THE INDEPENDENT REVIEW OF ADMINISTRATIVE LAW

Chair:

Lord Edward Faulks QC

Members:

Professor Carol Harlow QC

Vikram Sachdeva QC

Professor Alan Page

Celina Colquhoun

Nicholas J McBride

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INTRODUCTION

About the review

1. In its evidence to the Independent Review of Administrative Law (IRAL), the UK Administrative Justice Institute (UKAJI) observed that the Panel was:

> "being asked to address fundamental issues concerning the appropriate constitutional place of judicial review, including: whether certain types of executive decisions should be protected, whether appropriate tests of justiciability are being adopted and most fundamentally of all whether judicial review should be placed on a statutory footing and the grounds codified."

For this task the period of time given was "inadequate given the complexity, scope, and importance of the issues".[1] In saying this, UKAJI was expressing the views of a number of those who submitted evidence. The Panel had some sympathy with these views.

2. Ours is by no means the first review of judicial review procedures. In 1969, only four years after it was founded, the Law Commission of England and Wales (the Law Commission) came together with the Scottish Law Commission and the Standing Commission on Human Rights in Northern Ireland to request a Royal Commission to comprehensively review administrative law in England and Wales. The government comprehensively refused the request. There were, nonetheless, two significant outcomes.

3. The Law Commission informed the Lord Chancellor of "public concern" over "problems" with judicial review that in their view required attention as a matter "of considerable importance and even of some urgency".[2] Procedure at the time, being linked to the prerogative writs, was undoubtedly in need of "streamlining". As the Law Commission observed: "The procedural complexities and anomalies which face the litigant who seeks an order of certiorari, prohibition or mandamus have long been the subject of criticism, whilst the circumstances in which injunctions and declarations are obtainable would also appear to call for review."[3]

4. The Commissioners would have preferred to conduct a fuller inquiry into administrative law, covering other complaints procedures such as the newly appointed Parliamentary Commissioner for Administration. Instead, they were restricted by government to judicial review procedure, which was in any event at the top of their agenda. The very welcome practical outcome of their work was the innovative application for judicial review, in which both public law and private

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1 Marsons, Sunkin and Konstadinides, 'The UK Administrative Justice Institute's submission to the Independent Review of Administrative Law', UK Constitutional Law Blog, 26 October 2020.

2 Law Commission, *Administrative Law*, Law. Com. No 20 (1969), 1-2.

3 ibid. There was confirmation in de Smith's seminal study of judicial review: *Judicial Review of Administrative Action* (Sweet & Maxwell, 1959).

law remedies were available.[4] This was introduced in the civil procedure rules by RSC Order 53,[5] later revised and then placed on a statutory basis by the Supreme Court Act 1981 (now the Senior Courts Act). We discuss the content in Chapter 1.

5. The Law Commission returned to the subject in the early 1990s, when they chose to restrict themselves to procedural matters in a review of judicial review and statutory appeals. The choice was deliberate. The Commission believed that the substantive grounds for judicial review "should continue to be the subject of judicial development" but that continuing judicial development of the grounds needed to be "facilitated by an effective procedural framework." [6] Only minimal changes to judicial review were recommended, although a draft bill was included.

6. Judicial review was essentially peripheral to the later Law Commission study of monetary remedies in public law, which includes only a handful of descriptive paragraphs on judicial review. The programme was in any event virtually abandoned in the face of decisive opposition from the government as "key stakeholder". The Commission's final report does however contain a substantial consideration of the relationship of damages with judicial review. Noting that "the current regime had significant gaps in it", the Law Commission came down on the side of a new remedy in damages in judicial review proceedings.[7] The gap still remains – but thankfully it is not the task of the Panel to close it.

7. The second response to the 1969 Law Commission initiative was unofficial. It took the form of a committee of the great and good set up in 1978 by JUSTICE in conjunction with All Souls College, Oxford with a remit "to devise practical proposals for reform with the aim of giving administrative law clarity, coherence, comprehensiveness, and accessibility".[8] (This El Dorado, it must be said, has never been attained.) The Committee published a discussion paper in 1981 and its full report on the state of administrative law came in 1988 with three of the eleven chapters devoted to judicial review, the organisation of the courts and standing. The discussion of judicial review is largely procedural, centring on matters such as time limits, discovery and evidence, and leave to apply, rather than on the grounds for review. There is a short discussion of codification, which we reserve for Chapter 1.

8. Conscious that this ambitious attempt to review administrative law took around 10 years, the Panel has been careful to stay within the parameters allocated to us. We did not take our title literally. We rejected suggestions that we should step outside the boundaries of our terms of reference into the wider landscape

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4 See Law Commission, *Remedies in Administrative Law,* Law Com No 73 (1976) and Law Com Working Paper No 40, (1971). The public law remedies were certiorari, mandamus and prohibition; the private law remedies were declaration and injunction.

5 RSC Order 53, SI 1977/1955, SI 1980/2000.

6 Law Commission*, Administrative Law: Judicial Review and Statutory Appeals*, Law Com No 226 (1994), 2. And see Law Commission, *Administrative Law: Judicial Review and Statutory Appeals,* Consultation Paper, Law Com No 126 (1993).

7 Law Commission, *Administrative Redress: Public Bodies and the Citizen*, Law Com No 322, HC 6 (2009-10) Part 2, [2.1]-[2.91], at [2.50-2].

8 JUSTICE/All Souls Review, *Administrative Justice – Some Necessary Reforms* (Clarendon Press, 1988), Appendix 2 at 368.

of administrative law, though we were aware that this path has been chosen in both Wales and Scotland. In Scotland, the Tribunals and Administrative Justice Advisory Committee set out to produce a snapshot of the administrative justice and tribunals landscape in Scotland as at November 2015, with changes necessitated by devolution and the Courts Reform (Scotland) Act 2014 and Tribunals (Scotland) Act 2014 in mind. The aim was "to help inform future policy making, as well as shape the priorities of any future oversight body in the area".[9] In Wales, administrative justice was the subject of a review conducted by Welsh Universities in 2020 though judicial review was not its central concern and we received a helpful and lengthy submission from Professor Sarah Nason, part-author of the review.[10] The Commission for Justice in Wales also considered administrative justice, on the ground that it is "the part of the justice system most likely to impact upon the lives of people in Wales".[11] Their report contains proposals for rationalisation and a recommendation that it should be compulsory for cases against Welsh public bodies which challenge the lawfulness of their decisions to be issued and heard in Wales.[12]

9. Our report adopts the structure of the terms of reference. Chapter 1 deals with the possibility of a statutory codification both of jurisdiction in judicial review and of the grounds for review. Here we have drawn on submissions and helpful advice from lawyers in common law jurisdictions with some practical experience of a statutory code. Chapter 2 deals with the question of justiciability and non-justiciability and the possibility of drawing a clear boundary between the two. Chapter 3 deals with paragraph 3 of the terms of reference, which we interpreted as asking whether the effect of the law on judicial review on the exercise of public power can and should be moderated (a) by tailoring the grounds of review that can be invoked to set aside the exercise of a particular public power, and (b) by altering the remedies that are available in the event of a successful application for judicial review.

10. The terms of reference ask the Panel to consider "Whether procedural reforms to judicial review are necessary, in general to 'streamline the process'." They draw our attention to specific aspects of the judicial review process that may give cause for concern, for example: the duty of candour "particularly as it affects Government"; time limits (a notable bone of contention in planning cases); and standing, which is thought by some observers to be too wide. We were also asked whether procedural reforms are necessary generally with a view to streamlining, which raises the further question of whether streamlining is necessary. We received a request from judges to look at *Cart* reviews, which some of those who gave evidence thought adds an additional layer of appeal that was as unnecessary as it was unintended. These procedural matters are dealt with in Chapter 4, except for the issue of *Cart* reviews, which is dealt with in Chapter 3.

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9 Scottish Tribunals and Administrative Justice Advisory Committee, *Mapping Administrative Justice in Scotland* (2015)

10 Nason and others, *Public Administration and a Just Wales* (Universities of Cardiff and Bangor, 2020). The Review contains a single chapter on judicial review in Wales, noting access problems.

11 Commission on Justice in Wales, *Justice in Wales for the People of Wales* (October 2019), para 6.1.

12 ibid, para 6.27. As noted in Chapter 5, this recommendation has been implemented.

11. Given the limited time at our disposal, an in-depth survey was not feasible. We drew on the practical experience of some members of the Panel, the submissions of those who gave evidence, most of whom were lawyers, and many of whom were well-qualified practitioners and highly proficient public interest groups practising regularly in the field. Panel members participated in a helpful webinar set up to discuss reform by the Law Society, to whom we are grateful, and attended other webinars arranged by sets of chambers. We were also able to draw on a review conducted by four distinguished public law practitioners on behalf of the Bingham Centre in the context of government proposals leading up to the Criminal Justice and Courts Act 2015.[13] This study looked at every stage of judicial review proceedings and contains a large number of practical recommendations. The authors' objectives – to consider practical ways of streamlining the process of judicial review without impairing its chief function of vindicating the rule of law – had a certain resonance for us. Invaluable though all this was, we would not claim or wish to be thought of as having undertaken the "comprehensive assessment" of judicial review or the "review of the machinery of judicial review generally" for which the terms of reference ask.

12. The Panel was concerned at the gap left by the fact that we were unable to undertake an in-depth study of immigration cases, which are responsible, as is well-known, for up to 90% of judicial review applications.[14] We were, however, aware of the Law Commission's recent survey of the Immigration Rules,[15] in which they concluded that the complexity of the Rules contributed to mistakes inside the administration, slower decision making and costlier administration. This was responsible for an increased number of administrative reviews, appeals and judicial reviews. Their impact assessment estimated the potential savings to the judicial system as a result of reduced numbers of appeals and judicial reviews, and reductions in judicial reading and writing time from simplification of the Immigration Rules – something that the Panel could not have done.

13. Chapter 5 picks up the territorial dimension of our terms of reference, which invited us to "consider public law control of all UK wide and England & Wales powers that are currently subject to it whether they be statutory, non-statutory, or prerogative powers". As the chapter explains, our principal concern is with powers that may be exercised across the whole of the United Kingdom and are not devolved or transferred under one or more of the devolution settlements. As well as brief accounts of judicial review in Scotland and Northern Ireland, which as the chapter notes is a "devolved" matter in both jurisdictions, the chapter draws together the main threads of the devolution-related submissions we received.

14. In arriving at our conclusions, we were very conscious of the need for coherence in constitutional change. Random constitutional change may have

[13] Fordham, Chamberlain, Steele and Al-Rikabi, *Streamlining Judicial Review in a Manner Consistent with the Rule of Law* (Bingham Centre for the Rule of Law, Report 2014/01, 2014). Judge Michael Fordham QC is author of *The Judicial Review Handbook*, 7th ed (Hart Publishing, 2020).

[14] See Appendix C, Figs. 1 and 2.

[15] Law Commission, *Simplification of the Immigration Rules: Report* (Law Com 388, 2020), Ch 1.

unforeseen side effects – as we have seen in the unhappy example of the Fixed-term Parliaments Act 2011, ignored by Parliament on two occasions since 2015 and currently the subject of a draft bill before Parliament to repeal it.[16] We have therefore been cautious with recommendations, preferring to present options for possible government action. Our brief conclusions are set out at the end of the main body of our report.

Evidence and data

15 As already indicated, we have so far as possible based our conclusions throughout on responses to our call for evidence, on evidence submitted by practitioners in the public law field and on statistics assembled by our Secretariat and others. The data and statistics are published in Appendix D and a summary of the evidence in Appendix C. The methodology is explained in Appendix B. A list of respondents to our call for evidence (together with the code numbers which we will use to refer to their submissions in this report) is set out in Appendix E. As we had expected, many experienced practitioners and public interest groups responded formally or informally to the call for evidence. Of the 238 submissions, the overwhelming majority came from lawyers. 61 (26%) came from public interest groups and 68 (29%) from law associations or law firms. Many of the submissions have been published accessibly by their authors on the UKAJI website.[17]

16. We received some criticism for directing our call for evidence primarily at government departments. In fact, our call for evidence also encompassed a wide range of external stakeholders involved in the judicial review process. But the choice to target government departments in particular was deliberate. The Panel felt that too little was known about the government experience of judicial review. The obvious source, *The Judge Over Your Shoulder* (JOYS) – prepared by the Treasury Solicitor's Department in conjunction with the Management and Personnel Office of the Cabinet Office[18] – is written for public servants by lawyers. In the event, only 14 submissions (6%), came from government departments. This was a disappointment since one reason for our appointment was a perceived adverse effect on government departments of the increase in applications for judicial review.

17. In 1987, when the JOYS pamphlet was first published, it attributed the growth of judicial review in part to "an increasing willingness on the part of the judiciary to intervene in the day to day business of government, coupled with a move towards an imaginative interpretation of statutes".[19] In view of some of the intemperate criticism of judges and of recent decisions, the panel might have expected silence from the judiciary in response to our call for evidence. We were particularly grateful in these circumstances for the submissions we

[16] See Draft Fixed-term Parliaments Act 2011 (Repeal) Bill and Kelly, 'Fixed-term Parliaments Act 2011' HC Research Briefing (1 December 2020).

[17] At https://ukaji.org/2020/11/04/collection-of-responses-to-the-independent-review-of-administrative-law-iral/

[18] *The Judge Over Your Shoulder*, 5th ed (Government Legal Department, 2016) (updated 9 October 2018).

[19] *The Judge Over Your Shoulder*, 1st ed (Treasury Solicitor's Department, 1987), para 2.

received from senior retired judges and from the President of the Supreme Court (Lord Reed). The tone and content of these was wholly constructive and did not suggest that the review was in any way an illegitimate exercise. This was in line with Lord Reed's evidence to the House of Lords Constitution Committee: "Clearly the subject of judicial review and human rights are much in the air at the moment and they are perfectly proper matters for the Government and Parliament to consider."[20] The Panel agrees with this observation and with Professor Ekins, who said in his evidence to us that: "Parliament is constitutionally entitled to evaluate the law of judicial review and to intervene to correct it."[21]

18. Writing in the current edition of JOYS, Sir Jonathan Jones, the former Treasury Solicitor, suggests that information about the work of public servants (including information on the procedures, practices and conduct of, and decisions made by officials) has become much more accessible to the public since the Freedom of Information Act 2000 came into force in 2005. The work of the Civil Service is subject to much closer scrutiny and almost inevitably to more challenges. Thus the number of judicial review claims challenging government decisions, practices and policies had increased from 4,200 to over 15,600 between 2000 and 2013, and in the financial year 2014/15 alone there were around 20,000 new or threatened judicial review claims against government decisions, the majority immigration-related.[22] This is a heavy load, falling for the most part on the Home Office and Ministry of Justice.[23]

19. That judicial review has grown exponentially over the past quarter century is incontestable. Already in 1980, the editor of Professor Stanley de Smith's seminal treatise on judicial review was noting "a striking increase" over the previous 15 years of the frequency with which judicial review had been invoked and the readiness of the courts to intervene.[24] By 1995, when Maurice Sunkin and others published the first full statistical survey of judicial review with access provided by the Crown Office, they recorded that, between 1981 and 1994, applications grew from 553 to 3,208 annually – an annual growth rate of 16%.[25] The two most prolific subject areas were housing and immigration (a constant). Housing actually fell from 141 applications (44.4%) in 1987 to 108 (23.8%) in the first quarter of 1991, while over the same period, immigration fell from 671 (44%) to 103 (22.7%), only to reach a new record of 995 applications in 1994.[26] Statistics compiled by our Secretariat and published in Appendix D of this report show further steep rises in the present century. From 2000 to 2013, applications to the Administrative Court grew from 4,000 to nearly 16,000, with immigration averaging around 2,000 cases annually.[27] The sudden decline after that is

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[20] House of Lords Select Committee on the Constitution, Annual Evidence Session with President and Deputy President of the Supreme Court, 4 March 2020 (response to q 5).

[21] EXT078, para 2 (see Appendix E for a list of contributors to this review, and the code numbers assigned to their evidence).

[22] Sir Jonathan Jones, 'Foreword' in JOYS, 4.

[23] Of 1,600 judicial reviews brought against government departments from 2015-19, 1,410 were against the Home Office and 288 against the MoJ: Report Appendix D, Figures 14, 15.

[24] de Smith, *Judicial Review of Administrative Action*, 4th ed (Sweet & Maxwell, 1980), 31.

[25] Bridges, Meszaros and Sunkin, *Judicial Review in Perspective* (Cavendish Publishing, 1995).

[26] ibid, Table 2.1 and pp. 15-16.

[27] Appendix D, Fig. 1.

explained by the transfer of most immigration judicial reviews to the Upper Tribunal.

The political background

20. In his book *Justice, Continuity and Change*, Lord Dyson remarked that he was "not aware of a widespread sense of unease that judges are routinely overstepping the mark and impermissibly quashing executive decisions", adding that "if the European Convention on Human Rights is disregarded, I am unaware of any major policy issue whose merits have been resolved judicially."[28] He would have been surprised, in that case, by the scale and content of Policy Exchange's Judicial Power Project.[29] We were well aware that our review had a political dimension. IRAL was in part a response from the government to the Supreme Court's decisions in the two Brexit cases. We knew that feelings ran high. In the press, Helena Kennedy QC had accused the government of "constitutional vandalism" in attacking the judiciary, referring to the "loaded remit" of IRAL and the "limited relevant experience" of the Panel.[30]

21. There is nothing new in this. In the 1990s, the Conservative Home Secretary, Michael Howard, was highly critical of various judgments. In 2003, the Labour Home Secretary, David Blunkett, concerned at the rise in immigration cases, poured scorn on named judges and deplored "unaccountable and unelected judges usurping the role of parliament, setting the wishes of the people at naught and pursuing a liberal politically correct agenda of their own".[31] In 2011, Jack Straw (a former Lord Chancellor) remarked to the House of Lords Constitution Committee that "There is plainly a lack of mutual confidence between the senior judiciary and this place (Parliament) in respect of the role of the senior judiciary and its broadening authority into areas that are inevitably political."[32] In short, IRAL and its terms of reference form a small part of a debate that has smouldered, and sometimes burst into flames, over many years.

22. There is not, never has been and is unlikely to be, a fixed idea of the "appropriate place" of judicial review in the constitution, any more than there is likely to be a generally accepted and precise definition of "justiciability". Opinion naturally differs as to where the lines between justiciability and non-justiciability should be drawn, whether a given matter is or is not a "political question" and whether such matters are best left to the judiciary to determine or whether Parliament should intervene. Politicians and judges may hold differing views as to where the balance of the constitution lies and, just as politicians disagree with politicians over politics, so judges may legitimately disagree with one another over law. In the undoubtedly political first Brexit case,[33] three Supreme Court

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28 Dyson, *Justice, Continuity and Change* (Hart Publishing, 2018), 59-60.
29 Available at https://policyexchange.org.uk/?s=judicial+power+project
30 Kennedy, 'The government is bent on constitutional destruction. We should remember Lord Bingham now more than ever', *Prospect*, October 2020.
31 Comment, Daily Mail, 20 February 2003. For a more academic account see Rawlings, 'Review, revenge and retreat' (2005) 68 Modern Law Review 378.
32 House of Lords Constitution Committee, 25th Report, Judicial Appointments (2012), para 41.
33 *R (Miller) v Secretary of State for Exiting the European Union* [2018] AC 61.

Justices (Lords Reed, Carnwath and Hughes) delivered strong dissenting judgments, while in the hotly political and equally controversial prorogation case of *Miller and Cherry*, eminent members of the judiciary in England subscribed to the view that prorogation was not a justiciable issue.[34] In Scotland, Lord Doherty said in the Outer House:

> "I am not persuaded that any of the matters relied upon by the petitioners or the Lord Advocate result in the claim being justiciable. In my view the advice given in relation to the prorogation decision is a matter involving high policy and political judgement. This is political territory and decision-making which cannot be measured against legal standards, but only by political judgements. Accountability for the advice is to Parliament and, ultimately, the electorate, and not to the courts."[35]

23. Disagreement is, however, hardwired into our culture. Our adversarial system of justice is premised on disagreement; our judicial system, unlike many continental systems, allows for dissent at every level; and our system of government is based on government and opposition, with the two sides facing each other across an aisle in the House of Commons that is a symbolic two swords' lengths in width.

The constitutional context

24. Our review, like all other such reviews and reports, took place within a well-understood constitutional framework, which was not challenged by any of those who gave evidence to us, although, as stated earlier, opinion naturally differed as to where lines might be drawn. Lord Reed, in his submission to the Panel, conveniently summarised the two "long-established constitutional principles of fundamental importance" on which the constitution was seen to rest:

- Governmental power in this country, whether exercised by the government, local government, regulatory bodies or other public authorities, must be exercised in accordance with the law.
- Ultimate sovereign power resides in the Queen in Parliament. The government and other public authorities therefore require authority conferred by Parliamentary legislation for the powers that they exercise, with the limited exception of certain common law or prerogative powers.[36]

25. This summary differs in an important respect from the formula in our terms of reference, which invites us to balance "the role of the **executive** to govern effectively under the law" and the "legitimate interest in the **citizen** being able to challenge the lawfulness of executive action through the courts"**.** Against the background of a long tradition of parliamentary democracy, the Panel found the

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[34] *R (Miller) v The Prime Minister and others v. The Prime Minister* [2019] EWHC 2381 (Lord Burnett, LCJ, Sir Terence Etherton MR, Dame Victoria Sharp, President of Queen's Bench Division).

[35] *Cherry v Advocate General for Scotland* [2019] CSOH 70, [26]. In the Inner House, the matter was held to be justiciable: Lord President (Carloway), Lord Brodie, Lord Drummond Young) [2019] CSIH 49.

[36] EXT166, para 2.

omission of any reference to Parliament in the terms of reference surprising. UKAJI also expressed concern in its evidence about the omission, which "neglects the role of judicial review in supporting the sovereignty of Parliament and in ensuring that the executive acts in accordance with the law, as a junior constitutional partner".[37] The absence of any reference to Parliament (as surely there should be) in the terms of reference is a mischaracterisation in the view of the Panel. **The Panel thinks it crucial to emphasise the role of Parliament. Parliament should not be regarded as supine and incapable or unwilling to challenge or enact legislation, particularly of a constitutional character**.

26. In his evidence to the Panel, Professor Ekins underlines the role of Parliament in the expansion of judicial power in our constitution. This power shift – which was not acceptable to every member of the judiciary[38] – was in part a function of Parliament's legislative choices, through its decision to enact the European Communities Act 1972 and the Human Rights Act 1998, which reflected respectively the policies of a Conservative and a newly elected Labour government and were duly passed into law by Parliament. As explained by Lord Sumption, traditional notions of the constitutional distribution of powers have unquestionably been modified by the Human Rights Act, if only because "any arguable allegation that a person's Convention rights have been infringed is necessarily justiciable".[39] As Lady Hale later observed:

> "The courts have to operate the Human Rights Act – they are only doing what Parliament has told them to do. This inevitably involves making…judgments in real cases involving real people. The courts would not be doing right by those people if they failed to adjudicate upon their cases."[40]

27. It was Parliament that embedded the rule of law in the Constitutional Reform Act 2005, section 1 of which prescribes that nothing in the Act should adversely affect the "existing constitutional principle of the rule of law". Again, Parliament passed the Equality Act 2010, which deals at some length with enforcement in courts and tribunals. Panel members were also told during a seminar organised by Blackstone Chambers that many applications for judicial review were anticipated as a result of the statutory instruments generated by the coronavirus pandemic and the Brexit process.

28. The relationship between Parliament and the judiciary is traditionally a supportive one,[41] based on both sides on self-restraint and a strong sense of institutional deference. The relationship between Parliament and government is similarly supportive. It must be, since Parliament has the historic role (as Lord Howell recently reminded the Constitution Committee) of "supporting the

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37 EXT191, para 20.

38 See Irvine, 'Judges and decision-makers: the theory and practice of *Wednesbury* review' [1996] Public Law 59. As Lord Chancellor, Lord Irvine piloted the Human Rights Bill through the House of Lords.

39 *R (Lord Carlile) v Secretary of State for the Home Department* [2015] AC 945, at [29].

40 Hale, 'Law and politics: a reply to Reith' (Dame Frances Patterson Memorial Lecture, 8 October 2019) available at: https://www.supremecourt.uk/docs/speech-191008.pdf

41 Allison, *The English Historical Constitution* (Cambridge University Press, 2007), Chapter 7.

Executive or enabling the Executive to exist and the Queen's Government to carry on, which is rather important".[42]

29. Constitutions are shaped, as Professor John Griffith once observed:

> "by the working relationships between their principal institutions. Though the institutions may remain largely unchanged in their composition, if not their membership, these relationships are continually shifting. At different times in our history, Government, the Houses of Parliament, and the Judiciary have enjoyed more or less influence over each other."[43]

Griffith traced shifts in the balance of power with the judiciary gaining some power in the 1990s, when weak and strong governments alternated, with correlative strong and weak Parliaments. He correctly predicted that the judiciary would gain power and influence after the Human Rights Act came into force in 2000. In similar vein, when asked in the Constitution Committee whether the Supreme Court's view of the institutional relationships had not been "rather narrow" and ahistorical, Lord Reed replied that the period had been an exceptional one when government and Parliament were "clearly not working in tandem in the way they normally would".[44]

30. Sir Stephen Laws, who has a perspective not only as a lawyer but as First Parliamentary Counsel, went somewhat further in his submission to us. Underlining the primacy of Parliament and the political process over accountability to judges and the courts, Sir Stephen favoured limiting the areas of justiciability to reflect this reality. He entertained the possibility of wide-ranging statutory intervention, to endorse the constitutional principles requiring limits on interventions by the courts in Parliamentary business and in the relationship between Parliament and government.

Effective government versus the rule of law – a false antithesis

31. We have already referred to the "balance" required by the terms of reference between "the legitimate interest in the citizen being able to challenge the lawfulness of executive action through the courts...with the role of the executive to govern effectively under the law". This approach has a respectable pedigree. Professor Stanley de Smith opened his pioneering study of judicial review by remarking that:

> "the administrative process is not, and cannot be, a succession of justiciable controversies. Public authorities are set up to govern and administer, and if their every act were to be reviewable on unrestricted grounds by an independent judicial body the business of administration could be brought to a standstill. The prospect of judicial relief cannot be

[42] House of Lords Select Committee on the Constitution, Annual Evidence Session with President and Deputy President of the Supreme Court, 4 March 2020, q 2.
[43] Griffith, 'The common law and the political constitution' (2001) 117 Law Quarterly Review 42.
[44] House of Lords Select Committee on the Constitution, Annual Evidence Session with President and Deputy President of the Supreme Court, 4 March 2020 (response to q 2).

held out to every person whose interests may be adversely affected by administrative action."[45]

32. This takes us back to a time before the application for judicial review was instituted, when standing to seek a prerogative order was restricted to "persons aggrieved" and the term was narrowly interpreted. De Smith noted that, to be legally aggrieved, a person must "be able to point to an encroachment on vested rights or the imposition of a new legal obligation".[46] He does, however, mention a wider public interest role in "encouraging individual citizens to participate actively in the enforcement of the law".[47]

33. Again, Lord Woolf, a stout defender of courts, public law and judicial review, talked in his 1990 Hamlyn lectures of his growing anxiety over "central government's perception of judicial review". Up to that point, the co-operation of government departments with the judicial review process had contributed to its success; but "as judicial review has become more and more pervasive there has undoubtedly been increasing anxiety at the highest level of government as to whether judicial review is inhibiting the implementation of governmental decisions and policy to an extent which is becoming intolerable."[48] In terms echoed in our terms of reference, Lord Woolf placed great emphasis on the need for balance, underlining the many safeguards built into judicial review which enable the courts "to strike a balance between the interests of the administrators and the public, which in some proceedings for judicial review come into direct conflict".[49] While courts should never be inhibited in "interfering as forcefully as necessary" with a government department when necessary, they should at the same time "appreciate the consequence of their intervention".

34. This was not an approach with which the Panel felt wholly comfortable. To present judicial review in terms of an argument between the executive and the citizen is only part of the story. Protection of the individual, redress of grievance and defence of private interest are of course strong historical themes in the common law, and therefore there is some truth in the idea of judicial review as a vehicle for the protection of private interests and of a "rights-based" system of judicial review. But judicial review serves many other functions, in many of which government and public authorities have a significant interest. The efficiency and cost-effectiveness of judicial review proceedings are matters of both public and private interest, and are no doubt rated as highly by individual litigants as by government departments. The relationship of public bodies to judicial review may be a very positive one. All public bodies including government departments have an interest in legality as an element in good administration – the current edition of JOYS is described as "a guide to good decision making". Again, an important use of judicial review – that may, as it did in the Brexit cases, have political connotations – is to determine relationships

45 de Smith, *Judicial Review of Administrative Action*, 3rd ed (Stevens, 1973), 3.
46 ibid, 364-5. The question of change is extensively discussed by Lord Reed in *Walton v The Scottish Ministers* [2012] UKSC 44 from [82].
47 de Smith, *Judicial Review of Administrative Action*, 3rd ed (Stevens, 1973), 362-3.
48 Woolf, *Protection of the Public – A New Challenge* (Stevens, 1990), 17.
49 ibid, 19.

between public authorities and sort out disputes between them that cannot be resolved in a political process.[50]

35. Those government departments that gave an estimate of their cost in financial and human resources gave little indication that the cost was overwhelming or in any way disproportionate to the value of maintaining "the lawfulness of executive action".[51] Some departments pinpointed areas where judicial review seemed obstructive; the expansion of judicial review into areas such as international affairs as was the growth of "structural" and "merits review" were both mentioned. These subjects are discussed more fully under the heading of justiciability. There was also a feeling that judicial review was sometimes uncertain, and that judgments were hard to implement and less than clear. But none of the 84 responses to the question whether specified grounds for review "seriously impeded the proper or effective discharge of central or local government functions" suggested that this was the case.

36. We took note too of a recent impact study that addressed a general assumption that judicial review tends to be "an expensive and time consuming detour concerned with technical matters of procedure that rarely alters decisions of public bodies". Its impact on public administration is "largely negative because it makes it more difficult for public bodies to deliver public services efficiently".[52] The authors found no evidence that this was the case; indeed, they came to the conclusion that the assumption was at best misleading and generally untrue.

37. We learned very little about the expectations and experience of private citizens. Only 16 responses (7% of all responses) were received from private individuals. We asked no specific questions about impact and received little direct evidence as to motivation for litigation. It is in any case difficult to know whether a judicial review set down in the name of an individual is really fought by that individual. In Sunkin's 1987 study, for example, when the majority of applications were instituted in the names of individuals, "it proved impossible, without looking more closely at the nature of the claims, to know whether these applications were brought to redress purely individual grievances or whether the applications were representative cases raising issues of wider importance."[53] Public interest organisations are often fronted up by, and sue in the name of, an individual. We were careful to keep the imbalance in mind in our deliberations. We took it as our remit to pinpoint procedural issues of possible concern to all who participated in the judicial review process and where we felt that insufficient information was available to us to come to an appropriate conclusion, or that further work was needed before deciding on action, we have held back and said so.

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50 Discussed further in Chapter 2 and clearly illustrated in Chapter 5, para 5.37.

51 See Appendix D, Figs. 39 and 40.

52 Bondy, Platt and Sunkin, *The Value and Effects of Judicial review: The Nature of Claims, Their Outcomes and Consequences* (Public Law Project, 2015), 1.

53 Sunkin, 'The judicial review caseload 1987-89' [1991] Public Law 490, 497.

Governance and accountability

38. We cannot know either how the population at large feels about "the appropriate constitutional place of judicial review" or even about the constitution. Opinions will in any event differ. The terminology of "rule of law" is a little legalistic and off-putting but its general meaning is well understood in its simple sense that everyone is subject to and must obey the law. Other values are deeply embedded in popular culture. Honesty and integrity are said by the Commissioner for Public Standards to be "a norm in UK democracy" and "fairness" in decision-making processes is apparently taken for granted.[54]

39. In recent years, openness, transparency and accountability have become "buzz words of modern governance", constantly recurring in the media and listed in the Nolan standards of conduct in public life.[55] The Ministerial Code confirms that ministers are expected to observe the seven Nolan Principles of selflessness, integrity, objectivity, accountability, openness, honesty and leadership, and also states that holders of public office are accountable for their decisions and actions and "must submit themselves to whatever scrutiny necessary to ensure this". Ministers are said to "have a duty to Parliament to account, and be held to account, for the policies, decisions and actions of their departments and agencies". This duty "should be read against the background of the overarching duty on Ministers to comply with the law and to protect the integrity of public life".[56]

40. The two most potent accountability mechanisms in our contemporary system of governance are also our two most authoritative constitutional institutions: Parliament and the courts. In his study of democratic accountability, Richard Mulgan wrote that political accountability, left to itself:

> "falls short of its objective of making governments responsive to the interests of the public. Governments can still withhold information, resist scrutiny and unduly shape the agenda of the public debate. Other mechanisms are needed to help reduce the accountability deficit."

For Mulgan, review through the legal system and the courts is:

> "in some aspects the most powerful form of external review of executive action. Judicial hearings increasingly require the government to disclose publicly what it has done and why; they allow members of the public the right to contest such government actions, and they can force the government into remedial action. Indeed, an effective, independent judicial system is a fundamental prerequisite for effective executive accountability."[57]

The Panel agrees.

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54 Evans, 'Are we in a post-Nolan age?' (The Hugh Kay Lecture, 20 November 2020).
55 First report of the Committee on Standards in Public Life (1995).
56 Cabinet Office, Ministerial Code (2019) at [1.3].
57 Mulgan, *Holding Power to Account: Accountability in Modern Democracies* (Palgrave Macmillan, 2003), 74-5.

CHAPTER 1: CODIFICATION

Introduction

1.1. Paragraph 1 of the terms of reference asks the Panel to consider:

> **"Whether the amenability of public law decisions to judicial review by the courts and the grounds of public law illegality should be codified in statute?"**

This formulation envisages two separate forms of codification raising rather different issues, which the Panel dealt with separately:

- codification of amenability to review, which we understood to mean a possible statutory formulation of a jurisdictional test or, to put this differently, a statutory delineation of the boundaries of judicial review
- a "codification" or statutory formulation of the grounds for, or substantive law of, judicial review

1.2. In considering these questions, the Panel was asked to bear in mind possible unintended consequences of codification. They should consider the experience in other common law jurisdictions with special reference to Australia, where a statutory codification of judicial review was introduced at federal level in 1977.

A general statutory statement of amenability to review

1.3. Judicial review is a common law process, traceable over time in England and Wales to the prerogative writs, later orders, of the Crown,[1] a position confirmed by the Supreme Court in recent case law. In *Cart* and *Eba*,[2] which concerned the possibility of judicial review of the Upper Tribunal, apparently barred by the Tribunals, Courts and Enforcement Act 2007 (TCEA) in applications for permission or leave to appeal both in Scotland, and England and Wales, the government attempted to argue that unappealable decisions of the Upper Tribunal under TCEA were never subject to judicial review. In the Court of Appeal's decision in *Cart*, Sedley LJ said:

> "In our judgment, as in that of the Divisional Court, **the supervisory jurisdiction of the High Court, well known to Parliament as one of the great historic artefacts of the common law, runs to statutory tribunals both in their old and in their new incarnation unless ousted by the plainest possible statutory language**. There is no such language in TCEA. The statute invests with standing and powers akin to those of the High Court a body which would otherwise not possess them precisely

[1] For a history of judicial review in England and Wales, see de Smith, *Judicial Review of Administrative Action* (1959), now *De Smith's Judicial Review*, 8th ed (Sweet & Maxwell, 2018). For Scotland, see Chapter 5, para 5.7. below.

[2] *R (Cart) v The Upper Tribunal* [2012] 1 AC 663; *Eba v Advocate General for Scotland* [2012] 1 AC 710.

> because it and the High Court are not, and are not meant to be, courts of co-ordinate jurisdiction."[3]

1.4. In the Supreme Court, where the broad claim was abandoned, Lady Hale repeated that "the scope of judicial review is an artefact of the common law." Its object is to maintain the rule of law and ensure that, "within the bounds of practical possibility, decisions are taken in accordance with the law, and in particular the law which Parliament has enacted, and not otherwise."[4] Citing Laws LJ in the Court of Appeal, Lady Hale stated that:

> "It was a constitutional solecism to consider that merely to designate a body a 'superior court of record' was sufficient to preclude judicial review. This could only be done by the most clear and explicit language and not by implication…. The rule of law requires that statute law be interpreted by an authoritative and independent judicial source:
>
> 'the need for such an authoritative judicial source cannot be dispensed with by Parliament. This is not a denial of legislative sovereignty, but an affirmation of it... The requirement of an authoritative judicial source for the interpretation of law means that Parliament's statutes are always effective...'
>
> That source was the High Court. **This was not because it was a superior court of record but because it was a court of unlimited jurisdiction**. Other courts and tribunals, having a limited jurisdiction, were not that source and were susceptible to judicial review by the High Court. Unreviewable courts of limited jurisdiction were exceptional."[5]

This was confirmed in *Michalak v General Medical Council*, where Lord Kerr asserted that "judicial review is not a procedure which arises 'by virtue of' any statutory source. Its origins lie in the common law."[6]

1.5. When the Law Commission reviewed the prerogative orders in the early 1970s, it was restrained by the government from considering any "detailed definition of the circumstances in which an application for judicial review could be made." Its central recommendation was therefore to bring existing remedies together in the application for judicial review, now the standard procedure for obtaining review of a public law decision.[7]

1.6. The Law Commission returned to the subject in 1994, including in its report a draft bill that would have linked amenability to review closely to the common law jurisdiction to make orders of mandamus, prohibition and certiorari. They deliberately chose not to look at the substantive grounds for judicial review, which they believed should continue to be "the subject of judicial development".[8]

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3 [2010] EWCA Civ 859 at [20] (emphasis added).
4 *R (Cart) v The Upper Tribunal* [2012] 1 AC 663, at [37].
5 ibid, at [30] citing Laws LJ at [2011] QB 120, 138 [38].
6 [2017] 1 WLR 4193, at [32].
7 Law Commission, *Remedies in Administrative Law* (Law Com No 73, 1976).
8 Law Commission, *Administrative Law: Judicial Review and Statutory Appeals* (Law Com No 226, 1994), para [1.3].

1.7. The unofficial JUSTICE/All Souls Committee, set up in 1978 to examine and report on effective redress of grievances suffered as a consequence of acts or omissions of the various agencies of government, was probably the most thorough review of English administrative law to date. The committee did not devote much space to codification but, observing that "many, perhaps most, lawyers do not deal with administrative law cases in the course of their day-to-day practice and there are many litigants or potential litigants who would be assisted by a clear statement of the grounds of challenge",[9] they underlined the importance of making the law as clear as possible and accessible and intelligible to ordinary people. Sweeping aside criticisms of the Australian Administrative Decisions (Judicial Review) Act 1977 (ADJRA) – which is further discussed below – the Committee dismissed the idea that the ADJRA formulation was "no more than convenient shorthand labels for established ground of challenge" and recommended that an "enactment along the lines of the Australian legislation" should be adopted here.

1.8. Successive governments on the other hand have been happy to leave the question of amenability to the judges. There has been no attempt to formulate in statute the general jurisdiction of the courts to dispense judicial review, although a number of statutes touch peripherally on jurisdiction.

- Section 19 of the Senior Courts Act 1981 establishes the High Court as a superior court of record with a statutory jurisdiction that includes "all such other jurisdiction (whether civil or criminal) as was exercisable by it immediately before the commencement of this Act" – a formula that apparently preserves the existing common law jurisdiction.
- Section 31 of the Senior Courts Act provides that an application for a mandatory, prohibiting or quashing order, a declaration or injunction under subsection (2) or an injunction under section 30 "shall be made in accordance with rules of court by a procedure to be known as an application for judicial review".
- Section 54(2) of RSC Part 54 states that judicial review procedure "must be used" in a claim for judicial review where the claimant is seeking a mandatory order, a prohibiting order or a quashing order and "may be used" (section 54(3)) where the claimant is seeking a declaration or injunction. The structure was slightly modified by the TCEA, which established the Upper Tribunal as a superior court of record. It also inserted a new section 31A into the Senior Courts Act, authorising the High Court to transfer judicial review applications in certain circumstances to the Upper Tribunal. The effects of this transfer can be seen in the statistical figures in Appendix D.

[9] JUSTICE/All Souls, *Administrative Justice: Some Necessary Reforms* (Clarendon Press, 1988), 157-8.

Codification of the grounds for judicial review

1.9. There are two main approaches to codification of the grounds for judicial review:

- A statement of general principle
- A detailed list of the main grounds for review

Statement of general principle

1.10. The first approach is exemplified in the Barbados Administrative Justice Act 1983,[10] which provides:

> "The grounds upon which the Court may grant relief by way of the remedies mentioned in this Act include the following:
> (a) that an administrative act or omission was in any way unauthorised or contrary to law;
> (b) excess of jurisdiction;
> (c) failure to satisfy or observe conditions or procedures required by law;
> (d) breach of the principles of natural justice;
> (e) unreasonable or irregular or improper exercise of discretion;
> (f) abuse of power;
> (g) fraud, bad faith, improper purposes or irrelevant considerations;
> (h) acting on instructions from an unauthorised person;
> (i) conflict with the policy of an Act of Parliament;
> (j) error of law, whether or not apparent on the face of the record;
> (k) absence of evidence on which a finding or assumption of fact could reasonably be based; and
> (l) breach of or omission to perform a duty."

1.11. Clearly this is not a codification in the sense of a systematic statement of the rules and principles applicable to judicial review, but a "light touch" formulation, which leaves wide discretion to the judiciary. **The Panel observes, however, that statements of general principle are not without benefits. They bring together the traditional grounds for judicial review in one place, stamping them with the authority of Parliament and restating basic principle in simple language accessible to the general public. They therefore bestow the legitimacy of democratic approval on the judicial process and are educative, while retaining the flexibility of the common law.**

Listing the grounds for review specifically

1.12. An example of the listing approach is to be found in the South African Promotion of Administrative Justice Act (PAJA), which implements the constitutional right to administrative action that is "lawful, reasonable and procedurally fair". Section 6(2) of PAJA lists more than 15 specific grounds for review. According to Professor Cora Hoexter, a leading expert on South African administrative law, the outcome has been an upsurge in procedural litigation. "What had previously

[10] Cap. 109B, s 4. Professor HWR Wade advised on the Act, which came into force in 1983 and has not been substantially amended. See similarly the Trinidad and Tobago Judicial Review Act 2000.

been a non-issue in our administrative law became its most noticeable feature. The threshold administrative action enquiry soon took up far more space in the law reports than any other issue."[11]

1.13. The aim of the ADJRA was to invest a superior federal court with jurisdiction to hear judicial review applications, codify the common law of judicial review and be the primary means of seeking review of government decisions. But the ADJRA applies at federal level only and was never intended to be exclusive.[12] Section 5(1) of the ADJRA sets out the grounds for review expressed very generally. They are:

> "(a) that a breach of the rules of natural justice occurred in connection with the making of the decision;
> (b) that procedures that were required by law to be observed in connection with the making of the decision were not observed;
> (c) that the person who purported to make the decision did not have jurisdiction to make the decision;
> (d) that the decision was not authorized by the enactment in pursuance of which it was purported to be made;
> (e) that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made;
> (f) that the decision involved an error of law, whether or not the error appears on the record of the decision;
> (g) that the decision was induced or affected by fraud;
> (h) that there was no evidence or other material to justify the making of the decision;
> (j) that the decision was otherwise contrary to law."

1.14. Section 5(1)(e) is amplified by section 5(2), which is more specific and reads:

> "The reference in paragraph (1)(e) to an improper exercise of a power shall be construed as including a reference to:
> (a) taking an irrelevant consideration into account in the exercise of a power;
> (b) failing to take a relevant consideration into account in the exercise of a power;
> (c) an exercise of a power for a purpose other than a purpose for which the power is conferred;
> (d) an exercise of a discretionary power in bad faith;
> (e) an exercise of a personal discretionary power at the direction or behest of another person;
> (f) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;

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[11] Hoexter, 'The principle of legality in South African administrative law' [2004] Macquarie Law Journal 8. See also Forsyth and others (eds), *Effective Judicial Review: A Cornerstone of Good Governance* (Oxford University Press, 2010), 50.

[12] The ADJRA derives from a package of reforms relating to administrative justice recommended in the 1970s by the Kerr Committee and the Ellicott Committee: see Creyke, 'Administrative justice – towards integrity in government' **(**2007) 31 Melbourne University Law Review 706.

(g) an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power;
(h) an exercise of a power in such a way that the result of the exercise of the power is uncertain; and
(j) any other exercise of a power in a way that constitutes abuse of the power."

1.15. Stylistically, this detailed approach is more consistent with the style of statutory drafting in the United Kingdom. It is more like the modern idea of a code than a mere statement of general principle, but it is also longer and more complex – therefore less accessible to a non-legal audience. **The danger is, in short, that the detailed approach goes too far and not far enough. It is restrictive, which may make it hard to keep the law in tune with political and administrative change, but also misleadingly incomplete in that it does not capture every form of judicial review.** This is why sections 5(1)(j) and 5(2)(j) were included in the ADJRA at the suggestion of Professor HWR Wade, who was wary of the stultifying potential of an exhaustive codification that purported to be exclusive.

1.16. The Australian Administrative Review Council has reviewed the operation of the ADJRA several times, listing its benefits as being: to provide a list of grounds for review; flexible remedies; the right to request a written statement of reasons; and clear standing rules.[13] Academic opinion varies:

- Cane, McDonald and Rundle, who deal with the ADJRA at some length in their administrative law textbook, are less than positive.[14] They feel that the criteria for jurisdiction, applicable to (i) a decision (ii) of an administrative character (iii) made under an enactment has generated a "surprisingly technical and complex jurisprudence", which has "not resulted in an integrated set of principles".
- Groves calls the Act "an important milestone" in the development of Australian administrative law that on balance provides "a good model for statutory judicial review",[15] though he feels that it may have discouraged experimentation.
- Aronson describes the Act as a "legislative model" subject to three main criticisms: its restricted coverage, especially as compared to common law judicial review; its largely formulaic restatements of the common law's review grounds; and its failure to articulate any general principles or organising themes that might give some shape and direction to each particularised ground. His general conclusion is balanced. It is undoubtedly true that the mass of cases and commentaries surrounding the ADJRA "exert a powerful attraction away from the common law". It is, however, doubtful that this has resulted in undue rigidity, either at

[13] Australian Administrative Review Council, *Federal Judicial Review in Australia* (2012), 9, 11-12.
[14] Cane, McDonald and Rundle, *Principles of Administrative Law*, 3rd ed (Oxford University Press, 2018), [2.51].
[15] Groves 'Should we follow the gospel of the ADJR Act?' (2010) 34 Melbourne Law Review 737, 737.

> common law or with regard to developing understanding of the ADJRA grounds.[16]

1.17. Aronson praises the ADJRA right to reasons upon timely request as more specific than any common law right to reasons. But both Aronson and Groves have expressed concern that the duty to give reasons and the statutory (as opposed to common law) judicial review process can be excluded by making changes to the Schedule of the ADJRA. Aronson asserts that for roughly two decades now, the Commonwealth Attorney General's Department has steadfastly sought to excise subject matter from the ADJRA's coverage."[17] The constitutionally entrenched judicial review jurisdiction now provides the safety net in that country where statutory judicial review mechanisms have been withdrawn.

1.18 ADJRA coverage has been largely (although not entirely) withdrawn from migration matters. Statutory restriction or exclusion of judicial review has been used quite widely in the area of migration, even though judicial review is underwritten by section 75(v) of the Commonwealth Constitution.[18] An attempt was first made to codify the grounds of judicial review for migration by excising migration from ADJRA, and copy/pasting the review grounds into the Migration Act but excluding some of the grounds. The High Court found a number of loopholes. The copy/paste review grounds were then excised in a later Migration Act, leaving the High Court to develop new review grounds.

1.19 The result has been to force the Federal Court and the High Court back onto common law judicial review for "jurisdictional error", a ground that is constitutionally entrenched for both federal law and state law. Were it not for the legislative carve-outs from ADJRA coverage, Australia might have seen the gradual disappearance of the language of jurisdictional error, whereas the carve-outs have had the effect of making that constitutionally embedded terminology more prominent. In *Hossain v Minister for Immigration and Border Protection*, Kiefel CJ, Gageler and Keane JJ observed:

> "Had statutory mechanisms for judicial review (such as that contained in the *Administrative Procedure Act 1946* (US) or the *Administrative Decisions (Judicial Review) Act 1977* (Cth)) been enacted to cover judicial review of statutory decision-making more comprehensively, the terminology of jurisdiction and of jurisdictional error in its application to administrative action may well have fallen into desuetude in Australia. Indeed, there was a time in the 1980s and 1990s when the terminology was little used, and doubts were expressed even afterwards as to its continuing utility.

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[16] Aronson, 'Is the ADJR Act hampering the development of Australian administrative law?' (2004) 15 Public Law Review 202. A short account of ADJRA is to be found in Aronson, Groves and Weeks, *Judicial Review of Administrative Action and Government Liability*, 6th ed (Thomson Reuters, 2017), the leading Australian text on judicial review.

[17] See Aronson, 'Is the ADJR Act hampering the development of Australian administrative law?' (2004) 15 Public Law Review 202.

[18] See Edwards, 'Tampering with refugee protection: the case of Australia' (2003) 15(2) International Journal of Refugee Law 192.

> "For so long as there remains a necessity for courts to fall back on constitutionally entrenched minimum jurisdictions to engage in judicial review of administrative action, however, the traditional distinction between jurisdictional and non-jurisdictional error cannot be avoided. The traditional distinction can be explained in more modern language. But an attempt to reframe the distinction in entirely new language is unlikely to be helpful."[19]

1.20. The Australian courts recognise that the term "jurisdictional error" is conclusory, reached by establishing any one or more of the common law grounds of review, with a proviso that it must be possible to say that the challenged decision might have gone the other way if not for the error.

1.21. In Canada, as in Australia, the common law survives alongside statute.

1.22. The Canadian Federal Courts Act**,** RSC 1985, c. F-7 provides in section 18.1(4) for the Federal Court to have exclusive jurisdiction in specified public law cases. It may grant relief if satisfied that there has been a jurisdictional error or error of law, an erroneous finding of fact made perversely or capriciously, failure to observe a principle of natural justice, procedural fairness or other mandatory procedure or fraud. As with the ADJRA, there is a 'catch all' clause: the court may intervene where a relevant administrative body has "acted in any other way that was contrary to law" (section 18.1 (4)(f)).

1.23. In *Khosa*,[20] the Minister tried to persuade the Supreme Court that section 18.1 had established a *legislated* standard of review that displaced the common law altogether. The Court ruled that the general principles of judicial review had not been ousted by the statutory formulation. Reference to section 18.1(4) should be the "first order of business", but "most if not all judicial review statutes are drafted against the background of the common law of judicial review", and it was impossible to understand a framework statute like the Federal Courts Act without an appreciation of "curial approaches" to judicial review.

1.24. The South African Constitutional Court has taken an opposite approach, ruling that "the grundnorm of administrative law is now to be found in the first place not in the doctrine of ultra vires, nor in the doctrine of parliamentary sovereignty, nor in the common law itself, but in the principles of our Constitution." The common law informs the provisions of the Promotion of Administrative Justice Act 2000 (PAJA), which derives its force from the Constitution. Even so, the Constitutional Court left the door ajar, observing that the extent to which common law remained relevant to administrative review "will have to be developed on a case-by-case basis as the courts interpret and apply the provisions of PAJA and the Constitution".[21]

1.25. Statutory codifications are relatively easy to amend**.** In the United Kingdom, where a statute may of course be overridden, repealed or partially repealed by a

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[19] (2018) 264 CLR 123, at [21]-[22] (footnotes omitted).

[20] *Canada (Citizenship and Immigration) v Khosa* [2009] 1 SCR 339.

[21] ***Bato Star Fishing** (Pty) Ltd **v Minister of Environmental** Affairs and Tourism and Others* (2004) (4) SA 490 (CC) at [22] (footnotes omitted); *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others* (2000) (2) SA 674 (CC).

later statute, a practice has developed of providing in the parent Act that changes to primary legislation may be made by the executive via secondary legislation. Section 10(2) of the Human Rights Act 1998 provides, for example, that, "If a Minister of the Crown considers that there are compelling reasons for proceeding under this section, he may by order make such amendments to the legislation as he considers necessary to remove the incompatibility." This type of 'Henry VIII clause', which is becoming increasingly common, would put judicial review grounds into the hands of the executive.

Statutory codification and the common law: the United Kingdom

1.26. Essentially, there are four ways for an Act of Parliament to deal with the common law. It might:

- make specific provision for preserving the common law
- contain a clause permitting "any other ground of judicial review", as in the ADJRA
- be silent on the subject
- seek to abolish the common law – this is dealt with in para 1.33. below

Specific provision for preservation or an 'any other ground' clause

1.27. The Panel felt that these two statutory techniques would probably have much the same effect. Both would bring together the traditional grounds for review in one place, stamping them with the authority of Parliament. Judicial discretion as to interpretation and to introduce new grounds for review would remain. **The Panel consider that the chief advantage of such an approach is flexibility. It would allow judicial review to change and expand in line with the changing times, leaving space for new grounds to be introduced. The statute might have an inhibiting effect on judicial creativity, and specifically to authorise retention of the common law would create uncertainty, decrease clarity and might have the effect of reducing the statutory formulation to a largely educative function. In these circumstances, it would achieve very little.**

Statutory silence

1.28. Where a codifying statute is silent as to its effect on common law powers of judicial review, the ordinary rules of statutory interpretation will apply. Everything points to the conclusion that statutory silence would not be enough for modification of common law rules of judicial review to be implied. Access to justice is protected as a human right by ECHR Article 6. More important, it is now recognised as a common law constitutional right. In the *Unison* case, where the validity of the Employment Appeal Tribunal Fees Order 2013 was in issue, the Supreme Court accepted argument that a right to access to justice *under domestic law* was involved: "the right of access to justice is not an idea recently imported from the continent of Europe, but has long been deeply

embedded in our constitutional law." [22] Lord Reed went on to say: "many examples can be found of judicial recognition of the constitutional right of unimpeded access to the courts… **which can only be curtailed by clear statutory enactment**."[23]

1.29. In the case of secondary legislation, the presumption against implying restriction or abolition of the common law would be stronger. It is settled law that any interference with fundamental rights must be clearly authorised by primary legislation.[24] In the *Unison* case, *ex p Witham* was cited, where Laws LJ asserted that there were "implied limitations" on the Lord Chancellor's powers to prescribe court fees in Fees Orders. The governing statutory provision did not permit him to exercise the power in such a way as to deprive the citizen of "what has been called his constitutional right of access to the courts".[25] Any secondary legislation that purported to strike out or seriously restrict one of the grounds for review would almost certainly be sent back for Parliament to enact if it so wished.[26]

1.30. Furthermore, the courts would be likely to interpret changes to the judicial review process in the light of the principle of legality, a general principle of interpretation applied where there is ambiguity over rights. As enunciated by Lord Hoffmann in *Simms*, the principle of legality requires an express statement of intention in an Act of Parliament before the courts will accept that Parliament intends to override human rights:

> "Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document."[27]

1.31. Alternatively, legislation codifying judicial review might be treated as a "constitutional statute", which would afford some protection against implied

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22 *R (UNISON) v Lord Chancellor* [2020] AC 869, at [64] (Lord Reed).
23 ibid, at [76] and [79] (emphasis added).
24 *R v Secretary of State for Social Security, ex p B and JCWI* [2000] EWCA Civ 1293.
25 *R v Lord Chancellor, ex p Witham* [1998] QB 575, 580.
26 What the position would be with delegated legislation made in terms of s10(2) of the Human Rights Act is less clear: see Craig, 'Why remedial orders altering post-HRA Acts of Parliament are ultra vires', UK Constitutional Law Blog, 21 December 2017; Ekins, *Against Executive Amendment of the Human Rights Act 1998* (Policy Exchange, 2020).
27 *R v Home Secretary*, *ex p Simms* [2000] 2 AC 115, 131.

repeal, as Laws LJ suggested in *Thoburn v Sunderland CC*: "Ordinary statutes may be impliedly repealed. Constitutional statutes may not...A constitutional statute can only be repealed, or amended in a way which significantly affects its provisions touching fundamental rights or otherwise the relation between citizen and state, by unambiguous words on the face of the later statute."[28] Any statute that purported to codify judicial review could be regarded as constitutional if it impinged on common law rights, such as the common law right of access to the courts recognised in the *Unison* case. Whether the judiciary would want to move in this direction is unclear, as the point has never yet arisen.

Statutory abrogation and ouster

1.32. In the Panel's view, codification possesses the serious disadvantage that it would enable Parliament (and in some circumstances possibly the executive) easily to oust judicial review by abrogating or altering the statutory code, without any recourse to the common law. The code effectively crowds out the more flexible common law, making it easy and perhaps even a routine matter to change the rules of the game. For this reason alone, the courts seek to preserve their judicial review jurisdiction to deal with extraordinary situations, as they did in *Cart* and *Eba*, discussed in paragraph 1.3.

1.33. A codifying statute that purports to abolish the common law of judicial review has many of the characteristics of an ouster clause and would almost certainly attract the complex case law on that topic. *Anisminic v Foreign Compensation Commission*[29] involved a statutory provision reading "The determination by the Commission of any application made to them under this Act shall not be called in question in any court of law." By a majority, the House of Lords held that this wording was insufficient to preclude an appeal to the courts since the decision of the FCC (which contained what the Lords saw as an error of law) was merely a "purported determination" and hence a nullity. A famous passage from Lord Reid lists situations in which a tribunal decision might be a nullity:

> "It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive."[30]

1.34. In *Cart*,[31] it was accepted that *Anisminic* had abolished the old formalist distinction between jurisdictional and non-jurisdictional error, thus extending the

[28] [2003] QB 151, at [63].
[29] [1969] 2 AC 147.
[30] ibid, 171.
[31] *R (Cart) v Upper Tribunal* [2012] 1 AC 663.

reach of judicial review to all errors of law.[32] A bona fide attempt to make the Upper Tribunal the final court of appeal for certain procedural issues was defeated when the Supreme Court ruled that it was subject to judicial review.

