

Book Reviews: Administrative Law in Action: Immigration Administration

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Robert Thomas

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In *Administrative Law in Action*, Professor Robert Thomas investigates and analyses how administrative law works in practice through a detailed case study and analysis of what he calls the 'UK Immigration Department', the Home Office. As Thomas says [p 1]:

The Department is also one of the UK Government's most unstable and problematic administrative agencies. Few other government departments have been subject to as much persistent criticism and upheaval.

The book considers how the UK Immigration Department makes and controls policy and how it is controlled by law [p 5]. Thomas's approach to Administrative Law is wider than that of the courts in Judicial Review, adopting a 'governance model' analysing the practical affairs of administrative governance considering what they do and how they do it.

In Chapter 2, Professor Thomas gives an overview of the UK Immigration Department looking at its core tasks of making immigration policy through legislation and rules, administering those policies and rules, and ensuring enforcement through compliance. Thomas considers the different legal models of immigration administration moving beyond the familiar to considering 'living' administrative law grounded in performance and delivery.

Professor Thomas traces the recent history of the UK Immigration Department through its various incarnations as the Immigration and Nationality Directorate, the UK Border Agency and the three current directorates of UK Visas and Immigration, Immigration Enforcement and Border Force. Professor Thomas then gets under the surface of the department looking at the challenges it faces including the role of management of information and the internal

culture of accountability. Both the public and immigrants alike want competent immigration administration and the task of improving immigration administration is essential.

In Chapter 3, Thomas recharacterises administrative law as policy and implementation. He then illustrates this through the lens of the 'hostile environment' policy and the resultant Windrush scandal in which those lawfully settled in the United Kingdom were wrongly refused access to services, detained, removed and refused reentry into the United Kingdom. Thomas describes a key factor in the Windrush scandal as the lack of institutional memory within the UK Immigration Department which had lost sight of the Windrush generation and their rights in the United Kingdom. Thomas further points out that the department lacked an understanding of immigration law, its historical development and its implications for those caught up in the hostile environment policy. Thomas provides this pithy and powerful summary saying [p 63], 'the department lacked an historic understanding of its own legislation, and the implications of this legislation were not considered when the hostile environment policy was devised'. The appalling consequences and the recommendations of the Williams Review provide a blueprint for the department going forward but it remains to be seen how much change will actually be enacted.

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The Immigration Rules and the Secretary of State for the Home Department's policy guidance is the subject of Chapter 4. The current Immigration Rules are well over 1,000 pages long and according to Professor Thomas there are over 3,000 pieces of policy guidance available to Home Office staff. Thomas analyses the movement from discretion based rules to more hard edged bright line rules, which was accompanied by the progressive weakening of appeal rights. When considering Home Office guidance and policy Thomas says [p 81]: 'From a lawyer's perspective, such guidance seems rather low down in the legal hierarchy, but it is typically the first and perhaps often the only port of call for caseworkers.'

The problems with Home Office guidance will be well known to practitioners: often caseworkers fail to apply policy which has been poorly drafted and is at times inconsistent with the rules themselves. Professor Thomas notes [p 85] the 'uncoordinated and unsystematic dissemination' of policy within the department. In terms of the rules themselves, Thomas highlights their excruciating complexity which has led them to be impenetrable to ordinary people. Thomas concludes that the rules and guidance fail in multiple ways, with the trend towards bright line rules being taken to the extreme, and being exalted over substance and purpose. There is a clear need for the Law Commission's recommendations on simplification to be implemented but much more than that is also the need to make them transparent and accessible.

The essential task of the UK Immigration Department, casework, is examined in Chapter 5 which explores the fundamental challenge of producing good quality decisions in respect of an enormous volume of applications. I was struck by Professor Thomas's observation that the mundane reality is that executive power is exercised on a day-to-day basis by armies of junior civil servants who must take 20,000 decisions a day. As he states [p 100]: 'There is, then, a dissonance between the important consequences of decisions taken by caseworkers and their relatively low status and position.' Professor Thomas goes on to examine processing targets and their inevitable impact upon the quality of immigration casework decisions. Practitioners are all too familiar with poor quality decisions especially in respect of visit visas which account for three quarters of all entry clearance decisions. However as Thomas says, not enough attention has been given to what would be required, in both organisational and resource terms, to improve the quality of decisions. Professor Thomas explores three mechanisms of internal administrative law which have the potential to improve the quality of decision making: 'minded to refuse' notices, quality assurance of casework operations, and the Chief Caseworker Unit. Chapter 5 has a particular resonance when the lack of decisions in respect of asylum claims is front page news once again.

