Cambridge Law Journal, **83(3)**, November 2024, pp. 608–623 © The Author(s), 2025. Published by Cambridge University Press on behalf of The Faculty of Law, University of Cambridge
doi:10.1017/S000819732400062X

BOOK REVIEWS

Administrative Law in Action: Immigration Administration. By Robert Thomas. [Oxford: Hart Publishing, 2023. xxvi + 303 pp. Paperback £44.99. ISBN 978-1-50995-315-8.]

Legal academic research can serve a number of functions. For instance, academics have the distance from the factual outcome of cases so as to be able to see how (and whether) they fit within the existing doctrinal understanding of the subject. We can set recent developments within a historical, theoretical or comparative context. We also have the space to be able to become expert and specialist in particular fields.

Given the latter, it may come as a surprise that, in field of administrative law, scholarship is not more expert. We have been warned about the need to recognise that judicial review operates within sophisticated legislative contexts: see J. Bell, *The Anatomy of Administrative Law* (Oxford 2020). However, with some notable exceptions, the thrust of most administrative law scholarship focuses on the role of the court, the grounds of review and generic principles. By contrast, public law practitioners tend to specialise in one or more specific sectors. If practitioners are more specialised than scholars, the former may doubt what they can learn from the latter.

There is great scholarly potential in setting administrative law within its administrative context. Lord Steyn told us over 20 years ago, in a public law case, that "[i]n law context is everything" (*R (Daly) v Secretary of State for the Home Department* [2001] 2 A.C. 532). It is high time for scholars to take this statement seriously.

One academic who has done so is Robert Thomas. Following on from previous work on immigration tribunals and immigration judicial reviews, his book *Administrative Law in Action: Immigration Administration* considers the administrative system of the Home Office in relation to immigration. The book is superb: compelling (and sometimes shocking), with a masterful grasp of the material, a pertinent set of criticisms and realistic proposals for reform. *Administrative Law in Action* serves to open up the immigration system to lawyers. It is therefore fact-heavy (although none the worse for that and not short on analysis). However, it does mean that this short review leaves a number of aspects of the book untouched.

The focus in this book is less on legal doctrine and judicial intervention in immigration administration, and more on what the Home Office is seeking to achieve, and whether and how it manages to do so (or not). Thomas's argument is that administrative action, including in the immigration field, is seeking to implement policy effectively (p. 6) and administrative law should seek to ensure practical effectiveness (p. 70). In terms of achieving its policy aims, Thomas considers not only administrative law as it is conventionally understood in terms of judicial review of administrative action, but what he terms "internal administrative law" (pp. 9–11). This recognises the fact that only a tiny fraction of immigration decisions come under the scrutiny of independent judges whether on review or on appeal. In this sense, the primary control over decision-making is from inside, rather than outside, the department. Through a combination of

oversight, accountability and guidance, more senior officials control the work of those who are more junior.

Notwithstanding (or perhaps because of weaknesses in) this internal control, Thomas argues that coalface casework is of too low quality, with tight deadlines contributing to errors. Previous data suggests that in around 60 per cent of those cases where tribunal appeals were allowed, this was due to caseworking error (p. 138). Complexity in the system may also lead to mistakes: error itself leads to appeals and reviews (p. 92). It is concerning when officials interpret internal guidance differently to each other, or indeed where additional requirements had been imposed which had no basis in guidance (pp. 84–85). Where judicial reviews are allowed, this is frequently due to the case having been given insufficiently detailed consideration (p. 154). Thomas's suggestion is that the status of caseworkers should be enhanced (p. 116). Further, appeal rights (many of which were removed by the Immigration Act 2014) should be reinstated for high-stakes decisions based on the exercise of judgment or credibility of the applicant (p. 145). As well as formal controls over junior decision-makers, Thomas also points out that administrative culture is key in achieving policy aims. As to the culture in the Home Office, he points for instance to the problems of blame avoidance (pp. 39–40). It is commonly said that there is a culture of disbelief in the department (p. 43). Thomas recommends development of administrative empathy (pp. 257–58).

By focusing on the policies and effects of the immigration regime, Thomas is interested in tangible injustice. As such, it is unsurprising that discussion of the Windrush scandal forms a large part of the book. In short, the Windrush scandal arose from what is frequently known as the "hostile environment policy", whereby the Home Office attempted to make it difficult and uncomfortable to live in the UK without lawful status, so that illegal immigrants would decide to leave of their own accord (pp. 51–57). One problem was that there was a large cohort of individuals who were resident entirely lawfully in the UK but were unable to demonstrate this. They were then treated as if they were illegal immigrants, with disastrous consequences. The Home Office had been warned of this possibility, yet did nothing to address it before the scandal blew (p. 63). Guidance which was sympathetic to people who were lawfully resident but unable to demonstrate this was not publicised and seemingly neglected within the department (p. 67).

In line with his theme that our study of administrative law should not be confined to the role of the courts, Thomas notes that the illegality of the Government's behaviour in relation to the Windrush community was not revealed through litigation, but rather through political forms of scrutiny (p. 13). Further, outside of the Windrush context, the Home Office can seek to game the system by settling judicial review cases which it would be likely to lose (pp. 202–03). Thomas does not however discount the significance of the judicial role and supports systemic judicial review, in part because of the Home Office's own weaknesses (p. 211). Indeed, he goes so far as to suggest that the courts do get involved in the management and supervision of administration (p. 224).

By grappling with the status, effect and content of administrative policies, Thomas assists in correcting an imbalance in academic public law writing. While the position appears to be getting somewhat better, historically scholarship on administrative law underestimates the significance of guidance and policy documents in the modern state. It is unsurprising that, as a book which tries to reflect the actual reality of

administrative law, *Administrative Law in Action* has a chapter on administrative rules and guidance, as well as another chapter which deals with legal challenges to systemic issues, including policies.