1.35. *Anisminic* makes it difficult to find a form of words that will conclusively preclude judicial review. In *Privacy International*,[33] the issue was the possibility of review by the courts of the Investigatory Powers Tribunal (IPT), a specialist tribunal, with 10 legally qualified members, chaired by a Lord Justice of Appeal and with the status of the High Court. Section 67(8) of the Regulation of Investigatory Powers Act 2000 (RIPA) provides:

> "Except to such extent as the Secretary of State may by order otherwise provide, determinations, awards, orders and other decisions of the Tribunal (including decisions as to whether they have jurisdiction) shall not be subject to appeal or be liable to be questioned in any court."

1.36. Both the Divisional Court and the Court of Appeal held that section 67(8) precluded judicial review of the IPT decision. In the Court of Appeal, Sales LJ opined that "the drafter of section 67(8) has expressly adverted to the possibility of the IPT making an error of law going to its jurisdiction or power to act, by the words in parenthesis in that provision: 'including decisions as to whether they have jurisdiction'."[34] Yet by a majority of 4-3, the Supreme Court found the wording of section 67(8) of RIPA insufficient to oust the supervisory jurisdiction of the High Court for errors of law. Lord Carnwath in his majority opinion defended the current law as "wholly consistent with the modern constitutional settlement [as] confirmed by the [Constitutional Reform] Act 2005, and recognised by this court in *Miller".*[35] His obiter dicta go much further:

> "The critical step taken by this court in *Cart* was to confirm, what was perhaps implicit in some of the earlier cases, that it is ultimately for the courts, not the legislature, to determine the limits set by the rule of law to the power to exclude review. This proposition should be seen as based, not on such elusive concepts as jurisdiction (wide or narrow), ultra vires, or nullity, but rather as a natural application of the constitutional principle of the rule of law (as affirmed by section 1 of the 2005 [Constitutional Reform] Act), and as an essential counterpart to the power of Parliament to make law. The constitutional roles both of Parliament, as the maker of the law, and of the High Court, and ultimately of the appellate courts, as the guardians and interpreters of that law, are thus respected." [36]

1.37. Two recent bills laid before Parliament contain clauses designed to preclude judicial review worded with the apparent intention of circumventing the principles enunciated in Anisminic. Scrutinising the United Kingdom Internal Market Bill, the House of Lords Constitution Committee, warned that "If enacted, such an exclusion of the judicial function would put ministerial regulation-making

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[32] See Murray, 'Process, substance and the history of error of law review' in Bell and others (eds), *Public Law Adjudication in Common Law Systems* (Hart Publishing, 2016), 101-10.
[33] *R (Privacy International) v Investigatory Powers Tribunal* [2020] AC 491.
[34] [2018] 1 WLR 2572, at [34].
[35] [2020] AC 491, at [131].
[36] ibid.

powers above the law in an unprecedented manner. It would be an unacceptable breach of the rule of law."37 The clause was later withdrawn.

1.38. The Draft Fixed-Term Parliaments Act 2011 (Repeal) Bill currently before Parliament, with a request from the government to the Bill Committee and other parliamentary select committees to give the Bill careful consideration, contains a preclusive clause that aims to provide for the non-justiciability of "the revived prerogative powers". This is further discussed in Chapter 2.

1.39. In the view of the Panel, no conclusive answer can be given as to whether and when there can be a statutory abrogation of judicial review. Ouster clauses failed to preclude review in both *Anisminic* and *Privacy International*, but there are strong dissenting judgments in both, and the case law is generally inconsistent. In *Anisminic*, Lord Morris defended the carefully reasoned 10-page judgment of the FCC – a tribunal made up of people "in whom there could be every confidence"[38] and who were "centrally within their jurisdiction"[39] in arriving at their decision. In *Privacy International*, Lords Sumption, Wilson and Reed joined a unanimous Court of Appeal and Divisional Court in upholding the ouster, and Lord Sumption observed:

> "There is nothing inconsistent with the rule of law about allocating a conclusive jurisdiction by way of review to a judicial body other than the High Court. The presumption against ouster clauses is concerned to protect the rule of law, which depends on the availability of judicial review. It is not concerned to protect the jurisdiction of the High Court in some putative turf war with other judicial bodies on whom Parliament has conferred an equivalent review jurisdiction."[40]

Conclusions

1.40. In drawing conclusions, the Panel considered the wide range of responses to our call for evidence. The IRAL Secretariat logged 149 responses in relation to the topic of codification, of which six respondents were in favour, 22 favoured partial codification and 110 were against. Respondents for codification suggested that:

- Codification could enhance legal clarity and certainty as well as clarify the purpose of judicial review.
- Codification could increase the accessibility for potential litigants (particularly litigants in person) and speed up the process, by limiting the current areas of discretion.
- The standing of judicial review could be improved by making it a right, rather than a discretionary remedy.
- Codification could prevent the Supreme Court from introducing proportionality as a general ground for review.

37 House of Lords Constitution Committee, *UK Internal Market Bill*, HL 151 (2020), at [194]-[196].
38 [1969] 2 AC 147, 181.
39 ibid, 194.
40 [2020] AC 491, at [199].

1.41. The main arguments against codification were:

- Flexibility is crucial for the rule of law.
- It would undermine confidence in the public sector, if the perception was that government were confining the grounds on which it can be held accountable.
- High level and general legislative changes may not add anything in practice while substantive changes would be inconsistent with the UK's uncodified constitutional arrangements.
- Detailed and specific legislative changes could lead to uncertainty and a lack of accessibility.
- Existing restrictions on judicial review are currently adequate to filter weak claims. The cost of such claims is insufficient to warrant greater barriers. If further restrictions were relied on, injustice could occur.
- Codification could expand the scope of judicial review – once codified in an Act of Parliament, the grounds will be subject to judicial interpretation and could lead to an immediate rise in litigation.
- Statutory process could inadvertently remove some of the avenues of challenge available and could potentially have a negative impact on the effectiveness of the pre-action process.
- Reducing the oversight afforded by judicial review could increase perceived regulatory risk, which could lead to investments being perceived as riskier.

1.42. There was a general perception that codification of the core principles and grounds of judicial review in clear terms might be marginally beneficial for the educational purpose of improving public understanding and accessibility of the law. This marginal advantage is, however, outweighed by the many potential disadvantages. There was nothing in the experience of codification in other jurisdictions to persuade us that codification has advantages.

1.43. Our conclusions were:

- **Judicial review is considered an essential ingredient of the rule of law in the care of an independent judiciary.**
- **Judicial review is an essential element of access to justice, which is a constitutional right and also a right protected by the European Convention.**
- **The ability of the courts to interpret and apply the law in individual cases should not be restricted.**
- **A statutory formulation might add legitimacy to judicial review.**
- **It might also help to set boundaries to judicial interpretative expansion.**
- **A statutory formulation of judicial review will be interpreted as operating in the framework of the common law.**
- **Statutory (or regulatory) abrogation of judicial review can only be excluded by the most clear and explicit words in statute and will not be implied.**

- **On balance, little significant advantage would be obtained by statutory codification, as the grounds for review are well established and accessibly stated in the leading textbooks.**
- **But codification might make judicial review more accessible to non-lawyers.**

CHAPTER 2: NON-JUSTICIABILITY

Introduction

2.1. Paragraph 2 of the IRAL terms of reference asks the Panel to consider:

> **"Whether the legal principle of non-justiciability requires clarification and, if so, the identity of subjects/areas where the issue of the justiciability/non-justiciability of the exercise of a public law power and/or function could be considered by the Government."**

2.2. In considering this issue, we acknowledge the point made by the Cambridge Centre for Public Law in its submission to us that "it is important to recognise that the legal concept of justiciability is not a doctrine solely related to the judicial review process. It is also a general doctrine of domestic law. It is used primarily to determine whether there are some issues which courts cannot or should not determine on the ground that they are non-justiciable."[1]

2.3. The Centre goes on to observe the importance of the concept of non-justiciability in international law, "in relation to the acts of a foreign state whose validity is called into question in a UK domestic court. The rules on international law and comity will lead a domestic court not to adjudicate on such legal questions."[2]

2.4. Within the law on judicial review, the concept of non-justiciability plays a twofold role. First, it marks out certain exercises of public power as non-reviewable on any ground. In such cases, the exercise of the power is said to be "non-justiciable". It is in this sense that the grant of honours by the Queen is still recognised by the courts as being non-justiciable.[3] More colloquially, we might say that "non-justiciability" in this sense marks out a particular area of public power as being a "no-go" area for judges: it is for some other constitutional actor to decide how that power will be exercised, and not for the judges.

2.5. Second, it marks out certain grounds of review as not being available when reviewing the exercise of a particular type of public power because that ground of review raises issues that are not suitable for judicial determination. For example, in the *GCHQ* case – which opened the door to exercises of the royal prerogative being judicially reviewable – Lord Diplock took the view that while the exercise of a prerogative power might be reviewable on the grounds of "illegality" or "procedural impropriety", when it came to review on the ground of "irrationality", it was:

> "difficult to envisage in any of various fields in which the prerogative remains the only source of the relevant decision-making power a decision

1 EXT047, para 27.
2 ibid, para 29.
3 See *Graham Nassau Gordon Senior-Milne v Advocate General for Scotland* [2020] CSIH 39, [20]: "we are of [the] opinion that the decision of the Queen to grant or withhold an honour cannot be the subject to judicial review, in view of its fundamentally discretionary nature."

> of a kind that would be open to attack through the judicial process upon this ground. Such decisions will generally involve the application of government policy. The reasons for the decision-maker taking one course rather than another do not normally involve questions to which, if disputed, the judicial process is adapted to provide the right answer, by which I mean that the kind of evidence that is admissible under judicial procedures and the way in which it has to be adduced tend to exclude from the attention of the court competing policy considerations which, if the executive discretion is to be wisely exercised, need to be weighed against one another – a balancing exercise which judges by their upbringing and experience are ill-qualified to perform."[4]

2.6. As we will recount, the past 40 years or so have seen a steady retreat within the law on judicial review away from the view that exercises of certain public powers are by their very nature non-justiciable in favour of the view that the exercises of those powers are either justiciable or reviewable on some grounds but not others.

2.7. It is this reality that may well have prompted the government's invitation to assess how the "principle of non-justiciability" is currently deployed within the law on judicial review. This is a question that not only requires us to reflect on what sort of issues the courts are technically competent to address, but to engage in a wider discussion of what sort of issues may be properly regarded as falling within the courts' purview, and what issues should be regarded as purely political.

2.8. We will proceed as follows. We will begin by setting out the developments that have occurred in the past 40 years as regards the application of the "principle of non-justiciability" within the law on judicial review.

2.9. We will then assess the current state of the law on non-justiciability, taking into account the concerns that have been expressed to us as to the impact developments in the law on non-justiciability have had, and are having, on the workings of government.

2.10. It is ultimately for Parliament to decide what the law in this area (as with every other area of law) should be, and it is for the courts to interpret what Parliament has said.[5] Given this, we will conclude by setting out and evaluating the possible options that are open to Parliament should it wish to correct a particular development in the law on non-justiciability, or forestall the possibility of further judicial innovation in respect of some aspect of the law on non-justiciability.

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4 *CCSU v Minister of the Civil Service* [1985] 1 AC 374, 411.

5 As Professor Christopher Forsyth QC observed in his submission to us (EXT087, at page 7), the question of what is justiciable and non-justiciable ultimately comes down to who is going to hold the executive accountable: the courts or Parliament? He goes on to observe that it "is for Parliament not for academic commentators, the executive, or self-appointed guardians of the rule of law to judge" whether the balance struck between legal and political accountability by the courts' decisions on justiciability is "in the common weal".

The decline of non-justiciability

2.11. Four key triggers in the 40-year decline in the importance of non-justiciability within the law on judicial review can be identified.

GCHQ

2.12. The first was the decision of the House of Lords in the *GCHQ* case.[6] While it had always been the case that the scope of a prerogative power was a matter for the courts to decide[7] – a point we will return to below – before *GCHQ*, it was understood that the exercise of an acknowledged prerogative power would not be subject to judicial review on any ground.[8] That understanding was overturned in the *GCHQ* case, where the House of Lords held that there was no reason in principle why the exercise of a power delegated to the Prime Minister under the royal prerogative to alter the terms and conditions of the employment of employees at GCHQ could not be judicially reviewed in an appropriate case.

2.13. Their Lordships hastened to limit the inroads on the "principle of non-justiciability" that their decision potentially opened up. Lord Fraser held that the former position in relation to the exercise of prerogative powers, that "once the existence and the extent of a [prerogative] power are established to the satisfaction of the court, the court cannot inquire into the propriety of its exercise" still applied "in relation to many of the most important prerogative powers which are concerned with control of the armed forces and with foreign policy and with other matters which are unsuitable for discussion or review in the law courts".[9]

2.14. In a famous passage, Lord Roskill agreed:

> "Many examples were given during the argument of prerogative powers which at present advised I do not think could properly be made the subject of judicial review. Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think, susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process. The courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular manner or Parliament dissolved on one date or another."[10]

2.15. No less important was Lord Diplock's view that where the exercise of a prerogative power could be judicially reviewed, it was doubtful that it could be reviewed on the basis of "irrationality". In contrast, the exercise of a reviewable prerogative power could be reviewed on the basis of error of law, as the

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6 ibid.
7 *Proclamation's Case* (1611) 12 Co Rep 74, 76: "the King hath no prerogative, but that which the law of the land allows him."
8 *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508.
9 [1985] 1 AC 374, 398.
10 ibid, 418.

question of whether a decision maker had made an error of law was "par excellence a justiciable question to be decided, in the event of a dispute, by those persons, the judges, by whom the judicial power of the state is exercisable".[11]

2.16. Since the decision in *GCHQ*, the range of prerogative powers that are regarded as reviewable on one or more grounds has steadily expanded, so much so that the latest edition of *De Smith's Principles of Judicial Review* feels able to assert that "no power – whether statutory, common law *or under the prerogative* – is inherently unreviewable."[12] To similar effect, the authors of a casebook on administrative law argue that it is "meaningless to classify particular *powers*...as non-justiciable" and that the principle of non-justiciability should be seen as focusing instead on whether "a given exercise of power raises an *issue* upon which courts are able to adjudicate".[13]

2.17. As we will explain below, we think this view of the law overstates the position – at least so far as the common law of judicial review is concerned – in that there are still some powers that are non-reviewable on any ground. But the direction of travel in favour of regarding more and more prerogative powers as reviewable in principle is undeniable and has existed for many years.

2.18. In *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Everett*,[14] the Court of Appeal held that the Foreign Secretary's exercise of the prerogative power to refuse to grant someone a passport would be judicially reviewable: "common sense tells one that, if for some reason a passport is wrongly refused for a bad reason, the court should be able to inquire into it."[15]

2.19. In *R v Secretary of State for the Home Department, ex parte Bentley*,[16] the Court of Appeal extended the law on judicial review to the prerogative power to grant someone a pardon. The Court held that the Home Secretary's failure to grant a conditional and posthumous pardon to Derek Bentley – executed for the murder of a police officer carried out by his accomplice while attempting to burgle a warehouse – was reviewable on the basis that the Home Secretary had failed properly to consider his full range of options in determining whether or not to pardon Bentley.

2.20. *Bentley* was then invoked by the Privy Council in *Lewis v Attorney General of Jamaica*[17] as a basis for extending the law on judicial review to one of Lord Roskill's "no-go" areas: the prerogative of mercy. Observing that the prerogative power to grant a pardon was "not so far distant"[18] from the power to grant

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11 ibid, 410.
12 Woolf et al, *De Smith's Principles of Judicial Review*, 2nd ed (Principles of Judicial Review (Sweet & Maxwell, 2020), [1-035].
13 Elliott and Varuhas*, Administrative Law: Text and Materials*, 5th ed (Oxford University Press, 2017), 124 (emphasis in original).
14 [1989] 1 QB 811.
15 ibid, 817 (O'Connor LJ).
16 [1994] QB 349.
17 [2001] 2 AC 50.
18 ibid, 77.

clemency to a convicted prisoner, the Privy Council held that the exercise of the prerogative of mercy could be reviewed on the basis of procedural impropriety.

2.21. The basis on which the Court of Appeal in *Bentley* overturned the former understanding, that the exercise of the prerogative of mercy was non-justiciable and therefore non-reviewable, is worth remarking on, as it illustrates how the non-justiciability of prerogative powers can be eroded, as a preliminary step to being eliminated completely. The Court observed that "it was clear that [if] the Home Secretary had refused to pardon someone solely on the ground of their sex, race or religion, the courts would be expected to interfere and, in our judgment, would be entitled to do so."[19] Having in this way made an inroad into the principle that the exercise of the prerogative of mercy was non-justiciable, the Court then proceeded to review the Home Secretary's exercise of that prerogative in a situation that had nothing to do with its being exercised in a discriminatory manner.

2.22. A similar technique was used by Laws LJ in *R (Marchiori) v The Environment Agency* to bring into question the non-justiciability of other items on Lord Roskill's list, observing that "the law of England will not contemplate...review of any *honest* decision of government on matters of national defence"[20] and insisting that judicial review "remains available to cure the theoretical possibility of actual bad faith on the part of ministers making decisions of high policy".[21] Similarly, Sedley LJ suggested in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)*, that "the grant of honours for reward" might be reviewable.[22]

2.23. However, there has now been some judicial hesitation as regards the justiciability of certain prerogative powers being extended in this way, with Lord Reed warning in his (dissenting) judgment in *R (Miller) v Secretary of State for Exiting the European Union* that:

> "For a court to proceed on the basis that if a prerogative power is capable of being exercised arbitrarily or perversely, it must necessarily be subject to judicial control, is to base legal doctrine on an assumption which is foreign to our constitutional traditions. It is important for courts to understand that the legalisation of political issues is not always constitutionally appropriate, and may be fraught with risk, not least for the judiciary."[23]

and, as we have already observed, the non-justiciability of grants of honours has recently been reaffirmed by the Court of Session in Scotland.[24]

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19 ibid, 363.
20 [2002] EWCA Civ 3, [38] (emphasis added).
21 ibid, [40].
22 [2008] QB 365, [46]. See, to identical effect, Mance, 'Justiciability' (2018) 67 International & Commercial LQ 739, 753.
23 [2018] AC 61, [240].
24 See fn 3.

Gillick

2.24. The second key trigger was the House of Lords' decision in *Gillick v West Norfolk and Wisbech AHA.*[25] In *GCHQ*, Lord Diplock declared that:

> "'For a decision to be susceptible to judicial review the decision-maker must be empowered by public law...to make decisions that, if validly made, will lead to administrative action or abstention from action by an authority endowed by law with executive powers, which have one or other of the consequences mentioned in the preceding paragraph."[26]

The "consequences" referred to by Lord Diplock were that someone's "rights or obligations" be altered, or that someone be "deprived of some benefit or advantage" which they had a legitimate expectation of enjoying.[27]

2.25. This limit on the justiciability of an application for judicial review was ignored in the *Gillick* case, where judicial review was sought of a "memorandum of guidance" on prescribing contraception to young people that had been issued by the Department of Health to local health authorities. The House of Lords declined to quash the memorandum, but thought it was amenable to judicial review.

2.26. Lord Bridge noted the "significant extension of the court's power of judicial review" that was involved in holding that such documents were susceptible to judicial review:

> "We must now say that if a government department, in a field of administration in which it exercises responsibility, promulgates in a public document, albeit non-statutory in form, advice which is erroneous in law, then the court in proceedings in appropriate form commenced by an applicant or plaintiff who possesses the necessary locus standi, has jurisdiction to correct the error of law by an appropriate declaration. Such an extended jurisdiction is no doubt a salutary and indeed a necessary one in certain circumstances...."[28]

2.27. Without the decision in *Gillick*, many exercises of the prerogative powers might have remained non-reviewable even after *GCHQ* because the exercise of those powers could not be said to have altered someone's "rights or obligations" or have deprived someone of a "benefit or advantage" that they had a legitimate expectation of enjoying.[29] For the same reason, the decision of the Foreign Secretary in the *Pergau Dam* case,[30] authorising a loan of £234 million to the

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[25] [1986] 1 AC 112. The decision in *Gillick* followed on from the House of Lords' earlier decision in *Royal College of Nursing v Department of Health and Social Security* [1981] AC 800.

[26] [1985] 1 AC 374, 409.

[27] ibid, 408-409.

[28] [1986] 1 AC 112, 193.

[29] See Lord Diplock's judgment in *de Freitas v Benny* [1976] AC 239, refusing an application for judicial review of a decision not to exercise the prerogative of mercy to commute the applicant's death sentence on the ground (at 247) that "Mercy is not the subject of legal rights. It begins where legal rights end."

[30] *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement Ltd* [1995] 1 WLR 386, 402.

Malaysian government under the Overseas Development and Co-operation Act 1980, would not have been regarded as reviewable.

The Human Rights Act 1998

2.28. The third impulse behind the extension of justiciability was the enactment of the Human Rights Act 1998 (HRA). The HRA, which "incorporated" the European Convention on Human Rights (ECHR) into UK law, made justiciable the exercise of *any* form of public power that could be said to infringe someone's rights under the ECHR. As Baroness Hale observed in *R (Gentle) v Prime Minister:* "It is now common ground that if a Convention right requires the court to examine and adjudicate upon matters which were previously regarded as non-justiciable, then adjudicate we must."[31] Or, as Lord Sumption put it:

> "The Human Rights Act 1998 did not abrogate the constitutional distribution of powers between the organs of state which the courts had recognised for many years before it was passed…However, traditional notions of the constitutional distribution of powers have unquestionably been modified by the Human Rights Act 1998. In the first place, any arguable allegation that a person's Convention rights have been infringed is necessarily justiciable."[32]

2.29. Unlike the decisions in *GCHQ* and *Gillick*, the limits on non-justiciability brought about by the enactment of the HRA were ones that Parliament itself had chosen to create, by giving the courts the "very specific, wholly democratic, mandate...[of] 'delineating the boundaries of a rights-based democracy'...".[33] But the effect of Parliament's choice has been to make many exercises of public power that would have been unreviewable under the common law a potential object of judicial review under the HRA. Some examples (of many) from the caselaw are:

- *R (Aguilar Quila) v Secretary of State for the Home Department*,[34] where the UK Supreme Court considered whether rules regarding the grant of leave to remain in the UK that were intended to discourage forced marriages were compatible with Article 8 of the ECHR.[35]
- *R (SG) v Secretary of State for Work and Pensions*,[36] where it was assumed that caps on housing benefit amounted to an interference with someone's "possessions" for the purposes of Article 1 of the First

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31 *R (Gentle) v Prime Minister* [2008] 1 AC 1356, [60].

32 *R (Lord Carlile) v Secretary of State for the Home Department* [2015] AC 945, [28]-[29].

33 *A v Secretary of State for the Home Department* [2005] 2 AC 68, [42] (Lord Bingham, quoting Jowell, 'Judicial deference: servility, civility or institutional capacity?' [2003] Public Law 592, 597).

34 [2012] 1 AC 621.

35 Lord Brown dissented from the UK Supreme Court's decision that the rules were incompatible with Article 8 on the ground that making "the comparison between the enormity of suffering within forced marriages...and the disruption to innocent couples...whose desire to live together in this country is temporarily thwarted by the rule change, is essentially one for elected politicians, not for judges...What value...is to be attached to preventing a single forced marriage? What cost should each disappointed couple be regarded as paying? Really these questions are questions of policy and should be for government rather than us." (ibid, [91]).

36 [2015] 1 WLR 1449.

Protocol to the ECHR,[37] and the UK Supreme Court considered whether such caps were compatible with the ECHR Article 14 requirement that "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination...."

- *R (Tigere) v Secretary of State for Business, Innovation and Skills*,[38] where the UK Supreme Court considered whether limiting the availability of student loans to those who had been in the UK for three years before their university studies were due to begin and would be "settled" in the UK on the date their studies began violated Article 14 of the ECHR.
- *R (MA) v Secretary of State for Work and Pensions*,[39] where the UK Supreme Court considered whether Article 14 of the ECHR had been violated by rules that linked the amount of housing benefit payable to someone with how many bedrooms they were deemed to need.

2.30. Examples such as these show that any reforms of the law on non-justiciability as it applies to the common law of judicial review would have limited effect in terms of affecting what kinds of governmental decisions can be scrutinised by the judiciary.

Miller 2

2.31. The fourth development that has the potential to reduce the range of powers and issues that can be regarded as non-justiciable is the UK Supreme Court's decision in *R (Miller) v Prime Minister*[40] (*Miller 2*),[41] setting aside as void the Prime Minister's advice to prorogue Parliament, and the consequent prorogation of Parliament, for 34 days in the autumn of 2019.

2.32. We do not think it would be helpful to add to the already extensive literature on whether *Miller 2* was rightly or wrongly decided, other than to observe that there were strong arguments on both sides of the case. However, what is extremely important to observe is the approach that the UK Supreme Court adopted to the question of whether the advice, and consequent decision, to prorogue Parliament was justiciable, and therefore reviewable.

2.33. The Divisional Court in *Miller 2* had ruled that the exercise of the power to prorogue was non-justiciable, on two grounds. First, reviewing the exercise of that power was constitutionally inappropriate as the exercise of that power was a matter of "high policy",[42] with the result that the separation of powers between the courts and the executive would be violated if the courts involved themselves in reviewing the exercise of that power.

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37 ibid, [60].
38 [2015] 1 WLR 3820.
39 [2016] 1 WLR 4550.
40 [2020] AC 373.
41 "*Miller 2*" to distinguish it from *R (Miller) v Secretary of State for Exiting the European Inion* [2018] AC 61 (*Miller 1*).
42 [2019] EWHC 2381 (QB), [38], quoting from the judgment of Taylor LJ in *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Everett* [1989] 1 QB 811, 820.

2.34. Second, the Court took the view that it was institutionally incompetent to review the prorogation of Parliament on the basis that Parliament was being prorogued for too long as it was "impossible for the court to make a legal assessment of whether the duration of the prorogation was excessive by reference to any measure. There is no legal measure of the length of time between Parliamentary sessions."[43]

2.35. When *Miller 2* was decided by the UK Supreme Court, the Supreme Court held that "no question of justiciability...can arise in relation to whether the law recognises the existence of a prerogative power, or in relation to its legal limits. Those are by definition questions of law. Under the separation of powers, it is the function of the courts to determine them."[44] The UK Supreme Court went on to find that the conditions on when the power to prorogue Parliament would be validly exercised had been exceeded by proroguing Parliament for 34 days, with the result that Parliament had not been prorogued at all.[45]

2.36. The importance of this judgment is that it creates the potential for the courts to circumvent the "no-go" signs currently mounted around the exercise of prerogative powers in relation to "matters of high policy...[such as] making treaties, making war, dissolving Parliament, mobilising the Armed Forces".[46] The proposition that the exercise of such powers is non-justiciable – and therefore non-reviewable – could be evaded by (a) observing that the issue of when such a power *will be exercised* is perfectly justiciable, (b) imposing various conditions on when such a power can be said to have been validly exercised, and then (c) declaring that the power has not been exercised at all if those conditions are not observed.[47]

The current state of the law

2.37. The potential that is contained in the UK Supreme Court's judgment in *Miller 2* to abolish all remaining common law limits on the justiciability of the exercise of public powers is in our view unlikely to be realised. **While both Brexit cases – *Miller 1* and *Miller 2* – represented substantial setbacks for the government and were of considerable constitutional importance, we are not convinced that the decisions (novel though they were) in those cases are likely to have wider ramifications given the unique political circumstances which provided the backdrop for those cases being brought.**

2.38. Instead, the remaining pockets of non-justiciable powers and issues are likely to remain intact. The most obvious remaining no-go area covers those exercises

[43] [2019] EWHC 2381 (QB), [54].
[44] [2020] AC 373, [36].
[45] ibid, [70].
[46] *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Everett* [1989] 1 QB 811, 820 (Taylor LJ).
[47] It is for this reason that Dr David Tomkins dubbed *Miller 2* "The *Anisminic* of justiciability" in his eponymous blog (30 September 2019) for the Judicial Power Project: http://judicialpowerproject.org.uk/dr-david-tomkins-the-anisminic-of-justiciability/. See also McHarg, 'The Supreme Court's prorogation judgment: guardian of the constitution or architect of the constitution?' (2020) 24 Edinburgh Law Review 88, 93.

of public power that are protected by Parliamentary privilege, a term which covers both the privilege created by Article 9 of the Bill of Rights 1689 and the more ancient parliamentary privilege of exclusive cognisance, which refers to "the exclusive right of each House [of Parliament] to manage its own affairs without interference from the other or from outside Parliament".[48] Any exercise of public power that is covered by Parliamentary privilege will be non-justiciable, and therefore unreviewable on any grounds.[49] And while the courts' claims that it is for them to define the scope of Parliamentary privilege[50] have now been accepted,[51] the courts have made it clear that in developing the law on what is (and is not) covered by the scope of Parliamentary privilege, they "will pay careful regard to any views expressed in Parliament by either House or by bodies or individuals in a position to speak on the matter with authority."[52]

2.39. Lord Roskill's list of non-justiciable prerogative powers covered "those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others...".[53] We have seen that it is no longer true that the exercise of the prerogative of mercy is non-justiciable, and it is doubtful whether Lord Roskill's "as well as others" remains true. It is hard to think of a prerogative power not named on Lord Roskill's list that is non-justiciable, especially given the decision in *Miller 2* that the prerogative power to prorogue Parliament is justiciable.

2.40. In the *GCHQ* case, Lord Fraser suggested that prerogative powers relating to the conduct of foreign affairs would be non-justiciable,[54] but the courts have shown themselves willing to make limited interventions in that area, requiring the Foreign Office to consider a British citizen's request for assistance when being held abroad by another government,[55] and holding that the Foreign Secretary's decision to impose sanctions on a foreign national living in the UK because he was suspected of terrorist affiliations was reviewable.[56]

2.41. However, the non-justiciability of the other prerogative powers on Lord Roskill's list – those relating to the making of treaties, the defence of the realm, the grant of honours and the appointment of ministers – remains intact for the time being. The non-justiciability of the (currently defunct) prerogative power to dissolve Parliament will be discussed below.

2.42. **While the remaining pockets of non-justiciability are likely to remain in place, so too (absent reform) will be one of the noteworthy features of the**

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48 *R v Chaytor* [2011] 1 AC 684, [63] (per Lord Phillips).

49 For a recent example, see *R (Heathrow Hub Ltd*) v *Secretary of State for Transport* [2020] EWCA Civ 213, holding (at [169]) that any application for judicial review that draws a court into having to determine what a Minister said in Parliament was correct or not cannot be heard.

50 *Stockdale v Hansard* (1839) 9 A & E 1, 147-48 (per Lord Denman CJ).

51 Though as late as 1958, de Smith could talk of the House of Commons as "not...surrendering its historic claim to the exclusive right to determine the ambit of its own privileges": de Smith, 'Parliamentary privilege and the Bill of Rights' (1958) 21 Modern Law Review 465, 467.

52 *R v Chaytor* [2011] 1 AC 684, [15] (Lord Phillips).

53 [1985] 1 AC 374, 418.

54 ibid, 398.

55 *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598.

56 *R (Youssef) v Secretary of State for Foreign and Commonwealth Affairs* [2016] AC 1457.

current law – which is that in the past 40 years, no *new* instances of non-justiciable powers or issues have been recognised by the courts.

2.43. Few nowadays would regret the House of Lords' decision in *Gillick*,[57] which was consistent with a general reorientation in the law on judicial review away from seeking to ensure that individual interests were not abused by the government and towards seeking to ensure the legality of government action.[58]

2.44. However, it might have been expected that as more powers were brought within the scope of judicial review as a result of this reorientation, the issue of whether some of those powers should be regarded as non-justiciable might have been considered by the courts. This did not happen. Instead, non-justiciability was not raised as an issue in a whole host of cases where the courts undertook to review exercises of public power in circumstances where, at the very least, an argument might have been made that the exercise of that power was non-justiciable or that the power could only be reviewed on the narrowest of grounds.

2.45. Examples would include:

- the *Pergau Dam* case[59]
- the *Mousa* litigation (review of decisions made by the Ministry of Defence in respect of the composition of the Iraq Historic Allegations Team)[60]
- *R (Litvinenko) v Secretary of State for the Home Department* (review of the Home Secretary's decision not to order an inquiry into the death of Alexander Litvinenko)[61]
- *R (Plantagenet Alliance) v Secretary of State for Justice* (review of various ministerial decisions around the exhumation and reburial of the remains of King Richard III)[62]
- *R (Evans) v Attorney General* (review of the Attorney General's decision to prevent disclosure of information that the Upper Tribunal had found was disclosable under the Freedom of Information Act)[63]

We do not express an opinion on whether judicial review should have been available in these cases. We merely point out that it is notable that the

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57 An early dissentient was Sir William Wade, who was provoked by the post-*Gillick* decision in *R v Secretary of State for the Environment*, *ex parte Greenwich LBC*, The Times, 17 May 1989 (reviewing poll tax leaflets issued by the government) to write to The Times, protesting that judicial review was meant to "prevent the misuse of Government power", where power means "doing something which can have some effect on someone's legal position"; leaflets could not have that effect (The Times, 18 May 1989). This is very much a minority view nowadays, though it has its defenders. See, for example, Allan, *Constitutional Justice* (Oxford University Press, 2001), 195-97, arguing that judicial review is centrally concerned to protect and uphold individual rights.

58 On this reorientation, see Arvind and Stirton, 'The curious origins of judicial review' (2017) 133 Law Quarterly Review 91.

59 See above, para 2.27.

60 *R (Mousa) v Secretary of State for Defence* [2011] EWCA Civ 1334; *R (Mousa) v Secretary of State for Defence (No 2)* [2013] EWHC 1412 (Admin).

61 [2014] EWHC 194 (Admin).

62 [2015] 3 All ER 261.

63 [2015] AC 1787.

possibility that the courts may have been straying into non-justiciable territory was not even considered in any of these cases.

Assessment of the law

2.46. We now turn to assess the current state of the law on non-justiciability, as it applies to the common law of judicial review. Again, the Cambridge Centre for Public Law's submission of evidence provides us with a useful starting point for discussion. They argue that the courts "apply the distinction between justiciable and non-justiciable issues in a manner that is sensitive both to the need to uphold the rule of law and the separation of powers. They do so in a manner that respects the relative constitutional and institutional roles of the executive and the judiciary."[64]

2.47. We can assess this claim by reference to the two bases for judging the exercise of public power (or a particular ground of review of the exercise of that power) to be non-justiciable that were identified by the Divisional Court in *Miller 2*. First, that reviewing the exercise of that power (either generally, or on a specific ground) will involve the courts in considering issues that they are unsuited to considering by reason of the limits on their knowledge and expertise. Second, that reviewing the exercise of that power (either generally, or on a specific ground) would violate the separation of powers because the courts would thereby arrogate to themselves abilities to decide how that power is to be exercised that should be enjoyed by some other constitutional actor.

Knowledge and expertise

2.48. It is widely acknowledged that by virtue of their background and training, judges are ill-equipped to determine some issues, in particular issues around whether a minister or administrator was acting wholly irrationally or unjustifiably in (for example):

- taking macroeconomic decisions
- making resource allocation decisions
- acting on certain predictions as to what would happen in the future if the minister or administrator did not act
- taking certain steps that (it is claimed) will have disastrous consequences in the future[65]

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64 Para 34.

65 This point is sometimes confused with the quite separate point that our system of adjudication – which is organised around asking a judge to make a binary choice – is ill-equipped to deal with what Lon Fuller called "polycentric" problems, which are problems that are capable of being resolved in a multiplicity of different ways. (Fuller's examples of polycentric problems were distributing a collection of paintings 'in equal shares' among a number of heirs (394) and deciding which players should play in which positions on a football team: Fuller, 'The forms and limits of adjudication' (1978) 92 Harvard LR 353, 394-95.) We are as sceptical as the authors of *De Smith's Judicial Review*, 8th ed (Sweet & Maxwell, 2018) (at 1-048) as to the relevance of the concept of polycentricity to the proper scope of judicial review. While deciding how to resolve polycentric problems is the core function of public

2.49. There are plenty of examples in the caselaw of the courts' recognising that there are certain issues that they are ill-equipped to address. Lord Diplock's caution in the *GCHQ* case about reviewing the exercise of prerogative powers on the basis of irrationality is one such example.[66] Other examples are:

- *R v Secretary of State for the Environment*, *ex parte Hammersmith and Fulham LBC*, where Lord Bridge ruled that where a "statute has conferred a power on the Secretary of State which involves the formulation and the implementation of national economic policy and which can only take effect with the approval of the House of Commons, it is not open to challenge on the grounds of irrationality short of the extremes of bad faith, improper motive or manifest absurdity."[67]
- *Delve and Glynn v Secretary of State for Work and Pensions*, where the Court of Appeal had to consider an application for judicial review in respect of an increase in the pension age for women. They agreed with the Divisional Court that "The wider issues raised by the Claimants, about whether [the government's] choices were right or wrong or good or bad, are not for us; they are for members of the public and their elected representatives."[68] The Court went on to observe that "The Divisional Court were right to approach [the case] on the basis that this legislation operates in a field of macro-economic policy where the decision-making power of Parliament is very great."[69]
- *Secretary of State for the Home Department* v *Rehman*, where the Home Secretary decided to deport the applicant from the UK based on an assessment that the applicant might in the future involve himself with terrorist attacks on countries outside the UK, and that might in turn threaten the security of the UK. The House of Lords refused to judicially review the Home Secretary's decision, holding that they were: "not entitled to differ from the opinion of the Secretary of State on the question of whether, for example, the promotion of terrorism in a foreign country by a United Kingdom resident would be contrary to the interests of national security."[70]

2.50. However, there are other examples where it is arguable that the courts have assumed to themselves the power to decide issues that they are ill-equipped to address:

- *R (A) v Croydon LBC*,[71] where the UK Supreme Court held that if there were any dispute over whether an asylum seeker was a child – for the purpose, for example, of determining whether the asylum seeker was entitled to accommodation under section 20(1) of the Children Act 1989

administrators, it is not clear that judicially reviewing such a decision also raises a polycentric issue. Instead, the judge is faced with binary choices as to whether the administrator acted unlawfully/irrationally/unfairly or not. See Finn, 'The justiciability of administrative decisions: a redundant concept?' (2002) 30 Federal Law Review 239, 244.

66 See para 2.5.

67 [1991] 1 AC 521, 597.

68 [2020] EWCA Civ 1199, [22].

69 ibid, [42].

70 [2003] 1 AC 153, [53] (per Lord Hoffmann).

71 [2009] 1 WLR 2557.

– the age of the asylum seeker was a matter for the courts to determine, on the balance of probabilities.

- *R (UNISON) v Lord Chancellor*,[72] where the introduction of fees to access employment tribunals was made the subject of an application for judicial review.

  In the Divisional Court, arguments that the level of fees was reviewable given that they would have disproportionate impact on "access to justice" were dismissed on the basis that "it is not possible at this stage to form any clear view [of] the weight of the impact of the introduction of the scheme. It is, accordingly, not possible to weigh the impact with anything approaching precision."[73]

  In the Court of Appeal, arguments that a dramatic drop in the number of claims being made in employment tribunals was evidence that the new fees were having a disproportionate impact on access to justice were dismissed on the basis that "there is simply no safe basis for an untutored intuition about claimant behaviour or therefore for an inference that the decline *cannot* consist entirely of cases where potential claimants could realistically have afforded to bring proceedings but have made a choice not to."[74]

  Despite this, the UK Supreme Court felt able in *UNISON* – perhaps because of judicial loyalty to the ideal of access to justice – to judge whether or not the introduction of fees to access employment tribunals was having a disproportionate effect on access to justice.
- *R (Howard League for Penal Reform) v Lord Chancellor*,[75] where the Court of Appeal judicially reviewed the Lord Chancellor's decision to remove prisoners' abilities to obtain legal aid to challenge various categories of decision that might be made in respect of them on the basis that the resulting system for dealing with prisoners' cases was "systemically" or "inherently" unfair.

  To reach this conclusion, the Court of Appeal had to consider almost 2,500 pages of evidence.[76] But, as the Court of Appeal noted, all those pages did not include any "full-blown statistical or socio-legal study" of the structural impact of the withdrawal of legal aid on the way prisoners' cases were handled by the prison system as it "would be impossible to undertake the research that would be needed" to provide such a study "within the time limit for judicial review proceedings".[77] Professor Jason Varuhas has argued that the result was that the Court's "analysis of the *operation* of the given systems [for dealing with prisoners' cases] often came down to anecdotal evidence from players in the system".[78]

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72 [2020] AC 869.
73 [2014] EWHC 218 (Admin), [84].
74 [2015] EWCA Civ 935, [68] (emphasis in original).
75 [2017] 4 WLR 92.
76 ibid, [12].
77 ibid, [53].
78 Varuhas, 'Evidence, facts and the changing nature of judicial review', UKCLA blog, 15 June 2020 (https://ukconstitutionallaw.org/2020/06/15/jason-varuhas-evidence-facts-and-the-changing-nature-of-judicial-review/) (emphasis in original).

Separation of powers

2.51. It is open to question whether the law on non-justiciability, as it applies to the common law of judicial review, is consistent with the proper separation of powers between the courts and the executive. This question has understandably provoked sharp divisions in the evidence submitted to us.

2.52. The case for recognising that certain exercises of public power should be regarded as "no-go" areas for the courts, leaving the question of how that power should be exercised to other branches of our constitutional order, was powerfully put by Lord Hoffmann in his postscript to his judgment in the *Rehman* case, written after the 9/11 attacks in the United States:

> "I wrote this speech some three months before the recent events in New York and Washington. They are a reminder that in matters of national security, the cost of failure can be high. This seems to me to underline the need for the judicial arm of government[79] to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security. It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove."[80]

2.53. Speaking extra-judicially, Lord Sumption has made a similar case for recognising that certain exercises of public power should be regarded as exclusively political in nature, and should not be subject to judicial review:

> "Judicial resolution of major policy issues undermines our ability to live together in harmony by depriving us of a method of mediating compromises between ourselves. Politics is a method of mediating compromises in which we can all participate, albeit indirectly, and which we are therefore more likely to recognise as legitimate."[81]

2.54. In the *Belmarsh* case, Lord Bingham acknowledged that:

> "the more purely political (in a broad or narrow sense) a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decisions. The smaller, therefore, will be the potential role for the court. It is the function of political and not judicial bodies to resolve political questions…."[82]

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79 An expression used by Lord Hoffmann on a number of occasions, not without irony.

80 [2003] 1 AC 153, [62].

81 Sumption, 'The limits of the law', the 27th Sultan Azlan Shah Lecure, 20 November 2013 (reprinted in Barber et al (eds), *Lord Sumption and the Limits of the Law* (Hart Publishing, 2016) (the above quote can be found on pp 24-25)).

82 *A v Secretary of State for the Home Department* [2005] 2 AC 68, [29].

2.55. It is not easy to tell what counts as a "purely political" question, but some illumination may be provided by Lord Bingham's extra-judicial discussion of the areas in which the judges should shrink from making new law:

> "(i) where reasonable and right-minded citizens have legitimately ordered their affairs on the basis of a certain understanding of the law;
> (ii) where, although a rule of law is seen to be defective, its amendment calls for a detailed legislative code, with qualifications, exceptions and safeguards which cannot feasibly be introduced by judicial decisions, not least because wise and effective reform of the law calls for research and consultation of a kind which no court of law is fitted to undertake;
> (iii) where the question involves an issue of current social policy on which there is no consensus within the community;
> (iv) where the issue arises in a field far removed from ordinary judicial experience. This is not an exhaustive list."[83]

While Lord Bingham was attempting to determine how the powers to make law should be distributed between the courts and the legislature, his observations are also relevant to determining when the courts should regard the exercise of executive power as a "no-go" area, or at least an area where they should tread lightly.

2.56. We acknowledge that the case made out in the previous few paragraphs for judicial restraint on the issue of the justiciability of exercises of certain public powers is not accepted by everyone. It is sometimes hard to avoid the conclusion that if there has been an increase in the involvement of judges in political matters, then this has been regarded as a welcome development by those who have rather little faith in politicians and the political process.[84] As Lord Sumption has observed:

> "As politics have lost their prestige, judges have been only too ready to fill the gap. The catch-phrase that justifies this is the 'rule of law'. But in the last half-century the courts have developed a broader concept of the rule of law which penetrates well beyond their traditional role of deciding legal disputes and into the realms of legislative and ministerial policy."[85]

This case (presented, though not endorsed by Lord Sumption) for welcoming a general extension in what is regarded by the courts as justiciable was pithily summed up by the respected legal commentator Joshua Rozenberg QC, who concluded his recent book on the judiciary with the observation: "Far from being enemies of the people, judges are just about the only friends we have."[86]

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83 Bingham, *The Business of Judging: Selected Essays and Speeches* (Oxford University Press 2000), 31-32.

84 For example, the Good Law Project proclaims on its website that "Our politics is broken" (https://goodlawproject.org/about/).

85 Sumption, *Trials of the State: Law and the Decline of Politics* (Profile Books, 2019), 34.

86 Rozenberg, *Enemies of the People: How Judges Shape Society* (Bristol University Press, 2020), 190.

Submissions

2.57. These divisions over where the line is to be drawn between public powers that are subject to extensive judicial review and powers that should not – in the name of democratic accountability – be reviewable, or should only be subject to "light touch" review, were mirrored in the submissions of evidence that we received regarding the issue of non-justiciability.

2.58. **The overwhelming majority of submissions from those outside the government did not favour legislative intervention on the issue of non-justiciability in any form.** Among the reasons given for not defining, or not redefining, what powers or issues are non-justiciable were:

- the importance of setting proper boundaries and limits to a government's powers
- the risk of "freezing" the scope of judicial review when flexibility is of particular importance in an unwritten constitution
- a reduction in public confidence in the government and the legal system
- the importance of not insulating politicians from proper legal (as opposed to democratic) accountability

2.59. We did receive submissions from some respondents outside the government that were in favour of reforming the law so that the concept of non-justiciability plays a much greater role than it has tended to do in the past few years. Sir Stephen Laws QC argued that:

> "My own lengthy, professional experience, working closely at the interface between the law and the political institutions, has convinced me that the diagnosis of a dysfunctional political system is misconceived. It is also obvious to me that attempts by the courts to make good the supposed deficit are in fact more likely to aggravate any dysfunctionality than to repair it. By arrogating to themselves the responsibility for supervising how the proper responsibilities of the political institutions are discharged, the courts only risk creating a tendency in the political institutions to become more 'irresponsible', and to adopt a 'compliance culture' in which sound judgement is regarded as irrelevant. As usual in life, low expectations tend to generate inadequate performance."[87]

2.60. Professor Richard Ekins took a similar line:

> "The judicial, lawyerly and (longer-standing) legal-academic loss of confidence in politics, which is part of the explanation for the expansion of judicial review, is ungrounded. That is, the scepticism expressed by some judges and lawyers, and many legal academics, about parliamentary government or electoral politics cannot be squared with sound empirical study or a proper understanding of our constitution, its historical record, or the institutional dynamics in which it consists."[88]

[87] EXT131, para 15.
[88] EXT078, para 28(d).

2.61. Unsurprisingly, perhaps, the view that the law on non-justiciability was in need of shoring up was strongly endorsed by government departments that are most likely to be dealing with matters of "high policy".

2.62. There is plainly increasing nervousness among such departments about the boundaries of justiciability in the light of recent cases, in particular *Miller 2*. In its submission to us, one such department emphasised its commitment "to the rule of law, the independence of the judiciary and the availability of judicial review as a means by which citizens can challenge arbitrary executive action." However, it made the point that: "The rule of law requires predictable rules around which citizens, businesses and government can plan their activities and lives."

2.63. We were therefore asked to consider demarcation in at least some areas of prerogative powers, although it was acknowledged that any such reform would have to go hand in hand with reform of the Human Rights Act. While Lord Neuberger (and others) understandably emphasised the importance of flexibility in judicial review in his submission of evidence, for a government department, such flexibility can mean uncertainty.

2.64. Another department favoured a legislative response both to recent decisions and more generally. A number of criticisms were made of the courts and the development of judicial review. These included the introduction of a "sliding scale", which is said to justify greater scrutiny in cases that involve a substantial interference with human rights, and the introduction of proportionality-based merits review, an import from Strasbourg jurisprudence (although proportionality is not yet *clearly* a ground of judicial review in cases not involving Convention rights).

2.65. Concern was expressed "at the potential willingness of the judiciary to push the boundaries of the separation of powers". Cases that were singled out as examples of this tendency included, among others: *R (Jackson) v Attorney General*[89] (see para 2.88 below); *R (Evans) v Attorney General*;[90] and *R v Adams* (qualifying the *Carltona* principle).[91] The willingness of members of the UK Supreme Court to make obiter comments on difficult ethical issues such as euthanasia and abortion in cases such as *R (Nicklinson) v Ministry of Justice* (assisted dying)[92] and *Re an Application by the Northern Ireland Human Rights Commission for Judicial* Review (abortion)[93] was also noted.

2.66. As to legislation, the department in question did not favour "full codification" but suggested that "some aspects…would benefit from legislative intervention". The Panel interprets this as meaning legislation to reverse particular court decisions.

89 [2006] 1 AC 262.
90 [2015] AC 1787.
91 [2020] 1 WLR 2077. Although this was not, strictly speaking, a judicial review case, the decision has very important implications for ministerial accountability. It will involve an amendment to JOYS.
92 [2015] AC 657.
93 [2018] UKSC 27.

Possible responses

2.67. We now turn to how Parliament might respond to the developments in this area of the law.

Non-legislative responses

2.68. The first response would be – as a general rule – to allow the courts to take the lead in this area of law, and trust in the courts to properly observe the boundary between what sorts of exercises of public power (and issues in relation to the exercise of that power) should be regarded as justiciable and what sorts should be regarded as non-justiciable.

2.69. We have a number of reasons for favouring this response.

2.70. First, the vast majority of cases of judicial review are about matters such as immigration status or a right to statutory benefits. Cases with a constitutional component are very much the exception, and legislating to deal with those cases might be regarded as disproportionate. We think there is much force in Sir Stephen Sedley's observations in his submission of evidence to us that:

> "The Panel may find itself urged to treat one or more recent cases as evidence of a need for systemic reform. I would respectfully counsel caution about leaping from the particular to the general. For example, I am among those who doubt the conclusions of the *Evans* case; but to treat the outcome of the case by itself as evidence of dysfunction in the system of public law is to invite a cure worse than the disease."[94]

2.71. Second, legislating to clarify the law as regards justiciability could be hazardous. The courts have considered the issue on a number of occasions and there is a body of common law on the subject. Moreover, listing those matters that are to be regarded as non-justiciable might invite the courts to conclude that anything else *was* justiciable.

2.72. We think the government should bear well in mind the observations of Baroness Hale (former President of the Supreme Court) who said in her submission to us: "My experience as a Law Commissioner for nine and a half years has taught me how very difficult it is to encapsulate the subtleties of the common law in statutory language."[95] The exercise would be particularly challenging given that non-justiciability generally attaches not to the particular power in question but to the exercise of that power.

2.73. Third, many of the arguments against codification generally, such as the potential "freezing" of the law, apply to *any* decision to legislate in this area.

2.74. Fourth, the government should not ignore the fact that it "wins" many cases or they are disposed of at an early stage. For every controversial decision, there

[94] EXT175, para 8.
[95] EXT099, para 5.

are many others (less publicised and less commented-upon) where judges have shown "restraint".

2.75. Fifth, any potential gains in terms of making the law on non-justiciability more certain through legislation are likely not to be realised, given the Human Rights Act 1998, and the large extension in what sort of issues are regarded as justiciable under that Act.

2.76. Sixth, the political circumstances that gave rise to the judgments in *Miller 1* and *Miller 2* (which are regarded in some quarters as examples of the courts overreaching their proper constitutional boundaries) – namely the combination of Brexit and the effect of the Fixed-term Parliaments Act 2011 – are most unlikely to recur.

2.77. Seventh, we are optimistic that if there are examples of judicial overreach in the past, the judiciary may well recognise this and ensure that such overreach is both corrected and will not occur in the future. There may already be signs of this occurring among the judiciary in their approach to the issue of justiciability. The UK Supreme Court's declining to grant permission to appeal in the case of *Dolan v Secretary of State for Health and Social Care*[96] (challenging the legality of regulations created by the government to deal with the coronavirus crisis) on the basis that it disclosed "no arguable point of law" may be one such sign.

2.78. We should emphasise that our reasons for not favouring making large changes to this area of law do *not* include any argument that it might be inappropriate for Parliament to legislate in this area. On the contrary: **we are of the firm view that it is entirely legitimate for Parliament to pass legislation making it clear what sorts of exercises of public power (or issues relating to such exercises) should be regarded as non-justiciable**. We strongly agree with the view advanced by Baroness Hale in her submission to us that: "If Parliament does not like what a court has decided, it can change the law."[97] This is the case in every other area of law, and it is hard to see why it should not be in relation to the law on judicial review.

2.79. Given that it is entirely legitimate for Parliament to legislate in this area, if it sees fit to do so, we proceed to consider what options might be open to Parliament in this regard.

Legislation on what is non-justiciable

2.80. The most obvious option is to pass legislation specifying that a particular exercise of public power (or ground of review of a particular exercise of public power) is non-justiciable.

2.81. In considering this option, it may be helpful to distinguish between:

> (a) A *codifying* clause that seeks to prevent the courts from in future declaring something to be justiciable that is currently understood to be

[96] [2020] EWCA Civ 1605.
[97] EXT009, para 2.

non-justiciable. An example would be a clause that provides that "a declaration of war is non-justiciable."
(b) A *reforming* clause that seeks to turn something that is currently understood to be justiciable into something that is not justiciable. An example would be a clause that provides that "exercises of the prerogative of mercy are non-justiciable."

2.82. The distinction may be helpful because it may be incorrect to regard a type (a) clause as being an "ouster clause". It would be strange to say that a clause that provides that "a declaration of war is non-justiciable" is ousting the court's powers of judicial review given that no one has ever suggested that those powers extend to declarations of war. Similarly, Article 9 of the Bill of Rights is never referred to as being an "ouster clause". The argument might be made that as these provisions define the limits of the jurisdiction of the courts in reviewing the exercise of the public power; they do not seek to oust that jurisdiction as there is nothing to oust.

2.83. Because a type (a) clause may not be correctly regarded as being an ouster clause, we think that such a clause may not face the kind of judicial pushback that normally attends attempts by Parliament to use "ouster clauses" to cut back on the ambit of judicial review.

2.84. Given this, it could be argued that there is nothing objectionable in Clause 3 of the Draft Fixed-term Parliaments Act 2011 (Repeal) Bill, which was published in December 2020 and provides:

> **"Non-justiciability of revived prerogative powers**
>
> A court of law may not question –
> (a) the exercise or purported exercise of the powers referred to in section 2,
> (b) any decision or purported decision relating to those powers, or
> (c) the limits or extent of those powers."

The powers referred to are the prerogative powers to dissolve Parliament and call a new Parliament. It could be argued that Clause 3 therefore simply restates the position that everyone understood obtained before the Fixed-term Parliaments Act 2011 was passed, and cannot be sensibly described as an "ouster clause".

2.85. Given the points made in paras 2.71 and 2.72, above, we might have preferred not to make any explicit statutory provision as to the justiciability of the revived prerogative power to dissolve Parliament and trusted to the good sense of the judges to realise that the *status quo ante* the Fixed-term Parliaments Act 2011 had to prevail. However, it is understandable if the drafters of the Bill did not want to take that chance, given the decision in *Miller 2*.

2.86. A type (b) clause that seeks to turn something that is currently understood to be justiciable into something that is non-justiciable could be expected to be regarded as an "ouster clause" and may as a result face some judicial resistance. For example, a clause that provided that "exercises of the prerogative of mercy are non-justiciable" might result in the courts' employing

the reasoning deployed in *Miller 2*, placing conditions on when the prerogative of mercy could be said to have been exercised, and holding that that power has not in fact been exercised when those conditions are not satisfied.

2.87. It is far from clear whether an attempt to forestall that possibility by providing (as has been done in the Fixed-term Parliaments Act 2011 (Repeal) Bill) that not only exercises but also "purported exercises" of the prerogative of mercy are non-justiciable, will be effective. The question of what amounts to a "purported exercise" of the prerogative of mercy would be for the courts to decide and as a result they would still enjoy substantial discretion to set aside what was intended to be an exercise of the prerogative of mercy on the basis that it did not even amount to a purported exercise of that power.

2.88. Type (b) clauses that have a much more serious effect in terms of rolling back what is currently understood to be justiciable under the common law of judicial review – such as a clause providing that "All purported exercises of the royal prerogative are non-justiciable" – could be confidently expected to meet the kind of judicial resistance described in the last two paragraphs, and *in extremis* the courts may be tempted to revisit the remarks made by some of the Law Lords in *R (Jackson) v Attorney General* as to the primacy of the doctrine of Parliamentary sovereignty when Parliament legislates in a way that it incompatible with the rule of law.[98]

2.89. The debate over the limits of Parliamentary sovereignty in such cases is discussed in Lord Bingham's analysis of the rule of law.[99] While acknowledging the potency of the debate, the Panel approaches the issue on the assumption that the doctrine of Parliamentary sovereignty means that Parliament has the power to legislate in such way as to limit or exclude judicial review. The wisdom of taking such a course and the risk in doing so are different matters. Indeed, the Panel considers that there should be highly cogent reasons for taking such an exceptional course.

Other legislative responses

2.90. Two other types of legislative response to this area of law may be briefly mentioned. The first would be to deal with the issue of what exercises of power and issues are non-justiciable within an overarching code on judicial review. This could be expected to be much more successful in changing the law on non-justiciability as there would be no way of judicially reviewing the exercise of public power outside the code. However, as we have not recommended codification of this area of law, this is not an option we have explored any further.

2.91. The second alternative type of legislative response – and one which has been commended to us by some of those submitting evidence to our review – is to legislate on a piecemeal basis to reverse the effect of certain cases. As we have already observed (in para 2.78) this is a response that we regard as legitimate,

98 [2006] 1 AC 262, [102] (Lord Steyn), [104] (Lord Hope).
99 Bingham, *The Rule of Law* (Allen Lane, 2010), chapter 12.

and in fact in the next Chapter we will be recommending reversal of the decisions of the UK Supreme Court in *R (Cart) v Upper Tribunal*[100] and *Ahmed v HM Treasury (No 2)*.[101]

2.92. How this tactic might be deployed in relation to some of the cases discussed in this Chapter depends on the case. Certainly, as Professor Christopher Forsyth QC observed in his submission of evidence to us, if Parliament wished to reverse the UK Supreme Court's decision in *Miller 2* "it would be simple...to legislate to provide that advice to Her Majesty to prorogue Parliament shall be considered a proceeding in parliament for the purposes of Article 9 of the Bill of Rights Act 1688."[102] Such a provision would take advantage of the quality of non-justiciability that currently attaches to proceedings in Parliament and in a way that does not abuse either the concept of what is a proceeding in Parliament or the notion of non-justiciability.

