Exploring A Year of Administrative Law Adjudication in the Administrative Court

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Abstract: This article provides an analysis of 801 decisions handed down by the Administrative Court of England and Wales in a single year, 2017. The purpose of this inductive study of a substantial body of administrative law case law is to start a conversation about 'inattentional blindness' in administrative law scholarship and to identify questions to help structure discussion among administrative law scholars about how they study case law and the questions they ask about it. After providing an overview of the survey and the most significant findings from it, we identify three questions for further deliberation among administrative law scholars. First, how should administrative law scholars think about judicial review's location in a broader legal architecture? Second, how can scholars better factor in the role of legislation and policy in legal reasoning into administrative law thinking? Third, how should scholars understand the relationship between common and less common features of case law?

This article provides an analysis of 801 decisions handed down by the Administrative Court of England and Wales in a single year, 2017. Surveying the case law of a single year may seem

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an unusual scholarly enterprise. Legal scholars often group case law for the purposes of study but the year and court in which a case was decided are not the usual parameters.[1] We have carried out this analysis to intitate a structured discussion about what administrative law scholars do and don't focus on. Or to put the matter another way, we want to enourage administrative law scholars to reflect upon what they are inattentionally blind to.

"Inattentional blindness" is a term coined by psychologists Arien Mack and Irvin Rock.[2] It has been described as the phenomenon whereby "when one is engaged in a demanding task, attention can act like a set of blinders, making it possible for salient stimuli to pass unnoticed right in front of one's eyes".[3] The phenomenon is commonly illustrated through the "invisible gorilla" test.[4] Participants are shown a video of two teams passing a basketball around and asked to count the number of passes. During the video, a person wearing a full gorilla costume walks across the screen. When asked if they noticed anything unusual, around

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[1] Although note another study in this vein is Sarah Nason, *Reconstructing Judicial Review* (Oxford: Hart, 2016), chapters 6-7. Also see Karl Llewellyn, 'Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed' (1950) 3 Vanderblt Law Review 395, 396.

[2] Arien Mack & Irvin Rock, *Inattentional Blindness* (Cambridge, Mass.: MIT Press, 1998),

[3] Trafton Drew, Melissa Võ, and Jeremy Wolfe, "The Invisible Gorilla Strikes Again: Sustained Inattentional Blindness in Expert Observers" (2013) 24 Psychological Science 1848.

[4] *http://theinvisiblegorilla.com/gorilla_experiment.html*; Daniel Simons and Christopher Chabris, "Gorillas in Our Midst: Sustained Inattentional Blindness for Dynamic Events" (1999) 28 Perception 1059.

half of participants consistently report seeing nothing. So consumed by their task, they do not see significant parts of the picture.

Administrative law scholarship is not about watching basketballs. It is a difficult and absorbing set of diverse intellectual enterprises in which different scholars are working with different material and asking different questions. In the invisible gorilla test participants are shown the same short video and asked the same, simple question. Administrative law scholars grapple with a much larger and complex set of materials and approach it with different questions in mind. This diversity of approach is to be welcomed. Not least, because it goes someway towards safeguarding against the risk of collective blindspots. However, as individuals and as an expert community, we are not free from the risks of inattentional blindness. Such risks are an inevitable consequence of expertise, as to pay attention to everything is to undermine analytical rigour. By asking specific questions and by focusing on particular material, it is inevitable that aspects of administrative law adjudication will remain, to a greater or lesser degree, in the shadows.

To counteract the risks of inattentional blindness, our aim in this article is to inductively study a substantial body of administrative law case law with the purpose, quite simply, of seeing what we would find. Our purpose in doing this is to identify questions to help structure discussion among administrative law scholars about how they study case law and the questions they ask about it. Section 1 explains the rationale and limits of our survey. Section 2 presents some of our most significant findings. Section 3 identifies three questions for further deliberation among administrative law scholars. First, how should we think about judicial review's location in a broader legal architecture? Second, how can we better factor in the role of legislation and policy in legal reasoning into administrative law thinking? Third, how do we understand the relationship between common and less common features of case law?

Three points need to be made before starting. First, our aim here is not to offer a definitive statistical account of judicial review, or administrative law more broadly. As such, we have not used tables in presenting our findings and have endeavoured to keep statistics to a minimum. Similarly, our footnotes provide examples but not an exhaustive list of relevant cases. Second, in raising the issue of inattentional blindness we are not suggesting that administrative law scholarship is tainted by some kind of ingrained defect which is in need of urgent diagnosis and cure. Our point, rather, is that scholars are *all* inevitably blind to some things. We offer our survey in order to encourage greater thought and discussion of where the intellectual blindspots lie in this field. Third, we write at a time in which discussion over judicial review is highly politicised. This article is not a direct contribution to the debate. Our analysis does, however, reinforce a point recently made by Tomlinson, namely that "it is imperative that great care is taken to ensure [that discussion of judicial review is] firmly rooted in empirical reality and conducted with a sense of proportion to that reality."[5]

1. Rationale & Limits of the Survey

There are many different traditions in doctrinal administrative law scholarship including those that focus on: grounds of review, specific areas of administrative activity, and/or on fundamental constitutional principles.[6] It is neither wrong nor right to focus on any of these matters. All are worthy topics. A diversity of approaches to studying the same material can,

[5] Joe Tomlinson, "Review: Constitutional Rights and Constitutional Design: Moral and Empirical Reasoning" [2020] P.L. 388, 390.

[6] Carol Harlow & Richard Rawlings, "Administrative Law in Context: Restoring a Lost Connection" [2014] P.L. 28 and Christopher Forsyth (ed.), *Judicial Review and the Constitution* (Oxford: Hart, 2000).

furthermore, be valuable in shedding different kinds of light: the same case law might yield different insights to others who study it for different reasons. But as discussed in the introduction, our approach here is to undertake a more comprehensive survey of administrative law case law with the broad aim of seeing what can be learnt.

It is common for English administrative law scholarship to concentrate on judicial review by, and on appeal from, the Administrative Court (part of the Queen's Bench Division of the High Court).[7] Our survey therefore focused on the judgments of that Court. To minimise "inattentional blindness" we read all the judgments we could source from a single year. We chose 2017 because while being relatively recent, it would afford us an opportunity to follow through appeals. To date, appeals against 59 of the decisions in our survey have been heard by the Court of Appeal, and 11 by the Supreme Court. Our case sample consisted of 801 judgments found on BAILII and Westlaw.[8] It was clear from the outset that the role of the Administrative

[7] Part 54.1, CPR.

