those refused leave to enter and who had no entry clearance (this included asylum seekers who had claimed on arrival), and those refused the revocation of a deportation order.¹⁰⁸ There were no appeal rights arising from deportation decisions following the recommendation of a criminal court and from any decision taken on grounds of national security.¹⁰⁹ Importantly, appeal rights were also excluded from refusals to vary leave where the application to vary it was made after the expiry of the existing limited leave. Overstayers, therefore, did not have a right of appeal unless and until a removal decision was made (originally appealable under s 17 IA 1971).¹¹⁰

There were three grounds of appeal under IA 1971,¹¹¹ namely that the migration status decision was wrong in law,¹¹² not in accordance with the rules, or a discretion

¹⁰⁶ See Care, *Migrants and the Courts*, p 19. For a list of appealable decisions, see Macdonald, *Immigration Law and Practice 1st edn* p 272 and ss 12-23 and Schedule 5 of IA 1971 as enacted.

¹⁰⁷ s 13 IA 1971.

¹⁰⁸ See further Gina Clayton in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Brill 2010), p 400: 'The existence and effectiveness of a right of appeal is a key element in the impact of entry clearance on the formation of the extraterritorial legal border...'

¹⁰⁹ See further Chapter 6. The decision to exclude national security cases from the appeals process does not follow the recommendation of the Wilson Report which advised that only political decisions should be excluded and security cases should be held in private but within the appeals system. For a complete list of excluded decisions, see Macdonald, *Immigration Law and Practice 1st edn*, p 273.

¹¹⁰ There were, however, no appeal rights for those migrants subject to an expulsion decision for illegal entry: ss 12-23 and Schedule 5 IA 1971. The basis of the distinction was that the former group had been granted leave to enter the UK and so had a right to be heard before expulsion: Ian A. Macdonald and Ronan Toal, *Immigration law and practice in the United Kingdom* (8th edn, LexisNexis 2010), p 1719.

¹¹¹ The powers of the appellate authorities (adjudicators and tribunal) were contained in s 19 IA 1971 as enacted.

should have been exercised differently.¹¹³ The appellate authorities were expressly entitled to review any determination of a question of fact on which the decision under appeal was based.¹¹⁴ An appeal restricted to arguing that on the facts of the case there was no power in law to remove existed in relation to removal of illegal entrants or those who had entered in breach of a deportation order.¹¹⁵ In terms of onward appeal, following the recommendations of the Wilson Report there was a two-tier structure under IA 1971: adjudicators constituted the first tier and the Immigration Appeal Tribunal (IAT) was designated as the appeal tribunal. There was no onward appeal to the ordinary courts from decisions of the IAT but only judicial review of the decisions of the appellate authorities. Appeal to the IAT contained a leave requirement.¹¹⁶ Rule 14(2) of the procedural rules required leave to be granted ‘(a) if the authority is satisfied that the determination of the appeal turns upon an arguable point of law’ or where the authority is satisfied that the appellant will face persecution contrary to the Refugee Convention if removed. Macdonald, writing in 1983, noted that the meaning of ‘arguable’ as interpreted by the IAT was a high threshold, closer to that of ‘bound to win’ and that, as a result,

¹¹² This was construed broadly to include public law principles: see Macdonald, *Immigration Law and Practice 1st edn*, pp 280-1.

¹¹³ s 19(1)(a)(ii) IA 1971.

¹¹⁴ *ibid*, s 19(2). In other words, the jurisdiction of the appellate authorities was given over the merits of decisions. This provision was replicated in the Immigration and Asylum Act 1999, Schedule 4, para 21(3) and since NIAA 2002, whilst no longer expressly set out in statute, the ability of the tribunal to consider the merits of migration status decisions is implicitly present in provisions on evidence: see Ian Macdonald and Francis Webber, *Macdonald's Immigration Law and Practice* (6th edn, Butterworths 2005). Section 85(4) NIAA 2002 as enacted requires anything relevant to the substance of the decision to be considered.

¹¹⁵ *ibid*, s 16(1)(a) and (b). However, the restricted rights of appeal in s 16(1)(a) and (b) were ‘more or less dead letters, because in addition to the restricted grounds of appeal, no one may exercise the right while they remain in the UK.’ Macdonald and Blake, *Immigration Law and Practice in the United Kingdom 4th edn*, p 568.

¹¹⁶ rule 14 of Immigration Appeals (Procedure) Rules 1972 (SI 1972/1784). Although leave was required to be granted where an adjudicator had dismissed an appeal brought by a holder of entry clearance who had been refused entry: Macdonald, *Immigration Law and Practice 1st edn*.

there has been ‘an enormous increase in the number of applications for judicial review, applicants no doubt hoping that judges will do the Appeal Tribunal’s job despite their more limited jurisdiction.’¹¹⁷ There was a further discretion to grant leave where rule 14(2) did not apply, for example, where overwhelming new evidence had become available.¹¹⁸ Appeals to the IAT were not originally restricted to questions of law and could receive new evidence. However, Macdonald writing in 1983 noted that although the IAT was entitled to consider questions of fact it acted ‘more as a review body of questions of fact and there is never a total rehearing of the appeal.’¹¹⁹ Macdonald observes that the most important document before the IAT on questions of fact was the record of proceedings kept by the adjudicator under r 40 of the procedure rules¹²⁰ which was received as evidence.¹²¹

2.2.4 Subsequent amendment of IA 1971

Subsequent to IA 1971, there followed a number of amendments to the statutory appeals scheme. In 1981, a Home Office discussion document was published, its aims being to reduce costs and cut delays.¹²² However, it was not until 1988 that IA 1971 was amended for first time.¹²³ The clear intention of the amendment was to limit appeal

¹¹⁷ *ibid*, p 307.

¹¹⁸ *ibid* p 307, citing *R v Immigration Appeal Tribunal, ex p Jeyaveerasingham* [1976] Imm AR 137.

¹¹⁹ Macdonald, *Immigration Law and Practice 1st edn*, p 310.

¹²⁰ Rule 40 provides: ‘The appellate authority shall cause a summary of the proceedings before it to be taken, except insofar as a record of them is kept by means of shorthand notes or by mechanical means.’

¹²¹ r 18(1) Procedure Rules.

¹²² Home Office, *Review of Appeals under the Immigration Act 1971: a discussion document*. It was not acted upon.

¹²³ The procedure rules were amended in 1984 by virtue of Immigration Appeals (Procedure Rules) 1984 (SI 1984/2041) and Immigration Appeals (Notices) Regulations 1984 (SI 1984/2040)

rights.¹²⁴ Section 5 of the Immigration Act 1988 drastically curtailed the right of appeal against a decision to expel overstayers (or other breaches of conditions of leave) if the migrant last entered the UK fewer than seven years¹²⁵ before the decision.¹²⁶ Therefore, in these cases, as of 1 August 1988 the tribunal was restricted to considering whether there was a power in law to make the deportation order for the reasons stated in the notice of decision, for example, where it was claimed that the individual targeted was in fact a British citizen or had a right to remain in another capacity.¹²⁷ Accordingly, it was not possible for the tribunal to examine decisions on the basis of their compliance with the Immigration Rules, statute, fairness, or to examine whether a discretion should have been exercised differently.¹²⁸ In practical terms, this meant that once it had been accepted that the appellant was an overstayer who had been in the UK under seven years, the appeal would be dismissed since the adjudicator was prevented from adjudicating on the merits of the case. Consequently, '[a]ll overstayers, whatever their reason for failing to comply with the restrictions of their limited leave ... face[d] the daunting prospect of being deported without a full hearing of the circumstances that led to the immigration offence.'¹²⁹ Appeals made by overstayers were, therefore, rendered effectively meaningless by the 1988 reforms.

¹²⁴ See *R v Secretary of State for the Home Department Ex p Malhi* [1991] 1 QB 194 (CA), 943.

¹²⁵ The seven year period has been criticised as arbitrary: Chris Platt, *The Immigration Act 1988: A discussion of its effects and implications*, Policy Paper in Ethnic Relations No.16 (1991).

¹²⁶ s 5(2) Immigration Act 1988.

¹²⁷ s 5(1) Immigration Act 1988.

¹²⁸ See, eg, *R v Secretary of State for the Home Department Ex p Malhi* (n 124) and *Oladehinde and Alexander v SSHD* [1990] 3 WLR 797 (HL).

¹²⁹ Platt, *The Immigration Act 1988: A discussion of its effects and implications*, Policy Paper in Ethnic Relations No.16.

In relation to asylum seekers, the 1988 reforms contained an exemption whereby the appellate authorities could determine whether expulsion would be contrary to the UK's obligations under the Refugee Convention.¹³⁰ However, if it was found that an individual did not meet the definition of a person entitled to refugee status under the Convention, the effect of section 5 of the Immigration Act 1988 was that the Home Office's refusal of compassionate factors militating against expulsion (and leading to a grant of 'Exceptional Leave to Remain') could not be considered by the adjudicator. As Chris Platt notes, section 5 had a significant and detrimental effect on asylum seekers given that by the late 1980s far more asylum seekers were being granted Exceptional Leave to Remain than refugee status: for example, in 1986, 2332 applicants were granted exceptional leave to remain while only 459 were granted refugee status.¹³¹ However, in 1993 appeal rights were expanded for asylum seekers. Faced with legal challenge in Strasbourg in relation to the IA 1971's failure to provide suspensive appeals from a decision to refuse asylum,¹³² the Asylum and Immigration Appeals Act 1993 introduced rights of appeal before removal for the majority of asylum seekers (including those who faced removal to an EU Member State through which they had travelled to get to the UK under ad hoc arrangements pre-dating the Dublin Convention).¹³³ Yet, the 1993 Act also

¹³⁰ Immigration (Restricted Right Appeal against Deportation) (Exemption) (No 2) Order SI 1988 1203, Article 2(a) and 3(b).

¹³¹ Platt, *The Immigration Act 1988: A discussion of its effects and implications*, Policy Paper in Ethnic Relations No.16 (n 129).

¹³² See *Vilvarajah v United Kingdom* (1991) 14 EHRR 248. In the event the ECtHR agreed with the British Government's submissions that there was no violation of Articles 3 and 13 since judicial review was an effective remedy. The Asylum and Immigration Appeals Act 1993 was nonetheless passed.

¹³³ Asylum and Immigration Appeals Act 1993, s 8. The 1993 Act established a special regime for asylum appeals: Asylum and Immigration Appeals Act 1993, Schedule 2, para 1. The primary distinguishing feature of the asylum appeals regime was its speed; it took precedence over other appeals. Also an appeal to the IAT was precluded where the adjudicator (termed a 'special

removed the appeal rights of visitors and short-term students who had been refused entry clearance or leave to enter, and all applicants refused entry clearance or leave to enter who did not possess requisite documents or necessary age or nationality qualifications.¹³⁴ Following the Treaty on European Union in 1993, which established EU citizenship, appeal rights were created in respect of migration status decisions against EEA nationals and their family members in 1994.¹³⁵

In 1996, the Asylum and Immigration Appeal Act 1996 abolished in-country appeal rights for removal to ‘safe’ EU countries¹³⁶ under the ad hoc arrangements preceding Dublin Convention.¹³⁷ The 1996 Act also amended the ‘without foundation’

adjudicator’) upheld the Secretary of State’s certificate that the appeal was ‘without foundation’ (Asylum and Immigration Appeals Act 1993, Sch 2, para 5(3): an appeal is ‘without foundation’ where it does not raise any issue as to the UK’s obligations under the Refugee Convention; or it is otherwise frivolous and vexatious.’ Another effect of certification was to reduce the time limit for appealing to 2 days, instead of the usual 10. The Dublin Convention entered into force in 1997. It has since been superseded by a series of EU ‘Dublin’ regulations.

¹³⁴ Asylum and Immigration Appeals Act 1993, ss 10 & 11. Appeal rights for family visitors were reinstated by the Immigration and Asylum Act 1999. Other visitors, however, remained without a right of appeal.

¹³⁵ Section 7 Immigration Act 1988, which entered into force on 20 July 1994, exempted those exercising rights of free movement under the then European Community from migration control. Rights of Appeal were provided by Articles 15 and 18 Immigration (European Economic Area) Order 1994. Appeal rights from EU migration status decisions were consolidated at the EU level by Directive (EC) 2004/38 which was transposed into domestic law by the Immigration (European Economic Area) Regulations 2006 SI 2006/1003. Although appeal rights were not provided until 1994, EEA migrants seeking to enforce their directly effective rights to move within the EU were entitled to domestic judicial protection as a matter of EU law: *Case 41/74 Van Duyn v Home Office* [1974] ECR 1337, [7]. The *Van Duyn* case was referred to (what is now) the Court of Justice of the European Union by the Chancery Division of the English High Court.

¹³⁶ ss 2 and 3 of the Asylum and Immigration Act 1996. The list also contained Canada, Norway, Switzerland and the USA: Asylum (Designated Countries of Destination and Designated Safe Third Countries) Order 1996 SI 1996/2671, in force 1 October 1996. It has been suggested that the reason for removal of in-country appeal rights from this group was due to the ‘embarrassing number of successful appeals’ against the removal of asylum seekers to the ‘safe’ countries of the EU on the grounds that *refoulement* to third countries could not be ruled out: Macdonald and Toal, *Immigration law and practice in the United Kingdom*, 9th edn, p 1719.

¹³⁷ Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, Official Journal C 254, 19 August 1997. The Convention has subsequently been replaced by a series of regulations. Regulation No 604/2013 (Dublin III Regulation) is currently in force.

certification provisions, which had been first introduced in 1993, submitting cases selected on the basis of the country of origin, the timing of the claim, and the nature of claim (including that that claim is ‘manifestly unfounded’¹³⁸) to an expedited hearing without a right for an asylum seeker to apply to the IAT.¹³⁹ Further, the Special Immigration Appeals Commission Act 1997 established an appeal tribunal to hear cases involving national security. These cases had previously been denied a right of appeal and the extra-statutory advisory board that had been charged with reviewing decisions on national security had been criticised by the ECtHR in *Chahal v UK*.¹⁴⁰

Provisions of the ECHR relevant to migration (primarily Articles 8, protecting the right to family and private life, and 3 providing a right to freedom from torture and inhuman or degrading treatment or punishment), had been found to be applicable to migrants in the United Kingdom.¹⁴¹ However, a right of appeal on the basis of human rights was never part of the initial 1970 appeals scheme and in the late 1990s, there remained no appeal rights for those who could not claim to be refugees but whose removal arguably breached human rights. Judicial review challenges on human rights grounds (primarily articles 3 and 8 ECHR) had proliferated as a consequence.¹⁴² The appeals provisions of the Immigration and Asylum Act 1999, which came into force on the same day as rights protected by the ECHR were incorporated into domestic law under

¹³⁸ s 1(4)(b) Asylum and Immigration Act 1996.

¹³⁹ s 1 Asylum and Immigration Act 1996.

¹⁴⁰ *Chahal v United Kingdom* (1996) 23 EHRR 413.

¹⁴¹ See, eg, *Vilvarajah v United Kingdom*.

¹⁴² Macdonald and Toal, *8th edn*, fn 5 p 1464. Writing in 1997, Macdonald posits that following the judgment in *Chahal v United Kingdom*, it is arguable that where human rights are raised there is required to be a tribunal which can independently evaluate whether removal would breach the Convention: Ian Macdonald and Nicholas Blake *Macdonald's Immigration Law and Practice* (4th edn) Supplement, p 116.

the HRA 1998,¹⁴³ gave appeal rights to this group in providing a free-standing human rights (and racial discrimination) appeal right.¹⁴⁴ The 1999 Act also re-instated the appeal rights of family visitors¹⁴⁵ (these had been removed by the Asylum and Immigration Appeals Act 1993 – see above) but removed the appeal rights of overstayers facing expulsion from the UK who were now deemed to be in the same category as illegal entrants (as seen earlier, under the 1970 appeals system, illegal entrants were excluded from a full appeal on the merits).¹⁴⁶ It also introduced certification powers extinguishing appeal rights where transfer to another EU Member State or designated safe third country was envisaged, and the Secretary of State certified as manifestly unfounded a claim that such removal would breach a person's human rights.¹⁴⁷ The 1999 Act also introduced the so-called 'one-stop' appeal system¹⁴⁸ which sought to prevent multiple appeals, the rationale being that all appealable matters relating to migration status should be considered within one appeal.

In relation to leave to appeal to the IAT, this was amended by the 1984 procedural rules.¹⁴⁹ Rule 14(2)(a) removed the requirement that the decision 'turn on' an arguable point of law and required leave to be granted where the determination of the appeal

¹⁴³ 2 October 2000.

¹⁴⁴ The appeal right arose when an individual alleged that the decision-maker had violated his or her human rights, it did not depend on any decision made: Immigration Directorate Instructions, Chapter 12, Rights of Appeal, Section 1.3, National Archives July 2001: <https://web.archive.org/web/20010701124204/http://www.ind.homeoffice.gov.uk/default.asp?page=id=1203> <accessed on 1 January 2016>.

¹⁴⁵ IAA 1999, ss 59 and 60.

¹⁴⁶ Section 10 Immigration and Asylum Act 1999.

¹⁴⁷ Sections 11(3), 12(5) and 6, 72(2)(a) Immigration and Asylum Act 1999.

¹⁴⁸ Immigration and Asylum Act 1999, s 74 and ss 73-76; Immigration and Asylum Appeals (One-stop procedure) regulations 2000, SI 2000/2244.

¹⁴⁹ Immigration Appeals (Procedure Rules).

involves an arguable point of law save where the adjudicator ‘could properly have made the determination’ if she or he had not been guilty of a misdirection. Macdonald writing in 1987, noted that in response to the amendment, ‘there is no doubt that the Tribunal is more ready to grant leave than it was a few years ago.’¹⁵⁰ The Asylum and Immigration Appeals Act 1993 also curtailed the opportunities to judicially review decisions of the IAT¹⁵¹ by creating a right of appeal from the IAT to the Court of Appeal (or Court of Session if the case was decided in Scotland) with permission on a material point of law.¹⁵² The test for leave to appeal to the IAT was changed again by the procedural rules introduced in 2000.¹⁵³ Under the 2000 procedural rules the criteria for the grant of leave were whether the Tribunal was satisfied that the appeal would have a real prospect of success or there was some other compelling reason why the appeal should be heard.¹⁵⁴ This was a flexible test and would include the absence of an error of law but the existence of substantial new evidence.

2.2.5. Analysis

The period beginning with the Wilson Report in 1967 is seminal as it saw the birth of a system of administrative appeals in the modern sense of the word. This formed part of a more general move towards the establishment and development of a system of

¹⁵⁰ Ian Macdonald, *Immigration Law and Practice* (Butterworths 1987), p 460.

¹⁵¹ It broadened the scope for judicial review, however, by removing appeal rights in respect of entry clearance visitor and short term student applications.

¹⁵² The Asylum and Immigration Appeals Act 1993, s 9(1). Appeal only lay from a ‘final determination’ of the IAT. Otherwise judicial review remained the available remedy.

¹⁵³ SI 2000/2333.

¹⁵⁴ *ibid*, r 18(7)(a) and (b).

tribunals in the UK legal order¹⁵⁵ and the shift in perspectives leading to the modern acceptance of judicial tribunals as ultimate arbiters of individualised administrative decision-making.¹⁵⁶

Whilst the appeal system established in 1970 – based on the recommendations of the Wilson Committee – was criticised in various respects, it provided a right of appeal from most migration status decisions and, in particular, in those areas where conflict between the Secretary of State and migrants was most intense. There were, however, notable lacunae in the scheme of procedural protection provided by the initial appeals system, most significantly, rejected asylum seekers did not receive a right of appeal until 1993 (when the United Kingdom feared an adverse judgment in Strasbourg).¹⁵⁷ Moreover, legislative reform since 1970 further reduced the ambit of appeal rights, in particular, overstayers, visitors and short-term students received reduced protection. These reforms to the Wilson model highlight the politicisation of the appeals system and

¹⁵⁵ Satvinder Juss situates the Wilson Committee's decision to recommend immigration appeals in this climate: Juss, *Immigration, Nationality and Citizenship* (Chapter 5, n 94).

¹⁵⁶ See, in particular, the conclusions of the Franks Committee: Committee on Administrative Tribunals and Enquiries, *Report of the Committee on Administrative Tribunals and Enquiries* (Cmnd 218, 1957). Tribunals were established in the UK following the intensive social legislation after the end of the Second World War. They were intended to provide cheaper, simpler and quicker dispute resolution than the ordinary courts. The initial tribunals covered subject matter related to the welfare state (e.g. contested claims to benefits, mental health, the allocation of pupils to schools, taxation) but quickly expanded to other areas such as employment, competition, property and planning, and immigration. See further (Wade and Forsyth, *Administrative Law*, p 763). The question of whether tribunals would be administrative or judicial was determined by the Franks Committee, commissioned in 1955, which positioned tribunals firmly within the judicial fold. In its view: 'tribunals should properly be regarded as machinery provided by Parliament for adjudication rather than as part of the machinery of administration. The essential point is that in all these cases Parliament has deliberately provided for a decision independent of the Department concerned.' As for a comparison between tribunals and courts, see, eg, Hale LJ (as she then was) in *Saleem v Secretary of State for the Home Department* [2001] 1 WLR 443 (CA): '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. Their determinations are no less binding than those of the ordinary courts: the only difference is that tribunals have no direct powers of enforcement and, in the rare cases where this is needed, their decisions are enforced in the ordinary courts.'

¹⁵⁷ See further discussion of the impact of the ECHR on rights of appeal in Chapter 8.

the attempt, which reappears in relation to more recent changes, to achieve substantive anti-migration policy goals through procedural reform.

2.3. 2002-2014

2.3.1. *NIAA 2002*

Despite the frequency of the amending statutes described above, further legislation was introduced rapidly after the significant changes brought about by the 1999 Act. The Nationality Immigration and Asylum Act 2002 (NIAA 2002) attempted to rationalise the previous piecemeal amendments by creating a generic right of appeal against an ‘immigration decision’ as defined (s 82), and defining and bringing together grounds of appeal (s 84). However, it did little to render the system less stratified: the main appeal rights under the previous system were retained,¹⁵⁸ but the free-standing right of appeal on human rights or race discrimination grounds was abolished¹⁵⁹ as well as under-used rights such as rights of appeal against destination and against the decision that a person requires leave to enter. Excluded appeal rights included refusal of asylum where a decision to remove is not made or where the asylum seeker had leave of a year or less¹⁶⁰ (in practice refused asylum seekers would almost invariably be granted a right of appeal as the decision to remove would be made in tandem), refusals to treat representations as a fresh human rights or asylum claim, refusals to grant a work permit, impositions of conditions of leave or refusal to revoke conditions, grants of a lesser period of leave than sought, and refusals to grant leave to a person who had no leave at the date of

¹⁵⁸ See Macdonald and Toal, 8th edn, 18.12-18.13.

¹⁵⁹ s 114(1) NIAA 2002.

¹⁶⁰ s 83 NIAA 2002 provides a right of appeal in situations where leave of more than year has been granted.

application.¹⁶¹ In addition to its rationalisation of the appeals system, controversially, NIAA 2002 also extended the certification powers of the Secretary of State. Certification under NIAA 2002 extinguished the suspensive right of appeal in respect of any migrant (not just those being removed to safe third countries as before) whose asylum or human rights claim was certified as ‘clearly unfounded.’¹⁶² Equally controversial was the replacement of judicial review of the Immigration Appeal Tribunal’s refusal of permission of appeal by statutory review: a purely paper review subject to stricter time limits than judicial review.¹⁶³ Finally, the jurisdiction of the Immigration Appeal Tribunal (the second-tier authority introduced by IA 1971), which, since the institution of appeal rights in 1970, had been both facts and law, was reduced to points of law only.¹⁶⁴

2.3.2. The Asylum and Immigration (Treatment of Claimants) Act 2004 and Immigration Asylum and Nationality Act 2006

Further amendments followed the structural changes of NIAA 2002. The Asylum and Immigration (Treatment of Claimants) Act 2004 replaced adjudicators and the

¹⁶¹ See also Macdonald and Toal, 8th edn, 18.17. For a full list of excluded decisions under NIAA 2002 see MacDonald pp 1474-1476 18.22. The Immigration, Asylum and Nationality Act 2006 further excluded categories of entry clearance application from having a right of appeal.

¹⁶² s 94. Macdonald and Toal, *Immigration law and practice in the United Kingdom*, 9th edn, p 1721.

¹⁶³ s 101(2) NIAA 2002. See further *ibid*, p 1721. In *R (G) v Immig Appeal Tribunal* [2004] EWCA Civ 1731, [2005] 1 WLR 1445 (upholding the findings of the Administrative Court at [2004] EWHC 588 (Admin)) it was held that statutory review provided adequate and proportionate protection of the rights of asylum seekers so that Administrative court could decline to hear an application for judicial review which had been or could have been subject of statutory review. The court held that fact that migrants have no vested right to remain in the UK provides objective justification for any discrimination involved in the restriction of review rights). See [35]: ‘There are two related reasons why we consider that the discretionary denial of judicial review in cases such as the present is objectively justified. One is that, as article 5(1)(f) of the ECtHR recognises, non-nationals seeking entry or asylum stand in a fundamentally different legal situation from those who can enter or remain by right. The courts will so far as possible ensure due process for them, but due process does not necessarily mean the same process for all. The other reason is the one we have already given: that s.101, while it differs from other forms of recourse to the courts, is not deficient or unjust to an extent requiring alternative recourse by way of judicial review.’

¹⁶⁴ s 101(1) NIAA 2002.

Immigration Appeal Tribunal with a single-tier appellate authority.¹⁶⁵ It created the Asylum and Immigration Tribunal (AIT) to hear all migration appeals (except national security appeals¹⁶⁶). The most contested aspect of the legislation as introduced to Parliament was clause 11 which attempted to oust judicial review or appeal of the AIT's decisions except on a reference from AIT. Following widespread condemnation,¹⁶⁷ the clause was defeated in the House of Lords. It was replaced by provisions to permit the AIT to reconsider its decision and re-make it if a material error of law were found.¹⁶⁸ The 2004 Act also extended the presumptions of safety for the purposes of certifying, and thereby extinguishing, appeal rights that would otherwise exist.¹⁶⁹ Two years later, the Asylum and Nationality Act 2006 abolished rights of appeal except on human rights or race discrimination grounds in respect of a number of entry clearance decisions.¹⁷⁰ This entered into force in relation to applications to enter the UK for work and study (applications under the Points Based System) on 1 April 2008.

2.3.3. The Tribunal Courts and Enforcement Act 2007

The structure of the immigration appeals system was again overhauled by the Tribunal Courts and Enforcement Act 2007 (TCEA 2007)¹⁷¹ which abolished the AIT

¹⁶⁵ s 26 Asylum and Immigration (Treatment of Claimants) Act amending s 81 NIAA.

¹⁶⁶ See further Chapter 4, n 35.

¹⁶⁷ See, eg, Constitutional Affairs Committee's Asylum and Immigration Appeals, Second Report of Session 2003-4.

¹⁶⁸ s 103A NIAA. A right of onward appeal to the Court of Appeal existed following the Tribunal's refusal of reconsideration: s 103B(1).

¹⁶⁹ Macdonald and Toal, 8th edn p 1477 18.23. Immigration, Asylum and Nationality Act 2006 introduced rights of appeal for refugees who were no longer considered to qualify for that status following a five year review and against revocation of refugee status.

¹⁷⁰ Immigration Asylum and Nationality Act 2006, s 4.

¹⁷¹ The TCEA 2007 entered into force on 15 February 2010) (following the Report of the Review of Tribunals: Sir Andrew Leggatt, *Tribunals for Users, One System, One Service* (2001); and the

and replaced it (and other disparate administrative tribunals) with a single, unified two-tier tribunal: the First tier Tribunal (FTT) and the Upper Tribunal (UT). Immigration and asylum cases were designated to the Immigration and Asylum Chambers of the FTT and UT. A right of appeal exists from the FTT to the UT on a material point of law.¹⁷² Onward appeal from the UT to the Court of Appeal is subject to the second tier appeals test which requires an applicant to demonstrate the existence of an important point of principle or practice or some other compelling reason for the appeal to be heard.¹⁷³ Unappealable decisions of the Upper Tribunal¹⁷⁴ may be judicially reviewed if the second tier appeals test is satisfied.¹⁷⁵

The TCEA 2007 also conferred on the UT jurisdiction to exercise judicial review functions.¹⁷⁶ The Act required the Lord Chief Justice to specify the classes of case to be transferred. Originally, age dispute judicial reviews and the refusals of submissions that further representations amounted to a fresh claim were transferred.¹⁷⁷ This was extended dramatically by the Crime and Courts Act 2013 such that since 1 November 2013, the majority of immigration and asylum judicial reviews will be commenced and heard in the

White Paper: Secretary of State for Constitutional Affairs and Lord Chancellor, *Transforming Public Services: Complaints, Redress and Tribunals* (Cm 6243, 2004).

¹⁷² s 11(1) TCEA 2007.

¹⁷³ s 13(6) TCEA 2007. The Court of Appeal subsequently interpreted the test in *PR (Sri Lanka) v SSHD* [2011] EWCA Civ 988, [2012] WLR 73 and *JD (Congo) v SSHD* [2012] EWCA Civ 327, [2012] 1 WLR 3273.

¹⁷⁴ ie, those excluded by TCEA 2007.

¹⁷⁵ The application of the second tier appeals test in these circumstances was decided by the Supreme Court in *R (on the application of Cart) v Upper Tribunal* [2011] UKSC 28, [2012] 1 AC 663.

¹⁷⁶ s 15 TCEA 2007.

¹⁷⁷ Fresh claims transferred on 17 October 2011.

Upper Tribunal.¹⁷⁸ The cases in which the Administrative Court retains jurisdiction are exhaustively defined, they include challenges to legislation, including the Immigration Rules and unlawful detention claims.¹⁷⁹

2.3.4. Analysis

Despite the significance of the reforms in the Immigration and Asylum Act 1999, appeals were again the focus of legislative action in NIAA 2002. In relation to rights of appeal, the main aim of the legislation was rationalisation of the cohort such that a right of appeal arose only where the Secretary of State made an ‘immigration decision’ (this was defined by NIAA 2002 as an exhaustive list of migration status decisions) rather than there being separate rights of appeal against various appealable decisions. This did not materially diminish the pool of appeal rights; the changes being primarily of form rather than substance.¹⁸⁰ However, the effect of NIAA’s rationalisation of the appeals system was to focus attention on the Secretary of State’s decision as the trigger of a right to appeal. This focus on the administrative decision has been a constant feature of the system since its inception. However, as will be explored in subsequent chapters, the Immigration Act 2014 abandons this, instead focusing on the rights in issue (see below).¹⁸¹ An outline of the main changes to appeal rights is provided below before

¹⁷⁸ See The Crime and Courts Act 2013 (Commencement No 4) Order 2013 (SI 2013/2200), The Tribunal Procedure (Amendment No 4) Rules 2013 (SI 2013/2067); The First-tier Tribunal and Upper Tribunal (Chambers) (Amendment No 2) Order 2013 (SI 2013/2068) and The Upper Tribunal (Immigration and Asylum) (Judicial Review) (England and Wales) Fees (Amendment) Order 2013 (SI 2013/2069).

¹⁷⁹ Direction given in accordance with Pt 1 of Sch 2 to the Constitutional Reform Act 2005 and s18 of the Tribunal Courts and Enforcement Act 2007.

¹⁸⁰ As seen above, in this period entry clearance decisions were the only persistent focus of the attrition of rights of appeal.

¹⁸¹ See further Macdonald and Toal, *Macdonald's Immigration Law and Practice*, Preface p ix (footnotes omitted) ‘Over the years there has been an expansion of appeal rights... However, since

subsequent chapters move to consider the compatibility of these changes with the claims made in Chapters 2-4.

2.4. Current appeals system: Immigration Act 2014

As noted above, rights and grounds of appeal in NIAA 2002 are fundamentally changed by IA 2014 as it de-couples the right to appeal from distinct migration status decisions.¹⁸² Section 15 IA 2014 replaces sections 82 and 84 NIAA 2002 and repeals sections 83 and 83A NIAA 2002. Rather than – as had been the case since 1971 – deriving appeal rights from the type of migration status decision in issue,¹⁸³ appeal rights are governed under the IA 2014 amendments by the existence or otherwise of an application made in relation to specific substantive rights. In summary, appeal rights under the amended s 82 NIAA 2002 exist only where an application is made based expressly or impliedly on human rights under the ECHR or where an asylum or humanitarian protection claim (or a decision to revoke a protection status) is made. Appeal rights are also retained in relation to EEA decisions by virtue of the Immigration (EEA) Regulations 2006.¹⁸⁴ The grounds of appeal in the amended s 84 NIAA mirror the appeal rights in the amended s 82 such that the only grounds that may be relied on are that the migration status decision

2002 there has been a slow whittling down of appeal rights and their suspensive effect by successive governments. This has culminated in the radical changes proposed by the Immigration Act 2014... The changes are not only far reaching but also mark a set back to one of the fundamental and constitutional principles of our legal system.’

¹⁸² Except EEA migration status decisions, which are retained in the Immigration (EEA) Regulations 2006. Regulation 26 provides a right of appeal against an EEA decision, which is defined in para 2 to include a person's entitlement to be: admitted to the UK, to be issued with, or have renewed, or not to have revoked, a registration certificate, residence card, derivative residence card, document certifying permanent residence or permanent residence card; a person's removal from the UK, or the cancellation of their right to reside in the UK under reg 20A.

¹⁸³ Under s 82 NIAA 2002 as enacted the types of migration status decision generating appeal rights were listed and defined as ‘immigration decisions’. See further Chapter 4.

¹⁸⁴ See n 182.

challenged violates fundamental rights under the ECHR or the UK's international obligations in relation to refugee or humanitarian protection.¹⁸⁵ The amended s 84 repeals the majority of previous grounds of appeal which included that the decision was not in accordance with the law, was not in accordance with the immigration rules, was racially discriminatory, or that a discretion conferred by the immigration rules should have been exercised differently.¹⁸⁶ Section 85 NIAA is amended to prevent appellants raising new grounds of appeal that are not already the subject of the migration status decision. The provisions of IA 2014 relating to rights of appeal were brought into force in respect of certain classes of migrant on 20 October 2014 (students and those subject to deportation orders)¹⁸⁷ and 2 March 2014 (other categories of economic migration).¹⁸⁸ They entered into force generally on 6 April 2015.¹⁸⁹

¹⁸⁵ In EEA cases, migrants may also rely on EU grounds of appeal (n 182).

¹⁸⁶ It is considered, however, that it will remain possible to rely on the grounds repealed by IA 2014 since in order to satisfy human rights a decision must be 'in accordance with the law'. In relation to Article 8 ECHR, this is the third stage of the '*Razgar* test' (*R (on the application of Razgar) v Secretary of State for the Home Department (No 2)* [2004] UKHL 27, [2004] 2 AC 368). See further, eg, Colin Yeo, *Immigration Act 2014* (2014). A separate question is whether in certain cases human rights will be engaged at all (see, eg, *Patel v Secretary of State for the Home Department* [2013] UKSC 72, [2014] AC 651).

¹⁸⁷ I, articles 10 & 11(1)(a), (b) and (c), subsequently amended by SI 2015/371.

¹⁸⁸ Tiers 1, 2 and 5. SI 2015/371.

¹⁸⁹ *ibid.* Transitional provisions mean that the precursor regime continues to operate alongside the IA 2014 appeals system in respect of some migration status decisions taken before 6 April 2015.