2.93. However, when it comes to cases with more wide-ranging effects, such as *GCHQ*, it seems unlikely that those effects could be unwound in any way other than through the deployment of clauses providing that exercise of certain powers is not to be regarded as justiciable – which returns us to the considerations in the previous section.

Conclusions

2.94. **It is arguable that in the past 40 years the courts have – in some cases – decided to regard as justiciable certain exercises of public power (or issues relating to those exercises) that should have been regarded as non-justiciable.**

2.95. **Given this, we think it would be legitimate for Parliament to legislate to correct certain developments in the past 40 years as regards what the courts have come to regard as justiciable.**

2.96. **However, we would recommend that Parliament not pass any comprehensive or far-reaching legislation in this area, but instead legislate in response to particular decisions. The draft Fixed-term Parliaments Act 2011 (Repeal) Bill might be regarded as an example in this respect, reacting as it does to *Miller 2*. (As might other reversals of particular decisions – such as *Cart* – that will be recommended in the next Chapter.)**

2.97. **Parliament *could* also address concerns about the current state of law on non-justiciability by:**

> **(a) Choosing to *narrow the grounds* for judicial review either generally or in relation to particular *powers*, as we discuss in the next Chapter.**

[100] [2012] 1 AC 663.
[101] [2010] 2 AC 534.
[102] EXT087, page 7.

(b) Placing in statutory form various non-justiciable or no-go areas and/or various "restraining" factors already identified by the courts.

(c) Legislating to state or restate constitutional principles in such a way as to restrict the powers of the courts generally in relation to judicial review.

2.98. **However, the Panel would *not* recommend any of the broader options set out in the previous paragraph. We acknowledge the force of the submissions to us, the majority of which were *against* legislation. While the Panel understands the government's concern about recent court defeats, the Panel considers that disappointment with the outcome of a case (or cases) is rarely sufficient reason to legislate *more generally*.**

2.99. **Broader legislation in this area that purported to roll back certain developments in the law on non-justiciability would be regarded as amounting to an "ouster clause" and while the use of such a clause to deal with a specific issue *could* be justified, it is likely to face a hostile response from the courts and robust scrutiny by Parliament.**

2.100. **It is to be hoped that the courts will be particularly conscious of recent constitutional upheavals with the result that there will be less conflict between the Executive (or Parliament) and the judiciary. The decision to legislate in this area is ultimately a question of political choice. But when deciding whether or not to do so, the Panel considers that Parliament's approach should reflect a strong presumption in favour of leaving questions of justiciability to the judges.**

2.101. **We also point out that any legislation would be of limited effect unless changes are also to be made to the Human Rights Act. The Human Rights Act has resulted in an increase in what is *now* regarded by the courts as justiciable. Any reforms will need to take this into account.**

CHAPTER 3: MODERATING JUDICIAL REVIEW

Introduction

3.1. This chapter sums up our responses to the government's invitation, under the Panel's terms of reference, to consider:

> "**Whether, where the exercise of a public law power should be justiciable: (i) on which grounds the courts should be able to find a decision to be unlawful; (ii) whether those grounds should depend on the nature and subject matter of the power; and (iii) the remedies available in respect of the various grounds on which a decision may be declared unlawful.**"

3.2. We have interpreted this term of reference as asking us to consider whether the effect of the law on judicial review on the exercise of public power can and should be moderated by (a) tailoring the grounds of review that can be invoked to set aside the exercise of a particular public power, and (b) altering the remedies that are available where the exercise of a particular public power has been the subject of a successful application for judicial review. This chapter sets out our conclusions on these two issues.

Tailoring the grounds of review

3.3. We understand the government's invitation to consider issue (a) as being based on concerns created by: (i) the increasing diversity of grounds of common law judicial review; (ii) the open-textured nature of some of the newer grounds of review; and (iii) the direction of travel in the law on judicial review in favour of recognising grounds of review that focus more and more on the substance of administrative decisions rather than how they were arrived at (in other words, on outcomes, rather than processes).

3.4. While all of the grounds of judicial review can still formally be related back to Lord Diplock's classic threefold formulation of the grounds of common law judicial review,[1] the reality is that the law on judicial review nowadays contains within it many complex sub-heads of review that in some cases seem to cross over between Lord Diplock's three heads.

3.5. Examples of such sub-heads are:

- review for error of fact[2]
- review for unjustifiably resiling from someone's legitimate expectations (whether procedural or substantive) as to how a public body will act[3]

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1 *CCSU v Minister for the Civil Service* [1985] 1 AC 374, 410: "The first ground I would call 'illegality,' the second 'irrationality' and the third 'procedural impropriety'".

2 *R v Secretary of State for the Environment*, *ex parte Alconbury* [2003] 2 AC 295; *E v Secretary of State for the Home Department* [2004] QB 1044; *R (A) v Croydon LBC* [2009] 1 WLR 2557.

3 See below, paras 3.26-3.28.

- review for unjustifiably interfering with a common law constitutional right, principle or value[4]
- review for failing to formulate and publish a policy for the exercise of public power,[5] or for failing to abide by an announced policy,[6] or for failing to implement a policy consistently[7]
- review for failing to consult properly before adopting a particular policy or measure[8]
- review for implementing a policy or regime that operates in a way that is systematically unfair to those governed by that policy or regime[9]

3.6. The current state of the law on grounds of judicial review seems to give rise to two concerns in particular. The first is that it enables judicial overreach, in that there are now so many different bases on which governmental action can be challenged, a court which disagrees with the wisdom of that action will easily be able to rely on some ground or another as a ground for setting aside that action. If that happens, the fundamental basis of the law on judicial review – which is that the role of the courts is to scrutinise the legality of government action, rather than its merits – is abrogated.

3.7. Concern has been expressed to us that examples of such judicial overreach have begun to creep into the caselaw. Professor Jason Varuhas argued in his submission of evidence to us that there are "increasing instances of doctrines or approaches which are very difficult to reconcile with the idea of judicial review as a supervisory jurisdiction".[10] As an example (of several), he pointed to the Divisional Court's decision in *R (Litvinenko) v Secretary of State for the Home Department*.[11] In that case, he argued that the Court set aside the Secretary of State's decision not to hold a public inquiry into the death of Alexander Litvinenko simply because it "disagreed with reasons given by the Minister".

3.8. The second concern is that the current state of the law on grounds of judicial review makes it very difficult for a public body to be able to predict whether or not a proposed course of action will end up being successfully legally challenged in the courts. The number of different ways in which the exercise of public power can now be attacked, and the fact that the law can sometimes be quite vague around the issue of whether the exercise of public power can be successfully attacked on a particular ground, makes it difficult to assess whether the exercise of that power will or can be defended against all such possible attacks.

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4 See below, paras 3.29-3.33.

5 *R (Purdy) v Director of Public Prosecutions* [2010] 1 AC 345; *Nzolameso v City of Westminster* [2015] UKSC 22, [39] (Lady Hale).

6 *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245.

7 *Mandalia v Secretary of State for the Home Department* [2015] 1 WLR 4546; *United Policyholders Group v Attorney General of Trinidad and Tobago* [2016] 1 WLR 3383, [116] (Lord Carnwath); *Re Finucane's application for judicial review (Northern Ireland)* [2019] 3 All ER 191, [62]-[63] (Lord Kerr).

8 *R (Moseley) v Haringey London Borough Council* [2014] 1 WLR 3947

9 *R (Howard League for Penal Reform)* v *Lord Chancellor* [2017] 4 WLR 92.

10 EXT196, para 28.

11 [2014] EWHC 194 (Admin).

3.9. The result is, as one department explained to us, "The prospect of judicial review can sometimes result in a risk averse attitude and overly risk averse advice to ministers on policy options as well as on consultation. This can lead to unnecessary consultation, an overly long consultation, or one that is not targeted (for example a full public consultation when only a more limited one is needed)." Another department expressed concern that "The JR process introduces a significant amount of uncertainty into the policy making process. This can lead to policy being designed around what will ward off the risk of a legal challenge, rather than purely on what is the best option."

3.10. Given these concerns, we can see why tailoring the grounds of review according to "the nature and subject matter of the power" that is subject to review might seem an attractive way of addressing any problems that are proved to have been created by the current multiplicity of grounds of review. If the diversity and content of the grounds of judicial review is currently creating problems, then simplifying the grounds of review – at least in respect of some exercises of public power – would seem the obvious solution.

3.11. Tailoring the grounds of review according to the nature and subject matter of the power being reviewed is not unknown to the common law of judicial review. For example, it has always been acknowledged that requirements of procedural fairness will not apply across the board to all exercises of public power, with such requirements classically only applying where the exercise of public power threatens someone's rights or interests.[12] Moreover, in *AXA General Insurance Ltd v HM Advocate*,[13] the UK Supreme Court held that legislation adopted by the Scottish Parliament was not susceptible to being judicially reviewed on the grounds of irrationality,[14] but only on the grounds that the legislation was beyond the competence of the Scottish Parliament, or that it "offended against fundamental rights or the rule of law".[15]

3.12. The standard of review that an exercise of public power is subjected to may also vary according to the nature and subject matter of the power. It has been accepted for 30 years that the courts should apply "anxious scrutiny" to the question of whether a government minister acted in a *Wednesbury*-unreasonable fashion where the minister's decision impinged on fundamental human rights.[16] Under this approach, the courts ask themselves whether a rational minister could have thought that his or her decision was proportionate given what was at stake, and find that the minister acted in a *Wednesbury*-unreasonable fashion if the answer is no.[17]

3.13. These are limits that the courts themselves have placed on what grounds of judicial review may be available in respect of the exercise of a particular type of public power. With one exception – which we will come to in due course – we think that there are great difficulties in the way of Parliament seeking to legislate

[12] Craig, *Administrative Law*, 8th ed (Sweet & Maxwell, 2016), 12-015.
[13] [2012] 1 AC 868.
[14] ibid, [52] (Lord Hope), [148] (Lord Reed).
[15] ibid, [149] (Lord Reed); see also [51] (Lord Hope).
[16] *R v Home Secretary*, *ex parte Bugdaycay* [1987] 1 AC 514; *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696.
[17] ibid, 748-49 (Lord Bridge); *Pham v Home Secretary* [2015] 1 WLR 1591, [106] (Lord Sumption).

to do the same thing. In Chapter 5 we discuss our concerns that Parliament should not introduce changes in the law on judicial review that will result – owing to devolution – in a multi-tier system of judicial review, where certain grounds of review will apply in some parts of the United Kingdom and not others.

3.14. Another obstacle lies in the fact that such an attempt to tailor the grounds of judicial review is unlikely to be effective. Such an attempt could take the form of providing:

> (a) that a particular ground of judicial review will not apply to the exercise of a particular type of public power (which was the approach adopted in the *AXA* case)
> (b) that a particular ground of judicial review will only apply to particular kinds of exercises of public power (which is arguably the approach that obtains in respect of review for procedural unfairness)
> (c) that the exercise of a particular type of public power will only be reviewable on certain grounds

3.15. The fact that it is still open to the courts to generate new grounds of review means that approaches (a) and (b) are likely to prove ineffective. If implemented in legislation, approach (a) could be circumvented through the courts applying substantially the same ground of review under a different name.[18] The same flaw affects approach (b), where attempts to constrain the circumstances in which a particular ground of review will apply could be easily circumvented by applying substantially the same ground of review under a different name outside those circumstances.

3.16. Adoption of approach (c) effectively involves the use of an ouster clause to tailor the grounds of review that are applicable to the exercise of a particular type of public power. It is unlikely that such an ouster clause would be any more effective at protecting a public body from review on a particular ground than predecessor ouster clauses have proved. And even if an ouster clause could be drawn up in terms that were tight enough to be effective at limiting the grounds on which a particular exercise of public power could be reviewed, the practical advantages resulting from the existence of the clause would probably not be sufficient to justify the potential constitutional fallout that enactment of that clause might trigger.

3.17. **It follows that, as a general rule, we do not think that it would be wise for Parliament to attempt to deal with any problems that were established as arising out of the multiplicity or vagueness of grounds of review by trying to tailor the grounds of judicial review applicable to a particular exercise of public power according to the "nature and subject matter" of that power.** Solutions to those problems must be sought elsewhere.

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[18] A comparison may be drawn with the attempt made by the Trade Disputes Act 1906 to confer immunity on trades unions in respect of certain acts for which they would otherwise have been made liable in tort; which immunity was circumvented in cases such as *Rookes v Barnard* [1964] AC 1129 by recognising categories of tortious wrongdoing that were not covered by the language of the 1906 Act.

Alternative solutions

3.18. It seems to us that alternative solutions to any potential problems of judicial overreach and uncertainty created by the current state of the law on the grounds of judicial review must come from the courts, and the courts should be encouraged to do what they can to address these problems.

Judicial overreach

3.19. The most obvious solution to a potential problem of judicial overreach is judicial restraint. This solution involves the courts' reaffirming the fundamental constitutional fact that it is not for them to pronounce on the wisdom of the exercise of public power; instead, they are to perform the quite different function of determining whether the legal limits on the exercise of public power have been exceeded.

3.20. We would encourage the courts constantly to keep that constitutional fact in mind and endorse the advice from Michael Fordham QC (as he then was) that "Judicial vigilance is needed under the rule of law but judicial restraint is as necessary under the separation of powers. In considering whether a public body has abused its powers, Courts must not abuse theirs."[19]

3.21. We are as doubtful as the courts have been as to whether this necessary quality of judicial restraint is best described as involving the courts' showing "deference" to the judgments of public bodies.[20] Such language suggests that it is open to the courts to determine how any form of public power should be used, but on occasion they delegate the job of determining how a particular form of public power should be used to someone else.

3.22. We agree with those judges that have instead adopted "respect" as the key concept underpinning their approach to judicial review: the quality of judicial restraint that is required if the law on judicial review is to operate properly involves the courts' showing respect for the distinctive roles played by non-judicial public bodies in the life of the nation.[21]

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19 Fordham, *Judicial Review Handbook*, 6th ed (Hart Publishing, 2012), 13.1.

20 *R (ProLife Alliance) v British Broadcasting Corporation* [2004] 1 AC 185, [75]-[76] (Lord Hoffmann): "although the word 'deference' is now very popular in describing the relationship between the judicial and the other branches of government, I do not think its overtones of servility, or perhaps gracious concession, are appropriate to describe what is happening...[The courts'] allocation of decision-making power is [not] a matter of courtesy or deference...The allocation of...decision-making responsibilities is based upon recognised principles. The principle that the independence of the courts is necessary for a proper decision of disputed legal rights or claims of violation of human rights is a legal principle...On the other hand, the principle that majority approval is necessary for a proper decision on policy or allocation of resources is also a legal principle. Likewise, when a court decides that a decision is within the proper competence of the legislature or executive, it is not showing deference. It is deciding the law."

21 See *R (KM) v Cambridgeshire County Council* [2012] UKSC 23, [36] (Lord Wilson): "respect must be afforded to the distance between the functions of the decision-maker and of the reviewing court; and some regard must be had to the court's ignorance of the effect upon the ability of an authority to perform its other functions of any exacting demands made in relation to the manner of its presentation of its determination in a particular type of case."

3.23. This quality of respect is inherent in the nature of judicial review, and is expressly evidenced in cases such as:

- *Nottinghamshire County Council v Secretary of State for the Environment*,[22] where Lord Scarman observed that he could not "accept that it is constitutionally appropriate, save in very exceptional circumstances, for the courts to intervene on the ground of 'unreasonableness' to quash guidance framed by the Secretary of State and by necessary implication approved by the House of Commons, the guidance being concerned with the limits of public expenditure by local authorities and the incidence of the tax burden as between taxpayers and ratepayers. Unless and until a statute provides otherwise, or it is established that the Secretary of State has abused his power, these are matters of political judgment for him and for the House of Commons. They are not for the judges or your Lordships' House in its judicial capacity."[23]
- *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs*,[24] where an application for judicial review was made in respect of the Foreign Office's failure to make representations on behalf of a British national detained at Guantanamo Bay. The Court of Appeal held that it would not be "appropriate to order the Secretary of State to make any specific representations to the United States, even in the face of what appears to be a clear breach of a fundamental human right, as it is obvious that this would have an impact on the conduct of foreign policy...."[25]
- *Secretary of State for the Home Department v Rehman*,[26] where Lord Hoffmann refused to judicially review the Secretary of State's decision not to grant the claimant indefinite leave to remain in the country on the grounds of national security, citing the claimant's association with a terrorist organisation operating in India: "the question of whether something is 'in the interests' of national security is not a question of law. It is a matter of judgment and policy. Under the constitution of the United Kingdom...decisions as to whether something is or is not in the interests of national security are not a matter for judicial decision. They are entrusted to the executive."[27]
- *Hammersmith Properties Ltd v First Secretary of State*,[28] where the Court of Appeal declined to review a planning inspector's refusal to grant planning permission for the construction of a health club in an area that was designated as "employment land" reserved for industrial or business use. Smith LJ observed that "It seems to me to be a pity that the opportunity for the provision of a health club facility with a swimming pool should be lost, just because the proposed site is in a part of the town which is designated for employment purposes rather than leisure purposes...That is a personal view, which...is irrelevant in the present proceedings. The judicial role is to

[22] [1986] 1 AC 240.
[23] ibid, 247.
[24] [2002] EWCA Civ 1598.
[25] ibid, [107](ii).
[26] [2003] 1 AC 153.
[27] ibid, [50].
[28] [2005] EWCA Civ 1360.

examine the lawfulness and reasonableness of the inspector's decision. I can detect no error in the inspector's reasoning...."[29]

3.24. **We strongly endorse the view that cases such as these play just as – if not more – important a role within the law on judicial review as more celebrated cases that have extended the reach of the law on judicial review into areas and questions that would have previously been regarded as falling outside the domain of that area of law**.

Uncertainty

3.25. Uncertainty around how common law judicial review applies in concrete cases is, perhaps, inevitable. Our understanding of the grounds of review and the conditions on their application is developed on a case-by-case basis among many different judges with varying views as to what the law should say, and over a long period of time. Opportunities to clarify the law invariably depend on what sort of cases come before the courts and what issues they raise, and whether those opportunities are taken depends on the level of the court hearing the case and its degree of interest in clarifying the law. The result is that some grounds of review can remain unclear in their application, long after the existence of those grounds has been acknowledged by the courts.

3.26. One well-known example is review on the ground that public power has been exercised in a way that is inconsistent with someone's legitimate expectations (either procedural or substantive) as to how that power would be exercised. This ground of review is generally acknowledged to date back almost 50 years, to the decision of the Court of Appeal in *R v Liverpool Corporation, ex parte Liverpool Taxi Fleet Operators' Association*.[30]

3.27. 50 years on, it is routine for academics (and judges)[31] to bemoan the fact that there is still substantial uncertainty as to the scope and implications of this ground of review. So Professor Christopher Forsyth QC observes that "23 years...since I first set pen to paper on the subject of legitimate expectations...notwithstanding...many judgments and...acres of scholarly writing, we have made little progress. There is so much uncertainty that there is a real danger that the concept of legitimate expectation will collapse into an inchoate justification for judicial intervention."[32]

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29 ibid, [36].

30 [1972] 2 QB 299.

31 *Paponette v Attorney General of Trinidad and Tobago* [2012] 1 AC 1, [61] (Lord Brown), quoting with approval Watson, 'Clarity and ambiguity: a new approach to the test of legitimacy in the law of legitimate expectations' (2010) 30 Legal Studies 633, 651: 'Legitimate expectation in its current state as a patchwork of possible elements to consider, rather than [an] organised system of rules, is little more than a mechanism to dispense palm-tree justice.'

32 Forsyth, 'Legitimate expectations revisited' (2011) 16 Judicial Review 429, 429. See also Varuhas, 'In search of a doctrine: mapping the law of legitimate expectations' in Groves and Weeks (eds), *Legitimate Expectations in the Common Law World* (Hart Publishing, 2017), 17: "The field's nature and bounds are steeped in intolerable uncertainty, the field is in a permanently unsettled state, and answers to basic questions remain unresolved...."

3.28. Fortunately, perhaps, the evidence we considered as to the impact of the current state of the law on judicial review did not reveal that uncertainties around the law on legitimate expectations were proving problematic. This may be because relying on the law on legitimate expectations to make an application for judicial review is, for the most part,[33] as Professor David Feldman suggested in his submission, "the last gasp of a despairing advocate".[34] The vast majority of such claims fail as it is not an easy ground of review for a claimant to rely on.

3.29. However, the same cannot be said of the emergent ground of review under which the exercise of a public power stands to be set aside if it unjustifiably or disproportionately (it is a matter of taste which term one uses) impinges on a "constitutional right, value or principle". This ground of review has emerged out of the confluence of various different legal doctrines:

- A principle of statutory interpretation known as the "principle of legality"[35] under which "a constitutional right...cannot be abrogated by the state save by specific provision in an Act of Parliament".[36]
- What Professor Jason Varuhas calls an "augmented" principle of legality[37] under which "where Parliament authorises significant interferences with important legal rights, the courts may interpret the legislation as requiring that any such interference should be no greater than is objectively established to be necessary to achieve the legitimate aim of the interference: in substance, a requirement of proportionality."[38]
- The already-mentioned[39] principle that "anxious scrutiny" is the appropriate standard of review to adopt when asking whether a government minister acted in a Wednesbury-unreasonable fashion when his or her decision impinged on fundamental human rights.
- A principle that a "constitutional statute" – defined as a statute that "conditions the legal relationship between citizen and state in some general, overarching manner, or...enlarges or diminishes the scope of...fundamental constitutional rights" – may not be impliedly repealed by an Act of Parliament, but must be repealed by express words.[40]

3.30. This ground of review has now been recognised by the UK Supreme Court in a trio of high-profile and recent judicial review cases: *R (Evans) v Attorney*

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33 An obvious and recent exception is the UK Supreme Court's decision in *Re Finucane's application for judicial review (Northern Ireland)* [2019] 3 All ER 491, where the law on legitimate expectations formed a central plank of the application for judicial review in that case. However, even in that case, the UK Supreme Court refused to find that the government had acted unjustifiably in resiling from the legitimate expectations that it had created that it would hold a public inquiry into the death of Patrick Finucane.

34 EXT086, para 37.

35 The phrase "principle of legality" comes from Sir Rupert Cross' book on *Statutory Interpretation*. See *R v Home Secretary*, *ex parte Pierson* [1998] AC 539, 587-588 (Lord Steyn).

36 *R v Lord Chancellor*, *ex parte Witham* [1998] QB 575, 579 (Laws J).

37 Varuhas, 'The principle of legality' (2020) 79 Cambridge Law Journal 578, 590.

38 *Pham v Home Secretary* [2015] 1 WLR 1591, [119] (Lord Reed).

39 See above, para 3.12.

40 *Thoburn v Sunderland City Council* [2003] QB 151, [62]-[63] (Laws LJ).

General;[41] *R (UNISON) v Lord Chancellor*;[42] and *R (Miller) v Prime Minister*.[43] We address in the previous Chapter the question of whether the scope of this ground of review should be limited by reference to the "principle" of non-justiciability. In line with the position adopted earlier in this Chapter,[44] **we do not recommend that that ground of review, when it applies, should be altered or qualified.**

3.31. Having said that, we note that at the moment there exists little clarity around the question of what amounts to a "constitutional right, value or principle". There is not even any agreement as to how one might determine whether a particular right, value or principle is recognised as being "constitutional" under the common law, with some preferring an approach that simply looks at the state of the precedents and others preferring an approach that turns on arguments of political principle.[45]

3.32. Given this uncertainty, it is no surprise that it is hard to discern any underlying principle underpinning the list of constitutional rights supplied by the latest edition of *De Smith's Judicial Review*:[46]

- Access to a judicial remedy.
- The right to life.
- The liberty of the person.
- The doing of justice in public.
- The right to a fair hearing.
- The prohibition on the retrospective imposition of criminal penalty.
- Freedom of expression.
- The rights of access to legal advice and to communicate confidentially with a legal adviser under the seal of legal professional privilege.
- Limitations on searches of premises and seizure of documents.
- Prohibition on the use of evidence obtained by torture.
- That a British citizen has a fundamental right to live in, or return to that part of the Queen's territory of which he is a citizen.
- The deprivation of property rights without compensation.
- The privilege against self-incrimination.
- A duty on the State to provide subsistence to asylum-seekers.
- Freedom of movement within the United Kingdom.

3.33. Writing extra-judicially, Lord Reed, the current President of the UK Supreme Court, has acknowledged that "The implications of the idea of common law constitutional rights are still being examined by the courts in a range of

[41] [2015] AC 1787.
[42] [2020] AC 869.
[43] [2020] AC 373.
[44] See above, para 3.17.
[45] Contrast Phillipson, 'Searching for a chimera? Seeking common law rights of freedom of assembly and association' (at 141) and Fairclough, 'The reach of common law rights' (at 295-296), both in Elliott and Hughes (eds), *Common Law Constitutional Rights* (Hart Publishing, 2020).
[46] *De Smith's Judicial Review*, 8th ed (Sweet & Maxwell, 2018), 11-054.

situations, and it will be some time before the law becomes settled."[47] However, the history of the law on legitimate expectations shows that we have no reason for confidence that as more cases are decided in this area, the law will eventually work itself pure; it may equally well become much more confused and complicated.[48]

3.34. The question of what amounts to a constitutional right, value or principle is a question that is of such fundamental constitutional importance that the courts must have – if not the final word – a very large say in how that question is to be answered. However, we think it would be unwise not to acknowledge the problems involved in attempting on a case-by-case basis to develop the common law on this extremely important question without outside assistance. Given this, **we hope that extra-judicial bodies such as the Law Commission or the Constitution Committee of the House of Lords – that are able to take a more synoptic view of this question than the courts are institutionally capable of doing – will assist the courts in their deliberations by expressing their own views, with the benefit of full consultation, on the question of what amounts to a constitutional right, value or principle such that an interference with such a right, value or principle will attract a heightened degree of judicial scrutiny.**

Cart JR applications

3.35. There is one form of public power in respect of which we think the grounds of judicial review could be usefully cut back, so as to prevent that form of public power being reviewed on the basis of an error of law. The power in question is the Upper Tribunal's power to refuse to grant someone permission to appeal against a decision of a First-tier Tribunal.

3.36. Such a refusal is not capable of being appealed.[49] However, in *R (Cart)* v *Upper Tribunal*,[50] the UK Supreme Court held that if the decision of the First-tier Tribunal (FTT) was affected by an error of law, with the result that the refusal of the Upper Tribunal (UT) to grant permission to appeal against the decision of the FTT was also affected by an error of law, then the UT's denial of permission to appeal could – in certain circumstances – be judicially reviewed and quashed. The UK Supreme Court subsequently held in *Eba* v *Attorney General for Scotland*[51] that the same position obtained under the Scottish law of judicial review.

3.37. Applications for judicial review against a decision of the UTT to refuse permission to appeal against a decision of FTT on the basis that the FTT's

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47 Reed, 'Foreword' in Elliott and Hughes (eds), *Common Law Constitutional Rights* (Hart Publishing, 2020), vii.

48 See, for example, Professor Mark Elliott's note on the recent Supreme Court decision in *Re Finucane's application for judicial review (Northern Ireland)* [2019] 3 All ER 491, observing that "*Finucane* serves to muddy the waters rather than to clarify": Elliott, 'Legitimate expectation: reliance, process, substance' (2019) 78 Cambridge Law Journal 260, 261.

49 Tribunals, Courts and Enforcement Act 2007, s 13(8)(c).

50 [2012] 1 AC 663.

51 [2012] 1 AC 710.

decision was affected by an error of law, and therefore the UTT's decision was also so affected, have come to be known as applications for a '*Cart* JR'. Statistical information provided to us by the Ministry of Justice makes clear that applications to the Administrative Court for *Cart* JRs form the largest category of applications for judicial review to that court. The table below – which presents the five-year average number (from 2015–2019) of applications for judicial review to the administrative court each year per topic – illustrates the point:

Top six most common topics, (Immigration/Civil/Criminal)
Five-year average (2015-2019)

Immigration		**Civil: Other**		**Criminal**	
Topic	**Count**	**Topic**	**Count**	**Topic**	**Count**
Cart - Immigration	779	Town and Country Planning	160	Magistrates Courts Procedure	35
Immigration Detention	733	Family, Children and Young Persons	131	Crown Court	33
Naturalisation and Citizenship	210	Prisons (not parole)	119	Decision as to Prosecution	31
Immigration Human Trafficking	113	Homelessness	111	Other	25
Immigration Legislation Validity	100	Police (Civil)	92	Criminal Law (General)	22
Asylum Support	80	Disciplinary Bodies	92	PACE	20

3.38. *Cart* JRs contributed, on average, 779 applications for judicial review per year from 2015–2019, with applications for judicial review in relation to Home Office decisions to detain foreign nationals forming the next highest category, with an average of 733 applications for judicial review per year.

3.39. The procedures for bringing a *Cart* JR are laid out in the Civil Procedure Rules, 54.7A. Those make it clear – consistently with the decision in *Cart* – that permission to make an application for a *Cart* JR should only be granted if "there is an arguable case, which has a reasonable prospect of success, that both the decision of the Upper Tribunal refusing permission to appeal and the decision of the First Tier Tribunal against which permission to appeal was sought are wrong in law" and that either "the claim raises an important point of principle or practice; or...there is some other compelling reason to hear it."[52]

3.40. The UK Supreme Court hoped that allowing refusals of the UT to give permission to appeal against decisions of a FTT to be judicially reviewed for error of law – albeit subject to the limits just mentioned – would provide "for some overall judicial supervision of the decisions of the Upper Tribunal,

[52] CPR, 54.7A(7).

particularly in relation to refusals of permission to appeal to it, in order to guard against the risk that errors of law of real significance slip through the system."[53]

3.41. In order to test how effective *Cart* JRs are at achieving this goal, we trawled Westlaw and BAILII for all the reports and transcripts of cases involving a *Cart* JR since *Cart* was decided. What we wanted to find out was this: In how many of those cases were the courts able to detect and correct an error of law that a FTT had fallen into and that the UT had failed to correct because it refused permission to appeal the FTT's decision?

3.42. For our purposes, a positive result would be recorded if:

- a court granted permission to make an application for a *Cart* JR and in doing so made it clear that the FTT in question had misapplied the law;
- pursuant to an application for a *Cart* JR, a court quashed the UT's decision not to permit an appeal against a decision of a FTT on the basis that the decision of the FTT (and by extension the UT) was affected by an error of law; or
- a court granted permission to make an application for a *Cart* JR on the basis that the claimant had an arguable case for being granted judicial review of the UT's refusal to grant permission to appeal the decision of a FTT, the UT's refusal was subsequently quashed under the Civil Procedure Rules, 54.7A(9),[54] and when the UT subsequently considered the claimant's appeal, it found in favour of the claimant on the basis that the FTT had indeed misapplied the law in the claimant's case.

If any of these were true in a particular case, then the ability to make an application for a *Cart* JR would have resulted in an error of law on the part of a FTT being detected and corrected.

3.43. On the other hand, a negative result would be recorded if:

- a court refused to grant the claimant permission to make an application for a *Cart* JR, or refused the claimant's claim for judicial review, on the basis that it was clear the FTT had not misapplied the law in the claimant's case; or
- a court granted permission to make an application for a *Cart* JR on the basis that the claimant had an arguable case for being granted judicial review of the UT's refusal to grant permission to appeal the decision of a FTT, the UT's refusal was subsequently quashed under the CPR Rule 54.7A(9), but when the UT subsequently considered the claimant's appeal, it found against the claimant on the basis that the FTT had not in fact misapplied the law in the claimant's case.

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53 *R (Cart) v Upper Tribunal* [2012] 1 AC 663, 699 (per Lord Phillips).

54 This provides that if permission to apply for a *Cart* JR is granted, then if the UT or another interested party wishes to have a substantive hearing of the claimant's case for judicial review, it must apply for such a hearing within 14 days, and if no such application is made, then the court will automatically quash the UT's decision to refuse to give permission to appeal.

If either of these were true in a particular case, the ability to make an application for a *Cart* JR would not have resulted in an error of law on the part of a FTT being detected and corrected, because the FTT made no error of law.

3.45. The table below sets out our findings.

Year	2012	2013	2014	2015	2016	2017	2018	2019	**Total**
No. of applications	161	672	776	1,159	683	789	617	645	**5,502**
No. of reports/ transcripts	10[55]	11[56]	7[57]	5[58]	3[59]	1[60]	4[61]	4[62]	**45**
No. of "positive" results	2	3	2	2	1	0	1	1	**12**

The table sets out (on the basis of the Ministry of Justice's statistics) the total number of applications for a *Cart* JR each year from 2012–2019, how many reports or transcripts of cases involving a *Cart* JR we were able to find on Westlaw and BAILII for each year, and how many of those cases had a "positive" result in that the ability to make an application for a *Cart* JR resulted in an error of law by a FTT being detected and corrected.

3.46. These figures confirm that when an application for a *Cart* JR is made "Only rarely will the judge conclude that the hurdles set out in CPR Rule 54.7A have

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55 *A and ORS Application* [2012] NIQB 86; *JD (Congo) v Secretary of State for the Home Department* [2012] 1 WLR 3273; *R (Patel) v Upper Tribunal* [2012] EWHC 1416 (Admin); *Phillips v Upper Tribunal* [2012] EWHC 2934 (Admin); ***R (Essa) v Upper Tribunal* [2012] EWCA Civ 1718**; *R (HS) v Upper Tribunal* [2012] EWHC 3126 (Admin); *R (Sharma) v Upper Tribunal* [2012] EWHC 3930 (Admin); *R (Thapar) v Upper Tribunal*]2012] EWHC 3997 (Admin); ***R (P) v Upper Tribunal* [2012] EWHC 4384 (Admin)**; *WO (Nigeria), Petitioner* [2012] CSOH 88. ("Positive" results in **bold**.)

56 *Parekh v Upper Tribunal* [2013] EWCA Civ 679; ***R (SQ (Pakistan)) v Upper Tribunal* [2013] EWCA Civ 1251**; ***ABC v Secretary of State for the Home Department* [2013] EWHC 1272 (Admin)**; *R (AA (Iran)) v Upper Tribunal* [2013] EWCA Civ 1523; *R (Spaul) v Upper Tribunal* [2013] EWHC 2016 (Admin); *R (Hashemi) v Upper Tribunal* [2013] EWHC 2316 (Admin); *R (Kelway) v Upper Tribunal* [2013] EWHC 2575 (Admin); *R (Wellcome Trust Ltd) v Upper Tribunal* [2013] EWHC 2803 (Admin); *R (Osayende) v Secretary of State for the Home Department* [2013] EWHC 3603 (Admin); *R (Thangarasa) v Upper Tribunal* [2013] EWHC 3415 (Admin); ***R (Brown) v Upper Tribunal* [2013] EWHC 4802 (Admin)**. ("Positive" results in **bold**.)

57 ***R (Akpinar) v Upper Tribunal* [2014] EWCA Civ 937**; ***Kuteh v Secretary of State for Education* [2014] EWCA Civ 1586**; *R (Butt) v Secretary of State for the Home Department* [2014] EWHC 264 (Admin); *R (Decker) v Secretary of State for the Home Department* [2014] EWHC 354 (Admin); *Kharug v Upper Tribunal* [2014] EWHC 2037 (Admin); *Parkin v Dartford CC* [2014] EWHC 2174 (Admin); *R (Hareef) v Upper Tribunal* [2014] EWHC 2329 (Admin). ("Positive" results in **bold**.)

58 *Patel v Secretary of State for the Home Department* [2015] EWCA Civ 1175; *R (Sunassee) v Secretary of State for the Home Department* [2015] EWHC 1604 (Admin); ***R (Saimon) v Upper Tribunal* [2015] EWHC 2814 (Admin)**; *R (Odewale) v Upper Tribunal* [2015] EWHC 4098 (Admin); ***R (Secretary of State for the Home Department) v Upper Tribunal* [2015] EWHC 4182 (Admin)**. ("Positive" results in **bold**.)

59 ***R (G) v Upper Tribunal* [2016] 1 WLR 3417**; *Bangura v Upper Tribunal* [2016] EWCA Civ 279; *Ricketts v Upper Tribunal* [2016] EWHC 3602 (Admin). ("Positive" results in **bold**.)

60 *GK v Essex CC* [2017] UKUT 355 (AAC).

61 ***R (PA (Iran)) v Upper Tribunal* [2018] EWCA Civ 2495**; *Robertson v Webb* [2018] UKUT 235 (LC); *Shah ('Cart' judicial review: nature and consequences)* [2018] UKUT 00051 (IAC); *Thakrar (Cart JR; Art 8; value to the community)* [2018] UKUT 336 (IAC). ("Positive" results in **bold**.)

62 ***MA (Cart JR: effect on UT processes) Pakistan* [2019] UKUT 353 (IAC)**; *Ejiogu (Cart cases)* [2019] UKUT 395 (IAC); *HN v South Tyneside Council* [2019] UKUT 380 (AAC); *R (Faqiri) v Upper Tribunal* [2019] 1 WLR 4497. ("Positive" results in **bold**.)

been surmounted."[63] It will be rarer still that granting permission to pursue an application for a *Cart* JR will result in an error of law on the part of a FTT being identified and corrected. In fact, this happens so rarely (on the above figures, in 0.22% of all applications for a *Cart* JR since 2012) that **we have concluded that the continued expenditure of judicial resources on considering applications for a *Cart* JR cannot be defended, and that the practice of making and considering such applications should be discontinued**.

Remedies

3.47. We now turn to the second issue raised by the term of reference considered in this chapter, which is whether the effect of the law on judicial review on the exercise of public power can and should be moderated by altering the remedies that are available where the exercise of a particular public power has been the subject of a successful application for judicial review.

3.48. The remedies that are potentially available when an application for judicial review is successful are set out in section 31 of the Senior Courts Act 1981: (a) "a mandatory, prohibiting or quashing order";[64] (b) "a declaration or injunction";[65] (c) "damages, restitution or the recovery of a sum due".[66]

3.49. **Our only recommendation in this area is that section 31 be amended to give the courts the option of making a suspended quashing order – that is, a quashing order which will automatically take effect after a certain period of time if certain specified conditions are not met**.

3.50. It seems to us that such a reform would have a number of benefits. First, some of the concerns that attended the UK Supreme Court's decisions in *Evans*, *UNISON* and *R (Miller) v Prime Minister*[67] in some quarters – to the effect that the Court had overstepped its constitutional boundaries in deciding those cases in the way it did – would have been substantially allayed had the remedy in those cases consisted of a suspended quashing order.

3.51. In this context, the suspended quashing order could have indicated that the impugned exercise of public power would be automatically quashed at some point in the near future unless Parliament legislated in the meantime to ratify the exercise of that power. The order might have also have indicated in very general terms what the legislation would have to say to successfully ratify the exercise of that power.

3.52. Issuing such an order in those cases would have made it abundantly clear that the Court acknowledged the supremacy of Parliament in resolving conflicts between the courts and the executive as to how public power should be employed. Such an order might have been useful in the *Evans* case in allaying governmental concerns created by some of the judgments in that case that no

63 *R (G) v Upper Tribunal* [2016] 1 WLR 3417, [104] (Walker J).
64 s 31(1)(a).
65 s 31(1)(b).
66 s 31(4).
67 See above, para 3.30.

form of legislative words would ever have been accepted as authorising, in a sufficiently clear manner, an Attorney General to "overrule a decision of the judiciary because he does not agree with that decision".[68] (Though it should be noted that in the aftermath of the decision in *Evans*, Parliament chose in the end not to amend the provision in the Freedom of Information Act 2000 that was the subject of the litigation in *Evans*.)

3.53. Second, a different form of suspended quashing order would also have proved a useful remedy in *R (Hurley and Moore) v Secretary of State for Business, Innovation & Skills*,[69] where the High Court found that the Secretary of State had, in issuing Regulations allowing universities to charge students up to £9,000 in fees, breached his "public sector equality duties" to assess properly whether the proposed Regulations would prove unacceptably discriminatory on grounds of race, sex or disability.

3.54. Despite this, the High Court declined to quash the Regulations because of the inconvenience that it would cause. Instead, the Court issued a mere declaration that the Secretary of State had acted unlawfully. As a remedy, a suspended quashing order would have had more teeth. Such an order would have indicated that that the Regulations would be quashed within a couple of months of the Court's judgment unless the Secretary of State in the meantime properly performed his "public sector equality duties" and considered in the light of that exercise whether the Regulations needed to be revised. Such a remedy would have ensured that the Secretary of State was not left free to disregard his statutory duties in regard to the Regulations.

3.55. The possibility of issuing suspended quashing orders in common law judicial review cases has garnered some academic support,[70] and the proposal that the courts should be allowed to make suspending quashing orders was one that JUSTICE thought that there was some benefit in adopting, when making its submission of evidence to the Panel.[71]

3.56. Moreover, suspended quashing orders may be issued under section 102 of the Scotland Act 1998, which provides that in a case where a court or tribunal has decided that the Scottish Parliament or a member of the Scottish Government has acted beyond the bounds of their competence, the court or tribunal may make an order "suspending the effect of [its] decision for any period and on any conditions to allow the defect to be corrected".

3.57. However, reform of the law on what remedies will be available in response to a successful application for judicial review would be required if the courts are to have the option of awarding a suspended quashing order, as the possibility of

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68 *R (Evans) v Attorney General* [2015] AC 1787, [53] (Lord Neuberger).

69 [2012] EWHC 201 (Admin).

70 Adams, 'The standard theory of administrative unlawfulness' (2017) 76 Cambridge Law Journal 289, 307-310; Morgan, '"O Lord make me pure – but not yet": granting time for the amendment of unlawful legislation' (2019) 135 Law Quarterly Review 585.

71 EXT122, para 7(b).

issuing a suspended quashing order in a common law judicial review case was ruled out by the UK Supreme Court in *Ahmed v HM Treasury (No 2)*.[72]

3.58. Making such an order would have been inconsistent with what has been called the "metaphysic of nullity"[73] that the common law of judicial review has embraced since the House of Lords' decision in *Anisminic v Foreign Compensation Commission*:[74] namely, that an exercise of public power that has been established to have been unlawful was always null and void. Given this, the UK Supreme Court held that they would be contradicting themselves and confusing matters if they suspended the effect of the quashing orders that they made in *Ahmed* in respect of Orders in Council that they had just found were unlawful and *therefore* null and void.

3.59. We think that Parliament should legislate to reverse the UK Supreme Court's decision in *Ahmed* on this point and give the courts the option, in appropriate cases, of making suspended quashing orders. Such legislation would not involve any fundamental breach with the principles underlying the common law of judicial review. The common law's adherence to the "metaphysic of nullity" has never been more than half-hearted, driven as it has been less by considerations of principle and more by policy concerns to limit the operation of legislation ousting judicial review or to preserve people's abilities to mount collateral challenges under the civil and criminal law to the lawfulness of administrative action.

3.60. Leaving aside cases where an unlawful exercise of power is rendered seemingly valid simply because it was never subjected to judicial review – which adherents to the "metaphysic of nullity" explain on the basis that exercises of public power are always presumed to be valid until they are challenged through the courts – there are plenty of examples of cases where a finding that public power was exercised unlawfully does not lead to an ineluctable conclusion that the exercise of that power was always null and void:

- The fundamentally discretionary nature of remedies under the law on judicial review shows that a finding that a public body has acted unlawfully will not ineluctably lead to the conclusion that the public body's actions were null and void. This is what happened in *Hurley and Moore*:[75] the High Court's finding that the Secretary of State had acted unlawfully in creating Regulations on university fees did not result in those Regulations being quashed as null and void. Instead, the only remedy granted was a simple declaration that the Secretary of State had acted unlawfully.
- Before the House of Lords' decision in *Anisminic* effectively annulled the difference between jurisdictional and non-jurisdictional errors of law, superior courts would quash decisions of inferior courts that were affected by a non-jurisdictional error of law that appeared on the face of the record

[72] [2010] 2 AC 534.
[73] The expression derives from Sir John Laws' chapter on 'Illegality: the problem of jurisdiction' in the first edition of Supperstone and Goudie (eds), *Judicial Review* (Butterworths, 1992), 55.
[74] [1969] 2 AC 147.
[75] See above, para 3.53.

of the inferior courts' decision.[76] By definition, such non-jurisdictional errors could not make the decision of the inferior court null and void.

- The real significance of the House of Lords' ruling in *Anisminic* was to render null and void decisions by public bodies that were affected by an error of law, thus making it very difficult for Parliament to oust judicial review of such decisions. However, in *R (Privacy International) v Investigatory Powers Tribunal*,[77] Lord Carnwath expressed dissatisfaction with this aspect of *Anisminic*, arguing that there was a "need to move beyond the legal framework established by *Anisminic*",[78] that "it is highly artificial, and somewhat insulting, to describe the closely reasoned judgment" of the Investigatory Powers Tribunal, which the UK Supreme Court set aside for error of law, "as a 'nullity', merely because there is disagreement with one aspect of its legal assessment",[79] and that judicial review for error of law is based "not on such elusive concepts as jurisdiction (wide or narrow), ultra vires or nullity"[80] but on a "pragmatic and principled"[81] approach to upholding the rule of law.
- Where an administrative body is subject to, and breaches, a directory rule rather than a mandatory rule, it acts unlawfully but without rendering what it has done a nullity. This distinction is not a novelty but "has existed in the common law for about three hundred years".[82]
- In *R* v *Secretary of State for the Home Department*, *ex p Cheblak*,[83] the Court of Appeal held that the claimant could only seek a writ of habeas corpus where the Home Secretary's decision to detain him ahead of deportation under the Immigration Act 1971 amounted to a nullity. This would only be the case where the claimant was detained "without any authority or the purported authority [was] beyond the powers of the person authorising the detention...".[84] Where, on the other hand, the decision to detain the claimant was affected by some error or impropriety that meant "it should never have been taken",[85] the decision to detain the claimant, while unlawful, would not amount to a nullity and if the claimant wished to obtain

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76 *R v Northumberland Compensation Appeal Tribunal*, *ex parte Shaw* [1952] 1 KB 338. See, further, Murray, 'Process, substance, and the history of error of law review' in Bell et al (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart Publishing, 2016), explaining that the superior courts would quash a decision of an inferior court that was affected by *any* error of law of which the superior court was cognisant. The difference between a jurisdictional and non-jurisdictional error of law lay in the fact that superior courts were only willing to admit evidence by affidavit that a decision of an inferior court was affected by an error of law if that error was jurisdictional in nature. As a result, a decision of an inferior court could effectively only be quashed for a non-jurisdictional error of law if the error appeared on the face of the record of the inferior court's decision, which the superior court would have access to by virtue of issuing an order of certiorari for the record of that decision. See also *R* v *Governor of Brixton Prison, ex p Armah* [1968] AC 192, 233-34 (Lord Reid), asserting (one year before *Anisminic*) that "jurisdiction has nothing to do with" the basis of a court's power to review the decision of a magistrate.

77 [2020] AC 491.

78 ibid, [128].

79 ibid, [82].

80 ibid, [132].

81 ibid, [131].

82 Evans, 'Mandatory and directory rules' (1981) 1 Legal Studies 227, 227.

83 [1991] 1 WLR 890.

84 ibid, 894.

85 ibid, 894.

a writ of habeas corpus, he would have to apply for judicial review to get the decision to detain him set aside.

- In the case of *In re UK Withdrawal from the European Union (Legal Continuity) Bill*,[86] the UK Supreme Court ruled that when considering the legality of legislation passed by the Scottish Parliament: "There is a difference between a want of legislative competence and more general grounds for judicial review on public law grounds. The result of a want of legislative competence is that a Scottish enactment is a nullity ('not law')...A Scottish enactment which is held by a court to be unlawful on more general public law grounds is not necessarily a nullity."[87]

3.61. As a matter of principle, there is no reason why a finding that a public power has been exercised unlawfully (as is therefore reviewable) should *necessarily* result in a finding that the exercise of that power was always null and void. Professor Forsyth QC argues to the contrary: "a decision-maker who decides unlawfully, does an act which he has no power in law to do; that act is thus in law no act at all. It is invalid or simply void."[88] However, this argument overlooks the elementary distinction between a power and a duty.

3.62. Suppose a public body is vested with a power, and a duty as to how it exercises that power. If the public body exercises the power in breach of that duty, it acts unlawfully – but it does not follow that its exercise of that power was necessarily null and void. In fact, the power is exercised unlawfully because it was validly exercised – if it were not exercised at all, then there would be no basis for saying that it had been exercised unlawfully.

3.63. Of course, it would be an impossible task for the courts to attempt to distinguish between (i) cases where public power has been exercised validly but unlawfully and (ii) cases where it has not been exercised validly and its purported exercise was therefore null and void. This is one of the reasons why the distinction between jurisdictional and non-jurisdictional errors of law has been excised from the law. However, the fact that it is practically impossible to distinguish between type (i) cases and type (ii) cases is no reason to treat all cases that fall into category (i) as falling into category (ii) – which is what the law has tended to do since *Anisminic* was decided.

3.64. The better route, it seems to us, is to give the courts the freedom to decide whether or not to treat an unlawful exercise of public power as having been null and void ab initio. Doing this would have the advantage of allowing the courts to issue suspended quashing orders in response to the unlawful exercise of public power. As has already been observed, the ability to make such orders would be especially useful in (a) high-profile constitutional cases where it would be desirable for the courts explicitly to acknowledge the supremacy of Parliament in resolving disagreements between the courts and the executive over the proper use of public power, and (b) cases such as *Hurley and Moore* where it is

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86 [2019] AC 1022.

87 ibid, [26].

88 Forsyth, '"The metaphysic of nullity": invalidity, conceptual reasoning and the rule of law' in Forsyth and Hare (eds), *The Golden Metwand and the Crooked Cord: Essays in Honour of Sir William Wade QC* (OUP, 1998), 142.

possible for a public body, if given the time to do so, to cure a defect that has rendered its initial exercise of public power unlawful.

3.65. It does not seem to us that this "better route" undermines the valuable option of subjecting unlawful administrative action to a collateral challenge in civil or criminal proceedings. Under the "metaphysic of nullity" it is open to a defendant in criminal proceedings to argue that a rule under which he or she has been charged is null and void, and if the defendant is successful in that plea, he or she cannot be convicted. Similarly, in the case where a claimant who brings a civil case against a public defendant, and the public defendant seeks to justify its conduct by reference to some rule or decision under which it operated, the "metaphysic of nullity" allows the claimant to argue that that rule or decision was null and void and cannot provide a defence to his or her claim.

3.66. We readily acknowledge that the law would be in a radically defective state if such collateral challenges to the validity of administrative action were impossible. As Professor Feldman observes: "There is an intuitive revulsion against the idea of a person being subjected to a criminal penalty on the basis of a byelaw which is invalid, and it makes little difference whether the invalidity is procedural or substantive."[89] The same sense of revulsion would be felt if someone's private law rights were taken away, with no ability to get them returned, on the basis of an invalid byelaw.

3.67. However, the possibility of such collateral challenges could easily be retained under the more flexible approach to the consequences of unlawful administrative action that we favour. The courts could simply take the position that an administrative rule or decision cannot be relied on as a basis for criminal proceedings, or as a defence in civil proceedings, if it would have been the subject of a quashing order or a declaration of nullity had that rule or decision been the subject of a timely application for judicial review.

3.68. Accordingly, **we recommend that section 31 of the Senior Courts Act 1981 be amended to make it clear that the courts have the power to make suspended quashing orders in appropriate cases. This could be done through the insertion into section 31 of a new subsection (4A), which would read, "On an application for judicial review the High Court may suspended any quashing order that it makes, and provide that the order will not take effect if certain conditions specified by the High Court are satisfied within a certain time period."**

3.69. If section 31 were amended in this way, it would be left up to the courts to develop principles to guide them in determining in what circumstances a suspended quashing order would be awarded, as opposed to awarding either a quashing order with immediate effect or a declaration of nullity.

[89] Feldman, 'Collateral challenge and judicial review: the boundary dispute continues' [1993] Public Law 37, 42.

CHAPTER 4: PROCEDURE

Introduction

4.1. This chapter sums up our responses to the government's invitation, under the Panel's terms of reference, to consider:

> **"Whether procedural reforms to judicial review are necessary, in general, to 'streamline the process', and, in particular: (a) on the burden and effect of disclosure in particular in relation to 'policy decisions' in Government; (b) in relation to the duty of candour, particularly as it effects Government; (c) on possible amendments to the law of standing; (d) on time limits for bringing claims, (e) on the principles on which relief is granted in claims for judicial review, (f) on rights of appeal, including on the issue of permission to bring JR proceedings and (g) on costs and interveners."**

4.2. It should be made clear from the outset of this chapter that the Panel has limited its review of procedure to those in England and Wales and not those of Northern Ireland or Scotland. Matters of principle may, of course, be relevant to the latter.

4.3. There have been a number of reviews carried out in respect of judicial review and its procedure,[90] with three recently carried out by the Ministry of Justice between 2012 and 2015. The 2013 review, 'Judicial review: proposals for reform', led, inter alia, to the creation of the Planning Court in 2014, and to a series of significant reforms and amendments to procedures through the Criminal Justice and Courts Act 2015 (CJCA). Those changes included the potential for "leapfrog appeals" (from the High Court to the UK Supreme Court) and the "No likelihood of a substantially different outcome for the applicant" test for denying a claimant permission to make an application for judicial review.

4.4. It is noted that 2013 proposals, made so soon after those made in 2012, were considered to be justified by the government on the basis of the evidence of a continuing growth in judicial review applications.

4.5. Some five years have passed since the CJCA came into effect, and the Panel recognises the importance for all potential participants, as well as those who may be affected by the conduct of a claim for judicial review, of looking again at whether there are aspects of current judicial review procedure that could be improved further and/or refined. The Panel also recognises the need for all

[90] Law Commission Report on *Administrative Law: Judicial Review and Statutory Appeals* (1994); the Bowman Committee's '*Review of the Crown Office List'* (LCD, London, 2000), p.ii; Ministry of Justice – *Judicial Review: Proposals for Reform* (CP25/2012) published in December 2012; 'Judicial Review' (written ministerial statement) Hansard, HC Vol.561, col.50WS (23 April 2013) (C. Grayling); Ministry of Justice, *Judicial Review: Proposals for Further Reform, Cm 8703* (September 2013); Ministry of Justice, *Reform of Judicial Review: Proposals for the Provision and Use of Financial Information* (Cm 9303) (2015).

parties concerned with judicial review to have easy access to clear information on what is entailed.

Scope of this chapter

4.6. Given the time constraints under which the Panel has operated, we have carefully stayed within the parameters allocated to us. What follows does not therefore represent in any way a profound or wholescale review of judicial review procedures, or indeed wider procedural aspects related to administrative law. The Panel has instead limited its consideration to those procedures and powers encapsulated by section 31 of the Senior Courts Act 1981 (SCA 1981) and Parts 8 and 54 of the Civil Procedure Rules (CPR).

4.7. Our review did reveal some issues of concern related to procedural matters that fell outside our terms of reference. We will return to those issues at the end of this chapter. Other issues were too complex to realistically handle within the time frame asked of us.

4.8. For example, on the issue of costs, the Administrative Law Bar Association (ALBA) expressed concern that "the review panel is ill-equipped to undertake a review of costs in [privately funded judicial review] claims", in part because the impact of reforms of the costs rules on access to justice "depends to a large extent on how litigants respond to those rules in practice", with the result that:

> "any reforms should only be adopted on the strength of clear and robust empirical evidence as to: (a) the effect of the current costs rules on litigant behaviour, and (b) the effect the proposed reforms are likely to have in practice. ALBA struggles to see how the review panel is in a position to undertake the kind of empirical research required in the time available to it."[91]

4.9. The Public Law Project also pointed out that:

> "Any proposals to reform costs for judicial review must be cognisant of the fragility of the claimant public law supplier base. There are areas of the country where the lack of public law solicitors represents a significant barrier to individuals accessing judicial review. There has also been a significant contraction in the public law legal aid supplier base following the introduction of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. Before making any recommendations regarding the 'proportionality' of costs, there needs to be detailed empirical research regarding the sustainability of the public law supplier base to ensure that any reforms are evidence-based, and improve rather than undermine access to justice."[92]

4.10. We readily acknowledge that we have been unable to undertake the empirical research called for by ALBA and the Public Law Project, and as a result have

[91] EXT008, para 140.
[92] EXT162, page 36.

not considered making any recommendations for the reform of the law on costs as it applies to the law on judicial review.

4.11. We do note, however, the concerns that have been expressed to us on all sides about the impact of the current costs regime and the costs of conducting judicial review claims, both in terms of discouraging applications for judicial review, and also in the diversion of government funds in having to defend (often successfully) applications for judicial review.

4.12. In its submission, JUSTICE expressed "grave concerns about the current costs regime and its impact on access to justice",[93] pointing to the "prohibitively high" cost of bringing a judicial review claim (£200,000 for "a substantial two day hearing"),[94] the lack of legal aid "for those with savings or capital over £8,000 (£3,000 in immigration cases) or with a monthly disposable income of £733",[95] and the way that under the regime for making costs capping orders (CCOs), "the provision for a reciprocal cap on the defendant's liability for costs has a negative impact on the economic viability for practitioners of taking on cases as does the fact that an application for a CCO can only be made once permission is granted, which leaves claimants and/or practitioners 'at risk' financially until this point. In addition CCOs cannot be granted unless the issue in question is of wider public importance. If it is not, then the claimant must bear the full financial risk."[96]

4.13. The Home Office puts the cost of a substantive judicial review hearing at £100,000[97] and reports that it spent over £75 million in 2019/20 on defending immigration and asylum judicial reviews and associated damages claims, while only recovering £4 million "in terms of its own costs, much of which will be written off in future years given the difficulty in recovering debts from those who bring such challenges".[98] The Department of Health and Social Care has had to spend over £1 million so far in the financial year 2020/21 on defending judicial review claims, as compared with £600,000 in 2018/19.[99] The Department for Transport estimates that defending judicial reviews in relation to the expansion of Heathrow has so far cost approximately £3 million.[100] The Department for Education reports that in the past three years, it has defended 15 judicial review cases that each cost more than £15,000 to defend; 22 judicial review cases that cost between £5,000 and £15,000 to defend; and 36 judicial review cases that cost up to £5,000 to defend.[101]

4.14. **Therefore, one of the conclusions of this chapter will be that the potentially serious impact of the current costs regime in judicial review cases on access to justice, and the concern of defendants as to the impact of that regime on their functioning – and what might be done about**

[93] EXT122, para 106.
[94] ibid, para 103.
[95] ibid, para 104.
[96] ibid, para 105.
[97] GOV015, para 37.
[98] ibid, para 39.
[99] GOV008, Appendix.
[100] GOV011, page 3.
[101] GOV006, page 5.

that impact – needs further[102] careful study by a body equipped to carry out the kind of research and evaluation that we have not been able to apply to this question.