[8] 541 were accessed through the open access database BAILII. We located a further 260 case transcripts (including 37 judicial review judgments) on Westlaw which were not available on BAILII. Note some of the cases on BAILII were not available through Westlaw. These two databases were used by Varda Bondy, Lucinda Platt, and Maurice Sunkin, *The Value and Effects of Judicial Review: The Nature of Claims, their Outcomes and Consequences* (London: Public Law Project, 2015) 6. While we did have access to a large number of cases, we are also aware our sample is not comprehensive. It is not possible to know what proportion of decisions taken by the Administrative Court we had access to. This is in part because Ministry of Justice statistics record challenges by reference to the year in which they are lodged, rather than decided.

Court is not limited to judicial review.[9] 283 judgments were judicial reviews (including rolled-up hearings) and 56 were applications for permission. However, 309 involved some form of statutory appeal, and 153 dealt with procedural and other matters such as costs or interim relief. It is for this reason that we use the term "administrative law adjudication" throughout the paper.

We are aware our survey has its own blindspots. Focusing on only one year of decisions provides a snapshot at a particular point. Our survey[10] also does not make visible what happens prior to a case coming to court. Of the 4,196 actions lodged in 2017, 20% (828) of those were given permission for a full hearing.[11] While many of the cases heard and decided in 2017 were lodged before 2017, these numbers give a feeling for how few judicial review applications result in full hearings. Our findings also provide little insight into what happened after a judgment was delivered.[12]

More importantly, our survey does not cover other tribunals, courts, and other adjudicative fora which adjudicate on administrative law matters. There are many rights of appeal to bodies other than the Administrative Court and the legality of administrative action

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[9] See also *https://www.gov.uk/courts-tribunals/administrative-court*.

[10] E.g. Bondy, Platt, and Sunkin, *The Value and Effects of Judicial Review* and Varda Bondy and Maurice Sunkin, *The Dynamics of Judicial Review Litigation* (London: Public Law Project, 2009).

[11] See Civil Justice Statistics Quarterly: "January to March 2020 Tables", *https://www.gov.uk/government/collections/civil-justice-statistics-quarterly*. For a discussion of this see Bondy and Sunkin, *The Dynamics of Judicial Review Litigation.*

[12] E.g.. Carol Harlow, "Striking Back and Clamping Down" in John Bell et. al. (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Oxford: Hart, 2015).

can be challenged collaterally.[13] The Upper Tribunal, created in 2007, can also hear judicial review cases.[14] Over time it has had transferred to it judicial review in many areas where there are large number of applications (primarily relating to immigration matters) and it now considers more applications for judicial review than the Administrative Court. In the financial year 2016/7 13,372 judicial review receipts were received by the Upper Tribunal (Immigration and Asylum Chamber) alone[15] as compared to 4,196 judicial review actions being lodged before the Administrative Court in 2017.[16]

That our survey is limited, however, does not detract from its importance. As explained, the aim of our survey is not to generate conclusive statistics about administrative law adjudication. It is to explore what becomes visible from undertaking a different kind of inquiry into administrative law case law. This following sections present our findings and reflections.

2. Findings

In reading the 801 decisions in our survey, our approach was inductive. As Mulcahy and Wheeler have noted, "it remains a central tenet of this approach that order is imposed from the

[13] E.g. *PP v The Home Office & Anor* [2017] EWHC 663 (QB); *Richards v Worcestershire County Council & Anor* [2016] EWHC 1954 (Ch).

[14] Tribunals and Courts Enforcement Act 2007 ss18-19.

[15] Tribunal Statistics Quarterly, 'Main Tables': *https://www.gov.uk/government/collections/tribunals-statistics*. Note due to legislative reform to appeal rights this number has dropped. In the financial year 2019/20 it was 5679 but that number is still greater than the number of judicial review applications (3384 applications).

[16] Civil Justice Statistics Quarterly, "January to March 2020 Tables".

data up rather than from the researcher down".[17] We developed a checklist of generic information to collect in analysing the judgments, including type of legal action, parties, nature of the decision being challenged (for instance, whether the subject of the challenge was a decision or a policy), subject area, grounds of challenge (where relevant), outcome, and any striking features of the judgment or legal reasoning. As we explain below, collecting data on the grounds was inevitably a more interpretative inquiry.[18] We divided up the judgments between us, read and analysed them independently, and then compared our findings.

Overall, what emerges is a densely complex legal picture, and it is simply not possible to discuss everything of interest. The aim of this section is to offer a broad outline of our findings. We divide the discussion into four parts considering (a) type of administrative law adjudication, (b) parties and outcomes, (c) legal arguments and reasoning and (d) appeals.

a) Administrative Law Adjudication in the Administrative Court

Given our interest in doctrine, much of our survey focused on the different types of "administrative law work"[19] entailed in these 801 judgments. The Administrative Court carries out a variety of legal tasks. As noted above, the Court in 2017 gave judgment in 283 applications for judicial review, but also in 309 challenges brought through specific statutory

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[17] Linda Mulcahy and Sally Wheeler, "'Couldn't You Have Got a Computer Program to Do That for You?' Reflections on the Impact that Machines Have on the Ways We Think About and Undertake Qualitative Research in the Socio-Legal Community" (2019) 47 J.L.S. 149, 152. See also Nason, *Reconstructing Judicial Review*, chapter 2 for a thoughtful discussion of methodology.

[18] Mulcahy and Wheeler, "Couldn't You Have Got", 151.

[19] We are grateful to Katie Allan for the term, "administrative law work".

routes. Given that administrative law scholarship has traditionally focused on judicial review, an initial temptation was to remove the statutory appeals from the analysis. But while statutory appeals are distinct forms of legal action, their relationship with judicial review is an important, yet complex, one.

Sometimes the basis of a statutory appeal is the practical equivalent of judicial review. Statutory challenges to planning decisions, of which the Court gave judgment in 44, are effectively on questions of law.[20] In other contexts, rights of appeal are often broader, but still encompass review for legal errors. The Court, for example gave judgment in 147 extradition appeals. Section 27(3) of the Extradition Act 2003, which defines the grounds on which the High Court can overturn an extradition order on a section 26 appeal:

> The conditions are that (a) the appropriate judge *ought to have decided a question before him at the extradition hearing differently* and (b) if he had decided the question in the way he ought to have done, he would have been required to order that person's discharge.[21]

While this is a broader legal inquiry, the Administrative Court does not take extradition decisions afresh. Section 26 appeals, like other appeals to the Administrative Court, are subject to Part 52 of the Civil Procedure Rules, rule 21(3) of which provides:

> The appeal court will allow an appeal where the decision of the lower court was – (a) *wrong*; or (b) unjust because of a serious procedural or other irregularity.[22]

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[20] Town and Country Planning Act 1990 (TCPA) ss288(1) and 289(1).

[21] Emphasis added.

[22] Emphasis added.

The core question is not, therefore, what the appellate court would itself have decided, but whether the initial decision could be said to be *wrong*.[23] This often requires an engagement with legal authority,[24] as well as review of reasoning and of the decision-making process in order to determine whether either was tainted by a clear error.