MERITS REVIEW OF MIGRATION STATUS DECISIONS IN THE UK I: APPEALS

Having provided a historical overview of the UK's system of appeals and review from migration status decision-making, as noted earlier, the purpose of this chapter and the subsequent one is to consider the compatibility of the current UK model of adjudication of migration status decision-making with the specific requirements of the right to merits review set out in Chapter 4 (independence, *de novo* assessment and substantive remedy). This chapter examines the UK's statutory appeals system, with specific focus on three case studies (student visas as regulated by the Points Based System,¹ visit visa applications, and deportation decision-making) and Chapter 7 analyses the compatibility of UK judicial review and administrative review. It is argued that the current provision of appeal rights and judicial review in the UK does not satisfy the standards of fair treatment elaborated in Chapters 2 and 4. The reasons for this claim in respect of appeals is elaborated below.

1. Statutory right of appeal to the First-tier Tribunal

The current system of migration appeals has been sketched in outline in the previous chapter. As has been seen, the IA 2014 has removed rights of appeal from the majority of migration status decisions. The powers of the Immigration and Asylum

¹ See 2.1 below.

Chamber of the First-tier Tribunal (FTT)² have also been set out in Chapters 4 and 5. As will be explained below, in structural terms the FTT generally meets the criteria set out in Chapter 4. However, whilst it has the institutional capability, its jurisdiction over migration status decision-making is limited. As such, there are migration status decisions that involve the exercise of judgment discretion but which are not afforded a right of appeal and thus do not meet the requirements of fairness set out in Chapter 2.

1.1. Institutional capability to provide merits review: the FTT

As noted above, in structural terms, appeals in the FTT meet the three components of merits review. In relation to the first criterion, independence, as is clear from the historical overview in Chapter 5, since 1970 there have been rights of appeal from migration status decisions to a body separate from the Home Office but with varying degrees of independence. The scheme of the IA 1971 provided for the appointment of adjudicators (the first tier of the statutory appeal jurisdiction) to be undertaken by the Home Secretary,³ however, the current first-tier body, the FTT, is independent of the executive:⁴ judges and other members⁵ are appointed by a non-

² Established under the Tribunals Courts and Enforcement Act 2007. See further Chapter 4.

³ Their conduct of appeals received widespread criticism: see, eg, Macdonald, *Immigration Law and Practice 1st edn*), p 271 citing the JCWI Annual Report for 1975-6: 'The attitudes of adjudicators continue to appal us with the extraordinary disparity they display in their attitude towards the appellant and respondent.' See further Chapter 4. This was also the case under earlier statutory schemes. Under the 1905 Aliens Act regime the boards hearing appeals were directly appointed by the Home Secretary.

⁴ The SIAC is also independent of the executive: its establishment as an independent body was a direct consequence of the ECtHR's finding in *Chahal v United Kingdom* (Chapter 5, n 140) that the predecessor review body lacked the necessary independence.

⁵ 'Other members' do not have legal qualifications. They were referred to as 'lay members' under the AIT regime pre-dating the establishment of the FTT.

departmental body, the Judicial Appointments Commission.⁶ The FTT is also independent in structural terms: its procedure rules declare the overriding objective as being to decide cases ‘fairly and justly.’⁷ In relation to the second criterion, full jurisdiction over the merits, the FTT may decide cases *de novo* as if it were the primary decision-maker and not restrict itself to a supervisory review.⁸ This includes, therefore, the ability to determine for itself the veracity of past facts, future risk and the credibility of the appellant and any other witnesses tendered or summoned to give evidence.⁹ Finally, in respect of the third criterion, the ability to make substantive decisions, the FTT may substitute its judgment on the merits for that of the administrative decision-maker.¹⁰ The FTT, therefore, provides merits review.

⁶ The Judicial Appointment Commission was established on 3 April 2006 through the Constitutional Reform Act 2005. The JAC recommends candidates for appointment as judges of the High Court and to all judicial offices listed in Schedule 14 of the Constitutional Reform Act 2005.

⁷ The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, r 2. SI 2014/2604.

⁸ See, eg, *ex parte Zaman* (Chapter 4, n 57) *per* Woolf J (as he then was): ‘...the Tribunal must consider the matter *de novo* on the material before it and not restrict itself to the form of review which this court embarks upon when it is considering an application for judicial review. That the Tribunal should recognise that this is its function, can be of great importance to appellants before it, particularly in cases such as the present when the adjudicator had an extremely difficult task in trying to come to a satisfactory conclusion on the conflicting material before him.’

⁹ The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 SI 2014/2604, r 14. In relation to national security, however, appeals in the SIAC are limited. See *Secretary of State for the Home Department v Rehman* (Chapter 4, n 35). Rehman was a Pakistani national admitted to work as minister of religion. After finding a link with an Islamist terrorist organisation, the Home Secretary made a deportation order against him on grounds of public security. SIAC overturned the decision but this was overruled by the Court of Appeal and upheld by the House of Lords. The House of Lords held that where assessing the interests of national security was in issue, the court was effectively limited to legality review because, as explained by Lord Hoffmann, the question before it effectively was ‘whether the particular issue can be properly decided by a judicial tribunal at all’ [52]. See also discussion in Chapter 4.

¹⁰ The SIAC also has the ability to make substantive decisions subject to the limitations described in n 9 above.

1.2. Attrition of rights of appeal

However, as noted above, the effectiveness in practice of the appeals system in satisfying the moral demands of fair treatment claimed in Chapter 2 is attenuated significantly by the absence of a right of appeal from many migration status decisions. As seen in Chapter 5, there has never been a right of appeal from every migration status decision: the provision of appeals has been piecemeal since the establishment of the generalised system in 1970. Further, since the first reforms to the appeals regime in 1988,¹¹ there has been a trend towards attrition of appeal rights; a process that has been accelerated and extended significantly by IA 2014. Currently, there are only rights of appeal in three areas of migration status decision-making: where there is an EEA decision (as defined),¹² where there is a human rights claim (as defined)¹³ and where there is a protection claim (as defined).¹⁴ Given the significant level of discretion in the majority of these migration status decisions,¹⁵ the argument of this thesis supports the provision of appeal rights in these cases. However, as will be examined in relation to the specific case studies below, it is argued that the current appeals regime provides too few opportunities to challenge migration status decisions on their merits.

2. Appeal rights: case studies

The remainder of this chapter focuses on three specific areas of migration status decision making to test the normative claims of the thesis in practice. As noted above, the three

¹¹ See Chapter 5 at 2.2.4.

¹² See Chapter 5 at 2.4.

¹³ *ibid.*

¹⁴ *ibid.*

¹⁵ See, Chapter 2 at 4.3.2 and below.

areas of migration status decision-making examined are: i) the Points Based System; ii) visit visa applications; and iii) deportation. These have been selected to provide a broad cross section of the divergent interests involved in migration status decision-making and because the issues they raise challenge the normative claims. Thus, the Points Based System governs economic migration and is premised on eradicating discretion from the decision-making process. On the basis of the claims made in the first part of the thesis, where discretion is absent or *de minimis*, a right of appeal is not necessary as a matter of principle since legality review is sufficient¹⁶ to ensure that justice is done and seen to be done as the decision-making is purely mechanistic in nature. However, as explored below, the conclusion does not follow where in practice, discretion remains embedded, or is re-introduced, in the decision-making process. In relation to visa applications for temporary visits to the UK, given that the decision is based on a number of discretionary criteria, on the normative claims of the thesis, there should be an appeal right from a refusal decision, despite the fact that the individuals are not territorially present in the decision-making state. Yet, currently there is no right of appeal from a refusal of a visit visa application, save where human rights are engaged. Finally, the wide-ranging ‘public good’ standard implicated in certain deportation decisions is arguably the most discretionary in nature of all migration status decisions. However, since 2012, there have been attempts to circumscribe this discretion and to limit rights of appeal. It is argued that the discretion remaining (coupled with the awesome nature of the power involved in deportation decision-making) warrants judicial oversight beyond legality review. The chapter takes each case study in turn. It first provides a brief outline of the regime in

¹⁶ Although, as explored in the previous chapter, the institutional constraints of judicial review mean that a right of appeal may be necessary to ensure effective access to justice in practice as well as in theory.

place and then considers whether it complies with the standards of access to justice and fair treatment advocated in the normative argument of the thesis.

2.1. Case study one: Points Based System

2.1.1. *Overview of the Points Based System*

The Points Based System (PBS) covers all migrants coming to, or residing in, the UK for work (including self-employment) and study. It was introduced in 2008 following the publication of a series of consultation documents.¹⁷ The PBS comprises five ‘tiers’, each tier catering for a different type of migration.¹⁸ To qualify under the various tiers of the PBS, applicants must score sufficient points, according to the particular criteria of the tier. The criteria include specified ‘attributes’ such as educational qualifications, as well as language and maintenance requirements.¹⁹ For example, in order to be granted leave to enter or leave to remain as a Tier 4 (General) Student, the route for migrants aged 16 or over who seek to study in the UK,²⁰ an applicant is required to score a specified number

¹⁷ These include the following: Home Office, *Controlling our Borders: Making Migration Work for Britain* (White Paper Cm 6472, 2005); Home Office, *Selective Admission: Making Migration Work for Britain* (Consultation, 2005); Home Office, *A Points-Based System: Making Migration Work for Britain* (Command Paper Cm 6741, 2006).

¹⁸ Tier 1: highly skilled workers, including entrepreneurs and investors; Tier 2: skilled workers with the offer of a job from the sponsor; Tier 3: unskilled workers; Tier 4: students (with the offer of a place from a sponsoring institution); Tier 5 – temporary workers. Tier 3 was never brought into force and on 25 March 2013 the Prime Minister, David Cameron, announced that it would be permanently shut down. Tiers 1-2 and 4-5 have been substantially revised since 2008.

¹⁹ The criteria of the PBS have been criticised for their complexity. See, eg, Clayton, *Textbook on Immigration and Asylum Law* (Ch 4, n 1), p 345: ‘The PBS is difficult to navigate successfully. Criteria for entry are set out in the immigration rules. The rules themselves must be cross-referenced with the appendices. There is additional lengthy guidance for each Tier and in relation to each application form...Guidance is subject to frequent change, raising questions of certainty and clarity...’

²⁰ Immigration Rules, para 245ZT.

of points by reference to criteria set out in separate appendices to the Rules.²¹ They are required to score thirty points under Appendix A, which covers the necessary ‘attributes’. Thirty points are scored if the student has a valid ‘Confirmation of Acceptance for Studies’ (CAS).²² It is indicated that points will only be scored for a CAS if an applicant provides a valid CAS reference number.²³ The Rules then proceed to define the circumstances in which a CAS and a CAS reference number will be considered valid.²⁴ In relation to the CAS, the validity criteria include timing requirements (such as the CAS being issued no more than six months before the date of the application)²⁵ and requirements relating to the academic institution at which the individual will study (for example, the institution must hold a Tier 4 sponsor licence).²⁶ It is further specified that the CAS will only be valid if certain mandatory information is provided on it.²⁷ Appendix A then enumerates the information required. The list includes the applicant’s name, date of birth, gender, nationality and passport number, the course’s title, level, start and end dates, and hours per week, the main study address, accommodation, fees and boarding costs, details of how the Tier 4 Sponsor has assessed the English language ability of the applicant, and details of any work placements relating to the course. In relation to the CAS reference number, the Rules specify that it will only be considered valid if the number matches an entry on the CAS Checking Service and it has not been withdrawn or

²¹ *ibid*, para 245ZV(b) & (c) and 245ZX(c) & (d) require: ‘a minimum of 30 points under paragraphs 113 to 120 of Appendix A’ and ‘a minimum of 10 points under paragraphs 10 to 14 of Appendix C.’

²² *ibid*, Appendix A, table 16.

²³ *ibid*, Appendix A, para 115A.

²⁴ *ibid*, Appendix A, para 116.

²⁵ *ibid*, Appendix A, para 116(a).

²⁶ *ibid*, Appendix A, para 116(d) and (e).

²⁷ *ibid*, Appendix A, para 116(f).

cancelled by the sponsor or the Home Office since it was assigned.²⁸ Having established the criteria of validity for the CAS and CAS reference number, the Rules then indicate further circumstances in which no points will be awarded for a CAS.²⁹ These include documentary requirements: the applicant is required to provide specified documents, namely those used to obtain the offer of a place,³⁰ and a number of further requirements relating to, *inter alia*, the applicant's nationality and the level of the course.³¹ There are also minimum academic requirements³² and a requirement that the sponsor has confirmed that the course in respect of which the CAS has been assigned represents academic progress from previous study.³³

In addition to scoring thirty points under Appendix A, applicants for the Tier 4 (General) Student route are also required to score 10 points under Appendix C, which contains the maintenance requirements. Appendix C indicates the level of funds required and the time periods within which the specified funds must be held.³⁴ The criteria further specify, *inter alia*, the currency funds must be held in, the form funds must be held in (cash, not other financial instruments), and in whose name the funds must be held. As with attributes under Appendix A, the Rules also specify the documents that must be

²⁸ *ibid*, Appendix A, para 117.

²⁹ *ibid*, Appendix A, para 118.

³⁰ *ibid*, Appendix A, para 118(a) and para 120-SD.

³¹ *ibid*, Appendix A, para 118(b).

³² *ibid*, Appendix A, para 120.

³³ *ibid*, Appendix A, para 120A.

³⁴ *ibid*, Appendix C, para 1A and 11.

provided.³⁵ The specifications include the information that must appear on the relevant documents, and the permitted types of document.³⁶

2.1.2. A right of appeal?

When the PBS was introduced, the Government argued that there was no need for a right of appeal from decisions made under the regime since it was based on objectively ascertainable criteria. This, it was argued, minimised scope for human judgment and administrative discretion and it was claimed that management systems and technology would bring decision-making to a particularly high standard, thereby obviating the need for independent merits review.³⁷ Whilst the mere existence of points themselves does not signify an absence of discretion,³⁸ it is hard to deny that the PBS has reduced administrative discretion. As will be evident from the Tier 4 (General) Student example given above, in general terms the requirements of the PBS are objectively verifiable and (save for paragraph 245ZV(k) discussed below) contain little room for the decision maker to exercise his or her judgment discretion. This stands in contrast to earlier systems regulating migrants' work and study in the UK. Preceding the PBS, decisions on leave for work and study involved highly subjective judgments. As Colin Yeo notes in relation to student applications, the standard reasons for refusal prior to the PBS were 'no intention

³⁵ *ibid*, Appendix C, paras 1B and 11.

³⁶ *ibid*, Appendix C, para 1B.

³⁷ See, eg, HL Deb 7 February 2006, col 534 Baroness Ashton of Upholland. For criticism of the PBS, see Helena Wray, 'The points based system: a blunt instrument' (2009) 23 JIANL 231.

³⁸ As Clayton notes: 'points are simply another way of saying that the applicant must meet all the requirements of the immigration rules.' Clayton, *Textbook on Immigration and Asylum Law* (Chapter 4, n 1), p 345 (10.3.1. Flexibility).

to follow the course,’ and ‘no ability to follow the course,’³⁹ both of which involved substantial judgment discretion. By contrast, at its inception, the PBS was widely considered to remove discretion and subjectivity in decision-making. As Lord Hope summarised in *Munir*:

[the] introduction of a points-based system has created an entirely different means of immigration control. The emphasis is now on certainty in place of discretion, on detail rather than broad guidance. There is much in this change of approach that is to be commended.⁴⁰

Thus, unlike the earlier system, the PBS was designed to award points on an ‘all or nothing’ basis for exhaustively defined and objectively verifiable attributes.

As noted earlier, the removal of discretion was recognized by the Government as relevant to appeals under the PBS. A Home Office Policy Paper from March 2006 argued that there would be no need for appeals from PBS decisions since administrative discretion would be removed from the decision-making process as decision-making shifted from a subjective to an objective approach.⁴¹ In the event, rights of appeal were not removed from all PBS decisions initially, but entry clearance PBS applications were

³⁹ Colin Yeo, ‘Genuine Students and ECO Interviews’ (*Free Movement immigration law blog*, 17 May 2015) <https://www.freemovement.org.uk/genuine-students-and-eco-interviews/?utm_source=FM+master+list&utm_campaign=27905d5128-RSS_EMAIL_CAMPAIGN_DAILY&utm_medium=email&utm_term=0_792133aa40-27905d5128-105095029&mc_cid=27905d5128&mc_eid=c4e8d2d30a> accessed 25 June 2015.

⁴⁰ *R (Munir) v Secretary of State for the Home Department* (Chapter 5, n 3), [42].

⁴¹ Home Office, *A Points-Based System: Making Migration Work for Britain* paras 52-53. The paper compared ‘the old system’ in which ‘decision[s] [are] based on a wide range of entry criteria, some of which are subjective, and therefore have recourse to appeal’ with the ‘new system’ whereby ‘[d]ecisions [are] made using an expanded points-based system and other criteria where possible, thus providing more consistency, and supported by administrative review where appropriate.’ See further Home Office, *Controlling our Borders: Making Migration Work for Britain* p 2.

denied an appeal right save on human rights grounds.⁴² Since the implementation of the appeals provisions of IA 2014, all PBS decisions have been denied a right of appeal and are subject instead to the administrative review process.⁴³ On the basis of the argument made in the earlier chapters of this thesis, the absence of discretion in migration status decision-making eliminates the need for merits review.⁴⁴ Thus, if the PBS does eliminate judgment discretion, the necessity of an appeal is equally extinguished.⁴⁵ Is, therefore, the IA 2014's removal of PBS appeal rights justified as a matter of principle?

Certainly, the PBS as advertised – a regime removing or minimising administrative discretion – suggests that it is. However, in practice, discretion remains embedded in the current PBS rules: even if judgment discretion was initially eliminated, it has been re-introduced into the PBS, in particular in Tiers 1, 2 and 4.⁴⁶ Employing

⁴² See further Chapter 4 and Clayton, who notes that the Government has justified the loss of entry clearance appeal rights by reference to the 'objective and verifiable' criteria of the PBS, 'yet there is no evidence that human error has been eliminated': Clayton, *Textbook on Immigration and Asylum Law* (Chapter 4, n 1), p 347.

⁴³ Tier 4 appeals were the first to be removed in the staged implementation of IA 2014: SI 2014/2771.

⁴⁴ See Chapter 2.

⁴⁵ Although the inflexibility of the criteria may call, in the interests of fairness, for different protective measures to mitigate potential harshness. For example, in *NA and others v SSHD* [2009] UKAIT 00025, the applicants were refused leave under tier 1 because they failed to meet requirements as to period of time for which funds must be shown as available. The Tribunal held that it could not rely on other evidence of financial solvency other than that specified in the Immigration Rules. The impact of this on the applicants was significant, as despite mitigating circumstances such as ill health and evidence of the ability to meet the maintenance requirements in substance, the failure to show funds for the 3 month period required by the rules, meant that the applicants had to leave the UK, thereby losing their jobs. See also *FA and AA (PBS: effect of Pankina) Nigeria* [2010] UKUT 00304, the PBS guidance specified that funds must be held by applicant or the applicant's parents. In this case the funds were held by the applicant's husband leading to the rejection of the application. Thus, faced with such potential harshness, an evidential flexibility policy, permitting case workers to contact applicants in order that they provide the correct information in certain circumstances was introduced. See further *Mandalia v Secretary of State for the Home Department* 2015 UKSC 59, [2015] 1 WLR 4546. See also para 245AA of the Immigration Rules.

⁴⁶ Clayton (Chapter 4, n 1): 'The government vigorously promoted the transparency, objectivity, and flexibility of the PBS. However, in significant respects, the PBS lacks these characteristics, at least so far as applicants are concerned.' p 344 (10.3 The PBS: Introduction)... p 347 'When first

again the Tier 4 (General) Student route as an example, the move towards the re-introduction of subjectivity in PBS decision-making came with the insertion of paragraph 245ZV(k) into the Immigration Rules in July 2012. This requires the Entry Clearance Officer to be satisfied that the applicant is a ‘genuine student’.⁴⁷ In sharp contrast to other points conditions with particularized requirements such as levels of funds and specified documents characteristic of the PBS,⁴⁸ the assessment of ‘genuineness’ involves a large degree of subjectivity.⁴⁹ Significantly, guidance to decision-makers contains no clear instruction on the meaning of genuineness.⁵⁰ As Colin Yeo explains:

A list of potentially relevant considerations is set out but in reality most of these are of at best tangentially related to whether a person might be considered a “genuine student”. They consist of matters such as amount of time spent in the UK and elsewhere, immigration law compliance, time elapsed since last study and reasons, “sufficient commitment” to the course, whether the course represents academic progression, credibility of the rationale for the proposed course, relevance of the course for future plans, personal and financial circumstances.⁵¹

The effect of the breadth of the term ‘discretion’, coupled with broad guidance reinforces the extent of the subjectivity involved. As such, it can no longer properly be said

established, the aim was to provide an objective and transparent set of criteria (see, for example, *Controlling our Borders* pp 15-16) but this does not appear to be the case.’

⁴⁷ Paragraph 245ZV(k) of the Immigration Rules reads that: ‘[t]he Entry Clearance Officer must be satisfied that the applicant is a genuine student.’ Similar requirements of genuineness have also been inserted into tiers 1 and 2.

⁴⁸ See further the description of tier 4 above.

⁴⁹ In Colin Yeo’s view, the ‘genuine student’ requirement is more subjective than the reasons for refusal under the system pre-dating the PBS: Yeo, ‘Genuine Students and ECO Interviews’ (n 39).

⁵⁰ *ibid.* As Colin Yeo notes, the Statement of Changes introducing the provision (HC 514) provides reasons for the its introduction but does not elucidate its meaning. Guidance for Home Office caseworkers is available: Tier 4 interviews and genuine student rule (GSR): STY02.

⁵¹ *ibid.*

that the justice does not require an appeal from decisions under the PBS (at least insofar as there is a ‘genuineness’ requirement).⁵²

As such, the Upper Tribunal case of *Mushtaq*⁵³ underscores the need for independent merits review of the discretionary elements of the PBS as it shows both the room for error in discretionary decision-making and the high threshold for interference under legality review. In that case, the applicant applied for a Tier 4 visa and whilst he scored the requisite points under the objective parts of the PBS, he was refused on basis that he was not a ‘genuine student’ following an interview with an Entry Clearance Officer. Since there was no right of appeal from a PBS entry clearance application, the applicant applied for judicial review. This limited the review of the merits of the case to a consideration of the rationality of the decision (that is, whether the decision was perverse such that no rational decision-maker could have arrived at it). As will be explored in the subsequent chapter, this is an exceptionally high threshold for merits review, although in *Mushtaq* it was held that the hurdle had been met. As highlighted by McCloskey J, President of the Upper Tribunal, the Entry Clearance Officer’s judgment that the Applicant’s answers did not disclose any ‘real idea how [his] qualification in isolation will help [him] to achieve [his] aim’ was bare, unparticularised and unreasoned:

The Applicant was in possession of a “Confirmation of Acceptance of Studies” certificate authorising him to pursue a CIMA course at the London School of Business and Finance. In response to an earlier question, he stated that he has a brother in the United Kingdom who has been running a shop for four years. His last studies had been completed the previous year, following which he had concentrated on his Tier 4

⁵² See n 47 above.

⁵³ *R (on the application of Mushtaq) v Entry Clearance Officer of Islamabad, Pakistan (ECO – procedural fairness)* IJR [2015] UKUT 00224 (IAC).

application. Furthermore, he outlined what his post-study aspirations were.⁵⁴

The judgment continued to highlight the serial flaws in the decision.⁵⁵ Thus, in the most extreme cases of irrationality in primary decision-making,⁵⁶ such as *Mushtaq*, the limited merits review available under judicial review will provide an effective remedy. However, it will have insufficient effect insofar as decisions are wrong, but not perverse.⁵⁷ It is here that the adverse effects of the absence of appeal rights under the IA 2014 appeals scheme will be felt by applicants.

2.2. Case study two: entry clearance as a visitor

2.2.1. Overview of visit visa decision-making

The second case study focuses on the most short-term form of migration to the UK. Visitors include those who enter the UK for several months⁵⁸ or less for tourism,

⁵⁴ *ibid*, [10].

⁵⁵ *ibid*, [11]-[15] & [19].

⁵⁶ The *Mushtaq* case was exceptional (although perhaps not unusual) in its patent unreasonableness. In Colin Yeo's words: 'Most of these reasons [in the decision] are on the face of it utterly absurd... On top of this bizarre approach to assessing who is a genuine student, the applicant in *Mushtaq* simply had not been asked questions about these issues, which was said by the tribunal to be "manifestly unfair". The tribunal also ultimately considered the reasons to be unreasonable in the legal *Wednesbury* sense: no rational ECO would have relied on such reasons.' Yeo, 'Genuine Students and ECO Interviews'

⁵⁷ Entry clearance decision-making has been criticised by the Chief Inspector of Borders. In a report published in 2010 (John Vine Independent Chief Inspector of the UK Border Agency, *A Thematic Inspection of the Points-Based System: Tier 2 (Skilled Workers)* (2010)), he found that the complexity of the system and inconsistencies in practice between posts created difficulties for applicants and made good and consistent decision-making harder to achieve. See also Yeo, 'Genuine Students and ECO Interviews': 'The [*Mushtaq*] judgment ends with the suggestion that ECO interviewers employ care and planning, avoid ambiguous words and phrases and conduct themselves fairly by inviting the subject to clarify or expand an answer or probe a response. Sadly, this suggestion is utterly unrealistic and would require nothing less than a revolution in the conduct of visa officials. Interviews by ECOs are typically seen as an opportunity to gather reasons for refusal, no more, and it has always been thus.'

⁵⁸ The upper limit is six months, with a number of limited exceptions: see <https://www.gov.uk/standard-visitor-visa> accessed on 16 November 2015.

family reasons, business, sporting and entertainment events, or for private medical treatment.⁵⁹ Whilst different from many migration status decisions in that the anticipated term of presence in the UK is invariably short, as summarised by Clayton, ‘the law relating to visitors is principally concerned with the same issues as much of the rest of immigration law, and which are associated with particular regions and countries: deterring illegal and unwanted entrants, overstaying, asylum claims. It operates on the basis of discretionary judgments...’⁶⁰ Thus, as with many migration status decisions, credibility is a central element of decision-making on applications for visitor visas, making it a paradigmatic example of ‘very imperfect’ procedural justice.⁶¹

The visitor rules changed with effect from 24 April 2015. A new Appendix V⁶² applies to all visitor applications for entry clearance, leave to enter or remain decided on or after 24 April 2015. The Rules contain general conditions for so-called ‘Standard’ visitors and specific conditions for particularised visitors.⁶³ The Standard visitor rules contain a significant degree of subjectivity. Foremost amongst these are the requirements that there is a ‘genuine intention to visit’;⁶⁴ a genuine intention not to engage in prohibited activities, such as work, study, marriage or receiving medical treatment (save

⁵⁹ Appendix V defines ‘visitor’ as ‘a person who is coming to the UK for a temporary purpose, for example as a tourist, to visit friends or family or to carry out a business activity.’

⁶⁰ Clayton, *Textbook on Immigration and Asylum Law* (Chapter 4, n 1), chapter 11, pp 382-3.

⁶¹ *ibid*, p 383. See also Chapter 3 at 4.3.

⁶² https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/423477/20150424_immigration_rules_app_v_final_v2.pdf

⁶³ These include ‘PPE visitors’ (those seeking entry for enumerated permitted paid engagements), marriage and civil partnership visitors, and transit visitors: *ibid*, V5-7.

⁶⁴ *ibid*, V 4.2.

in the latter case, where the purpose of the visit is to receive private medical care).⁶⁵ There are further additional requirements within the Standard visitor rules depending on the type of visit applied for. These include a number of further discretionary criteria such as being ‘highly qualified’ (academic),⁶⁶ ‘adequate arrangements’ for the travel, reception and care (children), and even ‘genuine intention to donate’ (organ donor).⁶⁷ There is, therefore, significant discretionary judgment involved in decision-making in visitor entry clearance cases. Consideration of the genuineness of the applicant’s intentions in visiting the UK (including the genuineness of the intention to leave) requires an assessment of credibility. The burden of proof (on the civil standard) is on the applicant. Since intentions are manifestly difficult to prove,⁶⁸ the decision will be made on the basis of circumstantial evidence.⁶⁹ This may include: evidence of an incentive to return to the country of origin such as employment, the ownership of property, and family connections; evidence of the general economic circumstances in the applicant’s home country compared with those in the UK,⁷⁰ and details of the reason for the visit, if tourism, this may include an itinerary of the trip, if a family visit, it may require evidence from the sponsor.⁷¹ As Clayton notes, ‘such considerations are fraught with the potential for stereotyping and discrimination.’⁷² The far-reaching consequences of the significant

⁶⁵ *ibid*, V 4.5, 4.8, 4.9, 4.10.

⁶⁶ *ibid*, V 4.22(a)

⁶⁷ *ibid*, V 4.17.

⁶⁸ This may additionally include proof of a negative intention, such as demonstrating an intention not to work. Proof of maintenance and accommodation does not necessarily prove an absence of an intention to work: *Ashfaq Ahmed v ECO Islamabad* [2002] UKIAT 03891.

⁶⁹ Clayton, *Textbook on Immigration and Asylum Law* (Chapter 4, n 1), p 386.

⁷⁰ See, for an example of where this was deemed relevant, *Ashfaq Ahmed v ECO Islamabad* (n 68).

⁷¹ Clayton, *Textbook on Immigration and Asylum Law* (Chapter 4, n 1), p 386.

⁷² *ibid*, p 386.

judgment discretion involved in visit visa decision-making has been recognised by the tribunal. Thus, in *Ogunkola v ECO Lagos*,⁷³ it was noted that the genuineness test effectively permitted Entry Clearance Officers to refuse a visa to any applicant in whose country of origin the economic conditions were less prosperous than those in the UK.⁷⁴ As Clayton concludes:

[i]n reality...for those whose home lives are neither settled nor prosperous, there may be little concrete that can be put forward besides statements of good faith whose value depends on the subjective concept of credibility. The guidance paragraph on credibility illustrates the difficulty of proving intention for these individuals: 'Having a return ticket and other supporting evidence does not guarantee that a visitor intends to comply with their conditions of stay or that they intend to leave at the end of their visit.'⁷⁵

Further, whilst overall credibility is not in and of itself a criterion of the visit visa application, the applicant's previous conduct, or that of family members or associates, has been found to be relevant to the assessment of the genuineness of intentions.⁷⁶ Further, discrepancies between statements made by the applicant and other witnesses, primarily the sponsor, may undermine credibility (even where the discrepancies are not relevant to the issues at stake in the appeal). As Clayton notes, there are often legitimate reasons for discrepancies⁷⁷ and it may be said that in the absence of the ability to test

⁷³ *Ogunkola v ECO Lagos* [2002] UKIAT 02238 [7]: 'if lack of economic incentive to return to the country of origin were sufficient to found a refusal of a visit application, then no person living overseas whose standard of living was lower than that prevailing in the UK could ever come on holiday here, or visit relatives settled here. That is not the law.'

⁷⁴ See also, eg, *Mistry v ECO Bombay* [2002] UKIAT 07500: 'It comes down to the question of whether someone making a modest living in India must inevitably be regarded as too much prey to the temptations of doing much better here, at least in cash terms, to be regarded as a genuine short term visitor.'

⁷⁵ Clayton, *Textbook on Immigration and Asylum Law* (Chapter 4, n 1), p 387.

⁷⁶ *ibid*, pp 386-7.

⁷⁷ *ibid*, p 387.

them, they are an unreliable measure of credibility. The high degree of judgment discretion implicated in visit visa decision-making allows decisions to be made on the effective basis that the possibility alone that an applicant will not comply with the conditions of his or her visit is sufficient to deny a visa and in the absence of appeal rights, such decisions are difficult to overturn.⁷⁸

2.2.2. A right of appeal?

As such, entry clearance visitor decision-making is paradigmatically ‘very imperfect’ procedural justice. Although the stakes are not as high as in other areas of migration status decision-making, applicants’ interests are still affected and the high risk of injustice (and the appearance of injustice) caused by the high degree of judgment discretion involved in such decision-making means that, on the basis of the argument in Chapter 2, an appeal right should be afforded to applicants seeking visitor visas. However, a right of appeal against refusals of entry clearance for visitors was abolished by the Asylum and Immigration Appeals Act 1993.⁷⁹ Currently, under IA 2014 there are no appeal rights for visitor visas save where a ‘human rights claim’⁸⁰ interpreted by the

⁷⁸ *ibid*, p 387.

⁷⁹ See further Chapter 4. The appeal right was re-instated for family visitors by ss 59 and 60 of the Immigration and Asylum Act 1999 but the full right of appeal was again removed by s 52 of the Crime and Courts Act 2013, entering into force on 25 June 2013. From that date, family visitors who had submitted applications on or after 25 June 2013 could only appeal on limited grounds, namely, human rights or race discrimination.

⁸⁰ Section 82(1)(b) NIAA 2002. ‘Human rights claim’ is defined in NIAA 2002, s 113 to mean ‘a claim made by a person to the Secretary of State at a place designated by the Secretary of State that to remove the person from or require him to leave the United Kingdom would be unlawful under s 6 of the Human Rights Act 1998 (c 42) (public authority not to act contrary to Convention) as being incompatible with his Convention rights.’ IA 2014 amends the definition in s 113 by extending it to entry clearance applications (IA 2014, Sch 9, para 53).

Home Office,⁸¹ has been made. The Upper Tribunal has held that in relation to the vast majority of visitor visas it is unlikely that a human rights claim will be made.⁸² This is also the view of the Home Office whose policy advises that ‘[t]he starting position for considering a visit application is that a visit does not generally engage human rights.’⁸³ On the case law relating to Article 8 ECHR, where the family relationship is one between adult relatives, ‘more than normal emotional ties’ will need to be shown to engage the right.⁸⁴ However, the Home Office guidance states that even where the visit visa applicant is the spouse or civil partner, parent or child of the UK sponsor, there will be no right of appeal insofar as ‘there are no reasons why the UK based family members could not visit the applicant.’⁸⁵ This interpretation appears more restrictive than that established in the case law: in *Mostafa* it was accepted that Article 8 was generally engaged in the visitor context where the relationship was between spouses/civil partners or between parents and minor children save where ‘the proposed visit is based on a whim or will not

⁸¹ Home Office policy specifies the applications that it will regard as human rights claims (Home Office, *Rights of appeal, Version 2* (2015)) and sets out when it will consider human rights engaged for the purposes of a human rights claim (Home Office, *Considering human rights claims in visit applications, Version 1.0* (2015)).

⁸² In *Mostafa (Article 8 in entry clearance)* [2015] UKUT 00112 (IAC) and endorsed by *Adjei (visit visas – Article 8)* [2015] UKUT 261 (IAC), the Upper Tribunal held that in entry clearance visitor cases, the range of qualifying relationships would be ‘very narrow’: ‘this is likely to be limited to cases where the relationship is that of husband and wife or other close life partners or a parent and minor child and even then it will not necessarily be extended to cases where, for example, the proposed visit is based on a whim or will not add significantly to the time that the people involved spend together’ (para 24). Ultimately the FTT will determine its jurisdiction if the Home Office’s decision on whether or not an applicant has a right of appeal is challenged before it: *R (on the application of Khan) v Secretary of State for the Home Department (right of appeal – alternative remedy)* IJR (Chapter 4, n 62).

⁸³ Home Office, *Considering human rights claims in visit applications, Version 1.0*. See further, Home Office, *Rights of appeal, Version 2*.

⁸⁴ *Kuthagas v Secretary of State for the Home Department* [2003] EWCA Civ 31, [2003] INLR 170. See, more recently, *Singh v Secretary of State for the Home Department*.

⁸⁵ Home Office, *Considering human rights claims in visit applications, Version 1.0* p 8.

add significantly to the time that the people involved spend together'.⁸⁶ Further, although not in the context of entry clearance, the Court of Appeal and Supreme Court, in *AG (Eritrea)*⁸⁷ and *Quila & Bibi*,⁸⁸ respectively, have held that the threshold of interference for engaging Article 8 is 'not a specially high one'.