A fascinating chapter concerns what Thomas calls "bureaucratic oppression". Here, he considers the power imbalance between the Home Office and the migrants with whom it deals. Whilst bureaucratic oppression does include behaviour which would be unlawful in a public law sense, it also goes far beyond this, including failures in terms of the department's communication methods. One important example is delay, which can have considerable impact on individuals. It is very difficult to satisfy a court that there has been an unlawful delay in making an immigration decision: *R (FH) v Secretary of State for the Home Department* [2007] EWHC (Admin) 1571. Thomas cites (p. 242) a case in which the Upper Tribunal holds that a six-year delay was held not, without more, to constitute an unlawful delay: *R (MS) v Secretary of State for the Home Department (excluded persons: Restrictive Leave policy) IJR* [2015] UKUT 00539 (IAC).

As one of the authors of a leading textbook on constitutional law (M. Elliott and R. Thomas, *Public Law*, 5th ed. (Oxford 2024)), it is unsurprising that Thomas is sensitive to the constitutional context of immigration administration and law. He makes the perceptive observation that a conventional understanding of the Home Office based on the powers of the Secretary of State and the Royal Prerogative would be incomplete and misleading. The fact is that the Home Office itself exists, albeit its existence is intertwined with legal models, based on sovereignty, administrative justice and (more recently) human rights (pp. 23–24). He also notes that, despite attempts to reorganise the department, the impact of this is more symbolic than real and possibly harmfully distracting (pp. 25–31).

Another important constitutional reality of the immigration system is that, whilst almost all decisions are made by junior officials, this decision-making remains under ministerial control. This contrasts with the tax system, where general policy is set by ministers, but that policy is carried out by a body free of political interference in individual decisions, namely His Majesty's Revenue and Customs (p. 33). Indeed, one of the specific recommendations which Thomas makes in relation to potential reform of the immigration system is that the HMRC model be adopted, with a distinction drawn between policy and casework (p. 271).

Although the department has vast legal power over those subject to immigration control, its practical ability to enforce its immigration policy is limited by its resources (a topic discussed in detail in ch. 7). Like heavy artillery, the Home Office's substantial powers are difficult to target, particularly given the department's failures in terms of information gathering, which is a theme which runs through Thomas's criticisms of the department (p. 40) (indeed, he refers to the department's reputation for the quality of its data as "abysmal" (p. 189)). For instance, in providing information, the department focuses on what it has done, rather than what it has achieved in terms of outcomes (p. 38).

The Secretary of State herself has considerable powers. Indeed, immigration policy is not generally set out in primary legislation: the statutes set the legal framework, but the content of policy is a matter for the Secretary of State (particularly through the Immigration Rules). Thomas notes the control of the Government over the legislative process in Parliament and the policy agenda (p. 64). He also suggests that there is a risk that ministers are too powerful, with risks arising if officials bend to every ministerial whim (p. 71), the problem of

being too politically responsive (p. 267). The courts have a role in ensuring that matters which should not be employed to political ends are not used by ministers to their personal advantage (p. 217). As for democratic accountability, Thomas notes that there was no reference to the hostile environment policy, which gave rise to the Windrush scandal, in the 2010 Conservative manifesto (p. 57). The department can be secretive about data, which Thomas presumes is because the information would be embarrassing if released (pp. 95–96).

Thomas's book is not overwhelmingly negative and he wishes to avoid fatalism (p. 256). He does give credit when he finds it due, for instance in terms of improvements to the department's approach to reviews of decisions (p. 165). As to his recommendations, other than making casework independent of ministerial control, his suggestions include an annual plan for immigration policy which is to be laid before Parliament (pp. 272–73); setting policy by reference to what is achievable in terms of administrative capacity (p. 274); codifying the primary immigration legislation into a comprehensive statute (p. 276); and introducing an external agency to provide additional oversight (pp. 277–78).

Administrative Law in Action is an impressive achievement and it deserves to be read widely by public law scholars. It now being out in paperback (the hardback having been published in 2022) means that it is available at a lower cost. It provides benefit not only in informing us about its specific subject matter, but in showing the importance of us being informed about specific subject matter.

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Reclaiming the Public. By Avihay Dorfman and Alon Harel. [Cambridge University Press, 2024. x + 197 pp. Hardback £90.00. ISBN 978-1-00932-716-9.]

Reclaiming the Public is a seminal work that rigorously examines the concept of "the public", defining it in non-instrumental terms. The authors argue that institutions and officials qualify as public not merely by advancing our interests or acting on our behalf, but by "speaking in our name". This perspective, they contend, aligns state authority with the principles of freedom and equality, thereby affirming the legitimacy of political power and enhancing public autonomy.

Chapter 1 provides an account of political authority, critically assessing traditional theories of legitimacy and proposing an alternative grounded in specific mechanisms of representation. The authors contend that genuine legitimacy emerges when public institutions mirror the perspective of those they serve and operate non-hierarchically, by speaking on their behalf. Chapter 2 critiques legal positivism and natural rights theories for anchoring the normativity of law in its content. The authors propose an alternative approach that emphasises the authority of lawmaking agents, shifting the focus from *what* law is to *who* proclaims it. They argue that the moral difference law makes is one of "standing, agency, identity, or status" (p. 11) and ground the normativity of law in the public characteristics of the lawmaking agents. Chapter 3 explores some of the concrete institutional manifestations of this conceptualisation. The authors use the differences between constitutional and statutory rights, as well as between statutory rights and those derived from