Furthermore, whether the Court hears a judicial review application, or a statutory appeal primarily turns on the legislative framework. For example, while a developer has an initial right of appeal against a refusal of planning permission to the Secretary of State,[25] an objector to a grant does not. There were an equal number (44) of planning statutory challenges and planning judicial reviews in our case sample. Likewise, the General Medical Council (GMC) has broad rights of appeal[26] against decisions by the Medical Practitioners Tribunal, whereas the individual who is the subject of the decision can appeal a finding of impairment[27] but must seek judicial review of other decisions.[28] In consequence, a single decision can be the subject

[23] E.g. *Cwikla v Polish Judicial Authority* [2017] EWHC 2348 (Admin).

[24] E.g. *Stedman v French Judicial Authority* [2017] EWHC 2673 (Admin) and *Bobbe v Regional Court in Bydgoszcz (Poland)* [2017] EWHC 3161 (Admin).

[25] TCPA s.78.

[26] Medical Act 1983 s.40A.

[27] Medical Act 1983 s.40.

[28] E.g. *R. (on the application of Clinton) v General Medical Council* [2017] EWHC 3304 (Admin).

of both judicial review and statutory appeal.[29] Those seeking to challenge decisions by Magistrates or Crown courts must navigate a particularly complex set of procedural laws in determining whether the proper route is appeal, judicial review, or appeal by way of case stated.[30]

The legal work of the Court is not limited to judicial review and statutory appeals. For instance, 41 of the 283 judicial reviews were challenges to either immigration detention decisions or policy. Many, some of which had been transferred from the UT,[31] also involved claims for damages for false imprisonment.[32] The 153 cases on procedural matters also included a variety of legal tasks including applications for the extension of suspension orders in professional regulation cases, costs orders, disclosure orders, and applications for interim relief.

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[29] E.g. *General Medical Council v Professional Standards Authority for Health and Social Care; R (Nwachuku) v GMC* [2017] EWHC 2085 (Admin) (different applicants bringing the cases) and *R. (on the application of Denbighshire CC) v Welsh Ministers* [2017] EWHC 3219 (Admin) (same applicant bringing different action to challenge different but related actions – main action a statutory appeal).

[30] Law Commission, *The High Court's Jurisdiction in Relation to Criminal Proceedings* (H.M.S.O., 2010), Law Comm. No.324, H.C.329.

[31] E.g. *Molina, R. (On the Application Of) v The Secretary of State for the Home Department* [2017] EWHC 1730 (Admin).

[32] This issue also rose in other contexts. See *Merida Oil Traders Ltd, R (On the Application Of) v Central Criminal Court & Ors* [2017] EWHC 747 (Admin).

The discussion so far higlights the different and overlapping legal tasks of the Administrative Court. But the work of the Court also varies in terms of how "routine" the legal inquiry before it was. By "routine" we do not mean easy. In some categories of cases the legal test was well-established, and the Court's task was to apply that test to a specific set of facts – an exercise that was often complex. Extradition and professional discipline challenges[33] were clear examples. In the former, the question was usually whether the information contained in a warrant complied with statutory requirements or whether extradition would, on the facts, violate the individual's Article 8 right under the European Convention of Human Rights (ECHR).[34] In the latter, one question very commonly raised was whether the adjudicator had complied with sanctions guidance.[35] Many unlawful detention challenges also fell within this "routine" bracket. As it was put in one case, many were "straightforward *Hardial Singh* challenge[s], where the principles are well established but the individual resolution is case-specific".[36] As is clear from the subject matter, these routine cases typically related to circumstances where a public decision seriously affects an individual.

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[33] Including applications for interim suspension orders: E.g. *Nursing and Midwifery Council v Lagoudakis* [2017] EWHC 1316 (Admin).

[34] E.g. *Cimeri v Court of Agrigento (Italy)* [2017] EWHC 3048 (Admin) and *Pimenta v Government of the Republic of Brazil* [2017] EWHC 2588 (Admin).

[35] E.g. *Brookman v General Medical Council* [2017] EWHC 2400 (Admin).

[36] *R. (on the application of R (Bangladesh)) v Secretary of State for the Home Department* [2017] EWHC 3261 (Admin), [4]. *R. v Governor of Durham Prison, Ex parte Singh* [1984] 1 WLR 704,

There were other clusters of cases which concerned challenges to the same type of decision, but which raised a variety of different kinds of legal questions. Challenges to planning decisions were a case in point. Many concerned challenges to grants or refusals of planning permission, but the legal question(s) which arose varied considerably, and included issues of interpretation relating to local plans,[37] national policy[38] and legislation,[39] compliance with EU environmental law[40] and procedural unfairness.[41] The multi-layered nature of the legislative regimes which govern planning decision-making go a long way to explaining this diversity.

Other cases simply did not fall within clear clusters. This was most often seen in judicial review cases. We will return to the reasons for this below, but the following are a small handful of particularly striking illustrations: challenges to UK legislation on the basis of inconsistency with a recent major CJEU decision;[42] Regulations amending the eligibility criteria for personal

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[37] E.g. *R. (on the application of Aldingbourne Parish Council) v Arun DC* [2017] EWHC 3450 (Admin).

[38] E.g. *R. (Boot) v Elmbridge Borough Council* [2017] EWHC 12 (Admin).

[39] E.g. *Dill v Secretary of State for Communities and Local Government* [2017] EWHC 2378 (Admin).

[40] E.g. *R. (Community Against Dean Super Quarry Ltd) v Cornwall Council* [2017] EWHC 74 (Admin); *R (Shirley) v Secretary of State for Communities and Local Government* [2017] EWHC 2306 (Admin).

[41] E.g. *Wet Finishing Works Ltd, R (On the Application Of) v Taunton Deane Borough Council* [2017] EWHC 1837 (Admin).

[42] *Roadpeace v Secretary of State for Transport* [2017] EWHC 2725 (Admin).

independence payments;[43] government policy on the treatment of European Economic Area (EEA) nationals found rough-sleeping;[44] regulations and rules relating to the processing of asylum applications under the "Fast-Track" Procedure;[45] amendments to the Civil Procedure Rules on Aarhus claims;[46] a statutory order recognising rights of way;[47] rules of an auction used to distribute wireless telephone licences;[48] guidance on the allocation of organs for the purposes of transplantation;[49] adjustments to hospital provision in Oxfordshire;[50] and two challenges concerning a scheme for the resettlement of unaccompanied child refugees from Calais.[51] It might be tempting to think of these cases as less "legal", due to them being less "routine". That is not the case. These cases often involved the courts resolving novel questions

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[43] *R.F. v Secretary of State for Work and Pensions* [2017] EWHC 3375 (Admin).

[44] *R. (Gureckis) v Secretary of State for the Home Department* [2017] EWHC 3298 (Admin).