The argument against providing appeal rights in entry clearance cases is that, in contrast to expulsion cases – and family settlement – the interference in a migrant's life by the migration status decision is minimal.⁸⁹ As seen in Chapter 2, in part the justification for conferring merits review, as a more protective form of access to justice, on migration status decisions was based on the interference brought about by migration control and the exclusion of migrants from the host state franchise. Thus, given that those affected by visa decisions are outsiders who are not territorially present, there is no concern of exclusion from the democratic system of the would-be host state and the interference in the lives of the subjects of decision-making on visit visa applications is limited since their interests in coming to the UK are typically related to short-term concerns, with a low impact on a migrant's intimate life, such as tourism or business. Certainly, there is a significant differential between the interference involved in, for

⁸⁶ *Mostafa (Article 8 in entry clearance)* (n 82) [24].

⁸⁷ *AG (Eritrea) v Secretary of State for the Home Department* [2007] EWCA Civ 801, [2008] 2 All ER 28.

⁸⁸ *R (on the application of Aguilar Quila) v Secretary of State for the Home Department* [2011] UKSC 45, [2012] 1 AC 621.

⁸⁹ Territorial presence is recognised in the UK context as being relevant to appeal rights. See, eg, Wilson Report (Chapter 1, n 13), para 93: 'Given our recommendation in favour of an appeal against exclusions, the case for an appeal against [expulsion], which involves a much greater interference with a persons liberty, is correspondingly stronger.' It has also been recognized that states have fewer duties under Article 8 ECHR in relation to migrants who are off-shore than those who are territorially present. See: *Secretary of State for the Home Department v SS (Congo)* [2015] EWCA Civ 387, [2015] Imm AR 1036 [38]: '...the requirements upon the state under Article 8 are less stringent in the LTE context than in the LTR context.'

example, expulsion cases implicating the termination of family or private life and visit visa cases. However, whilst accepting this, the claim made by the thesis is that migrants as a whole should have access to justice and that whether or not specific groups of migrants should have a right to merits review of adverse migration status decisions should depend on the degree of judgment discretion involved in the decision-making. Thus, on the basis of the normative claims of this thesis, justice being done and being seen to be done remains relevant for visitors.

Indeed, this perspective has been previously recognised and adopted in the UK. The case for appeals from entry clearance cases was initially made in the Wilson Report. Here, the argument was made that the appearance of injustice was such as to necessitate an appeal to avoid charges of unfairness from migrants and migrants' advocacy groups.⁹⁰ The Report did not find that Home Office decision-making did in fact demonstrate unfairness but advocated appeal rights as a matter of principle to ensure that justice was seen to be done. This justification accords with the arguments made in an abstract context in Chapter 2 and remains relevant today. This is for (at least) five reasons. First, the appearance of unfairness felt by migrants and those working for them has not diminished, but if anything it has increased. This is due, in large part, to the expressly anti-migrant policies adopted by successive Governments and the climate of hostility engendered by, in particular, the Coalition Conservative-Liberal Democrat Government of 2010-2015 and its successor Conservative Government.⁹¹ Secondly, even if it were the case when the Wilson Report was published in 1967,⁹² it can no longer be said that there are not

⁹⁰ See further Chapter 4 and Chapter 9 at 2.1.1.

⁹¹ Chapter 9 at 2.2.

⁹² Wilson Committee, *The Wilson Report* (Chapter 1, n 13).

significant problems with the quality of decision-making in the Home Office.⁹³ Thirdly, the quality of decision-making has been found to be especially poor in entry clearance applications.⁹⁴ Fourthly, the alleged protections provided by the internal review of the Entry Clearance Manager have been found to be ineffective.⁹⁵ Fifthly, judicial review - the only available judicial remedy absent a right of appeal – is often ineffective as a remedy given the high threshold of rationality review (proportionality not being applicable in the absence of fundamental rights being engaged)⁹⁶ and the other institutional constraints examined in the following chapter. Accordingly, with potentially even more force than in 1967, there remains a case for appeals from all entry clearance cases save in the absence of judgment discretion. It is argued that concerns as to the insignificance of the interests implicated in visit visa decision-making may be better addressed by variables other than the standard of review, such as, in particular, whether or not there is an oral hearing.⁹⁷

⁹³ These problems have been documented at least over the past decade: see eg, F Lindsley Independent Monitor, *Report by the Independent Monitor* (2005) pp 33-45. See also Reports of the Chief Inspector of Borders and Immigration, cited in Clayton, *Textbook on Immigration and Asylum Law* (Chapter 4, n 1), p 388. She notes that the Chief Inspector ‘has been particularly critical of how evidential issues are determined, suggesting that decision-making is sometimes over-influenced by a generalized risk profile so that decision-makers rely too heavily on applicants’ personal characteristics (including, in the case of Pakistan, nationality) rather than on the contents of their application. Certain applicants are also subject to more onerous evidentiary demands. In such situations, applicants are treated as having low credibility from the outset.’

⁹⁴ *ibid.*

⁹⁵ See, eg, John Vine Independent Chief Inspector of the UK Border Agency, *Entry Clearance Decision-Making: A Global Review* and further, Chapter 5.

⁹⁶ See, eg, *R v Secretary of State for the Home Department, ex p Kurumoorthy* [1998] Imm AR 401. In that case the applicants, husband and wife who were Sri Lankan nationals, had been refused entry clearance for a visit to the UK. The Entry Clearance Officer’s decision appeared to have been influenced by the adverse immigration history of one of the applicants’ family members and had not balanced the positive factors against the negative. The judicial review application was dismissed on the basis that the decision was not irrational. See also *R v ECO Accra, ex p Aidoo* [1999] Imm AR 221, another case refused on the basis of the high irrationality threshold.

⁹⁷ See further Chapter 4.

2.3. Case study three: deportation

2.3.1. Overview of deportation decision-making

The third case study examined is deportation. This connotes the process whereby migrants may be compulsorily removed from the UK and prevented from returning unless the deportation order is revoked.⁹⁸ There are three grounds for deportation.⁹⁹ These are: i) where the Secretary of State deems deportation to be conducive to the public good;¹⁰⁰ ii) following conviction for a criminal offence where an individual is given at least one single sentence of imprisonment of 12 months or more;¹⁰¹ iii) where a court recommends deportation in respect of a individual over the age of 17 after conviction of an offence punishable by imprisonment.¹⁰² In addition to deportation of individuals under these three grounds, the family members of deportees may also be deported.¹⁰³ Deportation may be applied to migrants with leave to remain, including those with indefinite leave to remain in the UK, and its effect is to cancel that leave to remain.¹⁰⁴ This is distinguished from administrative removal, the other form of expulsion operative in the UK, which is applicable to migrants who do not have leave to remain because they

⁹⁸ Macdonald and Toal, *Macdonald's Immigration Law and Practice*, 16.1.

⁹⁹ Deportation under EU law is not considered here.

¹⁰⁰ IA 1971, s 3(5)(a), as amended.

¹⁰¹ UK Borders Act 2007, s 32.

¹⁰² IA 1971, s 3(6). The relevance of this ground for deportation has been diminished to the point of obsolescence since the introduction of s 32 of the UK Borders Act. See *R v Kluxen* [2010] EWCA Crim 1081, [2011] 1 WLR 218. Fripp, Moffatt and Wilford, *The Law and Practice of Expulsion and Exclusion from the United Kingdom: Deportation, Removal, Exclusion and Deprivation of Citizenship* (Chapter 4, n 1), p 249.

¹⁰³ IA 1971, s 3(5)(b), as amended. The power has not been widely used: Fripp, Moffatt and Wilford, *The Law and Practice of Expulsion and Exclusion from the United Kingdom: Deportation, Removal, Exclusion and Deprivation of Citizenship* (Chapter 4, n 1), p 249.

¹⁰⁴ IA 1971, s 5(1).

entered without leave, overstayed their leave or have had their leave revoked or curtailed.¹⁰⁵

A migrant will not be deported where it is found that expulsion would violate his or her human rights, where it would constitute *refoulement* under the Refugee Convention, or where it would violate his or her rights under EU law.¹⁰⁶ The decision to make a deportation order is regulated by the Immigration Rules. The Rules were changed significantly on 9 July 2012. Prior to that date, deportations were governed by paragraph 364 of HC 395. It applied to deportations made on conducive grounds, family deportations and where a criminal court has recommended deportation but imposed a sentence below the automatic threshold.¹⁰⁷ The decision to make a deportation order made under para 364 was not guided by any precise standards, but rather the Secretary of State was required to consider ‘all relevant factors’ to determine whether the public interest requires expulsion of the individual and, if so, whether or not the public interest in deportation was outweighed by the particular circumstances of the individual’s case, which, given the nature of deportation in cancelling leave to remain, often requires the consideration of the migrant’s private and family life in the UK.¹⁰⁸ This decision was not guided by any precise standards or code and the factors to be taken into account were at

¹⁰⁵ Prior to 2 October 2000 illegal entrants were subject to the deportation regime. This was changed by the Immigration and Asylum Act 1999 which henceforth reserved deportation for migrants (and their family members) in respect of whom it had on the basis of their conduct (usually criminal) from the UK warranted expulsion.

¹⁰⁶ The Rules expressly provide that a deportation order will not be made against a person with a well-founded fear of persecution or whose expulsion would be in breach of the UK’s obligations under the ECHR HC 395, para 380.

¹⁰⁷ Macdonald and Toal, *Macdonald's Immigration Law and Practice* (Chapter 4, n 1), 16.56.

¹⁰⁸ *ibid*, 16.59.

large.¹⁰⁹ Although it may at first sight appear that automatic deportation removes discretion given by operation of the mandatory deeming clause, the exceptions relating to (inter alia) fundamental rights, EU law and the Refugee Convention are applied expressly to automatic deportation.¹¹⁰ Similarly, the Secretary of State has a discretion whether or not to follow the direction of a criminal court¹¹¹ and the deportation of family members must also be considered on the individual merits of each case.¹¹² The determination of whether the public interest in deportation is outweighed requires both determination of general policy (for example the prevention and punishment of crime and public protection) and particularised criteria (such as the gravity of and the risks associated with the past, present and future offending of the individual).¹¹³

As noted earlier, the system changed significantly on 9 July 2012.¹¹⁴ Paragraph 364 of HC 394 was deleted. In its place, the Rules contained a presumption that the

¹⁰⁹ *ibid.*

¹¹⁰ UK Borders Act 2007, s 33.

¹¹¹ Macdonald and Toal, *Macdonald's Immigration Law and Practice* (Chapter 4, n 1), 16.54: 'In considering whether to deport an offender in respect of whom a recommendation has been made by the courts, the factors to be taken into account by the Secretary of State in exercising his or her discretion are the same as in conducive to the public good cases.' See also the basic statement of principle as to when a criminal court should order deportation: *R v Caird* (1970) 54 Cr App Rep 499 (endorsed in the leading case *R v Nazari* [1980] 3 All ER 880): 'that the courts when considering a recommendation for deportation are normally concerned simply with crime committed and the individual's past record and the question as to what is their effect on the question of potential detriment to this country of the appellant remaining here. It does not embark, and indeed is no position to embark, upon the issue as to what is likely to be his life if he goes back to his country of origin. That is a matter for the Secretary of State.' See further Fripp, Moffatt and Wilford, *The Law and Practice of Expulsion and Exclusion from the United Kingdom: Deportation, Removal, Exclusion and Deprivation of Citizenship* (Chapter 4, n 1), p 254: the case law demonstrates that it is open to the Secretary of State to seek to depart from a recommendation of a criminal court not to deport an individual but in so doing, she must consider the court's judgment.

¹¹² Macdonald and Toal, *Macdonald's Immigration Law and Practice* (Chapter 4, n 1), 16.41.

¹¹³ Although all factors continued to be relevant to the decision to deport, the discretion was limited to an extent in 2006 upon the introduction of an express presumption in favour of deportation where it was made on conducive grounds: HC 1337 which entered into force on 20 July 2006.

¹¹⁴ Implemented by HC 194.

public interest favoured deportation combined with a detailed code of how, where Article 8 ECHR is engaged, the proportionality balance should be struck.¹¹⁵ The code lists the circumstances in which deportation may be avoided on the basis of family and private life. There are a number of thresholds based on length of custodial sentence. For example, a migrant liable to deportation who had been sentenced to less than four years' imprisonment could avoid deportation on the basis of family life in the following very narrow circumstances:¹¹⁶

(a) where the deportee had a genuine and subsisting parental relationship with a minor child present in the UK who was either British or had resided in the jurisdiction for the seven years prior to the application and could not reasonably be expected to leave the UK, and where there were no other family members able to care for the that child in the UK;

(b) Where the deportee had lived continuously in the UK with valid leave for 15 years and was in a genuine and subsisting relationship with a partner in the UK who was either British, settled or present as a Refugee or with Humanitarian protection, with whom family life could not continue outside the UK due to the existence of insurmountable obstacles

Deportation is to be avoided on the basis of private life where either the person has lived continuously in the UK (excluding the time spent in prison) for at least twenty years or where he or she is under the age of twenty-five and has lived over half his or her life in the UK, and where there are no ties to the country of origin.¹¹⁷ Migrants sentenced in excess of four years and migrants sentenced to less than four years who do not satisfy the criteria set out above, were initially said to avoid deportation only in 'exceptional

¹¹⁵ Immigration Rules paras 398ff.

¹¹⁶ *ibid*, paras 399(a) and (b).

¹¹⁷ *ibid*, para 399A.

circumstances.’ This has now been amended to ‘very compelling circumstances’¹¹⁸ following litigation of the use of the term exceptionality in Article 8 ECHR.¹¹⁹

Thus, following the changes of July 2012, discretion in relation to deportation cases has been circumscribed, however, the standards that the 2012 Rules implemented remain highly discretionary in nature. As Macdonald and Toal note:

As the Court in *MF (Nigeria)* ... observed resolution of the issues arising under the rules may involve questions of evaluation as well as hard-edged fact, such as whether it would be ‘reasonable’ to expect a child to leave the UK or whether there are ‘insurmountable obstacles’. In relation to the policy objectives that an individual’s personal circumstances have to be weighed against, these have been referred to in many cases.¹²⁰

Similarly, administrators retain a large degree of judgment discretion over the nature of the individual actions sufficient to legitimise deportation proceedings. The standards in para 398 of the Immigration Rules refer to ‘serious harm’ and ‘persistent offending’, within this standard the Secretary of State retains a large degree of discretion as to whom and what sorts of offences and activity fall within.

2.3.2. A right of appeal?

The Wilson Committee was clear that there should be rights of appeal from all decisions to expel an individual from the UK.¹²¹ This view prevailed for over 40 years and there was a right of appeal from the decision to make a deportation order under s 82

¹¹⁸ *ibid*, para 398.

¹¹⁹ See further, *MF (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 1192, [2014] 1 WLR 544; *Kabia (MF: Para 298-Exceptional Circumstances)* [2013] UKUT 00569 IAC; *R (on the application of MM (Lebanon) v Secretary of State for the Home Department* [2014] EWCA Civ 985, [2015] 1 WLR 1073.

¹²⁰ Macdonald and Toal, *Macdonald's Immigration Law and Practice* (Chapter 4, n 1), 16.64.

¹²¹ See Chapter 5 at 2.2.1.

NIAA 2002, prior to amendment by IA 2014.¹²² Following amendment, an appeal only exists where the decision is construed as a human rights, EU or protection claim.¹²³ Given the nature of deportation cancelling leave to remain and the social and familial ties of the deportee, it is likely that many deportation cases will engage human rights (as defined under the IA 2014) so as to generate a right of appeal¹²⁴ (although the effectiveness of the right may be significantly diminished by the new provisions making deportation appeals non-suspensive of expulsion).¹²⁵ As seen in Chapter 5, the grounds of appeal are similarly limited to compliance with human rights (or international protection/EU rights). However, in practice this is essentially the same test as under the pre-IA 2014 regime, namely that of ‘ascertaining whether the deportation in issue struck a fair balance between the relevant interests, namely the applicant's right to respect for his private and family life, on the one hand, and the prevention of disorder or crime on the other.’¹²⁶ Further, the Government’s stated aim in implementing the July 2012 reforms was to

¹²² s 82(2)(j) (and to refuse to revoke a deportation order in s 82(2)(k)). There was no appeal from liability to deportation although this could be challenged through the ‘not in accordance with the law’ ground of appeal in a challenge to the making of a deportation order: Fripp, Moffatt and Wilford, *The Law and Practice of Expulsion and Exclusion from the United Kingdom: Deportation, Removal, Exclusion and Deprivation of Citizenship* (Chapter 4, n 1), p 253.

¹²³ The effects of IA 2014 are examined in *ibid*, p 287 (‘The IA 2014 has in effect reversed the progress made up to the NIAA 2002 in producing a relatively self-sufficient appeals system able to resolve almost all legal issues arising in the context of deportation’).

¹²⁴ Although equally, many may not. Cases which are unlikely to engage human rights include migrants who have been convicted of an offence, who are single, without claims to asylum or long residence in the UK.

¹²⁵ See further Chapter 4 at 2.3.2.

¹²⁶ *Samaroo v Secretary of State for the Home Department* [2001] EWCA Civ 1139, [2001] UKHRR 1150, Dyson LJ citing the decision of the European Court of Human Rights in *Boughanemi v France* (1996) 22 EHRR 228 [42]. The discretion under the Immigration Rules as to whether or not the decision to deport was outweighed by compassionate factors was recognized as equivalent to the Article 8 proportionality exercise in *N (Kenya) v Secretary of State for the Home Department* [2004] EWCA Civ 1094, [2004] INLR 612 [64].

restrain the FTT's original discretion in Article 8 deportation cases.¹²⁷ In other words, it sought to prevent the substitution by the judiciary of its view on the merits for that of the administrative decision-maker, thereby subduing the powers of the FTT as primary decision maker.¹²⁸ Two questions arise from these considerations: first, why should there be merits review from discretionary deportation decisions at all given the nature of the interests involved? And secondly, assuming that there should be merits review, do the July 2012 changes remove discretion from the primary decision-maker so as to obviate the need for an appeal? These are addressed below.

Turning first to the question of whether the interests implicated in deportation decisions should be insulated from appeal, it is important to note that the statutory right of challenge (as it existed before repeal by IA 2014) was to the decision to make a deportation order, not the decision of what the public interest is.¹²⁹ Moreover, as seen from Chapter 3 in relation to national security, were it accepted that questions of what is in the public interest relevant to crime and national security fall outwith the merits jurisdiction of a court and are subject only to residual supervisory review,¹³⁰ the argument

¹²⁷ Home Office, *Statement of Intent: Family Migration* (2012).

¹²⁸ See further the new Part 5A inserted by the IA 2014 into NIAA 2002, which applies only to courts and tribunals and prescribes what is in the public interest for the purposes of Article 8 proportionality.

¹²⁹ As expressed in *N (Kenya)* and subsequent cases, the public interest has regard to: i) the risk of re-offending; ii) the need to deter others; and iii) the need to express society's revulsion at criminality. See further, Fripp, Moffatt and Wilford, *The Law and Practice of Expulsion and Exclusion from the United Kingdom: Deportation, Removal, Exclusion and Deprivation of Citizenship* (Chapter 4, n 1), p 269.

¹³⁰ This is, however, not to concede that the principle is correct. The findings in *N (Kenya)* to the effect that a judge is ill-equipped to determine whether or not deportation is conducive to the public good, or in other words whether or not expulsion is in the public interest, sits uneasily with the criminal courts' power to recommend deportation. As the case law discloses, the question for the sentencing court includes the consideration of the 'effect on the question of potential detriment to [the UK] of the appellant remaining...' *R v Caird* (n 111). Thus, the central question is 'the potential detriment to the UK', implicating consideration of the gravity of the offence and the risk of re-offending (Guidelines in *R v Nazeri* (n 111). Macdonald and Toal, *Macdonald's Immigration*

of this thesis is not undermined. And as is clear from the UK deportation case law, the tribunal has found that it is within its jurisdiction to weigh the Secretary of State's assessment of the public interest against the individual rights of the deportee.¹³¹

Indeed, that the discretionary power of the Secretary of State to order the expulsion of an individual with leave to remain in the UK, including individuals who are settled in the UK or who have spent the great majority of their life in the UK, be subject to merits review is important in the light of both the breadth of the discretion and also the coercive nature of the power involved in deportation. The potential unfairness of the wide discretion the Secretary of State enjoys in 'conducive deportations'¹³² is evident in cases subject to the so-called 'Operation Nexus.' This process, whereby the Metropolitan police systematically passes the identity of anyone it arrests (whether or not an individual

Law and Practice, 16.47ff). Further, as noted by Macdonald and Toal, the assessment of the strength or weakness of the public interest is a not dissimilar exercise to that involved under Article 8(2) ECHR, with which courts are since 2000 very familiar, *ibid*, 16.59. Macdonald and Toal also note that no question of deference to the Secretary of State arose prior to the coming into force of the Human Rights Act 1998. See, eg, *Singh (Bakhtaur) v Immigration Appeal Tribunal*. See, also, the dissent of Sedley LJ in *N (Kenya) v Secretary of State for the Home Department* (n 126) who argued that the adjudicator's jurisdiction permitted him to give greater weight than the Home Secretary to certain public interest factors (*in casu*, the risk of reoffending)).

¹³¹ Although it should be recognised that the line between what the court should and should not review on the merits is at times blurred. In *N (Kenya) v Secretary of State for the Home Department* (n 126), a majority of the Court of Appeal held that the tribunal will commit an error of law if it does not give appropriate weight to the Secretary of State's policy. May LJ held at [54] that an adjudicator (the predecessor of the FTT): 'does not have expertise in judging how effective, any more than does the court, a deterrent is a social, economic and political policy of deporting foreign nationals who have been convicted of serious offences once they have served their sentences. For this reason, in my judgment, an adjudicator in a deportation appeal, in exercising his statutory discretion, should give appropriate weight to the Secretary of State's policy on deportation in cases such as this.' This has, in some cases, been held to mean that the Secretary of State's assessment of the public interest must be taken as given unless it is demonstrably wrong: Macdonald and Toal, *Macdonald's Immigration Law and Practice*, 16.58. See further *OP (Jamaica) v SSHD* [2008] EWCA Civ 440. In others, the threshold of review has been put less high: in *OH (Serbia) v SSHD* [2008] EWCA Civ 694, [2009] INLR 109, Wilson LJ whilst acknowledging the Secretary of State's 'primary responsibility' for the public interest, regarded her conclusion on the issue to be weighed independently in the court's assessment (at [15]). Thus, in Wilson LJ's view, the Secretary of State's view of the public interest was as important as the court's view of the separate facets of the public interest, but is not automatically determinative.

¹³² Decisions that the deportation of an individual is conducive to the public good.

is subsequently charged is irrelevant to the operation) to the Home Office has led to an increase of conducive deportation decisions taken on the basis of allegations alone. Decisions can, therefore, be made on the basis of evidence of low probative value, including hearsay and anonymous evidence.¹³³ The expansive extent of the discretion leaves little scope for successful challenge on public law grounds.¹³⁴ As to the coercive nature of the power, as Satvinder Juss summarises: '[d]eportation is an awesome use of executive power in respect of the individual and it is imperative that proper safeguards be implied into the exercise of this power.'¹³⁵ As such, the extent of the discretion and degree of coercive power involved in deportation decision-making means that the case for appeal rights is at its strongest. Indeed, as noted in Chapter 2, the stronger the interference of migration controls in individual lives and the greater the corresponding imbalance in power, the greater the need for an appeal.

As to the second question set out above (whether the 2012 changes remove discretion so as to obviate the need for an appeal), as is clear from both the Rules themselves and the case law set out above, subjective assessment remains a persistent feature of the deportation regime. Whilst some elements are objectively ascertainable (such as the length of custodial sentence, the existence of a British child or a child who has resided in the UK for seven years) judgment discretion remains embedded within the standards. Thus, for example, deportation is only avoided on the basis of family life where it would not be 'reasonable' to require a child (who satisfies the objectively

¹³³ Fripp, Moffatt and Wilford, *The Law and Practice of Expulsion and Exclusion from the United Kingdom: Deportation, Removal, Exclusion and Deprivation of Citizenship* (Ch 4, n 1), p 254.

¹³⁴ *ibid*, p 256. Fripp concludes that this may account for the small numbers of conducive deportation decisions.

¹³⁵ Satvinder Juss, 'Review and appeal in administrative law — what is happening to the right of appeal in immigration law?' (1992) 12 *Legal Studies* 364, 367.

ascertainable criteria) to leave the UK.¹³⁶ Equally, deportation may be avoided on the basis of having resided in the UK for an objectively ascertainable number of years where there are ‘no ties’ to the country of origin.¹³⁷ And the general test for avoiding deportation if the specific exceptions do not apply is one of ‘very compelling circumstances’, which has been interpreted by the courts to import the Article 8 proportionality balancing exercise.¹³⁸ Each potential deportation decision, therefore, is based on discretionary standards that require an exercise of judgment on the part of the administrative decision maker. As such, the 2012 changes do not alter the conclusion that an appeal on the merits from deportation decisions is necessary as a matter of fair treatment.

Conclusions

Thus, it is argued that since the exercise of judgment discretion in decision-making is a significant feature in the three case studies examined, there should be merits review from migration status decisions in these areas. However, as recognised in Chapter 2, the case studies examined in this chapter also show in practice that the urgency of the need for merits review from migration status decisions is not static but varies according to the interaction of two criteria, namely: i) the degree of discretionary judgment involved in the decision-making process; and ii) the interferences implicated and the nature of the consequences facing individuals following the decision. The relationship between discretion and interference in individual interests involved in the various instances of

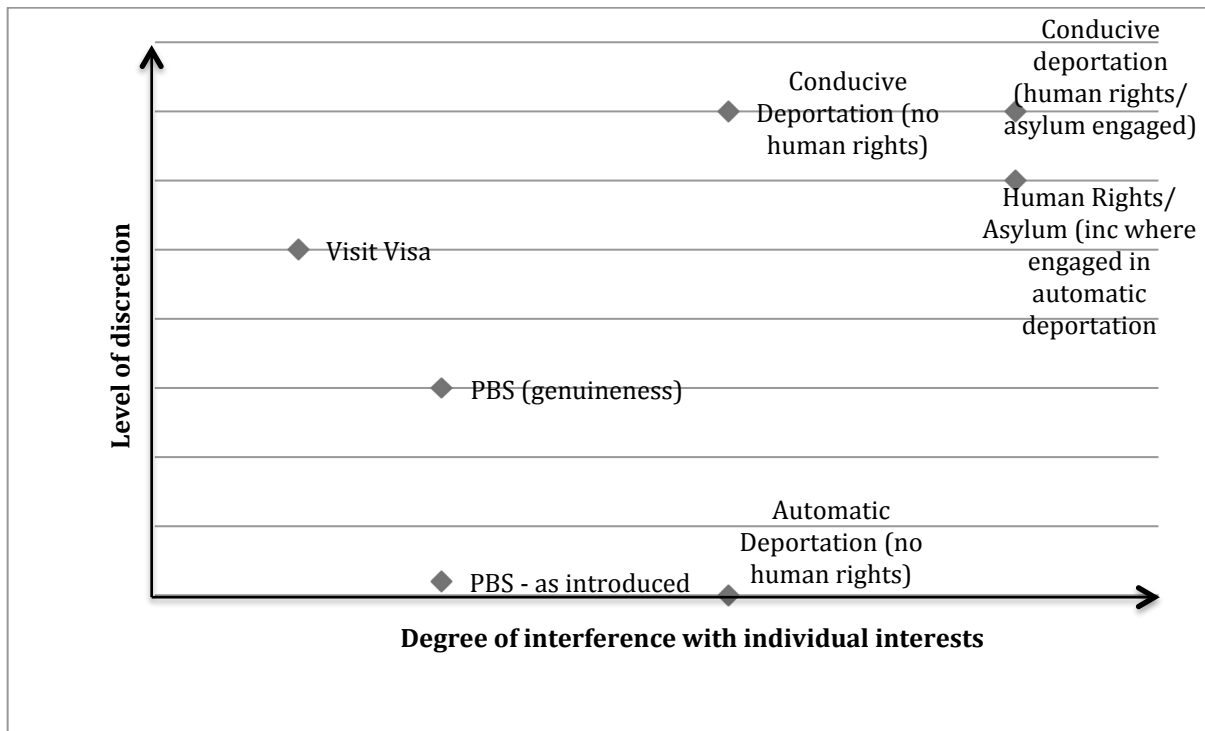
¹³⁶ See n 116 above.

¹³⁷ See n 117 above.

¹³⁸ *MF (Nigeria) v Secretary of State for the Home Department* and see n 119 above.

migration status decision-making examined in this chapter is plotted in the graph below (figure 1).

Figure 1



The discretion axis is both qualitative (compare, for example, the type of discretion in an evaluation of whether the public interest in deportation is outweighed by individual rights with ‘adequate arrangements for the travel, reception and care’ of children: the discretion implicated in the public good assessment is far wider ranging and looser than the requirements relating to the children’s travel and care arrangements) and quantitative (for example, the PBS as currently operating with majority objectively verifiable requirements and one ‘genuineness’ requirement is treated as being less discretionary

than visit visas which involve a number of discretionary elements).¹³⁹ The interference axis is set by reference to the broad value scale recognised by liberal democratic states as expressed in fundamental rights instruments.¹⁴⁰ Whilst, therefore, arguing that all migration status decisions should have a right to merits review, save in the absence of discretion, this thesis appreciates that the importance and relevance of merits review are not monolithic. As a very rough statement of principle, the higher the level of discretion and the greater the consequences for individuals; the greater the need for merits review. The discussion of where the line should properly fall and comparison of this with the Government's current policy is examined in Chapter 9.

¹³⁹ Where the amount of discretion varies as a result of the nature of the individual (for example, involvement of children and a spouse involves more discretionary elements than private life alone), this is not captured by the graphic as impossible to plot.

¹⁴⁰ In the UK, civil and political rights have traditionally taken precedence over social or economic interests. This is controversial and highly contested, however, and this thesis does not express a view on the normative value of the ranking of rights and interests. Its utility here is merely descriptive.

MERITS REVIEW OF MIGRATION STATUS DECISIONS IN THE UK II: JUDICIAL REVIEW AND ADMINISTRATIVE REVIEW

As noted at the outset of Chapter 6, the purpose in that chapter and the current one is to consider the compatibility of the UK system of appeals with the standard of merits review set out in Chapters 2 and 4. The previous chapter argued by reference in particular to three case studies that the current system of appeal rights in the UK is insufficiently protective in procedural terms as, whilst there is the institutional capability to satisfy the right to merits review, the allocation of rights of appeal to migration status decisions is overly narrow. This chapter considers other mechanisms of review operating in the UK legal order and asks whether the limited allocation of rights of appeal is remedied by the provision of judicial review and/or administrative review. They are examined below, in turn.

1. Does judicial review satisfy the definition of merits review?

As noted earlier, judicial review may be used to challenge migration status decisions, but it is in principle a review of the lawfulness of decision-making rather than a full review of fact, as well as law, as is the case on appeal.¹ However, judicial review

¹ See further Fordham: ‘Judicial review is a special supervisory jurisdiction which is different from both (1) ordinary (adversarial) litigation between private parties and (2) an appeal ([or] rehearing) on the merits. The question is not whether the judge disagrees with what the public body has done, but whether there is some recognisable public law wrong’: Fordham, *Judicial Review Handbook* (Chapter 4, n 24), 2.1.

does not ignore the merits of administrative decisions. As Paul Craig notes, all substantive review entails some consideration of the merits of a decision but ‘the live issue is how intensively the courts review the merits’.² Thus, the traditional rationality head of review looks to the merits of the decision but the threshold for interference by a court or tribunal is very high.³ Other standards of review that may apply in a judicial review, namely anxious scrutiny and proportionality, offer more intensive scrutiny of the merits.⁴ Judicial review is also independent of the Executive and provides an impartial forum for the resolution of challenges to the legality of administrative decisions. Indeed, as will be seen in Chapter 8, the view that judicial review provides an effective remedy from migration status decision-making has been endorsed by the ECtHR⁵ (although the correctness of this conclusion is questioned, especially in the light of more recent developments). The next section asks, therefore, whether the three criteria of merits review enumerated in Chapter 4 (independence, *de novo* assessment, substantive remedy) are met in substance by judicial review. The various standards of review employed in English judicial review - rationality, anxious scrutiny and proportionality - are examined below. Institutional constraints on the remedy are also examined. The chapter concludes that whilst proportionality review may come close to providing full jurisdiction over the facts, the margin of appreciation accorded to the primary decision-maker prevents it from satisfying the criterion of *de novo* assessment outlined in Chapter 4. Moreover, proportionality is not of general application in migration status decision-making, it only

² See further Craig, ‘Judicial Review and Anxious Scrutiny: Foundations, Evolution and Application’ (Chapter 2, n 118), p 75.

³ See 1.1 below.

⁴ See 1.2 and 1.3 below.

⁵ See discussion in Chapter 8 of *Vilvarajah v United Kingdom* (Chapter 5, n 132).

applies within a limited framework (certain fundamental rights) and then only to check the proportionality of one defined value against another. Further, the third Chapter 4 criterion, the ability to provide a substantive remedy, is not met by judicial review since it does not permit the substitution of its decision on the merits for that of the primary decision-maker.

1.1. Rationality review

As noted above, traditional judicial review includes within it heads of substantive review: both *Wednesbury* irrationality and review for illegality examine the merits of an administrative decision. The standard of *Wednesbury* irrationality is defined by reference to two seminal *dicta*: Lord Greene MR in 1947, who said that courts could only intervene in the factual findings of an administration where they were ‘so unreasonable that no reasonable authority could ever have come to it,’⁶ and Lord Diplock who defined the standard as ‘so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.’⁷ Likewise, the no evidence rule and the mistake of fact jurisdiction give the court the ability to quash a decision where evidence taken as a whole is not reasonably capable of supporting the factual findings made⁸ or where a decisive fact is found to be wrong, misunderstood or ignored.⁹ Thus, under both the irrationality and illegality heads of review the errors on the merits may be found to be so significant so as to amount to a

⁶ *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223 (CA) 230

⁷ *Council of Civil Service Unions v Minister for the Civil Service* 410 (Chapter 1, n 11).

⁸ Wade and Forsyth, *Administrative Law* (Chapter 2, n 45), p 229

⁹ *ibid*, p 234.

mistake of law for the purposes of judicial review. However, as such, they are narrow in ambit and unable to meet the criteria of merits review defined in Chapter 4.

In particular, reviewing a decision on the basis of rationality does not entail a full review of the facts. Rather than providing its opinion on the merits, it is intended that the reviewing court or tribunal should strive to apply an objective standard which leaves the deciding authority the full range of choices which the legislature is presumed to have intended.¹⁰ Thus, if the decision is within the confines of reasonableness, it is no part of the court's function to look further into its merits as 'two reasonable persons can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable.'¹¹ An example of this approach is provided by the High Court in *Rhandawa*.¹² An application under the Highly Skilled Migrant Programme had been refused because of evidence of false claims about employment, which were challenged by applicant. Sullivan J said that had this been an appeal on the merits, he might have been cautious about accepting the unfavourable evidence but that, in a judicial review, he was confined to deciding whether the defendants had been unreasonable to rely on it. Thus, for Paul Craig the 'barrenness of classic *Wednesbury* review' provides insufficient control over discretionary power. In his view, the 'extreme unreasonableness or perversity' anticipated by *Wednesbury* review

¹⁰ *ibid*, p 288.

¹¹ Per Lord Hailsham LC in *Re W (an infant)* [1971] AC 682 (HL), 700: 'not every reasonable judgment is right, and not every mistaken exercise of judgment is unreasonable.' See also Wade and Forsyth, *Administrative Law*, p 103: 'There is ample room, within the legal boundaries, for radical differences of opinion in which neither side is unreasonable.'

¹² *Rhandawa v Secretary of State for the Home Department* [2008] EWHC 3042 (Admin), [2008] All ER (D) 150 (Dec).