4.12. In relation to certain other issues identified by our terms of reference, we have made no recommendation, as our call for evidence has not revealed any problem requiring intervention. For example, in relation to "rights of appeal", we received a number of submissions arguing that the rights of judicial review applicants to appeal against an adverse decision in their case should remain untouched,[103] and no submissions that these should be restricted. **We do not, therefore, see the need for changes in this area**.[104]

4.14. There were, however, issues on which there was some disagreement among those who responded to our call for evidence, and on which we think we can make some useful recommendations. They are grouped under three headings:

- Standing and interveners (para 4.77)
- The duty of candour (para 4.109)
- Time limits (para 4.133)

4.15. We also felt able to make some recommendations in respect of a claimant's reply to a defendant's acknowledgment of service (para 4.150).

4.16. Before we address these aspects of the law on judicial review procedure, it may be helpful if we first of all lay out some basic elements of the procedure in judicial review cases. We will then set out the picture we have been able to build up of how judicial review operates in practice.

A summary of basic judicial review procedure

The CPR

4.17. Appendix A to this report provides a summary description of the nature of judicial review, and its rules and requirements.

4.18. Practitioners will be very familiar with the White Book, which contains, inter alia, the CPR and Practice Directions (PD) as well as Court Guides which apply to all proceedings in the County Court, the High Court,[105] and the Court of Appeal (Civil Division).

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[102] This area has, of course, already been reviewed by Sir Rupert Jackson: *The Jackson Report on Civil Litigation Costs* (December 2009), and *The Jackson Review of Fixed Recoverable Costs* (July 2017).

[103] See, for example, the submissions from JUSTICE (EXT122, paras 88-93) and ALBA (EXT008, paras 133-35).

[104] We have, of course, recommended in Chapter 3 that the ability to seek judicial review of a decision of the Upper Tribunal not to give permission to appeal against a decision of the First-tier Tribunal should be removed (paras 3.35-3.46). Chapter 3 also contains our reflections on the remedies that should be available to a successful applicant for judicial review, and we will therefore not revisit the issue of "the principles on which relief is granted in claims for judicial review" in this chapter.

[105] Except in relation to its jurisdiction under the Extradition Act 2003.

4.19. The Panel recognises that the above may not be as accessible for non-practitioners and litigants in person, and therefore wishes to draw attention to other helpful guides to judicial review, such as the HMCTS publication *Administrative Court Judicial Review Guide 2020* and the Public Law Project's *An Introduction to Judicial Review*.

4.20. In terms of the core provisions and rules in respect of judicial review, these are contained essentially in section 31 of the SCA 1981 and Parts 8 and 54 of the CPR. These rules replace the former RSC Ord.53, introduced in 1977, which previously set out the rules governing the making of applications for judicial review and which is now revoked. The White Book at para 54.0.1 confirms that "The rules are intended to ensure fairness as between the parties and to ensure that the relevant issues are properly identified and the relevant evidence produced in a coherent sequence. The conduct of litigation in accordance with the CPR is integral to the overriding objective[106] and the wider public interest in the fair and efficient disposal of claims: see [108] of the judgment of the Divisional Court in *R (AB) v Chief Constable of Hampshire* [2019] EWHC 3461 (Admin)."

The Planning Court

4.21. As referred to above, one of the principal consequences of the Ministry of Justice review conducted in 2013 was the setting up of a separate Planning Court as a specialist list within the Queen's Bench Division of the High Court. The Planning Court is led by the Planning Liaison Judge (currently Holgate J), whose role is to allocate cases to judges with appropriate expertise. The Planning Court replaced the Planning Fast Track, which had been set up in July 2013 to ensure a speedier resolution of planning claims before the Administrative Court.[107]

4.22. The impetus behind the creation of the new court was the government's view that there should be a speedier resolution of planning challenges, whether by way of statutory review (for example, under sections 288 or 289 of the Town and Country Planning Act 1990) or by way of judicial review (for example, a decision by a local planning authority to grant planning permission, or a decision by the relevant Secretary of State to grant a Development Consent Order, pursuant to section 118 of the Planning Act 2008), and it was persuaded away from its initial proposal expressed in the consultation of enlarging the jurisdiction of the Lands Chamber of the Upper Tribunal to keeping planning and related matters within the High Court.

4.23. The Planning Court and its procedures are notable in the context of this chapter of the Panel's report because the Court applies specific targets (set out in PD 54E) for hearing and disposal of claims that come before it, namely:

[106] CPR 1.1(1): "These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost."

[107] See the observations of Lindblom J (as he then was) in *London & Henley (Middle Brook Street) Ltd v Secretary of State for Communities and Local Government* [2013] EWHC 4207 (Admin).

- the determination of permission to apply within three weeks of the expiry of the time limit for filing of the acknowledgment of service by the defendant
- the hearing of any oral renewals of applications for permission to apply to be heard within one month of receipt of request for renewal
- applications for permission under section 289 of the Town and Country Planning Act 1990 are to be determined within one month of issue of the challenge
- hearing of planning statutory reviews within six months of issue
- the hearing of judicial reviews within 10 weeks of the expiry of the period for the submission of detailed grounds by the defendant or any other party

4.24. The Panel considered that there was much of interest in terms of pure "streamlining" from these Planning Court procedures, but recognised that it is perhaps possible only to achieve the above objectives because of the type of challenges that come before this Court, which involve statutory reviews as well as judicial review claims, and for the most part involve practitioners, and not litigants in person who might struggle more with complying with its rules.

Annual judicial review claims: statistical evidence

4.25. That the number of judicial review claims brought has increased exponentially since the 1970s is incontestable. In 1980, Professor de Smith referred to "a striking increase" over the previous 15 years in terms of the frequency with which judicial review had been invoked and the readiness of the courts to intervene.[108]

4.26. By 1995, when Maurice Sunkin and others published the first full statistical survey of judicial review with access provided by the Crown Office, they recorded that, between 1981 and 1994, applications grew from 553 to 3,208 annually, an annual growth rate of 16%.[109] The two most prolific subject areas were housing and immigration (a constant). Housing grew from 141 applications (44.4%) in 1987 to 108 (23.8%) in the first quarter of 1991, while over the same period immigration fell from 671 (44%) to 103 (22.7%), only to reach a new record of 995 applications in 1994.[110] Statistics compiled by our Secretariat and published in Appendix D of this report show further steep rises in the present century.

4.27. From 2000 to 2013, judicial review applications to the Administrative Court grew from 4,000 to nearly 16,000, with immigration averaging around 2,000 cases annually.[111] The sudden decline thereafter is explained by the transfer of most immigration judicial reviews to the Upper Tribunal. Levels of total numbers of

[108] de Smith, *Judicial Review of Administrative Action*, 4th ed (Sweet & Maxwell, 1980), 31.
[109] Bridges, Meszaros and Sunkin, *Judicial Review in Perspective* (Cavendish Publishing, 1995).
[110] ibid, Table 2.1 and pages 15-16.
[111] Appendix D, Fig. 1.

judicial review applications have now returned to those in 2000, as shown in Appendix D.

4.28. Because of time constraints, there was a limit to how much the statistical analyses and figures available to us could be refined. Detailed case and data gathering was also limited. However, the data that we were able to consider was very helpful, and the Panel is extremely grateful for the assistance and support we had from the Ministry of Justice, which provided us with the information we have.

4.29. As explained in Appendix D, the main source of data on judicial review is the Administrative Court database, which routinely publishes statistics. Data for the Upper Tribunal (Immigration and Asylum Chamber) (UTIAC) was also provided by the Upper Tribunal statistics team.

4.30. In addition, the Office of the Advocate General for Scotland provided information regarding cases in Scotland (in addition to the publicly available data on Scottish cases) and for Northern Ireland, the Northern Ireland Courts and Tribunal Service also provided the panel with data on their cases. As noted above, however, the Panel has concentrated its attention in this chapter on the Administrative Courts of England and Wales.

4.31. In terms of costs, the Government Legal Department (GLD) has provided central government with data setting out the total costs of judicial review cases overall on an annual basis since 1993. However, it was not possible from the information provided to draw any correlation between the number of judicial review cases and the costs of each of those cases, because of the different lengths of time different cases take, with every case needing to be billed on an annual basis whether it has been completed or not.

4.32. Of the responses to the call for evidence, 20 submitted substantial quantitative data. These were drawn from a range of sources including government publications, empirical studies, academic articles, and research conducted by the respondent or their organisation.

Number of applications for judicial review

4.33. In headline terms, the data available shows that over the period 2000 to 2019, total applications for all forms of judicial review[112] were 4,238 in 2000 and 3,383 in 2019.

4.34. This period notably saw a significant increase in total cases up to 2013, when it reached a high point of 15,592 applications made. However, this increase was almost entirely owing to the growth in immigration cases. In November 2013, the UTIAC took over assessing applications for the vast majority of immigration

[112] Including immigration judicial reviews, but only up to 2014, before transfer to the UTIAC; also including statutory challenges under the Town and Country Planning Act 1990, both before and after the setting up of the Planning Court in 2013.

and asylum judicial reviews and led to a significant decrease back down to the levels referred to above.

4.35. This is further informed by an analysis (shown in Figs. 1 and 2 of Appendix D) excluding immigration judicial review cases altogether. This shows that there has indeed been little variation in the numbers of judicial review applications brought over the past decade[113] and there has been a decrease in non-immigration judicial review applications of around 27% in total, at an average rate of 4% per year. The sustained decrease in cases began in 2011/12, accelerating after 2014, with only one year, 2016, seeing an increase up to 2019.

4.36. The picture in immigration judicial review cases is very different. Fig. 3 of Appendix D combines data from the Administrative Court and the UTIAC. This shows a significant growth rate in immigration judicial reviews of around 30–40% per year, being reversed in 2013/14 when case numbers began to fall at a much higher rate (20–30%) to that observed in non-immigration cases (1–11%). The number of immigration cases in 2019 was still higher, however, by a factor of nearly three as compared to the number of immigration cases in 2000. Proportionally the data also shows that immigration makes up the vast majority of all judicial reviews (82%).

Progress of judicial reviews

4.37. It is possible, again in headline terms, to determine broad outcomes following an application for judicial review.

4.38. Looking at the combined figures (i.e. immigration and non-immigration judicial reviews) it appears that a substantial proportion of cases are consistently withdrawn even before they go before a judge to consider whether to grant permission on the papers (referred to as the "first stage" in the analyses in Appendix D). So, for example, of the 4,238 applications in 2000, only 3,590 reached the first stage after 648 claims were withdrawn; and in 2019, 2,542 of the 3,383 applications reached the judge, with 841 being shown as withdrawn.

4.39. Of those applications that reach the first stage, a further large proportion are refused permission: almost half in 2000 (1,984 out of 3,590) and around two-thirds in 2019 (1,956 out of 2,542).

4.40. The likelihood of an unsuccessful claimant seeking a renewal of their application being granted permission at a renewal hearing at first instance is not high. Again, taking the examples of the data in relation to all types of judicial review from 2000 and 2019, in 2000, of the 746 who applied for permission at a renewal hearing, only 164 were granted it; and in 2019, of the 420 who applied for a renewal, only 126 were granted permission to proceed.

4.41. The Panel considered that this evidence showed that the permission stage was clearly a significant filter of judicial review claims.

[113] The average absolute deviation being 210 cases.

4.42. It should be noted that no data was available to show the numbers and outcomes of appeals made to the Court of Appeal against refusals of permission (where such appeals are available).[114]

4.43. In terms of the consequences of claimants being granted permission to proceed with their judicial review claims, while the data reveals no record of cases being settled by Consent Order (i.e. with the defendant making a concession to the claim in whole or part), there is data showing cases being withdrawn after the first stage. In any event, the data shows clearly that not all claims granted permission proceed to a full substantive hearing.

4.44. In 2000, the data shows that of the total 1,857 claims granted permission either at first stage or at renewal, a total of 559 cases went through to a full substantive hearing.

4.45. In 2019, the equivalent data shows that of the total 727 judicial review claims granted permission either at the first stage or at renewal, a total of 189 cases went through to a full substantive hearing.

4.46. The Panel concluded from this that the permission stage not only operates as a significant filter for claims that should not proceed, but after permission was granted, parties often went on to settle their claims.

Outcomes following application for judicial review

4.47. Unfortunately, it is not possible to know which claims are settled in the claimant's favour by means other than judicial determination, i.e. by way of Consent Order.

4.48. This is highlighted in the analysis in Appendix D, which notes that the Administrative Court datasets do not capture the reasons for cases being withdrawn. The panel assumed that a proportion of cases marked "withdrawn" were settled in favour of the claimant. Even of the cases withdrawn by the claimant, a number of them may well have resulted in something of value to the claimant.

4.49. It is, nevertheless, at least possible using the data to see which way the High Court (and equivalent) eventually ruled.

4.50. In 2000, of the 559 claims that went to a full hearing (after permission), 504 were determined in the claimant's favour. In 2019, of the (far fewer) 189 claims that went to a full hearing, 87 were determined in the claimant's favour.

4.51. One other feature worth noting is that the years 2000 and 2001 show themselves to be unusual in the numbers of eventual substantive hearings (more than 500). Other than these years, even at the height of the increase in 2013 in judicial review claims being commenced (when about 15,000 claims

[114] For example, no appeal is available following a refusal of permission to proceed with a statutory challenge under s 289 of the Town and Country Planning Act 1990 against an enforcement appeal decision.

were made), no more than 507 claims proceeded to an eventual substantive hearing.

4.52. In addition, in terms of successful claims, again the years 2000 and 2001 can be seen to be unusual in that more claimants were successful than defendants. By contrast, in all subsequent years, defendants have been more successful.

4.53. Finally, in terms of proportions of success – as noted in the analysis in Appendix D (see Fig. 18) – other than in 2000 and 2001, looking simply at the number of cases found in favour of the claimant at a substantive hearing, the trend is generally the same as that for total case numbers. Looking at the proportion of cases found in favour of the claimant at a final hearing to the total number of final hearing cases also indicates that "success rates" – defined by success for the claimant at a final hearing – have stayed fairly constant. They have been lower than the success rate for the defendants, but not significantly so.

4.54. It should be noted, however, of these data that it is not known which cases may have bypassed a separate permission stage in any event and ordered to be heard as a "rolled up" hearing.

Data submitted by government departments

4.55. What additional information can we glean from the data submitted by government departments? The Panel was extremely grateful to have helpful figures from government departments in their responses, although they did not all relate to the same period and were not comprehensive.

4.56. In the Home Office response, it was noted that only around 1% of claims brought to a final hearing were decided in favour of the claimant. However, they also remarked that the Home Office took the approach of settling claims in favour of the claimant on many occasions when they thought they had a high chance of winning, as the cost of fighting the judicial review would not be sustainable. The Home Office reported that in 2019/20, 68% of cases were successfully defended**.**

4.57. The Ministry of Housing, Communities and Local Government reported that they dealt with around 200, mostly planning, cases per year and successfully defended 75% of them.

4.58. The Department of Health and Social Care's response referred to 41 claims for judicial review that had been made against it between 2017 and 2020, all of which had been successfully defended.

4.59. The Department for Transport reported dealing with 70–80 threatened judicial review claims since the start of 2016/17. Of these, 35–45 were either withdrawn or never made. Of those claims that were made, only two were decided in favour of the claimant, with one being settled and 12 successfully defended.

4.60. The response from the Attorney General's Office focused on the 2018/19 financial year, reporting on judicial review claims that had been concluded in that year (this would include ongoing cases from previous years). Of the 18 that

were concluded, seven were withdrawn, two were settled (it is assumed in the claimant's favour), eight were successfully defended in court and one claim was successful.

4.61. The Department for Digital, Culture, Media and Sport reported that seven of the 12 claims for judicial review that they had to address over the past two years (since 2018) did not progress beyond the pre-action protocol stage. Of the remaining five: one has been granted permission and is due to be heard in March 2021; three were successfully defended by the department; and one claim was successful.

4.62. The Department for Work and Pensions reported that over the past two years (2018–2020) they have concluded 111 cases. They settled five, with 31 being withdrawn, and five being found in favour of the claimant.

4.63. The response of the Department for Environment, Food and Rural Affairs refers to its dealing with a total of 90 cases, 67 of which were successfully defended (i.e. 75%). It was not clear which period this relates to, but in discussing the total costs of such claims, the department refers to the period since 2016.

4.64. The Department for Education reported that between 2017 and 2020, of 105 judicial review cases that they had to address, nine were settled (again it is presumed in the claimant's favour), 45 were withdrawn and three found in favour of the claimant at a final hearing.

4.65. The Department for Business, Energy and Industrial Strategy reported that since 2016 they have had to address a total of 21 judicial review cases. Of these, two were settled, nine were withdrawn and 10 were successfully defended.

4.66. The Foreign, Commonwealth and Development Office (FCDO) provided a much more detailed breakdown of their judicial review cases over a much greater period than other departments, having commissioned specialist junior counsel to undertake a survey of judicial review claims against the Foreign and Commonwealth Office and the Department for International Development (which are now combined) over the past 40 years. Of the total of 66 claims for judicial review made between 1981 and 2020, 46 were successfully defended and 20 claims were made out. The FCDO makes the point that of the 38 cases that were subjected to final substantive hearings and judgments, the claimant was wholly unsuccessful in 26 cases, partially successful in nine cases and wholly successful in three cases.

Data submitted by non-government respondents

4.67. The Hackney Community Law Centre (HCLC) provided a detailed breakdown of their caseload, the majority of which is housing- or welfare-related. Since January 2019, their clients requested 47 judicial reviews, the majority of which (72%) were resolved before the need to make a claim for judicial review. Of those that proceeded, 42% have so far been resolved in favour of the claimant,

with the main reasons being that the public body being challenged accepted the validity of the claim or provided an alternative remedy.

4.68. HCLC's data is a small sample in a specific area, but it appeared to demonstrate that the pre-action protocol could be effective in favour of early resolution of claims.

4.69. To understand more clearly the relative success rates of judicial review cases, more data is required than just the outcome of judicial review claims. Information is also needed as to the number of claims made; the amount of permissions granted; and rates of ultimate success at a hearing.

4.70. The Bangor Law School submission summarises empirical research into settlement, pointing to Bondy, Platt and Sunkin's study on the *Value and Effects of Judicial Review and Dynamics of Judicial Review*.[115] This work, like the HCLC submission, found that claimants were often successful through settlement or the defendant reconsidering decisions.

4.71. The Bangor Law School submission considered that "around 1/3rd of civil (non-immigration) claims are issued but withdrawn prior to a permission decision, and around half of claims granted permission are withdrawn before a final substantive hearing."[116] They went on to refer to research evidence in the Bondy, Platt and Sunkin study, which found that:

> "of the cases which settled pre-permission, 46% of claimants obtained a particular benefit that had been sought and in a further 39% of cases the defendant agreed to reconsider decisions or carry through a decision-making process that they had failed to complete. Of the cases that settled post-permission 59% were reported to have settled in favour of the claimant, and this regularly involves individuals being granted a benefit or entitlement previously withheld or withdrawn."[117]

4.72. Within the business sector, the joint submission from BT, Centrica, Heathrow, Sky and Vodaphone provided data which was consistent with these findings. They reported that around 50% of judicial review claims against the economic regulators were successful.

4.73. The Law Society of England and Wales was also keen to emphasise the effectiveness of the Pre-Action Protocol in avoiding the need to make a judicial review claim at all. In a survey of its members, they estimated that around 50% of non-immigration judicial reviews are settled.

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[115] Bondy, Platt and Sunkin, *The Value and Effects of Judicial Review: The Nature of Claims, Their Outcomes and Consequences* (Public Law Project, 2015).
[116] EXT022, para 53.
[117] ibid.

Conclusions

4.74. In overall terms, therefore, the Panel concluded:

- While there has been an exponential increase in judicial review claims being made to the courts since the 1970s, the most recent evidence shows that it is at a similar level to that recorded in the mid-1990s (i.e. between 3,000 and 4,000).
- There is also evidence that claims are decreasing.
- In terms of the effectiveness of the permission stage as a filter of claims for judicial review, there was good evidence to show that significant numbers of claims fell away and that for the most part, judges' refusals of permission on the papers did not lead to a high number of re-applications for permission with a hearing.
- The grant of permission also led to significant numbers of claims that had been found to be arguable being settled without the need for a substantive hearing.
- The number of cases that went to a substantive hearing were a very small proportion of the claims made (and a small proportion of those permitted to proceed).
- A higher proportion of claims were successfully defended than were made out.
- The evidence did not suggest that large numbers of claims lacking merit claims were being allowed to proceed.
- The judicial review pre-action protocol procedure is operating as a significant means of avoiding the need to make claims and for valid cases to be considered and settled by defendants, as well as identifying claims which were not arguable.

4.75. Nevertheless, government departments expressed strong views with regard to the judicial review claims each had had to address and expend resources on, and that the process took a long time and often led to delay in resolving important policy issues or decisions. Where claims were successfully defended, it still meant delay and unrecovered expenditure.

4.76. We now turn to the four areas on which we thought we were able to make recommendations.

Standing and interveners

Standing

4.77. Until 1978, the standing rules varied according to the nature of the particular remedy sought. The position is now set out in the SCA 1981, section 31(3), which reads as follows:

> "No application (claim) for judicial review shall be made unless the leave of the court has been obtained in accordance with the Rules of Court and the court shall not grant leave to make such an application unless it considers

> that the applicant has a sufficient interest in the matter to which the application relates."

4.78. The parties and/or the court cannot agree that a case can proceed where a claimant does not have standing and the court has no discretion in the matter. It only has jurisdiction where the claimant has "sufficient interest".[118] Since the issue of standing goes to jurisdiction,[119] it can be raised not only at the permission stage but at any stage in the proceedings.

4.79. Traditionally, questions of standing and timeliness were addressed at a preliminary stage in the proceedings. There was, however, a decided shift after the well-known *Federation* case,[120] where a trade association sought to challenge a tax amnesty negotiated between the Revenue and interested trade unions on behalf of individual taxpayers. While on the facts of the case, standing was held not to be made out, the House of Lords held that "in a case of sufficient gravity, the court...might be able to hold that another taxpayer or taxpayers could challenge…the acts of abstentions of the revenue".[121]

4.80. Lord Diplock remarked:

> "It would… be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public spirited taxpayer, were prevented by outdated technical rules of [standing] from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped."[122]

This dictum opened the way for a public interest model of judicial review, in which the emphasis shifted from judicial review as solely a vehicle for protecting the private interest of individuals to an administration-centred model designed for censuring illegality. In any case where a prima facie evidence of illegality could be shown, courts were likely to pass over the question of standing.

4.81. How the term "sufficient interest" should be interpreted today was explained by Lord Hope in *AXA General Insurance*:

> "a person may have a sufficient interest to invoke the court's supervisory jurisdiction in the field of public law even though he cannot demonstrate that he has a title, based on some legal reason, to do so…A personal interest need not be shown if the individual is acting in the public interest and can genuinely say that the issue directly affects the section of the public that he seeks to represent."[123]

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[118] The Administrative Court: Judicial Review Guide 2020, para 5.32.

[119] *R v Secretary of State for Social Services, ex parte Child Poverty Action Group* [1990] 2 QB 540, 556 (Woolf LJ).

[120] *R v Inland Revenue Commissioners, Ex p National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617.

[121] ibid, 633.

[122] ibid, 644.

[123] *AXA General Insurance Ltd v The Lord Advocate* [2012]1 AC 868, at [63]. The original Scottish test, to which Lord Hope was referring, was that of "title and interest to sue".

This passage suggests two forms of "sufficient interest", both of which involve an individual or individuals who are or who are likely to be affected. A further test governs some cases involving human rights. Where a claim involving human rights is brought by way of an application for judicial review, section 7(3) of the Human Rights Act provides that the applicant is to be taken to have a sufficient interest in relation to the unlawful act *only* if he is, or would be, a victim of that act (emphasis ours).

4.82. *De Smith's Judicial Review* summarises the constitutional values that underlie the courts' current approach to the standing requirement:

> "To deprive a person of access to the courts because of lack of standing can raise issues of constitutional significance. At its heart the question is whether it can ever be right, as a matter of principle, for a person with an otherwise meritorious challenge to the validity of a public authority's action to be turned away because his rights or interests are not sufficiently affected by the impugned decision. To put it another way, if a decision which is otherwise justiciable is legally flawed, should the court prevent its jurisdiction being invoked because the litigant is not qualified to raise the issue? To answer 'yes' to these questions presupposes that the primary function of the court's supervisory jurisdiction is to redress individual grievances, rather than that judicial review is concerned, more broadly, with the maintenance of the rule of law. In recent years the courts have approached standing issues in a more flexible and liberal way than was once the case."[124]

4.83. Taking the same view, Lord Reed has observed:

> "The essential function of the courts is… the preservation of the rule of law, which extends beyond the protection of individual's legal rights. There is thus a public interest involved in judicial review proceedings, whether or not private rights may also be affected. A public authority can violate the rule of law without infringing the rights of any individual: if, for example, the duty which it fails to perform is not owed to any specific person, or the powers which it exceeds do not trespass upon property or other private rights. A rights-based approach to standing is therefore incompatible with the performance of the courts' function of preserving the rule of law, so far as that function requires the court to go beyond the protection of private rights…
>
> "For the reasons I have explained, *such an approach cannot be based upon the concept of rights, and must instead be based upon the concept of interests*. A requirement that the applicant demonstrate an interest in the matter complained of will not however operate satisfactorily if it is applied in the same way in all contexts. In some contexts, it is appropriate to require an applicant for judicial review to demonstrate that he has a particular interest in the matter complained of: the type of interest which is relevant, and therefore required in order to have standing, will depend upon the particular context. In other situations, such as where the excess or misuse of power affects the public generally, insistence upon a particular interest

[124] *De Smith's Judicial Review*, 8th ed (Sweet & Maxwell, 2018), 2-004.

> could prevent the matter being brought before the court, and that in turn might disable the court from performing its function to protect the rule of law. I say 'might', because the protection of the rule of law does not require that every allegation of unlawful conduct by a public authority must be examined by a court, any more than it requires that every allegation of criminal conduct must be prosecuted. Even in a context of that kind, there must be considerations which lead the court to treat the applicant as having an interest which is sufficient to justify his bringing the application before the court. *What is to be regarded as sufficient interest to justify a particular applicant's bringing a particular application before the court, and thus as conferring standing, depends therefore upon the context, and in particular upon what will best serve the purposes of judicial review in that context*."[125]

4.84. As a result of this approach to the issue of standing, standing is rarely an issue in the modern law of judicial review – though perhaps it should be. One government department's submission to the Panel expressed concerns about the way in which the courts interpreted the "sufficient interest" test. In particular, concern was expressed that:

> "some challenges to executive action are not brought out of concern about whether executive action complies with the law, but to impede lawful action on the basis of disagreement over the public policy direction taken by the Government. Some such cases are based on how executive action might apply to hypothetical circumstances. Responding to these can be more difficult and incur unjustified cost to the taxpayer."

The submission also reflected a general concern about "abuse" of judicial review and suggested that "it would be beneficial to clarify the sufficient interest test in statute and there ought to be a clearer public interest test not just in bringing a claim, but in pursuing it when a settlement is offered or reached."

4.85. Lord Sumption has described the current position in this way:

> "Just about anyone can apply for judicial review if he has either a personal or an institutional concern with the outcome. This approach necessarily exposes the courts to a great deal of litigation which is essentially politics by other means. It opens the government to challenges in the courts by pressure groups often concerned with a single issue, which have no interest in the process of accommodation between opposing interests and values that is fundamental to the ability of nations to live in peace."[126]

4.86. A problematic case was one brought by the Joint Council for the Welfare of Immigrants (JCWI) to challenge the so called "right to rent" provisions of the Immigration Act 2014, which made it unlawful for private landlords to rent property to persons unlawfully in the UK and so required landlords to check the immigration status of prospective tenants. The JCWI issued judicial review proceedings against the Secretary of State challenging the lawfulness of the

[125] *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46, [169]-[170].
[126] Sumption, 'Foreign affairs in the English courts since 9/11', Lecture at the Department of Government London School of Economics, 14 May 2012, pages 2-3.

Scheme, claiming a violation of Articles 8 and 14 of the ECHR. No question of standing seems to have been taken, although Hickinbottom LJ remarked on appeal:

> "It is important to note the nature of the challenge. It was not brought by any individual claiming that he or she has been the victim of discrimination as a result of the operation of the Scheme: rather, it was a challenge to the validity of the statutory provisions themselves. Furthermore, the challenge was not in respect of any adverse effect of the Scheme upon those towards whom it was directed (i.e. irregular immigrants whose right to rent was deliberately curtailed by the Scheme), but the alleged unintended but (it is said) inevitable discriminatory consequences for certain categories of those with a right of abode or leave to enter/remain and thus a right to rent, namely those without British passports and especially those without British passports and without ethnically British attributes such as name."[127]

4.87. In a note on the High Court judgment, where the policy was held unlawful, Professor Ekins observed that:

> "Much of the High Court's judgment consists in a review of empirical evidence about what landlords have done or intend to do, evidence which turns on analysis of survey results and their statistical significance. This is not evidence which courts are well-placed to consider, especially when, as in this case, they relate to the merits of general social policy embedded in legislation."[128]

4.88. A question which arises is why the JCWI had standing. The JCWI is a body with a clear view about the government's immigration policy, as they make clear in their helpful submission to us. Some of the Panel question why a court granted permission to hear a case that consisted of an appraisal of government policy in the guise of a "structural review" – in the words of Professor Varuhas – of a legislative scheme that a judge later said had a legitimate policy purpose, was consistent with EU law, preserved remedies under the Equality Act, and "was fully debated and consulted on in all relevant respects, including discrimination, before being brought into effect".[129]

4.89. A similar point could be made concerning the proceedings brought in the name of the Northern Ireland Human Rights Commission (NIHRC) to challenge the compatibility of the abortion law of Northern Ireland with Articles 3, 8 and 14 ECHR.[130] No particular "victims" participated, though the NIHRC was in touch with victims.

4.90. The question of standing arose in the High Court, where Horner J held that NIHRC had standing to bring the proceedings in its own name, a ruling that was

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[127] *R (Joint Council for The Welfare of Immigrants) v Secretary of State for the Home Department* [2020] EWCA Civ 542 at [4].

[128] Ekins, 'The High Court's "right to rent"' decision is a travesty', Policy Exchange (2 March 2019). The decision was reversed on appeal.

[129] [2020] EWCA Civ 542, [179] (Davis LJ).

[130] *In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland)* [2018] UKSC 27.

upheld in the Court of Appeal. On appeal, a majority of the Supreme Court (Lord Mance, Lord Reed, Lady Black and Lord Lloyd-Jones) concluded that NIHRC did not have standing to bring the proceedings. Consequently, the Court did not have jurisdiction to make a declaration of incompatibility.

4.91. Lord Mance, who dealt with the standing issue at great length, concluded that where the Commission is *instituting* human rights proceedings, it need not itself be a victim, but there must be an actual or potential victim of an unlawful act to which the proceedings relate. Where the Commission seeks to *intervene* in human rights proceedings, the person instituting the proceedings must be an actual or potential victim of an unlawful act.[131] It is somewhat surprising, therefore, that the majority went on fully to consider the substantive issue of whether the law on abortion in Northern Ireland was in breach of Convention rights. Lord Mance explained that this was "appropriate" as the point had been fully argued.[132]

4.92. A minority of the Court (Lady Hale, Lord Kerr and Lord Wilson) thought the NIHRC did have standing. Lady Hale dismissed the matter as "an arid question, because there is no doubt that the NIHRC could readily have found women who either are or would be victims of an unlawful act under the Human Rights Act 1998 and either supported or intervened in proceedings brought by those women".[133]

4.93. Although this was a human rights case that turned on the interpretation of specific sections of the Northern Ireland Act 1998, some of the Panel thought it of general importance. The recent case law suggests that the concept of standing may receive a relatively restrictive interpretation. In practice, however, the requirements are likely to be largely overlooked. The case law also suggests that an individual can usually be found to front up the application in all forms of public interest litigation. We return to the pros and cons of this below.

4.94. It seems to us that the lack of an adequately funded claimant should not be a bar to a judicial review of executive action if such action may be unlawful. It is in the public interest (and of constitutional importance) that such cases can reach the courts.

4.95. Most of the submissions emphasised the value provided by NGOs and charitable organisations, pressure groups, and sympathetic individuals in enabling judicial reviews to reach the courts. The submission from ALBA pointed to the fact that such organisations are "public spirited"[134] and that their submissions are "better prepared".[135] Professor David Feldman emphasised how difficult it is for those without "clout" to bring a judicial review.[136] Many submissions drew our attention to the very limited availability of public funding for individual claimants.

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[131] ibid, [56] (emphasis added). Lord Reed, Lady Black and Lord Lloyd-Jones agreed.
[132] Lord Mance, Lord Reed, Lady Black and Lord Lloyd-Jones would not have made a declaration that the law of Northern Ireland is incompatible with Art 3 ECHR: ibid, [34] and [100].
[133] ibid, [11].
[134] EXT008, para 77.
[135] ibid, para 72.
[136] EXT086, para 10.

4.96. A few respondents, including the Haldane Society and the Public Law Project, thought that the current standing test did not go far enough and should be extended. The majority of the submissions that we received thought the standing tests worked well and did not suggest that standing should be either restricted or expanded.

4.97. In some of the Panel's view, however, it is important to distinguish between an issue which "directly affects the section of the public that (a claimant) seeks to represent" and a policy choice by government that *may* adversely affect a section of society. An organisation representing that section of society may disagree with the policy, but judicial review of the policy has the potential to become "politics by another means".[137] Disapproval of a policy does not entitle a body to cite *their* judgment of public interest as providing sufficient interest to give them standing to challenge the policy. This is not an easy distinction to draw but the courts should, in appropriate cases, be prepared to do so.

4.98. **Should the government want to legislate on the issue of standing, it can of course do so.** The Law Commission has suggested amendment of section 31 of the SCA 1981 and Order 54 to make special provision for cases where the applicant is a representative or where there is a public interest in a matter but no individual has standing. They envisaged a "two track" system in which criteria for a form of "public interest standing" would be established and applied.[138] The government could even restrict the right to judicial review to those "directly affected" by government action or inaction, but such a course would have significant constitutional implications and we do not recommend it. **Our view, in line with the many submissions we received, is that the temptation to legislate should be resisted**.

4.99. **We point out that if the courts' current broad approach to standing is proving problematic for government bodies, it is always open to defendants in judicial review proceedings to do more to challenge the standing of claimants to bring such proceedings than they perhaps do at the moment. Given the jurisdictional importance of standing to the courts' ability to consider a claim for judicial appeal, we would also encourage the courts to address expressly the issue of standing in proceedings that are brought before them, regardless of whether that issue is raised by the parties.**

4.100. We also note – as did many of the respondents to our call for evidence – that the government has been down this path before and chosen, ultimately, not to act. The Panel considers that this was the correct decision. We do, however, hope that the courts will be astute to distinguish between "public spirited" groups that enable challenges to the legality of an act or decision to take place and those applications which seek to involve the courts in a general policy review of decisions that an elected government is entitled to make.

[137] *R (Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* [2019] 1 WLR 4105, [326].
[138] Law Commission No 226, at paras 5.16-22.

Interveners

4.101. The classical design of adversarial, bipolar procedure was by definition antithetical to third-party interventions, whether in oral or written form. Participation was restricted to official amicus curiae, typically a legal representative of the Crown appointed at the request of the court to assist it with legal argument. Order 53 made provision for intervention only where a party was "directly affected" (a formula narrowly defined)[139] or where the court considered that a person desiring to be heard in *opposition* to an application was a "proper person to be heard".

4.102. Today, CPR 54.17 gives the court power to grant "Any person…permission: (a) to file evidence or (b) to make representations at the hearing of the Judicial Review" whether in support of, or in opposition to the claim. Such a person is known as an "intervener". Such an application must be made promptly.

4.103. Authorities on intervention have been noted as being "sparse".[140] In terms of the court's approach to granting permission to intervene, in *R (British American Tobacco UK Ltd) v Secretary of State for Health* [2014] EWHC 3515 (Admin); [2015] C.M.L.R. 35,[141] Turner J refused an application to intervene because it was considered that the interests of the proposed interveners were not discernibly different from those of the claimant. As such, their intervention would offer little assistance to the court. This approach was applied in *R (Philip Morris Brands Sarl) v Secretary of State for Health*.[142]

4.104. In *R (Air Transport Association of America Inc) v Secretary of State for Energy and Climate Change*, Ouseley J observed:

> "It has been the practice of this court for a number of years, well established and beneficial, to allow interventions by groups or bodies, or individuals who have particular knowledge and expertise in the area, whether in terms of the effect which the action at issue may have upon them and their interests, or by virtue of the work which they carry out or through close study of the law, practice and problems in an area, or because of the campaigning experience and knowledge which their activities have brought."[143]

4.105. In *Re Northern Ireland Human Rights Commission*,[144] the NIHRC asked the court to confirm its power to intervene in litigation as a third party. The House of Lords gave cautious approval. The governing Act did not specifically confer intervention rights on the Commission, but it had general powers to promote the understanding of human rights law and practice and to review its

[139] *R v Rent Officer Service, ex p Muldoon* [1996] 1 WLR 1103.
[140] *R (British American Tobacco UK Ltd) v Secretary of State for Health* [2014] EWHC 3515 (Admin), [15] (Turner J).
[141] [2014] EWHC 3515 (Admin).
[142] [2014] EWHC 3669 (Admin).
[143] [2010] EWHC 1554, [8].
[144] [2002] UKHL 25.

adequacy and effectiveness. But the final decision on whether the Commission could intervene lay with the court.

4.106. In terms of the role of interveners, Lord Hoffmann, criticising an intervention from the NIHRC, had this to say:

> "It may however be of some assistance in future cases if I comment on the intervention by the Northern Ireland Human Rights Commission. In recent years the House has frequently been assisted by the submissions of statutory bodies and non-governmental organisations on questions of general public importance. Leave is given to such bodies to intervene and make submissions, usually in writing but sometimes orally from the bar, in the expectation that their fund of knowledge or particular point of view will enable them to provide the House with a more rounded picture than it would otherwise obtain. The House is grateful to such bodies for their help.
>
> "An intervention is, however, of no assistance if it merely repeats points which the appellant or respondent has already made. An intervener will have had sight of their printed cases and, if it has nothing to add, should not add anything. It is not the role of an intervener to be an additional counsel for one of the parties. This is particularly important in the case of an oral intervention. …In future, I hope that interveners will avoid unnecessarily taking up the time of the House in this way."[145]

4.107. Since 2000, however, there has been a significant increase in the use of intervention, most obviously in the House of Lords, where groups such as Liberty and JUSTICE have effectively acquired repeat-player status.[146] In *A (No2)* there were 16 requests to intervene, though only two interveners were represented by counsel in the oral proceedings.[147] There were five interveners in *Miller (No 1)*[148] and in the Northern Ireland abortion case mentioned earlier, there were 10 interveners. It is questionable whether this number of interveners was justifiable, or even helpful.

4.108. The Panel is concerned that this development is the product of unfettered judicial discretion. Promptness aside, CPR 54 is silent about the relevant criteria and judicial failure to explain when, why, by whom and in what form intervention will be permitted is a major point of criticism.[149] The courts have effectively adopted a policy of drift.[150] Intervention as a lobbying tactic also raises concerns for the integrity of the adjudicative process and separate identity of courts. **The Panel therefore recommends that criteria for**

[145] *E (A Child) v Chief Constable of Ulster* [2009] AC 536, [2]-[3].
[146] Hannett, 'Third party intervention: in the public interest?' [2003] Public Law 128. Poole, Shah and Blackwell, 'Rights, interveners and the Law Lords' (2013) 34 Oxford Journal of Legal Studies 1.
[147] *A v SSHD* [2005] UKHL 71.
[148] [2017] UKSC 5.
[149] For an earlier, unsuccessful, attempt at structuring, see JUSTICE/Public Law Project, *A Matter of Public Interest* (1996).
[150] See Brooke, 'Interventions in the Court of Appeal' [2007] Public Law 401; also Fordham, '"Public interest" intervention: a practitioner's perspective' [2007] Public Law 410.

permitting intervention should be developed and published, perhaps in the Guidance for the Administrative Court.

The duty of candour

Introduction

4.109. The judicial review procedure obliges *both* parties to disclose relevant information under the "duty of candour". This includes information that undermines the party's own case.

4.110. The submissions that we received in relation to the duty of candour focused on the defendant's duty of candour; there were no submissions in respect of the claimant's duty[151] and we make no recommendations for changes in relation to that.

4.111. The duty of candour requires that a public authority defending a judicial review set out the relevant facts and the reasoning behind its decision-making process.[152] In *R. v Lancashire CC, ex parte Huddleston*,[153] Sir John Donaldson MR described this obligation on the defendant as a "duty to make full and fair disclosure"[154] while Parker LJ stated that the defendant "should set out fully what they did and why so far as is necessary fully and fairly to meet the challenge" made by the claimant.[155]

4.112. The Court of Appeal emphasised the importance of the duty of candour in *R (Citizens UK) v Secretary of State for the Home Department*[156] when it found that the Secretary of State for the Home Department had failed to inform the court why the reasons for adverse decisions in relation to children seeking to enter the UK were so sparse (the government had feared legal challenge if it gave fuller reasons). The failure to do so, although not deliberate, was considered a serious breach of the duty of candour.

4.113. The duty of candour exists because "public authorities are not engaged in ordinary litigation, trying to defend their own private interests. Rather, they are engaged in a common enterprise with the court to fulfil the public interest in upholding the rule of law."[157]

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[151] For an example of the application of the duty of candour to the claimant in a judicial review case, see *Khan v Secretary of State for the Home Department* [2016] EWCA Civ 416.

[152] See *Tweed v Parades Commission for Northern Ireland* [2007] 1 AC 650, at [31] (Lord Carswell) and [54] (Lord Brown).

[153] [1986] 2 All E.R. 941.

[154] ibid, 945.

[155] ibid, 947.

[156] [2018] EWCA Civ 1812.

[157] *R (Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHC 1508 (Admin), [20]. See also *Re Application by Brenda Downes for Judicial Review* [2006] NIQB 77, [31]: "Public bodies and central government agencies in particular are involved in the provision of fair and just public administration and must present their cases dispassionately and in the public interest. Justice lies at the heart of public interest and can only be served by openness in assisting the court to arrive at a proper and just decision."

Discussion

4.114. In the submissions we received there was no quarrel with the need for defendants in judicial review proceedings to be subject to a duty of candour. JUSTICE's submission was representative, opposing "any reform to remove or limit the duty of candour" because (among other things):

> "The rationale of judicial review is to ensure lawful, fair and just public administration. A public authority's objective should not therefore be to win the case at all costs, but to assist the court with ensuring the lawfulness of the decision under challenge, with a view to upholding the rule of law and improving standards in public administration. There is inherent and important value in public authorities acting transparently in their decision making and conducting themselves transparently in litigation. Any other approach undermines the role of public authorities in upholding the rule of law."[158]

4.115. However, as the Society of Labour Lawyers pointed out in its submission, "Practitioners have expressed some uncertainty over the precise parameters of the duty of candour" and they observe that it "would be desirable for those parameters to be clarified".[159] They identify three areas of uncertainty in particular:

> "(i) First, there is some uncertainty over the timing of the duty. In particular, does it apply only once permission for judicial review has been granted, or does it also apply to pre-action correspondence and any Summary Grounds for contesting a claim that a defendant might choose to file prior to the grant of permission?
>
> "(ii) Secondly, there is some uncertainty over the extent of the duty. In particular, is it limited to information relevant to the grounds that a claimant has raised for challenging the defendant's decision; or does it also extend to other matters, beyond the scope of the pleaded issues?
>
> "(iii) Thirdly, there is some uncertainty as to whether compliance with the duty requires the disclosure of documents as opposed to the provision of information."[160]

4.116. On the first issue, it seems incontestable that the duty of candour applies once a court is engaged in a claim for judicial review, i.e. on issue of proceedings. It is therefore incorrect to suggest that the duty of candour might only apply when permission for judicial review has been granted. The real issue is whether the duty of candour can apply before a court is engaged in considering the claim, i.e. before proceedings are officially issued. On that issue, the Treasury Solicitor's 2010 *Guidance on Discharging the Duty of Candour and Disclosure in Judicial Review Proceedings* takes the view (at para 1.2) that:

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[158] EXT122, para 57.
[159] EXT182, para 165.
[160] ibid, para 166 (emphases in original).

> "The duty of candour applies as soon as the department is aware that someone is likely to test a decision or action affecting them. It applies to every stage of the proceedings including letters of response under the pre-action protocol, summary grounds of resistance, detailed grounds of resistance witness statements and counsel's written and oral submissions."

4.117. However, the duty of candour is owed to a court, so it is hard to see how the duty can arise before a court is engaged in considering a claim for judicial review. **Having said that, it should be emphasised, that even if this is correct, the Pre-Action Protocol for judicial review claims could not work without the defendant's explaining the facts on which the claimant's proposed claim is based, and sharing "information and relevant documents" (PAP, 3(a)).**

4.118. On the second issue, the Treasury Solicitor's Guidance (again at para 1.2) states that:

> "The duty extends to documents/information which will assist the claimant's case and/or give rise to additional (and otherwise unknown) grounds of challenge."

In *R v Lancashire County Council, ex parte Huddleston*,[161] the Court of Appeal struck a more cautious note, with Parker LJ observing that "when challenged" a defendant in a judicial review case "should set out fully what they did and why, *so far as is necessary, fully and fairly to meet the challenge*"[162] and making it clear that:

> "I would not wish it to be thought that once an applicant has obtained leave he is entitled to demand from the authority a detailed account of every step in the process of reaching the challenged decision in the hope that something will be revealed which will enable him to advance some argument which has not previously occurred to him."[163]

Sir John Donaldson MR agreed "with Parker LJ that the grant of leave to apply for judicial review does not constitute a licence to fish for new and hitherto unperceived grounds of complaint...'".[164]

4.119. Against this, and more recently, in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 4)*,[165] Lord Kerr endorsed (at [183]) the position taken in the 6th edition of Michael Fordham QC's[166] *Judicial Review Handbook*,[167] according to which (at page 125), the "vital duty" that is owed by "A defendant public authority and its lawyers...to make full and fair disclosure of relevant material...include[s] (1) due diligence in investigating

[161] [1986] 2 All ER 941.
[162] ibid, 947 (emphasis in original).
[163] ibid.
[164] ibid, 946.
[165] [2017] AC 300.
[166] As he then was.
[167] Fordham, *Judicial Review Handbook*, 6th ed (Hart Publishing, 2012).

what material is available; (2) disclosure which is relevant or assists the claimant, *including on some as yet unpleaded ground*...".[168]

4.120. On the third issue, the previous quotation from the Treasury Solicitor's Guidance suggests that discharging the duty of candour may involve providing a claimant for judicial review with copies of documents relevant to their claim. However, the classic formulations of the duty of candour referred to above merely require defendants to set out the facts relevant to the claimant's case and the reasoning behind its decision-making process. Cranston and Lewis JJ thought that when it came to the issue of whether the disclosure of documents was *required* by the duty of candour:

> "the better approach at present is to express the content of the duty of candour simply by reference to the wording of existing case law dealing with the identification of relevant facts and the reasoning process. That would leave the public body free to continue with the practice of voluntarily providing disclosure of relevant documents. If it is said that the disclosure of a particular document is necessary for fairly dealing with an issue, that can be dealt with by means of an application for specific disclosure. We would not, at present, consider it appropriate to particularise (and in our view, extend) the scope of the duty of candour on the defendant by incorporating specific disclosure obligations into the Practice Direction."[169]

4.121. However, more recent caselaw has cast doubt on this approach. In *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 4)*,[170] Lord Kerr took the view that "The duty [of candour] extends to disclosure of 'materials which are reasonably required for the court to arrive at an accurate decision'".[171]

4.122. It is this third issue that provoked the most discussion by respondents who addressed the duty of candour.

4.123. On the one hand, Liberty took the view that "There should not be any issue with locating or disclosing documents underlying decision-making. If there is, then this is an issue with the processes of data collection and record keeping, not with the duty of candour or disclosure."[172] ALBA similarly claimed that "the duty of candour does not ordinarily involve large volumes of disclosure, even if there is voluminous relevant documentation."[173] ALBA went on:

> "provided there is...a proper paper trail, the burden of complying with the duty of candour should not be onerous. In the event of a challenge, the decision makers ought to be able accurately to summarise the reasons for the decision and to disclose the relevant documents. Where it does not

[168] Emphasis added.
[169] Cranston and Lewis JJ, *Defendant's Duty of Candour and Disclosure in Judicial Review Proceedings: A Discussion Paper* (28 April 2016), para 19.
[170] [2017] AC 300.
[171] ibid, [184], quoting from the Privy Council decision in *Graham v Police Service Commission* [2011] UKPC 46, at [18] (Sir John Laws).
[172] EXT138, para 17.
[173] EXT008, para 92.

> occur, the solution lies not in reducing the duty of candour...but improving record-keeping."[174]

4.124. Public Law Wales supported the disclosure of documents as part of the duty of candour on the basis that "The knowledge that there may be a need to disclose decision making documents as part of the Defendant's duty of candour...in Court proceedings encourages good first-time decision making."[175] While JUSTICE argued that the requirement to disclose documents as part of the duty of candour should apply even at the pre-action stage: "the public authority should be required to provide information *and documents* which are proportionate and properly necessary for the claimant to understand why the challenged decision has been taken...".[176]

4.125. On the other hand, Linklaters described the Treasury Solicitor's Guidance as setting out a "'gold standard' for discharging the Duty of Candour that requires defendants to conduct an exercise that does not fall far short of the requirements of standard disclosure in civil litigation. This approach can create a practical burden on defendants and can be exploited by claimants...".[177]

4.126. We were supplied with some evidence as to how much of a practical burden this creates for defendants in judicial review cases:

> "the Treasury Solicitor's Guidance is applied vigorously by the Government Legal Department to the many thousands of pre-action letters which are issued each year, and to any judicial review proceedings thereafter. This means Government Departments face constant calls to search for and disclose documents that might be relevant to the litigation. Such an approach consumes massive resources across Government since vast numbers of officials have to trawl back looking for potentially relevant documents, inevitably duplicating other searches, and then make assessments about relevance, legal privilege, redactions etc."

4.127. In one case, the Department of Work and Pensions estimated that the work of discharging the duty of candour cost £380,000, sifting through 30 years of evidence over "a six to eight-week period", with "16,000 files sifted to around 4,000 documents which were then comprehensively reviewed".[178] Another department pointed to the "huge overhead around managing litigation, particularly around disclosure" and observed that:

> "While the Department is absolutely committed to fulfilling its duty of candour, and fully accepts that individuals bringing challenges should have access to information directly relevant to their case, there are cases of

[174] ibid, 95.
[175] EXT164, para 38.
[176] EXT122, para 63 (emphasis added). To similar effect, see EXT015, page 6 (Anti-Trafficking and Labour Exploitation Unit): "[A recalcitrant] approach to pre action disclosure can cause significant delay as well as being an impediment to effectively advising survivors on the merits of their case. If disclosure of these documents were provided early, *in compliance with the duty of candour*, it would enable parties to better assess the prospects of a claim and help to deter those pursuing weaker claims" (emphasis added).
[177] EXT139, page 9.
[178] GOV012, para 35.

disclosure requests which go beyond this. This is particularly the case when seeking to challenge a policy rather than individual decisions."

4.128. Concern has also been expressed to us that the duty of candour can result in expectations that advice given by officials to ministers will be disclosed to claimants, when such advice would not be disclosable under, for example, the Freedom of Information Act 2000. For example, one government department observed that the scope of its disclosure obligations, as currently interpreted, has the effect of "removing the safe space for policy development, for example to consider all options, as increasingly there is an expectation of disclosure of this advice" and asks whether there "could be an opportunity to consider whether the breadth of litigation disclosure options, as compared with FOI where Parliament provided exemptions balanced against the public interest in disclosure, should be revised".

4.129. Another department submitted that application of the duty of candour at the pre-action stage has resulted in a significant increase:

> "in the number of Pre-Action Protocol (PAP) letters...over the last few years... In [some] instances, PAP letters are used as a means of seeking further information from the Department, not in the context of the established statutory framework of [Freedom of Information], but in the context of the duty of candour. At worst these are fishing expeditions for evidence."

Similarly, the Crown Prosecution Service observed that in "challenges to decisions not to prosecute...the CPS frequently receive wide-ranging requests for disclosure of the underlying prosecution material, which includes witness statements, and a defendant's police interview. Neither is it uncommon in [such] applications...for the claimant to request a copy of the prosecutor's review/s."[179]

Conclusions

4.130. **We agree that there is a need to clarify the scope of the duty of candour**.

4.131. **Adopting the structure suggested by the Society of Labour Lawyers as to how the duty of candour might be usefully clarified:**

- **On issue (i), the duty of candour does not formally arise until proceedings are issued. However, it should be emphasised that there are obligations on defendants under the Pre-Action Protocol to help claimants "understand and properly identify the issues in dispute in the proposed claim and share information and relevant documents" (PAP, 3(a)).**
- **On issue (ii), some of the Panel are attracted to the position suggested by the Society that the duty of candour "should not extend beyond the provision of information about the decision-**

[179] GOV003, paras 17, 19.

maker's reasoning and the facts relevant to a claimant's grounds of challenge. A duty of candour in relation to as yet unidentified grounds of challenge would be excessively onerous."[180] **Others were persuaded by the approach adopted by Lord Kerr in the *Bancoult (No 4)* case,**[181] **under which the duty of candour extends to material relevant to an as yet unpleaded ground of challenge.**

- **On issue (iii), some of the Panel are attracted to the view that the position set out above by Cranston and Lewis JJ on the relation of the duty of candour to the disclosure of documents**[182] **should be adopted; whereas others consider that disclosure of documents is required under the duty of candour in order to resolve the matter between the claimant and the defendant fairly and justly.**

4.132. **We consider that the Treasury Solicitor's Guidance may have been interpreted in an excessively onerous way. We do not suggest any change in the way the courts interpret the duty of candour, but do consider that some revisiting of the Guidance would result in a more proportionate approach to the duty without undermining the fundamental importance of candour in judicial review proceedings.**

Time limits

4.133. With regard to the time limit within which a claim for judicial review must be brought by filing the relevant claim form at court, CPR 54.5 states that it must be "no later than three months after the grounds to make the claim first arose" but the first requirement is that this must be done "promptly".

4.134. CPR 54.5(5) also provides that in a case relating to a decision made by the Secretary of State or local planning authority under the Planning Acts, "the claim form must be filed not later than six weeks after the grounds to make the claim first arose." This time limit also applies to statutory reviews under section 288 of the 1990 Act; in cases related to section 289 challenges, the time period is 28 days. Other lesser time periods also apply in particular cases:

- procurement reviews and utility contract reviews: 30 days[183]
- *Cart* judicial reviews: 16 days[184]
- judicial review of the decision of a minister in relation to a public inquiry: 14 days[185]

4.135. It is well established that a claim for judicial review will not necessarily be made promptly simply because it has been made within the three-month

[180] EXT182, para 167.
[181] [2017] AC 300, at [183].
[182] See above, para 4.30.
[183] CPR 54.5(6), Public Contracts Regulations 2015, reg 92; Utilities Contracts Regulations 2016, Concession Contracts Regulations 2016.
[184] CPR 54.7A(3).
[185] Inquiries Act 2005, s 38(1).

period.[186] However, in the Panel's view, it is rare for a court to dismiss a claim outright if it has been brought within the three-month period even if it can be argued that the claimant failed to act promptly. The decision in *Sustainable Development Capital LLP* is an exception to this, where a claim was brought towards the end of the three-month period. However, that case was also a weak one, where the court held that "there is no basis for concluding" that the defendants committed "a public law error" in the way they handled the claimant's case.[187] It is doubtful whether the court would have been as happy to dismiss the claimant's application for judicial review on the grounds of lack of promptness had the claimant's case been stronger.

4.136. The time for making an application for judicial review begins to run from the date when the grounds of challenge first arose. This is usually the date on which the decision under challenge was taken.[188] When considering whether an application for judicial review was brought promptly, the date when the claimant knew (or ought to have known) enough information to enable to make an application for judicial review will be material to the question of whether the application was brought promptly or whether an extension of time for bringing the claim should be granted.[189]

4.137. Time limits may not be extended by agreement between the parties, but the Court has the power to extend time for the filing of a claim under CPR 3.1(2). Section 31(6) of the SCA 1981 provides that the court may refuse an application for an extension of time to file a claim for judicial review "if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration".

4.138. By contrast, where time limits are imposed on statutory review challenges such as section 288 of the Town and Country Planning Act 1990 and section 24 of the Acquisition of Land Act 1981, they are in general treated as absolute, and the court has no discretion to extend those time limits under the SCA 1981 and CPR 54.5 (3).[190]

4.139. The submissions we received on the appropriate time limits for bringing a claim for judicial review were almost uniformly of the view that shortening the

[186] *R. v Independent Television Commission, ex parte TV NI Ltd,* The Times, 30 December 1991, *R v Cotswold DC*, *ex parte Barrington Parish Council* (1997) 75 P & C.R. 515, 523–523; *Finn-Kelcey v Milton Keynes BC* [2009] Env. L.R. 17; *R (Sustainable Development Capital LLP) v Secretary of State for Business, Energy and Industrial Strategy* [2017] EWHC 771 (Admin).

[187] ibid, at [67].

[188] Though see Moore-Bick LJ in *R (Berky) v Newport City Council* [2012] EWCA Civ 378, at [48] (taking the view that the time for bringing a claim for judicial review runs from the day *after* the impugned decision was taken).