[45] *T.N. (Vietnam) v Secretary of State for the Home Department* [2017] EWHC 59 (Admin).

[46] *R.S.P.B., Friends of the Earth & ClientEarth v Secretary of State for Justice* [2017] EWHC 2309 (Admin).

[47] *R. (Roxlena Ltd) v Cumbria CC* [2017] EWHC 2651 (Admin).

[48] *R. (Hutchison 3G UK Ltd) Office of Communications* [2017] EWHC 3376 (Admin).

[49] *R. (A) v Secretary of State for Health* [2017] EWHC 2815 (Admin).

[50] *Cherwell D.C. & Others v Oxfordshire C.C.G.* [2017] EWHC 3349 (Admin).

[51] *R. (Help Refugees) v Secretary of State for the Home Department* [2017] EWHC 2727 (Admin) and *Citizens U.K. v Secretary of State for the Home Department* [2017] EWHC 2301 (Admin).

of statutory construction and/or determining how well-established principles established across previous authorities applied in new contexts.

b) Parties and Outcomes

The above makes clear that administrative law adjudication is not a single legal task. The diversity of the case law becomes even more obvious when we turn to who were the parties to these actions and what the outcomes were. We concentrate on the 283 judicial reviews and the 309 statutory appeals. As will become clear, any generalisation should be made with caution.

First, let us provide a picture of who are the parties to these cases. We focus on the primary parties, but it should be noted that in 117 (41%) of the judicial review cases there were other parties and intervenors including other public bodies, companies, and non-governmental organisations. In judicial reviews and in statutory appeals, there were also silent parties – those that had been a party in the primary decision, but were not a party to the action before the Administrative Court because they sought neither appeal or review.

By far the most significant portion of cases were brought by individuals: 196 of judicial reviews and 246 of statutory appeals (75% of judicial reviews and statutory appeals combined). Although a small number of these individuals sought to challenge a general measure in judicial review[52] or were of a more "idiosyncratic" nature',[53] the vast bulk challenged a particularised decision (such as a decision to detain, to refuse a visa or decline parole) or a grant of planning

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[52] E.g. *R. (Conway) v Secretary of State for Justice* [2017] EWHC 2447 (Admin) (an unsuccessful challenge to section 1 of the Suicide Act).

[53] E.g. *Watts v Driver and Vehicle Standards Agency* [2017] EWHC 1019 (Admin) (appeal by way of case stated on the basis that periodic training for a minibus licence breached Magna Carta).

permission. In a handful of planning cases, an individual was a claimant on behalf of a local group.[54] In a few other cases, the individual claimant had the support of a civil society organisation.[55]

Companies brought actions in 48 judicial review cases (including 4 brought by industry associations) and 13 statutory appeals (10% of judicial reviews and statutory appeals combined). In 22 of these challenges, companies sought to challenge a decision relating to them specifically,[56] such as orders or warrants facilitating investigations,[57] ombudsmen findings[58] and changes to visa-sponsorship status.[59] In 16, the challenge was to a regulation, regime, or

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[54] E.g. *R. (Austin) v Wiltshire Council* [2017] EWHC 38 (Admin).

[55] E.g. *R. (On the Application Of A.B. (A Child)) v The Secretary of State for Justice* [2017] EWHC 1694 (Admin).

[56] E.g. Some raised questions of construction of broader importance: *R. (Chiltern Farm Chemicals Ltd) v Health and Safety Executive* [2017] EWHC 2491 (Admin).

[57] E.g. See for instance *R. (Superior Import/Export Ltd) v HMRC* [2017] EWHC 3172 (Admin).

[58] E.g. *Full Circle Asset Management Ltd v Financial Ombudsman Service Ltd & Ors* [2017] EWHC 323 (Admin)

[59] E.g. *R (Sri Prathinik Consulting Ltd) v Secretary of State for the Home Department* [2017] EWHC 3204 (Admin).

policy.[60] 17 appeals or reviews concerned planning decisions such as refusals of permissions or grants to third parties, and there were 6 further challenges dealing with other matters.

A public body brought the action in 21 judicial reviews and 33 statutory appeals (9% of judicial reviews and statutory appeals combined). Three of these were brought by other states in extradition cases.[61] 14 were by local authorities in planning cases. There were also 15 other statutory appeals by professional regulatory bodies, usually challenging a failure to find an individual's fitness to practice was impaired or the leniency of a sanction.[62] Overall then, the number of cases being brought by public and professional bodies was more than brought by companies (12%). Some of these cases concerned relatively contained matters, such as which of two councils had responsibility under the Housing Act to meet the needs of an individual.[63] Others raised questions of widespread importance, such as the lawfulness of the central government's approach to funding local authority deprivation of liberty assessments.[64] There

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[60] Or, in one case, a decision-maker's approach to interpreting policy documents: *May-Lean & Co v Gas and Electricity Markets Authority* [2017] EWHC 2307 (Admin).

[61] E.g. *Government of Rwanda v Nteziryayo & Ors* [2017] EWHC 1912 (Admin).

[62] E.g. *Sussex Police & Anor, R. (On the Application Of) v Police Appeals Tribunal & Anor* [2017] EWHC 2333 (Admin).

[63] E.g. *Royal Borough of Kensington and Chelea v London Borough of Ealing* [2017] EWHC 24 (Admin).

[64] E.g. *R (Liverpool City Council & Anor) v Secretary of State For Health* [2017] EWHC 986 (Admin). The case follows *P v Cheshire West & Cheshire Council* [2014] UKSC 19 in which the Supreme Court endorsed a broader conception of deprivation of liberty, with very significant financial implications for local authorities.

was one case in which a local planning authority brought a judicial review against itself due to a planning officer making a determination without any power to make it.[65]

Civil society organisations brought 18 judicial review actions and were the main party in 2 statutory challenges (6% of judicial reviews or 3% of judicial review and statutory appeals combined). These claimants represented a range of civil society interests including human rights,[66] environmental concerns,[67] local interests,[68] animal welfare,[69] recreational activities,[70] and privacy.[71]

The defendants in these 592 cases were a range of public bodies. Regarding statutory challenges, the defendants were overwhelmingly inferior courts or some other form of

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[65] *Andrews v New Forest DC* [2017] EWHC 1545 (Admin).

[66] E.g. *The Centre for Advice on Individual Rights In Europe v The Secretary of State for the Home Department & Anor* [2017] EWHC 1878 (Admin).

[67] E.g. *R. (on the application of ClientEarth) v Secretary of State for Environment, Food and Rural Affairs* [2017] EWHC (Admin) 1966.

[68] All objecting to a planning permission. E.g. *Leckhampton Green Land Action Group Ltd), R. (On the Application Of) v Tewkesbury Borough Council* [2017] EWHC 198 (Admin).

[69] E.g. *Trail Riders Fellowship v Secretary of State for the Environment, Food And Rural Affairs* [2017] EWHC 1866 (Admin).