‘never translates into reality’.¹³ Whilst Paul Craig notes that in practice the ‘situation is not so bleak’ since courts do not in fact ‘actually stick to the limits of rationality review’ as formulated under the *Wednesbury* test,¹⁴ this leaves considerable uncertainty - inimical to effective procedural protection - as to the proper scope of merits review under the rationality jurisdiction.

1.2. Heightened rationality review: anxious scrutiny

The content of rationality review is not, however, exhausted by the classical *Wednesbury* formula but rather its intensity is context-specific. In *ex p Smith* it was held that ‘the more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable.’¹⁵ Anxious scrutiny is a heightened, more exacting form of review than classic *Wednesbury* review.¹⁶ The principle originated in the case of *Bugdaycay*¹⁷ and was applied in *WM (DRC)*.¹⁸ In *Bugdaycay*, an asylum case dating from 1987, before the introduction of appeal rights from asylum decisions and pre-dating the entry into force of the Human

¹³ Craig, ‘Judicial Review and Anxious Scrutiny: Foundations, Evolution and Application’ (Chapter 2, n 118), pp 75-6. Although, for an example of a tribunal employing classic *Wednesbury* review to overturn an administrative decision, see *R (on the application of Mushtaq) v Entry Clearance Officer of Islamabad, Pakistan (ECO – procedural fairness) IJR* (Chapter 6, n 53). The Upper Tribunal found the decision of the Entry Clearance Officer to be irrational in the *Wednesbury* sense, see [10]-[11]: ‘Having regard to the answers provided by the Applicant, during both this phase of the interview and generally, I readily conclude that this assessment also is irrational in the *Wednesbury* sense. It flies in the teeth of the information provided by the Applicant in response to questions.’

¹⁴ Craig, ‘Judicial Review and Anxious Scrutiny: Foundations, Evolution and Application’, p 76-7.

¹⁵ *R v Ministry of Defence Ex p Smith* [1987] AC 514 (CA), 554.

¹⁶ Craig, ‘Judicial Review and Anxious Scrutiny: Foundations, Evolution and Application’, p 77.

¹⁷ *Bugdaycay v SSHD* (Chapter 4, n 64).

¹⁸ *WM (Democratic Republic of Congo) v Secretary of State for the Home Department* [2006] EWCA Civ 1495, [2007] Imm AR 337.

Rights Act 1998,¹⁹ Buxton LJ held that the Secretary of State's decision to refuse asylum would be irrational if it was not taken on the basis of anxious scrutiny of the evidence to ensure that the claimants would not be subjected to a real risk of persecution on return to their country of origin.²⁰ Similarly, in *WM (DRC)*, the Court of Appeal applied anxious scrutiny to the Secretary of State's treatment of the evidence in a fresh claim application.²¹ The principle originated, therefore, in the asylum context but the courts have extended reliance on anxious scrutiny beyond asylum to other immigration cases.²² It remains unclear, however, whether such cases engage anxious scrutiny by virtue of being migration cases or whether more is required, such as the engagement of rights.²³

Yet whilst there is some dispute over the role and value of anxious scrutiny,²⁴ it is clear that as an obligation on the court,²⁵ anxious scrutiny manifests itself as a

¹⁹ See further Chapter 5.

²⁰ *Bugdaycay v SSHD* (Chapter 4, n 64), 531: '...the resolution of any issue of fact and the exercise of any discretion in relation to an application for asylum as a refugee lie exclusively within the jurisdiction of the Secretary of State subject only to the court's power of review... Within those limitations the court must, I think, be entitled to subject an administrative decision to the more rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines. The most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny.'

²¹ *WM (Democratic Republic of Congo) v Secretary of State for the Home Department* (n 18).

²² Paul Craig acknowledges the focus of anxious scrutiny on migration cases (70 per cent of cases involving anxious scrutiny relate to immigration and asylum). He is critical of the failure to extend properly anxious scrutiny beyond the migration context. Craig, 'Judicial Review and Anxious Scrutiny: Foundations, Evolution and Application' (Chapter 2, n 118), p 73.

²³ Craig suggests that the application of anxious scrutiny goes broader to reviewing the Secretary of State's application of the immigration rules and immigration legislation. *Ibid*, p 68.

²⁴ Jonathan Sumption SCJ has argued extra judicially that anxious scrutiny is nothing more than an empty catchphrase. Jonathan Sumption, 'Anxious Scrutiny' (*Administrative Law Bar Association Annual Lecture* 2014) p 5: 'In practice, the main impact of anxious scrutiny was on the court's approach to the factual basis of the decision under review. The burden of justifying the decision was placed firmly on the decision-maker instead of the applicant. A more comprehensive review of the facts and a higher standard of proof were expected of him before he could claim to have discharged it. But it is hard to regard this as a significant change. Courts of review have always been entitled to examine the facts if they are open to dispute.' Paul Craig, however, identifies two areas in which anxious scrutiny has played a role separate from proportionality review. First, it has

requirement to apply a heightened, more searching standard of rationality review. It does not, therefore, leave the arena of rationality review so as to constitute full merits review, but rather constitutes a more rigorous examination of the reasonableness of the Secretary of State's decision. As Lord Sumption explains '[i]n effect, anxious scrutiny remain[s] a technique for evaluating the decision-making process, rather than a review of the compatibility of the result with some external standard.'²⁶ And as Simon Brown LJ said in *Turgut*:²⁷

It is one thing to say that a decision to deport will be rigorously examined and subjected to the most anxious scrutiny: quite another to say that the court will form its own independent view of the facts which will then necessarily prevail over whatever view has been formed by the Secretary of State.²⁸

1.3. Proportionality

Thus the standard and heightened forms of rationality review do not satisfy the criteria of merits review set out in Chapter 4. Proportionality, however, requires a more far-reaching engagement with the facts. Proportionality is not a general head of review in domestic judicial review but it applies to the assessment of human rights under the Human Rights Act 1998²⁹ and in cases dealing with EU law.³⁰ Lord Steyn in *Daly*³¹ gave two reasons

been applied to determine whether or not ECHR rights are engaged, and secondly, it has been applied to determine the extent of the margin of discretionary judgment accorded to the decision maker in proportionality review: as such it has justified a more intense review where the rights in play are more fundamental. Craig, 'Judicial Review and Anxious Scrutiny: Foundations, Evolution and Application' (Chapter 2, n 118), pp 65-67.

²⁵ Craig distinguishes between anxious scrutiny as it applies to the courts and to the administration: Craig, 'Judicial Review and Anxious Scrutiny: Foundations, Evolution and Application'.

²⁶ Sumption, 'Anxious Scrutiny' (n 24), p 4.

²⁷ *R v Secretary of State for the Home Department, Ex p Turgut* [2001] 1 All ER 719 (CA).

²⁸ *ibid*, 728.

²⁹ *R (on the application of Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532. Craig, *Administrative Law*, p 624.

why proportionality is different from rationality review (including anxious scrutiny). First, proportionality could require the reviewing court to assess the balance struck by the decision-maker, not merely whether it is within the range of reasonable decisions open to him or her; and secondly, it could oblige the court to pay attention to the relative weight accorded to relevant interests in a way not generally undertaken under the traditional *Wednesbury* review.³² Thus, whereas under traditional principles of judicial review, insofar as the Secretary of State had complied with all legal requirements, the law could not control a discretionary decision of the Secretary of State (provided it was not capricious or outrageous),³³ where fundamental rights and/or EU law are involved, the Secretary of State's discretion is reviewable for its compliance with the standards of human rights and/or EU law. These are substantial differences.³⁴ Does proportionality review, therefore, satisfy the second criterion of the definition of merits review in Chapter 4 (full jurisdiction over the facts)?

The fact that the ultimate decision as to compliance with proportionality lies with the court may suggest that proportionality review does entail full jurisdiction over the facts.³⁵ In assessing proportionality, the central question is whether there has been a violation of an ECHR or EU right; the reviewer does not look to whether the decision maker properly turned his or her mind to the question (or whether he or she rationally

³⁰ See further, eg, Gordon and Moffatt, *EU Law in Judicial Review* (Ch 4, n 37), chapter 11.

³¹ *R (on the application of Daly) v Secretary of State for the Home Department* (n 29).

³² Craig, *Administrative Law* (Chapter 2, n 19), p 622-3

³³ See *R (on the application of Daly) v Secretary of State for the Home Department* (n 29) (where the Secretary of State had complied with all legal requirements for deporting an alien, it remains for him to decide whether or not to deport). See also Wade and Forsyth, *Administrative Law* p 207.

³⁴ Sumption, 'Anxious Scrutiny' (n 24), p 4.

³⁵ *R (Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100, [30], Craig, *Administrative Law*, p 624.

thought a decision was proportionate).³⁶ Lord Sumption recently claimed extra-judicially that proportionality review amounted in practice to merits review.³⁷ However, whilst it is abundantly clear that proportionality review does review the merits of administrative decisions, it is argued that it does not satisfy the criteria in Chapter 4.³⁸ The primary reason for this is the degree of deference accorded to the primary decision-maker.³⁹ As Paul Craig summarises,

³⁶ Sumption, 'Anxious Scrutiny' (n 24), pp 7-8. See also *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19, [2007] 1 WLR 19 ([13]-[14], [31], [44], [88]-[89], and *R (Nasseri) v Secretary of State for the Home Department* [2009] UKHL 23, [2010] 1 AC 1.

³⁷ Sumption, 'Anxious Scrutiny' (n 24), p 8: '[f]or my part, I question whether you can address the questions posed by the doctrine of proportionality without accepting some shift to a merits review. And I question whether a more intensive standard of review can ever be a sufficient response to the question what departures from Convention rights are proportionate to a legitimate objective.'

³⁸ This is the orthodox view, see, eg, Dinah Rose and Tom Richards, 'Appeal and Review in the Competition Appeal Tribunal' (2010) *Judicial Review* 201 and *R (Begum) v Headteacher and Governors of Denbigh High School* (n 35), per Lord Bingham. Rose and Richards refer to: 'isolated instances of the Court suggesting that a "full merits review" was permissible in a judicial review. See *R (Wilkinson) v Broadmoor Special Hospital Authority* [2001] EWCA Civ 1545 [2002] 1 WLR 419 and *R (JB) v Haddock* [2006] EWCA Civ 961, [2006] HRLR 40, both cases of forced medical treatment, where there is a significant overlap between the judicial review claim and the availability of a claim in tort.'

³⁹ See: *R v DPP Ex p Kebeline* [2000] 2 AC 326 (HL): per Lord Hope: 'In this area difficult choices may have to be made by the executive or the legislature between the rights of the individual and the needs of society. In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention. This point is well made at p. 74, para 3.21 of *Human Rights Law and Practice* (Butterworths, 1999), of which Lord Lester of Herne Hill Q.C. and Mr David Pannick Q.C. are the General Editors, where the area in which these choices may arise is conveniently and appropriately described as the "discretionary area of judgment." It will be easier for such an area of judgment to be recognised where the Convention itself requires a balance to be struck, much less so where the right is stated in terms which are unqualified. It will be easier for it to be recognised where the issues involve questions of social or economic policy, much less so where the rights are of high constitutional importance or are of a kind where the courts are especially well placed to assess the need for protection.'

[t]he fact that the ultimate decision as to compliance with proportionality resides with the court does not however, tell us how much weight will be accorded to the view of the initial decision-maker when the court is making its ultimate decision.⁴⁰

Thus, where a court is so inclined, it may disagree with the primary decision maker on proportionality but there is no obligation to always re-consider the facts *de novo*. In some cases the court may decide to give substantial deference to the primary decision maker such that the decision would be regarded as proportionate by the court ‘whichever way [it] went’.⁴¹ The degree of weight to be given to the primary decision maker is not a readily quantifiable concept. Whilst attempts may be made at categorizing it as a function of the type of right involved,⁴² it also depends on the view of the individual judge on the relative extent of the court’s expertise, the relative importance of the interests at stake, and the nature of the subject matter.⁴³ In *Farrakhan*⁴⁴ – a case challenging the Secretary of State’s refusal of entry to a controversial speaker – the Court of Appeal held that the Secretary of State must be accorded wide area of discretion for a number of reasons, including the subject matter (an immigration case based on a concern for public order), the fact that it was the Secretary of State’s personal decision, that the Secretary of State was better placed to reach informed decision than a court, and that the

⁴⁰ Craig, *Administrative Law* (Chapter 2, n 19), p 624. See further: Craig, ‘Judicial Review and Anxious Scrutiny: Foundations, Evolution and Application’, p 75 ‘What the court should not normally do is substitute judgment on the merits of the discretionary determination, in the sense of imposing the decision that it would have made had it been the primary decision-maker. The courts will perforce be the ultimate arbiters of whether the test for review, whatsoever it might be, has been met on the facts of a case, but this is nonetheless distinct from a court substituting its decision for that of the public body simply because it would have reached a different conclusion had it been making the initial determination.’

⁴¹ *Belfast City Council v Miss Behavin' Ltd* (n 36), [46] (Lord Mance).

⁴² See, eg, Lady Hale in *R (on the application of Countryside Alliance) v Attorney General* [2007] UKHL 52, [2008] 1 AC 719, [124].

⁴³ Craig, *Administrative Law*, p 626.

⁴⁴ *Farrakhan* (Chapter 3, n 12).

Secretary of State was democratically accountable for the decision. It also appears that substantial deference is particularly likely where the decision-maker has provided a considered opinion on Convention issues.⁴⁵ By contrast, there was found to be no room for a discretionary area of judgment in *Edore v SSHD*,⁴⁶ also an immigration case but one in which the balance tipped so heavily one way that only one outcome was possible and the court simply substituted its own opinion since, as it explained, ‘there really is only room for one view as to how the balance between these competing interests should be struck’.

Accordingly, whilst it is possible for there to be full merits review of the type described in Chapter 4 under the proportionality standard of review (where there is only room for one view under the proportionality balancing exercise), it falls short of the criteria in Chapter 4 because of the discretionary area of judgment. In other words, full merits review may be an incident of a proportionality assessment rather than invariably the standard of review. This is no different in quality from the jurisdiction of the court under rationality review to substitute its judgment on the merits where a factual finding is perverse or demonstrably wrong, save that the threshold for interference is far higher in the latter case. Thus, the degree of deference marks the extent to which the decision-maker may exercise an autonomous judgment, or in other words, the extent to which the test of proportionality is not merits review.⁴⁷ As such, proportionality cannot guarantee *de*

⁴⁵ *Belfast City Council v Miss Behavin' Ltd* (n 36), [47], [91].

⁴⁶ *Edore v Secretary of State for the Home Department* [2003] EWCA Civ 716, [2003] 1 WLR 2979. Wade and Forsyth, *Administrative Law* (Chapter 2, n 45), p 312.

⁴⁷ Wade and Forsyth, *Administrative Law* (Chapter 2, n 45), p 208.

novo review in every case: it does not signal the systematic substitution of the court's view for that of the primary decision maker but rather permits it in particular cases.⁴⁸

1.4. Institutional limitations

Therefore, whilst all the standards of review deployed in judicial review have some regard to the merits of a case – and may result in full merits review as described in Chapter 4 – it is not systematically the case. A further barrier to achieving full scrutiny of the merits in judicial review relates to institutional competence. Typically, the remedy – if the application is granted – will be an order quashing the unlawful decision. As Tomkins explains:

...the court may quash government decisions, may order the government to fulfil its duties, and may prohibit the government from acting unlawfully. While the grant of any of these remedies may cause immediate inconvenience to the government, how difficult will it really be for the government to overcome their inconvenience? ... if a decision is quashed on substantive, rather than procedural grounds, the government may well be able simply to remake the decision, but on alternative grounds, or relying on an alternative source of authority. If this course of action turns out not to be open to the government, there is nothing to prevent it from going to parliament to seek further authority.... The courts can do nothing to ensure that the remedies they grant are executed in the manner in which either they or the claimants who brought the action would ideally wish.⁴⁹

Thus, although a court may require a certain course of action, it may only do so where it is the sole result that is legally permissible. This was confirmed by the Upper Tribunal in *R (Sultana) v SSHD*.⁵⁰ In this case previous proceedings brought against a decision to refuse entry clearance had been settled with the decision under challenge being

⁴⁸ This distinction is exemplified by comparing the assessment of proportionality undertaken in the First-tier Tribunal with the review of that proportionality assessment in the Upper Tribunal in accordance with its error of law jurisdiction.

⁴⁹ Tomkins, *Public Law* (Chapter 1, n 76), p 208.

⁵⁰ *R (Sultana) v SSHD* [2015] UKUT 226 (IAC).

withdrawn. However, subsequently, entry clearance was not granted but the Home Office required a further interview. The Applicant challenged the demand for an interview and argued that the tribunal should make a mandatory order requiring a grant of entry clearance. The Upper Tribunal dismissed the application on the basis that it was not the sole, legally permissible outcome. It is, therefore, difficult to secure a concrete outcome from judicial review, typically a successful application requires the decision to be re-made with the result that it may be identical on the merits as the decision originally challenged. In addition to this central institutional constraint to achieving full merits review, remedies are discretionary in judicial review⁵¹ and it is expensive and procedurally complex jurisdiction. The cumulative effect of changes to, in particular, legal aid, additionally problematize access to judicial review.⁵²

1.5 Conclusion on judicial review

Judicial review does not, therefore, satisfy the definition of merits review set out in chapter 3. Moreover, the purpose of judicial review, traditionally conceived of as enforcing administrative duties on behalf of the public, arguably renders it an inapt forum for the assertion of the types of private rights and interests typically involved in migration status decisions. In judicial review a person's individual interests are relevant to the question of standing but not remedy. Judicial review can only enquire into legality, rationality and fairness of a decision whereas in an appeal on the merits the relevant question is whether or not the parties can prove their cases on the relevant standard of

⁵¹ Wade and Forsyth, *Administrative Law* (Chapter 2, n 45), p 426 and *Hoffmann La Roche v SS for Trade and Industry* [1975] AC 295 (HL) at 320 per Lord Denning MR.

⁵² See further: Moffatt and Thomas, 'And then they came for judicial review: proposals for further reform' (Chapter 4, n 70); and Joint Committee on Human Rights, *Eighth Report, Legislative Scrutiny: Immigration Bill*, para 39.

proof. Although it has been said that the HRA 1998 has changed the complexion of judicial review such that it is now more directed at the protection of individual interests, as seen earlier, the doctrines of margin of appreciation and deference means that there remain limitations on the ability of individuals to assert their interests through judicial review.⁵³

2. Does administrative review satisfy the definition of merits review?

Unlike appeals, the standards of scrutiny developed under judicial review did not originate in statute. Appeals are not, however, the only statutory review mechanism. As noted above, some migrants excluded from appeal rights under IA 2014 are offered an internal, administrative review of the migration status decision.⁵⁴ Administrative review is defined in the Immigration Rules as ‘the review of an eligible decision to decide whether the decision is wrong due to a case working error.’⁵⁵ It does not, however, apply generally to all migration status decisions: notable exclusions from the administrative review mechanism are protection and human rights cases (which have a statutory right of appeal) and visitor and short-term student applications and decisions to curtail leave

⁵³ The benefits of appeal rights for applicants are summarized by Thomas, ‘Evaluating tribunal adjudication: administrative justice and asylum appeals’, pp 465-6: ‘For applicants the establishment of appeal rights had clear advantages as it entitled them to an independent de novo merits appeal which afforded them a greater degree of participation in the decision-making process. As in other tribunal systems, a right of appeal provides appellants with the opportunity of presenting a well-prepared claim and adducing additional evidence in support of a favourable decision. In light of the difficult and uncertain fact-finding exercise involved in asylum decision-making and the possibility that initial decision-making may be inadequate, appeal rights have been of considerable importance to appellants.’ Thomas also acknowledges the benefits of appeal rights to the Government in ‘legitimizing executive decision-making by having external legal control without incurring the expense and delay of judicial review proceedings’, p 466.

⁵⁴ See Paragraphs 34L to 34Y of the Immigration Rules and Appendix AR.

⁵⁵ Appendix AR, AR2.1.

(which do not have a statutory right of appeal).⁵⁶ The Government outlined its proposals to replace appeal rights with rights to administrative review in cases not involving international protection, EU law and fundamental rights in the following way:

an appeal to an immigration judge is a very costly and time-consuming way to correct simple case work errors which could be resolved by a request to the Home Office to review the decision...Where an immigration application is wrongly refused because of casework error it will be corrected by a less costly and quicker process.⁵⁷

...

We do not believe that a costly, complex and lengthy appeal process is the most appropriate way to resolve factual errors.⁵⁸

...

Furthermore, the majority of Points Based System appeals (economic migrants and students) are currently allowed on the basis of a factual error by the decision maker. A full-merits appeal, which can be prolonged and expensive for both the applicant and the Government, is not the appropriate mechanism for resolving such errors.⁵⁹

At the centre of the argument is the appropriateness of administrative review as a remedy to correct ‘case working errors.’ ‘Case working errors’ are defined broadly: in relation to certain decisions (refusal on the basis of previous breach of the UK’s immigration laws and deception⁶⁰ and refusal on the basis that an application was beyond a time limit specified in the Immigration Rules) a case working error is defined as ‘where

⁵⁶ See further *ibid*, AR3.2-4.

⁵⁷ Home Office, *Immigration Bill Factsheet: Appeals* (October 2013).

⁵⁸ Appeals Impact Assessment (Chapter 1, n 24), p 3.

⁵⁹ *ibid*, p 4.

⁶⁰ Immigration Rules, paras 320(7A), 320(7B) or 322(1A) and 321A(2).

the original decision-maker's decision... was incorrect.'⁶¹ In relation to other decisions eligible for administrative review⁶² case working errors are identified as '[w]here the original decision maker otherwise applied the Immigration Rules incorrectly'⁶³ and '[w]here the original decision maker failed to apply the Secretary of State's relevant published policy and guidance in relation to the application.'⁶⁴ Thus, in effect 'case working error' appears to include errors of subjective assessment applying standards under the Rules (for example, credibility assessments and assessments of whether other legal standards under the Rules are correct) as well as some process errors (failure to consider a document, incorrect calculation etc).⁶⁵ It constitutes, therefore, merits review: the reviewer has full (or almost full) jurisdiction over the facts and may substitute his or her judgment for that of the primary decision-maker, thereby satisfying the second and third Chapter 4 criteria. However, administrative review is not independent. As such, the first Chapter 4 criterion is not met. As seen in earlier chapters, it is accepted that there may be some migration status decisions in relation to which the provision of a mechanism of review satisfying the Chapter 4 criteria is not necessary as a matter of principle: in summary this is where there is no or de minimus discretion in the primary decision. However, insofar as migration status decisions include the exercise of judgment over discretionary criteria, they are unsuited to internal review in the light of the absence

⁶¹ Appendix AR2.11(a) and (b).

⁶² *ibid*, AR3.2-4.

⁶³ Appendix AR2.11(c).

⁶⁴ *ibid*.11(d).

⁶⁵ Appendix AR, A3.4. Whilst the list of available 'case working errors' was reduced with effect from 6 April 2015, discretionary judgments remain reviewable given the grounds include 'the decision maker otherwise applied the Immigration Rules incorrectly' and re-examination of the general grounds of refusal.

of structural independence. Thus, for the reasons explored in Chapter 2, this is inimical to the moral demands of fair treatment.

Conclusions

Neither judicial review nor administrative review provide a standard of merits review meeting the definition in Chapters 2 and 4 (independent, *de novo* assessment of facts, ability to provide a substantive judgment). Judicial review is independent of the executive and provides impartial review, and it may in certain extreme cases allow for full jurisdiction over the facts but this is not guaranteed. Crucially, it does not generally permit the reviewer to make a substantive judgment substituting his or her view for that of the primary decision-maker. Whilst administrative review allows for full scrutiny of the merits and the substitution of judgment, it is not independent. The limitations of alternative remedies reinforce the need for statutory appeals to provide procedural fairness in migration status decision-making. Yet, as seen earlier, there is unwillingness at the legislative level to base the provision of a statutory appeals system on the moral demands of fair treatment. As noted in the following chapter, given constitutional and structural limitations, the requirements of procedural fairness at common law cannot compel the provision of rights of appeal through statute. However, the UK's obligations as a matter of international and European law are not, in certain circumstances, so constrained. This is addressed in the following chapter.

MERITS REVIEW OF MIGRATION STATUS DECISIONS IN THE UK III: THE CONTRIBUTION OF INTERNATIONAL AND EU FUNDAMENTAL RIGHTS

The question asked in this chapter is whether current international and EU legal standards¹ applicable in the UK require merits review of migration status decisions (comprising the three elements of independence from the executive, *de novo* assessment and substitution of judgment as defined in Chapters 2 and 4). As has been seen in the previous chapters, the UK system of recourse from migration status decision-making does not confer a right of appeal on the merits from all migration status decisions. As explained in Chapters 4 and 5, in the UK statute provides the legal basis for migration appeal rights and as such, due to the nature of the UK constitutional framework, common law standards of procedural justice,² which cannot override primary legislation, have little influence on the allocation or modification of these rights. International and regional human rights regimes, however, may, in certain circumstances, require the provision of access to justice and a specific standard of review. The aim of this chapter is to establish whether this is the case in relation to all or any migration status decisions in the UK. In order to do so, the application and nature of procedural standards under international law

¹ For a comprehensive examination of fundamental rights under the ECHR, see: Clayton and Tomlinson, *The Law of Human Rights* (Chapter 4, n 24). For an examination of EU fundamental rights applicable in the UK, see: Gordon and Moffatt, *EU Law in Judicial Review* (Chapter 4, n 37), and for an examination of international law applicable in the UK, see Shaheed Fatima, *Using International Law in Domestic Courts* (Hart 2005).

² See discussion of natural justice in Chapter 4.

(primarily the Refugee Convention, the Convention Against Torture (CAT) and the International Covenant on Civil and Political Rights (ICCPR)), the ECHR, and EU law are examined.

In summary, the strongest procedural protection is provided by EU law, which has articulated a right to what is understood to be, on the definition given in Chapter 4 of this thesis, merits review³ in respect of migration status decisions involving those aspects of migration regulated by EU law in the UK. The ECHR procedural rights are less protective in relation to guaranteeing a right to merits review. Article 6, which has been interpreted by the Strasbourg Court to require merits review (subject to exceptions), has been held not to apply to migration status decisions and there is case law under Article 13 plus 3 finding that UK judicial review provides an effective remedy. Yet, as the previous chapter concluded, UK judicial review does not satisfy the Chapter 4 criteria and, therefore, arguably, for the reasons outlined below, this conclusion should be revisited.⁴ Finally, whilst the monitoring bodies of some international treaties have articulated a right to merits review,⁵ in general terms, the impact of international instruments on determining the standard of review is insignificant in the UK. This is due to a combination of both the content of the rights and the limitations on their application. The following sections analyse these conclusions in more detail but first and by way of

³ As explored below, this is not the terminology used by the EU legislator and CJEU.

⁴ cf Procedural standards elaborated by the African Union's African Commission of Human and Peoples' Rights (ACommHPR); as well as the Organization of American States' Inter-American Court of Human Rights (IACtHR) and Inter-American Commission on Human Rights (IACommHR). See discussion in David Cantor, 'Reframing Relationships: Revisiting the Procedural Standards for Refugee Status Determination in Light of Recent Human Rights Treaty Body Jurisprudence' (2015) 34 Refugee Survey Quarterly 79, at sections 3.3-4.

⁵ See *ibid*

introduction, the chapter briefly explores why the common law is inapt to influence the UK's appeals system.⁶

1. Common law

As is clear from the descriptions in Chapters 4 and 5, generally the common law principles of natural justice and procedural fairness (which include a right to be heard) have been applied to migration status decision-making.⁷ In terms of the substance of the common law right to a hearing, the nature of the right is flexible and is dependent on the subject matter and interests at stake.⁸ It is generally conceived of as giving rise to a right to be heard before administrative action takes place, rather than recourse *ex post facto* and, moreover, generally any recourse required as a matter of natural justice/procedural fairness is before the administrative decision-maker rather than a court or tribunal.⁹ As

⁶ The Joint Committee on Human Rights in a report from 2014 were more open to a role for the common law in requiring a right of appeal: para 35: 'The Bill's removal of rights of appeal against immigration decisions on other public law grounds potentially represents a departure from this common law right of access to a court or tribunal to challenge unlawful administrative decisions.' Joint Committee on Human Rights, *Eighth Report, Legislative Scrutiny: Immigration Bill*.

⁷ There is no express threshold restriction on the application of the principles of natural justice and the general approach of the English courts across time (see Chapter 5 for a discussion of the courts' restriction of the application of procedural fairness to administrative processes of a judicial nature in the first half of the Twentieth century) has been to apply the precepts of natural justice provided that the interest affected is regarded as sufficiently important, Craig, 'The Human Rights Act, Article 6 and Procedural Rights' at 753. See also *Ridge v Baldwin* and *Council of Civil Service Unions v Minister for the Civil Service* (Chapter 1, nn 10-11). Of the many cases in the FTT and UT applying principles of procedural fairness, see, eg, *Marghia (procedural fairness)* [2014] UKUT 00366 (IAC) and *MM (unfairness; E & R) Sudan* [2014] UKUT 105 (IAC).

⁸ See, eg, *Cooper v Board of Works for the Wandsworth District* (Chapter 4, n 25); *Ridge v Baldwin* (Chapter 1, n 10); *Lloyd v McMahon* [1987] AC 625 (HL); *Osborn v Parole Board* [2013] UKSC 61, [2014] AC 1115, [2] (held that an oral hearing is required where the fairness necessitates it in light of the facts of the case and the importance of what is at stake). See also Wade and Forsyth, *Administrative Law*, p 421.

⁹ The question of whether an appeal right may be derived from common law natural justice was examined by the Court of Appeal in *Ward v Bradford Corporation* (1971) 70 LGR 27. The case involved the expulsion by a teacher training college of one of its pupils (the claimant, Miss Ward) for breaching the terms of occupancy of Halls of Residence by permitting a man to stay with her. One of the grounds advanced by Miss Ward was that, as a matter of natural justice, she should have been given a right of appeal from the decision of the college's Disciplinary Committee to

seen in earlier chapters, by contrast, the Supreme Court has held that a right to judicial review arises out of the constitutional principle of the rule of law.¹⁰ However, it has not been found that the rule of law compels a particular standard of review. The silence of the common law fairness rights on the standard of review may be due, at least in part, to the provision of alternative remedies in statute.¹¹ Thus, insofar as statute determines that there should (or should not) be a right of appeal from the decision of an administrative authority, the common law may not supplant or modify Parliament's specifications:¹² statute occupies the field and any pre-existing common law rights may be impliedly abrogated¹³ (subject to the principle of legality).¹⁴ In application to migration status

expel her. The Court (Lord Denning MR, Phillimore and Orr LJJ) unanimously dismissed the claim. In the words of Lord Denning, 'natural justice does not require the provision of an appeal. So long as the party concerned has a fair hearing by a fair-minded man or body of men, that is enough.' Thus, a distinction was drawn between an appeal in the legal sense and the right to a hearing, that is, a right to address the deciding authority in mitigation. Lord Phillimore relied on the speech of Lord Hodson in *Ridge v Baldwin* to identify the requirements of natural justice in a situation such as that in issue: '(1) That the Court or individual which tries anyone should be free from bias. (2) That the person accused should be told what rule it is said that he or she has broken; and (3) That he or she should be given a fair hearing to allow any defence to be put forward.' In the Court's view, therefore, the requirements of natural justice did not (and cannot) compel a judicial hearing on the merits of the College's decision.

¹⁰ *R (Evans) v Attorney General* (Chapter 2, n 13), [51]ff.

¹¹ By the nature of the UK constitutional settlement, common law rights are not necessarily proofed against legislative override (see further below). Although the reasoning in *Ward* appears to suggest that is the nature of natural justice itself that cannot provide a right to merits review (rather than any constitutional constraint). See n 9. Insofar as the conclusion stands for a general principle that natural justice cannot require merits review *per se*, it is open to criticism. The requirements of natural justice are by definition context-specific such that if the justice required merits review on a given set of facts, there is nothing inherently preventing its provision through the common law.

¹² See Wade and Forsyth, *Administrative Law* (Chapter 2, n 45), p 448: 'natural justice does not require that there should be a right of appeal from any decision. This is an inevitable corollary of the fact that there is no right of appeal against a statutory authority unless statute so provides.'

¹³ See further, Francis Bennion, *Bennion on Statutory Interpretation* (Lexis Nexis 2013) and *Eastwood v Magnox Electric Plc* [2004] UKHL 35, [2005] 1 AC 503 (common law right of unfair dismissal with an undetermined level of damages would be inconsistent with the new statutory scheme prescribing limits on compensation for unfair dismissal).

¹⁴ The principle of legality is a fetter on the abrogation of common law rights without express Parliamentary provision. See eg, *Al Rawi v Security Service* [2011] UKHL 34, [2011] 3 WLR 388. See also Michael Fordham, 'Secrecy, Security and Fair Trials: The UK Constitution in Transition' [2012] *Judicial Review* 187, 201. Fordham advocates the elevation of the principle of legality to a

decision-making, statute governs the conditions under which migrants subject to adverse migration status decisions may exercise a right of appeal.¹⁵ The fact that Parliament has occupied the field of migration status appeals, arguably, therefore, precludes the development of parallel common law rights (save, of course, in relation to judicial review, which is viewed as the practical application of the constitutional principle of the rule of law).¹⁶

2. General international law instruments

As noted above, the UK is party to a number of international conventions with relevance to migration,¹⁷ however, the inapplicability of the instruments in the UK coupled with the nature of the rights themselves means their impact on determining rights of recourse from migration status decision-making in the UK is minimal.¹⁸ These reasons are examined in turn below.

constitutional principle, with similar effect to EU and ECHR rights, such that it acts as a fetter on unconstitutional statutes where such is explicitly provided for. However, in the absence of pre-existing common law rights (as with the right of appeal), the principle of legality cannot be invoked.

¹⁵ See the NIAA 2002 and description of the UK system of access to justice from migration status decision making in Chapters 4 and 5.

¹⁶ For a discussion of the unconstitutionality of the ouster of judicial review, see, eg, Richard Rawlings, 'Review, Revenge and Retreat' (2005) 68 *The Modern Law Review* 378. Any such critique of the failure of common law to provide procedural protection in an area occupied by Parliament is, therefore, a constitutional matter that lies beyond the purview of this thesis.

¹⁷ In addition to the two UN Covenants (International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)), the following are of particular relevance to issues of migration: the Convention Relating to the Status of Refugees (Refugee Convention (RC)), the Convention Against Torture (CAT), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the United Nations Convention on the Rights of the Child (CRC), and International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Migrant Worker Convention (MWC)).

¹⁸ A full examination of the procedural protections of the various international treaties relevant to migration status decisions is beyond the scope of this thesis. For a detailed account, regard should

2.1. Application in the UK

There are a number of situations in which an international convention will not apply directly in the UK. First, some international instruments have not been ratified by the UK. This is the case in respect of the International Convention on the Rights of Migrant Workers,¹⁹ for example, which provides for a number of procedural protections but has not been ratified by the UK. Secondly, whilst some international conventions have been ratified, they have then not been incorporated into domestic law, as is the case, for example, with the ICCPR and ICESCR in the UK. Whilst an unincorporated treaty may have certain effects in UK law (primarily it may be relied on to assist the interpretation of the common law and provides a legitimate expectation that its contents will be respected), individuals may not rely on unincorporated rights.²⁰ Thirdly, there may be no right of petition afforded to individuals, as is the case in the UK in respect of, for example, the ICCPR and the CAT. Thus, the ICCPR provides for procedural safeguards against expulsion of lawfully present migrants by Article 13, but it is not directly enforceable as the ICCPR is not domestically incorporated and there is no right of individual petition in respect of any claimed violations.

be had to Cantor, 'Reframing Relationships: Revisiting the Procedural Standards for Refugee Status Determination in Light of Recent Human Rights Treaty Body Jurisprudence', Baldinger, *Rigorous Scrutiny versus Marginal Review* (Chapter 4, n 78) and, in the expulsion context, to Fripp, Moffatt and Wilford, *The Law and Practice of Expulsion and Exclusion from the United Kingdom: Deportation, Removal, Exclusion and Deprivation of Citizenship* (Chapter 4, n 1).