[189] *R v Secretary of State for Transport, ex p Presvac Engineering Ltd.* (1991) 4 Admin Law Reports 121, 133-44.

[190] *R (Blue Green London Plan) v Secretary of State for the Environment, Food and Rural Affairs* [2015] EWHC 495 (Admin), [43]-[46].

current time limits would likely prove counterproductive. Drawing on research by Dr Varda Bondy and Professor Maurice Sunkin,[191] JUSTICE argued that:

> "Shorter time limits would potentially increase the number of weak and premature claims as claimants are more likely to file claims on a protective or precautionary basis without having had time to properly asses, and get advice on, the merits of the case or negotiate an out of court settlement in accordance with the Pre-Action Protocol. This would increase the burden on public authorities who would have to respond to greater numbers of premature claims. This risk was recognised by the Government in its 2012 consultation, which is why it did not propose a general reduction in judicial review time limits."[192]

Similar concerns were expressed by the Equality and Human Rights Commission,[193] ALBA,[194] the Society of Labour Lawyers,[195] and the Law Society of England and Wales.[196]

4.140. The Law Society reported that while "the majority of our members who were surveyed approved of the current time limit, 30% felt it is too short"[197] with a "common theme in comments from members [being] that a longer time limit would allow for better engagement with the pre-action protocol stage, thereby encouraging settlement".[198]

4.141. A way of retaining the current time limit on bringing claims for judicial review while promoting greater engagement with the pre-action protocol was suggested by Hogan Lovells in its submission:

> "In our view, judicial review procedure could be improved by strengthening the obligations of the putative parties to an action to engage more openly and constructively in pre-action correspondence, so as more often to avoid the need to proceed to formal judicial review proceedings, where possible. These new obligations could provide that claims should only be pursued once the parties can demonstrate that they have engaged sufficiently at the pre-action stage to identify and narrow the issues in dispute...and to determine whether the parties agree there is an arguable case. *The time limits for bringing judicial review claims could be adjusted as time 'stops' once the parties engage in pre-action correspondence*, thus reversing the incentive not to engage meaningfully in such correspondence under the

[191] Bondy and Sunkin, 'Judicial review reform: who is afraid of judicial review? Debunking the myths of growth and abuse' (UK Constitutional Law Association Blog, 10 January 2013) (available at: https://ukconstitutionallaw.org/2013/01/10/varda-bondy-and-maurice-sunkin-judicial-review-reform-who-is-afraid-of-judicial-review-debunking-the-myths-of-growth-and-abuse/).
[192] EXT122, para 75.
[193] EXT083, para 33.
[194] EXT008, para 113.
[195] EXT182, para 201.
[196] EXT127, para 49.
[197] ibid, para 48.
[198] ibid, para 49.

> current system, due to the shortness of time available to issue formal judicial review proceedings in most circumstances."[199]

4.142. While we were attracted to this submission, **we did not see how legislation could provide in a sufficiently determinate way for the time to bring a claim for judicial review to stop and restart, depending on whether the parties to that claim were engaging in a meaningful way with the pre-action protocol for bringing a claim for judicial review.**

4.143. A different way of achieving the same result would be to adopt the recommendation of the Bingham Centre for the Rule of Law's report on *Streamlining Judicial Review in a Manner Consistent with the Rule of Law*[200] that it should be possible for the parties to a putative claim for judicial review to agree to extend the time limit for bringing that claim:

> "CPR 54.5(2) provides that an extension of time for filing a claim for judicial review cannot be agreed between the parties. This rule reflects the idea that it is the Court who has and retains control of the proceedings, and not the parties. That is appropriate in public law, given the wider public interest and the effect on third parties. We would not disagree with any of that. However, the inability to agree that time should be extended has led to a position in which potential defendants and interested parties 'agree not to take a time point'. That will reassure some claimants some of the time. Others will issue claims protectively, to guard against the risk of the court...refusing to extend time. This can involve unnecessary costs being incurred... We think that [this] informal practice...could be regularised by...allowing the relevant parties to agree that they will consent to an extension of time, should judicial review later become necessary. We recognise that parties would need to be careful...to identify those who are 'directly affected' by the claim. But we do not think it would be incompatible with the rule of law, if all parties to proposed judicial review proceedings, including defendants and interested parties, were permitted to agree that an extension of time is appropriate."[201]

4.144. While we were also attracted to this suggestion, **we think that it may be very difficult to implement without creating undesirable side effects for third parties, including other government agencies**.

4.145. In its submission, Liberty argued that:

> "The requirement to act promptly as well as not later than three months from the date that the grounds first arose creates uncertainty for claimants and is already a much shorter time limit than most areas of law. A clear three-month time limit with no additional requirement to act promptly would

[199] EXT109, para 2.1 (emphasis added).
[200] Fordham, Chamberlain, Steele & Al-Rikabi, *Streamlining Judicial Review in a Manner Consistent with the Rule of Law* (Bingham Centre Report 2014/01), Bingham Centre for the Rule of Law, BIICL, London, February 2014.
[201] ibid, 2.6.

reduce this uncertainty without creating additional delays in public administration."[202]

4.146. In considering this argument, we were mindful of the fact – noted in Chapter 5[203] – that the requirement that a claim for judicial review be brought promptly was abolished in 2018 in Northern Ireland for reasons identical to those advanced by Liberty.

4.147. The fact, already mentioned,[204] that it is so rare for claims for judicial review to be dismissed on the ground that they have not been brought "promptly" (although they had been brought within three months) cuts both ways in considering whether or not the requirement of promptness should be abolished. This rarity might be taken as favouring abolition of the "promptness" requirement: why retain a requirement that is invoked so rarely? But equally it could be taken as favouring retention: why not retain a requirement that is invoked so rarely?

4.148. **Ultimately, we think that there may well be a case for following the example of Northern Ireland and abolishing the requirement of promptitude**.

4.149. **Our conclusion is that we have found it difficult to identify any aspects of the law in this area which are open to being clearly improved**. This conclusion should not be regarded as surprising. This is an area that has been subjected to repeated scrutiny, and significant improvements to the law from further reforms could be expected to be difficult to achieve. We wish to make it clear that **we would certainly not favour any tightening of the current time limits for bringing claims for judicial review**. The arguments made by respondents to our call for evidence that such a move would be counterproductive and would also have serious effects on access to justice for some of the most disadvantaged in society[205] are clear and compelling.

Reply to acknowledgment of service

4.150. Once a claim has been issued, the defendant and anyone who intends to contest the claim must serve an acknowledgement of service (AOS) within 21 days from service of the claim form setting out a summary of his grounds for contesting the judicial review claim.[206]

4.151. Before permission being determined, there is no formal provision for a response or reply to the AOS. However, as noted by the Planning and Environment Bar Association in its submission to the Panel, replies "are frequently deployed by claimants, sometimes supported by additional evidence. It is not always clear whether this material makes its way to the

[202] EXT138, para 27.
[203] See para 5.30.
[204] See para 4.43.
[205] See, for example, EXT122, para 74 (JUSTICE); EXT008, para 112 (ALBA); EXT164, para 47 (Public Law Wales).
[206] CPR 54.8.

judge adjudicating on whether to grant permission, or whether permission is required to adduce the further evidence...".[207]

4.152. The Administrative Court Guide 2020 provides for this material to be put before a judge and for it turn on that judge's discretion as to whether it should be admitted.[208] That could lead to inconsistency of approach.

4.153. The Panel considers that formal provision for a Reply, to be filed within seven days of receipt of the AOS, should be made in the CPR.

4.154. As to written evidence, as noted in the commentary in the White Book to CPR 54.8, there is no express provision permitting a defendant or interested party to file and serve written evidence at this stage. As observed in the same paragraph: "equally, there seems no reason, in principle, why this should not be done in appropriate cases or, more usually, crucial documents may be attached to the acknowledgment of service." In the Panel members' experience, this occurs regularly in Planning Court cases.

4.155. The White Book goes on to refer to the previous practice under the former procedural rule[209] where:

> "it was common for the proposed respondent to file evidence about delay (which was particularly important since that matter could only be dealt with at the permission stage and could not be re-argued at the substantive hearing if permission was granted: *R v Criminal Injuries Compensation Board, ex parte A* [1999] 2 AC 330) to draw attention to an alternative appeal procedure, or to set out a fuller version of the facts, in an attempt to persuade the court that permission should not be granted."

In such circumstances, provided that the claimant had had an opportunity to address the evidence, it is said that the court "usually had regard" to it.

4.156. The benefits of admitting such evidence – namely the court having relevant evidence before it as to the arguability or validity of a claim at the time of reaching a decision on such matters at permission stage, rather than for it to be adduced later – may be weighed against the potential consequences of having to allow the claimants time to consider and respond to the evidence.

4.157. A detailed response from the defendant (and anyone else wishing to contest the claim) is only formally required after permission to make an application for judicial review has been granted[210] together with any written evidence. This must be served and filed within 35 days of service of the order giving permission.

4.158. The Panel considered that the CPR should be amended to provide for the right for claimants to file a Reply within seven days of receipt of the

[207] EXT158, pages 5-6.
[208] Para 7.2.5.
[209] RSC, Ord 53.
[210] CPR r 54.14.

AOS. This would remove an otherwise inconsistent approach, and provide certainty as to timing.

Other issues

4.159. We noted at the start of this chapter that our review of judicial review procedure had highlighted some issues falling outside our terms of reference. We mention those here, to encourage other bodies such as the Law Commission or the JUSTICE Administrative Law Council to think about addressing those issues.

4.160. First, we are concerned about the increasing practice of crowdfunding applications for judicial review. This was a topic that a number of respondents touched on. The fact that crowdfunding platforms are unregulated led some respondents to express concern that funders of a particular judicial review might be misled as to the nature, or prospects, of that review.[211] The Public Law Project expressed concern that crowdfunding might result in the government having to waste time and resources fending off unmeritorious, but popular, claims for judicial review.[212] We also note Dr Joe Tomlinson's concern that crowdfunding judicial review claims lacks a proper ethical basis and requires regulation.[213]

4.161. Second, in response to the question "Is the process of i) making a Judicial Review claim, ii) responding to a Judicial Review claim and/or iii) appealing a Judicial Review decision to the Court of Appeal/Supreme Court clear?", the Law Society of England and Wales responded that "From the perspective of practising solicitors, the process of making, responding to and appealing judicial review claims is sufficiently clear, with the process being primarily set out in the Civil Procedure Rules and Senior Courts Act 1981."[214]

4.162. But the Law Society went on, rightly in our view, to note that "this perspective may not be shared by a lay person acting as a litigant in person, for example, who could struggle to access, navigate and apply these rules."[215] The lesson the Law Society draw from this is that "legal aid, to ensure access to legal advice and representation, is...vital so that people are supported in bringing judicial review claims."[216] **A different lesson would be the importance of doing more to make the procedures for bringing claims for judicial review accessible to ordinary people.** Codification might be thought to be the answer, except that the CPR and SCA 1981 already represent a kind of

[211] EXT002, page 3 (11 King's Bench Walk); EXT040, para 6 (British Property Foundation); EXT058, response to q 2 (City of London Law Society).
[212] EXT162, page 13.
[213] Tomlinson, *Justice in the Digital State* (Policy Press, 2019), 55-56.
[214] EXT127, para 43.
[215] ibid, para 44. See also EXT188, page 136 (Professor Robert Thomas and Dr Joe Tomlinson): "It is generally accepted that litigants in person are more likely to encounter problems and obstacles than those in receipt of good legal advice and representation. The judicial review system has been designed on the assumption that litigants will be advised and represented. Consequently, the system finds it difficult to accommodate the needs of litigants in person."
[216] EXT127, para 44. A lesson also drawn by the Bangor Law School Public Law Research Group: EXT022, para 30.

code in this area – but it is not one that ordinary people can understand. What is needed is an equivalent of JOYS for ordinary people who wish to bring claims for judicial review, perhaps built on the back of the relatively accessible *Administrative Court Judicial Review Guide*. The code of practice developed in relation to planning and environmental cases in Northern Ireland[217] may provide a useful precedent.

4.163. Third, as Professor Robert Thomas and Dr Joe Tomlinson note in their 2019 study – submitted to this review – on *Immigration Judicial Reviews: An Empirical Study*:

> "There is a digitalisation project currently being developed, known as the 'RCJ project'. This is a joint project between the Administrative Court and the Upper Tribunal to introduce an online system for judicial review. This will include an IT and database common platform. Claimants will be able to file an application online and upload documents. The Home Office and the Government Legal Department will likewise be able to upload grounds of defence and other documents to the online system. The idea is to have a root and branch reform away from a paper-based system to an online system in which all forms, grounds of challenge, listing of cases etc will be placed online."[218]

It is not clear what impact, if any, the digitalisation of the procedure for bringing a claim for judicial review will have on the rules governing that procedure. Attention will need to be paid to this question at some stage, with particular reference to how the needs of those who find it difficult to operate in a digital world should be accommodated.

4.164. Fourth, while we were deliberating over our report, the Court of Appeal handed down its judgment in *R (Dolan) v Secretary of State for Health and Social Care*.[219] In a postscript to its judgment, the Court said that it was "concerned that a culture has developed in the context of judicial review proceedings for there to be excessive prolixity and complexity in what are supposed to be concise grounds for judicial review. As often as not, excessively long documents serve to conceal rather than illuminate the essence of the case being advanced. They make the task of the court more difficult rather than easier and they are wasteful of costs."[220] The Court went on to observe that although:

> "the Administrative Court Judicial Review Guide is clear, we consider that the time has come to invite the Civil Procedure Rule Committee to consider whether any amendments to the Rules or Practice Direction governing

[217] Judicial Review in Planning and Environmental Cases in Northern Ireland – A Guide for Litigants in Person (2019) (available at: https://ejni.net/wp-content/uploads/2019/12/Judicial-Review-guide-FINAL-v2.pdf).
[218] EXT188, page 156.
[219] [2020] EWCA Civ 1605.
[220] ibid, [120].

> judicial review claims are called for to contain the problem we have identified."[221]

Although the point does not directly fall within our terms of reference, we agree with the wisdom of having the Civil Procedure Rule Committee address this problem, as well as some other aspects of the law on procedure considered above.

Conclusions

4.165. **The impact of the costs regime in judicial review cases – and what might be done about it – needs further careful study by a body equipped to carry out the kind of research and evaluation that we have not been able to apply to this question.**

4.166. **Should the government want to legislate on the issue of standing, it can of course do so. Our view, in line with the many submissions we received, is that the temptation to legislate should be resisted.**

4.167. **Defendants should be encouraged to raise the issue of the standing of a claimant in a judicial review case; and the courts should be encouraged to raise and address that issue, as going to their jurisdiction to hear a claim for judicial review**.

4.168. **The Panel recommends that criteria for permitting interventions in judicial review cases should be developed and published, perhaps in the Guidance for the Administrative Court.**

4.169. **We agree that there is a need to clarify the scope of the duty of candour, but there was disagreement over how this might be done, particularly on the relation of the duty of candour to the disclosure of documents.**

4.170. **We consider that the Treasury Solicitor's Guidance may have been interpreted in an excessively onerous way. We do not suggest any change in the way the courts interpret this duty, but do consider that some revisiting of the Guidance would result in a more proportionate approach to the duty without undermining the fundamental importance of candour in judicial review proceedings.**

4.171. **We would not favour any tightening of the current time limits for bringing claims for judicial review.**

4.172. **We think that there may well be a case for abolishing the requirement that claims in judicial review be brought promptly.**

4.173. **More should be done to make the procedures for bringing claims for judicial review accessible to ordinary individuals.**

[221] ibid, [121].

CHAPTER 5: THE TERRITORIAL DIMENSION

Introduction

5.1. Our terms of reference require us to **"consider public law control of all UK wide and England & Wales powers that are currently subject to it whether they be statutory, non-statutory, or prerogative powers"** (Note A). As elaborated in our call for evidence, our terms of reference were the subject of some criticism in their application to Scotland, Wales and Northern Ireland.[222] It may be helpful therefore if we set out our understanding of their territorial dimension at the outset.

5.2. The expression "UK wide" we take to refer to powers that may be exercised across the whole of the United Kingdom. They do not include powers in respect of matters that are devolved or transferred under one or more of the devolution settlements. They are instead powers in respect of matters that are excepted or reserved in all three settlements. They include aspects of the constitution, defence, foreign affairs, national security, immigration and nationality – the list is not exhaustive. It is judicial review of those matters with which we are concerned, and not matters that are either not reserved or excepted across the United Kingdom (justice and policing, for example, are not "reserved" in Scotland or Northern Ireland but are in Wales), or that are devolved or transferred under one or more of the devolution settlements.

5.3. "England & Wales" we take to refer to powers that may be exercised in England and Wales as distinct from powers that may be exercised in only England or Wales. We assume it was not intended that 'England only' powers be excluded, but that 'Wales only' powers are. The latter include powers exercisable in relation to Wales by UK ministers concurrently with their Welsh counterparts, as well as powers exercisable exclusively by the Welsh ministers.[223] Scotland and Northern Ireland are not mentioned in our terms of reference, but our interpretation of "UK wide" excludes powers in respect of matters that are transferred or devolved in either, as well as matters that are not reserved in other parts of the United Kingdom.

5.4. There is one other matter that should be noted at the outset, which is that judicial review is "devolved" in both Scotland and Northern Ireland by reason of not being reserved or excepted,[224] but not in Wales in the absence of its own jurisdiction.[225] **It follows that any changes to the procedures by which judicial review may be obtained in Scotland or Northern Ireland, whether or not of the "minor and technical" nature referred to in our call for**

[222] See especially EXT122 (JUSTICE), paras 12-15; EXT164 (Public Law Wales), paras 14-25; and EXT022 (Bangor Law School), para 93.
[223] Government of Wales Act 2006 (GOWA 2006) sch 3A lists functions exercisable concurrently with the Welsh ministers.
[224] Scots private law, as defined in the Scotland Act, includes judicial review of administrative action: Scotland Act 1998 (SA 1998) s 126(4); following the devolution of justice to the Northern Ireland Assembly in 2010, the Northern Ireland Act 1998, sch 3, para 15 which would have reserved judicial review was repealed.
[225] GOWA 2006, sch 7A para 8(1)(f) (judicial review of administrative action).

evidence, and whether or not arising from our recommendations, will be a matter for the institutions of devolved government in Scotland and Northern Ireland.

5.5. The chapter is in three parts. In the first part we (briefly) outline the position in Scotland and Northern Ireland. We also say something about the current position in Wales. In the second part we draw together the threads of the submissions we have received. In the final part we summarise our conclusions.

Judicial review in the devolved nations

5.6. There are substantial similarities in judicial review in all three United Kingdom jurisdictions: in the understanding of its constitutional function and purpose; in the grounds of review; in procedures, including the rules on standing; and in the available remedies. The differences, if differences there are, are more in judicial attitudes towards the role of the courts in the control of government than in the substantive law. Such differences may also occur within jurisdictions but are perhaps more likely in the larger jurisdiction of England and Wales than in the two smaller jurisdictions.

Scotland

5.7. The Court of Session, Scotland's highest civil court, has long exercised a jurisdiction to control the legality of administrative action, which has been traced to its foundation in the sixteenth century.[226] During the nineteenth century, the Court exercised a broad supervisory jurisdiction over the administrative apparatus of what was still a local state, but in the twentieth century its jurisdiction declined to such an extent that it became effectively moribund. In 1985, however, an application for judicial review procedure was introduced, modelled on but not in all respects identical to the procedure introduced in England and Wales in 1978.[227] Since the introduction of the new procedure, the Court of Session's supervisory jurisdiction has undergone a revival, reaching a peak of 496 petitions in 2015/16 in anticipation of a permission requirement coming into effect in September 2015.

5.8. The Court of Session's supervisory jurisdiction is a vital part of the machinery by which the rule of law is secured in Scotland. In the absence of a statutory right of appeal, it is the only means of obtaining an authoritative ruling on the legality of administrative action:

> "The fundamental purpose of the supervisory jurisdiction is in my opinion to ensure that all government, whether at a national or local level, and all actions by public authorities are carried out in accordance with the law. That

[226] Reed, 'The development of judicial review in Scotland' [2015] *Juridical Review* 325; the traditional view traced its origins to the abolition of the Scottish Privy Council in 1708.

[227] Act of Sederunt (Rules of Court Amendment No 2) (Judicial Review) 1985 (SI 1985/500). The rules on judicial review are now contained in Ch 58 of the Rules of the Court of Session: Act of Sederunt (Rules of the Court of Session) 1994 (SI 1994/1443). The procedure was introduced following Lord Fraser's suggestion in *Brown v Hamilton District Council* 1983 SC (HL) 1, 49.

> purpose is fundamental to the rule of law; public authorities of every sort, from national government downwards, must observe the law. The scope of the supervisory jurisdiction must in my opinion be determined by that fundamental purpose."[228]
>
> "*Walton*[229] emphasizes the importance of the rule of law in public law decisions. It is one of a number of recent cases…that place stress on the proposition that government must in a civilised society be conducted in accordance with the law, and a major function of public law remedies – including judicial review – is to achieve that result. Procedural niceties should not stand in the way of due observance of the rule of law, and enforcing the rule of law is a vital function of the courts."[230]

5.9. It is only recently that the purpose of the Court of Session's supervisory jurisdiction has been defined in terms of securing the rule of law. Of much longer standing is the insistence that judicial review lies to control the legality of executive action, not its merits, which are treated as a matter for the initial decision maker subject to any right of appeal that may have been provided:

> "Judicial review is available, not to provide machinery for an appeal, but to ensure that the decision-maker does not exceed or abuse his powers or fail to perform the duty which has been delegated or entrusted to him. It is not competent for the court to review the act or decision on its merits, nor may it substitute its own opinion for that of the person or body to whom the matter has been delegated or entrusted."[231]

5.10. There is no difference of substance between the grounds of review in Scots and English law:

> "There is no substantial difference between English law and Scots law as to the grounds on which the process of decision-making may be open to review. So reference may be made to English cases in order to determine whether there has been an excess or abuse of the jurisdiction, power or authority or a failure to do what it requires."[232]

5.11. Until recently there was uncertainty over whether the Court of Session possessed the power to correct errors of law made within jurisdiction,[233] but the matter was put beyond doubt in *Eba v Advocate General for Scotland*:

> "Once again it must be stressed that there is, in principle, no difference between the law of England and Scots law as to the substantive grounds on which a decision by a tribunal which acts within its jurisdiction may be open to review."[234]

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[228] *Wightman v Secretary of State for Exiting the European Union* [2018] CSIH 62, [67] (Lord Drummond Young).
[229] *Walton v Scottish Ministers* [2012] UKSC 44.
[230] *Taylor v Scottish Ministers* [2019] CSIH 2, [15] (Lord Drummond Young).
[231] *West v Secretary of State for Scotland*, 1992 SC 385, 413 LP (Hope).
[232] ibid.
[233] *Watt v Lord Advocate*, 1979 SC 120; Clyde and Edwards, *Judicial Review* (W Green, 2000), 22.23.
[234] *Eba v Advocate General for Scotland* [2011] UKSC 29, [34] (Lord Hope).

5.12. A convenient summary of the grounds of review, which has found favour in recent years, is to be found in *Wordie Property Co v Secretary of State for Scotland*:

> "A decision of the Secretary of State acting within his statutory remit is ultra vires if he has improperly exercised the discretion confided to him. In particular it will be ultra vires if it is based upon a material error of law going to the root of the question for determination. It will be ultra vires, too, if the Secretary of State has taken into account irrelevant considerations or has failed to take account of relevant and material considerations which ought to have been taken into account. Similarly it will fall to be quashed on that ground if, where it is one for which a factual basis is required, there is no proper basis in fact to support it. It will also fall to be quashed if it, or any condition imposed in relation to a grant of planning permission, is so unreasonable that no reasonable Secretary of State could have reached or imposed it."[235]

5.13. The underlying ethos, however, is one of judicial self-restraint in the exercise of the power of review. The following excerpts from recent judicial opinions are illustrative of the general approach:

> "Parliament has determined that the decision-maker in this area is not to be a judge or sheriff, hearing testimony from experts in the formal setting of a court room. The decision is not to be a judicial one based upon an impartial assessment of testimony. It is not one following a public inquiry in which a specialist reporter could apply his scientific or other technical expertise to the problem. …The decision is one made by the respondents, who operate in a political context, albeit constrained by the environmental regulatory regime. Despite paying lip service to the correct legal test for judicial review, the Lord Ordinary has strayed well beyond the limits of testing the legality of the process and has turned himself into the decision-maker following what appears to have been treated as an appeal against the respondents' decisions on the facts. He has acted, almost as if he were the reporter at such an inquiry, as a finder of fact on matters of scientific fact and methodology which, whatever the judge's own particular skills may be, are not within the proper province of a court of review. For this reason alone, his decision on this ground cannot be sustained."[236]

> "The petitioner's case fails to appreciate the limitations under which the court operates when asked to review the decision of a specialist tribunal such as the respondents. As the Lord Ordinary correctly reasoned, the task of forming a view on whether a miscarriage of justice may have occurred…has been entrusted by Parliament to the respondents. There is no statutory appeal process. The respondents' determinations are therefore susceptible to review by the court, but only on conventional grounds of illegality."[237]

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[235] *Wordie Property Co v Secretary of State for Scotland* 1984 SLT 345, 347-8 LP (Emslie).
[236] *RSPB v Scottish Ministers* [2017] CSIH 31, [207] LP (Carloway).
[237] *Sheridan v Scottish Criminal Cases Review Commission* [2019] CSIH 23 [72] LP (Carloway).

> "In the context of judicial review, it is not for the court to engage in a process of testing the accuracy of the information [on which secondary legislation was based], at least in the absence of some obvious readily identifiable error, by hearing counter evidence and determining fact as if it had heard testimony on the issues at a proof. The material was demonstrated to have existed and to have an evidential basis. The correctness of that material is not capable of analysis in this type of process. If it is thought to be in error, the correct course is to make representations to the Secretary of State or to Parliament."[238]

5.14. In a recent lecture, the Lord President said:

> "My own emphasis on legality has been criticised as discouraging individuals from challenging decisions on merits grounds, especially on environmental concerns in the planning sphere. Outwith the area of fundamental rights or EU law, I *would* advise parties to think carefully before lodging judicial review petitions if the grounds are not capable of expression within the conventional test in *Wordie Property*."[239]

5.15. The principal respect in which judicial review in Scotland does differ from the rest of the United Kingdom is in its scope, which is not conditioned by the public/private law distinction:

> "The competency of the application does not depend upon any distinction between public law and private law, nor is it confined to those cases which English law has accepted as amenable to judicial review, nor is it correct in regard to issues about competency to describe judicial review under Rule of Court 260B as a public law remedy."[240]

The difference, however, which means that private bodies such as golf clubs and the like are within the scope of the Court of Session's supervisory jurisdiction,[241] is not material for the purposes of this review.

5.16. As originally introduced, there was no requirement to obtain permission to proceed with an application for judicial review. In 2015, however, a requirement was introduced, together with a three-month time limit on applications.[242] A permission requirement, the Scottish Civil Courts Review argued, would assist in preventing unmeritorious claims from proceeding, as well as encouraging early concessions by respondents in cases that were well-founded.[243]

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[238] *Nyamayaro v Advocate General* [2019] CSIH 29 [82] and [85] LP (Carloway).
[239] Carloway, 'Constitutional principle and the rule of law', Lord Rodger Memorial Lecture 29 October 2020 (emphasis in original).
[240] *West v Secretary of State for Scotland*, 1992 SC 385, 413 LP (Hope).
[241] *Crocket v Tantallon Golf Club*, 2005 SLT 663; *Ashley v Scottish Football Association Ltd* [2016] CSOH 78.
[242] Court of Session Act 1988 (CSA 1988) ss 27A and 27B (as inserted by Courts Reform (Scotland) Act 2014, s 89); the three-month period may be extended for cause.
[243] Scottish Civil Courts Review, *Report of the Scottish Civil Courts Review* (2009), ch 12, p 50.

5.17. Permission is conditional on the applicant demonstrating a "sufficient interest" in the subject matter of the application and the application having "a real prospect of success".[244] The "sufficient interest" test of standing was established following the Supreme Court's decision in *AXA General Insurance Ltd v Lord Advocate,*[245] which was intended to put an end to what was later described as:

> "an unduly restrictive approach to standing which had too often obstructed the proper administration of justice: an approach which pre-supposed that the only function of the court's supervisory jurisdiction was to redress individual grievances and ignored its constitutional function of maintaining the rule of law."[246]

5.18. The annual average of petitions for judicial review initiated over the past five years is 392.[247] The single most important source of petitions, and the source of much of the growth over the past 20 years or more, is immigration, which accounts for an annual average of 76% of petitions initiated over the past five years.[248] Immigration is a reserved matter. The most important devolved source of petitions in recent years is prisons, followed by housing and planning. The numbers are small, however, accounting for less than 10% of all petitions over the same period.[249] Once immigration and prison-related petitions are excluded, the number of petitions shows little change since the application for judicial review procedure was introduced.[250]

5.19. A large proportion of petitions are resolved or discontinued before the permission stage is reached.[251] Of those on which a decision is made, roughly one in two are granted permission,[252] slightly less than 30% (28.3%) of the petitions initiated over the past three years.

5.20. Most cases that are granted permission do not proceed to a substantive hearing; a very substantial number are resolved or discontinued without a hearing. In 2019/20, the court made 52 decisions following a substantive hearing. The corresponding figures for 2018/19 and 2017/18 were 42 and 47 – an average of 47 decisions over the three-year period.[253]

5.21. A minority of the petitions that are granted permission are ultimately upheld following a substantive hearing. In the calendar year 2019 there were 42 cases

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[244] CSA 1988, s 27B; additional requirements apply where the application relates to a decision of the Upper Tribunal: CSA 1988, s 27B(3).
[245] [2011] UKSC 46.
[246] *Walton v Scottish Ministers* [2012] UKSC 44 [90] (Lord Reed). Reed, 'The development of judicial review in Scotland' [2015] *Juridical Review* 325, 332: "As a result of *AXA* and *Walton* a more liberal test of standing is now firmly established in the law."
[247] Sources: Civil Justice Statistics in Scotland, Keeper of the Rolls of the Court of Session (2019-20).
[248] In contrast to England and Wales, immigration petitions have not been transferred to the Upper Tribunal.
[249] The second most important category of petitions numerically is 'other', which is said to defy further classification.
[250] Page, 'The judicial review caseload: an Anglo-Scottish comparison' [2015] *Juridical Review* 337-352.
[251] An average of 40% over the past three years; figure calculated from information provided by the Keeper of the Rolls of the Court of Session.
[252] An average of 46.5% over the past three years; figure calculated from the same source.
[253] EXT067, annex 2.

in which the court issued an opinion disposing of a judicial review and the opinion was published on the Scottish Courts and Tribunals Service website. In 12 of those cases the petitions for judicial review were granted. In 30 cases they were refused – a success rate of just under 30%.[254] The number of 'successful' petitions, measured in terms of petitions granted, is therefore very small.

Northern Ireland

5.22. Judicial review in Northern Ireland is much closer in origin to the law of England and Wales than is judicial review in Scotland. As in England and Wales, it had its origins in the prerogative writs, later renamed the prerogative orders,[255] before an application for judicial review procedure on the model of England and Wales was introduced in 1980.[256] The new procedure was put in place by statute, rather than by an amendment to the rules of court, but fears that this would promote divergence from England and Wales did not materialise.[257]

5.23. As elsewhere in the United Kingdom, judicial review is a critical part of the machinery for securing the rule of law in Northern Ireland. Its importance in this regard was underlined recently in *McNern's application for judicial review*,[258] which arose out of the Northern Ireland Executive's Office's failure to take the necessary steps to implement a victims' payments scheme made by the Secretary of State, under which 'pensions' would be paid to those injured as a result of "Troubles-related incidents". Rejecting the argument advanced on behalf of the Executive Office that the court was not "constitutionally entitled or properly equipped" to adjudicate upon its reasons for not taking the necessary steps, which were to put pressure on the Secretary of State to revise the scheme, McAlinden J said:

> "This argument does not withstand even the most cursory form of scrutiny. It is, in reality, arrant nonsense dressed up in the guise of reasoned legal argument. The Court does not have to resort to reliance on the *Padfield* [1968] AC 997 line of authority in order to dispose of this argument. I accept that the Court must always be wary of engaging in any form of intensive merits-based review when matters of policy and political decision making are concerned. For the avoidance of doubt the Court is not concerned with the merits of the political arguments at the heart of this case. The Court is only concerned with the legality of the actions of the Executive Office and will only consider the political arguments to the extent that it is necessary to do so to determine the legality of the actions of the Executive Office. That legitimate level of scrutiny by the Court leads to only one conclusion. Far from delaying designating a Department in an effort to ultimately ensure that the policy and objects of the scheme are better delivered by changes to

[254] ibid.
[255] Northern Ireland Act 1962, s 10; the MacDermott Committee described them as having "always formed important weaponries in the legal armoury of the subject" (*Report of the Committee on the Supreme Court of Judicature of Northern Ireland* (Cmnd 4292, 1970), quoted in EXT066.
[256] Judicature (Northern Ireland) Act 1978 (JNIA 1978) s 18(1).
[257] Maguire, 'The procedure for judicial review in Northern Ireland' in Hadfield (ed), *Judicial Review: A Thematic Approach* (Gill and Macmillan, 1995), 370.
[258] *McNern's application for judicial review* [2020] NIQB 57.

> the scheme which the Executive Office or one Minister in it wishes to see occur, what is in reality being done is that the Executive Office is deliberately stymieing the implementation of the scheme in order to pressurise the Secretary of State for Northern Ireland to make a different scheme which will be substantially directly funded by Westminster and which will have very different entitlement rules. The actions of the Executive Office cannot be construed as a lawful decision to delay designation of a Department in order to promote the policy and objects of the legislation but rather an unlawful decision to refuse to designate a Department in an effort to have the lawful scheme promulgated in the 2020 Regulations replaced by a very different scheme. Under no circumstances can such stance be sanctioned or left unaddressed by the Court.
>
> "Put in its starkest terms, the Executive Office seeks to persuade the Court that it is legitimate for the Executive Office to deliberately refuse to comply with a legal requirement set out in a legislative scheme promulgated by the Westminster Parliament in order to force changes to that legislative scheme. This is a truly shocking proposition. It demonstrates either wilful disregard for the rule of law or abject ignorance of what the rule of law means in a democratic society."[259]

5.24. Judicial review in Northern Ireland also lies to control the legality of administrative action, not its merits, which are treated as a matter for the public authority concerned:

> "In judicial review, the High Court is not a court of appeal. It does not hear and determine appeals on the merits against decisions of public authorities. Rather, the High Court exercises a supervisory jurisdiction. Stated succinctly, the function of the High Court is to ensure that public authorities observe all relevant legal rules, standards and requirements and act within the limits of their powers. In essence, the High Court conducts an audit of legality. Where, in judicial review proceedings, any material failing is demonstrated, the court is empowered to grant an appropriate remedy. In a very small minority of cases, the High Court can order the defaulting public authority to actively perform its legal duties. However, this occurs very rarely and is a reflection of the truism that, in judicial review litigation, the High Court is not the final decision maker. Rather, the power of final decision making remains with the public authority concerned."[260]
>
> "While developments in judicial review have resulted in new principles that clearly have increased the scope for judicial invigilation of decision-making processes and outcomes, judicial review remains wedded to a historical 'review, not appeal distinction' that permits the courts to assess only the legality of decisions and not their merits."[261]

[259] ibid, [26]-[27].
[260] *Re Board of Governors of Loreto Grammar School's Application* [2011] NIQB 36 (McCloskey J).
[261] Anthony, *Judicial Review in Northern Ireland*, 2nd ed (Hart Publishing, 2014), para 1.03.

5.25. The grounds of review are also the same as in England and Wales:

> "The grounds for judicial review and its function are little different in Northern Ireland from those in England and Wales. There is a shared embracing of Lord Diplock's synthesis of the grounds for intervention."[262]

5.26. In terms of the general approach of the High Court to its supervisory jurisdiction, the Bar Council of Northern Ireland in their submission to the Panel drew attention to cases in which the judiciary had declined to intervene, demonstrating "the way in which they very clearly respect the boundaries between the courts and the Executive".[263]

5.27. In an appeal against a decision that the Department of Justice had acted unlawfully by failing to provide sufficient funding to the Police Ombudsman for Northern Ireland to enable it to carry out its statutory obligation to investigate a complaint within a reasonable period of time, Gillen LJ distilled the following "seemingly uncontroversial principles" from the authorities:[264]

> "(a) Normally, the question whether the Government allocates sufficient resources to any particular area of state activity is not justiciable.
>
> "(b) A decision as to what resources are to be made available often involves questions of policy, and certainly involves questions of discretion. It is almost invariably a complex area of specialized budgetary arrangements taking place in the context of a challenging economic environment and major cutbacks on public spending. There should be little scope or necessity for the Court to engage in microscopic examination of the respective merits of competing macroeconomic evaluations of a decision involving the allocation of (diminishing) resources. These are matters for policy makers rather than judges: for the executive rather than the judiciary.
>
> "(c) The greater the policy content of a decision, and the more remote the subject matter of a decision from ordinary judicial experience, the more hesitant the Court must necessarily be in holding a decision to be irrational. Where decisions of a policy-laden nature are in issue, even greater caution than normal must be shown in applying the test, but the test is sufficiently flexible to cover all situations.
>
> "(d) Provided the relevant government department has taken the impugned decision in good faith, rationally, compatibly with the express or implied statutory purpose(s), following a process of sufficient inquiry and in the absence of any other pleaded public law failing, such a decision will usually be unimpeachable.

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[262] Maguire 'The procedure for judicial review in Northern Ireland' in Hadfield (ed), *Judicial Review: A Thematic Approach* (Gill and Macmillan, 1995), 370. On the grounds of review, see Anthony, *Judicial Review in Northern Ireland*, 2nd ed (Hart Publishing, 2014), chs 4-7; and Larkin and Scoffield, *Judicial Review in Northern Ireland. A Practitioner's Guide* (SLS Legal Publications (NI), 2007), ch 2. In contrast to Scotland it does not seem to have been felt necessary to make this explicit.

[263] EXT024, para 30.

[264] *The Department of Justice v Bell (Patricia) and Police Ombudsman for Northern Ireland* [2017] NICA 69, [19].

> "(e) However when issues are raised under Articles 5 and 6 of the European Convention on Human Rights and Fundamental Freedoms as to the guarantee of a speedy hearing or of a hearing within a reasonable time, the Court may be required to assess the adequacy of resources, as well as the effectiveness of administration.
>
> "(f) Nonetheless in general a court is ill-equipped to determine general questions as to the efficiency of administration, the sufficiency of staff levels and the adequacy of resources.
>
> "(g) There is a constitutional right of access to justice and access to the courts.
>
> "(h) Powers ought to be exercised to advance the objects and purposes of the relevant statute."

Applying those principles to the appeal, the department's decision was "Wednesbury compliant and unimpeachable".[265]

5.28. As in England and Wales, judicial review in Northern Ireland lies to control the exercise of public functions: it does not lie to control the exercise of private functions, including private functions exercised by public bodies. The 'public interest' test used when mapping the boundaries of judicial review in Northern Ireland is said to be broader in its reach than comparable tests in England and Wales.[266]

5.29. The judicial review procedure in Northern Ireland involves two stages: an application for leave (or permission) to apply stage, followed by a substantive hearing if leave is granted.[267]

5.30. An application for leave to apply must be made within three months from the date the grounds for the application first arose, unless the court considers there is good reason to extend the period. A requirement that applications be made promptly was removed in January 2018; its removal, it was concluded, would deliver "a measure of certainty and clarity into a somewhat vague aspect of our law".[268] The Bar Council of Northern Ireland considers that the three-month time limit, coupled with the early engagement required under the Pre-Action Protocol, help to ensure that the right balance is struck between allowing time for a claimant to lodge a claim and ensuring effective administration.[269]

5.31. Leave is conditional on the applicant having "sufficient interest" in the matter to which the application relates.[270] Standing is said to be rarely an issue, with the

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[265] ibid, [44].
[266] Anthony, *Judicial Review in Northern Ireland*, 2nd ed (Hart Publishing, 2014), xii and para 2.25.
[267] The procedure is governed by JNIA 1978, ss 18-25 and Order 53 of the Rules of the Court of Judicature of Northern Ireland 1980. There is also a Judicial Review Practice Direction (03/2018), incorporating a Pre-Action Protocol.
[268] Review of Civil and Family Justice in Northern Ireland, *Review Group's Report on Civil Justice* (September 2017), para 20.32.
[269] EXT024, para 43.
[270] JNIA 1978, s 18(4); Order 53 rule 3(5).

leave stage operating to weed out unmeritorious cases.[271] The submissions make clear that any attempt to limit standing would be strongly opposed.[272]

5.32. A "progressive" feature of judicial review proceedings in Northern Ireland, which has no counterpart in England and Wales or Scotland, is the emphasis placed on the "consensual resolution" of cases. In granting leave it is open to the judge to specifically highlight apparent weaknesses in either party's case and to exhort consensual resolution; most frequently, though not invariably, this entails the respondent rescinding the impugned decision, undertaking to make a fresh decision and paying the claimant's costs:[273]

> "In any case where the judge considers that the parties should explore consensual resolution, whether through a mediation/ADR mechanism or otherwise, this is expressly exhorted. This applies particularly, though not exclusively at the leave stage. The court in such cases will normally impose a moratorium on further cost incurring steps pending its further order and directions. The parties are required to operate within a court imposed timetable and to report at the appropriate time. Generally this works well in practice. In particular the three most recently designated presiding judges of the court have no experience of a case where consensual resolution has not been effected following judicial exhortation of this course.
>
> "More generally, in the not too distant past it is correct that judicial review cases rarely settled. The reasons for this are not entirely clear. However it is beyond dispute that this is no longer the case. There has been a welcome change of culture, the drivers whereof include proactive judicial exhortation; saving legal costs; reducing the risk of adverse publicity; increased transparency on the part of public authorities; and the growing influence of judicial review in the matter of educating and guiding public authorities and correcting their errors, while simultaneously recognising that save in the very small category of cases in which an order of mandamus is made the function and duty of final decision making rests with the authority concerned. The final observation is that in those judicial review cases which prove susceptible to consensual resolution, the judicial experience is that this is normally achievable by the parties and their legal representatives without resort to an ADR/mediation process."[274]

5.33. The information available about judicial review in Northern Ireland is limited. Information is lacking, in particular, about the subject matter of applications and therefore whether they are about excepted or transferred matters. The annual average of applications for leave to apply for judicial review over the past five

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[271] EXT066 (Court of Judicature of Northern Ireland), para 25.9.

[272] EXT024 (Bar Council of Northern Ireland), para 59; EXT064 (Committee on the Administration of Justice), page 15. See also Anthony, *Judicial Review in Northern Ireland*, 2nd ed (Hart Publishing, 2014), at para 3.67.

[273] EXT066 (Court of Judicature of Northern Ireland), para 13. For the background, see Review of Civil and Family Justice in Northern Ireland, *Review Group's Report on Civil Justice* (September 2017), paras 20.41-20.48.

[274] EXT066 (Court of Judicature of Northern Ireland), paras 22-23. The Bar Council of Northern Ireland describes consensual resolution as a "helpful feature of judicial review proceedings in Northern Ireland in recent years": EXT024, para 42.

years is 307. The annual average of applications for leave granted over the same period is 78.6, with the remainder either being withdrawn, refused or unaccounted for (an average of 106 were withdrawn or refused). The annual average of applications for judicial review over the same period is 83.4. The annual average of applications granted over the same period is 10.6, with the remainder being either withdrawn, dismissed or unaccounted for (an average of 30.8 were withdrawn or dismissed). The number of 'successful' applications, measured in terms of judicial review granted, is therefore very small: in the region of 10 applications a year (one in the period of January to June 2020).[275]

5.34. The Northern Ireland Audit Office is examining judicial review in Northern Ireland. Its report, which will deal only with judicial reviews relating to "delegated matters", i.e. matters delegated to the departments that make up the Northern Ireland Executive, will include:

- a comparison of the arrangements in Northern Ireland against other United Kingdom jurisdictions and the Republic of Ireland;
- judicial review statistics, for example, on the numbers over the past 10 years, analysed by department/public body and by type of issues being challenged, the time taken and outcomes at various stages of judicial review process;
- estimates of the cost of judicial reviews to individuals and departments/public bodies (we will also want to identify the number of cases taken by individuals entitled to legal aid); and
- a review of some individual judicial reviews (case studies) to illustrate the impact on projects/public administration and to highlight the arrangements in place to facilitate learning across the public sector.

Its report is expected to be published in June 2021.[276]

Wales

5.35. As part of the wider jurisdiction of England and Wales, judicial review in Wales is no different from judicial review in England. Following a comprehensive examination of the operation of the justice system in Wales, the Commission on Justice in Wales has recommended that justice be devolved to Wales.[277] Among the Commission's recommendations with regard to administrative justice were that challenges to the lawfulness of Welsh public authorities' decision making should be issued and heard in Wales.[278] This recommendation has been given effect by an amendment to the Civil Procedure Rules.[279]

[275] EXT066 (Court of Judicature of Northern Ireland), paras 15-16; Northern Ireland Courts and Tribunals Service, *Judicial Statistics 2019*.
[276] https://www.niauditoffice.gov.uk/publications/review-northern-ireland-judicial-review-process
[277] Commission on Justice in Wales, *Justice in Wales for the People of Wales* (October 2019); for discussion in the two legislatures, see House of Commons Debates 22 January 2020, cols 138WH-160WH, and National Assembly for Wales, Record of Proceedings 4 February 2020.
[278] Commission on Justice in Wales, *Justice in Wales for the People of Wales* (October 2019), para 6.27.
[279] The Civil Procedure (Amendment No. 3) Rules 2020, SI 2020/748.

Submissions

5.36. We received 19 devolution-related submissions, including submissions from the Scottish and Welsh governments, the judiciary, and both branches of the profession in Scotland and Northern Ireland. Submissions were also received from Public Law in Wales, the Scottish Human Rights Commission, JUSTICE and other non-governmental and civil society organisations, as well as from academic lawyers and other individuals.

5.37. The devolution-related submissions attest to the importance of judicial review in each of the devolved nations – nowhere more so than in Northern Ireland in the absence of fully functioning devolved institutions for sometimes long periods in the past 20 years. The critical importance of the courts in safeguarding the rights and protections guaranteed by the Belfast (Good Friday) Agreement and the Northern Ireland Act 1998 in the absence of functioning political institutions was highlighted in an application for leave to apply for judicial review arising out of the failure to implement the recommendations of the Historical Institutional Abuse (HIA) inquiry:[280]

> "The indefinite moratorium afflicting the Executive and legislature of Northern Ireland featuring in the present case arises in other judicial review cases. One of the consequences of this moratorium is that members of the Northern Ireland population are driven to seek redress from the High Court in an attempt to address aspects of the void brought about by the absence of a Government and legislature. This, as in the large cohort of 'legacy' cases, in effect involves the High Court adjudicating in disputes in cases which would not otherwise arise and entails a significant diversion of judicial and administrative resources. While this does not involve Judges encroaching upon the impermissible territory of political and legislative decision making, it skews the constitutional arrangements whereby this country is governed. While the spotlight on the implementation of the HIA redress proposals should be firmly on the Northern Ireland Executive and Assembly it is, rather, on the courts."[281]

5.38. **The submissions are without exception opposed to, or at best not persuaded of, the need for reform**. Reforms have recently been made to judicial review in both Scotland and Northern Ireland, following comprehensive reviews of their civil justice systems, and are said to be working well: "The practice and procedure in judicial review in the jurisdiction of Northern Ireland are in good health. No persuasive case for change is apparent."[282] The Scottish Government is satisfied that the law of judicial review as recently "modernised" provides an "efficient, proportionate response to the litigation of issues of public

[280] Other examples include: *Re Hughes Application* [2018] NIQB 30 and *R (Buick) v Department for Infrastructure* [2018] NICA 26. Submissions which speak to the importance of the role of the judicial system include EXT024 (Bar Council of Northern Ireland) and EXT064 (Committee on the Administration of Justice).
[281] *JR80 v Secretary of State for Northern Ireland* [2018] NIQB 32, [13] (McCloskey J).
[282] EXT066 (Court of Judicature of Northern Ireland), para 26 (McCloskey J).

concern".[283] The permission requirement is said to operate satisfactorily: "It sifts out petitions which have no real prospect of success."[284]

5.39. **The assumed purpose of any 'reform' would be to exclude or otherwise limit judicial review in respect of certain matters; together with possible amendments to the Human Rights Act, it might lead to a loss of judicial protection to which respondents would be opposed**.

5.40. The likely consequences of any restriction of judicial review are seen as being especially serious in Northern Ireland:

> "Legislation curtailing judicial review would have a particularly detrimental effect on the public interest in Northern Ireland. Given the unique constitutional arrangements in this jurisdiction and the periodic political vacuums in power, the judicial review role of the courts in Northern Ireland has proved to be indispensable and any attempt to restrict its availability would be contrary to the public interest. During times of general political instability and uncertainty, aggrieved applicants have been able to resort to the judicial review court and resolve disputes in an ordered, constructive and constitutional manner."[285]

5.41. The Scottish and Welsh governments would be no less concerned by proposals to limit the availability of judicial review. The Scottish Government "would have significant concerns about any attempt or proposals designed to restrict the reach of judicial review, limit the rights of individuals in this area and the accessibility of judicial review, or interfere with the powers of the independent judiciary and the ability of the courts to hold government to account, particularly if they were to extend to Scotland."[286] The Welsh Government has "not seen any case for any diminution in the availability and scope of judicial review and would have profound concerns about such diminution being applied to the actions of public authorities in Wales without the support of the democratic institutions of Wales".[287]

5.42. **Respondents are also concerned that statutory intervention might result in a "dual" or "fragmented" system in which "UK wide" reserved or excepted matters and "other" matters are treated differently.**

5.43. Particular emphasis was again placed on the potential adverse consequences in Northern Ireland:

> "Insofar as legislation were effective to limit the scope of judicial review in Northern Ireland over matters which are excepted or reserved (as decisions being made by the UK Government), this could give rise to a situation where different laws, practices and procedures could apply to different respondents in the same case, for example, in applications where both the Secretary of State and Stormont Ministers are respondents by virtue of their

[283] GOV026, page 3.
[284] EXT067 (Senators to the College of Justice), page 2.
[285] EXT024 (Bar Council of Northern Ireland), para 15.
[286] GOV026, page 2.
[287] GOV028, page 1.

> respective powers and duties….This would result in the case against the Secretary of State having to be argued under the new UK judicial review law and procedure but against the Stormont Ministers under Northern Ireland judicial review law and procedure; a form of two-tier justice that would be difficult to justify and complex to operate in practice."[288]
>
> "In relation to Northern Ireland, reform of the grounds for review could have implications for the control of public authorities in that jurisdiction. Judicial review has played a fundamentally important role since the time of the Belfast/Good Friday Agreement, where public authorities – including Ministers of the Crown – have often been held to account by the courts. A narrowing of the grounds for review would be a matter of concern in Northern Ireland, notably if narrower grounds for review would apply to Ministers of the Crown. This could lead to bifurcation of the grounds for review as are applied to different authorities – something that would plainly be undesirable."[289]
>
> "The Review's Terms of Reference refer to the 'unintended consequences' of any changes and we would again stress the potential difficulties with the operation of two different legal and procedural frameworks for judicial review across NI and the UK."[290]

5.44. Similar concerns were expressed in relation to Scotland. The Scottish Government would thus be opposed to any proposals:

> "which would lead towards the development of fragmented procedures within Scotland. There is a serious danger in that the creation of a twin-track arrangement for reserved and devolved matters depending on the subject matter of dispute, would give rise to incoherence in Scots Law, in the operation of the Scottish Courts and additionally in public understanding of how these processes operate. This would be undesirable and something which we would wish to avoid."[291]

5.45. Its views were echoed by the Law Society of Scotland:

> "[F]ragment[ing] the general approach of Scots law to judicial review...could involve the Court of Session applying different principles and procedures according to the subject matter of the case. It might even be unworkable. This fragmentation is therefore considered to be undesirable."[292]

5.46. Noting that Scotland is on a different "human rights trajectory" from the rest of the United Kingdom, the Scottish Human Rights Commission questioned whether:

> "two different sets of judicial review principles and procedures will emerge depending on whether a power is UK-wide or devolved. The impact of this

[288] EXT024 (Bar Council of Northern Ireland), para 14.
[289] EXT122 (JUSTICE), para 14.
[290] EXT024, para 23; see also paras 33 and 38.
[291] GOV026, page 2.
[292] EXT129, page 3.

> divergent approach could mean that a person's access to remedy would be reduced if a breach of their human rights occurred in a reserved area."[293]

5.47. So, too, in relation to Wales there was concern that:

> "There is a real risk of developing reforms that would see the availability of judicial review diverge depending on whether the decisions challenged are those of Welsh Ministers or UK Ministers, even where the nature of those decisions are identical."[294]

5.48. **We agree that it would be highly undesirable were statutory intervention to result in a "dual" or "two-tier" system of the kind described in the submissions we received. Among the questions such a system would raise would be where the dividing line between "UK wide" and "other" matters was to be drawn, bearing in mind that they do not exist in separate watertight compartments, and whether different matters could be combined, and different respondents joined, in the same proceedings. To be avoided is a system which is more complex and uncertain than the existing system, which has all the advantages of familiarity and relative freedom from technicality.**

5.49. Some respondents question whether the UK government can as a matter of law legislate to exclude or otherwise restrict judicial review in respect of excepted and reserved matters.[295] Regardless of whether or not it can, the potential for statutory intervention to become a matter of serious dispute between the UK government and the devolved administrations should not be underestimated. Respondents emphasise the importance of consultation over any proposals for reform that might emerge, and we would wish to underline the fundamental importance of such consultation, conscious as we are that in responding to our call for evidence, which did not set out any specific proposals for reform, respondents have for the most part been 'shooting in the dark'.

Conclusions

5.50. In summary, our conclusions are as follows:

- **Judicial review is 'devolved' in both Scotland and Northern Ireland, by reason of not being reserved or excepted, but not in Wales in the absence of its own jurisdiction.**
- **There are substantial similarities in judicial review in the United Kingdom's three jurisdictions. The differences, if differences there are, are more in judicial attitudes towards the role of the courts in the control of government than in the substantive law.**
- **The devolution-related submissions attest to the importance of judicial review in the three devolved nations, nowhere more so than**

[293] EXT174, page 2.
[294] EXT022 (Bangor Law School), para 93. See also EXT164 (Public Law Wales), paras 19-25.
[295] EXT024 (Bar Council of Northern Ireland), paras 11-15; EXT129 (Law Society of Scotland), page 3; EXT122 (JUSTICE), para 13.

in Northern Ireland in the absence of fully functioning devolved institutions for sometimes long periods in the past 20 years.

- **The submissions are without exception opposed to, or at best not persuaded of, the need for reform. Reforms have recently been made to judicial review in both Scotland and Northern Ireland, following comprehensive reviews of their civil justice systems, which are said to be working well.**
- **The submissions assume that the purpose of 'reform' would be to curtail judicial review, to which respondents would be opposed.**
- **Respondents in all three devolved nations are also concerned that statutory intervention might result in a "dual" or "two-tier" system in which "UK wide" reserved or excepted matters and "other" matters are treated differently. We agree that it would be highly undesirable were intervention to result in a "dual" or "two-tier" system of the kind described in the submissions we received.**
- **Some respondents question whether the UK government can as a matter of law legislate to exclude or otherwise restrict judicial review in respect of (UK wide) reserved or excepted matters. Regardless of whether or not it can, the potential for statutory intervention to become a matter of serious dispute between the UK government and the devolved administrations should not be underestimated.**
- **Respondents emphasise the importance of consultation over any proposals for reform that might emerge, and we would wish to underline the fundamental importance of such consultation, conscious as we are that in responding to our call for evidence respondents have for the most part been 'shooting in the dark'.**
- **It would be for the institutions of devolved government in Scotland and Northern Ireland to decide whether to adopt any procedural changes that might be introduced in England and Wales in implementation of or following our recommendations.**
- **Devolution has been described as a "policy laboratory".[296] There may be interest therefore in the recent emphasis placed on the 'consensual resolution' of judicial review cases in Northern Ireland.**

[296] Paun, Rutter and Nicholl, *Devolution as a Policy Laboratory. Evidence Sharing and Learning Between the UK's Four Governments* (Alliance for Useful Evidence, October 2016).

CONCLUSIONS

1. The Panel had to undertake this review in the middle of a pandemic. The size of our task and the limited time available has meant that this report could never be a complete analysis of judicial review (if that were possible). Nor have we had 10 years for our task, as did the JUSTICE/All Souls Committee. This report is not a White Paper or a Green Paper. Nor is it comparable to a report by the Law Commission.

2. Our report is, however, intended to reflect *some* of the current concerns about judicial review, as reflected in the terms of reference and in the responses to our call for evidence. We have also tried to provide the government with options for change, together with our views about those options. We would like to emphasize that *any* changes should only be made after the most careful consideration, given the important role that judicial review plays in our constitutional arrangements and, in particular, in maintaining the rule of law.

3. We were considerably assisted in our task by the quantity and quality of the submissions that we received in response to the call for evidence. Many of the submissions have been published on various websites. We welcome the debate that the review has engendered not only in those submissions but in numerous webinars and virtual conferences that have taken place since the announcement of our review. We have had an enormous amount of material to help us in our work.

4. The Panel would also like to thank our Secretariat for all the support they have given us. Their task was rendered extremely challenging, as indeed was ours, by the need for all communications to be remote. We would like to pay particular tribute to their efforts in collating statistics and data about judicial review. The analysis was also derived from some of the submissions that we received. The Panel believes that this is the most complete study yet available.

5. We acknowledge some significant omissions from our report:

   (a) The Human Rights Act was outside our terms of reference. We draw attention in our report to the significance of this omission. Since we began our review, the government has announced the launch of an independent review of the Human Rights Act to be chaired by Sir Peter Gross. The review will consider, among other things: “The impact of the HRA on the relationship between the judiciary, executive and Parliament, and whether domestic courts are being unduly drawn into areas of policy.” There is clearly a degree of overlap between that review and ours.