[70] E.g. *The Ramblers Association v Secretary of State for Environment Food And Rural Affairs* [2017] EWHC 716 (Admin)

[71] *E.g. R. (Privacy International) v Investigatory Powers Tribunal* [2017] EWHC 114 (Admin) (privacy).

specialist adjudicatory body. The 147 extradition appeals were appeals from District Judges. There were another 24 statutory appeals from inferior courts, usually in regard to criminal prosecutions. The 61 professional discipline appeals were from tribunals and the 44 statutory planning challenges primarily concerned decisions of Planning Inspectors. The rest of the appeals involved a miscellany of cases where a public body had made an adverse decision against an individual.

In regard to judicial review actions, the defendants were inevitably more mixed. In 125 judicial review cases the defendant was a central government department, including 85 cases brought against the Home Office. That number is misleading however in that many cases were not a decision against a Secretary of State, but of an institution exercising delegated power such as the Planning Inspectorate. 69 cases were against local authorities or local public service providers; 37 against inferior courts, tribunals or adjudicatory bodies; 24 against a body involved in the criminal justice process (including the police, Parole Board and prison authorities); 17 against some form of regulator; 7 against HMRC, 2 against public Ombudsman; and 2 against companies. In many of these cases, the decision being reviewed was part of a network of public decision-making by a range of judicial, administrative, and executive bodies at both central and local levels.[72]

In terms of outcomes, in regard to the 283 judicial review applications the court concluded that there was unlawfulness on at least one ground in 127 cases (45% of judicial

[72] E.g. *R. (R) v National Police Chief's Council & Secretary of State for Justice* [2017] EWHC 2586 (Admin).

cases), a number reasonably consistent with findings elsewhere.[73] In regard to statutory appeals the success rate was less (98 - 32% of statutory appeals). These statistics hide much, however. Not least that the success rate varied across different types of case. Thus, for example the success rate for statutory appeals concerning extradition was 22%, for professional discipline cases it was 49%, and statutory planning challenges 32%. Given the diversity of judicial review actions, it is far harder to make generalisations. There are some striking patterns however, for example in relation to the 41 immigration detention cases. Of the 37 challenges involving immigration centres, detention was held to be unlawful in 23 cases (62%). Furthermore all 3 challenges to curfews succeeded[74] as did the 1 challenge to central government guidance.[75]

It is also important to note that to view a decision in binary terms, as either successful or not successful, is somewhat misleading. In many cases, a challenge was only partially

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[73] Of the 322 judicial review cases lodged in 2017 that have been heard, 130 (41%) were found in favour of the claimant and 184 in favour of the defendant. Civil Justice Statistics Quarterly "January to March 2020 Tables".

[74] This is unsurprising in light of *R. (Gedi) v Secretary of State* [2016] EWCA Civ 409. Note that two of the decisions concerned the same challenge, later appealed to the Supreme Court: *R (Jalloh) v Secretary of State for the Home Department* [2020] UKSC 4.

[75] *Medical Justice & Others v Secretary of State for the Home Department* [2017] EWHC 2461 (Admin).

successful.[76] In others, the legal remedy was to remit to the original decision maker.[77] The finding of legal error also did not mean a remedy necessarily followed.[78]

c) Legal Arguments and Legal Reasoning

We now turn to consider the legal arguments and the legal reasoning in these judgments. We focus primarily on the judicial review cases. As noted in Section 2.a, statutory appeals in areas such as extradition and professional regulation were largely, although not always, a form of routine legal inquiry mandated by legislation. While routine, these cases did involve the consideration of substantive legal norms. Thus, as already noted, extradition appeals often raised questions concerning Article 8, ECHR.

In the judicial review cases there was more variation in legal argument. Our analysis here is not the same as an in-depth doctrinal analysis, and it cannot be comprehensive. It is also the case that of the various items on our checklist of information, the grounds relied on were by far the most difficult to gather and assess. In nearly all cases a range of grounds were argued (usually around 3). The grounds of review also bled into one another in legal reasoning. For instance, where in determining whether a decision was rational, the court would sometimes ask

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[76] *Save Diggle Action Group v Oldham Council* [2017] EWHC 349 (Admin).

[77] E.g. *R. (Noye) v Secretary of State for Justice* [2017] EWHC 267 (Admin).

[78] In a small handful, relief was refused. In immigration detention challenges this was usually because, although the decision to detain was legally flawed the applicant could have been lawfully detained under a different provision. See *Lumba v Secretary of State for the Home Department* [2011] UKSC 12.

whether the decision-maker properly understood applicable policy.[79] There were also different ways of labelling the grounds of challenge. In some cases, the applicant's arguments were given labels clearly recognisable to administrative law scholars ("procedural unfairness", "irrationality" etc).[80] In other cases, grounds were presented as specific complaints about something which had gone legally wrong in the course of decision-making. Analysis of legal reasoning in these cases is thus inevitably interpretative. With that said, four patterns can be seen.

First, legislation played a fundamental role in reasoning in these cases. The Court's judgment almost always began with an overview of the governing legislative framework. The legislative frameworks were diverse[81] and often highly detailed. Our case survey also highlighted the dynamic nature of administrative law legislation. We explained above that a significant portion of the judicial review case law could be described as "novel". One source of this novelty was recent, or relatively recent, legislative change. In at least 50 of the cases, the legislative framework had changed since 2010 and in a further 83 cases since 2000. While there were examples of direct challenges to the legislative amendment,[82] most cases required the court to review whether the decision-maker had properly interpreted the new provision.

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[79] *R (S.B.) v NHS England* [2017] EWHC 2000 (Admin), especially [64]-[65].

[80] Though sometimes the argument could plausibly have been explained in another way, and in determining the ground the court used the language of other grounds.

[81] Joanna Bell, *The Anatomy of Administrative* Law (Oxford: Hart, 2020) chapter 3.

[82] *R. (on the application of News Media Association) v Press Recognition Panel* [2017] EWHC 2527 (Admin).

In 131 of the judicial reviews the main legal issue before the Court was compatibility with legislation, delegated legislation or a clear legal precedent and this usually involved the question of whether law had been properly interpreted. The precise type of legal complaint varied. In some, the applicant argued that the decision-maker has failed to fulfil a statutory duty[83] or to recognise and consider exercising a statutory power.[84] Other challenges raised the question of whether the decision-maker had exceeded the terms of its statutory powers.[85] In many, the argument was simply that the decision-maker had failed to properly comply with the terms of the legislation and, as a result, reached a legally unsound decision. Furthermore, in the cases where the primary legal issue was to do with what might be thought of as review of discretion or procedure, legislation still played an important role. There were 8 cases where the arguments before the Court were multitudinous and/or effectively arguments on the merits (and easily identifiable as such). None of these were successful.