¹⁹ Adopted by UN General Assembly resolution 45/158 18 December 1990.

²⁰ See Blake and Husain, *Immigration, Asylum and Human Rights* (Chapter 2, n 88), p 277. See further Eric Fripp, Rowena Moffatt and Ellis Wilford *The Law and Practice of Expulsion and Exclusion from the United Kingdom* (Chapter 4, n 1), chapter 3.

2.2. Nature of the rights

The second obstacle mentioned earlier to the recognition of a right to merits review from migration status decisions as a matter of international law is the nature of the rights themselves. No international convention contains an express right to merits review and the monitoring bodies have generally been reluctant to pronounce on national procedures and remedies.²¹ Thus, in relation to the ICCPR, the Human Rights Committee (HRC) has not developed principles on the required intensity of national judicial scrutiny in administrative law cases.²² Initially, this was also the case under the CAT, although more recent jurisprudence of the Committee Against Torture on Article 3 of the CAT (prohibition on *refoulement*)²³ has stipulated what amounts in substance to a right to merits review.²⁴ Thus, in *Nirmal Singh v Canada*²⁵ the Committee Against Torture found that the ‘very narrow review for gross errors of law’ undertaken by the Federal Court of Canada did not constitute an effective remedy for the right protected by Article 3.²⁶ It

²¹ Baldinger, *Rigorous Scrutiny versus Marginal Review* (Chapter 4, n 78), p 183. For an exploration of the position taken, see further Cantor, ‘Reframing Relationships: Revisiting the Procedural Standards for Refugee Status Determination in Light of Recent Human Rights Treaty Body Jurisprudence’

²² Baldinger, *Rigorous Scrutiny versus Marginal Review* (Chapter 4, n 78), p 85. Moreover, the fair trial right in Article 14 ICCPR has been held not to apply to decisions on expulsion and deportation (General Comment No 32).

²³ Article 3 CAT reads: ‘(1) No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. (2) For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.’

²⁴ Baldinger, *Rigorous Scrutiny versus Marginal Review* (Chapter 4, n 78), p 183.

²⁵ *Nirmal Singh v Canada* No 319/2007 (CAT, 30 May 2011).

²⁶ *ibid*, para 8.8. In an earlier case, *Agiza v Sweden* No 233/2003 (CAT, 20 May 2005), the Committee Against Torture had found an implied right to an effective remedy for the breach of Article 3 CAT in order to ensure protection of the substance of the right. It specified that effective review required, in the context of *refoulement*, ‘an opportunity for effective, independent and impartial review of the decision to expel or remove,’ para 13.7.

concluded that ‘the State party should provide for judicial review of the merits,’²⁷ rather than merely of the reasonableness, of decisions to expel an individual where there are substantial grounds for believing that the person faces a risk of torture.’²⁸

Given the partially overlapping nature of the prohibition on *refoulement* in the CAT and the protections of the Refugee Convention, it might be expected that an analogous principle exists under the latter instrument. However, the procedural rights under the Refugee Convention have been expressed in more equivocal terms, notwithstanding calls from the UNHCR for recourse from asylum decision-making should be both on the facts and the law.²⁹ Thus, it is unclear whether the right of access to justice under Article 16 of the Refugee Convention applies to the determination of an asylum claim (or other migration status decision).³⁰ Further, in Hathaway’s view, the right of due process of law prior to expulsion on grounds of national security and public order in respect of lawfully present refugees under Article 32, does not necessarily require an appeal to a court.³¹

²⁷ From this it is unclear whether the three criteria of merits review articulated in Chapter 4 are satisfied. Given that it is compared with ‘reasonableness’ review, the Committee’s definition could arguably refer to other light touch forms of substantive review, such as proportionality.

²⁸ *Nirmal Singh v Canada* (n 25), para 9.

²⁹ See, eg, UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)* (EC/GC/01/12, 31 May 2001). And see further Baldinger, *Rigorous Scrutiny versus Marginal Review* (Chapter 4, n 78), pp 36 and 380.

³⁰ Baldinger summarises the various views and concludes that majority now find it applicable. Baldinger, *Rigorous Scrutiny versus Marginal Review* (Chapter 4, n 78), pp 25-25. See further, Cantor, ‘Reframing Relationships: Revisiting the Procedural Standards for Refugee Status Determination in Light of Recent Human Rights Treaty Body Jurisprudence’.

³¹ James C Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2005), pp 670-77. See further discussion of scholarship in Cantor, ‘Reframing Relationships: Revisiting the Procedural Standards for Refugee Status Determination in Light of Recent Human Rights Treaty Body Jurisprudence’. Cantor notes that ‘On their own, it is fair to conclude that these sources of international law provide only a relatively fragile legal basis for the elaboration of procedural standards for refugee status determination. Indeed, it is a notable feature of both UNHCR doctrine and scholarly argument on this point that a firm legal basis for such procedural

2.3. Analysis

What then is the impact of international conventions on the UK's provision of appeal rights from migration status decisions? Of the rights discussed above, the clearest articulation of a right to merits review is by the Committee Against Torture in relation to the prohibition on *refoulement* under the CAT. Does, therefore, Article 3 of the CAT as interpreted by the Committee Against Torture, require an appeal on the merits from a decision to expel an individual claiming to face a real risk of persecution? The CAT has been ratified by the UK but, as noted above, it has not recognised the competence of the Committee Against Torture to receive individual petitions. However, notwithstanding the absence of avenues of individualised recourse, the UK is obliged to respect its obligations under the CAT. The UK does currently provide full *ex nunc* merits review from rejected asylum decisions, however, even if it were to rely solely on domestic judicial review, the *Nirmal Singh* case does not necessarily mean that the UK would be in violation of Article 3 CAT. The issue in *Nirmal Singh* was not necessarily a failure in the court's powers (it had jurisdiction to review the merits on grounds of mistake of fact) but rather a failure to exercise them in a proper way for the purposes of providing an effective remedy.³² As discussed in earlier chapters, UK judicial review does include low intensity merits review. Provided, therefore, that a UK court or tribunal effecting a judicial review did not restrict itself to reviewing on narrow grounds for manifest errors of law (reasonableness),

standards is ultimately sought in the distinct but closely related corpus of international human rights law, particularly in purportedly universal expressions of the right to a fair trial as in the ICCPR.'

³² Baldinger, *Rigorous Scrutiny versus Marginal Review* (Chapter 4, n 78), p 126.

it is likely to be compliant with Article 3 CAT. The CAT definition of merits review, does not, therefore, satisfy the definition provided in Chapters 2 and 4.³³

3. The European Convention on Human Rights

By contrast to general international law, regional rights instruments afford greater procedural protection.³⁴ In certain circumstances, a right to merits review from administrative decisions has been held to be necessary as part of a right to a fair hearing in Article 6 ECHR. However, migration status decision-making has been excluded from the application of this right.³⁵ Although there are a number of other provisions generating procedural rights under the ECHR, none of these has been found by the Strasbourg Court to generate a right of merits review. This case law is examined and critiqued in the following section. As a preliminary it is useful to set out, briefly, how the ECHR applies to migrants seeking to enter or residing in the UK.

3.1. Application of Convention to migration status decisions

Article 1 ECHR entitles each individual, irrespective of his or her nationality, within the jurisdiction of the contracting states to benefit from the application of the ECHR.³⁶ Jurisdiction is defined territorially, however, the ECtHR has accepted jurisdiction over applications lodged by at least some would-be migrants.³⁷ The Human

³³ See n 27 above.

³⁴ See also African Charter on Human and Peoples' Rights and Inter-American human rights system: n 4 above

³⁵ See 3.2.1 below.

³⁶ Article 1 ECHR provides: The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

³⁷ The matter of jurisdiction is complex and why entry clearance decisions may fall within the jurisdiction of the ECHR has not been expressly articulated. Gina Clayton suggests that they may

Rights Act 1998 (HRA) incorporated the majority of rights protected under the ECHR³⁸ to permit reliance on ECHR rights domestically.³⁹ Under the terms of the HRA, public authorities, including courts and tribunals, are required to uphold Convention rights⁴⁰ and as such, they must be considered insofar as they are claimed to arise in migration status decision-making. There are a number of ECHR provisions that seek expressly or impliedly to guarantee the procedural rights of those under the jurisdiction of the Convention. These include Articles 6, 13, 1 of Protocol 7, 5(4), 8 and 3. Their application to migration status decision-making and the claims made in this thesis are examined in detail below.

3.2. Article 6 ECHR

3.2.1. *Application*

The primary procedural justice rights under the ECHR are provided by Article 6.

Whilst there is no express right to access to justice provided in Article 6,⁴¹ it has been

fall within the consular exception to territorial jurisdiction. See further Clayton, *Textbook on Immigration and Asylum Law*, pp 224-5, *The Law and Practice of Expulsion and Exclusion from the United Kingdom: Deportation, Removal, Exclusion and Deprivation of Citizenship* (Eric Fripp, Rowena Moffatt, Ellis Wilford ed, Hart 2014) (Chapter 4, n 1), chapter 5, pp 118-122, and Cathryn Costello, 'Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored' (2012) 12 Human Rights Law Review 287. In terms of the litigation of ECHR rights in domestic courts, the application of the Convention rights is clear as a matter of s 6 HRA 1998.

³⁸ The HRA 1998 entered into force on 2 October 2000.

³⁹ The rights are contained in Schedule 1 HRA. Article 13 ECHR was not incorporated as the HRA itself was considered to be an effective remedy. There is also a right of individual petition (now art 34 ECHR), which permits individuals within the jurisdiction of contracting states to apply to the ECtHR for a judgment on the compatibility of the law(s) or action(s) of a contracting state with the ECHR.

⁴⁰ HRA 1998: '6 Acts of public authorities. (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right...' As noted above, this provides the jurisdiction of domestic courts over ECHR Rights.

⁴¹ The civil limb of Article 6 ECHR provides: 'In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

implied in the jurisprudence of the Court.⁴² However, the ECtHR has excluded migration status decision-making and its adjudication from the purview of Article 6. It has done so on the basis that Article 6 is expressly limited to the determination of a civil right or a criminal charge⁴³ and that, in its view, litigation in respect of the entry, stay and deportation of migrants (including asylum claims) involves neither.⁴⁴ The ECtHR (and previously the European Commission of Human Rights) have provided a number of justifications for this limitation to the application of Article 6. First, it has said that determinations taken by the contracting states as to whether a migrant should be permitted to enter or stay are matters of public law which are discretionary and administrative in nature and therefore do not constitute the determination of civil rights.⁴⁵ Secondly, the procedural guarantees conferred on migrants contained in Article 1 of Protocol 7 to the ECHR (procedural safeguards relating to the expulsion of migrants)⁴⁶ constitute a *lex specialis* which demonstrates that the intention of the contracting states was not to include the determination of the entry, residence and deportation of migrants within Article 6.⁴⁷ And thirdly, the fact that administrative determinations on the entry and residence of migrants may have an incidental but major impact on an individual's private, family life and/or employment prospects does not suffice to engage the civil limb

⁴² *Golder v United Kingdom* (1975) 1 EHRR 524, 536. See also *Brown v Stott* [2003] 1 AC 681 (PC), 694.

⁴³ See n 41 above.

⁴⁴ *Agee v United Kingdom* [1976] 7 DR 164; *Maaouia v France* (2001) 33 EHRR 42. However, the ECtHR has held that a migrant's right to apply for a work permit may fall within Article 6: *Jurisc and Collegium Mehrerau v Austria* App no 62539/00, paras 54-62. See also Council of Europe, 'Practical Guide to Article 6 – Civil Limb' (*Council of Europe*, 1 May 2013) .

⁴⁵ *Agee v United Kingdom* (n 44); *VP v United Kingdom* (1987) 54 DR 211, para 2.

⁴⁶ See 3.4.1 below.

⁴⁷ *Maaouia v France* (n 44), para 37.

of Article 6.⁴⁸ These arguments are, however, unconvincing. The first collapses when faced with the otherwise expansive approach to the definition of ‘civil right’ under the ECHR⁴⁹ and the fact that in many cases, as seen earlier, migrants have rights to enter and reside.⁵⁰ The second is undermined by the severely limited nature of the procedural rights in Article 1 of Protocol 7 (see further below). And the third, rather than forming an objection to the application of Article 6, in fact demonstrates the very importance of recognising its relevance to migration status decisions.⁵¹ Thus, this work joins a growing number of other commentators in criticising the ECtHR’s refusal to include migration status decisions within the fold of Article 6.⁵²

3.2.2. *Standard of review*

Even if Article 6 were to apply, however, it would not necessarily require merits review (as defined in Chapter 4) of all migration status decisions. Where the right has been held to apply, there is significant equivocation over what, in terms of the intensity of judicial scrutiny, Article 6 specifically guarantees. From the case law, the general rule

⁴⁸ *ibid*, para 38.

⁴⁹ See Jean-Etienne Kautzmann; Melanie Fiona Oliver, ‘The Applicability of Article 6 ECHR to Asylum Procedures’ (2012) 17 *Interights Bulletin* 36, and Clayton and Tomlinson, *The Law of Human Rights*.

⁵⁰ Although it should be noted that ‘civil rights’ has an autonomous ECHR definition and is not determined by reference to rights existing domestically or by reference to other supranational organisations, such as the EU.

⁵¹ An exploration of why the ECtHR’s justification of the exclusion of the determination of the entry, stay and deportation of migrants is unconvincing is beyond the ambit of this work, but see Oliver, ‘The Applicability of Article 6 ECHR to Asylum Procedures’ pp 36-44; Blake and Husain, *Immigration, Asylum and Human Rights* (Chapter 2, n 88), pp 244-7. See also dissenting judgments in *Maaouia* (n 44): “(i)t is inconceivable in a Convention which, according to its preamble, was intended to safeguard ‘those fundamental freedoms which are the foundation of justice... in the world’ and implement the principle of the ‘rule of law’ to provide for a fair administration of justice only in respect of certain legal rights and obligations, but not in respect of rights concerning relations between the individual and the Government,” p 1052.

⁵² See *ibid*.

appears to be that a court or tribunal reviewing an administrative decision should generally have full jurisdiction over merits (in, as will be seen, the sense defined in Chapters 2 and 4 of this thesis) and legality.⁵³ In *Albert and Le Compte v Belgium*,⁵⁴ the first case in which the ECtHR dealt expressly with the question of the sufficiency of jurisdiction of national courts,⁵⁵ the Court held that Article 6 required review by a tribunal with jurisdiction to examine the full merits of the decision.⁵⁶ The case concerned the disciplinary proceedings of a professional association relating to doctors. The applicants had sought to challenge the decisions preventing them from practising medicine but the appeal court (ultimately, the Belgian Court of Cassation) did not have jurisdiction to find facts or substitute judgment. The ECtHR came to a similar conclusion in relation to administrative decisions restricting access to a child in care⁵⁷ and the dismissal of employees.⁵⁸ As the subject matters of these decisions would appear to indicate, therefore, '[t]he adequacy of review will be assessed against a number of factors, of which the nature and importance of the applicants' interests will clearly be one.'⁵⁹

However, following *Albert and Le Compte*, the right to a review of full jurisdiction (i.e. including on the merits) has been circumscribed in later cases.⁶⁰ In *Bryan*

⁵³ Baldinger, *Rigorous Scrutiny versus Marginal Review*, pp 211-12.

⁵⁴ *Albert and Le Compte v Belgium* (1981) 5 EHRR 533, para 26.

⁵⁵ Baldinger, *Rigorous Scrutiny versus Marginal Review* (Chapter 4, n 78), p 211.

⁵⁶ *Albert and Le Compte v Belgium* (n 54), paras 26 and 37.

⁵⁷ *W v United Kingdom* (1987) 10 EHRR 29, para 82.

⁵⁸ *Obermeier v Austria* (1990) 12 EHRR 290, para 70.

⁵⁹ Michael Beloff and Rupert Beloff, 'Judicial Review – Is it Sufficient for Arts 6 and 13 of the European Convention on Human Rights?' [2011] *Judicial Review* 154.

⁶⁰ In *W v United Kingdom* (n 57) (involving parental access to a child in public care) the ECtHR, found that the national remedies of judicial review and wardship proceedings did not satisfy

*v United Kingdom*⁶¹ (a planning case involving review of planning inspector's decision to uphold enforcement notice requiring removal of buildings erected without planning permission), the ECtHR held that the compliance with Article 6 of legality review of administrative decisions was to be determined on a case-by-case basis. Relevant factors were considered to be the subject matter of the decision challenged (in particular, whether the decision was taken on grounds of administrative 'expediency'⁶²), the manner in which the decision was made and the procedural safeguards in place, and whether or not there was a factual dispute.⁶³ On the facts of *Bryan*, the Court concluded that the limited nature of review was not contrary to Article 6 given the specialized nature of the planning inspector's inquiry, the quasi-judicial nature of the proceedings before the inspector and the procedural safeguards in those proceedings.⁶⁴ *Bryan* was applied in *Alconbury* in the

Article 6 as they did not permit examination of the merits. The confinement of its judgment to 'cases of the present kind', laid the groundwork for the recognition in future cases that legality review may suffice in certain circumstances. Thus, in *Zumtobel v Austria* App no 12235/86 (ECHR, 21 September 1993), a planning case involving expropriation proceedings, the ECtHR found that review limited to legality grounds did not violate Article 6 in the circumstances of that case. See, for a detailed examination of *Zumtobel*, *Baldinger*, *Rigorous Scrutiny versus Marginal Review* (Chapter 4, n 78), pp 213-15.

⁶¹ *Bryan v United Kingdom* (1995) 21 EHRR 342.

⁶² The term 'expediency' as employed by the ECtHR is better understood in the UK context as 'policy'. See further the explanation of Lord Hoffmann in *Secretary of State for the Home Department v Rehman* (Chapter 4, n 35), para 47.

⁶³ These principles were summarised by the ECtHR in *Sigma Radio Television Ltd v Cyprus* App nos 32181/04 and 35122/05 (ECHR, 21 July 2011), para 154. See also summary in *Baldinger*, *Rigorous Scrutiny versus Marginal Review* (Chapter 4, n 78), pp 214-5. *Baldinger* points to four factors that led the court to accept more limited review: 'the fact that the particular subject matter of the litigious decision belonged to classical tasks of the administration (the classical exercise of administrative discretion) and/or involved a specialised issue requiring professional knowledge or experience; and the thorough safeguards attending the preceding administrative procedure; and the fact that the national judicial review was, although limited, indeed meaningful as it entailed at least a very thorough examination of the disputed points of law and procedural points; and the fact that there was no true dispute on points of fact before the national courts.'

⁶⁴ *Bryan v United Kingdom* (n 61), para 47: 'Such an approach by an appeal tribunal on questions of fact can reasonably be expected in specialised areas of the law such as the one at issue, particularly where the facts have already been established in the course of a quasi-judicial procedure governed by many of the safeguards required by Article 6(1).'

House of Lords.⁶⁵ The case also concerned planning. The House of Lords first re-iterated that assessing the compliance of judicial review with Article 6 was not ‘mechanical’ and depended on ‘all the circumstances.’⁶⁶ It held that judicial review satisfied Article 6 on the facts of *Alconbury* since, as with *Bryan*, there were procedural safeguards in place in the proceedings before the inspector and importantly, the decision at issue was one of administrative policy. It would, therefore, be constitutionally improper to require the reviewing court to have the ability to reconsider the merits of such policy decisions.⁶⁷ Therefore, in the circumstances, Article 6 required ‘sufficient review of the legality of the decisions and the procedures followed,’⁶⁸ which was found to be satisfied by UK judicial review.⁶⁹

In *Runa Begum*⁷⁰ the House of Lords sought to highlight the distinguishing features of cases in which legality review was sufficient for the purposes of Article 6. Lord Hoffman identified two characteristics of such cases relied upon by the ECtHR: first, where there are ‘specialised areas of the law’, interpreted to mean ‘those areas of the

⁶⁵ *Regina (Alconbury Developments Ltd and Others) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295. It was also applied by the ECtHR in a series of planning cases (eg *Fischer v Austria* App no 16922/90 (ECHR, 26 April 1995); *Chapman v UK* App no 27238/95 (ECHR, 18 January 2001); *Jane Smith v UK* App no 25154/95 (ECHR, 18 January 2001)); in a case relating to the regulation of the gaming industry (*Kingsley v UK* App no 35605/97 (ECHR, 28 May 2002)); in a case relating to environmental protection (*Alatullkila v Finland* App no 33538/96 (ECHR, 28 July 2005)); and in a case relating to the regulation of radio and television broadcasting (*Sigma Radio Television Ltd v Cyprus* (n 63)).

⁶⁶ *Regina (Alconbury Developments Ltd and Others) v Secretary of State for the Environment, Transport and the Regions* (n 65), para 45.

⁶⁷ See consideration of similar arguments in the deportation context in Chapter 6.

⁶⁸ *Regina (Alconbury Developments Ltd and Others) v Secretary of State for the Environment, Transport and the Regions* (n 65), para 49.

⁶⁹ See description in Chapter 4.

⁷⁰ *Runa Begum v Tower Hamlets LBC* [2003] UKHL 5, [2003] 2 AC 430. The case concerned homelessness and whether the internal review procedure of a housing officer’s decision that certain accommodation was suitable, combined with a review of legality in the County Court, satisfied the requirements of Article 6 ECHR.

law such as regulatory and welfare schemes in which decision-making is customarily entrusted to administrators’,⁷¹ and secondly, where there is a ‘classic exercise of administrative discretion.’⁷² He argued that on the basis of these two characteristics it was possible to delineate a cohort of cases that would not require merits review, including those which required fact-finding and judgment discretion, as well as ‘strong’ discretion as defined in Chapter 2.⁷³ The test outlined in *Begum* is, therefore, far more exclusionary than that advanced in this thesis and rather than viewing the presence of judgment discretion as a trigger for merits review, Lord Hoffmann’s principle militates for the opposite conclusion.

Yet, since *Begum* in the House of Lords, the ECtHR decided *Tsfayo v United Kingdom*,⁷⁴ which casts doubt on the breadth of the conclusions drawn in *Runa Begum*. In *Tsfayo*, a case concerning social benefits, the ECtHR held that judicial review with jurisdiction solely over the legality of an administrative decision was compliant with Article 6 ECHR only where the matters in issue necessitated ‘a measure of professional knowledge or experience and the exercise of administrative discretion pursuant to wider policy aims,’ or where the assessment of facts are ‘merely incidental’ to a decision on policy.⁷⁵ In *Tsfayo*, the question to be determined by the administrative agency was

⁷¹ *ibid*, para 56.

⁷² *ibid*, per Lord Hoffmann para 56: ‘And when the court in *Kingsley* spoke of the classic exercise of administrative discretion, it was referring to the ultimate decision as to whether Kingsley was a fit and proper person and not to the particular findings of fact which had to be made on the way to arriving at that decision. In the same way, the decision as to whether the accommodation was suitable for Ms Begum was a classic exercise of administrative discretion, even though it involved preliminary findings of fact.’ cf the summary given by *Baldinger, Rigorous Scrutiny versus Marginal Review* (Chapter 4, n 78).

⁷³ See Chapter 2 at 5.1.

⁷⁴ *Tsfayo v United Kingdom* (2009) 48 EHRR 18.

⁷⁵ *ibid*, para 46.

whether there was ‘good cause’ for delay in making a housing benefits claim. The UK Government had argued that the nature of the subject matter, which pertained to social welfare, justified the limited review of the High Court. However, the ECtHR disagreed. It found that the existence or otherwise of ‘good cause’ for delay was a ‘simple question of fact’ – an assessment of the applicant’s credibility – and consequently the provision of judicial review alone was insufficient to satisfy Article 6.⁷⁶

How, therefore, could this jurisprudence be relevant to migration status decision-making (the enquiry is hypothetical given the non-application of Article 6)? The case-specific focus of the ECtHR’s judgments on merits review and Article 6 suggests that not all migration status decisions would necessarily be found to require the same type of review. Since the case law establishes that the subject matter of the decision is relevant,⁷⁷ those decisions recognized as involving fundamental rights (primarily Articles 3 and 8 in the migration context) and significant individual interests may be more readily

⁷⁶ *ibid*, para 46: ‘...In *Bryan, Runa Begum* and the other cases cited ... above, the issues to be determined required a measure of professional knowledge or experience and the exercise of administrative discretion pursuant to wider policy aims. In contrast, in the instant case, the Hammersmith and Fulham Council Housing Benefit and Council Tax Benefit Review Board (HBRB) was deciding a simple question of fact, namely whether there was “good cause” for the applicant’s delay in making a claim. On this question, the applicant had given evidence to the HBRB that the first that she knew that anything was amiss with her claim for housing benefit was the receipt of a notice from her landlord – the housing association – seeking to repossess her flat because her rent was in arrears. The HBRB found her explanation to be unconvincing and rejected her claim for back-payment of benefit essentially on the basis of their assessment of her credibility. No specialist expertise was required to determine this issue, which is, under the new system, determined by a non-specialist tribunal (see paragraph 22 above). Nor, unlike the cases referred to, can the factual findings in the present case be said to be merely incidental to the reaching of broader judgments of policy or expediency which it was for the democratically accountable authority to take.’ Notwithstanding *Tsfayo*, however, in *Ali v Birmingham City Council* [2008] EWCA Civ 1228, [2009] 2 All ER 501, the Court of Appeal held that conclusions in *Begum* remained good law.

⁷⁷ See, eg, n 71 above.

established as necessitating merits review.⁷⁸ This accords with the views of Judge Martens in his separate opinion in the *Fischer v Austria*⁷⁹ case. Judge Martens argued that a right to merits review was most warranted in cases concerning fundamental rights, such as the right to family and private life protected by Article 8 ECHR, and those in which the interests of the individual are significant.⁸⁰

But equally, the question of the standard of review is also dependent on the existence of questions of fact at the heart of the dispute. *Tsfayo* suggests that even in areas of classic administrative discretion (such as, *in casu*, social welfare), insofar as simple questions of fact (save those that are merely incidental to a decision on a question of policy) are in issue, mere legality review is insufficient. Arguably, therefore, were migration status decisions accepted as falling within the ambit of Article 6, merits review would be required from those which involved fact-finding (including credibility assessments – as in *Tsfayo*) more than that incidental to a decision on policy. Given the prevalence and centrality of credibility assessments in migration status decision-making,⁸¹ arguably, therefore, as a matter of Article 6 ECHR (and for reasons different to those advanced in Chapter 2), the majority of migration status decisions should be reviewable on the merits.

⁷⁸ This is separate to the consideration of Articles 3 and 8 plus 13, or the implied procedural aspects of those provisions (see below). For an exposition of this view, see Baldinger, *Rigorous Scrutiny versus Marginal Review* Chapter 4, n 78), p 225.

⁷⁹ *Fischer v Austria* (n 65).

⁸⁰ *ibid*, para 8.

⁸¹ See further Chapters 2 and 6.

3.3. Article 13 ECHR

3.3.1. *Relevance of Article 13 for migrants*

Yet, as noted above, despite the potential in Article 6, the case law continues to assert the non-applicability of the provision to migration status decisions. In light of the exclusion of the protections afforded in Article 6 ECHR to the vast majority of migrants, Article 13 ECHR, which guarantees an effective remedy where there is an arguable violation of another Convention right, has been important in respect of migrants' procedural rights. Articles 6 and 13 have been held by the ECtHR to interact. In its judgment in *Kudla v Poland*,⁸² the ECtHR found that the requirements of Article 13 should reinforce those of Article 6(1). The extent to which this happens in practice is examined below.⁸³ Article 13 provides the right to an effective remedy against the infringement of other rights protected by the ECHR.⁸⁴ Accordingly, migrants do not have the right to an effective remedy against decisions on entry, stay and expulsion *per se* because the ECHR neither guarantees the right to enter and/or settle nor the freedom from expulsion. A migrant may only claim a right to an effective remedy under Article 13 against a decision on entry, settlement or expulsion if (s)he alleges that it violates a

⁸² *Kudla v Poland* App no 30210/96 (ECHR, 26 October 2000).

⁸³ See 3.3.2.

⁸⁴ Article 13 reads: 'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.' The difference between Articles 6 and 13 is summarized succinctly by Beloff: 'By reason of Art. 6, the Convention requires civil rights to be determined by a tribunal of appropriate qualities which has, inter alia, "full jurisdiction". By reason of Art. 13 the Convention requires Convention rights to be protected by provision of "an effective remedy" for their breach.' Beloff and Beloff, 'Judicial Review – Is it Sufficient for Arts 6 and 13 of the European Convention on Human Rights?', para 14.

Convention right, such as (most frequently) Article 3 or 8 ECHR.⁸⁵ This restriction on the application of Article 13 is mitigated in practice since many migration status decisions will engage the family life limb (for example, the majority of family reunion applications and expulsion decisions involving the separation of family units) and/or the private life limb (primarily expulsion decisions or long residence applications) of Article 8.⁸⁶ Unlike Article 6, Article 13 is drafted in general terms: it applies to ‘everyone’, but it does not specifically require a judicial remedy. In *Silver and Others v the United Kingdom*,⁸⁷ the ECtHR set out three standards a municipal remedy must meet for it to be effective for the purposes of Article 13 ECHR:⁸⁸ first, it must exist institutionally (but does not necessarily have to be provided by a judicial authority);⁸⁹ secondly, it must be adequate and effective in practice⁹⁰ (but traditionally states have had a large margin of discretion over the form of the remedy and the requirements vary depending on the nature of the application); and thirdly, it must be available such that an applicant claiming a breach of, for example, Article 3, is not expelled without having the opportunity to appeal the decision against him or her on that basis.⁹¹ In its recent judgments,⁹² the Court has developed and

⁸⁵ Also Article 4 of Protocol 4, which prohibits the collective expulsion of migrants.

⁸⁶ Some, of course, will not: for example, in general terms, entry clearance applications between adult family members (see, eg, *Adjei (visit visas – Article 8)* (Chapter 6, n 82) and territorial residence for a very short period. Article 3 ECHR will also be applicable where an asylum application is made.

⁸⁷ *Silver v United Kingdom* App no 5947/72 (ECHR, 25 March 1983).

⁸⁸ See also Council of Europe, *Recommendation No (98) 13 of the Committee of Ministers of the Council of Europe on the right of rejected asylum seekers to an effective remedy against decisions on expulsion in the context of Article 3 of the ECHR* (1998); and Helene Lambert and Council of Europe Directorate of Human Rights, *The position of aliens in relation to the European Convention on Human Rights* (3rd edn, Council of Europe Publishing 2006).

⁸⁹ *Silver v United Kingdom* (n 87), para 113.

⁹⁰ *ibid.*

⁹¹ *ibid.* See also Blake and Husain, *Immigration, Asylum and Human Rights*, pp 237-8.

expanded its procedural jurisprudence in relation to applications brought by migrants under Article 13 plus Article 3. There are now a number of specific elements built onto the overall framework under Article 13 plus 3 such that the provisions have been found to require:⁹³ access to information;⁹⁴ access to legal advice and interpretation;⁹⁵ access to the asylum procedure;⁹⁶ suspensive remedies;⁹⁷ and examination within a reasonable time.⁹⁸ In relation to the appropriate standard of review under Article 13 plus 3, the Court has developed a standard of ‘independent and rigorous scrutiny’⁹⁹ and a requirement of full and *ex nunc* assessment.¹⁰⁰ In practice, this means ‘a serious, individual, case-specific, factual examination on the merits of the claim, based on a correct standard and burden of proof.’¹⁰¹ Whether or not this standard is met is determined by the Court on a case-by-case basis.¹⁰²

Thus, Article 13 has become an important right in guaranteeing the procedural protection of migrants facing expulsion who claim to face persecution in their countries of origin. However, for the purposes of the claims made in this thesis, Article 13 has

⁹² Including, *MSS v Belgium and Greece* (2011) 53 EHRR 2 ECtHR; *Hirsi Jamaa v Italy* (2012) 55 EHRR 21; and *IM v France*.

⁹³ See Jean-Etienne Kautzmann and Melanie Fiona Oliver, ‘The Applicability of Article 6 to Asylum Procedures’ (2012) 17 Interights Bulletin 36, 37.

⁹⁴ *MSS v Belgium and Greece* (n 92); *Hirsi Jamaa v Italy* (n 92).

⁹⁵ *MSS v Belgium and Greece* (n 92); *Hirsi Jamaa v Italy* (n 92); *IM v France* (n 92).

⁹⁶ *Hirsi Jamaa v Italy* (n 92); *IM v France* (n 92).

⁹⁷ *MSS v Belgium and Greece* (n 92); *IM v France* (n 92).

⁹⁸ *MSS v Belgium and Greece* (n 92).

⁹⁹ The necessity of independent review was first recognised by the Court in *Chahal v United Kingdom*, para 151; and the requirement of rigour in *Jabari v Turkey* App no 40035/98 (ECHR, 11 July 2000), para 50. This has since been reiterated by the Court repeatedly: see, eg, *Hirsi Jamaa v Italy* (n 92) and further examples in Baldinger, *Rigorous Scrutiny versus Marginal Review*, p 199.

¹⁰⁰ *Salah Sheekh v the Netherlands* (2007) 45 EHRR 50, para 136.

¹⁰¹ Baldinger, *Rigorous Scrutiny versus Marginal Review*, p 280.

¹⁰² *ibid*, p 199.

proved unsatisfactory. This is for (at least) two reasons. First, there remain some disparities between Article 13 protection and that under Article 6. For example, as noted earlier, there is no requirement under Article 13 that the reviewing authorities be judicial in nature.¹⁰³ Absent this stipulation, the protections of Article 13 plus 3 ECHR do not meet the first criteria of merits review set out in Chapter 4 (independence). Moreover, by contrast with the case law under Article 6 on UK judicial review,¹⁰⁴ as a matter of Article 13 plus 3, UK judicial review has been endorsed by the Court as compatible with the right to an effective remedy. Secondly, the standards of Article 13 are not monolithic but appear to vary according to context. In particular, the more rigorous standards developed under Article 13 plus Article 3 have not been transposed into Article 13 in combination with the other right central to migration cases: Article 8. As the Court made clear in the *De Souza Ribeiro*¹⁰⁵ case, in the context of the non-suspensivity of remedies, the standards it has set out in relation to Article 3 are not simply to be read across to Article 8.¹⁰⁶

¹⁰³ See Kautzmann and Oliver, 'The Applicability of Article 6 to Asylum Procedures' (n 49), 38: 'the safeguards afforded under Article 13 are insufficient and do not amount to the protection under Article 6... Accordingly, the current approach of the Court does not fully comply with international Refugee Convention standards.' Yet, the ECtHR has, since *Chahal*, insisted that Article 13 guarantees an independent review: *Chahal v United Kingdom* (Chapter 5, n 140).

¹⁰⁴ See above and in particular, the *Albert and Le Compte v Belgium* (n 56) and *Tsfayo v United Kingdom* (n 74) case law.

¹⁰⁵ *De Souza Ribeiro* (Chapter 4, n 96).

¹⁰⁶ *ibid*, para 83: '...where expulsions are challenged on the basis of alleged interference with private and family life, it is not imperative, in order for a remedy to be effective, that it should have automatic suspensive effect. Nevertheless, in immigration matters, where there is an arguable claim that expulsion threatens to interfere with the alien's right to respect for his private and family life, Article 13 of the Convention in conjunction with Article 8 requires that States must make available to the individual concerned the effective possibility of challenging the deportation or refusal-of-residence order and of having the relevant issues examined with sufficient procedural safeguards and thoroughness by an appropriate domestic forum offering adequate guarantees of independence and impartiality...'