Professor Thomas goes on, in Chapter 6, to consider the issue of Redress and Legal Challenges. Over recent years there has been a decrease in appeal rights which have been replaced with a move to administrative review. Administrative review can be more efficient and user-friendly [p 136] but at the time of writing there is a huge backlog in administrative review applications such that this writer has had to draft judicial review applications

challenging unlawful delay in deciding administrative review applications. In general, administrative review is limited and inadequate. It is also, as Thomas points out, inappropriate in cases where the central refusal issue is that of credibility. It is also anomalous that administrative review is not available in visit visa refusals which, since the removal of appeal rights, have plummeted in terms of the quality of decisions. Professor Thomas suggests a move forward where the UK Immigration Department becomes a proactive learning environment where potential errors are detected, corrected and

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prevented. Given the current state of play this appears a long way off at present.

Chapter 7 addresses Immigration Enforcement which Professor Thomas describes as [p 168], 'encouraging, incentivising and compelling people to do things that they would not do voluntarily because they stand to benefit from resisting or evading the rules.' Enforcement is a central activity of the immigration system and probably its most challenging. Enforcement is also controversial and Professor Thomas cites an important study which found that there is little evidence that enforcement reduces the number of irregular migrants and that it actually may increase suffering and encourage criminal activity. Professor Thomas considers the various 'enforcement options' from regularisation, incentives to return, to the hostile environment. It is noteworthy that in recent times the UK Immigration Department has relied upon outside actors, such as employers and universities, to monitor compliance. Professor Thomas cites the National Audit Office and the Public Accounts Committee and their findings that the UK Immigration Department measures success, in terms of enforcement, against activities taken rather than outcomes achieved. He also highlights the difficulties with removal targets and data sharing. In terms of improving enforcement operations, Professor Thomas considers the areas highlighted by the National Audit Office. The clear takeaway from this chapter is the need for data which provides for an assessment of the impact of the UK Immigration Department's activities. There is also a need for more diversity in the higher echelons of the UK Immigration Department, which will help avoid another Windrush style scandal.

In Chapter 8, Professor Thomas considers the role of judicial review in ensuring that the UK Immigration Department carries out its functions in a lawful manner. Professor Thomas focuses on broader systemic judicial review challenges and the vital role of the courts in managing and supervising administration. Professor Thomas considers various challenges under the headings of Systemic Procedural Unfairness and Principles of Legality. For an immigration practitioner this chapter represents a jurisprudential trip down memory lane with a consideration of some of the key decisions such as *Detention Action, BF (Eritrea), Mandalia, Limbu, Rashid, Lumba, Muuse, Anufi jeva* and more. Professor Thomas's survey of these decisions highlights some shocking maladministration by the UK Immigration Department over the years and emphasises the importance of judicial review in ensuring that the principles of legality and good administration are abided by.

The theme of bureaucratic oppression is explored in Chapter 9. Bureaucratic oppression is very familiar to anyone who interacts with the immigration system on a regular basis: delays, lost documents, mistakes and discrimination are only the tip of the iceberg. As Professor Thomas says [p 228], the 'underlying causes of bureaucratic oppression are all accentuated in the immigration context.' This bureaucratic oppression has a huge human cost, but, as Professor Thomas notes, the courts and tribunals are a limited solution in respect of most oppressive administrative behaviour. The chapter explores the limits of the various complaint handling systems and highlights the clear need for improvement in the effectiveness of complaints procedures and the substantive handling of complaints [p 240]. Professor Thomas strikes a more positive note in respect of the role of independent inspection and monitoring which has an essential role to play in reducing bureaucratic oppression in the immigration system. As an immigration practitioner, I have become more cognisant of the importance of the role played by the Chief Inspector of Borders and Immigration over recent years. Professor Thomas goes on to consider some specific contexts of bureaucratic oppression considering immigration detention and the hostile environment which provide a stark, and somewhat scary, reminder of the sometimes fatal consequences of such

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oppression. As Professor Thomas states [p 259], 'new and different ways of thinking about the problem will be required if the underlying causes of bureaucratic oppression are to be addressed.' I read this chapter against the recent announcement by the Home Secretary that she was abandoning some of the key recommendation of the Windrush Review which raises huge concerns about tackling oppression going forward.

Professor Thomas concludes by returning to his aim of analysing how administrative law works in practice through the lens of the UK Immigration Department. When considering reforming immigration administration, Professor Thomas is sanguine in respect of whether the Windrush Review recommendations will be fully implemented given the extent of change which they entail. Professor Thomas provides some powerful suggestions for reform including reconstituting the UK Immigration Department, having policy set out in an annual plan laid before Parliament and considering how administrative capacity should frame policy goals in the context of an open and honest debate.

Professor Thomas's book is an important and timely work which approaches administrative law and the study of administration in a wider context. As a practising immigration lawyer, my focus can often be narrowly upon the courts and judicial remedies and reading this work has broadened my canvass and consequently benefited my practice. Professor Thomas's approach will hopefully impact how administrative law is taught at university level and also be utilised by those studying immigration law modules. Hopefully this work will also be read by those who work within, and set the agenda for, the UK Immigration Department as it is more needed than ever.

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