A second feature of the legal reasoning in the judicial review case law concerned the prevalence of guidance, including statutory guidance,[86] published policy, and codes of practice and rules. 141 of the 283 judicial review challenges (just under 50%) referred to guidance.

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[83] *Care England v Essex CC* [2017] EWHC 3035 (Admin).

[84] *Mishra v Colchester Magistrates' Court* [2017] EWHC 2869 (Admin).

[85] *Dean v Secretary of State for Business, Energy & Industrial Strategy* [2017] EWHC 1998 (Admin).

[86] By which we mean guidance published pursuant to a legislative power or duty. An example is local development schemes, *Rogers v Wycombe DC* [2017] EWHC 3317 (Admin) but there were also a range of other cases involving statutory guidance, *R. (Gilmore) v Police and Crime Commissioner for West Yorkshire* [2017] EWHC 2867 (Admin).

Discussion of guidance was particularly prominent in certain areas. Planning challenges, for instance, often related to local and central government planning policy. Similarly, challenges to immigration decisions (including detention) commonly referred to the *Enforcement Instructions Guidance*[87] and other sources of guidance it consolidates.

Furthermore, 25 of the judicial review challenges explicitly raised the question of whether the decision-maker had acted in accordance with its own guidance, or that published by central government. As seen above, however, guidance was relevant in many other cases and, for instance, sometimes shaped how the court assessed the rationality of decisions. Related to this were 27 cases which involved a direct challenge to the lawfulness of policy, guidance, Rules, Codes or schemes[88] (in a few cases, in conjunction with a broader challenge to Regulations[89] or primary legislation).[90] The grounds of challenge were highly diverse. They included 6 allegations of improper consultation, various other procedural complaints (such as that the policy had been introduced without following the proper legislative process)[91] and arguments to the effect that the policy was inconsistent with the overarching legislative framework.

[87] *https://www.gov.uk/government/collections/enforcement-instructions-and-guidance*. Chapter 55 (which concerns immigration detention) was especially prevalent.

[88] Note there were also 2 challenges to primary legislation and 6 to Regulations

[89] *R. (McNiece) v Criminal Injuries Compensation Authority* [2017] EWHC 2 (Admin)

[90] *R. (R.)* [2017] EWHC 2586.

[91] *William Davis Ltd v Charnwood BC* [2017] EWHC 3006 (Admin).

Third, and briefly, some grounds of review were conspicuous by the infrequency with which they were raised. Despite a burgeoning academic literature, for instance, legitimate expectations challenges featured in only 5 cases.[92]

Finally, our survey also emphasised the difficulties of making any general claim about what human rights challenges "routinely" involve. In 22 cases the strongest legal argument was based on the Human Rights Act 1998 or the Equality Act 2010, although these Acts did also figure as a supplementary argument in other cases. Many of these challenges simply required courts to apply well-established legal principles about what a specific legal obligation required to a particular sets of facts.[93] Similarly, our survey made clear that it is not uncommon in some areas of administration for legislation and policy to provide detailed guidance as to how Convention rights are best respected and thus human rights adjudication sometimes shades into courts reviewing the decision for compliance with legislation/policy.[94] The courts were also noticeably concerned in many cases, not with conducting its own assessment of the merits, but with ensuring that the authority's decision-making processes were such that *it* was undertaking a sufficiently nuanced approach to balancing. For instance, in *R*[95] an Order and policy were held to be unlawful because, due to the rigidity of their content, they prevented *decision-makers* from conducting a rigorous analysis of individual cases.

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[92] E.g. *Dickinson & Ors, R (on the application of) v HM Revenue & Customs* [2017] EWHC 1705 (Admin).

[93] E.g. *Green v Parole Board* [2017] EWHC 2612 (Admin).

[94] *R (Goldsworthy) v Secretary of State for Justice* [2017] EWHC 2822 (Admin).

[95] *R. (R.)* [2017] EWHC 2586.

d) Cases on Appeal

Our survey primarily focused on the Administrative Court. Cases are, of course, appealed. We thus traced Administrative Court decisions from 2017 which have so far been appealed to the Court of Appeal and the Supreme Court.[96] These cases are not our primary focus, and thus our analysis is brief. We are also aware that the discussion below paints a partial picture of administrative law adjudication at the appellate levels. Both courts, for instance, hear appeals from the Upper Tribunal and the Supreme Court has jurisdiction to hear appeals from devolved jurisdictions. A comprehensive analysis would also need to aencompass a survey of the leave to appeal process.

The Court of Appeal has given judgment in 60 cases appealed from the Administrative Court. Again, care needs to be taken with any numbers. In some cases, there were cross appeals[97] and some cases were joined.[98] In 23 cases there were other parties. 26 cases concerned an appeal by an individual, 17 a company, 15 a public body, and 6 a civil society organisation. The subject matters areas were diverse, but the largest cluster was planning and related matters (19). In 26 cases the appeal was allowed or partially allowed, with the rest dismissed except

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[96] We only looked at BAILII for these. Note in two cases, the transcripts for the original Administrative Court decision were not on BAILII or Westlaw. See *O.W.D. Ltd (t/a Birmingham Cash and Carry) & Anor v Revenue and Customs* [2019] UKSC 3 and *Putney Bridge Approach Ltd v The Secretary of State for Communities And Local Government* [2018] EWCA Civ 2268.

[97] *R. (The Pharmaceutical Services Negotiating Committee and Susan Sharpe) v Health Secretary, National Pharmacy Association v Health Secretary* [2018] EWCA Civ 1925.

[98] *R. (Hemmati & Ors) v Home Secretary, Home Secretary v R(SS)* [2018] EWCA Civ 2122.

for a joined appeal where 1 appeal was allowed and the other was dismissed. In 33 cases the main legal argument raised questions of statutory interpretation; 6 concerned the meaning of policy; 12 focused on the decision-making process; 8 concerned procedural matters; and 1 was concerned primarily with human rights.

The Supreme Court has so far determined appeals from 11 cases, 3 of which were directly appealed to the Supreme Court. 4 appeals were brought by public bodies, the rest by individuals (4), civil society organisations (2) and 1 by a company. The subject matters were again diverse and included 3 planning challenges and 3 challenges concerning criminal justice or national security issues. Strikingly, most of these cases[99] raised questions concerning the proper construction of legislation[100] and/or policy.[101]

3. Three Questions for Further Discussion

There is much in the last section to digest. Indeed, perhaps the most striking, overarching finding which emerged from our survey was how legally complex and varied adjudication in the Administrative Court is. That is not a new phenomenon or a novel finding. It will also come as no surprise to many practitioners and scholars, especially those working within specific

[99] *R. (Stott) v Secretary of State* [2018] UKSC 59 (a discrimination case) and *Jalloh* [2020] UKSC 4 (concerning the scope of false imprisonment) were exceptions.