3.3.2. *Compatibility of judicial review with Article 13*

The question of the compatibility of legality review (judicial review in the UK context) with Article 13 was first considered directly by the ECtHR in the context of asylum in *Vilvarajah v United Kingdom*.¹⁰⁷ As seen in Chapter 5, prior to 1993, the migration appeals system did not contain in-country rights of appeal for asylum seekers. The *Vilvarajah* case involved five Sri Lankan nationals who had all claimed asylum in the UK. Their claims were rejected by the Secretary of State and they had been removed to Sri Lanka. All had, unsuccessfully, sought judicial review of their removal directions. The applicants subsequently all faced various kinds of ill-treatment of the type they had claimed to fear. From Sri Lanka, out-of-country appeals were lodged under the then s 13 IA 1971 and in all cases the appellants were successful. It was argued by the applicants that the failure to provide an in-country appeal on the merits violated Articles 3 and 13 ECHR. The Commission found a violation, however, the Court reversed the decision on appeal finding that judicial review of an adverse asylum decision was an effective remedy.¹⁰⁸ The applicants had argued (and the Commission had agreed) that the fact that the judicial review court did not have the jurisdiction either to establish whether or not the Secretary of State was correct in her assessment of the risk of ill treatment on return, or to substitute its views on the merits of the case for the Secretary of State's, meant that it did not provide a sufficient remedy consistent with Article 13 ECHR.¹⁰⁹ Whilst the applicants accepted that judicial review may satisfy Article 13 where the facts were not in

¹⁰⁷ *Vilvarajah v United Kingdom* (Chapter 5, n 132).

¹⁰⁸ Despite the ECtHR's eventual decision in favour of the British Government, the legislation (the Asylum and Immigration Appeals Act 1993) creating appeal rights from an adverse asylum claim entered into force on 26 July 1993.

¹⁰⁹ *Vilvarajah v United Kingdom* (Chapter 5, n 132), para 118.

dispute between the parties, however, in a case such as this, where the nature of the risks on return was the substance of the dispute, review solely on the grounds of the rationality of the way in which the decision on merits was taken was insufficient. In addition to the Commission, Judges Walsh and Russo agreed with the applicants in a dissenting opinion. They concluded that a court that was unable to rule on the merits could not provide an effective remedy where the facts were in dispute. It, therefore, distinguished the Court's earlier judgment in *Soering*¹¹⁰ (concerning extradition to face death-row) in which the ECtHR had found judicial review to be a sufficient remedy.¹¹¹ Notably, in the specific circumstances of that case there was no factual dispute in issue (rather, the question was whether subjection of an individual through extradition to the death row phenomenon constituted a violation of Article 3). Therefore, in that specific case, the arguments *Soering* had advanced to the ECtHR could equally have been advanced under UK judicial review.¹¹²

The majority of the Court in *Vilvarajah*, however, dismissed the appeal. It relied on the *Soering* case to hold that the jurisdiction of the English High Court on judicial review to examine the reasonableness of a decision (as well as being able to strike it down on the basis of procedural impropriety or unlawfulness) constituted an effective remedy for the purposes of Article 13.¹¹³ The ECtHR cited UK courts' self-proclaimed duty to apply anxious scrutiny¹¹⁴ to administrative decisions where 'an applicant's life or liberty may be at risk' and the practice of not removing asylum-seekers pending the

¹¹⁰ *Soering v United Kingdom* (1989) 11 EHRR 439.

¹¹¹ *ibid*, paras 116-124.

¹¹² *ibid*, para 121.

¹¹³ *Vilvarajah v United Kingdom* (Chapter 5, n 132), para 123.

¹¹⁴ See discussion of inadequacies of anxious scrutiny in Chapter 7.

determination of the judicial review claim as further support for its conclusion.¹¹⁵ Therefore, the ECtHR held that the limitations on the power of courts in judicial review proceedings were of insufficient gravity to find a violation of Article 13.¹¹⁶ The ECtHR's conclusion in *Vilvarajah* has since been applied and endorsed in *Hilal v UK*.¹¹⁷ It recalled the finding in *Vilvarajah* that 'English courts could effectively control the legality of executive discretion on substantive and procedural grounds and quash decisions as appropriate,' referring to the ability of a court effecting judicial review to quash a decision 'on the ground that in all the circumstances of the case the decision was one that no reasonable Secretary of State could take.'¹¹⁸ It concluded:

While the applicant argued that in judicial review applications, the courts will not reach findings of fact for themselves on disputed issues, the Court is satisfied that the domestic courts give careful scrutiny to claims that an expulsion would expose an applicant to the risk of inhuman or degrading treatment. The Court is not convinced that the fact that this scrutiny takes place against the background of the criteria applied in judicial review of

¹¹⁵ *Vilvarajah v United Kingdom* (Chapter 5, n 132), para 125.

¹¹⁶ *ibid*, para 126.

¹¹⁷ *Hilal v United Kingdom* (2001) 33 EHRR 2. Further, the Supreme Court heard argument on the question in *TN and AA (Afghanistan) v Secretary of State for the Home Department* [2015] UKSC 40, [2015] 1 WLR 3083. The appellants were Afghan unaccompanied asylum seeking children. Their asylum claims were rejected but they were granted discretionary leave until the age of 17 and a half. Two of the appellants were granted leave for a period of less than 12 months and therefore could not appeal the decision refusing to grant them asylum pursuant to NIAA 2002, s 83 (in force at the time). One of the issues before the Supreme Court was whether the appellants had an effective remedy. It was held that the appellants had an effective remedy under the NIAA scheme, even if it was not immediate. As a consequence of this finding, the court did not deem it necessary to decide whether judicial review would be an effective remedy. See, paras 31-32. At 31, the Court held: 'The Strasbourg court has consistently accepted that judicial review is capable of satisfying the requirement of providing an effective remedy within the meaning of article 13 of the European Convention in the context of asylum cases: *Vilvarajah v United Kingdom* (1991) 14 EHRR 248, para 126, *D v United Kingdom* (1997) 24 EHRR 423, para 71, and *Bensaid v United Kingdom* (2001) 33 EHRR 205, para 56. Those cases undoubtedly establish an important general principle, but I regard it as a mistake to concentrate on the remedy of judicial review in the particular circumstances that Parliament has established a statutory procedure under NIAA for granting and withdrawing refugee status.'

¹¹⁸ *Hilal v United Kingdom* (n 117), para 77.

administrative decisions, namely, rationality and perverseness, deprives the procedure of its effectiveness.¹¹⁹

These judgments are problematic for a number of reasons. First, they do not take sufficient account of the necessary case specificity of the finding of the compatibility of judicial review and Article 13. The decisions in *Vilvarajah* and *Hilal* base themselves on the initial conclusion in *Soering* without referencing what is arguably a central distinguishing feature, namely that unlike *Soering*, the latter two cases concerned issues of disputed facts. Whilst it is correct to state (and this was conceded by the applicants in *Vilvarajah*)¹²⁰ that in the absence of a dispute of fact, review of legality alone will provide an effective remedy, the same conclusion – as the outcome in *Vilvarajah* shows – cannot automatically be read across to situations of disputed fact. In each of the applicants' cases in *Vilvarajah*, the existence of the remedy of judicial review failed to prevent *refoulement* since upon return to Sri Lanka the applicants were subjected to either the risk, or the occurrence, of arbitrary detention and torture. Secondly, *Vilvarajah* sits uneasily with the Article 6 jurisprudence on full jurisdiction.¹²¹ In particular, the reasons provided in *Vilvarajah* for why judicial review is Convention compliant do not align with the factors outlined in *Bryan* and, in particular, *Tsfayo*. The latter case makes clear that where the central issue is one of disputed fact, the court should have full jurisdiction over the merits and judicial review does not satisfy this requirement. However, as noted above, the ECtHR's judgment in *Kudla v Poland*¹²² holds that the requirements of Article 13 should reinforce those of Article 6(1). Arguably, therefore, case law under Article 6(1)

¹¹⁹ *ibid*, para 78.

¹²⁰ It is also recognised in Chapter 2.

¹²¹ See 3.2.2 above.

¹²² *Kudla v Poland* (Chapter 8, n 82).

should also form part of Article 13.¹²³ Thirdly, the ECtHR's reliance in *Vilvarajah* on the fact that removal is generally suspended until the conclusion of judicial review proceedings as relevant to the effectiveness of the remedy does not address the prior question of whether the nature of the remedy of judicial review is itself effective. If a review of legality cannot properly prevent *refoulement* then the fact that removal is delayed until the end of an ineffective process is immaterial.

However, the ECtHR's judgment in *Smith v United Kingdom*¹²⁴ (concerning the discharge of persons from the armed forces on the grounds linked to their homosexuality) sheds some light on what may in fact have motivated its approach in *Soering*, *Vilvarajah* and *Hilal*. The Court in *Smith* found a violation of Article 13 since there was no body with full jurisdiction to review the decision. The Court said the following in relation to compatibility of judicial review with Article 13:

In such circumstances, the Court considers it clear that, even assuming that the essential complaints of the applicants before this Court were before and considered by the domestic courts, the threshold at which the High Court and the Court of Appeal could find the Ministry of Defence policy irrational was placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims pursued, principles which lie at the heart of the Court's analysis of complaints under Article 8 of the Convention. The present applications can be contrasted with the cases of *Soering* and *Vilvarajah*. In those cases, the Court found that the test applied by the domestic courts in applications for judicial review of decisions by the Secretary of State in extradition and

¹²³ Baldinger, *Rigorous Scrutiny versus Marginal Review* (Chapter 4, n 78), p 281.

¹²⁴ *Smith v United Kingdom* (2000) 29 EHRR 493. The Court also found a violation of Article 13 in *Chahal v United Kingdom* (Chapter 5, n 140) where there was no judicial review of the national security grounds for expulsion.

expulsion matters coincided with the Court's own approach under Article 3 of the Convention.¹²⁵

Thus, the main thrust of the Court's reasoning appears to be that - unlike the *Soering*, *Vilvarajah* and *Hilal* cases - on the specific facts of *Smith* the reviewing courts had placed the reasonableness threshold so high that it precluded any effective assessment of the facts under Article 8.¹²⁶ As Dana Baldinger summarises, in *Vilvarajah*: 'the ECtHR found the national judicial examination Articles 3- and 13-proof because, in essence, it did not differ significantly from the assessment performed by the ECtHR itself.' Accordingly, *Smith* makes clear that the Strasbourg Court in *Soering* and *Vilvarajah* did not rule that the existence of judicial review would *always* provide an effective remedy, rather, its application *in practice* needed to do so by reference to its own assessment of the case. This, however, is a different, apparently less protective, test than the principle of full jurisdiction adumbrated in *Tsfayo* under Article 6.¹²⁷

The cases cited so far on the compatibility of UK judicial review with Article 13 predate the entry into force of the HRA 1998, which added proportionality as a ground of review in judicial review in cases involving human rights under the ECHR and/or EU law. Proportionality¹²⁸ as a head of judicial review arguably bolsters the ECtHR's conclusion in *Vilvarajah* and *Hilal*.¹²⁹ However, for the reasons explored in Chapter 7,

¹²⁵ *Smith v United Kingdom* (n 124), para 138.

¹²⁶ See also the findings of the Committee Against Torture in *Nirmal Singh v Canada* (n 25).

¹²⁷ See 3.2.2.

¹²⁸ See definition and discussion in Chapter 7.

¹²⁹ See, eg, *R (Nasseri) v Secretary of State for the Home Department* (Chapter 7, n 36) where the House of Lords noted at [14] that when the breach of a Convention right is in issue, 'an impeccable decision-making process by the Secretary of State will be of no avail if she actually gets the answer wrong' (Lord Hoffmann).

neither rationality review applying anxious scrutiny,¹³⁰ which requires judges when reviewing administrative decisions to be especially mindful of the fundamental rights implicated in them,¹³¹ nor proportionality, meet the criteria of merits review as defined in Chapter 4 (independence, *de novo* assessment and substantive judgment). As noted in Chapter 7, the weight that must be accorded to the decision-maker's discretionary area of judgment in proportionality review prevents a court effecting a judicial review from enjoying full jurisdiction over the facts. Thus, in *R (A) v The Chief Constable of Kent Constabulary*¹³² it was held that where the relevant factors have been properly considered by the decision maker, his or her view would carry weight, however, where there has been no, or no proper, consideration of relevant factors, the decision-maker's view carries little weight and the court must make its own mind up.¹³³ Provided, therefore, that the decision-making process is found to be lawful and provided the decision is not irrational, it is very likely that a court effecting judicial review will find that the decision was within the reasonable range of responses open to the decision-maker even if it does not agree with the outcome. The problems identified with the *Vilvarajah* judgment are not, therefore, remedied by the introduction of proportionality as a head of judicial review.¹³⁴ Arguably *Vilvarajah* and *Hilal* may require reconsideration by the Court in the light of

¹³⁰ *Bugdaycay v SSHD* (Chapter 4, n 64).

¹³¹ See further definition in Chapter 7 at 1.2.

¹³² *R (A) v The Chief Constable of Kent Constabulary* [2013] EWCA Civ 1706, (2014) 135 BMLR 22.

¹³³ *ibid*, para 39.

¹³⁴ See further Chapter 7.

more recent developments in the Article 13 case law¹³⁵ and, as will be seen below, the influence of EU standards of review.

3.4. Other ECHR procedural rights

In addition to the core procedural justice rights in Articles 6 and 13, the ECHR contains a number of further procedural protections of possible relevance to migration status decisions. These include, in particular, Article 1 of Protocol 7, procedural rights implied into Articles 3, 8 and Article 4 of Protocol 4, and the procedural rights under Article 5(4). As demonstrated below, however, none of these rights are capable of founding a claim to merits review of migration status decisions.

3.4.1. Article 1, Protocol 7

As noted above, as one of its reasons for the non-application of Article 6 to determinations on the entry, stay and expulsion of migrants, the ECtHR pointed to the existence of a so-called *lex specialis* for ‘procedural safeguards relating to the expulsion of migrants’ in Article 1, Protocol 7 to the ECHR. Article 1, Protocol 7 provides for a series of procedural rights for migrants, namely that a decision on expulsion must be reached by law and migrants must be permitted to submit reasons against expulsion, have their cases reviewed, and be represented before the relevant authority. However, there are four major limitations: first, Article 1, Protocol 7 only applies to migrants who are ‘lawfully resident’ in a contracting state. The Court has found this to exclude migrants at the border and migrants whose status is or has become irregular, including those who

¹³⁵

See n 92 above.

have a decision against them pending.¹³⁶ Secondly, review of the case is to be undertaken by a competent authority, but there is no requirement that it be judicial and independent. Thirdly, there is a general derogation where expulsion is necessary on grounds of public order or national security.¹³⁷ Finally (and fundamentally), Protocol 7 remains non-ratified by seven Council of Europe member states, including the UK. The protection provided to migrants by Article 1, Protocol 7 is, therefore, singularly weak.¹³⁸

3.4.2. Article 5(4)

There are further procedural protections for migrants who are detained. Detention is permitted under the ECHR to prevent unauthorised entry or to facilitate expulsion.¹³⁹ By virtue of Article 5(4) ECHR, ‘(e)veryone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.’ The ECtHR has interpreted the procedural requirements in Article 5(4) strictly such that (at least in the context of the lengthy detention of a migrant on national security grounds),¹⁴⁰ its procedural protection equiparates with that under the criminal limb of

¹³⁶ See, eg, *Voulfovitch and Oulianova v Sweden* (1992) 74 DR 199 where the Court held that the applicants were not entitled to rely on Article 1, Protocol 7 as they had overstayed their transit visa whilst waiting for the determination of their asylum claim and so were not ‘lawfully present’ for the purposes of that article (para 209).

¹³⁷ Although in the case of *Lupsa v Romania* App no 10337/04 (ECHR, 8 June 2006), the Court held that the applicant, who had been deported to Serbia on grounds of national security, was entitled to rely on the guarantees contained in Article 1 of Protocol 7 and found a violation.

¹³⁸ Lambert and Council of Europe Directorate of Human Rights, *The position of aliens in relation to the European Convention on Human Rights*, pp 23-24: ‘Article 1 of Protocol 7 allows migrants the right to have their arguments against expulsion heard by the executive but it offers limited guarantee of procedural due process in cases of expulsion.’ See also Kautzmann and Oliver, ‘The Applicability of Article 6 to Asylum Procedures’ p 39.

¹³⁹ Article 5(1)(f) ECHR.

¹⁴⁰ See *A v United Kingdom* (2009) 49 EHRR 29.

Article 6.¹⁴¹ However, as the Court held in *Chahal v UK* the standard of review varies according to the nature of the detention in question and has stated that Article 5(4):

...does not guarantee a right to judicial review of such breadth as to empower the court, on all aspects of the case including questions of pure expediency,¹⁴² to substitute its own discretion for that of the decision-making authority. The review should, however, be wide enough to bear on those conditions which are essential for the "lawful" detention of a person according to Article 5 para. 1...¹⁴³

Moreover, Article 5(4) does not apply to migration status decisions since a decision to detain does not fall within the definition of a decision on migration status (entry and residence)¹⁴⁴ but rather relates to liberty and the lawfulness of detention within the UK. Therefore, the standard of review articulated in *Chahal* cannot be read across to migration status decisions.

3.4.3. Implied procedural rights

In addition to express procedural provisions, as noted above, the ECtHR has held that procedural safeguards are vital ingredients of substantive Convention rights.¹⁴⁵ In the migration context, Articles 3 and 8 are of particular relevance. As the Court has made clear, procedural rights implied into Articles 3 and 8 are concerned with ensuring the effective protection of those rights broadly equivalent to the procedural protection under

¹⁴¹ See *AF v Secretary of State for the Home Department* [2009] UKHL 28 [2010] 2 AC 269. See also *De Wilde, Ooms and Versyp v Belgium* (1971) 1 EHRR 373, paras 78 and 79. However, the wider rights afforded to criminal suspects contained in Article 5(3) ECHR do not apply to immigration detainees not accused of criminal conduct.

¹⁴² As to the meaning in the UK context of the term 'expediency', see nn 72 and 76 above.

¹⁴³ *Chahal v United Kingdom* (Chapter 5, n 140), para 127, and in the Article 8 context, *W v United Kingdom* (1998) 10 EHRR 29; *Al-Nashif v Bulgaria* (2003) 36 EHRR 37. Domestically, the case of *R (Gudanaviciene and others) v The Director of Legal Aid Casework and others* (Chapter 1, n 73) has relied on the procedural rights implied in Article 8 in the legal aid context.

¹⁴⁴ See definition in Chapter 1.

¹⁴⁵ See, eg, *Chahal v United Kingdom* (Chapter 5, n 140).

Article 13.¹⁴⁶ Finally, Article 4 of Protocol 4, which prohibits collective expulsion of migrants, imports procedural obligations, requiring ‘reasonable and objective examination of the particular cases.’¹⁴⁷ This, however, is by its nature focused on primary decision-making rather than review: where the Court has found a violation of Article 4 of Protocol 4 typically there has been no individualised administrative decision in the case.¹⁴⁸ Article 4 of Protocol 4 does not, therefore, contain guidance as to the proper standard of review on appeal.

3.5. Analysis

Under the scheme of the ECHR, therefore, the standard of review has been articulated as either a question of ‘full jurisdiction’ (Article 6)¹⁴⁹ or ‘independent and rigorous scrutiny’ (Article 13, Article 3, Article 8). The ‘full jurisdiction’ standard is equivalent to the definition of merits review in this thesis (ie it meets the criteria of independence, *de novo* assessment and substantive judgment). The ‘independent and rigorous scrutiny’ standard falls short, for the reasons examined earlier.¹⁵⁰ In Article 6 cases, it is accepted that UK judicial review does not constitute ‘full jurisdiction’, but the

¹⁴⁶ For examples, see Baldinger, *Rigorous Scrutiny versus Marginal Review*, p 198. This, may, however, be context-specific. Compare, eg, the context of legal aid (*R (Gudanaviciene and others) v The Director of Legal Aid Casework and others* (Chapter 1, n 73): ‘[t]he article 8 test is broader than the article 6(1) test, but in practice we doubt whether there is any real difference between the two formulations in the context with which we are concerned’ [69]-[70]) with the context of national security (*IR (Sri Lanka) v Secretary of State for the Home Department* [2011] EWCA Civ 704, [2011] 4 All ER 908: [19]-[20] where the Court of Appeal held that the procedural requirements in Article 8 do not equal those in Articles 5 and 6 ECHR but rather constitute a standard of independent and rigorous scrutiny, analogous to the Article 13 jurisprudence).

¹⁴⁷ *Hirsi Jamaa v Italy* (n 92).

¹⁴⁸ *ibid.*

¹⁴⁹ In some contexts, this may also constitute the standard implied into Articles 3 and 8 (see n 146 above).

¹⁵⁰ See 3.3.2.

Court has nonetheless found it to be sufficient in certain exceptional cases, primarily those involving planning, environmental protection and regulation of certain specified activities, such as gambling.¹⁵¹ In Article 13 cases, UK judicial review has generally been found to be an effective remedy due to the availability of low intensity substantive scrutiny under rationality review. Whilst in certain circumstances, UK judicial review has been found to be incompatible with both Article 6¹⁵² and Article 13,¹⁵³ this is not the case in relation to migration status decision-making. It has been argued earlier that this is a significant shortcoming in the procedural protection afforded by the ECHR. In the case of Article 6, the exclusion of migration status decisions from the scope of that provision prevents the application of the *Albert le Compte/Tsyfayo* jurisprudence to migration status decisions. For the reasons outlined earlier, the exclusion of Article 6 from migration cases is increasingly contestable.¹⁵⁴ It has also been argued that the conclusions of *Vilvarajah* and *Hilal* should be re-visited in the light of both the Article 6 case law (and the recognition by the ECtHR that Article 13 is informed by the content of Article 6)¹⁵⁵ and the developments in the Article 13 case law towards a more exacting form of procedural protection.

The tests for when merits review is necessary under the ECHR are, moreover, different from those proposed by the argument in Chapters 2 and 3. As seen clearly from the *Tsyfayo* case, under the Article 6 jurisprudence, legality review is sufficient where the decision in question is one of administrative policy (or ‘expediency’ in the terminology

¹⁵¹ See n 65 above.

¹⁵² See, eg, *Tsfayo v United Kingdom* (n 74).

¹⁵³ See, eg, *Smith v United Kingdom* (n 124).

¹⁵⁴ See 3.2.1.

¹⁵⁵ See 3.2.2.

employed by the Strasbourg Court), which includes exercises of judgment discretion as defined in this thesis.¹⁵⁶ Whilst accepting that in the absence of disputed facts, legality review will provide a sufficient remedy,¹⁵⁷ the argument of this thesis challenges the Strasbourg approach in several ways. First, as has been argued earlier, there are good grounds for requiring merits review of highly discretionary judgment calls.¹⁵⁸ Secondly, factual disputes need not invariably warrant merits review; where the factual dispute relates to a simple, mechanistic calculation (for example, the determination of points based on the presence or otherwise of specified documents under the Points Based System¹⁵⁹) legality review would provide a sufficient corrective.

4. European Union

By contrast to the shortcomings in ECHR protection, the right to merits review under EU law is more robust as both a matter of the general principles of EU law and Article 47 of the Charter of Fundamental Rights of the European Union (CFREU). Further, the remedial power of EU law is potent: its supra-national nature requires the disapplication of any rule of domestic law (including statute) that conflicts with an EU norm.¹⁶⁰ However, the application of EU procedural rights is limited to migration status decisions

¹⁵⁶ See Chapter 2 at 5.1. It is noteworthy, however, that the principle is not directed at ‘strong’ discretion since, as is clear from the facts of the various cases, the decision-makers were applying facts to existing standards.

¹⁵⁷ For another challenge to the ECtHR’s approach see, the separate opinion of Judge Martens in *Fischer v Austria* (n 65).

¹⁵⁸ See, in particular, Chapter 2.

¹⁵⁹ See further Chapter 6.

¹⁶⁰ Case C-213/89 *R v Secretary of State for Transport, ex p Factortame Ltd (No 2)* [1990] ECR I-2433 and *R (HS2 Action Alliance Ltd) v the Secretary of State for Transport* [2014] UKSC 3, [2014] 1 WLR 324.

that fall within the ‘scope’ of EU law.¹⁶¹ The meaning of this term in the context of migration status decisions is examined briefly as a preliminary point below.

4.1. Application to migration status decisions

EU law¹⁶² entered the UK legal order by virtue of its incorporation through the European Communities Act 1972 (ECA 1972). The ECA 1972 has had profound effects on UK constitutional and administrative law since Parliament has no power to amend EU law and, as noted above, it has supremacy over incompatible domestic law.¹⁶³ There are four sources of procedural rights of potential application to migrants in EU law: the Treaties,¹⁶⁴ the CFREU,¹⁶⁵ EU secondary legislation (for example, the Asylum Procedures Directive¹⁶⁶ and the Citizens Directive¹⁶⁷) and the general principles of EU

¹⁶¹ The ‘scope of EU law’ is a controversial concept. However, the CJEU has held that Member States act within the scope of EU law when they implement, and derogate from EU law: Case 5/88 *Wachauf* [1989] ECR 2609 and Case C-260/89 *ERT* [1991] ECR I 2925.

¹⁶² Given the EU’s ‘variable geometry’, the precise meaning and content of ‘EU law’ depends on the Member State to which it is applied. The UK has a number of opt-ins and opt-outs. In the context of migration (Justice and Home Affairs), see, Protocols 19 and 21 to the Lisbon Treaty. Given the focus of this thesis on the UK legal order, only those EU norms applicable in the UK are examined.

¹⁶³ Section 2(4) ECA 1972. The effects have been felt, in particular, on the doctrine of parliamentary sovereignty, which, in its traditional sense conferred legal supremacy on acts of parliament such that parliament may make or unmake any rule of law and no one may override properly enacted statute. See further, eg, Tomkins, *Public Law* (Chapter 1, n 76), p 47.

¹⁶⁴ ie, the Treaty on European Union (TEU), as amended, and the Treaty on the Functioning of the European Union (TFEU), as amended. Article 19(1) of the Treaty on European Union (TEU) requires Member States to ‘provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.’

¹⁶⁵ The CFREU became legally binding upon the entry into force of the Lisbon Treaty on 1 December 2009.

¹⁶⁶ Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L326/13. The UK has not opted into the recast Procedures Directive (2013/32/EU) and accordingly Directive 2005/85/EC continues to apply.

¹⁶⁷ Directive 2004/38/EC.

law.¹⁶⁸ Fundamental rights are protected by the general principles of EU law¹⁶⁹ and the EU Charter of Fundamental Rights, which entered into force on 1 December 2009. Despite political attempts to exclude its application to the UK, the Charter applies to situations within the scope of EU law.¹⁷⁰

Thus, as already noted, EU procedural rights apply within the scope of EU law.¹⁷¹

In very general terms, the regulating principle to determine whether public authority falls within the scope of EU law is whether there is a sufficiently close connection between that exercise of authority and substantive rights under the EU Treaties to justify determining legality by reference to EU norms.¹⁷² Providing a precise definition of the scope of EU law is difficult, in particular given the incremental approach of the Court's

¹⁶⁸ See further below. General principles of EU law have been developed by the Court of Justice of the European Union from the Constitutional traditions of the Member States and the ECHR: see, eg, Takis Tridimas, *The General Principles of EU law* (2nd edn, Oxford University Press 2006). The Court has recognised a general principle of effective judicial protection. See, eg, Case 222/84 *Johnston v Chief Constable of RUC* [1986] 5 ECR 1651 and, more generally, Tridimas, *The General Principles of EU law* and Gordon and Moffatt, *EU Law in Judicial Review* (Chapter 4, n 37), ch 10 Due process.

¹⁶⁹ See generally, Tridimas, *The General Principles of EU law* and Gordon and Moffatt, *EU Law in Judicial Review* (Chapter 4, n 37), Part II.

¹⁷⁰ See n 161 above. In respect of the Charter, Article 51(1) CFREU provides that Charter rights will be binding on Member States only when they are 'implementing EU law.' The Explanations – to which, by Article 6 TEU, due regard is to be had when interpreting the Charter – refer to the 'scope' of EU law. Initially, it was unclear whether the different choice of terminology in defining the application of the CFREU had material impacts, however, the question has since been settled. In Joined Cases *C-411/10 and 493/10 NS and others* [2012] 2 CMLR 9, the Court applied its existing case law on the scope of EU law and in *C-617/10 Aklagaren v Fransson* [2013] 2 CMLR 46 the Court confirmed this approach. Thus, the formulation in Article 51(1) CFREU is to be equated with the classical 'scope' doctrine. See Gordon and Moffatt, *EU Law in Judicial Review* (Chapter 4, n 37), pp 205-208.

¹⁷¹ See n 161.

¹⁷² Gordon and Moffatt, *EU Law in Judicial Review* (Chapter 4, n 37), p 201. This has been expressed in a number of ways, including whether national measures 'implement' or 'derogate from' EU law (*C-260/89 ERT* (n 161)) and whether it has its 'ultimate authority' in EU law (see, eg, opinion of Advocate General Cruz Villalon in Case *C-176/12 Association de mediation sociale v Union locale des syndicats CGT* [2014] 2 CMLR 41).

case law,¹⁷³ and space does not permit a full account in this chapter.¹⁷⁴ However, for the purposes of migration status decision-making in the UK,¹⁷⁵ the following situations may be said to fall within the scope of EU law¹⁷⁶ (although in certain cases, the inclusion of a case within the ambit of EU law is contentious).¹⁷⁷ In respect of citizens of the Union (and their family members), they fall within the scope of EU law when they have exercised free movement rights (often in the migration context that constitutes the right to enter and reside in the UK for the purposes of work, or study, or on the basis of self-sufficiency, but it may also include exercise of the other fundamental freedoms guaranteed under the Treaties¹⁷⁸), or when they, having exercised their free movement rights, face expulsion from the UK.¹⁷⁹ There are also certain limited circumstances in which British nationals who have not exercised their free movement rights may come

¹⁷³ Gordon and Moffatt, *EU Law in Judicial Review* (Chapter 4, n 37), p 202. The CJEU declined to follow Advocate General Sharpston's recommendation for a 'bright line rule' regulating the scope of EU law based on EU competences as defined in the Treaties. See Opinion and judgment in Case C-34/09 *Zambrano* [2011] ECR I-1177.

¹⁷⁴ For a fuller account, see Gordon and Moffatt, *EU Law in Judicial Review* (Chapter 4, n 37), pp 201-218.

¹⁷⁵ The UK has an opt-out under the Common European Asylum System and is bound only by the legal instruments in which it has elected to participate.

¹⁷⁶ In addition to the cases enumerated, challenges to migration status decisions which otherwise demonstrate a sufficiently close connection to EU law may also fall within the scope of EU law. Examples of clear cut cases include a challenge involving the interpretation of a provision of the EU Treaties or other EU norms, challenging the validity of EU acts, or raising the proper interpretation and/or legality of domestic legislation implementing or derogating from an EU norm: Gordon and Moffatt, *EU Law in Judicial Review* (Chapter 4, n 37), pp 203-04. The proposition that a national measure falls within the scope of EU law insofar as it hinders the exercise of EU law is more controversial, at least in the domestic context, see *R v MAFF, ex p First City Trading* [1993] ECR I-5145 and the discussion of that case in Gordon and Moffatt, *EU Law in Judicial Review*, pp 212-15.

¹⁷⁷ See, eg n 180 below.

¹⁷⁸ Of relevance to the migration context, these include a right to provide and receive services, freedom of establishment. See, eg, Case C-60/00 *Carpenter v SSHD* [2002] ECR I-6279.

¹⁷⁹ By virtue of the citizenship rights contained in Article 21 TFEU and rights contained in the Citizens Directive. The UK's implementation of the Citizens Directive, the Immigration (European Economic Area) Regulations 2006, extend this protection to EEA and Swiss nationals and their family members.

within the scope of EU law.¹⁸⁰ In respect of non-EU migrants, in general terms, EU procedural rights may apply in the UK in three ways: first, where provision is made for them under EU secondary legislation (the primary rights for non-EU nationals flow from their connection to an EU citizen under Directive 2004/38 but they may also benefit from rights under other secondary instruments of EU law¹⁸¹); secondly, where bi-lateral agreements between the EU and third countries provide for a right to reside as a result of EU law;¹⁸² and thirdly, arguably¹⁸³ where a non-EU national applies for international protection (as a refugee or subsidiary protection¹⁸⁴ beneficiary).¹⁸⁵ Importantly, therefore,

¹⁸⁰ This depends on whether the exercise of public authority would deprive a British (and, therefore, EU) citizen in the UK of the genuine enjoyment of their EU rights. See *C-34/09 Zambrano* (n 173) and Case *C-256/11 Dereci* [2011] ECR I-11351; *Cf C-299/95 Kremzow v Austria* [1997] ECR I-2405. Mr Kremzow, an Austrian national convicted of murder in Austria and sentenced to imprisonment in Austria could not, therefore, rely on EU law in challenging his detention: ‘Whilst any deprivation of liberty may impede the person concerned from exercising his right to free movement, the Court has held that a purely hypothetical prospect of exercising that right does not establish a sufficient connection with Community law to justify the application of Community provisions’ (para 16). See further, on the *Zambrano* principle, eg, Peter Van Elsuwege, ‘Shifting the Boundaries? European Union Citizenship and the Scope of Application of EU Law’ (2011) 38 *Legal Issues of Economic Integration* 263, Alina Tryfonidou, ‘Redefining the Outer Boundaries of EU Law: The *Zambrano*, *McCarthy* and *Dereci* trilogy’ (2012) 18 *European Public Law* 493.

¹⁸¹ See, for example, Directive 2004/114/EC on the position of non-EU students as applied in Case *C-491/13 Ben Alaya v Germany* [2015] 1 CMLR 22. In the UK context, however, Directive 2004/38 will provide the main source of rights for non-EU citizens due to its opt-out from the EU migration acquis. Directive 2004/114/EC does not apply in the UK.

¹⁸² This applies, in various capacities, to nationals of Turkey, Algeria, Morocco, Tunisia and Russia. See Simon Cox and Stephen Kostas, ‘Undisclosed Allegations and Secret Evidence: Procedural Protections Available in European Exclusion Proceedings’ (2012) 17 *Interights Bulletin* 44, pp 46-7. In Case *12/86 Demirel* [1987] ECR 3719, however, the CJEU held that the question of whether the wife of a Turkish worker should be permitted to stay in the host Member State fell outside the scope of EU law since (at that time) family reunification was not covered by the EEC/Turkey Association Agreement.

¹⁸³ The case law confirms that the Qualification Directive does not preclude an individual applying for ‘another kind of protection’ outside the scope of the Directive, and thus EU law. See, Joined Cases *C-57/09 and C-101/09 B and D* [2010] ECR 10979, paras 116-118.

¹⁸⁴ In Case *C-277/11 MM v Minister for Justice, Equality and Law Reform, Ireland* [2013] 1 WLR 1259 the CJEU applied the CFREU, relying on Articles 41 and 47 CFR to hold that applicants must have access to a procedure in which they are able to make known their views before the adoption of any decision that does not grant the protection requested [82]-[89].

¹⁸⁵ Directive 2004/83/EC (Qualification Directive). The UK has not opted into the recast Qualification Directive (2011/95/EU).

as noted above, EU procedural rights are limited in their sphere of application: they do not apply to every migration status decision.