   (b) Immigration in numerical terms is, and has been for some time, the subject of more judicial reviews than any other subject. The law in this area is generally regarded as lacking clarity. The Immigration Rules

have recently been the subject of a Law Commission report.[1] We understand that the law in relation to immigration is the subject of a great deal of work in government. In the time available we did not consider that we could add anything useful, with one significant exception – namely in relation to cases that are known as *Cart* judicial reviews (see Chapter 3).

6. The Panel did not think it helpful to record our views on the relatively few judicial review cases that have attracted particular attention. There would not have been agreement. The fact that 'difficult' cases attract different views is true in other areas of law and by itself is rarely justification for radical reform. We stress, as we say in the body of the report, that the great majority of cases involve the straightforward application of well-established judicial review principles.

7. The Panel, however, is well aware that there have been occasions when, in the words of Professor Varuhas, the courts may be thought to have gone "beyond a supervisory approach" and employed "standards of scrutiny that exceed what is legitimate within a supervisory jurisdiction". That the courts have been able to do this is because Parliament has, for the most part, largely left it to the judges to define the boundaries of judicial review. Part IV of the Criminal Justice and Courts Act 2015 may be regarded as an exception, but it represented only a modest legislative intervention, and in the response to our call for evidence, there was no consensus as to its impact.

8. What, then, are the options available to the government?

   (a) General codification is an option but the advantages of this are comfortably outweighed by the disadvantages (Chapter 1).

   (b) Parliament could legislate to reverse particular court decisions if there were a strong case for doing so (Chapters 2 and 3).

   (c) Parliament could legislate more widely to set out in statutory form what is non-justiciable and/or the circumstances in which the courts should defer or exercise restraint. We do not recommend this course (Chapters 1 and 2).

   (d) Parliament could legislate to specify the grounds for judicial review. We do not recommend this course (Chapters 1 and 2).

   (e) Parliament could not exclude judicial review generally. This would be contrary to the rule of law.

   (f) Parliament could oust or limit the jurisdiction of the courts in particular circumstances if there is sufficient justification for doing so. It would have to confront "hostility" from the courts, careful parliamentary scrutiny and rule of law arguments (Chapter 2).

[1] Law Commission, *Simplification of the Immigration Rules: Report* (Law Com No 388, 2019).

(g) Parliament ought to intervene to reverse Cart (Chapter 3).

(h) Parliament ought to provide (or the judges should develop) a remedy of suspension to alleviate the bluntness of a quashing order (Chapter 3).

(i) It would be very difficult for Parliament to improve the law on procedure through legislative means. While Parliament would, of course, be entitled to change the law on standing, we do not recommend it do so; and we are not in favour of any tightening of the current time limits on bringing claims for judicial review (Chapter 4).

(j) We do, however, think that there may well be merit in abolishing the requirement of promptitude in the current rule that (with exceptions) claims for judicial review must not only be brought within three months, but promptly as well (Chapter 4).

(k) Further improvements to the law on procedure may be sought through non-legislative means. The courts should be encouraged to do more to address the issue of standing in claims that come before them. Criteria should be developed and publicised for determining when the courts will hear from an intervener in a claim for judicial review; and the government should revisit the guidance it currently follows in determining how to discharge its duty of candour to the court hearing a claim for judicial review against it (Chapter 4).

9. There are significant potential implications for Scotland, Northern Ireland and Wales if there is to be any legislation. We discuss the potential implications in Chapter 5.

Some concluding observations

10. The Panel consider that the independence of our judiciary and the high reputation in which it is held internationally should cause the government to think long and hard before seeking to curtail its powers.

11. It is inevitable that the relationship between the judiciary, the executive and Parliament will from time to time give rise to tensions. Recent decisions provide a clear illustration of this. On one view, a degree of conflict shows that the checks and balances in our constitution are working well.

12. However, the government is undoubtedly entitled to legislate in relation to judicial review, and may well be justified in doing so in certain circumstances. None of the judges who provided submissions to us called this into question. Although there could be said to be an element of conventional law reform about some of our proposals, any decision to legislate more widely will essentially be a political one.

13. One theme which we would like to emerge from our review is that there is a continuing need for respect by judges for Parliament. This is rendered easier where there is evidence of real parliamentary scrutiny. In this context, we welcome the fact that the Fixed-term Parliaments Act 2011 (Repeal) Bill 2021

is to be the subject of pre-legislative scrutiny by an all-party Joint Committee of the Houses of Lords and Commons.

14. We also note the recent observations of the Lord Chief Justice in the Dolan case when discussing the affirmative resolution procedure. He said: “It does go to the weight which courts should give to the judgment of the executive, because it has received the approval of Parliament.” We do, however, acknowledge that the excessive use of framework bills, where much is left to regulation, is much less reassuring.

15. Respect should be based on an understanding of institutional competence. Our view is that the government and Parliament can be confident that the courts will respect institutional boundaries in exercising their inherent powers to review the legality of government action. Politicians should, in turn, afford the judiciary the respect which it is undoubtedly due when it exercises these powers.

APPENDIX A: THE NATURE OF JUDICIAL REVIEW

A1. What follows consists of edited extracts from *The judge over your shoulder – a guide to good decision making* (5th ed, 2018) (JOYS).[2] The target audience for JOYS is "junior administrators whose task is to make decisions affecting members of the public, or to prepare the material to enable others to make such decisions in departments whose ministers answer to the Parliament at Westminster"[3] and is designed to help them gain "a good understanding of the legal environment in which decisions in central government are made and an ability to assess the impact of legal risk on their work."[4]

A2. The guide primarily focuses on "what happens in a typical judicial review case in England, Wales and Northern Ireland".[5] A separate section deals with the position in Scotland, where "The grounds on which judicial review may be sought....are substantially the same as those described for the rest of the UK"[6] but "the scope of judicial review in Scotland is different because it does not depend on any distinction between public and private law."[7] As of 2015, "changes have been made to the judicial review procedure in Scotland...with the effect that it is more in line with the rest of the UK".[8]

What is judicial review?

A3. Judicial review is the legal procedure by which the decisions of a public body can be challenged. The Courts 'review' the decision being challenged and decide if it is arguable that the decision is legally flawed.[9]

A4. Judicial review is a discretionary remedy of last resort – all other appeal options must be exhausted first. This includes any statutory rights of appeal or review; sending and responding to a 'letter before claim' (i.e. before a judicial review is initiated); and possible mediation (or another form of alternative dispute resolution).[10]

A5. Judicial review is not concerned with the merits of a decision but whether or not it was lawfully made.[11]

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2 Available online at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/746170/JOYS-OCT-2018.pdf
3 JOYS, Preface.
4 JOYS, Foreword.
5 JOYS, 60.
6 JOYS, 90.
7 ibid.
8 ibid.
9 JOYS, 8.
10 JOYS, 19.
11 ibid.

What can be challenged by judicial review?

A6. Judicial review can challenge:

- direct decisions affecting a particular person or group, e.g. a decision to detain an individual in immigration detention; or a decision to reform legal aid funding;
- statutory provisions;
- subordinate legislation;
- policies;
- exercise of a discretion;
- reports and recommendations;
- advice or guidance;
- procedures used when making decisions, e.g. a challenge to whether a consultation process has been adequate;
- inaction, e.g. a challenge to a failure to issue guidance; and
- delay, e.g. a challenge to a delay in making a decision regarding an individual's application for leave to remain in the UK.[12]

Who can bring an application for judicial review?

A7. Only a person with 'sufficient interest'/'standing' is entitled to apply for judicial review.

- A person is not entitled to challenge a decision which does not affect him personally, simply because he disagrees with it.
- A 'person' includes legal persons, such as groups or organisations protecting or campaigning for a particular public interest, e.g. a trade union.
- An 'interested party' might be joined to a judicial review claim – i.e. this party is not a claimant or defendant but is directly affected by the outcome of the judicial review.
- An 'intervener' is a third party interested in the outcome of a judicial review claim but who is not directly affected by the outcome of the claim. An intervener applies to the Court for permission to be involved in the claim, in order to submit specialist information, e.g. a charity or a non-governmental organisation applies to be an intervener in order to provide information in its area of expertise.
- Depending on the nature of the decision disputed, judicial review claims are pursued in the High Court (e.g. the Planning Court or the Administrative Court) or in the Upper Tribunal (for the majority of immigration related judicial review claims).[13]

[12] JOYS, 9.
[13] JOYS, 19.

On what grounds?

A8. Administrative law has developed a series of tests for measuring the lawfulness of an exercise of public law powers:

- Legality – acting within the scope of any powers and for a proper purpose. To act lawfully the department must have the legal power to do what it intends to do. If it does not, it will be acting ultra vires, or outside its powers. It will be acting illegally. Where the power does exist, it will usually be found in primary legislation (an Act of Parliament) or subordinate or secondary legislation (a statutory instrument, etc.).
- Procedural fairness – e.g. to give the individual an opportunity to be heard.
- Reasonableness or rationality – following a proper reasoning process and so coming to a reasonable conclusion.
- Compatibility with rights under the European Convention of Human Rights.[14]

A9. A decision maker must therefore act:

- lawfully: i.e. within the limits of the power as given by statute;
- fairly: i.e. the decision maker must demonstrably use a fair decision making procedure and the decision maker must be free from the appearance of bias;
- reasonably: i.e. a decision is not legally valid if it is manifestly unreasonable. A decision could be unreasonable because no decision maker would rationally have made it or because the decision maker took account of irrelevant factors or relied on inaccurate information;
- without breaching human rights: i.e. the decision must comply with the European Convention on Human Rights and the Human Rights Act 1998;
- without discrimination: i.e. the decision must not discriminate against a person or category of persons as set out in the Equality Act 2010.[15]

Are any kinds of decisions immune from being challenged by judicial review?

A10. There are a limited category of decisions which the Court is reluctant to review, because the Court accepts the decision maker is better qualified than the Court to make a judgment due to specialist knowledge or because political judgment is needed, e.g.

- in the field of foreign affairs, in judging how to negotiate with foreign governments;
- ordering financial priorities, in deciding to spend public money in one way rather than another;

[14] JOYS, 35.
[15] JOYS, 18–19.

- assessing the needs of national security and public order; or
- setting policy on immigration and deportation.[16]

A11. Acts of Parliament (and by extension decisions by ministers as to what to propose to Parliament by way of legislation) are not reviewable except in relation to compliance with the Human Rights Act 1998 and the European Convention on Human Rights.[17]

What remedies may be obtained by bringing an application for judicial review?

A11. All of the Court's remedies are discretionary, which means that a claimant has no absolute right to a remedy.[18]

A12. Following a successful judicial review, the Court can make:

- a quashing order, which sets aside or cancels an unlawful decision (or subordinate legislation). (This is the most common remedy ordered by the Court);
- a prohibiting order, which forbids the public authority from performing an act deemed to be unlawful;
- a mandatory order, which requires the public authority to perform a particular action;
- a declaration that declares what the law is, e.g. that a particular decision is unlawful;
- an award of damages (in limited circumstances), by which the Court can award financial compensation. Damages cannot be awarded alone – they must be claimed and awarded alongside another remedy. Under the Human Rights Act 1998, damages specifically for a breach of a Convention (human) right are available;
- a Declaration of Incompatibility: the High Court (or higher court) can grant this Declaration, which confirms primary legislation is incompatible with a Convention (human) right. These Declarations are rare.[19]

A13. While the above sets out the remedies available to the Court in England and Wales, broadly the same powers are available to the Court in Scotland (although the terminology differs) including an injunction (called an "interdict" or "interim order").[20]

16 JOYS, 17–18.
17 JOYS, 18.
18 JOYS, 23.
19 JOYS, 23–24.
20 JOYS, 91.

Within what period must an application for judicial review be brought?

A14. In general, an application for judicial review in England and Wales must be brought promptly and in any event within three months of the decision under challenge.[21]

A15. However, the claim form for certain planning judicial reviews must be filed within 6 weeks and the claim form for certain procurement judicial reviews must be filed within 30 days.[22]

A16. The Court has the power to extend the claim filing time but requires a "good reason" to be shown. The Court applies the power to extend time liberally, particularly where there appears to be a strong case on the merits and there is no detriment to any other person.[23]

[21] JOYS, 19.
[22] JOYS, 67 n14.
[23] JOYS, 67.

APPENDIX B: CALL FOR EVIDENCE METHODOLOGY

B1. The Independent Review of Administrative Law was established following the government's manifesto commitment to ensure that judicial review is available to protect the rights of the individual against an overbearing state, while ensuring that it is not abused to conduct politics by other means or create needless delays.[24] Based on this commitment, the government announced the creation of the Independent Review of Administrative Law (IRAL). On 31 July 2020, the Lord Chancellor announced the appointment of the IRAL Panel (the Panel) to undertake the review, alongside a secretariat staffed by Ministry of Justice officials.

B2. Tasked with considering whether the right balance is being struck between the rights of citizens to challenge executive decisions and the need for effective and efficient government, the Panel undertook a five-month review of the law on judicial review with a focus on its four terms of reference:

- Whether the amenability of public law decisions to judicial review by the courts and the grounds of public law illegality should be codified in statute.
- Whether the legal principle of non-justiciability requires clarification and, if so, the identity of subjects/areas where the issue of the justiciability/non-justiciability of the exercise of a public law power and/or function could be considered by the government.
- Where the exercise of a public law power should be justiciable: (a) on which grounds the courts should be able to find a decision to be unlawful; (b) whether those grounds should depend on the nature and subject matter of the power; and (c) the remedies available in respect of the various grounds on which a decision may be declared unlawful.
- Whether procedural reforms to judicial review are necessary, in general to 'streamline the process', and in particular: (a) on the burden and effect of disclosure in particular in relation to 'policy decisions' in government; (b) in relation to the duty of candour, particularly as it affects government; (c) on possible amendments to the law of standing; (d) on time limits for bringing claims; (e) on the principles on which relief is granted in claims for judicial review; (f) on rights of appeal, including on the issue of permission to bring judicial review proceedings; and (g) on costs and interveners.

B3. During the review, the Panel examined a wide range of data and evidence – including relevant caselaw on the development of judicial review and relevant statistics and data. The IRAL was informed by the following evidence:

- Research undertaken by the IRAL Panel and the IRAL Secretariat
- Stakeholder engagement with interested parties
- A call for evidence

[24] *Conservative and Unionist Party Manifesto 2019*, page 48: the government "will ensure that judicial review is available to protect the rights of the individuals against an overbearing state, while ensuring that it is not abused to conduct politics by another means or to create needless delays".

- Data and statistics from the UK and devolved governments (including the Government Legal Department)

B4. The call for evidence document was released on 7 September, and published on 8 September 2020, and invited submissions on three areas:

- Questions for government departments (and non-government respondents' views on these questions)[25]
- Codification and clarity
- Procedure and process

Evidence responding to any or all of these three areas was welcomed. The deadline for responses was 26 October 2020. The Panel invited people who have direct experience in judicial review cases, including those who provide services to claimants and defendants involved in such cases; professionals who practise in this area of law; and observers of, and commentators on, the process. It was also publicly available on the IRAL's webpage on https://www.gov.uk/government/groups/independent-review-of-administrative-law

B5. Appendix C provides a general overview of the number and type of responses received, followed by a more detailed look at responses in each question area, identifying themes and gaps in the responses received.

B6. Responses to the call for evidence were logged and reviewed by the IRAL Secretariat. The following information was captured as part of this process:

- The type of organisation that responded
- The author of the response
- Date of submission
- High-level themes and sub-themes covered in the response
- Any key points

An overview of this information is set out in Appendix C. The Secretariat analysed this information and provided a thematic analysis, in order to supplement the Panel's wider research and stakeholder engagement being undertaken to inform the Review. Where respondents recommended or included further reading, the Panel were made aware, where appropriate.

B7. A number of respondents offered to meet the Panel to discuss their response further. Given the tight timescales for this Review, it was at the Panel's discretion as to who was engaged with further and how.

[25] There were two questionnaires: one for government departments (including local governments and public bodies) and one for external stakeholders (including external interested parties and members of the public in general). Both had 14 questions respectively, divided into three sections (Questionnaire to Government Departments/Judicial Review and Government Decisions, Codification and Clarity, and Process and Procedure). The questionnaire for external stakeholders asked whether respondents had comment on the Questionnaire to Government Departments. In addition to the call for evidence questionnaires, during the evidence gathering phase, members of the Panel had one-to-one engagement and roundtable events with a number of interested parties.

APPENDIX C: SUMMARY OF RESPONSES

Overview

C1. The call for evidence generated 236 responses from both individuals and a variety of different types of organisation.[26] (See Appendix E for a complete list of organisations and individuals that responded to the call for evidence.) The table below shows the breakdown of the type of organisation that responded. We were pleased with the wide-ranging perspectives provided by such a large number of responses. It is worth noting that while Lord Reed provided a written submission, we did not receive written responses from other senior sitting members of the judiciary.

CONTRIBUTOR	NUMBER OF RESPONSES	% OF TOTAL RESPONSES
Pressure group / charity	61	26
Legal association	38	16
Law firm	30	13
Lawyer	29	12
Academic	20	8
Private citizen	16	7
Government department	14	6
Judge	9	4
Arm's length bodies / public bodies	8	3
Local government*	6	3
Parliamentarian	4	2
Business / business group	2	1
Devolved government	1	0

***The Local Government Association sent a compiled response from a number of LAs (but this is only counted as one response here).

C2. The IRAL Secretariat recorded how the various submissions related to certain themes. These themes were chosen by identifying the key topics in the call for evidence questions and terms of reference. Expecting a number of responses not to follow the format of the questions, this method was chosen so all responses could be recorded consistently and subsequently compared. The graph and the table below highlight the prevalence of themes covered within the evidence received.

[26] In addition, the Panel had access to two minuted roundtable meetings (with Blackstone Chambers, and with representatives of judicial review claimants) discussing the Panel's terms of reference.

Theme	Number of responses which covered this theme	% of total responses which covered this theme
Procedural reforms	191	80
Comments on the impact on decision making	158	66
Codification	149	63
Justiciability	114	48
Remedies	107	45
Out of court proposals	104	44
Specific topics	95	40
Grounds for review	84	35
International comparisons	31	13

C3. The most frequently covered topic was procedural reform, with 80% of respondents covering this topic. However, comments were unevenly distributed among topics. The three most frequently covered themes make up 60%, or almost two-thirds, of total themes being covered, showing there is a weighting towards these topics. Many respondents covered multiple themes, with the most common (modal) number of themes covered in a submission being six out of nine and the median number of themes covered being four out of nine.

C4. The IRAL Secretariat also recorded the relative prevalency of more general themes, covering the overall tone of the response, whether the response included quantitative data and whether it covered devolved matters, as shown in the table below:

Topic	Number of responses	% of responses
Quantitative data	20	8
In favour of reform	25	11
Against reform	135	57
Gradual reform	42	18
Devolved matters	19	8

C5. ‘For’ or ‘against’ reform refers to the opinion of the submission of structural and/or major reform to judicial review rather than minor procedural changes. Some responses advocated changes in specific or limited areas. Such submissions that expressed a desire on the whole for judicial review to stay unchanged would be counted as ‘against reform’. A further distinction was made between ‘in favour’ and ‘gradual’ – gradual being responses that were generally in favour of changes, but did not specify the extent of the changes that should be made without extensive research, testing, consultation, etc.

C6. Within each theme, the Secretariat categorised responses’ advocacy for reform (or not) through scoring the submission against various sub-themes, noting if the submission was for any change, against any change or neutral/balanced. Again, the majority of respondents were against reform in

87% of sub-themes. The sub-themes where there were more (or equal) advocates in favour of any sort of reform over no change were:

Sub-theme	Number in favour of reform in this area	Number against reform in this area
Costs procedures	68	47
Time limits	52	44
Costs proportionality	35	35
Proposals on decision maker/claimant action on minimising the need for JR	17	6
Other procedural reforms	12	10
Other remedies	6	4
Health/education/social care JR	6	3
Environmental JR	5	0
Criminal JRs	1	0

Codification

C7. The call for evidence asked respondents to consider "Is there a case for statutory intervention in the judicial review process? If so, would statute add certainty and clarity to judicial reviews? To what other ends could statute be used?" The IRAL Secretariat logged 149 responses against the codification theme; of which 6 respondents were 'in favour', 22 were 'partial' and 110 were 'against'.

C8. The main arguments made against codification were:

- Flexibility in the law was crucial for the rule of law to be maintained.
- Codification would undermine confidence in the public sector if it was perceived that the government was seeking to limit the grounds on which it could be held accountable.
- High-level and general legislative changes may not add anything in practice, while substantive changes would be inconsistent with the UK's uncodified constitutional arrangements.
- Detailed and specific legislative changes could lead to uncertainty and a lack of accessibility.
- Existing restrictions on judicial review are currently adequate to filter weak claims. The cost of such claims is insufficient to warrant greater barriers. If further restrictions were relied on, injustice could occur.
- Codification could expand the scope of judicial review – once codified in an Act of Parliament, the grounds would be subject to judicial interpretation and could lead to an immediate rise in litigation.
- Statutory process could inadvertently remove some of the avenues of challenge available and could potentially have a negative impact on the effectiveness of the pre-action process.
- Reducing the oversight afforded by judicial review could increase perceived regulatory risk, which could lead to investments being perceived as riskier.

C9. The principal arguments for codification were that:

- Codification could enhance legal clarity and certainty as well as clarify the purpose of judicial review.
- Codification could increase the accessibility for potential litigants (particularly litigants in person) and speed up the process, by limiting the current areas of discretion.
- The standing of judicial review could be improved by making it a right, rather than a discretionary remedy.
- Codification could prevent the Supreme Court from introducing proportionality as a general ground for review.

C10. Some support was expressed for codification of parts of the law on judicial review, in order to:

- clarify that a claim for judicial review can only be granted when no adequate alternative remedy is available;
- set (or re-set) the direction of travel in the law on judicial review, clarifying that proportionality or merits-based review is not a ground of review;
- align time periods for challenge to all matters connected with planning;
- clarify which prerogative powers are reviewable and which are not, and to clarify what counts as a proceeding in Parliament;
- clarify and expand the grounds of review of the decisions of financial regulators.

Justiciability

C11. The call for evidence asked respondents to consider "Is it clear what decisions/powers are subject to judicial review and which are not? Should certain decisions not be subject to judicial review? If so, which?" The IRAL Secretariat logged 114 responses against this theme, with 16% in favour of changes and 67% against.

C12. A number of arguments were made against changing the law on justiciability:

- Any attempt to introduce or redefine non-justiciable powers would violate the rule of law, as being susceptible to executive abuse.
- Every government power is defined by boundaries and limits. Marking off certain areas of government action as non-justiciable would enable the government to escape scrutiny whether it was exercising powers beyond those powers' boundaries and limits.
- Reform in this area could politicise judicial review, and undermine public confidence in the government.
- Defining certain exercises of government power as non-justiciable would freeze the law on judicial review at one specific moment in time, and undermine the flexibility which is inherent in the constitution.
- The courts are the best bodies to decide to what degree of scrutiny a particular type of governmental power should be subjected.

C13. Even respondents who were pro-reform in this area expressed concerns about the practicality of any reforms in this area:

- It would be extremely difficult to craft legislation with the degree of specificity required to render a particular exercise of governmental power non-justiciable. Such legislation would always be vulnerable to creative interpretation.
- Because the ways in which the government works are ever changing, it is impossible to create an exhaustive list of non-justiciable decisions that will endure satisfactorily over time.
- Seismic changes to the legal framework could create the potential for uncertainty and challenge until the new framework becomes settled.
- Scottish and Northern Irish law would need to be changed to achieve uniform non-justiciability of reserved powers to stop forum shopping, which could have presentational risks of undermining the independence of the devolved jurisdictions.

Remedies

C14. The call for evidence asked respondents to consider "Are remedies granted as a result of a successful judicial review too inflexible? If so, does this inflexibility have additional undesirable consequences? Would alternative remedies be beneficial? To what other ends could statute be used?" and "Do you have any experience of settlement prior to trial? Do you have experience of settlement 'at the door of court'? If so, how often does this occur? If this happens often, why do you think this is so?"

C15. Government respondents were asked "In your experience, and making full allowance for the importance of maintaining the rule of law, do any of the following aspects of judicial review seriously impede the proper or effective discharge of central or local governmental functions? If so, could you explain why, providing as much evidence as you can in support?"

C16. The IRAL Secretariat logged 107 responses against this theme. The majority (74%) of respondents did not want any changes to remedies.

C17. By a clear majority, respondents stated that remedies are indeed sufficiently flexible and the court's discretion is a positive element of judicial review. There was a further sense that remedies should not be linked to certain grounds being raised. They also argued that codification would lead to inflexibility.

C18. Many respondents who act for both defendants and claimants specified that quashing orders were a satisfactory remedy, despite the inconvenience they might occasion. Mandatory orders were considered to be controversial. However, it was also noted that they were rarely used. It was suggested that public remedies, overall, could be simplified in a limited way. One suggestion was to merge mandatory and prohibitory orders with mandatory and prohibitory injunctions. It was further suggested that clarification would be useful to claimants to know when remedies were not available.

C19. A small number of respondents suggested expanding the number of remedies to allow even greater flexibility of judicial response to a successful application for judicial review. Suggested additional remedies were:

- Giving judges the power to modify a decision in a limited way.
- Merits review to be allowed in certain regulated sectors.
- Ordering the making of a public apology.
- Public and administrative sanctions for wrongdoing.
- Instructing that human rights education be undertaken.

C20. Other proposals included:

- An early-stage remedy at permission could be used in a similar fashion to a declaration. The court would declare the correct interpretation of the law in question. This could be further constrained to just a single issue to be heard on the papers unless an oral hearing was requested.
- A greater role for declaratory orders. It was argued that it would be fairer for the courts to be restricted to a non-invalidating declaratory remedy wherever primary legislation is involved in the judicial review and potentially in relation to secondary legislation.
- Courts should be empowered, in exceptional circumstances, to suspend the effect of a quashing order to allow the defects to be rectified.
- Allowing the courts to provide that its decision had only prospective and not retrospective effect.

C21. On damages, respondents generally argued that damages need to be more freely available, on the basis that other jurisdictions allow damages for maladministration. However, a significant minority argued that administrative law was largely not about damages at all.

C22. A significant majority of submissions took the view that settlement is extremely common in judicial review cases, though very rarely done at the court door – immigration cases seemed to be the most likely to settle at the door. It was generally claimed that most settlements were in favour of the claimant.

Grounds of review

C23. The call for evidence did not specifically ask respondents about the grounds for review. However, government departments were asked “In your experience, and making full allowance for the importance of maintaining the rule of law, do any of the following aspects of judicial review seriously impede the proper or effective discharge of central or local governmental functions? If so, could you explain why, providing as much evidence as you can in support?” Respondents were also asked “Is the process of i) making a Judicial Review claim, ii) responding to a Judicial Review claim and/or iii) appealing a Judicial Review decision to the Court of Appeal / Supreme Court clear?”

C24. The IRAL Secretariat logged 84 responses against the grounds for review theme. There was a fairly even distribution across the sub-themes, which

were: mistake of law; irrationality; *Wednesbury* unreasonableness; procedural impropriety; mistake of fact; irrelevant/relevant considerations; legitimate expectations; the Human Rights Act 1998; access to justice; and proportionality. No sub-theme attracted more respondents arguing in favour of reform than against. Overall, 50% of comments on the sub-themes discouraged reform and 13% encouraged reform, with a fairly high proportion being neutral (37%).

C25. Most respondents felt that the current set of grounds accepted by the courts were appropriate and should not be narrowed. A smaller group emphasised that the expansion of the grounds of review, particularly regarding the Human Rights Act, was a move in the right direction as increasing access to justice.

C26. The issue most widely debated among respondents was the growth of so-called 'merits-based review', with many offering additional discussion of the evolution of judicial review grounds. The key area of expansion was generally held to be in the sphere of proportionality/reasonableness/irrationality. Opposing arguments coalesced around the question of whether proportionality was straying into the territory of 'merits-based review'. Respondents on both sides tended to recognise this as a potential risk but disagreed as to whether it had happened. There were a minority of respondents who agreed that judicial review was moving into the realms of merit-based review, but instead of seeing this as a judicial overreach, argued that this was a proper evolution of the role of the courts and that merits-based review should be expanded further.

C27. Although attracting less discussion, submissions also made substantive comments over other aspects of the grounds of review:

- The duty to give reasons was raised a few times as a 'growth area' of review. Responses which addressed this tended to stay neutral or agree that this should be a ground of review.
- On legitimate expectations, there was widespread agreement that while no reforms were necessary at this point, it was an area that could bear more thought.
- Environmental groups consistently recommended that environmental grounds be recognised as a ground of review in and of itself.

Dealing with judicial review cases out of court

C28. The call for evidence asked respondents to consider "What more can be done by the decision maker or the claimant to minimise the need to proceed with judicial review?" and "Do you think that there should be more of a role for Alternative Dispute Resolution (ADR) in Judicial Review proceedings? If so, what type of ADR would be best to be used?"

C29. The IRAL Secretariat logged 104 responses against this theme. Responses were split fairly evenly between 37% not favouring ADR, 28% in favour and 35% neutral. Discussion focused on the expanded use of ADR as well as the pre-action protocol (PAP).

C30. On ADR, responses tended to argue against increasing the use of ADR, for a variety of different reasons:

- ADR is not appropriate where there are issues as to the legality of a public body's actions.
- If the law needs to be clarified then judgment from the courts is preferable to a solution reached through ADR.
- ADR is not suitable where a public body's decisions, and the outcome of any potential judicial review proceedings, have implications for more than just the claimant and the public body defendant.
- ADR is not suitable in many areas of law, such as planning judicial reviews. The legislative framework appears to hamper the effectiveness of any proposed increase in ADR.
- Power dynamics are problematic in encouraging parties to use ADR (especially with unrepresented parties) as there is no incentive for the defendant to settle, except when they are keen to avoid an adverse judgment or strategic litigation with wider implications.
- ADR offends against the principle of open justice.
- ADR would not be suitable in cases where claimants require an urgent consideration of their position.
- Increasing ADR is not the most efficient solution to reducing the number of judicial review claims that are brought. A better use of resources would be to improve the funding, efficiency and existence of statutory appeal routes against a public body's decision.
- Decision makers cannot offer any assurance about future policy that might facilitate settlement as it would arguably amount to an unlawful fettering of their discretion.

C31. A minority favoured an increased use of ADR, arguing that:

- An advantage of ADR was the flexibility in the solutions that it could offer a claimant. As opposed to formal public law remedies, apologies, among other remedies, can be offered.
- The flexibility in the type of ADR that is used was also an advantage, especially in addressing any power imbalance between the defendant and the claimant.
- Claims for judicial review often do not involve the need to assess the limits of a legal power, and are not concerned to set a precedent or a legal standard. ADR is most appropriate for judicial review claims that involve damages.
- ADR helps to focus the potential issues to be raised at trial, thereby removing irrelevant or inarguable matters. This reduces the complexity of the case and narrows the issues.
- Dealing with a claim for judicial review in a non-adversarial environment helps to maintain future relationships.
- There is empirical evidence of ADR being successful in judicial review cases.

C32. Comments were generally in favour of promoting the resolution of judicial review cases through the PAP.

C33. Responses frequently reported that parties are frustrated with the lack of engagement at the PAP stage. They argued that the PAP is genuinely effective at resolving judicial review cases, but too often parties did not engage in PAP correspondence either at all, or when they did it was not genuinely or constructively. There was divergence of opinion on who was most at fault at failing to engage, although a large number singled out the Home Office for generic, 'copy and paste' responses.

C34. Respondents made a variety of suggestions on how to improve the PAP process:

- Responses suggested defendants should employ legally qualified personnel to monitor the correspondence stage, and actively communicate with pre-action correspondence. This would increase efficiency, as full engagement during the PAP stage could highlight claims that either have merit or are unmeritorious, even if a resolution was not achieved.
- Documents should be reviewed to ensure that there is effectively a presumption that ADR will be attempted in any case which is not otherwise settled; and that litigants are fully aware of or have been fully informed about the alternatives to litigation.
- PAP procedure should require parties to provide reasons for refusing ADR where it has been offered, with costs sanctions attached thereto to encourage compliance or engagement.
- Specific time limits should be implemented to allow public bodies enough time to consider and respond in a meaningful way through the PAP.
- PAP precedent documents and guidance should be amended to emphasise the need for prospective claimants to not 'store up' prospective grounds until permission stage.

C35. A minority of respondents were sceptical as to the usefulness of the PAP in resolving judicial review cases satisfactorily. Such responses mainly focused on three points:

- Time limits for bringing a judicial review claim are too tight to enable the PAP to be used properly. Without enabling parties to extend the time limits of their own volition, adding costs sanctions to non-engagement at PAP could lead to more premature claims, protracted correspondence and entrenched positions from an abundance of caution. The current time limits already force claimants to issue judicial review claims sooner that they would otherwise like.
- Encouraging the disposal of cases through the PAP did nothing to address the problems created by information asymmetry between the claimant and the defendant. Until sanctions could be applied for withholding information from one party by the other, greater focus on PAP seemed incidental.
- As publicly funded claimants do not get legal aid until permission is granted, any costs incurred at PAP are not recovered. Complex claims could therefore hit claimants particularly hard.

Procedural reforms

Introduction

C36. The call for evidence asked respondents to consider "[w]hether procedural reforms to judicial review are necessary, in general to 'streamline the process', and, in particular: (a) on the burden and effect of disclosure in particular in relation to 'policy decisions' in Government; (b) in relation to the duty of candour, particularly as it affects Government; (c) on possible amendments to the law of standing; (d) on time limits for bringing claims; (e) on the principles on which relief is granted in claims for judicial review; (f) on rights of appeal, including on the issue of permission to bring JR proceedings; and (g) on costs and interveners."

C37. The IRAL Secretariat logged 191 responses for this theme, with the most common sub-theme being cost procedure.

Disclosure and the duty of candour

C38. The question of what, if anything, should be done in relation to the law on disclosure and the duty of candour in judicial review cases provoked a mixed response.

C39. A minority view was in favour of clarifying the scope of the duty of candour by way of amendments to the CPR, making it clear that:

- the duty does not apply prior to the grant of permission for judicial review;
- the duty does not extend beyond the provision of information about the decision maker's reasoning and the facts relevant to a claimant's grounds of challenge; and
- it is a duty to identify relevant facts and the reasoning process, and it does not necessarily require disclosure of documents.

C40. Against this, a majority argued that:

- While the administrational burden can be high on a public body, the duty of candour serves an important purpose to ensure openness in how decisions have been made which underpins transparency in the democratic process. If the duty were restricted, it would risk undermining the purpose of judicial review.
- If the duty were to be curtailed or removed, there would likely be a consequential increase in specific disclosure applications under the CPR 31, which will slow down the determination of claims.

C41. Within that majority, some were in favour of strengthening the duty of candour by:

- Ensuring that relevant information is disclosed at pre-action stage in order to encourage early settlement, which could drive down the number of cases brought.
- Extending the duty of candour to require disclosure of the full papers prepared for the relevant decision-maker.

C42. Others took the view that disclosure is not a burden but a responsibility, and that the current rules around disclosure did not go far enough and needed clarification through legislation. It was argued that any curtailment of a defendant's disclosure obligations enabled a public authority to present a misleading picture and prevented judges from fairly dealing with cases, undermining public confidence.

C43. Against this, it was argued that:

- A full standard disclosure process would add significant time and cost to the judicial review process, for government and claimants.
- As it is now, compliance with the duty of candour is cheaper and more straightforward than disclosure. It is far better than the alternative, as in other forms of civil proceedings where the duty of candour does not apply to the parties and the claimant is forced to make applications to court to oblige the public body to provide such information.

Standing

C44. A variety of arguments were made in favour of leaving this area of law undisturbed:

- The rules as to what amounts to a requisite 'sufficient interest' to have standing to bring a claim for judicial review are sufficiently clear.
- Any limits on the current test would allow the government to act with impunity.
- Claims brought by public interest groups vindicate the rule of law and enable the courts to perform their constitutional function. In addition, this is a more efficient use of court time than dealing with a group claim brought by many different individuals.
- Representative litigation can be extremely helpful in avoiding numerous cases being brought. Any reform should take careful account of the need to ensure that those who retain standing are able to access the funding necessary to do so.
- The current test for standing already prevents public bodies being harassed by irresponsible applications.

C45. Against this, it was argued that:

- Common law principles on standing have become confused over time and often appear to be given little weight. Clarification of some kind to

provide clarity on standing would assist both claimants and defendant public bodies.
- There are reasons to tighten the rules of standing, specifically, for a stricter application of the sufficient interest test for second or third claimants. Multiple claimants can add considerably to the costs of defending proceedings.

C46. A few submissions argued for an even more flexible approach to standing in cases involving those bringing challenges on behalf of vulnerable groups or the environment, or in cases involving breach of the equal treatment principle.

Time limits

C47. In general terms, respondents maintained that time limits are sufficiently tight, so no reform was encouraged. However, if any reform was to be considered, it should be to extend the time or to allow parties to agree on extensions, rather than to shorten it.

C48. Those arguing against any further restrictions of the time limits for bringing a judicial review claim argued that:

- Time limits are clear and sufficient. It ensures that claims are brought promptly but allows for pre-action correspondence seeking settlement.
- If the time limit is shortened, it is likely that this will lead to an increase in litigation because parties are unable to settle prior to issuing. This will affect directly to vulnerable parties, and will undermine access to justice.
- Time limits have already been reduced in respect of some planning and procurement matters.

C49. Those who encouraged liberalisation of the time limits on bringing a claim for judicial review argued that:

- Three months is not enough time to understand the process, the decision that has been made, consider other options to rectify the decision, secure legal representation and comply with pre-action protocol. The time limits significantly limit the time available to try to negotiate an alternative outcome to litigation.
- Since judicial review claims are ‘front-loaded’, it is difficult to gather all the evidence and materials relevant to the claim before making the application.
- A positive reform would be for a clear three-month time limit and the removal of the additional requirement to act ‘promptly’. This would reduce this uncertainty without creating additional delays in public administration.
- Increasing the funding and resources available to the courts to prevent delays and allow matters to be resolved in a timely fashion was highly recommended.
- Extending the time limit might increase the proportion of cases that settle before the formal issuing of a judicial review claim, thereby

reducing costs. Some suggested that the time for making a claim should be extended from three months to six, to take account of continuing decisions. Others suggested that time limits should be extended from three months to three years (including after release of government papers under the 30-years rule) in light of the complexity of some judicial review cases.

- The law should enable an agreed extension between the parties to the three-month time limit to comply fully with the PAP, and establish a presumption that delay in legal aid is a good reason for an extension of time, where the application has been made promptly.

Permission to apply

C50. Those who argued in favour of the law in this area remaining unchanged argued that:

- Evidence suggests that an effective and rigorous 'sifting' system is already in place, as evidenced by the number of claims which are removed from the system.
- Raising the bar for claimants to meet at the permission stage or removing or further modifying the right to request an oral renewal hearing would risk filtering out meritorious claims, undermining the purpose of judicial review.
- The renewal process is clear and essential in ensuring access to justice.
- Put together, pre-litigation correspondence and the permission requirement make judicial review an efficient process for resolving many disputes without the need for formal litigation.

C51. It was suggested that there would be value in the reasoning behind permission decisions being published – if not for each specific decision, then at least a regular digest summary of collated common reasons for refusing permission in recent Administrative Court cases.

Rights of appeal to the Court of Appeal / UK Supreme Court

C52. Due to the decrease in appeals over the past few years the majority of respondents considered that there is no justification for limiting the right of appeal in judicial review cases. It was highlighted that given the constitutional significance of judicial review, it is important for the senior appellate courts to adjudicate on judicial review cases where the threshold for appeals is met.

C53. Some reforms that were suggested in this area were:

- Greater resources should be made available to the Court of Appeal to ensure that applications for permission to appeal are dealt with within a tight timescale.
- The biggest improvement to judicial review would be to change the appeal landscape around it. If a decision has a right of appeal elsewhere, there

will be no need for a judicial review. This would reduce volume, and challenges which are solely 'merits based'.

- Create an appeal process that bypasses the High Court. This would save the cost to the public purse of having the claim considered by two courts, but it would ensure important issues are considered by the more senior court.
- Reforms introduced and effective from 1 July 2013 (when a claimant is denied an oral hearing if the court, having reviewed the application for permission, determines the claim to be 'totally without merit') should be reversed. It should be easier to appeal, and the time limit should be extended.
- In the planning system, it was suggested that the Panel should consider additional mechanisms and opportunities for appeal, for example, introduce third-party rights of appeal. Having robust procedures in place to ensure the applicant has fully engaged in the planning process before getting leave to appeal was also suggested.
- Parliament and the government ought to consider whether to re-introduce appeal rights in certain categories of case, such as human trafficking, statelessness, and domestic violence cases.
- Codification of appeal processes for 'criminal cause or matter' should be considered. The route of appeal in judicial review proceedings relating to a 'criminal cause or matter' is to the Supreme Court, but that requires the High Court to certify a point of law of general public importance. Otherwise, appeal from the High Court is to the Court of Appeal and does not require certification of a point of law of general public importance.

Costs

C54. In general terms, respondents regarded judicial review as being an expensive process. Costs have become less, not more, favourable to claimants and interveners. Many will have legitimate concerns and standing about the government's actions but be financially prevented from taking any action such as a judicial review. Despite this imbalance, some do not consider that the level of claimants' recoverable costs in judicial review are disproportionate to the outcomes achieved for individuals.

C55. Most respondents highlighted the importance of legal aid, and how the drastic reduction in the scope and availability of legal aid has had a significant impact on access to justice. Increasing the availability of legal aid by reforming the means test would enable early legal advice to be sought and encourage settlement. The way in which legal aid for permission stage is awarded also should to be reconsidered, so that solicitors are not forced to take a financial risk when representing claimants.

C56. The common lines of argument that encouraged reform in this area can be summarised as follows:

- Any system which excludes people from access to justice by means of cost cannot be considered reasonable or fair – particularly when it

disproportionately affects people who are already disadvantaged by discrimination and inequality.

- Adoption of Jackson LJ's recommendations for reform of costs following his review was highly recommended, in particular (1) to extend the Aarhus rules to be adapted to all judicial review claims, and not just environmental claims, and (2) that costs management should be introduced in the case of 'heavy' judicial reviews.
- Escalating costs could be avoided by engagement with the case from the earliest opportunity.
- Defendants should be able to recover pre-action costs in cases which are wholly without merit. Where a local authority successfully defends a judicial review, it will typically face difficulties in recovering costs from the claimant and/or the interest group which organised the litigation.
- Some suggested that a more satisfactory system for both claimants and defendants would be one with a broader legal aid regime for public interest litigation coupled with a narrower costs capping order regime to cover exceptional circumstances falling outside the scope of legal aid.
- Costs should be awarded against the government on an indemnity basis for any breach of citizens' rights following a judicial review.
- The availability of protective costs orders (or costs capping orders), while important to enable claimants to get justice, should be carefully controlled to ensure that they are not a licence for unelected guardians of the public interest to litigate on a risk-free basis.
- Introducing rules under which a costs cap is set at the outset of proceedings, and only varied downwards where the need for a lower cap is proved by the claimant, was recommended. The possibility to reconsider costs on appeal should only be available in exceptional circumstances and where it would not expose the claimant to prohibitive expense. The reciprocal costs cap of £35,000 should be removed altogether as it perversely risks many cases becoming too expensive to win.
- Recent changes to the costs capping regime and the costs rules for interveners have created a chilling effect; costs caps should not be variable. It could be improved by implementing qualified one-way costs shifting.

Interveners

C57. The majority of respondents considered the role of interveners as positive. It was emphasised that they can be of great assistance to the court, bringing evidence and perspectives which may not be available or apparent to the parties, and recommended to substantially limit any costs related to such interventions.

C58. On the other hand, some maintained that in complex cases, the court permits a range of interveners to address the court, resulting in an imbalance in arms and encouraging the perception that the case is more a commission of inquiry or a select committee than an adjudication of a discrete legal challenge.

Other procedural reforms

C59. Respondents also provided direct recommendations regarding other procedural reforms:

- Use district judges at permission stage; add judicial review procedures to the family courts and other specialist areas.
- There should be sufficient harmony between the procedural rules governing judicial review and the procedural rules of general application to avoid fruitless arguments as to whether the proceedings should have been brought by judicial review or by an alternative process applicable to other civil proceedings.
- Where protective costs orders are not applied for or granted, judges should exercise more freely the discretion they have at the end of a case not to award costs against an unsuccessful NGO bringing a case in the public interest. The test should be whether clarification of the issue was reasonably called for.
- Consideration should be given as to whether other types of immigration judicial review work could be usefully transferred from the Administrative Court to the Upper Tribunal, such as nationality cases.
- Rather than focusing on the time limits for bringing a judicial review claim, attention would be better focused on the time taken for a claim for judicial review to process post-issue. It can take anywhere from three to nine months for a decision for permission on the papers to be made.
- A special Public Administration Court be set up with its own president and panel of assigned specialist judges (three in number) to handle and determine all judicial review cases.
- Crowd-funding of judicial review: the value or potential difficulties of this should be considered, and it is an aspect worthy of consideration in this review and is a field with scope for further research.
- Adoption of modern information systems and greater digitisation. In particular: (1) claims should be recorded on a central register which is open to public access and capable of being searched as soon as claims are issued by the Administrative Court Office; and (2) an electronic register of claims, the accuracy of which is guaranteed by the court and which is capable of being searched remotely by any member of the public would resolve these problems. Similarly, a public register of interlocutory orders should be maintained and made available to public access.
- A review of the application of judicial review to business-related cases would be helpful, to start to unlock the current difficult interface between judicial review and legitimate commercial areas of concern involving authorities or regulators.
- Consider an amendment to section 31(3C) of the Senior Courts Act 1981 so that, when considering whether to grant permission to apply for judicial review, the High Court (and the Court of Appeal, where such an application is appealed) is obliged to consider whether the outcome for the applicant would have been substantially different if the conduct complained of had not occurred.

- Change the procedure rules so that a defendant is only obliged to submit Summary Grounds of Resistance where: (a) the claimant is unrepresented; (b) the PAP was not followed; or (c) the claimant has raised (without sufficient notice) new grounds not foreshadowed in the PAP correspondence.
- Change the costs rules so that defendant may only expect to recover his cost of the Acknowledgement of Service where permission is refused and (a)–(c) above apply.
- Change the costs rules so that, if the defendant contests arguability, they will expect to pay the claimant's costs of the permission application in any event where permission is granted on any of the grounds (save where (b)–(c) above apply).
- Discourage the defendant's attendance at court on renewed permission hearings by strictly limiting the time available for such hearings and providing that defendants will only be permitted to make oral submissions at the court's specific invitation.

Impact on decision making

C60. The call for evidence asked government respondents to consider "In relation to your decision making, does the prospect of being judicially reviewed improve your ability to make decisions? If it does not, does it result in compromises which reduce the effectiveness of decisions? How do the costs (actual or potential) of judicial review impact decisions?" Non-government respondents were also offered the opportunity to comment on this.

C61. The IRAL Secretariat logged 158 responses against this theme. The majority of respondents (66%) thought judicial review to have a positive impact, while 14% thought judicial review had a negative effect. Focusing simply on the effect of judicial review on the quality of decision making, 92% of respondents argued that judicial review had a positive impact, while only 5% argued that it had a negative impact.

C62. Of that 92%, most criticised the Panel's terms of reference, arguing that the terms of reference set up a false dichotomy between judicial review and the quality of public bodies' decision making. They took the position that the two were not opposed but complementary, arguing that:

- Judicial review's role in supporting the sovereignty of Parliament and ensuring that the executive acts in accordance with the law helped to ensure that the quality of decision making is high.
- There was very little empirical evidence to suggest judicial review is hampering decision making. Judicial review affects a tiny proportion of government decisions, and an even smaller proportion of those judicial review cases result in a finding against the government.
- Judicial review aids the quality of decisions by allowing courts and the government to work together to resolve any ambiguities/interpretations of statute, and to fill gaps to make legislation more effective. This also aids future decision making as the meaning of legislation is clarified.

- Judicial review is a mechanism for securing the proper discharge of government functions, while decisions not based on proper and fair procedures will be worse decisions.
- Overturning government decisions leads to better decisions being made, with more positive outcomes for the citizens/organisations involved.
- Research has provided statistical evidence demonstrating that legal challenge to local authorities through judicial review is linked to improvements in their performance measured against official quality indicators.

C63. Very few respondents argued that there was a tension between judicial review and effective decision making. The arguments made by those respondents who did perceive such a tension were more heterogeneous, varying in the degree to which they thought judicial review had a negative impact.

C64. At one end, some argued that there was a possibility that judicial review may impede the government – but the solution was to be found in procedural reform in the courts system to increase efficiency rather than systemic reform.

C65. Others advanced a stronger critique of the effect of the law on judicial review on governmental decision making, focusing on the risk and cost of judicial review causing officials to be more risk averse in their decision making, impeding progress through unnecessary delay and increased uncertainties. This, it was argued, can also lead to unnecessary compromise, especially in planning.

Devolution

C66. The IRAL Secretariat logged 19 responses against this theme.

C67. Although many responses to the IRAL's call for evidence were against reform on substantial issues such as justiciability, those that did advocate reform opined on the need for such proposals to be implemented in a uniform way across the UK. It was suggested that to avoid forum shopping, any proposals resulting from this review in relation to justiciability will need to apply in Scotland and Northern Ireland (NI).

C68. Responses from organisations, government departments and legal actors in Scotland, Wales and NI all raised concerns as to the scope of the review in relation to devolved matters. Many cited the terms of reference, arguing that there was a lack of detail as to how devolved administrations were to be isolated from any reform of UK-wide judicial review. The lack of clarity led many respondents to assume that procedural amendments suggested would also be recommended to Scotland and NI.

C69. Responses emphasised that trying to overrule NI and Scottish competence in implementing reform of judicial review will likely raise constitutional questions.

C70. Overall, responses emphasised the need for strong and effective judicial review in Scotland, with significant concerns being raised regarding any attempt or proposals designed to restrict the reach of judicial review, limit the rights of individuals in this area and the accessibility of judicial review, or interfere with the powers of the independent judiciary and the ability of the courts to hold government to account. Scottish respondents emphasised their lack of desire for a two-track system being created in Scotland and further emphasised how the Scottish courts' judicial review procedures were recently the subject of review, which led to the Courts Reform (Scotland) Act 2014. Respondents argued that those procedures successfully helped to clarify and streamline the process of judicial review in Scotland. Respondents further submitted that the rules concerning the judicial review process in Chapter 58 of the Rules of the Court of Session (RCS) are clear, intelligible and well understood by practitioners and the court.

C71. It was also pointed out that the Scottish competence of judicial review derives from Article XIX of the Acts of Union of 1706 and 1707. As such, respondents warned the panel that care always has to be taken so as not to render the Court's jurisdiction in judicial review ineffective. Reforms in this area may be in breach of the Acts of Union if they go too far.

C72. Respondents from Wales took a similar line to those from Scotland. It was noted that there is growing divergence between the law of England and the law of Wales. This is because the Welsh Government and the Senedd have used devolved competence to develop innovative policies and legislation to seek to improve decision making by public bodies in Wales. Multiple respondents commended to the panel the recent work done by the Law Commission in relation to judicial review in Wales.

C73. While noting the IRALs focus on reserved matters, respondents said that there are circumstances where UK government and Welsh ministers may exercise concurrent powers out of practical necessity, for example relating to cross-border issues, and emphasised contemplation of such circumstances by the IRAL. Reforms could, once again, lead to an issue of creating two systems.

C74. With regards to Northern Ireland, respondents frequently emphasised the importance of judicial review. It was submitted that, in a society emerging from conflict like Northern Ireland, the principle of holding public bodies appropriately to account through access to the courts assumes an even greater importance than in other jurisdictions. Indeed, it was asserted that given the unique constitutional arrangements and the periodic political vacuums in power, the judicial review role of the courts in Northern Ireland has proved to be indispensable. Judicial review provides a non-political avenue to resolve disputes in a constructive and constitutional manner both with and without a functioning government.

C75. Nearly every response from Northern Ireland noted that the IRAL has no NI expertise. The overall message of Northern Irish responses was that practice and procedure in judicial review in Northern Ireland are in good health, with no persuasive case for change apparent.

APPENDIX D: DATA AND STATISTICS

Overview

D1. This chapter provides a summary of the data and statistics the Panel received in the course of its deliberations.

D2. The main source of data on judicial review is the Administrative Court database. Statistics from this are routinely published. The Ministry of Justice also provided the panel with a tool they could use to explore this data. Data for the Upper Tribunal on Immigration and Asylum Cases were provided by the Upper Tribunal. The Government Legal Department provided data on the costs of Judicial Review to central government, while the Courts in Northern Ireland and Scotland provided data on their respective jurisdictions.

D3. Twenty submissions to the call for evidence contained substantial quantitative data, drawn from a range of sources including the government publications, as well as empirical studies, academic articles and research conducted by the respondent or their organisation.

D4. Each section in this chapter attempts to capture the data presented on the following topics of interest:

- Number of cases brought each year, including:
  - (a) topics on which cases were brought
  - (b) the bodies against which cases were brought
- Progression of cases through each stage of judicial review, from permission to final hearing
- 'Success' rate of cases including evidence presented on settlement
- Judicial review in immigration cases
- Government costs in litigating judicial reviews
- Judicial review in the devolved administrations

Caveats

D5. When examining data drawn from this data set the following caveats apply:

- From 17 October 2011, Judicial Review Human Rights and Asylum Fresh Claim applications were transferred to the Upper Tribunal.
- From November 2013, the Upper Tribunal (Immigration and Asylum Chamber) (UTIAC) took over assessing applications for the vast majority of immigration and asylum judicial reviews.
- Of the remaining immigration and asylum judicial reviews whose applications are received by the administrative court, a proportion of these are then transferred to UTIAC.
- Data by department is created by mapping party name to public body. As this process relies on free text fields the accuracy of this data is dependent on how consistently these fields are populated and mapped.

- Data by department was mapped as of October 2020, and is reflective of departments and their roles at this time. Older data may therefore be mapped to a department which did not exist at the time, or which did not perform that function at that time.
- The size of individual boxes or nodes in treemap or Sankey charts are only proportionate to data contained within that visualisation, and cannot be compared between charts.
- Departments with five or fewer judicial reviews in a given year have been grouped into the 'other' category.
- Topics with five or fewer judicial reviews in a given year have been grouped into the 'other' category.
- Administrative Court Office data is extracted from the COINS database.
- Administrative Court Office data includes regional offices of the Administrative Court, although most cases received were issued in London.

Sources

D6. All England and Wales cases in the Administrative Court for immigration, civil, other and criminal are drawn from the COINS database. This data was accessed through the 3 September 2020 Civil Justice Quarterly.

D7. All Upper Tribunal for Immigration and Asylum Cases data are drawn from the ARIA database.

D8. All government costs data were provided by the Government Legal Department and drawn from their case management system.

D9. All data on judicial review in Scotland were drawn from the Scottish Government Civil Justice Statistics Publications as well as data provided by the Senators of the College of Justice of the Court of Session.

D10. All data on judicial review in Northern Ireland were provided by the Northern Ireland Courts and Tribunals Service, drawn from their case management systems.

D11. Other data sources are cited when used.

Number of cases brought each year

D12. The Ministry of Justice publishes quarterly civil justice statistics, which include the number of judicial review applications. This data set goes back to 2000 and also provides a breakdown of topic. The Administrative Court data team within Ministry of Justice have also developed a more accurate system of recording the department or public body involved in these judicial reviews. This was part of the data set and accompanying online tool which were submitted to the panel. The tool allows easy comparison of number, topic and department across each year – in total or five-year averages.

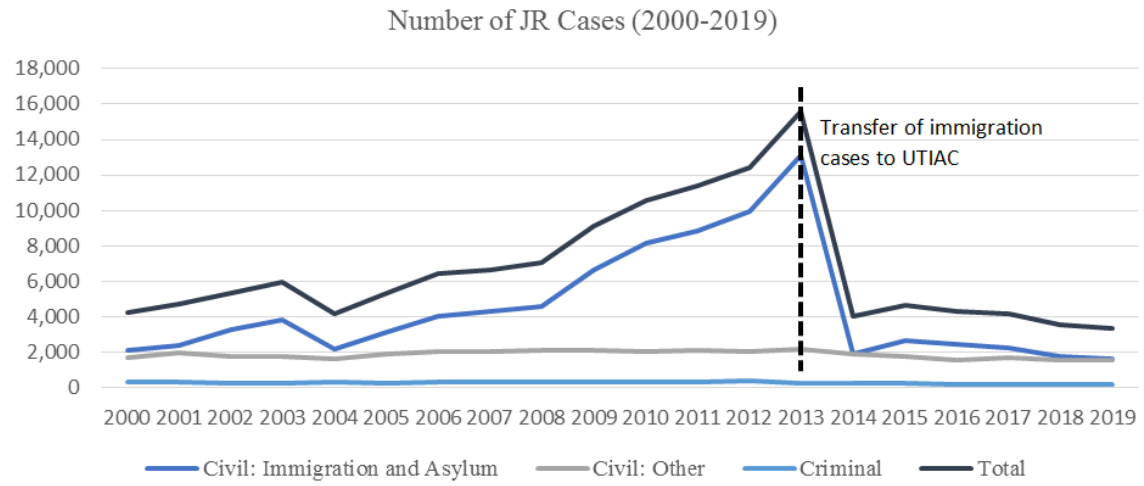

Fig. 1

D13. The number of judicial reviews in the Administrative Court grew significantly from 2000 to 2013 – however this increase is almost entirely owing to the growth in immigration cases. Focusing on 'civil: other' and 'criminal' gives a clearer picture of trends in non-immigration judicial review.