[100] In some of these cases – e.g. *Privacy International, R (on the application of) v Investigatory Powers Tribunal & Ors* [2019] UKSC 22; *Palestine Solidarity & Anor, R (on the application of) v Secretary of State for Housing, Communities and Local Government* [2020] UKSC 16 – the interpretive question was controversial and split the Supreme Court.

[101] E.g. *R (Samuel Smith Old Brewery) v North Yorkshire CC* [2020] UKSC 3.

areas, such as immigration and planning, which are renowned for their complexity.[102] While the picture is a complex one, three questions did emerge from our survey which would serve as a helpful basis for further scholarly discussion. We consider each of these in turn.

a) Judicial Review's Location in the Larger Legal Architecture

The first question concerns how administrative law scholars should think about the place of judicial review as part of a bigger legal picture. Doctrinal administrative law scholarship tends to focus almost exclusively on judicial review by, or on appeal from, the Administrative Court. Our decision to focus on that Court reflects this. But, what became clear from our survey, is that judicial review is part of a broader legal architecture. In being so it is playing both a modest and fundamental role. These terms may not, at first sight, seem to sit well together and so let us explain what we mean by each in turn.

Judicial review is *modest* in the sense that it is only one interlocking part of a much bigger picture. Harry Arthurs once wrote that "there is nothing less at issue in our analysis of administrative law than an inquiry into the nature of the legal system itself".[103] His point was that there is not only one, but many legal fora which do and should play a role in resolving administrative law disputes. This point continues to be of relevance.[104] Thus, as we have

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[102] Law Commission, *Simplification of the Immigration Rules: Report* (H.M.S.O 2020), Law Com. No. 388, H.C. 14.

[103] Harry Arthurs, 'Rethinking Administrative Law: A Slightly Dicey Business.' (1979) 17 Osgoode Hall LJ 1, 42.

[104] Albeit, in a different way. Arthurs was arguing for a system of "pluralism" in which adjudication would be the province of specialist tribunals, largely outside of the purview of "ordinary" courts.

explained, our case sample consisted of more statutory challenges than applications for judicial review – a reminder of how much courts are carrying out review under an explicit legislative mandate. Furthermore, the Administrative Court is only one of many courts and tribunals which adjudicate challenges to administrative decision-making. Most significantly, the Upper Tribunal now hears more judicial reviews than the Administrative Court.

Our survey also emphasised that judicial review is modest in a further sense. Judicial review is a "remedy of last resort"[105] in the English and Welsh legal system. We mean something quite significant by that. In the case of judicial review, the Administrative Court resolves disputes for which there is simply no other available, satisfactory forum. There are many legislated routes to challenge decisions before tribunals and courts. The Court was mindful of those routes in carrying out review.[106] Legislation, however, has not created an appeal route for every situation where a significant legal error can arise and judicial review provides an important safety net for dealing with those errors. To put it another way, judicial review is a "procedural mop": one of its roles is to absorb arguable legal challenges for which there is no other route. This "mop" like nature of judicial review provides an explanation of why legal inquiry in judicial review cases are less routine (see section 2.a).

While judicial review is modest in both of these senses, our survey emphasises that it is also *fundamental* in many ways. That judicial review is not an applicant's first port of call but the last, does not make it unimportant. Without judicial review, applicants who are not beneficiaries of a specific legislative appeals route would be unable to challenge decisions with

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[105] *Glencore Energy UK Ltd v HMRC* [2017] EWHC 1476 (Admin), [40].

[106] E.g. *Zahid, R (On the Application Of) v The University Of Manchester* [2017] EWHC 188 (Admin).

very significant consequences. Indeed, a significant amount of the Administrative Court's judicial review workload is made up of what Nason calls "individual grievance"[107] cases, in which individuals are given an opportunity to put their arguments and obtain an authoritative ruling on the lawfulness of a personal decision. Similarly, without accessible and effective judicial review there would not necessarily be a forum for resolving broad legal questions of very real and general practical importance. These include questions about how new legislative amendments should be read,[108] whether practical changes are needed to ensure proper implementation,[109] and what the implications are of new major court rulings, at both the domestic[110] and international level.[111] Judicial review in the Administrative Court, in other words, plays an essential role in stabilising the law in light of new legal developments in fast-moving areas of law.

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[107] Nason, *Reconstructing Judicial Review*.

[108] E.g. *Jimenez v First Tier Tribunal & HM Commissioners for Revenue and Custom* [2017] EWHC 2585 (Admin) (reversed on appeal); *R (Banghard) v Bedford BC* [2017] EWHC 2391 (Admin).

[109] E.g. *Gaskin v Richmond upon Thames LBC* [2017] EWHC 3234 (Admin).

[110]E.g. *T.N. (Vietnam)* [2017] EWHC 59 (Admin) (determining the implications of *R (Detention Action) v Secretary of State* [2014] EWCA Civ 1634); *R (Lupepe) v Secretary of State for the Home Department* [2017] EWHC 2690 (Admin) (determining implications from *Gedi* [2016] EWCA Civ 409.

[111] E.g. *Roadpeace* [2017] EWHC 2725 (Admin) (determining implications from C-162/13 *Damijan Vnuk v Zavarovalnica Trigalev* ECLI:EU:C:2014:2146).

b) Legislation and Policy in Legal Reasoning

A second question concerns how administrative law scholars should think about the role of legislation and policy in legal reasoning. The importance of statute is well known to administrative law scholars.[112] Policy less so. But what our survey revealed is that both play crucial roles in structuring legal reasoning in at least three ways.

First, as we explained above, much of the Administrative Court's workload involves determining challenges brought pursuant to particular statutory provisions. Some direct the Court to review for error of law, while others empower the Court to conduct a more wide-ranging inquiry into whether the decision was "wrong". In deciding a challenge, judges were guided by relevant provisions, as well as binding precedents offering guidance as to how to conduct the inquiry.[113] Second, it was common for case law to primarily raise questions of "legality".[114] As explained above, at the heart of many challenges was the question of whether the decision-maker had complied with legislative or policy provisions.[115] Strikingly, this was true also at the appellate levels (see Section 2.d). Third, legislation and policy provisions also played an important role in the application of grounds other than legality. In determining

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[112] Lord Justice Sales, 'Modern Statutory Interpretation' (2016) 38 Statute L. Rev. 125 and D. G. T. Williams, 'The Case-Law of Administrative Law' (1982) 6 Trent L. J. 1, 3.

[113] See e.g. *Cwikla* [2017] EWHC 2348 (Admin).

[114] See also Bell, *The Anamtomy of Administrative Law*.