4.2. Merits review under EU law

As noted earlier, where it applies, EU law provides greater procedural protection than that afforded under the ECHR and there are four sources of procedural rights: the Treaties, the general principles, the CFREU¹⁸⁶ and secondary legislation. Until the reforms brought about by the Treaty of Lisbon, the EU Treaties did not contain any provision on the nature of the remedies that should be provided as a matter of EU law. The principle of ‘national procedural autonomy’ apparently allocates responsibility for procedural and remedial matters to Member States.¹⁸⁷ However, the need to ensure the effective enforcement of EU rights has meant that the EU has developed an overall supervisory framework which requires national laws to provide sufficient domestic remedies.¹⁸⁸ This framework was formulated incrementally under the general principles of EU law. Since the entry into force of the Treaty of Lisbon and the CFREU, the general principles have been supplemented by Article 19(1) of the Treaty on European Union, which requires Member States to ‘provide remedies sufficient to ensure effective legal protection in the fields covered by Union law,’ and Article 47 CFREU, which in broad terms codifies the general principles as well as bringing together in one provision Articles 6 and 13 ECHR. There has also been articulation of procedural rights in secondary

¹⁸⁶ See n 165 above.

¹⁸⁷ See, eg, *Case C-120/97 Upjohn Ltd v Licensing Authority* [1999] ECR I-223, para 32.

¹⁸⁸ Gordon and Moffatt, *EU Law in Judicial Review* (Chapter 4, n 37).

legislation.¹⁸⁹ As such, relying on the general principles (and latterly Article 47), a right to merits review has been articulated by the CJEU in certain circumstances, discussed below. In certain instances, secondary legislation has also provided specifically for merits review.¹⁹⁰ The circumstances in which a right to merits review has been recognised in EU law, and the extent to which the EU right matches the three criteria in Chapter 4 (independence, *de novo* assessment, and substantive judgment) are examined below.

4.2.1. General Principles of EU law

Rights protected by EU general principles, whether conceptualised as rights to effective judicial protection,¹⁹¹ the effectiveness of EU substantive rights,¹⁹² and equivalent procedural protection between comparable EU and domestic rights¹⁹³ may, in certain circumstances, require the availability of merits review from an administrative decision. The CJEU has ruled on the right to recourse and the proper standard of review in a number of cases. In relation to access to justice, unlike the exclusionary approach of the ECtHR in relation to ‘civil rights and obligations’ under Article 6 ECHR, the CJEU has

¹⁸⁹ See 4.2.3 below.

¹⁹⁰ Moreover, in the context of whether a body making a preliminary reference is a ‘court or tribunal’ for the purposes of Article 267 TFEU, the CJEU has developed an autonomous definition which includes the ability to examine facts and law: *Case C-506/04 Wilson v Ordre des avocats du barreau de Luxembourg* (Chapter 4, n 79), paras 61-62. See further Caoimhe Sheridan and Sadhia Rafi, *The application of the EU Charter of Fundamental Rights to asylum procedural law* (ECRE, Dutch Council for Refugees, 2014), pp 146-53.

¹⁹¹ The right to effective judicial protection was first articulated by the Court in *Case 222/84 Johnston v Chief Constable of RUC*.

¹⁹² *Case 33/76 Rewe* [1976] ECR 1989. The principle of effectiveness requires that national procedural rules do not render the vindication of EU rights ‘virtually impossible’ or ‘excessively difficult.’

¹⁹³ *ibid* and *Case C-326/96 Levez v Jennings (Harlow Pools) Ltd* [1998] ECR I-7835 in which the CJEU held that ‘[the] principle of equivalence requires that the rule at issue [is] to be applied without distinction, whether the infringement alleged is of Union law or national law, whether the purpose and cause of action are similar.’

found a right to a hearing insofar as the interests involved are ‘perceptibly affected.’¹⁹⁴ This is a broad formulation, which resembles in part that adopted in Chapter 2 of this thesis (which argues that migration control affects the interests of all subjects of migration status decision-making). By focusing on individual interests that are detrimentally affected, the threshold criterion tends to exclude cases where the measure is of general application so as to have only diffuse effects.¹⁹⁵ In relation to the standard of review, whilst the CJEU has applied varying standards of review to various types of administrative decision,¹⁹⁶ in respect of decisions relating to the free movement rights of EU citizens (and their non-EU citizen family members), the Court has applied its most intense form of judicial scrutiny, which includes a requirement of merits review.¹⁹⁷ Indeed, the standard of review required under EU law goes further than the three criteria set out in Chapter 4: as the CJEU outlined in *Orfanopoulos and Olivieri*,¹⁹⁸ the EU right includes *ex nunc* judicial scrutiny; that is a requirement that the national court take into account facts that have arisen following the administrative decision appealed.¹⁹⁹ As outlined below, the protective standard of review has been codified in Directive 2004/38. Dana Baldinger argues persuasively that, by analogy with the nature of the interests implicated, a similarly high standard – including merits review – would be required in

¹⁹⁴ Case 17/74 *Transocean Marine Point Association v Commission* [1974] ECR 1063. See further Gordon and Moffatt, *EU Law in Judicial Review* (Chapter 4, n 37), pp 322-23.

¹⁹⁵ Gordon and Moffatt, *EU Law in Judicial Review* (Chapter 4, n 37), p 322.

¹⁹⁶ Dana Baldinger’s classification is instructive. She divides the cases into the following categories: complex economic assessments, cases requiring medical or technical knowledge, complex value judgments in staff matters, and protection of consumer rights. Baldinger, *Rigorous Scrutiny versus Marginal Review* (Chapter 4, n 78), p 316-22.

¹⁹⁷ *ibid*, pp 324-330, 358.

¹⁹⁸ *C-482/01 Orfanopoulos v Land Baden-Wurttemberg* [2004] ECR I-5257.

¹⁹⁹ The CJEU has since applied the standard of full *ex nunc* review to decisions under the Turkish Association Agreement: Case *C-467/02 Cetinkaya* [2004] ECR I-10895.

asylum cases.²⁰⁰ Indeed, the CJEU in *Diouf*,²⁰¹ in the context of a challenge to natural procedural rules not permitting appeal from the decision to subject an asylum claim to an accelerated procedure, said the following:

The right to an effective remedy is a fundamental principle of EU law. In order for that right to be exercised effectively, the national court must be able to review the merits of the reasons which led the competent administrative authority to hold the application for international protection to be unfounded or made in bad faith...

4.2.2. Article 47 CFREU

Article 47 CFREU now codifies the right to effective judicial protection. It includes the right to an effective remedy before a court or a tribunal and the right to a fair trial.²⁰² The wording of the provision, therefore, combines the fair trial guarantees of Article 6 and the requirement for an effective remedy in Article 13 ECHR. Article 52 (3)

²⁰⁰ Baldinger, *Rigorous Scrutiny versus Marginal Review* p 326-330. See also Sheridan and Rafi, *The application of the EU Charter of Fundamental Rights to asylum procedural law* p 152ff. However, the CJEU's judgment in Case C-394/12 *Shamso Abdullahi* [2014] 1 WLR 1895 on the standard of review under transfer decisions where another Member State has accepted responsibility for refugee status determination under Article 10(1) of Council Regulation (EC) No 343/2003 (the Dublin II Regulation) is at odds with this jurisprudence. The Court held that in these circumstances, a scope of an appeal under Article 19(1) of the Dublin II Regulation was limited such that 'the only way in which the applicant for asylum can call into question the choice of that criterion is by pleading systemic deficiencies in the asylum procedure' and reception conditions of the receiving Member State so as to violate Article 4 CFREU. The effect of *Abdullahi* is, therefore, to severely limit the grounds on which a transfer decision may be challenged since both full merits review and full legality review are denied. However, the Dublin II Regulation was superseded by the Dublin III Regulation on 1 January 2014 (Regulation EU 604/2013). The new regulation provides in Article 27(1) for 'an effective remedy, in the form of an appeal or a review, in fact and in law, against a transfer decision, before a court or tribunal.' Arguably, therefore, *Abdullahi* no longer applies to the Dublin III Regulation. This question is currently pending before the CJEU in two preliminary references: C-155/15 *George Karim v Migrationsverket* and C-63/15 *Mehrdad Ghezelbash v Staatssecretaris van Veiligheid en Justitie*.

²⁰¹ Case C-69/10 *Diouf* [2011] ECR I-7151.

²⁰² Article 47 CFREU reads: 'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice.'

CFREU requires the jurisprudence of the ECtHR to be applied to the interpretation of Charter rights with analogues in the ECHR, but expressly does not prevent the more protective provision of rights under EU law. Importantly, as with the general principles, Article 47 is not subject to the central constraint of Article 6 as it has general application²⁰³ rather than being confined to the contestations of ‘civil rights and obligations’. Given that the CFREU is informed by ECHR rights but is not limited by them, it is likely that EU procedural protection as developed further under Article 47 CFREU will continue to provide more substantial rights within its scope of application than that under the ECHR.²⁰⁴ However, as noted above, there is a significant limitation on Charter rights (as with the general principles) since Article 47 only applies within the scope of EU law and so its impact on migration status decision-making is limited.

4.2.3. Secondary legislation

As noted earlier, the standards of review articulated by the CJEU through its jurisprudence on the general principles of EU law have been codified in various instruments of secondary EU law. Thus, Article 31(3) of Directive 2004/38 (procedural safeguards) requires ‘an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based’ in respect of decisions to expel EU citizens (and/or their family members) from the territory of a host state.²⁰⁵

²⁰³ The text of the provision states that it applies to ‘everyone’ (within the scope of EU law).

²⁰⁴ For example, in the context of national security, the CJEU has found Article 47 CFREU to require more by way of disclosure than Article 6: see Case C-300/11 *ZZ (France) v Secretary of State for the Home Department* [2013] 3 CMLR 46. See further Sheridan and Rafi, *The application of the EU Charter of Fundamental Rights to asylum procedural law*, pp 152-59.

²⁰⁵ In the UK this is interpreted as a right to merits review in the FTT. See reg 26 of the Immigration (European Economic Area) Regulations 2006 and, further, Chapters 4 and 5.

Equally, Article 27(1) of the Dublin III Regulation,²⁰⁶ which provides for redress against a transfer decision taken by a host Member State, reads: ‘[t]he applicant ... shall have the right to an effective remedy, in the form of an appeal or a review, in fact and in law, against a transfer decision, before a court or tribunal.’²⁰⁷ The UK does not grant statutory appeal rights in respect of transfer decisions, accordingly, arguably, Article 27(1) requires a review of merits to be undertaken on judicial review.²⁰⁸ By contrast, the Procedures Directive applicable in the UK,²⁰⁹ which details the procedural guarantees applicable in the treatment of asylum claims, does not specifically require Member States to provide merits review. Article 39 requires Member States to provide an effective remedy before a court or tribunal in relation to decisions on their asylum application. However, given that EU secondary legislation must be interpreted by reference to higher norms of EU law, namely the general principles and the Treaties (including the CFREU),²¹⁰ it is likely that, as has been seen from the *Diouf* case, an ‘effective remedy’ requires merits review in practice. The Supreme Court in *TN and AA (Afghanistan) v Secretary of State for the Home Department*²¹¹ was invited to determine whether judicial review was an effective remedy for the purposes of the Procedures Directive, however, it decided the case on an alternative basis, thereby obviating the need to determine the compatibility of judicial review with the EU effective judicial protection standards.

²⁰⁶ Regulation 604/2013.

²⁰⁷ This provision entered into force on 1 January 2014.

²⁰⁸ What this provision means is currently pending before the CJEU. See n 200 above.

²⁰⁹ See n 166 above. It is noteworthy that the recast Procedures Directive provides for ‘a full and *ex nunc* examination of both facts and points of law’ (Article 46(1) and (3)). See further

²¹⁰ The CFREU has the same status as the EU Treaties: Article 6(1) TEU.

²¹¹ *TN and AA (Afghanistan) v Secretary of State for the Home Department* (n 117).

4.3. Analysis

Procedural protection under EU law is significantly more protective than under the ECHR regime in relation to merits review of migration status decisions in, at least, two ways. First, unlike Article 6(1) ECHR, the fair trial rights under Article 47 CFREU are not limited to contestations of civil rights or criminal charges and so apply to migration status decisions and unlike Article 13 ECHR, the right to an effective remedy under the Charter requires a judicial remedy before a tribunal. Secondly, the specific right to full and *ex nunc* review has been articulated as the standard of migration status decisions within the scope of EU law, both by the Court and by the EU legislator. Thus, in relation to all asylum decisions,²¹² as a result of EU law, it appears that the standard of review must be (*ex nunc*) merits review (as noted above, this goes beyond the definition of merits review employed in this thesis). However, the impact on migration status decision-making as a whole remains limited, since in order to rely on any EU procedural rights, a migrant must fall within the limited scope of EU law. Under the IA 2014 scheme, the UK has retained appeal rights for the vast majority of those whose cases fall within the scope of EU law.²¹³ However, this is not the case in relation to decisions taken in relation to Turkish nationals under the European Community Association Agreement with Turkey (ECAA). Home Office Guidance states that as of 6 April 2015 ECAA cases

²¹² See further Baldinger, *Rigorous Scrutiny versus Marginal Review* (Chapter 4, n 78), p 361: EU law ‘causes a transformation in the legal status of existing standards on evidence and judicial scrutiny contained in or flowing from international asylum law. These existing standards transform from non-binding principles into more important rules which must be respected... from inter-governmental law into binding primary supranational EU law.’

²¹³ See summary in Chapter 4.

will not have a right of appeal but rather an internal, administrative review.²¹⁴ On the basis of the reasoning above, in respect of this group the failure to provide appeals is arguably in contravention of EU law.²¹⁵

Conclusions

As has been demonstrated in this chapter, the EU has now established a right to merits review from (the majority of) migration status decisions falling within its scope. Whilst no comparable right of application to migration has been articulated under the ECHR, arguably the earlier case law finding UK judicial review to be Convention-compliant should be revisited. The trajectory of the case law is towards greater procedural protection and the ECtHR should recognise expressly that access to merits review is a question of justice, not politics, which should be available from migration status decisions engaging substantive Convention rights. However, even if the ECtHR has yet to recognise this expressly, the current limited constellation of appeal rights to the FTT available in the UK legal order, based as they are on the existence of a protection, human rights or EU claim, appears to do so. In its recent reforms to the appeals system the Government has posited the claims to the protection of substantive fundamental rights as

²¹⁴ Home Office, *ECAA Turkish employed applications Guidance* (Version 9) p 48; Home Office, *Business applications under the Turkish EC Association Agreement* (Version 5) p 97.

²¹⁵ There is a further argument based on the application of the standstill clause contained in Article 13 of Decision No 1/80 of the Association Council (in respect of workers) and Article 41, para 1 of the Additional Protocol to the Turkey ECAA (in respect of self-employed persons), which prohibit the introduction of new national measures that impose more restrictive requirements on the free movement of workers, the freedom of establishment and the freedom to provide services as compared to the date at which the Additional Protocol and Decision 1/80, respectively, entered into force (in relation to the Additional Protocol, this date is effectively 1 January 1973 for the UK, when it joined what is now the EU, and in relation to Decision 1/80 this date is 1 December 1980 when it entered into force). The CJEU has held that Member States may not introduce measures more restrictive than more favourable provisions that were introduced after the date of the entry into force of the Additional Protocol/Decision of the Association Council (see Joined Cases *C-300/09 & 301/09 Toprak and Oguz* [2010] ECR I-12845). Arguably, therefore, the removal of ECAA appeals is contrary to the standstill clause.

the reason for which appeals from migration status decisions must, in certain cases, be provided.²¹⁶ Whilst this apparent recognition that appeal rights are not simply a gift of the administration, but should be distributed in accordance with what justice demands, is welcome, defining what the justice demands by reference to substantive international human rights obligations is, in moral terms, an unreliable barometer. Whilst it is accepted that the nature of the interests involved in migration status decisions affects the intensity of the review required, it has been argued in this thesis that the right to merits review as a minimum generally applies to all migration status decisions due to the interference of migration control in migrants' lives, save in the absence of judgment discretion in decision-making and where the adverse effects are in practice insignificant. Insofar as fundamental rights instruments do not recognise this, defining appeal rights by reference to what fundamental rights require will not fully reflect the moral entitlement to fair treatment. As such, human rights compliance in IA 2014 masks a significant diminution of procedural justice.

²¹⁶

See discussion in Chapter 9.

CONCLUSIONS AND RECOMMENDATIONS

The previous three chapters have analysed the compatibility of the UK's system of recourse from migration status decisions with the moral claims made in Chapters 2-4. It has been argued that in order to provide fair treatment, there should be recourse from migration status decisions to a body independent of the executive and impartial (independence), with full jurisdiction over the facts (*de novo* assessment), and the ability to substitute its judgment for that of the administrative decision-maker (substantive judgment). As is clear from the previous three chapters (examining appeals, judicial and administrative review, and international and EU norms), the UK's current system of recourse from migration status decisions does not meet those standards. Whilst there is the institutional capability (through the FTT) to provide merits review, as seen in Chapters 5 and 6, the allocation of rights of appeal is overly narrow.¹ The lacunae in protection is not mitigated by the alternatives to appeal (administrative review and judicial review) in their current forms. There is, moreover, now recognition in EU law of a right to full merits review from (at least) certain migration status decisions. What remains, therefore, is to undertake three final enquiries: first, to compare in summary the approach of this thesis and that of the UK Government to where the line between merits

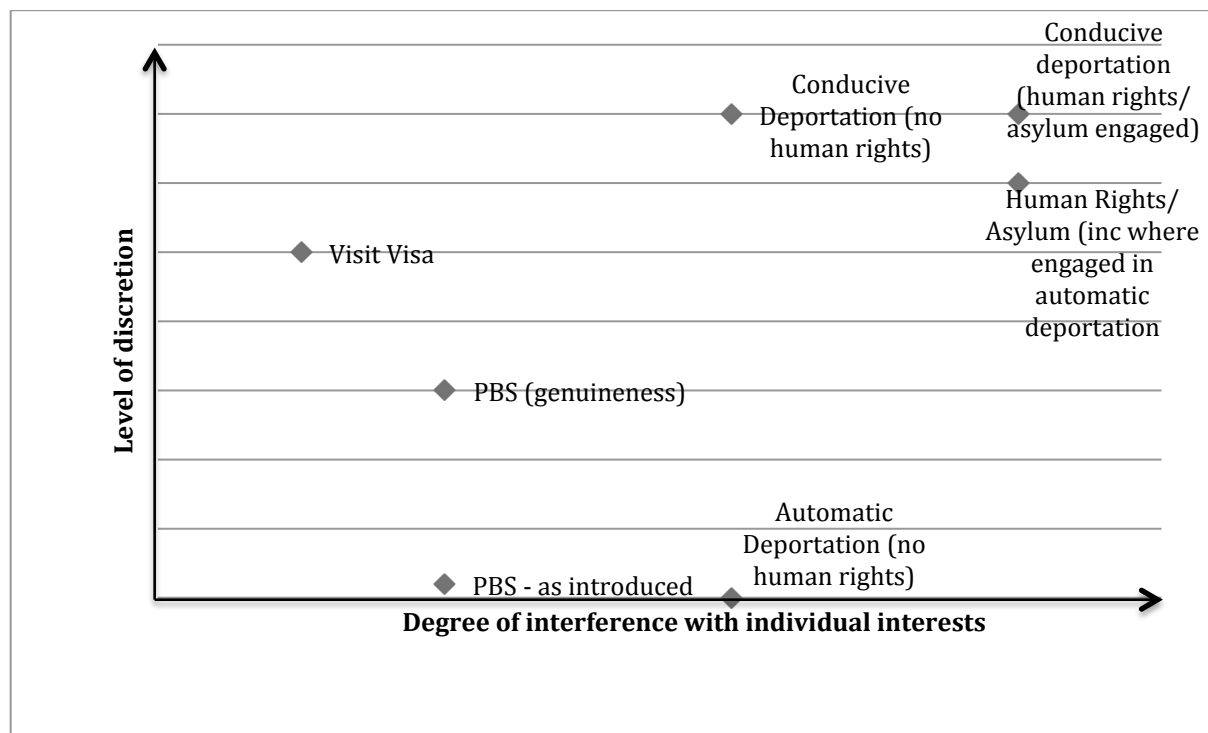
¹ Under IA 2014 there are rights of appeal only where there is a human rights claim, a protection claim or an EU claim. Since the inception of the appeals system under the 1971 Act, the provision of appeals has been piecemeal. See further Chapter 5.

review and legality review should be drawn in relation to various migration status decisions; secondly, to ask why the UK system presently does not satisfy the moral claims to fair treatment, and finally, to suggest ways in which the system might be altered such that the standards of merits review claimed by this work to constitute fair treatment might be met. These final questions are considered below, in turn.

1. Where should the line be drawn?

At the conclusion of Chapter 6, the case studies examined were plotted in a graph. The axes took into account the varying levels of discretion in decision-making and interference faced by the individuals subject to the three types of migration status decision discussed (Points Based System, visit visa and deportation). The graph is reproduced below (figure 1).

Figure 1



As is clear, Figure 1 displays the varying amounts of discretion and interference involved in different migration status decisions. It does not, however, indicate where the line between a right of appeal and no right of appeal should be drawn. The gradient and position of the line will determine, respectively, how discretion should be weighed against interference and how many migration status decisions should have a right of appeal. Figures 2 and 3, show the possible variations in the gradient and the position of the line, respectively. In figure 2, line A represents a position where interference is prioritised over discretion, whereas line B shows the opposite (discretion is prioritised over interference). Line C represents a position of equal concern between interference and discretion. In figure 3, the three gradients (A, B and C) are reproduced. Each line is drawn in three places on the graph to represent the position: where appeals are granted from the vast majority of migration status decisions (lines A1, B1 and C1), where the vast majority of migration status decisions do not have appeals (lines A3, B3 and C3), and an intermediate position (A2, B2 and C2).

Figure 2: Gradient of line

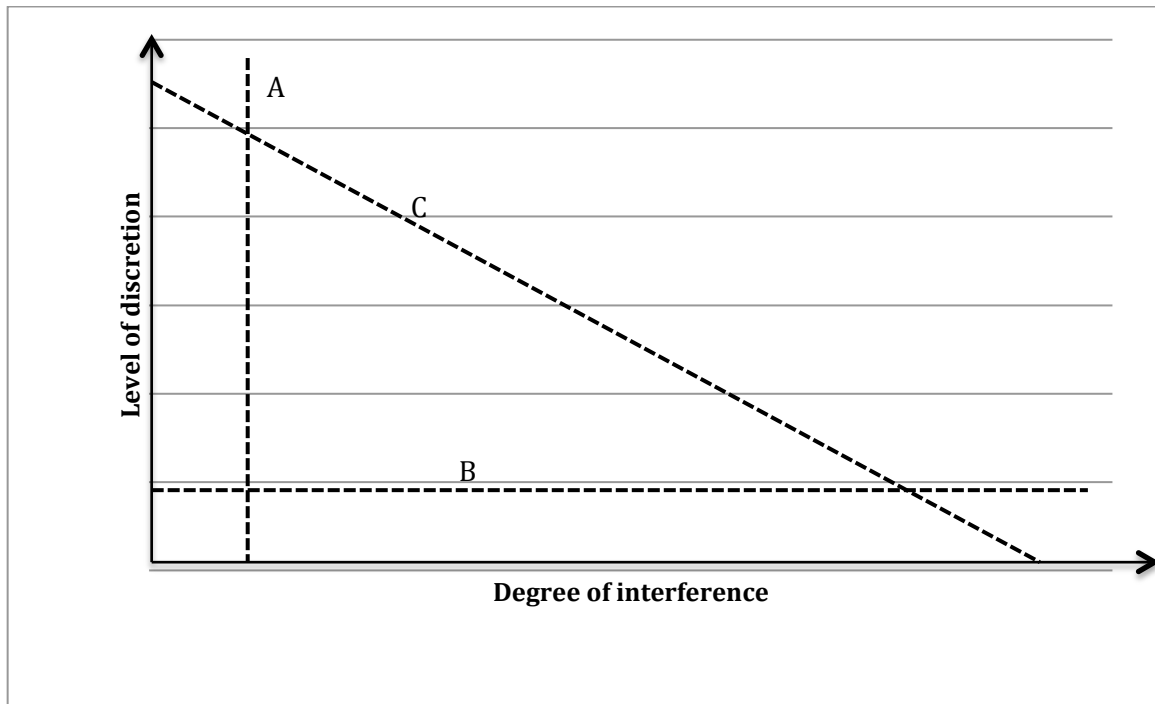
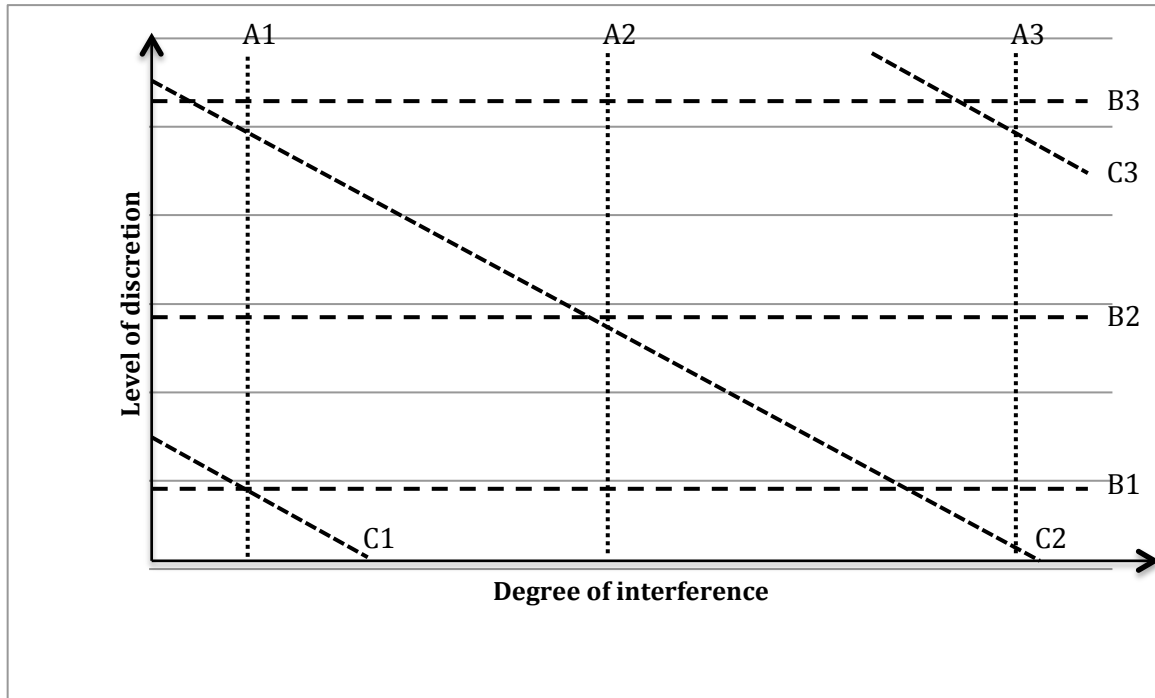


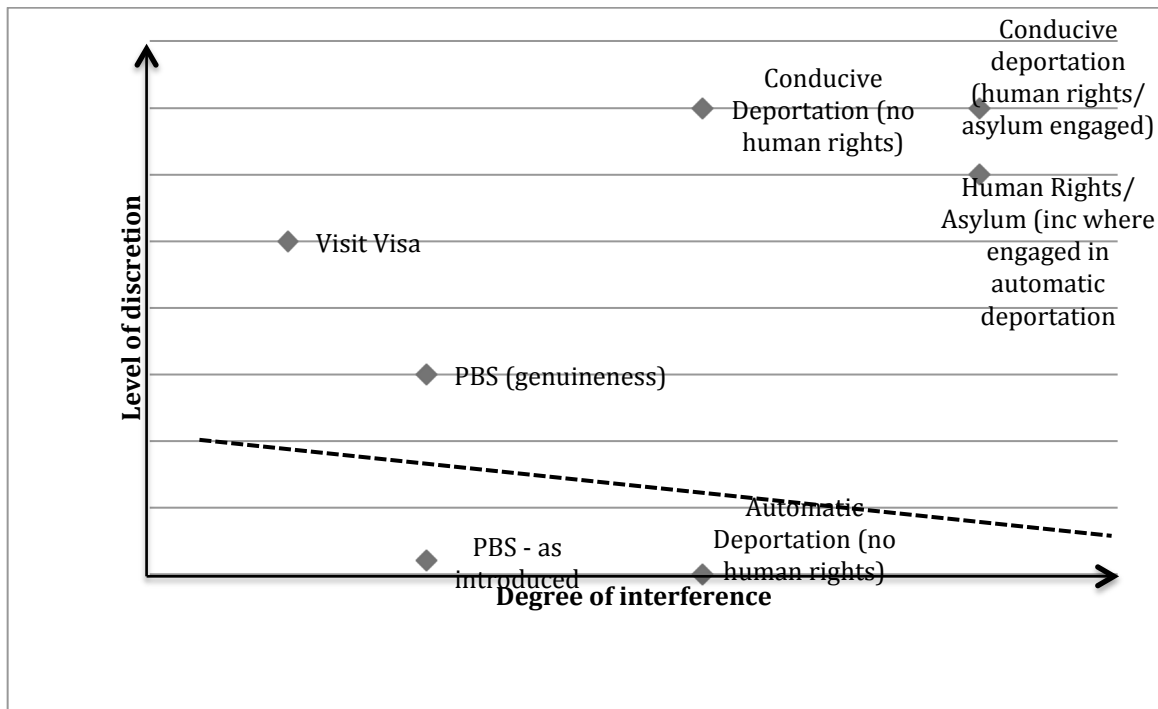
Figure 3: Position of line



Where, therefore, should the line be drawn in the interests of procedural justice? On the conclusions of this thesis, the presence or otherwise of judgment discretion is relevant to the standard of review. As has been argued, this is because with legality review generally the administrator's judgment calls are immune to challenge. By contrast, legality review is a sufficient corrective in the absence of any, or any significant, judgment discretion (including the absence of a factual dispute). It has been argued that although – as is clear from the graphs above - some migration status decisions interfere less in the lives of the migrant than others, in general terms the proper standard of review of migration status decision-making is merits review in light of migration control and the 'very imperfect' nature of migration status decision-making. In particular, migration control creates extra vulnerabilities in the subjects of migration status decision-making that, in turn, widen the imbalance in power between the decision's maker and its subject and certain features inherent in much migration status decision-making increase the risk of error. Thus, it has been argued that whilst the need for merits review is not static across migration status-decision making (the higher the degree of discretion and the greater the consequences at stake, the greater the need for merits review), the considerations outlined make the three criteria of merits review set out in Chapter 4 (independence, *de novo* assessment and substantive judgment) the general base line in procedural protection. Thus, on the basis of the argument of this thesis, the line is drawn such that a right of appeal lies from all migration status decision-making involving more than *de minimis* discretionary judgment: see Figure 4. As seen from the current cross section of UK migration status decision-making considered in Chapter 6, this would

mean in practice that the vast majority of migration status decisions should have a right of appeal on the merits.

Figure 4: Conclusions of thesis



As is apparent from the analysis in Chapters 4-8, this is not where the line has been drawn in the UK. The traditional approach (since the inception of the appeals system in 1970 until IA 2014) is, however, far closer to the conclusions of this thesis than the current allocation of rights of appeal under IA 2014. Indeed, when it was set up in 1970, the appeals regime conferred appeal rights on the vast majority of migration status decisions.² In the intervening years appeal rights were cut but broadly speaking, the exclusion of certain migration status decisions (with notable exceptions)³ was justified on grounds accepted in this work, namely, a combination of an absence of discretion and a

² See Chapter 5.

³ For example, the exclusion of asylum decisions under the IA 1971 scheme. See further Chapter 5.

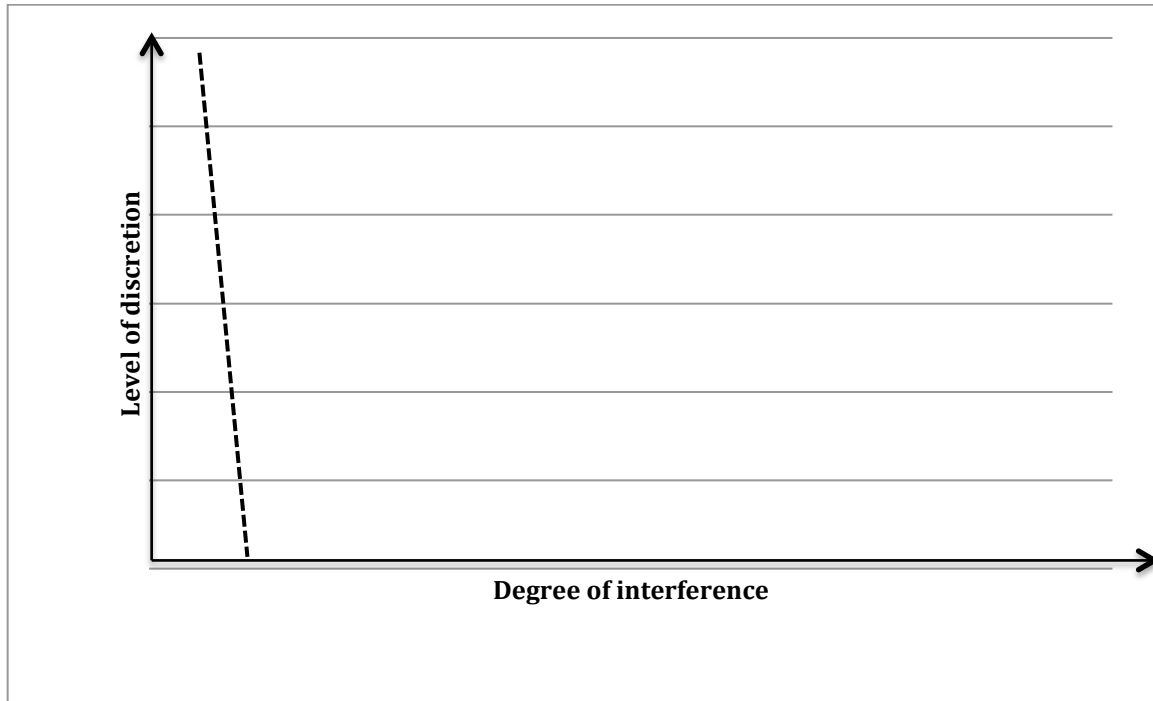
perceived absence of significant interference by migration controls in the lives of those affected.⁴ The approach that, in broad terms, applied between 1970-2014 is encapsulated in Figure 5 (see below).⁵ This approach, however, has been superseded by IA 2014. It appears that the model in IA 2014 has no regard to the level of judgment discretion in migration status decision-making, but rather focuses solely on the degree of interference with interests (or rights): see Figure 6 below. Thus, as has been discussed at length elsewhere in this thesis, the result of the IA 2014 approach is that many migration status decisions, including conducive deportation cases that are not deemed to include a ‘human rights claim’, Points Based System cases, and visit visas, are no longer granted a right of appeal. The critique of the approach in IA 2014 may be conceptualised in three ways: first, it could be said – as has been argued above – that it does not take into account the relevance of judgment discretion to the allocation of rights of appeal sufficiently or at all. Secondly, it could be argued that the IA 2014 approach does not give sufficient weight to the degree of interference in the lives of those migrants subject to decisions under the categories excluded from appeal rights. Thirdly, arguably the IA 2014 regime does not take any, or any sufficient, account of the difficulties inherent in migration status decision-making that increase the risk of error. As is clear from the body of the work, this thesis adopts all three critiques: it argues that judgment discretion is relevant to the standard of review, migration control affects all migration status decision-making, and

⁴ The paradigmatic example of this approach is PBS entry clearance: Immigration Asylum and Nationality Act 2006, s 4. See further Chapter 5 at 2.3.2.