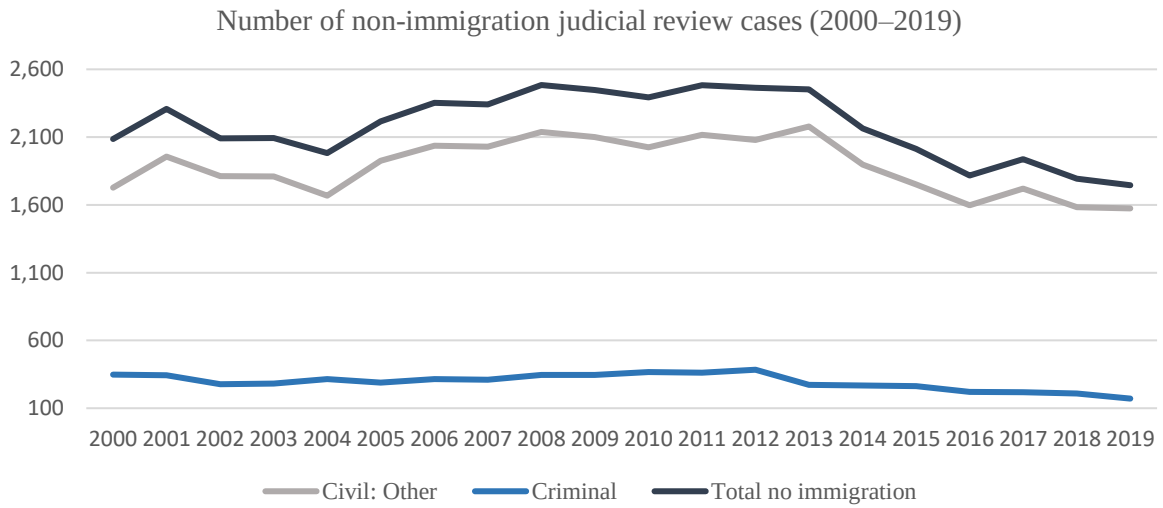

Fig. 2

D14. Without taking into account immigration, there has been some variation in case numbers. In the past decade there has been a decrease in cases of around 27% in total, at an average rate of 3% per year. The sustained decrease in year-on-year cases began in 2011–2012, accelerating after 2014 with only one year (2017) seeing an increase compared to the previous year.

D15. The picture in immigration is very different. Fig. 3 combines data from the Administrative Court and the UTIAC. Note that these data are stored and compiled using different database systems (COINS and ARIA respectively). Therefore, cases that transferred between the courts may be double counted. There is no way to reconcile this without examining cases on an individual basis. However, it is still possible to examine general trends.

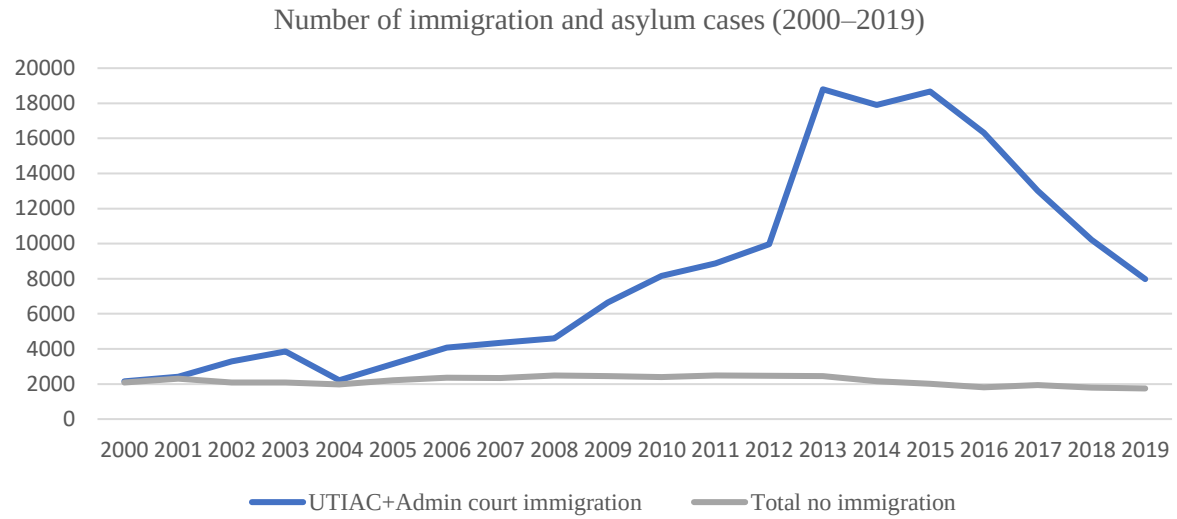

Fig. 3

D16. The significant growth rate in immigration judicial reviews, around 30% per year on average in the five years up to 2013, began to plateau and then fall at a much higher rate (around 20% per year) to that observed in non-immigration cases (1–12%). Also, the number of immigration cases in 2019 was still higher by nearly a factor of four to the number of immigration cases in 2000. Proportionately, immigration used to be about half of all judicial reviews (similar numbers in Fig. 3 in 2000) and it now makes up the vast majority of all judicial reviews (82%). Further data on immigration are explored in more depth later in this chapter.

Topics on which cases were brought

D17. The Administrative Court database allows a further breakdown of topics. The tree maps below give an idea of the distribution of topics in terms of case numbers for non-immigration cases. These tables and the full datasets can be explored in more depth at this link: https://judicial-reviews-app.apps.alpha.mojanalytics.xyz/

Top 10 most common Civil (non-immigration/Criminal topics of Judicial Review.
20-year Average (2000-2019)

Civil		Criminal	
Topic	**Count**	**Topic**	**Count**
Prisons	220	Magistrates Courts Procedure	59
Town and Country Planning	155	Criminal Law (General)	55
Housing	147	Crown Court	36
Homelessness	137	Other	23
Education	113	PACE	16
Disciplinary Bodies	95	Criminal Cases Review Commission	16

Family, Children and Young Persons	94	Extradition	14
Community Care	88	Costs and Legal aid (Criminal)	13
Police (Civil)	77	Decision as to Prosecution	10
Prisons (not parole)	62	Bail	10

Fig. 4 *Fig. 5*

D18. Looking at a five-year average, including immigration cases, in the Administrative Court shows the extent to which immigration cases remain the largest overall category, while certain immigration sub-categories such as cart – immigration also make up a large proportion of overall cases.

Top six most common topics, (Immigration/Civil/Criminal)
Five-year average (2015-2019)

Immigration		**Civil: Other**		**Criminal**	
Topic	**Count**	**Topic**	**Count**	**Topic**	**Count**
Cart - Immigration	779	Town and Country Planning	160	Magistrates Courts Procedure	35
Immigration Detention	733	Family, Children and Young Persons	131	Crown Court	33
Naturalisation and Citizenship	210	Prisons (not parole)	119	Decision as to Prosecution	31
Immigration Human Trafficking	113	Homelessness	111	Other	25
Immigration Legislation Validity	100	Police (Civil)	92	Criminal Law (General)	22
Asylum Support	80	Disciplinary Bodies	92	PACE	20

Fig. 6

D19. As an average over 20 years, Figs. 4 and 5 hide some of the variation and trends in year-to-year case numbers between topics. For a topic such as town and county planning (and town and county planning significant) the trend somewhat matches that seen in the overall figures for judicial review. However, for a topic such as education, which also makes up a larger than average number of cases, the trend is very different, showing a sustained decrease in cases.

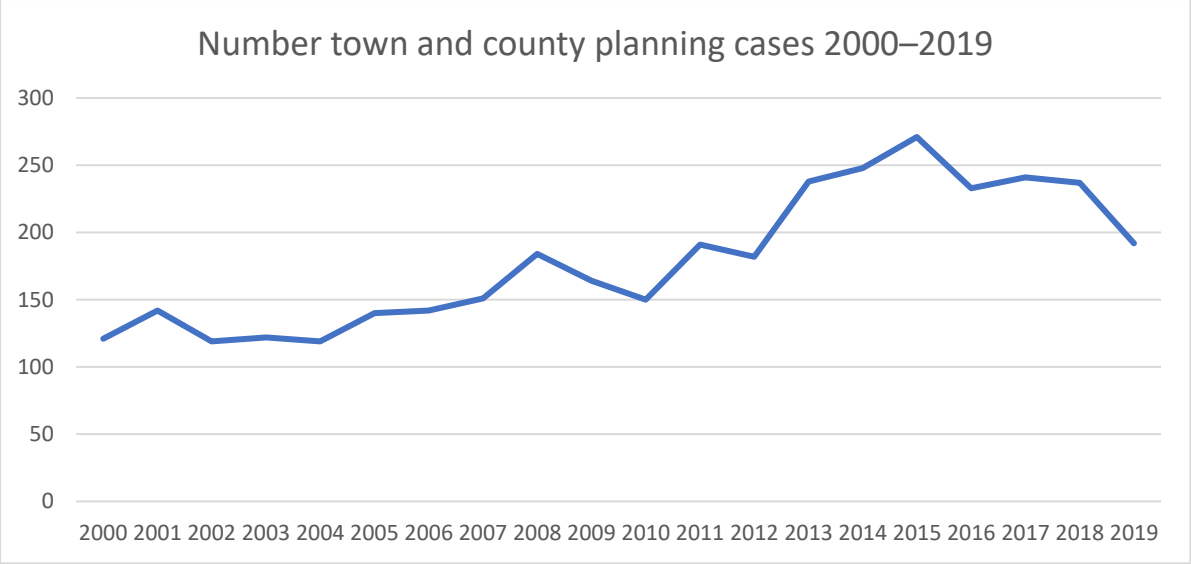

Fig. 7

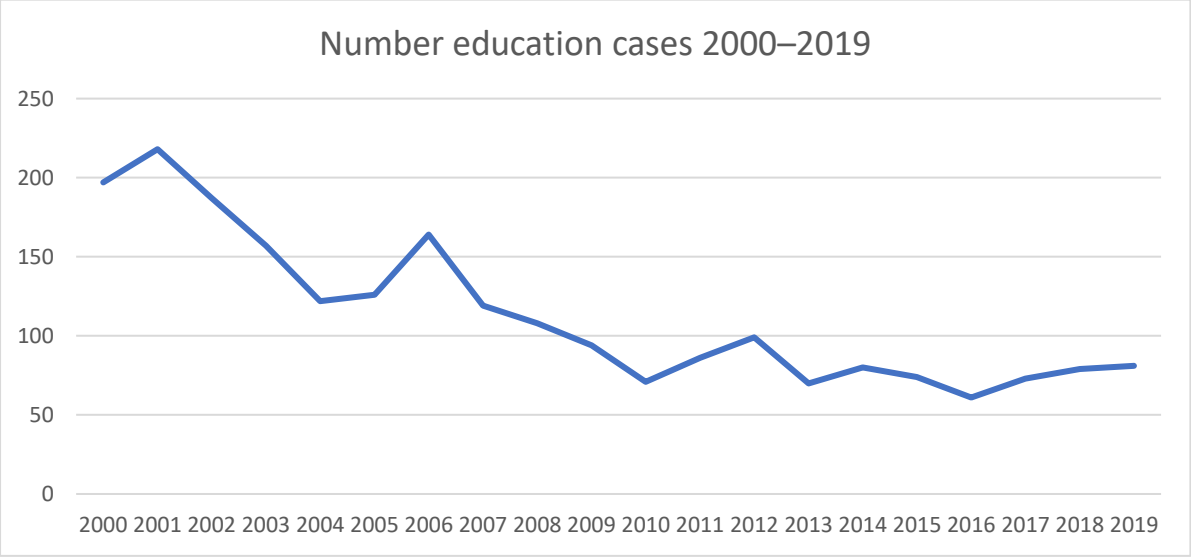

Fig. 8

Progress of cases through each judicial review stage

D20. The Administrative Court data also provides a breakdown of the course of a case through each judicial review stage from application to final hearing. Progression of cases can be usefully visualised through Sankey diagrams which represent the number of cases making it through each stage. In considering the most recent cases, the figures are unlikely to be the final figures on case progressions, since cases need time to work their way through the Administrative Court system. Also note that cases granted permission to proceed to a final hearing include those granted permission to proceed on paper and those granted permission to proceed at an oral hearing. These graphs and the full datasets can be explored in more depth at this link: https://judicial-reviews-app.apps.alpha.mojanalytics.xyz/

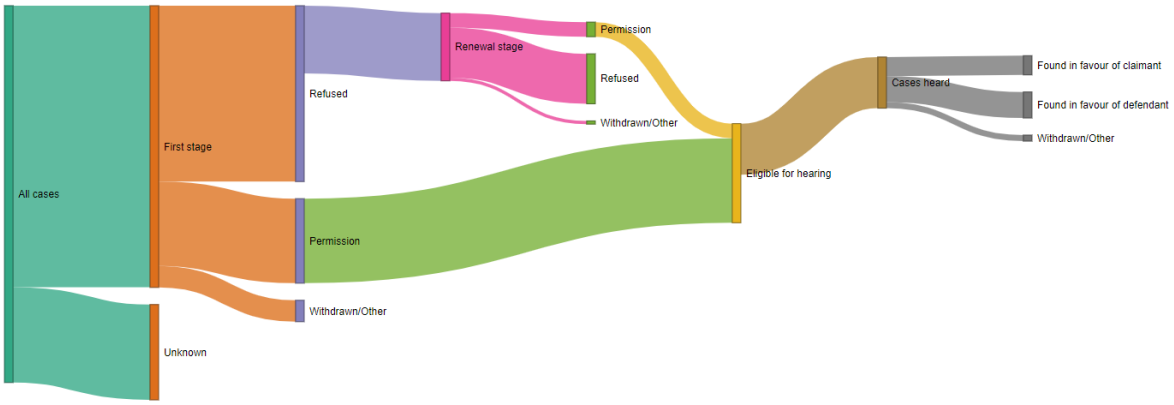

Fig. 9: 20-year averages; number of civil: other cases (2000–2019)

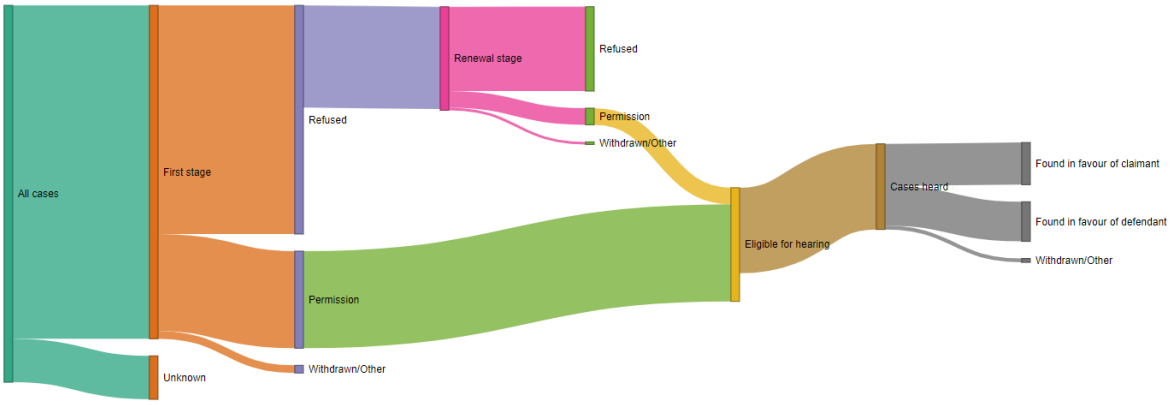

Fig. 10: 20-year average; number of criminal cases (2000–2019)

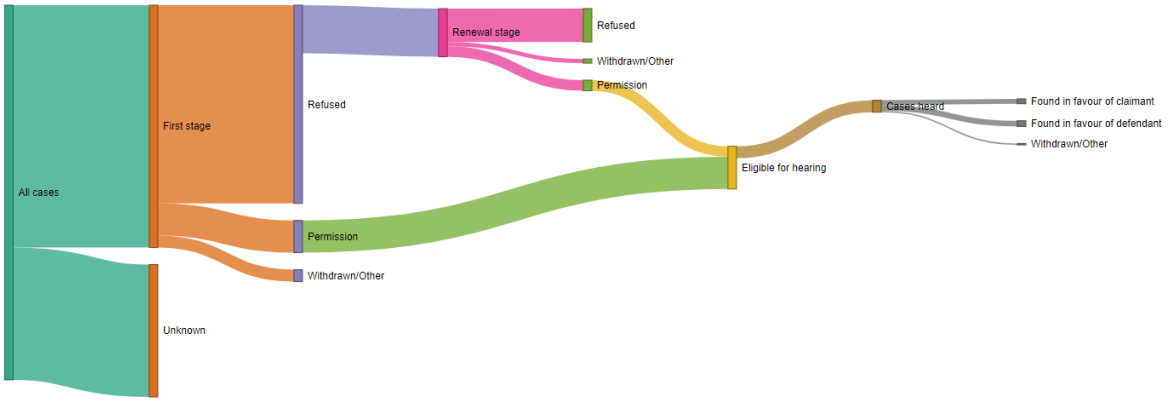

Fig. 11: 20-year average; number of immigration and asylum cases (2000–2019)

D21. As seen above, in all areas only a small proportion of cases make it to a final hearing compared with the number of applications. Indeed, a significant number do not reach the permission stage or are withdrawn between being granted permission and their substantive hearing.

D22. There are differences in the number of cases reaching a final hearing between the three main topics. Immigration cases are much less likely to progress to a final hearing and a larger proportion are withdrawn between the application and first stage. A slightly smaller proportion are not granted an oral renewal

either. Reasons for these differences are likely due to a multitude of factors not discernible from these data alone.

Permission stage

D23. There has been much less change since 2000 in the proportion of cases that proceed to the first or permission stage than in the proportion that are granted permission to proceed to a substantive hearing.

D24. Within non-immigration judicial review, the proportion of applications that reach permission stage has remained fairly constant, though there has been an overall decrease of around 10 percentage points over the period. It was higher in 2019 than the lowest point (2005) by around 7 percentage points. Immigration cases show a different trend of proportionately fewer cases reaching permission stage, during the time when the total number of immigration cases was increasing significantly. Following the transfer of most immigration cases to the UTIAC, the proportion of immigration cases still assigned to the Administrative Court reaching permission stage court is comparable to non-immigration cases.

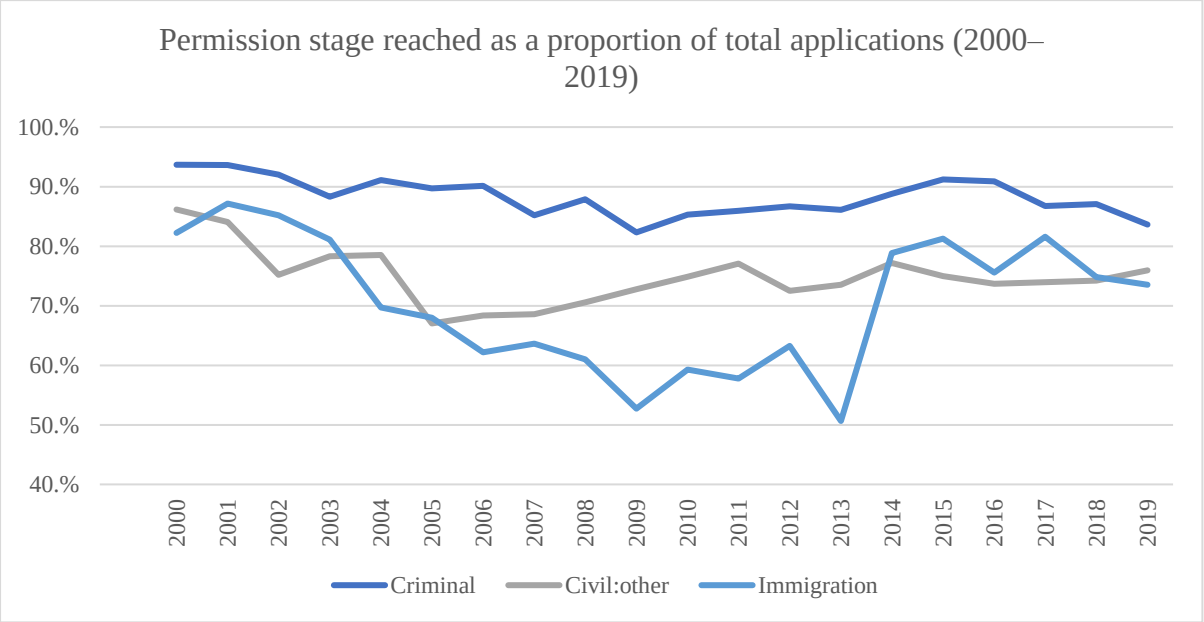

Fig. 12

D25. In terms of permission granted, there has been an overall trend of a decreasing proportion of cases being granted permission (Fig. 13). This is more evident in non-immigration cases as the proportion has remained far steadier than in immigration cases. Unfortunately, from the available data it is impossible to discern why cases are refused permission or do not proceed to the permission stage. Anecdotal and empirical evidence suggests at least some of this is due to settlement and this is explored later in the chapter.

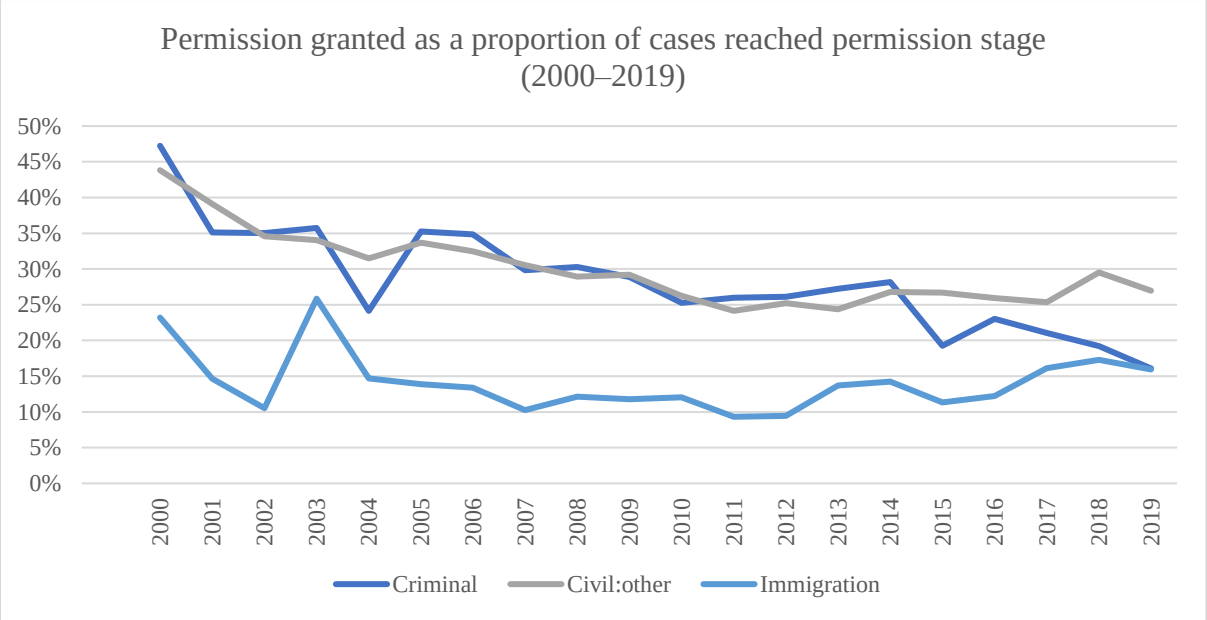

Fig. 13

Oral renewal

D26. Trends are very similar to permission stage in the proportion granted an oral renewal hearing (Fig. 14), but very different in the proportion of those granted permission at that oral hearing (Fig. 15).

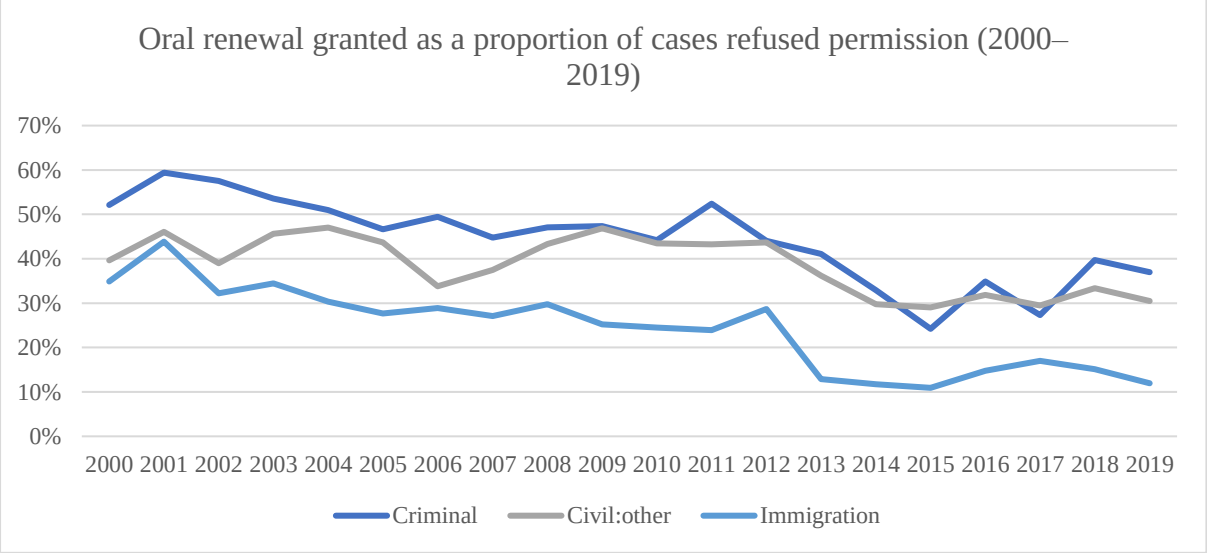

Fig. 14

D27. There has been an increasing proportion of cases that are granted an oral renewal and are also then granted permission to proceed to a substantive hearing.

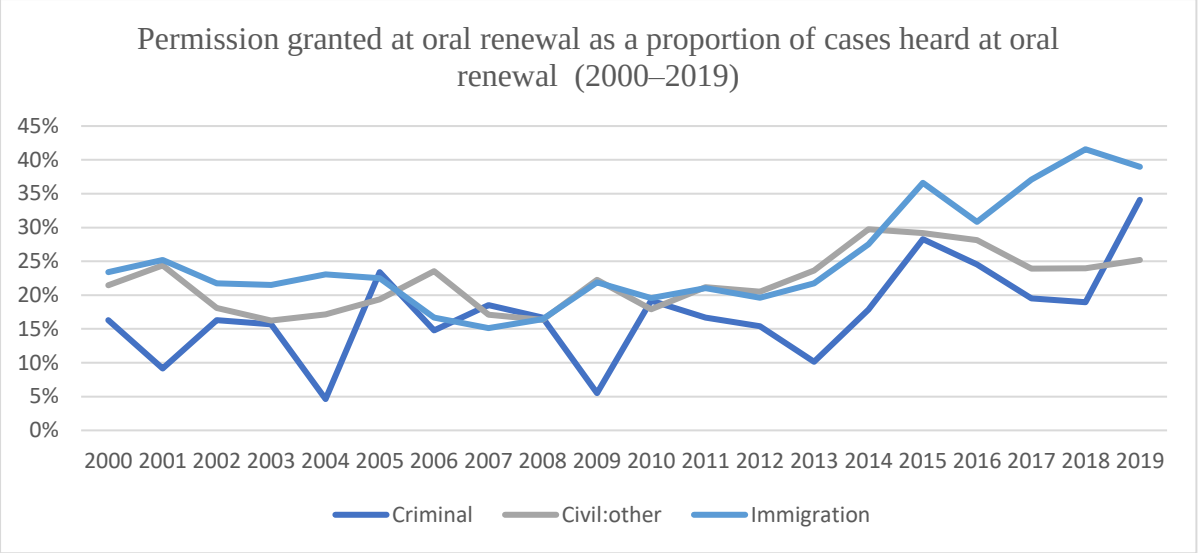

Fig. 15

Substantive hearings

D28. The number of cases reaching a substantive hearing as a proportion of those which reached the permission stage has also seen a decrease over the period. While the majority of this decrease occurred in 2000–2002, a noticeable decrease has continued for criminal judicial reviews, which fell a further 14 percentage points between 2003 and 2019.

D29. Looking at the difference in the number of cases that were granted permission and the number that have their substantive hearing, there appears to be some volatility in all topics. This is made clearer in Fig. 18, which shows the difference in cases as a proportion of total applications for judicial review. Again, from these data it is impossible to discern the reasons for this – for example, whether one side concedes, a settlement is reached or the case is withdrawn for other reasons.

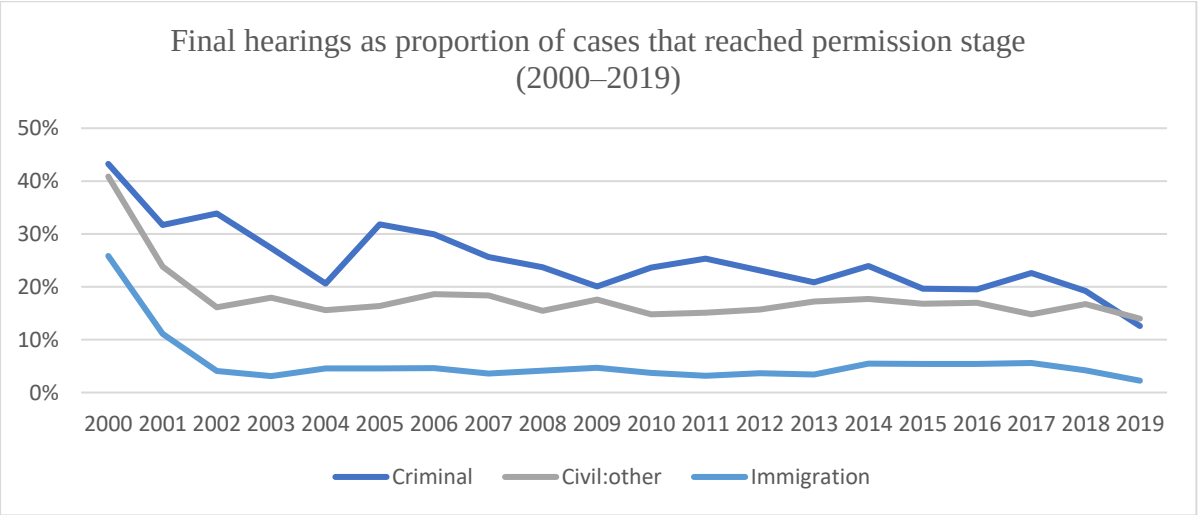

Fig. 16

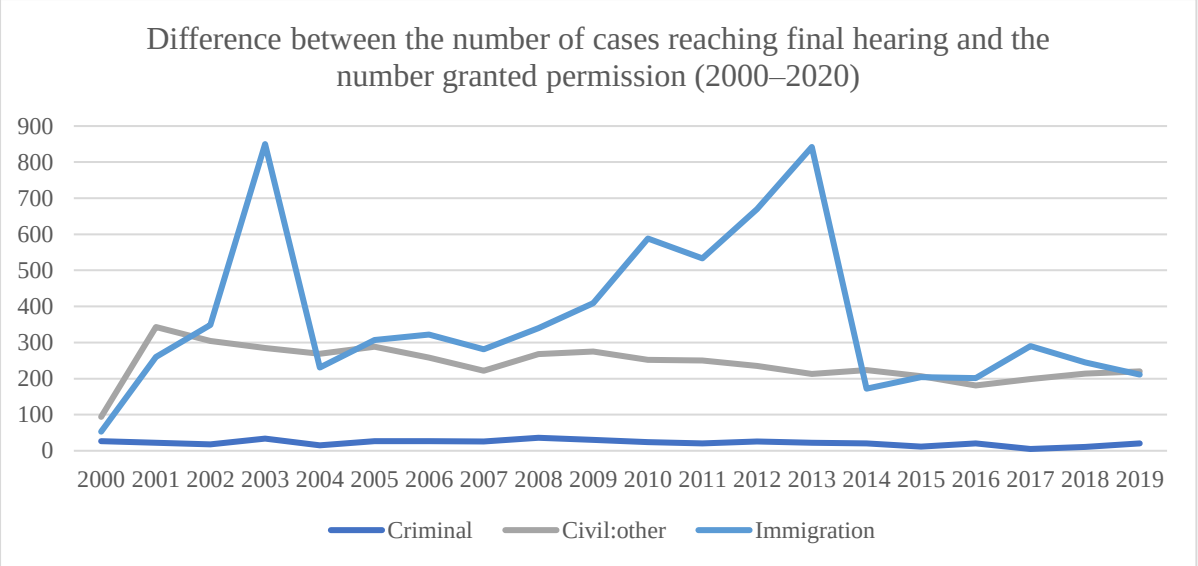

Fig. 17

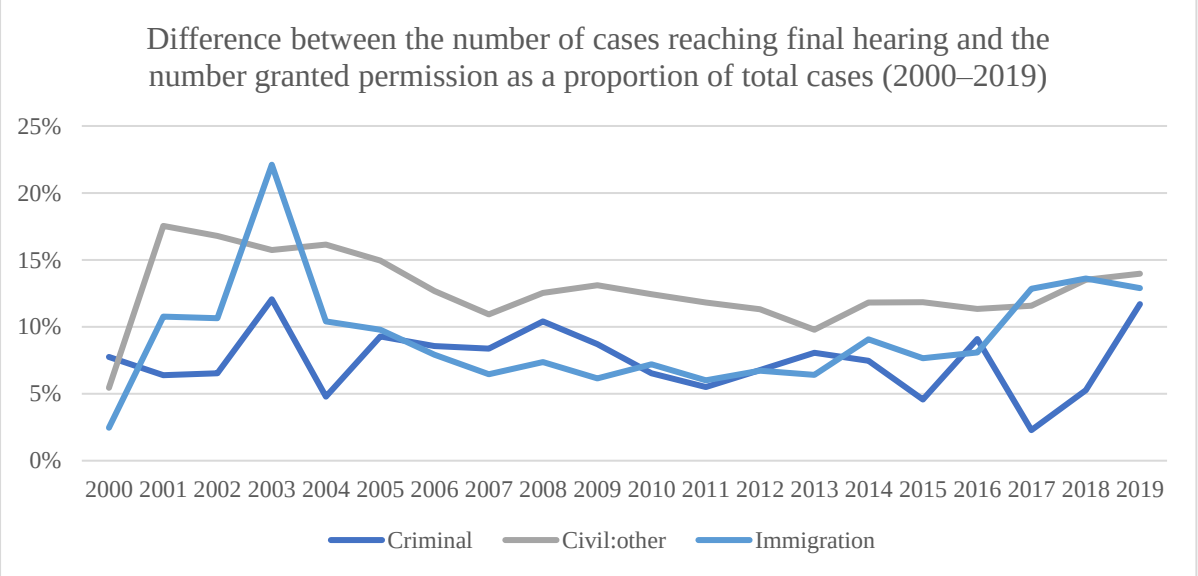

Fig. 18

The bodies that cases were brought against

D30. Including immigration and asylum cases held in the Administrative Court, the overwhelming majority of judicial reviews since 2000 have been brought against the Home Office. This is discounting immigration and asylum cases from 2013 onwards that were moved to the UTIAC, as these cases are not held within the Ministry of Justice COINS database. While the Home Office is the defendant in a majority of immigration cases, a significant number are defended by other departments such as the Ministry of Justice, and HM Revenue and Customs (HMRC).

D31. Looking at the five-year average of cases per department from 2015 (after immigration cases were transferred to the UTIAC) the majority of cases are still handled by the Home Office and a small number of other defendants. Just

under 90% of cases were defended by the Home Office, Ministry of Justice and local authorities.

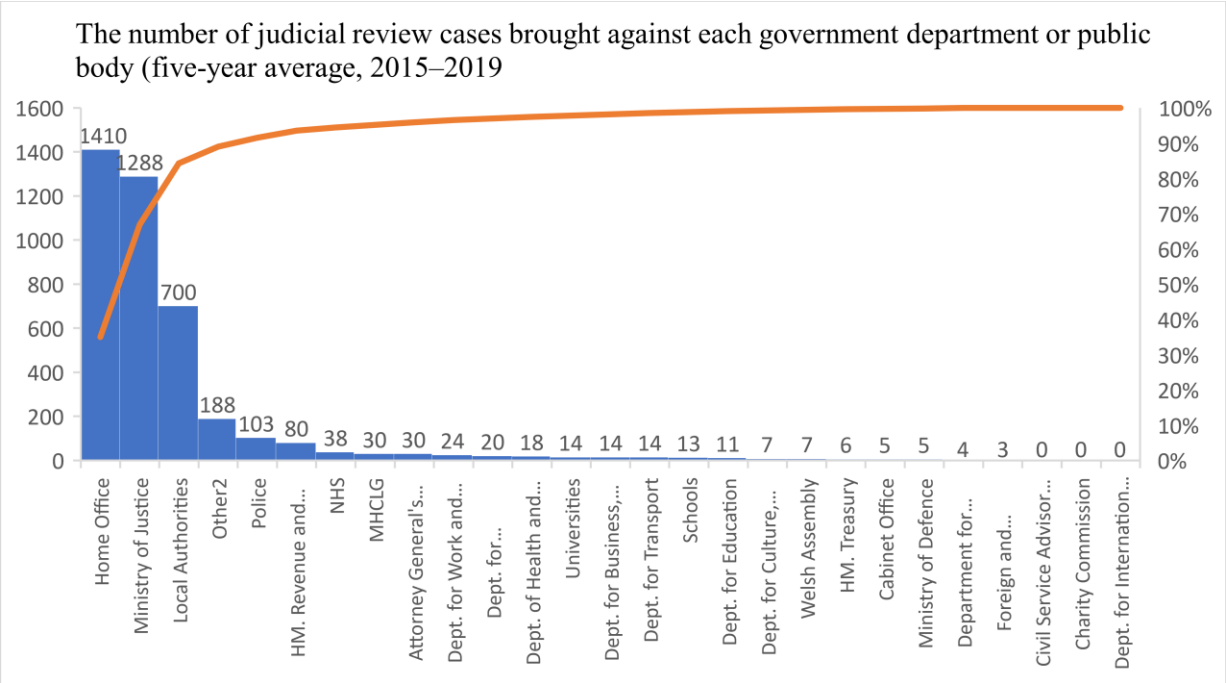

Fig. 19

D32. Looking at the further breakdown by topic within the Home Office's and Ministry of Justice's caseloads bears out that immigration-related claims were the majority over the period. These tables and the full datasets can be explored in more depth at this link: https://judicial-reviews-app.apps.alpha.mojanalytics.xyz/

Top six topics of all judicial reviews against Home Office (Immigration/Civil/Criminal) (sum 2000-2019)					
Immigration		**Civil**		**Criminal**	
Topic	**Count**	**Topic**	**Count**	**Topic**	**Count**
Immigration Not Asylum	33895	Prisons	1027	Extradition	142
Immigration Asylum Only	26507	Police (Civil)	480	Criminal Law (General)	93
Immigration Detention	4582	Age Assessment	53	Sentencing	49
Immigration Asylum Fresh Claim	4223	Mental Health	51	Other	47
Asylum Support	2718	Other	41	Terrorism	44
Naturalisation and Citizenship	1447	Disciplinary Bodies	39	PACE	15

Fig. 20

Top six topics of all judicial reviews against the Ministry of Justice (Immigration/Civil/Criminal) **(sum 2000-2019)**					
Immigration		**Civil**		**Criminal**	
Topic	**Count**	**Topic**	**Count**	**Topic**	**Count**
Cart - Immigration	5257	Prisons	3136	Magistrates Courts Procedure	1135
Immigration Asylum Only	3397	Prisons (not parole)	1131	Crown Court	671
Immigration Not Asylum	952	County Court	853	Criminal Law (General)	349
Asylum Support	78	Costs and Legal aid (Civil)	576	Other	247
Immigration Detention	28	Cart - Other	402	Costs and Legal aid (Criminal)	244
Immigration Legislation Validity	23	Parole	392	Bail	174

Fig. 21

D33. After 2013, the caseloads in the Administrative Court shift emphasis slightly, but the majority of cases remain immigration related. The growth in Cart – immigration cases in the Ministry of Justice is notable.

Top six topics of all judicial reviews against Home Office (Immigration/Civil/Criminal) (sum 2015-2019)					
Immigration		**Civil**		**Criminal**	
Topic	**Count**	**Topic**	**Count**	**Topic**	**Count**
Immigration Detention	3637	Police (Civil)	78	Other	10
Naturalisation and Citizenship	1045	Prisons (not parole)	17	Terrorism	7
Immigration Human Trafficking	558	Homelessness	12	Extradition	6
Immigration Legislation Validity	480	Other	12	PACE	6
Asylum Support	382	Age Assessment	11	Criminal Law (General)	4
Immigration Sponsor Licensing	340	Disciplinary Bodies	11	Decision as to Prosecution	2

Fig. 22

Top six topics of all judicial reviews against the Ministry of Justice (Immigration/Civil/Criminal) (sum 2015-2019)					
Immigration		**Civil**		**Criminal**	
Topic	**Count**	**Topic**	**Count**	**Topic**	**Count**
Cart - Immigration	3788	Prisons (not parole)	522	Magistrates Courts Procedure	170
Immigration Not Asylum	31	Cart - Other	295	Crown Court	152
Immigration Detention	21	County Court	278	Other	69
Immigration Legislation Validity	20	Parole	225	Criminal Law (General)	53
Asylum Support	10	Magistrates Courts Procedure	111	PACE	53
Immigration Asylum Only	7	Costs and Legal aid (Civil)	100	Costs and Legal aid (Criminal)	35

Fig. 23

D34. For local authorities, which do not tend to defend against immigration topics, the majority of cases concerned several other categories:

Top six topics of judicial reviews against local authorities (Immigration, Civil, Criminal) (sum 2000-2019)					
Immigration		**Civil**		**Criminal**	
Topic	**Count**	**Topic**	**Count**	**Topic**	**Count**
Asylum Support	366	Housing	2713	Other	33
Age Assessment	185	Homelessness	2638	Criminal Law (General)	12
Immigration Asylum Only	25	Town and Country Planning	2574	Decision as to Prosecution	9
Immigration Not Asylum	18	Family, Children and Young Persons	1617	Magistrates Courts Procedure	4
Other	5	Community Care	1185	PACE	4
Immigration Human Trafficking	3	Education	1095	Road Traffic	4

Fig. 24

D35. Examining trends in the caseload of department, it can be seen that the Home Office (and immigration cases within that department) dominates the trend, as expected. Excluding immigration, the overall trend is pretty flat, with a slight downwards slope. For bodies that do not see many reviews, their small same sizes are not sufficient to establish any meaningful trends. Therefore, the focus here is on the largest nine. Of these nine, only police forces and HMRC see a significantly different trend to the other departments, exhibiting growth in number of cases over time, with HMRC having a sharp spike from 2015 to 2017. The AGO also displays an increase over time, but on a smaller scale.

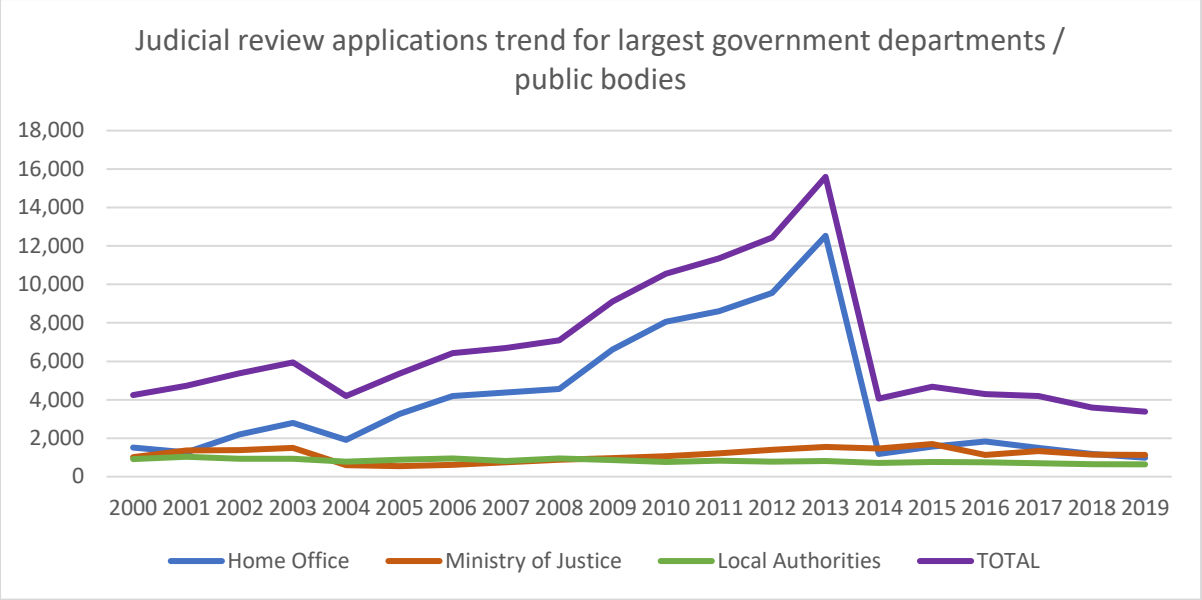

Fig. 25

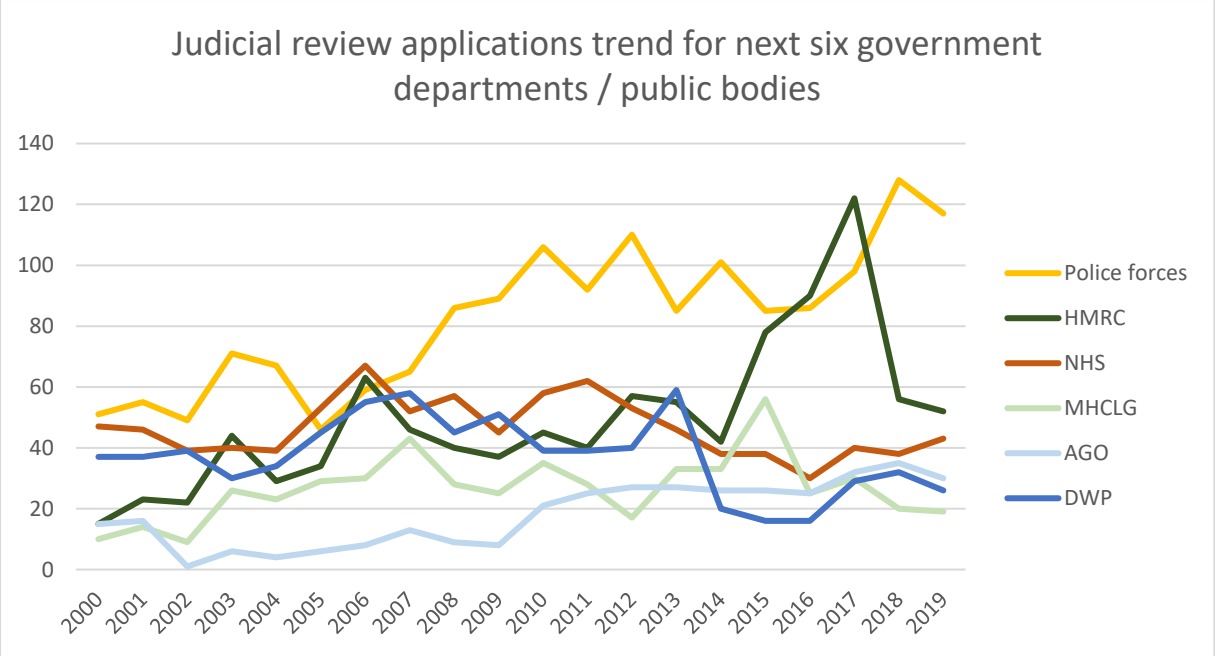

Fig. 26

Success rate

D36. Measuring the 'success' of judicial reviews over time is a difficult task. The main problem is that the Administrative Court data sets do not capture the reasons for cases being withdrawn. It stands to reason that a proportion of these would have been settled, and a proportion of those would have been settled in favour of the claimant. Even of the cases withdrawn with no settlement, it might be that the government or defendant changed their policy or decision, rendering the review moot.

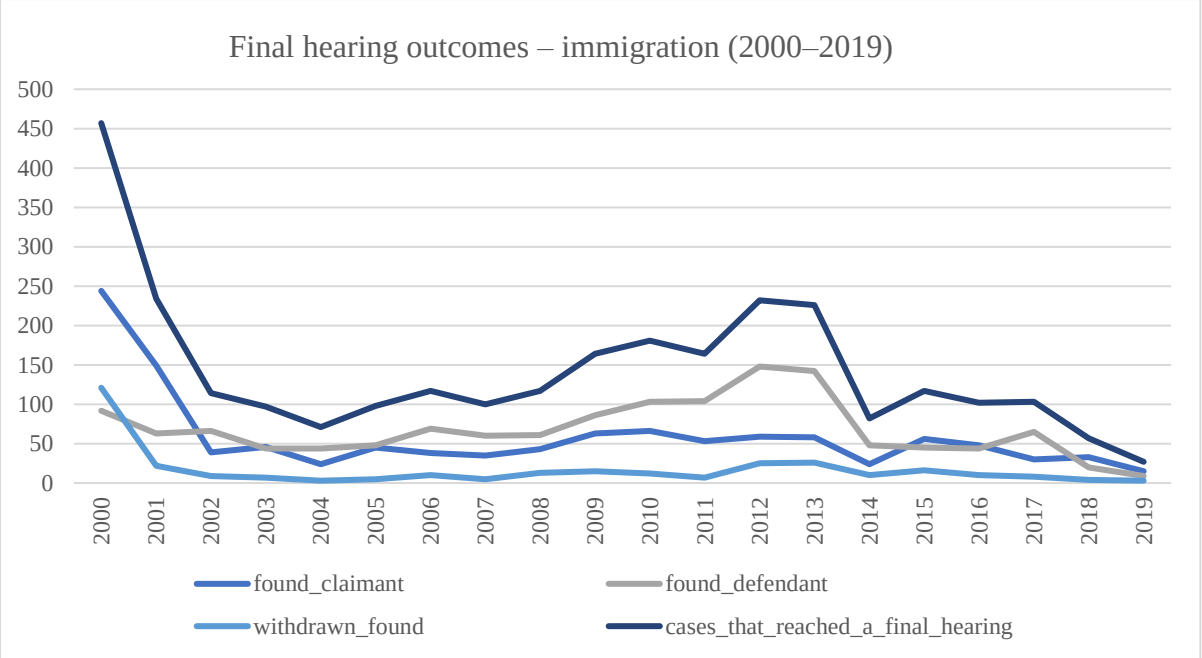
Final hearing outcomes – immigration (2000–2019)
500
450
400
350
300
250
200
150
100
50
0
2000
2001
2002
2003
2004
2005
2006
2007
2008
2009
2010
2011
2012
2013
2014
2015
2016
2017
2018
2019
found_claimant
found_defendant
withdrawn_found
cases_that_reached_a_final_hearing

Fig. 27

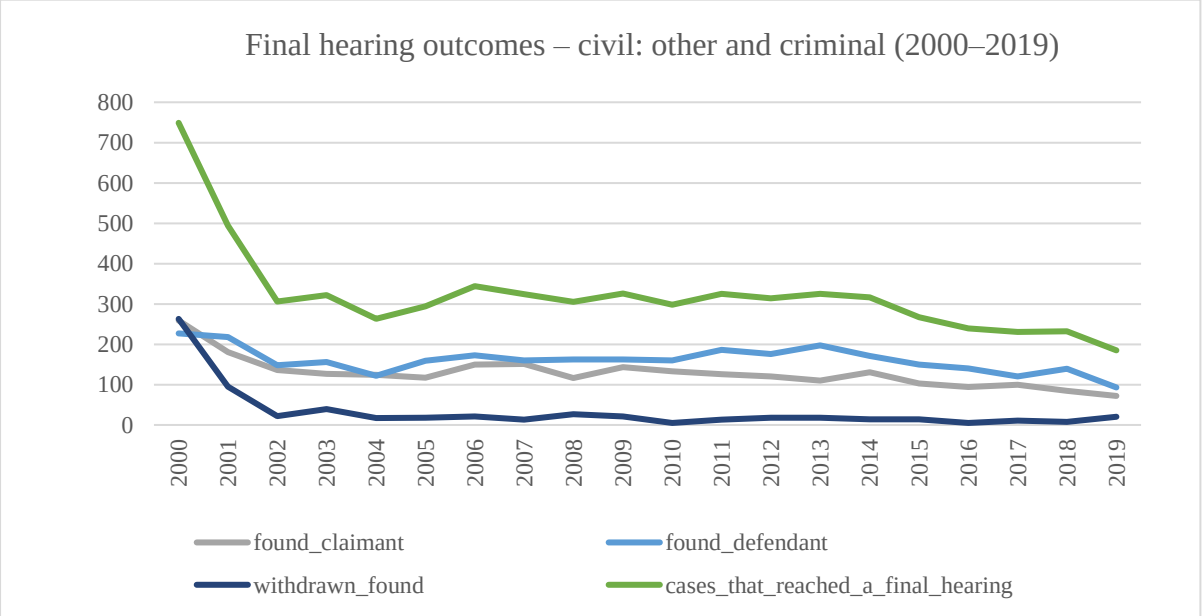
Final hearing outcomes – civil: other and criminal (2000–2019)
800
700
600
500
400
300
200
100
0
2000
2001
2002
2003
2004
2005
2006
2007
2008
2009
2010
2011
2012
2013
2014
2015
2016
2017
2018
2019
found_claimant
found_defendant
withdrawn_found
cases_that_reached_a_final_hearing

Fig. 28

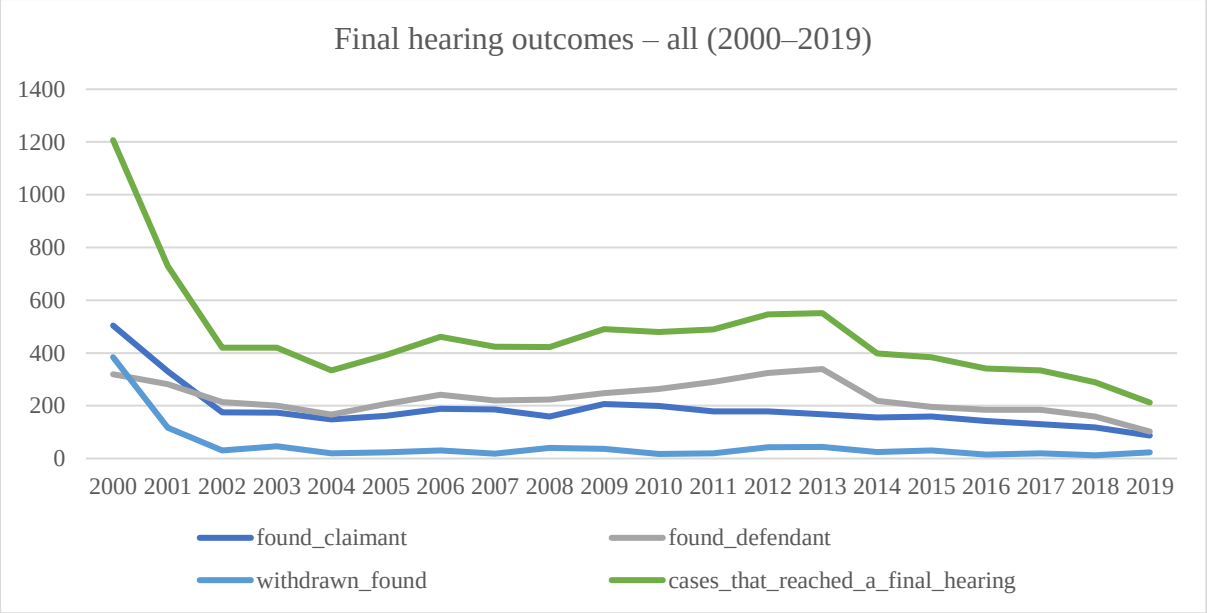

Fig. 29

D37. Looking simply at the number of cases found in favour of the claimant at a substantive hearing, the trend is generally the same as that for total case numbers. Looking at the proportion of cases found in favour of the claimant at final hearing to the total number of final hearing cases also indicates that 'success rates' defined by success for the claimant at a final hearing have stayed fairly consistent (though volatile from year to year).

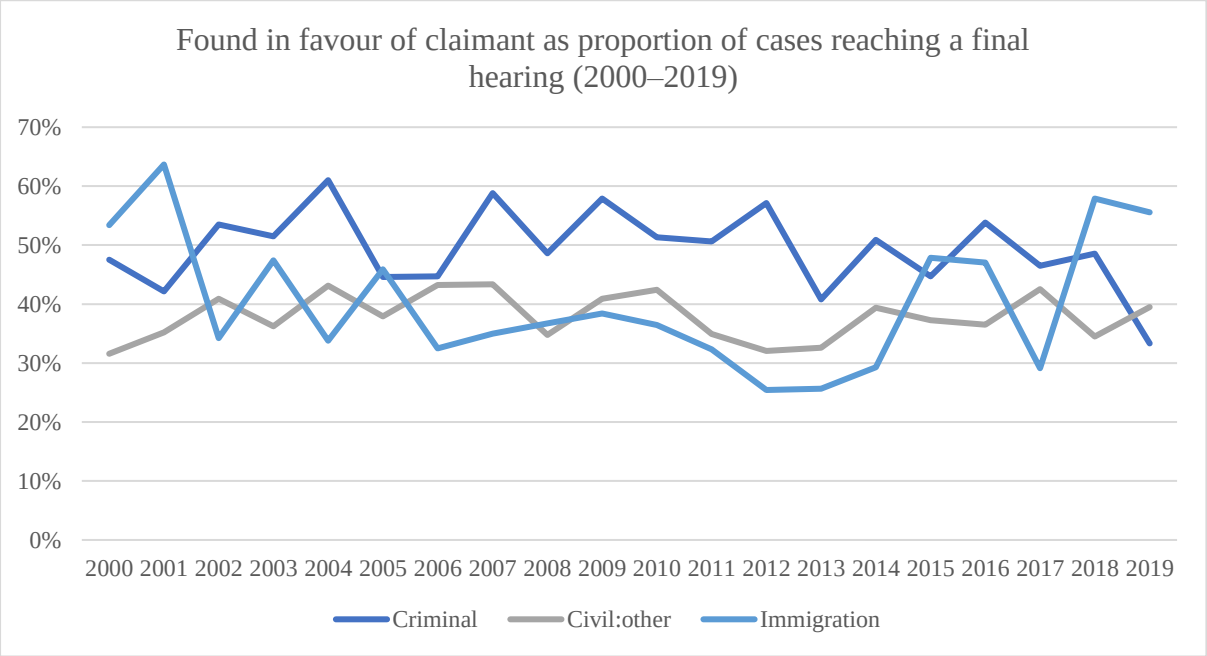

Fig. 30

Call for evidence data

D38. Government departments provided some details on their judicial review caseload. Some departments reported the proportion of cases they consider they defended successfully. This tended to average around 80%, which is less than the Administrative Court data would suggest, where only 2–10% of cases were resolved in favour of a claimant at a substantive hearing.