[115] Some case also raised the question of how to properly ascertain the meaning of legislative provisions. For instance *R. (CXF) v Central Bedfordshire Council NHS Norfolk Clinical Commissioning Group* [2018] EWCA Civ 2852 considered when, if ever, guidance can be used as a guide to statutory construction.

whether a decision was rational, for instance, the Court would sometimes be guided by the decision-maker's policy: a failure to accord with policy was taken to indicate inreasonableness.[116] Similarly, guidance was sometimes central in determining whether a human rights challenge was made out.[117]

It is sometimes assumed that to highight the importance of statutes is to make an argument about the constitutional justifications of judicial review[118] or the existence of general principles of administrative law.[119] These are examples of inattentional blindness at work. Our point is that our survey shows that administrative decision-making is structured by large swathes of statute, delegated legislation, and guidance. This is a legal reality, the implications of which should be discussed among administrative law scholars as a means of illuminating how scholars do, and can, approach the study of administrative law adjudication as a legal practice. Many administrative law scholars (as are lawyers in other fields)[120] are already engaging in such discussion but there is value in broadening out the participants in this interchange. This conversation may involve questions of method, of focus, and of the lines of inquiry that scholars pursue.

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[116] *S.B.* [2017] EWHC 2000 (Admin).

[117] *Goldsworthy* [2017] EWHC 2822 (Admin).

[118] Forsyth, *Judicial Review and the Constitution*.

[119] Paul Daly, 'The General, the Specific and the Anatomy of Administrative Law' (Administrative Law in the Common Law World Blog, December 2020) https://adminlawblog.org.

[120] Eg TT Arvind and Jenny Steele (eds) *Tort Law and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (Oxford: Hart, 2012).

c) The Common and the Uncommon

The final question that our survey identified as in need of discussion among administrative law scholars concerns how scholars should make sense of features of administrative law adjudication that are common and uncommon. This is particularly when issues that occur with frequency in practice are not necessarily the ones which generate the most academic engagement. Correlatively, matters which are very much absent from day-to-day adjudication have at times become "flashpoints" for extended, sometimes heated, debate in both academic and policy spheres. The reasons for and effects of this would benefit from greater thought.

To begin, let us give a few examples. As we noted in section 3.b, legislation and policy dominated legal reasoning across the case law. This dominance is matched in portions of administrative law scholarship, especially that which works within particular subject areas.[121] It is not uncommon, however, for more general discussion of administrative law and judicial review to make little or no mention of either legislation or policy.[122] Relatedly, whereas the evolution of common law principles in administrative law has been subjected to rigorous study, there has been far less scholarly engagement with questions about whether the role(s) of legislation has changed in this area.[123] There were also narrower, recurrent features of the case law which have not been the subject of scholarly analysis. It was clear from our survey, for

[121] Elizabeth Fisher, "Executive Environmental Law" (2020) 83(1) M.L.R. 163.

[122] Dean Knight, *Vigilance and Restraint in the Common Law of Judicial Review* (Cambridge: CUP, 2018).

[123] For discussion of some key themes see House of Lords Select Committee on the Constitution, *The Legislative Process: The Delegation of Powers* (16th Report of Session 2017-2019).

instance, that challenges to consultation are now a relatively frequent occurrence.[124] At the same time, consultation is the subject of little sustained analysis in academic textbooks.[125]

On the flipside, issues which have in recent years been flashpoints for, sometimes heated and politicised, debate over the reform of judicial review were strikingly absent from our survey. Take for example anxieties over litigation by public interest groups.[126] As seen above, relatively few judgments had civil society organisations as the main party (18 of 283 judicial review; around 6%) and they made up a small proportion of the overall work of the Administrative Court (3%). The numbers are especially striking when contrasted with the proportion of challenges brought by public authorities (12%), an aspect of practice which has generated next to no attention. Similarly, contrary to the intense current interest in review of prerogative powers, almost all challenges concerned decisions taken under statutes. There were a very small handful of challenges to the prerogative power to issue or revoke a passport.[127] Permission for judicial review was refused in *McClean v First Secretary of State*[128] where the applicant sought to challenge a confidence-and-supply agreement on unarguable grounds.

To highlight these examples of what is common and uncommon in administrative law adjudication is to highlight underexplored questions about what we take to be "central" and what we take to be "peripheral" in administrative law scholarship. This is not an issue which

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[124] See for instance *Help Refugees* [2017] EWHC 2727 (Admin).

[125] cf Mark Elliott & Jason Varuhas, *Administrative Law* (5th edn, Oxford: OUP, 2017), chapter 10.

[126] Ministry of Justice, *Judicial Review: Proposals for Further Reform* (Cm 8703, 2013) 22.

[127] E.g. *R. (MR) v Home Secretary* [2017] EWHC 469 (Admin).

[128] *McClean v First Secretary of State* [2017] EWHC 3174 (Admin).

we can solve here. Two observations, however, are pertinent. First, it is not necessarily the case that what is "central" needs to be defined in *quantitative* terms. We are not suggesting, in other words, that what scholars focus on should be guided solely by what occurs most often. There might be good reasons to focus attention on the numerically peripheral. Judicial review of prerogative power, for instance, might be rare. Its study, however, may yield insights into the nature of judicial review, and the overarching relationship between courts, Parliament and the executive.[129] At the same time, there is a need for scholars to be *conscious* of the complex relationship between the common and uncommon, and thus the central and the peripheral in this field. As the invisible gorilla test reminds us, what we focus on shapes what we see. In identifying the questions we ask about administrative law adjudication, it is therefore important to be guided by careful thought and not by reflex.

Second, and perhaps most importantly, it is vital that discussion of the practically peripheral is appropriately *contextualised*. Without careful contextualisation, there is a danger that the uncommon can come to shape narratives about administrative law adjudication *as a whole*.[130] This is something which must be safeguarded against. Not only is weaving a grand narrative from a subset of potentially unrepresentative data methodlogically problematic, maintaining a sense of proportion[131] in discussion about administrative law adjudication is especially important at a time when judicial review has become such a politicised topic.

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[129] Mark Elliott, Jack Williams & Alison Young, *The UK Constitution after Miller* (Oxford: Hart 2018).

[130] Paul Craig, "Judicial Power, the Judicial Power Project and the UK" (2017) 36 University of Queensland L.J. 355; Stephen Sedley, 'Judicial Politics' (2012) 34(4) LRB 15.

[131] Tomlinson, 'Review'.

4. Conclusion

Administrative law scholarship is not counting basketballs. It is far more intellectually demanding. There is a lot to focus on and a lot to think about. What scholars do is inevitably diverse. The purpose of our survey of one year of the Administrative Court is to catalyse structured discussion among administrative law scholars about the questions they ask, the material they work with, and the methods they use. What emerges from our inductive survey are three questions to structure discussion. For some scholars these questions will be surprising. They have been inattentionally blind to them. To others they won't be. The important point is that scholars should be having a conversation about these questions and that legal reality so as to foster a more rigorous set of approaches to the study of administrative law adjudication. The purpose of this survey is thus to open up, not close down debate.