⁵ No specific migration status decisions are plotted as the precise constellation of rights of appeal varied between 1970-2014: see Chapter 5.

the inherent nature of migration status decision-making makes it a very ‘imperfect’ form of procedural justice.⁶

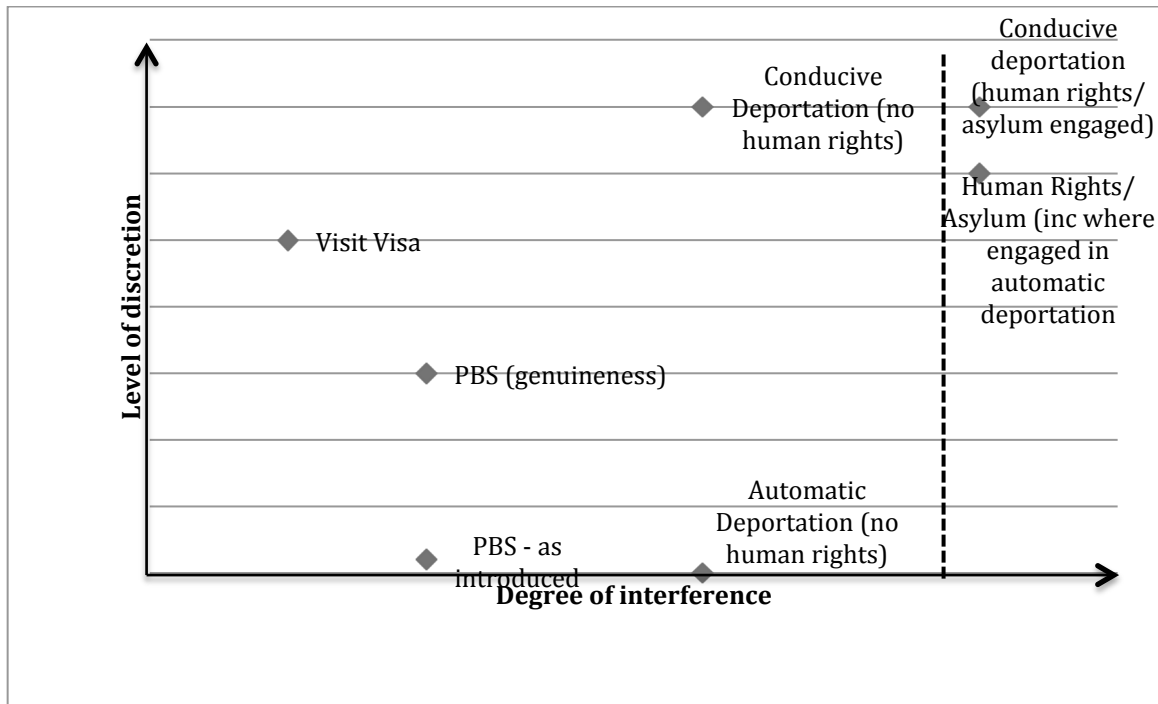
Figure 5: 1970-2014



⁶

See Chapter 2.

Figure 6: IA 2014



2. Why does the UK system not satisfy the moral claims made?

It is clear from the summary above and the analysis undertaken in Chapters 6-8, therefore, that the UK system of recourse from migration status decision-making does not meet the moral claims made in this thesis. It is useful as a preliminary step in the analysis of how the UK system may be made compliant to ask why. The following section considers first the impact of the theory – or absence of theory – of appeals underlying the establishment of the system; and secondly, it considers the impact of the persistent view at the level of Government that substantive anti-migration policy may be executed through the appeals system.

2.1. Absence of a cogent theory of appeals

In *Saleem v Secretary of State for the Home Department*⁷ Hale LJ (as she then was) explained the establishment of tribunals to adjudicate on the merits of administrative decisions in terms of ‘the perceived need for independent adjudication of the merits and to reduce resort to judicial review.’⁸ This, she argued, ‘was undoubtedly the motivation for grafting asylum cases onto the immigration appeals system in 1993.’⁹ However, whilst the need for independent adjudication has been stressed as central to the perceived need for migration status appeals, the question of when and why this need is ‘perceived’ has been less clearly articulated by legislators and policy makers in the UK. It is argued below that there were central flaws in the original justification for migration appeals in 1967 and that there has been no subsequent comprehensive attempt to justify and theorise the need for migration appeals, there remains a lack of clarity as to their relevance and role. This absence of clarity, it is argued, has contributed to the prevalent view in Government that migration appeals are a matter of policy¹⁰ rather than a fundamental moral right.

2.1.1. The Wilson Report: justice being seen to be done

Any consideration of the theory of appeals in the UK necessarily starts with the Wilson Report. That justice must be seen to be done in respect of migrants was the fundamental

⁷ *Saleem v Secretary of State for the Home Department* (Chapter 5, n 156).

⁸ *ibid*, 458.

⁹ *ibid*.

¹⁰ Or ‘strong’ discretion, see Chapter 2 at 5.1.

premise on which appeal rights were recommended by the Wilson Committee. To this end, it said the following:

...however well administered the present control may be, it is fundamentally wrong and inconsistent with the rule of law that power to take decisions affecting a man's whole future should be vested in officers of the executive, from whose findings there is no appeal. ... it is understandable that an immigrant and his relatives or friends should feel themselves from the outset to be under a disadvantage, and so should be less willing than they might otherwise be to accept the eventual decision. If a Commonwealth citizen or alien claims afterwards that 'they didn't give me any reason for the decision' or 'they wouldn't listen to what I said', he may only be trying to save face, but we believe that such complaints quite often express the feeling that the person concerned never had a chance to confront his interrogators on equal terms. Allegations of this kind are hard to counter when the whole process has taken place in private. They reflect unfairly on the officials concerned, and cumulatively they give rise to a general disquiet in the public mind... We doubt whether it will be possible to dispel this belief so long as there is no ready way of having decisions in such cases subjected to an impartial review.¹¹

This justification is based on an argument of what is termed by the Wilson Committee to be 'basic principle', namely that as well as justice being done, it must be seen to be done. On this basis, the Wilson Report advocated the provision of appeal rights in areas where conflict most often arises between migrants and the authorities.¹²

As is clear from the conclusions of this thesis, as a statement of principle, there is nothing objectionable about the view taken by the Wilson Committee that a strong appearance of injustice and bias in the administration of migration control necessitated the provision of a system of independent review of the merits of migration status decisions. However, the Report's insistence that the problem lay *solely* in the appearance

¹¹ Wilson Committee, *The Wilson Report* (Chapter 1, n 13), para 84.

¹² *ibid* para 100.

of injustice has been roundly criticised.¹³ In Satvinder Juss' view, that the Committee came to the view that substantive injustice in the administration of immigration control was absent was 'remarkable' given the charges of the improper exclusion of intending migrants, the at times arbitrary and capricious operation of the system, and the failure to give proper attention to cases that had been levelled 'consistently and constantly' over the twenty-five years following the establishment of an appeals system in 1970 (the period researched by Juss).¹⁴ In the light of what he saw as the apparent decision of the Wilson Committee to close its eyes to the failings of justice in the administration of migration control, Juss, therefore, considered the establishment of an appeals system in 1970 on the back of Wilson's recommendations as 'nothing more than "a kind of reassurance"' to migrants and their communities and supporters.¹⁵

Insofar as the Wilson Report disregarded overwhelming evidence of flaws in the administration of migration control, Juss's criticisms of the Report's conclusions are convincing and significant problems in the administration of migration control persist.¹⁶

¹³ See Juss, *Immigration, Nationality and Citizenship* (Chapter 5, n 94), pp 125-9 and those publications cited at fn 25 (chapter 5) and Runnymede Trust, 'The Pivot of the System: A Briefing Paper on Immigration Appeals' (Runnymede Trust 1981).

¹⁴ *ibid*, p 125.

¹⁵ *ibid*, p 128.

¹⁶ There are many statements to this effect. Of these, see, eg, Joint Committee on Human Rights, *Eighth Report, Legislative Scrutiny: Immigration Bill* which notes 'the relatively high proportion of such appeals which currently succeed due to the well-documented shortcomings in the quality of decision-making by the UK Border Agency' (para 39); Thomas, 'Mapping judicial review litigation: an empirical analysis', 659: 'For many years, this administrative process has been characterised by stresses and strains attributable to the pressure of work leading to errors and delays, which are then compounded by administrative blunders.' Thomas also refers to a 'perceived Home Office determination to refuse applications rather than make an objective view' (at 660). Further, the reports of Independent Chief Inspector of Borders and Immigration have also highlighted repeated failings in administrative decision-making on migration status, see, eg, BBC News, 'Chief inspector of borders and immigration resigns': 'For six years, John Vine painted a bleak picture of Britain's border and immigration controls. His reports were a severe embarrassment for a government that had pledged to bring down net migration and restore order to the system.' John Vine's most recent report criticised both case workers and management: 'I still

By failing to recognise the flaws in the system, the Wilson Report arguably provided a justification for appeals that was out of kilter with reality and which would facilitate the future attrition of appeal rights. The inherent problems associated with migration status decision-making are recognised and explored in Chapter 2 of this thesis. However, this apparently significant flaw in the Committee's approach does not negate the validity of the appearance of justice as a justification for the establishment of a system of appeals from migration status decisions. This point is also underscored in Chapter 2.¹⁷ The Wilson Committee, writing in the 1960s, was alive to the effect that the Commonwealth Immigrants Act 1962, which for the first time imposed immigration control on Commonwealth citizens, had had on fomenting fears of racial discrimination. The Committee concluded that from the evidence that it had received, there was a strong suggestion that:

among the communities of Commonwealth immigrants in this country, and among people specially concerned with their welfare, there is a widespread belief that the Immigration Service deals with the claims of Commonwealth citizens seeking admission in an arbitrary and prejudiced way.¹⁸

Although the nature of events has changed, justice being seen to be done remains of importance today. This is particularly the case in relation to the Coalition Government

find too much evidence that the Home Office does not get the basics right. This includes the quality and consistency of decision making but also having case workers with the right skills, aligning resources to the right priorities and having high quality management information that provides a sound basis on which to make decisions on future strategy and resourcing... there is an ongoing need for the Home Office to maintain management grip of the quality, consistency and fairness of its work. I have repeatedly had to report on the lack of quality assurance by managers across the board and I have identified a number of backlogs of work that senior officials had not been aware of...' (John Vine Independent Chief Inspector of the UK Border Agency, *Annual Report 2013-14* (2014) pp 6-7).

¹⁷ See Chapter 2, 4.1.1.

¹⁸ Wilson Committee, *The Wilson Report* (Chapter 1, n 13), para 84.

of 2010-2015's policy to reduce net migration: an expressly anti-migrant policy held by the administrative decision-maker.¹⁹ Similarly, the existence of numerical targets for refusals built into the decision-making process, raises questions of fairness. This has been criticized by the Independent Chief Inspector of Borders and Immigration who, in his 2010-11 annual report, noted that the emphasis on achieving numerical targets contributed to poor-quality decision-making in the Home Office.²⁰ In a climate in which the authority with control of decision-making on migration status decisions expressly seeks to prevent and reduce migration and where administrative officials are driven by numerical targets on the number of grants and refusals, justice being seen to be done would appear to be more important than ever. However, significantly, the need for justice

¹⁹ The Conservative Manifesto in 2010 announced the pledge: 'immigration today is too high and needs to be reduced. We do not need to attract people to do jobs that could be carried out by British citizens, given the right training and support. So we will take steps to take net migration back to the levels of the 1990s – tens of thousands a year, not hundreds of thousands' (The Conservative Party, *The Conservative Manifesto* (2010) p 21); reiterated, once in office, on 14 April 2011: 'I believe controlling immigration and bringing it down is of vital importance to the future of our country. That's why during the election campaign, Conservatives made a clear commitment to the British people...that we would aim to reduce net migration to the levels we saw in the 1980s and 1990s. Now we are in government, we are on track to meet that aim. We are controlling legal immigration - having introduced a cap on non-EU economic migrants. We are clamping down on illegal immigration. And we are getting to grips with the asylum system too' BBC News, 'In full: David Cameron immigration speech' (14 August 2011) <<http://www.bbc.co.uk/news/uk-politics-13083781>> accessed 1 January 2016. Although the Coalition Government has since been forced to admit that it has failed to meet the target it had set, David Cameron has re-iterated that it remains a policy objective. See, eg, BBC News, 'Net migration target perfectly achievable - Cameron' (13 March 2014) <<http://www.bbc.co.uk/news/uk-politics-27389189>> accessed 1 January 2016; Andrew Grice, 'David Cameron immigration pledge 'failed spectacularly' as figures show net migration almost three times as high as Tories promised' (*Independent*, 26 February 2016) <<http://www.independent.co.uk/news/uk/politics/generalelection/tory-immigration-pledge-failed-spectacularly-as-figures-show-net-migration-nearly-three-times-as-10071710.html>> accessed 1 January 2016.

²⁰ John Vine, Independent Chief Inspector of the UK Border Agency, *Annual Report 2010-11* (2011) p 7: '[my] inspections continue to expose issues where more of a 'right first time' approach needs to become the norm...error rates are still far too high in the [UK Border] Agency's visa decision-making, with too much emphasis placed on achieving numerical targets and not enough on the quality of decision-making. These issues are, unfortunately, not exceptional...'. The Government also maintains targets for reducing the number of successful appeals against its decisions. See, eg, Home Office, *Asylum applications: response to second report of the Home Affairs Committee* (Policy Paper, Cm 6166, 2004) pp 19-20.

to be seen to be done is no longer present in the Government's rhetoric surrounding appeals. Rather, a narrative of 'abuse' of the system predominates,²¹ thereby downplaying the moral demands of fair treatment in the Government's justification of the appeals system.

2.1.2. The Wilson Report: protection of substantive rights

In addition to his criticism of the apparent disingenuousness of the Wilson Report (for locating the need for an immigration appeals system on the need to allay fears of migrant communities, rather addressing the substantive injustices in the application of immigration control), Satvinder Juss has also criticised the Report's failure to locate the need for an appeals system in the protection of migrants' substantive rights, since '[p]rocedural rights are after all parasitic upon substantive rights.'²² He attributes the failure of the Wilson Report to advocate an appeals system on the basis of protecting the substantive rights of migrants as underlying the subsequent failures of the appeals system following its establishment in 1970.²³ However, as has been argued in this thesis, access to justice does not exist purely to enforce substantive rights (although as acknowledged above, the importance of having an appeal may increase in relation to the importance of the right involved), but rather pursues the moral right to fair treatment, and as such, the potential for unfairness. In some cases, therefore, an administrative decision on a clear-

²¹ See, eg, Home Office, *Immigration Bill Factsheet: Appeals*; Home Office, *Impact Assessment of Reforming Immigration Appeal Rights*.

²² Juss, *Immigration, Nationality and Citizenship* (Chapter 5, n 94), p 129.

²³ *ibid*, p 129: 'For many years after Wilson, moreover, determinations of the IAT still did not take the form of 'reasoned decisions' in any probative sense. The answer to this question must in a large part lie in the absence of substantive rights that Wilson failed to seek protection for. Procedural rights are after all parasitic upon substantive rights. If Wilson did not advocate these rights, and Acts of Parliament and the immigration rules did not either for the most part, then what was it that the new system was striving to achieve?' Footnotes have been omitted from this citation.

cut right (involving no judgment discretion) may not need a right of appeal since the decision can be justly and reliably made by way of a reliable mechanistic process with objectively verifiable facts.²⁴ The real problem with the Wilson Report is not, therefore, its failure to recognise substantive injustices in immigration control or state in terms that appeals should be established to vindicate migrants' substantive rights, but rather that it does not explain why justice being seen to be done in the migration decision-making context is important. As Juss rightly notes, the thrust of the Wilson approach is that appeals will provide reassurance in a general and amorphous sense. The Committee fails to identify the specific importance of appeals as correctives against subjective assessments and judgment calls made by the administration where the risk of bias is high. By failing to explain the importance of the appearance of justice, the theory of appeals presented in the Wilson Report lacked cogency and durability.

2.1.3. Policy positions after Wilson: the role of discretion

Whilst, as seen above, the relevance of discretion did not play a role in the Wilson Report's justification of appeals, it has since been recognized by Government as a basis for allocating appeals from migration status decisions. Thus, the creation of the Points Based System in 2005-2006 located the need for an appeal in the existence of discretionary judgments. Policy documents suggested that there would be no need for appeals from decisions under the PBS since administrative judgment discretion would be removed from the decision-making process as it shifted from a subjective to an objective

²⁴ See Chapter 1 and, generally, Galligan, *Due Process and Fair Procedures* (Chapter 1, n 29).

approach.²⁵ Similarly, a 1981 Home Office discussion document shows recognition of the importance of discretion in determining the proper level of procedural protection. It contrasts the existence of ‘significant room for argument on the law or facts of the case’ with a situation where:

given the requirements of the Immigration Rules, the issues in the case should normally be entirely straightforward... requirements that are so clear-cut that it should normally be readily apparent whether or not they are met. For example, there are requirements which cannot be met unless certain specific documents (eg work permits or entry clearances) are held, or permission to work is obtained from the Department of Employment, or the applicant comes from a particular part of the world, or falls within certain age or time limits. These are matters of fact which either apply or do not apply as the case may be. If they do apply the applicant will readily be able to establish this...²⁶

It concludes that in a clear-cut case, less procedural protection is necessary.

However, despite the recognition in some Home Office policy documents subsequent to the Wilson Report of the role that discretion plays in allocating appeal rights, this acknowledgment has not been implemented in practice in any comprehensive or systematic way. The majority of migration status decisions involving judgment discretion – where there is significant room for argument on the facts – have, since the reforms implemented by IA 2014, been denied an appeal right. Thus, the failure in practice to recognize the relevance of discretion for generating appeal rights excludes many migration status decisions from the appeals system. In this respect also, as noted

²⁵ Home Office, *A Points-Based System: Making Migration Work for Britain* paras 52-53. The paper compared ‘the old system’ in which ‘decision[s] [are] based on a wide range of entry criteria, some of which are subjective, and therefore have recourse to appeal’ with the ‘new system’ whereby ‘[d]ecisions [are] made using an expanded points-based system and other criteria where possible, thus providing more consistency, and supported by administrative review where appropriate.’

²⁶ Home Office, *Review of Appeals under the Immigration Act 1971: a discussion document* paras 25-26. The discussion relates to when an oral appeal may not be necessary.

above, the absence of a coherent and lasting theory of migration appeals has permitted the creeping attrition of appeal rights.

2.2. The pursuit of substantive policy objectives through the appeals system

Thus, the absence of a coherent and durable theory of appeals has contributed to the uneven provision of rights of appeal from migration status decisions. Moreover, it is also suggested that the absence of a robust theory of appeals has facilitated the Government's recalibration of the appeals system for political²⁷ ends. Reforms to the appeals system have long been considered central to the Government's substantive policy concerns on migration and inherent in this is the idea that appeals constitute an immigration advantage (as opposed to a procedural advantage).²⁸ The idea that granting appeal rights increases migration has been expressed both as a matter of it encouraging entry (granting an appeal will 'vastly increase the number of people who try to get into the country'²⁹) and preventing removal ('immigration appeals are unusual in that delays work in favour of the appellant if he is already in the United Kingdom'³⁰). In particular, appeals are seen as advantageous in immigration terms due to the concomitant delay which 'work[s] to the

²⁷ See definition: Chapter 1, n 22.

²⁸ The reasons why merits review is more protective for individuals than legality review are examined in Chapter 2 at 4.1.

²⁹ HC Deb 9 December 1958, vol 213, col 137-8.

³⁰ Home Office, *Review of Appeals under the Immigration Act 1971: a discussion document* para 18. See also discussion of immigration appeals by Lady Hale in *R (on the application of Cart) v Upper Tribunal* [46]-[47]: 'In most tribunal cases, a claimant will have little to gain by pressing ahead with a well-nigh hopeless case. He may have less money than he otherwise would, but he will not have to leave the country and may make another claim if circumstances change. But in immigration and asylum cases, the claimant may well have to leave the country if he comes to the end of the road. There is every incentive to make the road as long as possible, to take every possible point, and to make every possible application. This is not a criticism. People who perceive their situation to be desperate are scarcely to be blamed for taking full advantage of the legal claims available to them.' See also HC Debs vol 560, cols 158 and 161 (Theresa May, Home Sec) 22 October 2013.

advantage of appellants already in the country who may thereby achieve substantial extensions of stay, whatever the merits of their case, simply by appealing.³¹ Thus, the practice of appeals being lodged by visitors and then withdrawn prior to the hearing has been explained as a means of achieving substantial extension of stay when an actual visa extension has been refused, thereby circumventing immigration control.³² The delay in hearing an appeal may also provide an appellant with not only an extension of stay but a further reason for not leaving the territory of the UK since relationships may be built and events may happen during that time which confer additional rights on the appellant (notably private and family life protected by Article 8 EHCR).³³ It has also been suggested that appeals may make immigration control unworkable since delaying removal would cause either a space problem if migrants were to be detained, or an absconding problem if migrants were released pending appeal.³⁴

The view that appeals increase migration has had consequences for Government policy on appeals. A discussion document on appeals dating from 1981 reveals a belief that the existence of an appeals system requires stricter immigration controls since

³¹ Home Office, *Review of Appeals under the Immigration Act 1971: a discussion document* para 4. It should be noted, however, that this criticism (and other examples given below) applies only insofar as appeals are suspensive of removal. As to this, see chapter 4.

³² *ibid* paras 12 and 18: ‘there is no doubt that a further right of appeal would be used by a number of appellants solely to delay their departure; as things are the appeal system is already abused in this way by hopeless appeals being lodged and withdrawn shortly before the hearing.’

³³ In the Government’s rhetoric, it is so-called ‘foreign criminals’ who benefit most from delays: Speech at Conservative Party conference, Manchester 30 Sept 2013, cited in Thomas, ‘Mapping judicial review litigation: an empirical analysis’, 675. Yet, criminal deportees accounted for 2.6 per cent of appellants in 2013/2014: *ibid*.

³⁴ See, eg, HL Deb 3 August 1905, vol 151, col 10: Lord Belper ... If the Amendment of the noble and learned Lord were carried, it would make the Bill practically unworkable. In the first instance the matter would have to go to a Court of summary jurisdiction, but if there was to be an appeal to quarter sessions, as in all cases of dispute there would be, that might mean a delay of two or three months. What was to be done with the alien who was landed for the purpose of this inquiry during that time? It would make the Bill unworkable if the decision in his case were to be delayed for any such length of time as that.

appeals frustrated the effective removal of migrants with no right to remain.³⁵ Further, when the system was first reformed in 1988, the debates in Parliament revealed the Government's clear view that the appeals system was antithetical to effective migration control.³⁶ In Chris Platt's view, the 1988 reforms characterized the appeals system 'as being a form of statutory loophole open to the abuse of those seeking, illegally, to enter the UK,' with the consequence that 'they [were] thereby able to claim an automatic justification for the restrictive changes.'³⁷ The rhetoric of abuse persists today.³⁸ Moreover, the literature relating to IA 2014 makes clear that in the Government's view, reducing rights of appeal will contribute to its pledge to reduce net migration.³⁹ As the Immigration Bill Factsheet on appeals makes clear: '[t]he bill will make it... easier to remove and deport illegal immigrants by: ...cutting the number of decisions that can be appealed from 17 to 4....'⁴⁰

³⁵ Home Office, *Review of Appeals under the Immigration Act 1971: a discussion document* para 12: 'if the right of appeal in [certain] cases were removed it might be possible to take a somewhat more relaxed attitude about admission if the persons concerned could be removed more rapidly than is now the case.'

³⁶ Platt, *The Immigration Act 1988: A discussion of its effects and implications, Policy Paper in Ethnic Relations* No.16 <https://web.warwick.ac.uk/fac/soc/CRER_RC/publications/pdfs/Policy%20Papers%20in%20Ethnic%20Relations/PolicyP%20No.16.pdf>. See also T Renton: 'one of the problems about Britain's treatment of immigration cases is that the superstructure of appeal upon appeal - the number of safeguards that we have given those who come here - to which we have added a Member of Parliaments representation, means that we arrive at a thicket within which the immigrant is well protected. He goes from one appeal to the next while the years drag on, at the end, after eight or nine years, it is almost inevitable that he will be given leave to remain in Britain', cited in *ibid*

³⁷ *ibid*.

³⁸ Home Office, *Immigration Bill Factsheet: Appeals*.

³⁹ See above discussion.

⁴⁰ Home Office, *Immigration Bill Factsheet: Overview of the Bill* (October 2013).

The politicisation of appeal rights is, therefore, longstanding. However, granting or withdrawing appeal rights should not be a tool of migration control since as has been seen in earlier chapters, it is concerned with the moral right to fair treatment, not whether there should be more or fewer migrants in the UK. The grant and withdrawal of appeal rights should not, therefore, implicate aims such as reducing net migration, removing migrants (or certain groups of migrants) from the territory of the UK, or preventing migrants (or certain groups of migrants) from entering the UK. Simply put, securing justice in individual cases should not be used as a policy tool. Further, the argument is premised on the power of migration control and individual rights of appeal existing in an antagonistic relationship but, as explored in Chapter 3, this is not necessarily so. The aim of migration control is the selection and enforcement of who should and who should not be permitted to enter and remain in the UK. Appeals are, therefore, a way of determining that a proper selection of those chosen to be in or out is made. Moreover, evidence shows that appeals are successful: as Macdonald records ‘...more than 40 per cent of all immigration appeals to the [FTT] are allowed so the principal effect of the abolition of appeal rights will be to take away an important, accessible and effective remedy against injustice.’⁴¹ Thus, the appeals reforms may suggest, in the words of Robert Thomas, that ‘unable to win at appeals, the governmental alternative has been to change the rules of the

⁴¹ *Tribunal Statistics Quarterly: April to June 2014*, Ministry of Justice, 11 September 2014: 42 per cent allowed in the financial year 2013-14; 2012/13 – 44%; 2011-12 – 45%, 2010-2011 – 48 % *Tribunal Statistics Quarterly (including Employment Tribunal and EAT): April to June 2013*, 12 September 2013, Ministry of Justice, Table 2.5, cited in Macdonald and Toal, *8th edn*: p 1723.

game.’⁴² Insofar as this represents reality, it constitutes, it is argued, an improper means of allocating procedural rights.

2.3 Summary

Thus, from the above discussion (and that in previous chapters), it is possible to propose (at least) three reasons why the UK system does not satisfy the moral demands of fair treatment. These are: first, the absence of an articulation of a fundamental right to merits review generally applicable to migration status decisions (as analysed in Chapter 8); secondly, the failure to identify and implement a coherent theory of appeals; and thirdly, the implementation of substantive anti-migration policy objectives through the appeals system. It is argued that the appeals system should be insulated from substantive anti-migration policy and that, in order to do so, a robust theory of appeals should be articulated at the level of Government. In other words, Government needs to explain and justify properly, as a matter of fair treatment, its procedural decisions.

3. Initial recommendations and suggestions for reform

It has been a major objective of this thesis to set out a comprehensive and coherent theory of appeals. The previous sections of this chapter (in addition to the previous three chapters) have argued and explained why and how the incumbent system of recourse from migration status decisions in the UK does not meet the moral claims made in this thesis. It remains, therefore, to consider how these claims could best be met in the UK. The final section of this thesis sketches some initial suggestions for reform and considers

⁴² Thomas, ‘Mapping judicial review litigation: an empirical analysis’, (Chapter 2, n 111), 676. Thomas employs the party capability theory to posit that the Home Office with better resources, and a more capable repeat player should win the majority of cases as a matter of logic.

their compatibility with the moral claims made.⁴³ A distinction is made between reforming avenues of recourse from migrations status decisions and, more radically, reforming the primary decision-making mechanism itself.

3.1. Reforms focusing on recourse

3.1.1. Focus on internal review

As Chapters 4 and 7 demonstrate, the IA 2014 scheme prioritises internal review as an alternative to appeal. A meaningful and effective internal review process (as opposed to a defective one)⁴⁴ has advantages including efficiency and low cost: it ‘is likely to be cheaper and quicker for both sides than letting a refusal go to appeal.’⁴⁵ As noted in earlier chapters, internal reviews are now available in the majority of cases (with some exceptions)⁴⁶ that previously had a right of appeal. However, as has been argued in Chapter 7, and for the reasons set out there in more detail, as a matter of institutional competence alone, internal review cannot be a sufficient replacement for rights of appeal to the FTT since it is undertaken within the Home Office. Thus, even if it were shown to be effective, it lacks the independence and impartiality that would permit justice to be seen to be done.

⁴³ The primary aim of the thesis is to provide a theory of appeals. The recommendations as to how this should be modelled in practice are tentative and further work is required on how best the moral claims may be institutionalised.

⁴⁴ See criticisms at n 16.

⁴⁵ Home Office, *The Government Reply to the Fifth Report from the Home Affairs Committee Session 2005-06 HC 775* (Command Paper, Cm 6910, 2006) para 219.

⁴⁶ See further Chapters 5 and 7.

3.1.2. Focus on judicial review

It has been argued in this thesis that judicial review does not meet all of the three criteria of merits review set out in Chapter 4 and as such cannot provide sufficient review to satisfy the moral demands of fair treatment in all cases. However, given that the judicial review jurisdiction in the Upper Tribunal (and to a lesser extent, the Administrative Court)⁴⁷ is a creature of statute,⁴⁸ it is possible to envisage legislative amendment which would empower merits review in certain cases.⁴⁹ A further possibility would be, as Dana Baldinger has suggested, for national courts (like the ECtHR) to have the jurisdiction to determine the standard of review on a case by case basis.⁵⁰

However, there are problems with any approach that focuses on UK judicial review as the mechanism to institutionalise the moral claim to fair treatment. Most significant are the institutional constraints on accessing judicial review. These, as examined in more detail in Chapter 7,⁵¹ include a permission threshold, costs risk, procedural complexity, and expense. Moreover, it would circumvent the constitutional purpose of judicial review as a supervisory remedy of last resort, elevating it instead to an initial, all-purpose avenue of recourse and thereby shifting the focus away from the traditional check on Governmental wrongs to individual rights.⁵²

⁴⁷ See further Chapter 5 for a description of the division in jurisdiction. The Criminal Justice and Courts Act 2015 creates a partial statutory basis for judicial review.

⁴⁸ See Chapter 5 at 2.3.3.

⁴⁹ As seen in Chapter 8, this may be necessary as a result of the Dublin III Regulation.

⁵⁰ '[national courts should]...at least always have the fully free choice to determine, in each particular case at hand, whether full judicial scrutiny or a somewhat less intense form of judicial review is appropriate.' Baldinger, *Rigorous Scrutiny versus Marginal Review* (Chapter 4, n 78), p 374.

⁵¹ See 1.4.

⁵² Chapter 7 at 1.5.

3.1.3. *Focus on appeals*

Accordingly, neither reforms to internal review structures nor the residual remedy of judicial review are necessarily suitable means of implementing the moral claims of this thesis. The third reform approach focuses on appeals; suggesting the provision of a right of appeal to the FTT from any migration status decision involving the exercise of judgment discretion on the part of the primary decision-maker. The advantage of reforming the FTT appeals system is that the accessibility, efficiency and cost-effectiveness of the tribunal justice⁵³ is maintained. However, on the basis of the present system of migration controls where, as has been seen in relation to the PBS, discretion is a pervasive if not paradigmatic feature of migration status decision-making, this recommendation would have the effect of requiring a right of appeal from almost every migration status decision. Under current austerity drives, this approach is highly likely to appear unattractive to law makers. Yet, it is important to not unrealistic: a similarly inclusive approach to appeal rights was proposed by the Labour Government of 2005-2010 in its draft Immigration Bill of 2009,⁵⁴ and, as has been considered earlier, the 1970 appeals system provided very broad rights of appeal. Further, as mooted elsewhere in this work, other procedural variables,⁵⁵ in particular limiting the use of oral hearings, may be invoked to manage ‘floodgates’ concerns.⁵⁶

⁵³ See Chapter 4.

⁵⁴ Home Office, *Simplifying Immigration Law The Draft Bill* (Cm 7730, November 2009). This was not enacted (and never even introduced as a bill) because Labour was voted out in the General Election of 2010. Section 173 provides for a right of appeal on all individualised applications and expulsion decisions.

⁵⁵ See Chapter 4 at 2.3.

⁵⁶ Although this falls outside the scope of this thesis, this requires considerably more thought in particular in relation to the legitimacy of other procedural choices. Of particular current relevance is the use of non-suspensivity as a means of reducing the number of appeals. See further Appeals

3.2. Suggestions focusing on first instance decision-making

Thus, on the basis of the analysis above, if avenues of recourse are to be retained, appeals are considered to be the most appropriate mechanism for ensuring fair treatment in migration status decision-making. A different – and more radical – approach to reform is, however, to focus on first instance decision-making rather than review. This focus is apt since a central problem in migration status decision-making identified by this thesis is the lack of independence of first instance decision-makers (the first criterion identified in Chapter 4). On this basis, the argument could be made that if first instance decision-making were independent and impartial, the need for merits review of these decisions falls away.⁵⁷ Such a course of action could be implemented by removing first instance decision-making from within the Home Office to an independent and impartial body.⁵⁸ Residual recourse to judicial review would ensure that the decisions of the decision-making body remained lawful.

The benefits of an approach to procedural reform focusing on first instance decision-making lies primarily in the efficiency gains, including cost-reduction and the time saved by a focus on ‘getting it right first time’.⁵⁹ However, there are also significant notes of caution and potential disadvantages associated with such radical reform. First,

Impact Assessment 2013, which takes account of the probable reduction in volumes of appeals caused by the non-suspensive provisions of IA 2014.

⁵⁷ This is not, however, to concede that the moral claim to access to justice equally falls away. There are other reasons, as explored in Chapter 2, why recourse is necessary.

⁵⁸ See, from an empirical perspective, the importance placed on the independence of the first instance decision maker in Rebecca Hamlin’s comparative study of asylum decision-making: Hamlin, *Let Me Be a Refugee: Administrative Justice and the Politics of Asylum in the United States, Canada, and Australia* (Chapter 2, n 51).

⁵⁹ See comments on a ‘right first time’ approach in the reports of the Chief Inspector of Borders and Immigration, n 16.

the effectiveness of the reform would largely depend on the nature and calibre of the cohort of decision-makers: there would likely be, for example, a significant difference between the quality of decisions that came from a body composed of former judges of the FTT compared with a body made up of former Home Office case workers.⁶⁰ If the latter group were simply transposed into a new structurally independent agency, existing concerns⁶¹ would be likely to persist. Further, the judicial and adversarial method undertaken in the FTT would be absent (necessarily since no adverse decision has yet been made) and a primary decision-maker may be unable to assess properly the case without full presentation of case from both sides. Before such radical reform is contemplated, therefore, significant further research and assessment would be necessary.⁶²

3.3. Conclusions

In terms of recommendations, therefore, on the basis of this initial sketch of possible options, reform of the current FTT appeals system is, *prima facie* most desirable.⁶³ As is clear from the Government's own figures, the Tribunal system is working.⁶⁴ As such, and on the basis of the arguments made in this thesis, there was no proper justification for

⁶⁰ As to concerns as to the quality in decision-making of the latter, see n 16.

⁶¹ *ibid.*

⁶² This falls outside the scope of this thesis. See Chapter 1 at 3.2.

⁶³ This is supported by theories of 'path dependence' which refers to the idea that '[i]t is often more natural and efficient to copy what already exists and seems to be working tolerably well than to redesign and rebuild institutions from scratch. This is true even if the older model evolved more or less serendipitously and the older model is decidedly suboptimal.' Asimow and Lubbers, 'The Merits of 'Merits' Review: A Comparative Look at the Australian Administrative Appeals Tribunal'.

⁶⁴ See Home Office, *Impact Assessment of Reforming Immigration Appeal Rights* (15 July 2013): 50% of entry clearance appeals, 49% of Managed Migration appeals and 32% of deportation appeals succeeded in 2012-13.

removal of rights of appeal in IA 2014. Current alternative mechanisms of internal review coupled with residual judicial review cannot provide merits review, which, as has been argued, is what is required by way of recourse from migration status decisions as a matter of the moral right to fair treatment.

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