D39. This suggests a number of cases marked as withdrawn/other are settled in the claimant's favour. However, because of inconsistencies between how departments record judicial data and what has been presented, it is very difficult to draw any accurate conclusions as to the number of cases settled from departmental data. The best assessment it is possible to make is set out below:

Department	Reported department success rate	Reported settlement rate
HO	68%	
MHCLG	75%	
DHSC	100%	
DfT	48%	4%
DWP	85%	6%
DEFRA	74%	
DfE	57%	9%
BEIS	100%	10%
FCO	86%	
AGO	100%	
MOD		11%
Average	**79%**	**8%**

Fig. 31

D40. The impression that departments defend judicial reviews successfully in a majority of cases, given by both the courts' data and departments, is challenged somewhat from some of the evidence provided by organisations in some areas. This discrepancy may be because of certain selection biases in examining submissions from the call for evidence, where it may stand to reason that more successful firms or organisations would provide data than those that are generally less successful in pursuing judicial review. Equally, data from departments may be subject to similar biases.

D41. Hackney Community Law Centre (HCLC) provided a detailed breakdown of their caseload, the majority of which are housing or welfare related. Since January 2019, their clients requested 47 judicial reviews, the majority of which (72%) were resolved before the need to make a judicial review claim. Of those that proceeded, 42% have so far been resolved in favour of the claimant, with the main reasons being that the public body being challenged accepted the validity of the claim or provided an alternative remedy. HCLC's data is a small sample in a specific area, but does demonstrate it is possible many of the cases listed as 'withdrawn/other' are resolved in the claimant's favour.

D42. The Bangor Law School submission summarises empirical research into settlement, pointing to Bondy, Platt and Sunkin's study on the value and effects of judicial review.[27] This work found that claimants were often successful through settlement or the defendant reconsidering decisions as the evidence from HCLC points to. Quoting directly from Bangor Law School's submission:

> "Loosely we can say that around one-third of civil (non immigration) claims are issued but withdrawn prior to a permission decision, and around half of claims granted permission are withdrawn before a final substantive hearing. In the Dynamics research sample it was found that, of the cases which settled pre-permission, 46% of claimants obtained a particular benefit that had been sought and in a further 39% of cases the defendant agreed to reconsider decisions or carry through a decision-making process that they had failed to complete. Of the cases that settled post-permission 59% were reported to have settled in favour of the claimant, and this regularly involves individuals being granted a benefit or entitlement previously withheld or withdrawn."[28]

D43. The Public Law Project similarly presented empirical evidence drawn from various studies, providing a comprehensive resource for academic research into judicial review, including data on settlement.

D44. Within the business sector, the joint submission from BT, Centrica, Heathrow, Sky and Vodaphone provided data that was consistent with these findings. They reported that around 50% of judicial review claims against the economic regulators were successful. This is also supported by the Law Society's survey of its members. They estimate that around 50% of non-immigration judicial reviews are settled, and draw on Bondy, Platt and Sunkin's study.

D45. Taking the focus away from 'success rates' or settlement, several other contributions to the call for evidence provided useful statistical or empirical data:

- The submission by Mishcon de Reya LLP. They presented data sourced from vLex Justis to investigate judicial review case numbers by courts and by defendant. This provides an additional level of data to that provided by the Administrative Court as it shows cases from the Court of Appeal and Supreme Court as well.
- Oxford University Public Lawyers shared the findings of their survey of the 801 judgements by (and on appeal from) the Administrative Court in 2017. In this they examined both judicial review and statutory appeals, which again provides an important addition to the data presented in this chapter. They provide a detailed methodological synopsis and elaboration of their intent in surveying these cases: "to undertake a research project which would give us a better appreciation of the 'day-to-day' nature of administrative law adjudication". Especially

[27] Bondy, Platt and Sunkin, *The Value and Effects of Judicial Review: The Nature of Claims, Their Outcomes and Consequences* (Public Law Project, 2015).
[28] EXT022, [53].

interesting is their examination of the topics of the judicial reviews, the grounds on which they were brought, the parties bringing cases and the kind of legal questions arising.

- Several submissions concentrated on environmental judicial reviews. The RSPB presented an analysis of judicial reviews covered by Article 9 of the Aarhus Convention. The analysis details the history of the legal framework with respect to Aarhus and the relevant UK legislation. The RSPB present a summary of the data on Aarhus claims as well as a discussion of the possible causes behind the various trends observed. The Wildlife and Countryside Link also submitted evidence, presenting a detailed sample of recent cases concerned with the environment.
- As well as the submission from BT, Centrica, Heathrow, Sky and Vodaphone, data on judicial reviews involving businesses or corporations was provided by Hogan Lovells, who presented findings from a survey of the senior executives of multinational corporations.

Immigration and UTIAC cases

D46. The picture in immigration judicial review (immigration JR) cases is significantly different to other civil and criminal judicial review cases. As seen above, immigration JR has driven the trends overall in terms of case numbers. In terms of progression of cases, immigration JR cases also have much lower success rates in proceeding through permission and oral renewal to a substantive hearing. However, it should be noted that cases that are heard at oral renewal have slightly higher chances of being granted permission.

D47. Data from UTIAC allows an examination of outcomes in immigration JR since 2013. UTIAC decides applications for judicial review of certain decisions made by the Home Secretary, entry clearance officers and others under immigration legislation since November 2013.

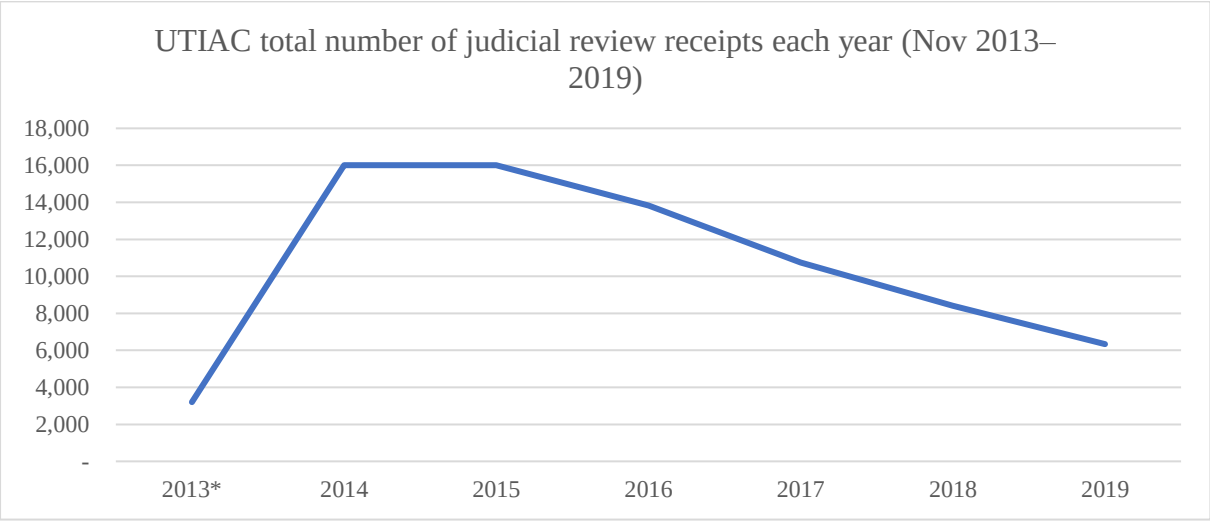

Fig. 32

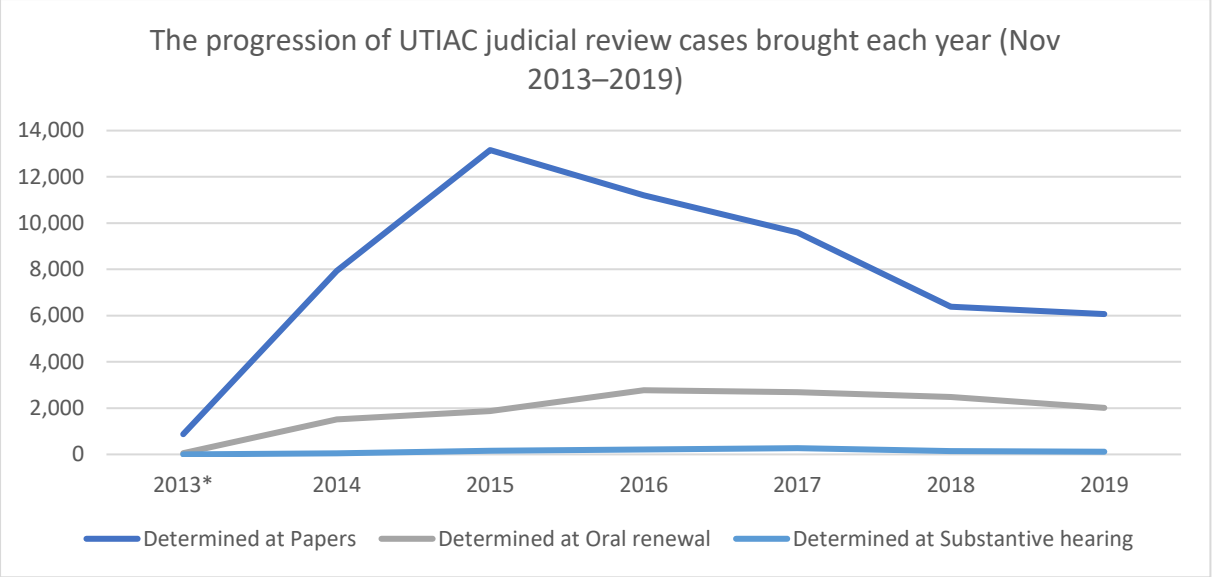

Fig. 33

D48. The large increase in cases over 2014 and 2015 had a greater impact on the number being determined at the papers stage rather than at substantive hearing or oral renewal. This is also reflected in the number of cases deemed totally without merit during the same period.

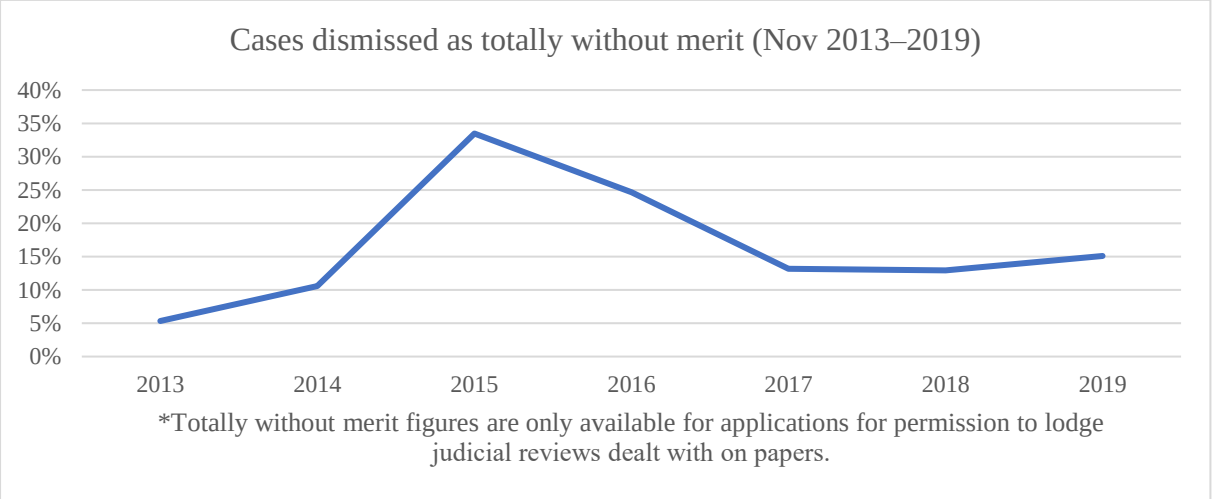

Fig. 34

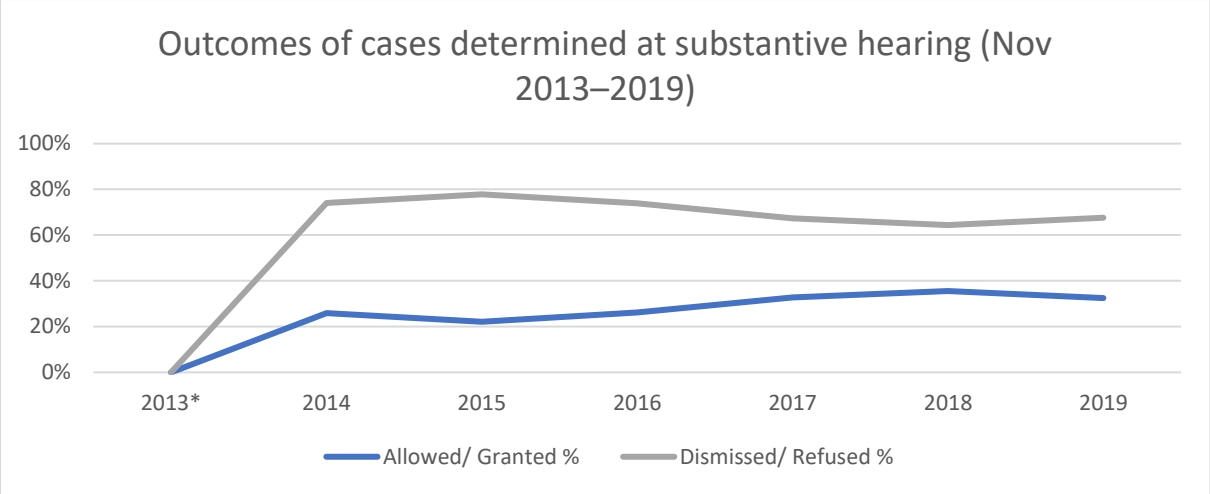

Fig. 35

D49. For cases that reached a substantive hearing, the proportion allowed or dismissed has remained fairly constant throughout, with an increase in the number allowed from 2015 from 22% to 32%.

D50. Several submissions to the call for evidence focused on immigration JR and brought further analysis of these trends. Notable submissions included the paper on immigration JR by Professor Robert Thomas and Dr Joe Tomlinson, which provides a very detailed and comprehensive analysis of the trends seen above, as well as making 16 recommendations for improving the immigration JR process.[29]

Government judicial review costs

D50. The Government Legal Department provided data on judicial review costs based on the amount they bill departments. The data sets show a high-level summary of costs from 1993 and in-depth breakdown of costs (total and average) from 2016–2019, categorised by department and topic.

D51. Disparity in dates for each data set is because of the move to a digital case management system that allows a far more detailed breakdown to be easily accessible. These data are drawn from GLD's case management system, and as such may contain errors owing to manual input of data into the CMS. The CMS is also dynamic, meaning that these data are a snapshot of the picture as at October 2020. Therefore, further revisions are made as cases are concluded and data quality assured.

D52. Further, it is difficult to draw correlations between the number of cases and costs of cases, as cases which last multiple years will be billed in each of those multiple years according to the money spent in each year. The costs breakdown is based on invoices from GLD, rather than the total spent on an individual case. Multiple invoices may cover a single case across multiple

[29] Thomas and Tomlinson, *Immigration Judicial Review: An Empirical Study* (Nuffield Foundation, 2019).

years, for example, meaning the averages seen below are an average of all invoices in a single year.

D53. The total billed to departments from 1993 shows a sustained increase across the period at a rate far above inflation, with only a few years showing a decrease in costs compared to previous years. The average cost per year, on the other hand, remains fairly constant throughout the period.

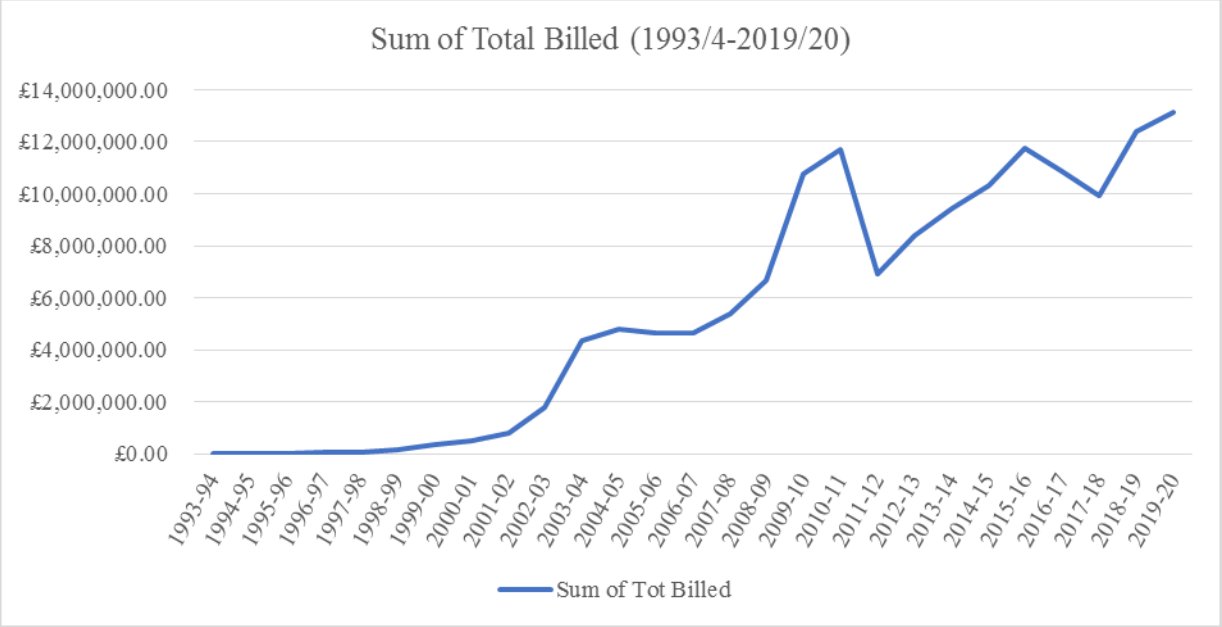

Fig. 36

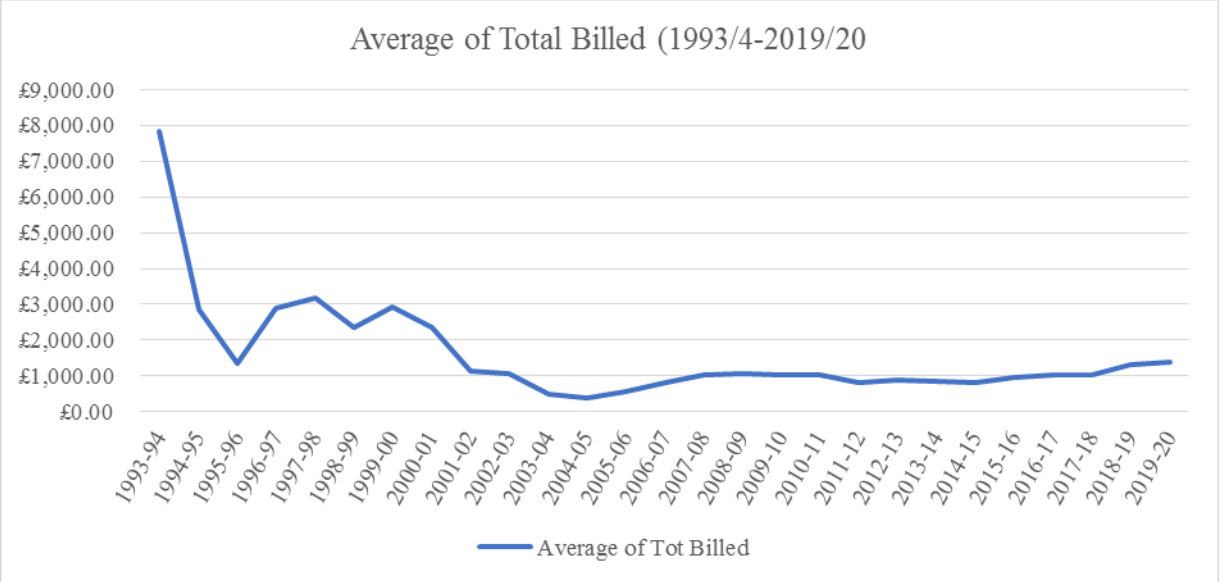

Fig. 37

D54. Examining costs broken down by department shows some interesting points – there is a fairly wide disparity both in the total costs and the average costs of judicial review. This is somewhat to be expected considering a few government departments defend a high proportion of total judicial reviews, as seen in Figs. 14 and 15.

D55. However, there is also a fairly wide disparity in average costs across departments, suggesting that certain types of judicial review are less costly to defend. What is also interesting is the tendency for the average cost to be inversely proportional to the total costs. For example, the Home Office and Ministry of Justice defend the vast majority of cases, yet their average costs are the lowest, while total costs are the highest. This may be down to a variety of factors not discernible through these data, but is interesting nonetheless.

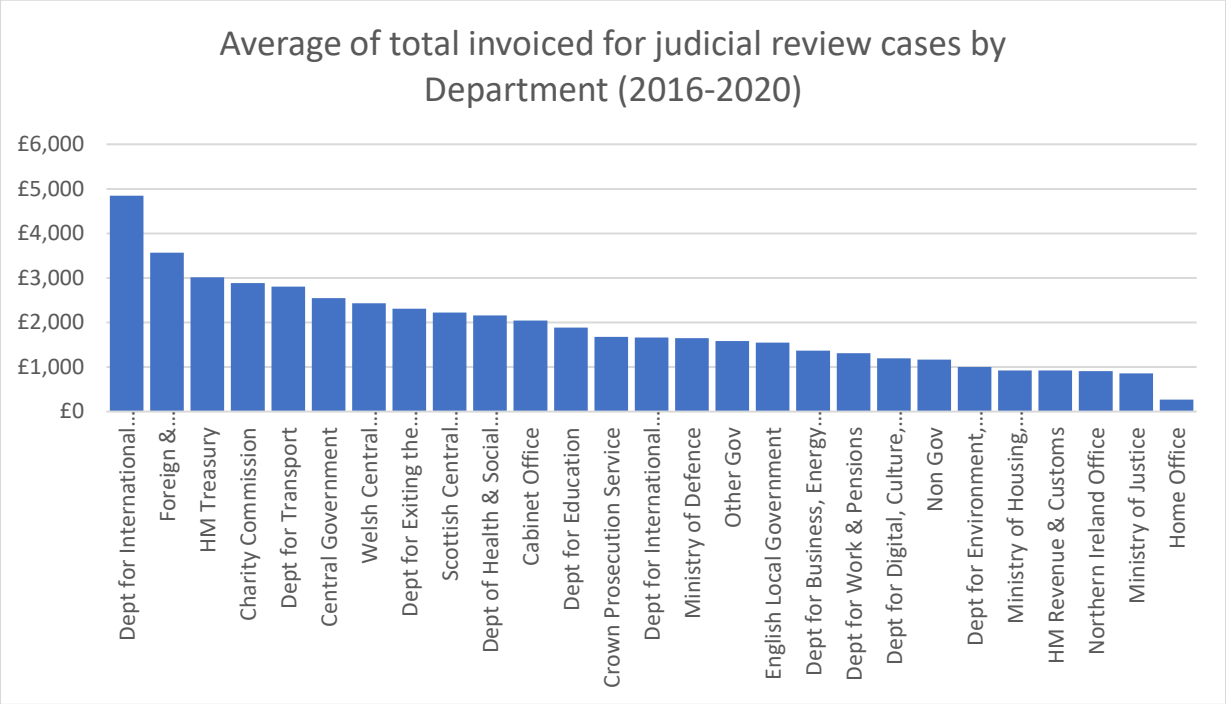

Fig. 38

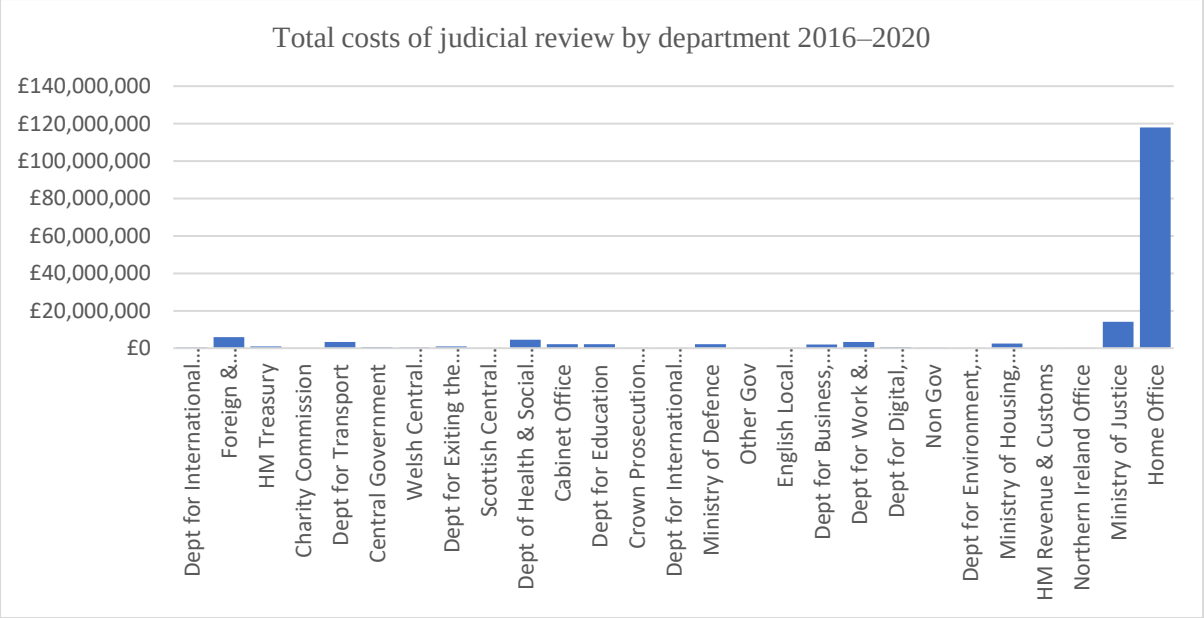

Fig. 39

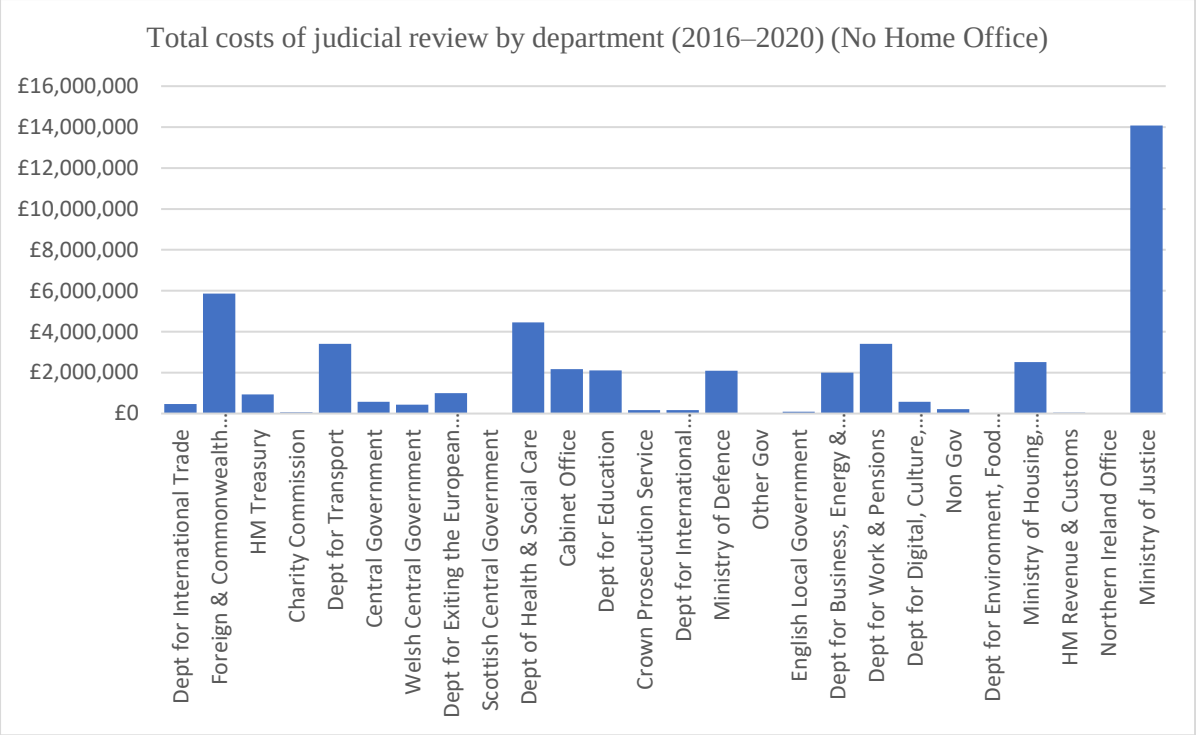

Fig. 40

D56. Part of the explanation for the disparity seen in the total and average costs for the Home Office is due to the topic of judicial review. The Home Office overwhelmingly deals with immigration cases, the total costs of which since 2016 have been £122,793,969. However, the average of the total invoiced was £262, compared with an average of £1,434 of the total invoiced for public law judicial reviews.

Judicial review in the devolved administrations

D57. Data for judicial review in each of the devolved nations and England and Wales are collected differently and stored on different digital systems. This makes like-for-like comparison difficult in some areas. However, there is consistent data on at least applications for judicial review, with some similarities in topic breakdowns and case progression. Where possible, comparisons have been made to make any differences or similarities in trends clear.

D58. Even excluding immigration figures from the England and Wales data, the trends in judicial review are different between the jurisdictions, as seen more clearly in Fig. 35. There does not appear to be consistency in the timing of changes, although the extent of variation in case numbers is very similar, with Scotland showing slightly more volatility in applications for JR.

Applications for judicial review

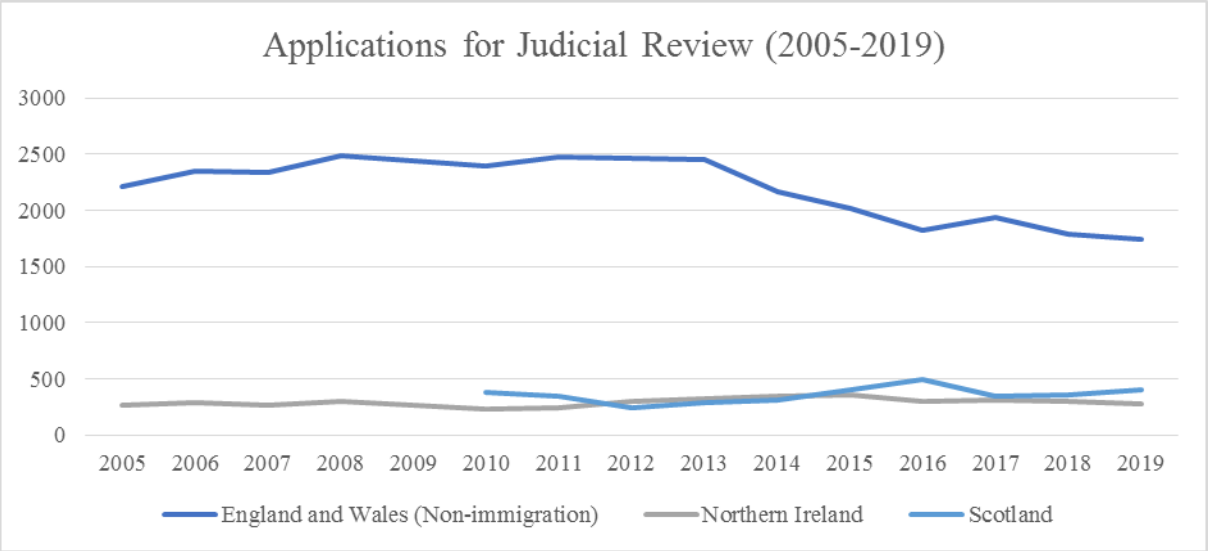

Fig. 41

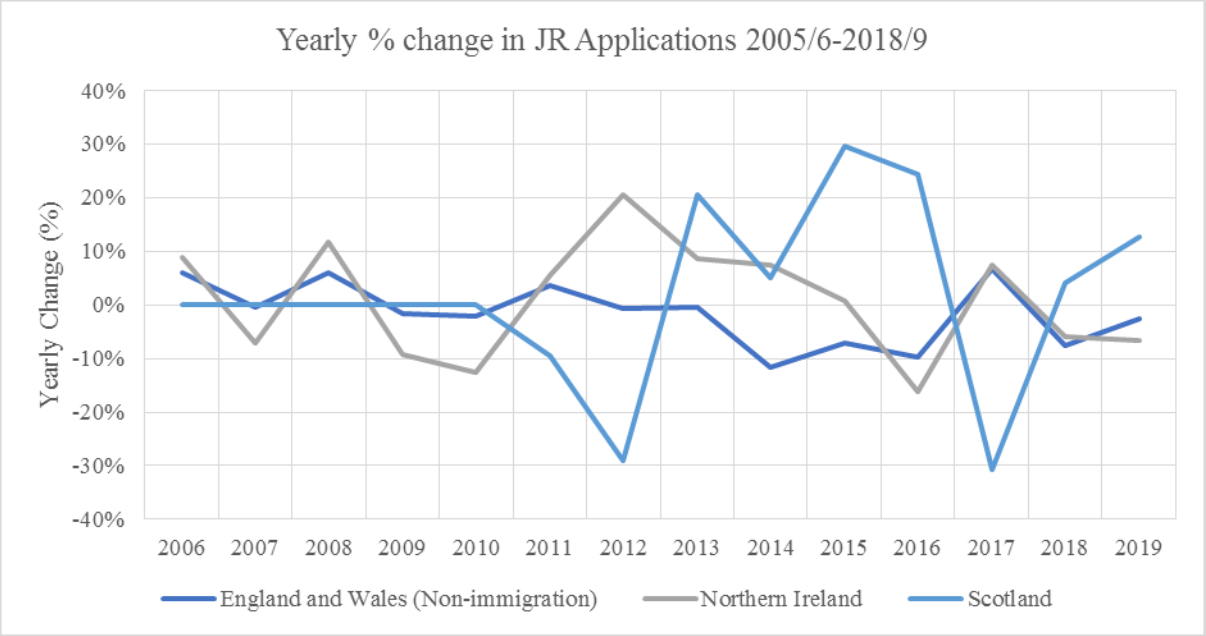

Fig. 42

Topics

D59. Data from the Court of Session also allows for a topic breakdown:

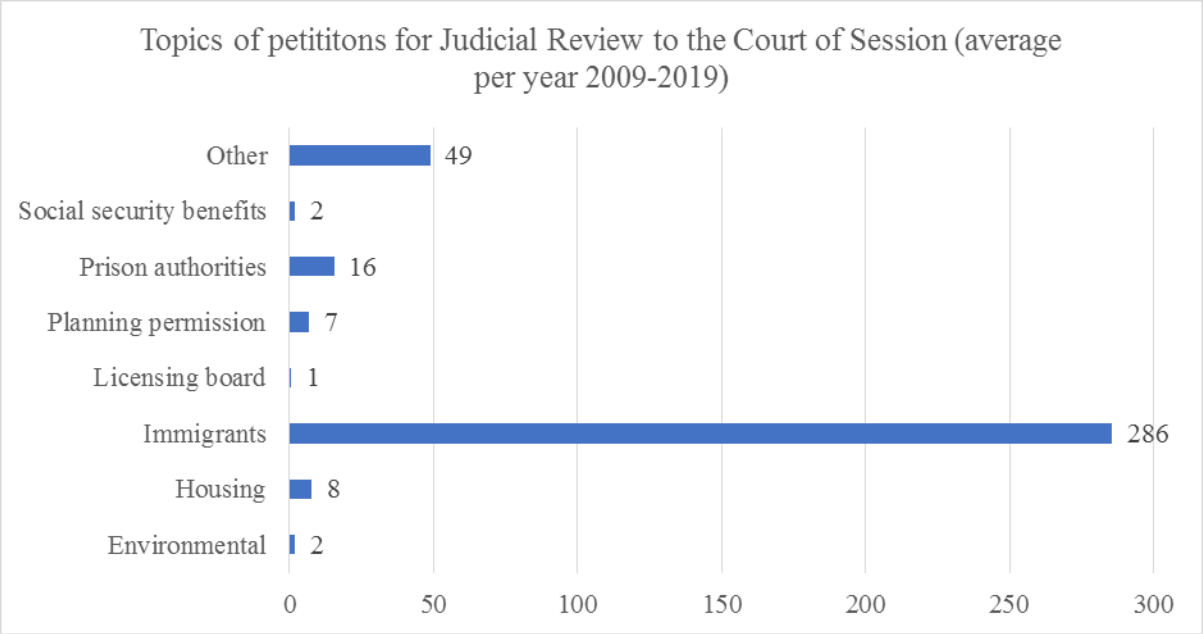

Fig. 43

Permission stage

D60. Looking at permission / result of first stage of judicial review applications, even excluding immigration cases in England and Wales (which have an extremely low rate of being granted permission), a higher proportion of judicial review applications are granted permission or proceed to a substantive hearing in Scotland and Northern Ireland. Note, however, that the total numbers are much lower.

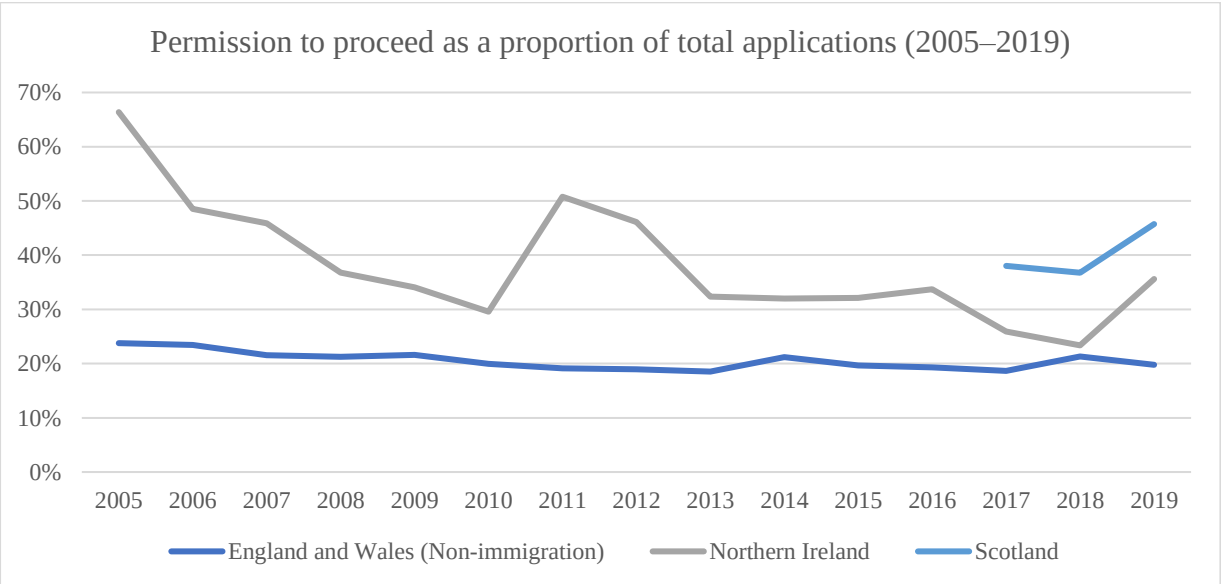

Fig. 44

D61. A more detailed look at applications and outcomes in Northern Ireland:

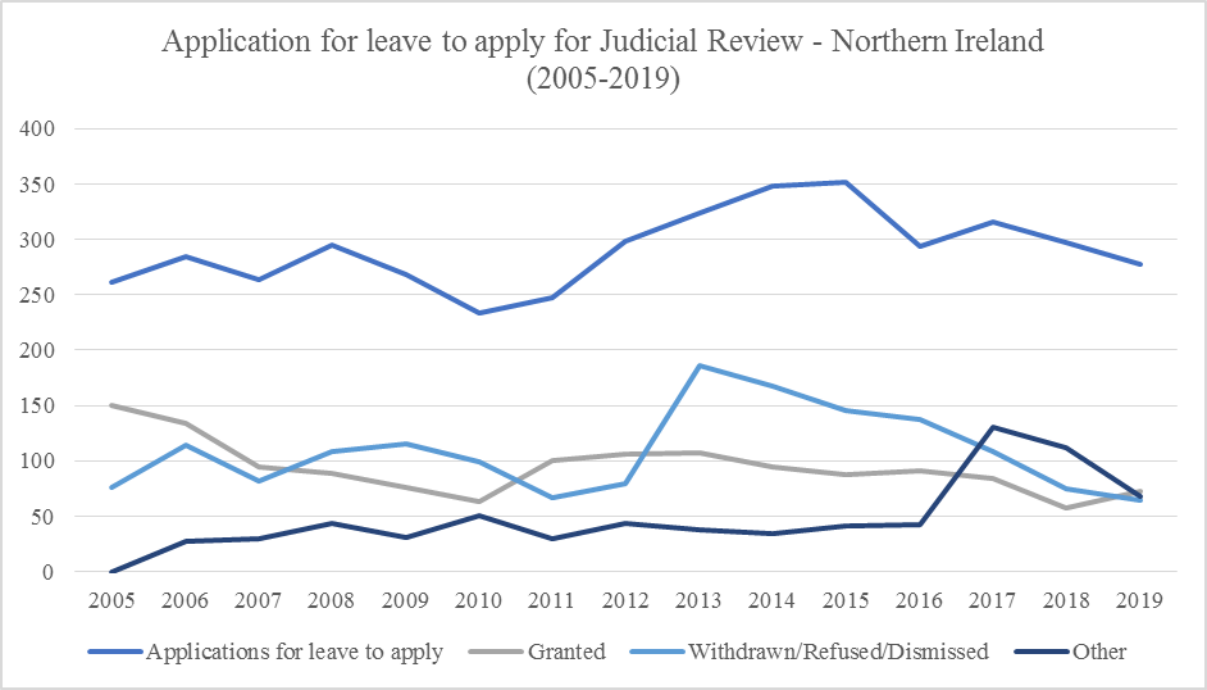

Fig. 45

D62. In Northern Ireland there has been a steady decline in the number of cases that make an application for judicial review after being granted leave to apply.

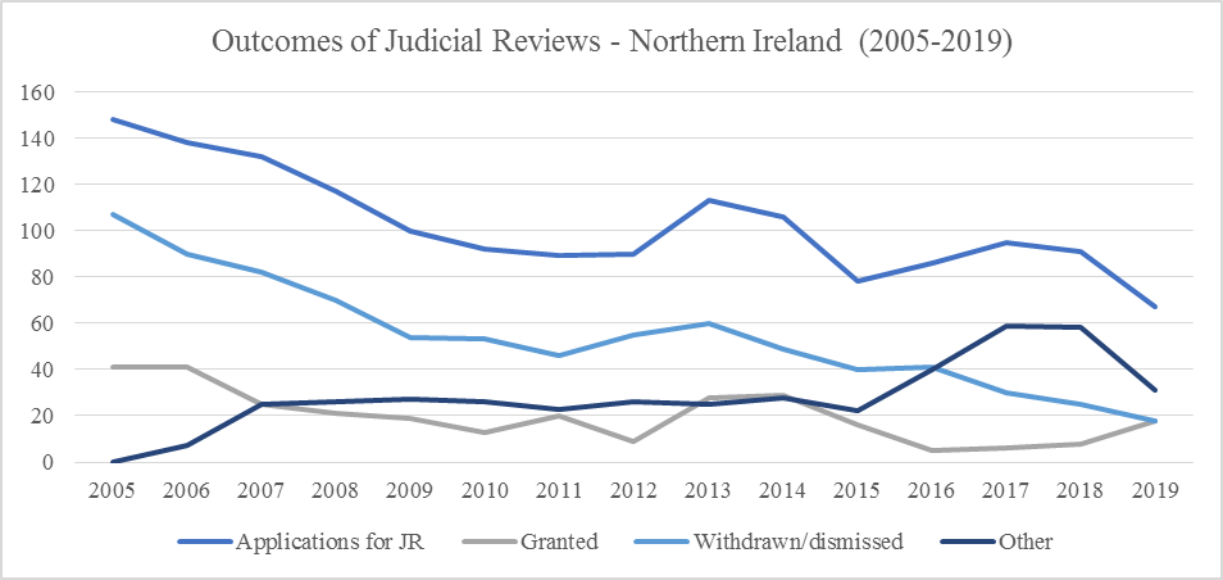

Fig. 46

D63. Outcomes as a proportion of applications for judicial review in Northern Ireland show a slightly decreasing proportion of judicial reviews being granted, with most of this decline accounted for by the number of cases marked in the 'other' category.

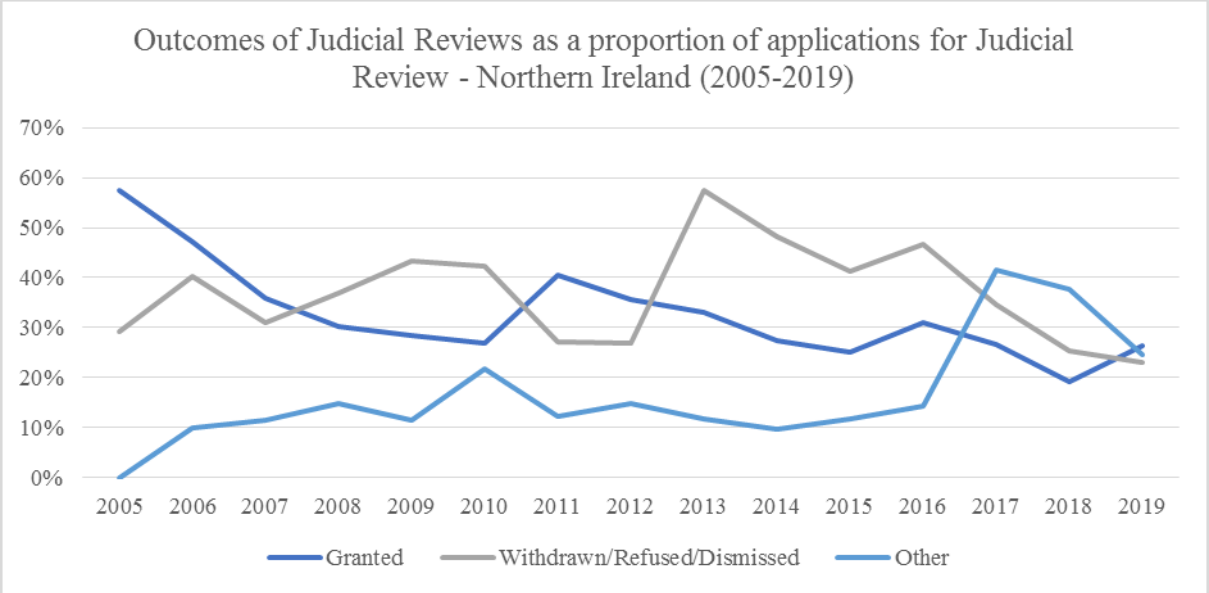

Fig. 47

D64. In reference to Scotland, the Senators of the College of Justice – Court of Session provided the following breakdown for the past three years. In total this shows that on average around 12% of petitions for judicial review end in a substantive hearing.

Judicial review petitions resulting in a court decision following a substantive hearing	**2017-18**	**2018-19**	**2019-20**
Environmental	2	0	0
Housing	0	1	2
Immigration	25	19	21
Licensing board	0	0	0
Other	15	18	20
Planning permission	4	2	2
Prison authorities	0	2	7
Social security benefits	1	0	0

Fig. 48

APPENDIX E: LIST OF CONTRIBUTORS

Online links to the submissions made by contributors marked with a * may be found, for the time being, at https://ukaji.org/2020/11/04/collection-of-responses-to-the-independent-review-of-administrative-law-iral/

35 individuals made submissions or provided evidence to the call for evidence. Individual names have been anonymised due to General Data Protection Regulation considerations except where the individual concerned has consented to being quoted in the report.

Local and central government

GOV001	Arun District Council
GOV002	Attorney General's Office
GOV003	Crown Prosecution Service
GOV004	Department for Business, Energy and Industrial Strategy
GOV005	Department for Digital, Culture, Media and Sport
GOV006	Department for Education
GOV007	Department for Environment, Food and Rural Affairs
GOV008	Department of Health and Social Care
GOV009	Department for Infrastructure Planning Group
GOV010	Department for International Trade
GOV011	Department for Transport
GOV012	Department for Work and Pensions
GOV013	Foreign, Commonwealth and Development Office
GOV014	HM Treasury
GOV015	Home Office
GOV016	Leicestershire CC
GOV017	Local authorities (Islington Council, North Norfolk District Council Eastlaw, Three Rivers District Council)
GOV018	Maidstone, Swale and Tunbridge Wells councils
GOV019	Medway Council
GOV020	Ministry of Defence
GOV021	Ministry of Housing, Communities and Local Government
GOV022	NHS Resolution
GOV023	No. 10 Downing Street
GOV024	Ofsted
GOV025	Planning Inspectorate
GOV026	Scottish Government
GOV027	Serious Fraud Office
GOV028	Welsh Government

External stakeholders

EXT001	9 members of Wildlife and Countryside Link*
EXT002	11KBW*
EXT003	39 Essex Chambers
EXT004	Access Social Care I

EXT005	Access Social Care II
EXT006	Advocates for Animals*
EXT007	Administrative Justice Council*
EXT008	Administrative Law Bar Association*
EXT009	*Individual name anonymised due to General Data Protection Regulation considerations*
EXT010	AIRE Centre
EXT011	Aireborough Neighbourhood Development Forum
EXT012	All Party Parliamentary Group on ADR
EXT013	Amnesty International
EXT014	Anti-Slavery International
EXT015	Anti-Trafficking & Labour Exploitation Unit*
EXT016	Article 39*
EXT017	Authors of *De Smith's Judicial Review**
EXT018	Bach Commission
EXT019	Bail for Immigration Detainees
EXT020	*Individual name anonymised due to General Data Protection Regulation considerations*
EXT021	Baker McKenzie*
EXT022	Bangor Law School Public Law Research Group*
EXT023	Bar Council*
EXT024	Bar Council of Northern Ireland*
EXT025	Baring Foundation
EXT026	Bates Wells*
EXT027	BDB Pitmans*
EXT028	Bevan Brittan LLP*
EXT029	Bhatt Murphy LLP
EXT030	Sky Bibi
EXT031	Bindmans LLP*
EXT032	Birmingham Law Society
EXT033	*Individual name anonymised due to General Data Protection Regulation considerations*
EXT034	Bonavero Institute of Human Rights
EXT035	Dr Katie Boyle and Dr Diana Camps, University of Stirling*
EXT036	*Individual name anonymised due to General Data Protection Regulation considerations*
EXT037	Brethren's Gospel Trusts Planning Group
EXT037	Brick Court Chambers*
EXT039	British Institute of Human Rights*
EXT040	British Property Federation
EXT041	*Individual name anonymised due to General Data Protection Regulation considerations*
EXT042	Browne Jacobson LLP
EXT043	Bryan Cave Leighton Paisner
EXT044	BT, Centrica, Heathrow, Sky and Vodafone
EXT045	Lord Burnett of Maldon, LCJ
EXT046	*Individual name anonymised due to General Data Protection Regulation considerations*
EXT047	Cambridge Centre for Public Law*
EXT048	Campaign for Protection of Rural Wales

EXT049	Centre for Governance and Scrutiny
EXT050	Centre for Military Justice
EXT051	Centre for Women's Justice
EXT052	Chancery Bar Association
EXT053	Child Law Network UK
EXT054	Child Poverty Action Group*
EXT055	Children's Legal Centre
EXT056	Christian Legal Centre
EXT057	Chris Daniel, Director – Possession Friend
EXT058	City of London Law Society
EXT059	Civil Justice Council
EXT060	Claimants' Forum
EXT061	ClientEarth*
EXT062	CMS Cameron McKenna Nabarro Olswang
EXT063	*Individual name anonymised due to General Data Protection Regulation considerations*
EXT064	Committee on the Administration of Justice*
EXT065	*Individual name anonymised due to General Data Protection Regulation considerations*
EXT066	Court of Judicature of Northern Ireland
EXT067	Court of Session – Senators of the College of Justice
EXT068	DAC Beachcroft
EXT069	*Individual name anonymised due to General Data Protection Regulation considerations*
EXT070	Professor Paul Daly*
EXT071	Deighton Pierce Glynn
EXT072	*Individual name anonymised due to General Data Protection Regulation considerations*
EXT073	Deloitte LLP
EXT074	*Individual name anonymised due to General Data Protection Regulation considerations*
EXT075	Discrimination Law Association
EXT076	DLA Piper LLP*
EXT077	Doughty Street Chambers*
EXT078	Professor Richard Ekins, Judicial Power Project
EXT079	*Individual name anonymised due to General Data Protection Regulation considerations*
EXT080	*Individual name anonymised due to General Data Protection Regulation considerations*
EXT081	Employment Lawyers Association
EXT082	Environmental Law Foundation
EXT083	Equality and Human Rights Commission*
EXT084	Equally Ours
EXT085	Faculty of Advocates*
EXT086	Professor David Feldman
EXT087	Professor Christopher Forsyth
EXT088	*Individual name anonymised due to General Data Protection Regulation considerations*
EXT089	Fraud Lawyers Association
EXT090	Friends of the Earth

EXT091	Freshfields Bruckhaus Deringer
EXT092	*Individual name anonymised due to General Data Protection Regulation considerations*
EXT093	Garden Court Chambers
EXT094	General Counsel 100*
EXT095	Goldsmith Chambers*
EXT096	*Individual name anonymised due to General Data Protection Regulation considerations*
EXT097	Hackney Community Law Centre*
EXT098	Haldane Society of Socialist Lawyers
EXT099	Lady Hale
EXT101	*Individual name anonymised due to General Data Protection Regulation considerations*
EXT102	Hammersmith and Fulham Law Centre
EXT103	Daniel Hayes, Director of D Hayes Public Law Practice
EXT104	Helen Bamber Foundation*
EXT105	Herbert Smith Freehills LLP*
EXT106	Hickman & Rose LLP
EXT107	Hodge, Jones & Allen LLP*
EXT108	*Individual name anonymised due to General Data Protection Regulation considerations*
EXT109	Hogan Lovells*
EXT110	House of Lords Frontbench
EXT111	Housing Law Practitioners Association*
EXT112	Howard League Prison Reform
EXT113	Humanists UK
EXT114	International Regulatory Strategy Group
EXT115	Immigration Law Practitioners' Association
EXT116	Intellectual Property Bar Association
EXT117	Irwin Mitchell
EXT118	Islington Law Centre Immigration Team
EXT119	*Individual name anonymised due to General Data Protection Regulation considerations*
EXT120	Joint Charities and Civil Society Response*
EXT121	Joint Council for the Welfare of Immigrants*
EXT122	JUSTICE*
EXT123	*Individual name anonymised due to General Data Protection Regulation considerations*
EXT124	Kingsley Napley LLP*
EXT125	Landmark Chambers
EXT126	Law Centres Network
EXT127	Law Society of England and Wales*
EXT128	Law Society of Northern Ireland*
EXT129	Law Society of Scotland*
EXT130	LawWorks*
EXT131	Sir Stephen Laws, Policy Exchange JPP
EXT132	Lawyers in Local Government*
EXT133	Legal Action Group
EXT134	The Legal Company
EXT135	Sir Thomas Legg/ Policy Reform Group

EXT136 Leigh Day*
EXT137 Duncan Lewis
EXT138 Liberty*
EXT139 Linklaters LLP
EXT140 Matrix Chambers*
EXT141 *Individual name anonymised due to General Data Protection Regulation considerations*
EXT142 *Individual name anonymised due to General Data Protection Regulation considerations*
EXT143 *Individual name anonymised due to General Data Protection Regulation considerations*
EXT144 Mind
EXT145 Mischon de Reya LLP*
EXT146 *Individual name anonymised due to General Data Protection Regulation considerations*
EXT147 *Individual name anonymised due to General Data Protection Regulation considerations*
EXT148 Antonia Murillo*
EXT149 National AIDS Trust
EXT150 National Education Union
EXT151 National Landlords Association
EXT152 National Council for Voluntary Organisations
EXT153 Lord Neuberger
EXT154 *Individual name anonymised due to General Data Protection Regulation considerations*
EXT155 Oxford Human Rights Hub*
EXT156 *Individual name anonymised due to General Data Protection Regulation considerations*
EXT157 *Individual name anonymised due to General Data Protection Regulation considerations*
EXT158 Planning and Environment Bar Association*
EXT159 *Individual name anonymised due to General Data Protection Regulation considerations*
EXT160 Public Interest Law Centre
EXT161 Public Interest Litigation Support Project*
EXT162 Public Law Project*
EXT163 Public Law Solicitors Association*
EXT164 Public Law Wales*
EXT165 Ramblers
EXT166 Lord Reed
EXT167 *Individual name anonymised due to General Data Protection Regulation considerations*
EXT168 Reprieve
EXT169 Rights of Women
EXT170 Rook Irwin Sweeney LLP*
EXT171 Royal Society for the Protection of Birds*
EXT172 Royal Town Planning Institute
EXT173 *Individual name anonymised due to General Data Protection Regulation considerations*
EXT174 Scottish Human Rights Commission

EXT175	Rt Hon Sir Stephen Sedley
EXT176	Blair Sessions
EXT177	Simpson Millar Solicitors
EXT178	Southall Black Sisters
EXT179	Shelter
EXT180	Small Charities Coalition
EXT181	*Individual name anonymised due to General Data Protection Regulation considerations*
EXT182	Society of Labour Lawyers*
EXT183	Society of Legal Scholars
EXT184	South West Administrative Lawyers Association*
EXT185	St John's Chambers Public and Administrative Law Group
EXT186	Lord Thomas of Cwmgiedd
EXT187	*Individual name anonymised due to General Data Protection Regulation considerations*
EXT188	Professor Robert Thomas and Dr Joe Tomlinson*
EXT189	Thompsons LLP
EXT190	TUC
EXT191	UK Administrative Justice Institute*
EXT192	UK Environmental Law Association*
EXT193	UK Finance*
EXT194	UK Working Group on Arms
EXT195	Unison
EXT196	Professor Jason Varuhas
EXT197	Victims Commissioner*
EXT198	Vodafone
EXT199	The Western Circuit*
EXT201	Which?
EXT202	*Individual name anonymised due to General Data Protection Regulation considerations*
EXT203	Women's Aid
EXT204	Martin Wood*
EXT205	Lord Woolf
EXT206	WWF
EXT207	Young Legal Aid Lawyers*
EXT208	*Individual name anonymised due to General Data Protection Regulation considerations*

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