

**Administrative Law Bar Association Annual Conference
Cambridge July 06**

Judicial Review in Action

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1. I am currently working on two empirically based research projects on judicial review:

i) The effect of the post Bowman reforms on the operation of the jr procedure and in particular the permission stage. This work is funded by the Nuffield Foundation and I am doing the work in partnership with the Public Law Project. The principal researcher for this work is Varda Bondy assisted by Caroline Stone. This 18 month project has been running since August 2005.

ii) Researching the impact of litigation on the quality & delivery of public services by local authorities in England & Wales. This project is funded by the ESRC (RES-153-25-0081). It is being conducted by an interdisciplinary team based at the University of Essex, under the auspices of the Human Rights Centre. The team consists of myself, Drs Lucinda Platt, (Sociology) and Todd Landman, (Government). The Senior Research Officer is Dr Kerman Calvo. This two year project has been running since January 2006.

In view of the time available I shall concentrate on the second of these projects, but shall say a word or two about the first if time permits.

Background

2. There is no need to tell those who daily toil in this field of justice about the growing status of our public law or the recent overall growth in the jr caseload.¹ While at one time it was emphasised, as S. A. de Smith famously put it, that ‘judicial review is inevitably sporadic and peripheral’² it is now commonly assumed that: ‘the effect of judicial review on the practical exercise of power has [...] become constant and central.’³ It is said that judicial review is a ‘new and important stage in the public policy process’.⁴

3. Against this background there is now a growing body of research that uses social science methodologies to explore just how important judicial review is to the practical

¹ L. Bridges, G. Meszaros & M. Sunkin *Judicial Review in Perspective*, 1995 2nd ed

² S A de Smith, *Judicial review of Administrative Action* 1st ed Stevens 1959, p 1. The Comment was retained in each of the five editions of the work

³ S.A. de Smith, H. Woolf & J.A. Jowell *Judicial Review of Administrative Action*, 5th ed., 1995 p.vii

⁴ S. James, ‘The Political and Administrative Consequences of Judicial Review’ *Public Administration*, (1996) Vol 74, 613.

exercise of power in this country.⁵ Much of the work focuses on particular areas such as homelessness⁶, prisons⁷, asylum⁸ or the impact of court decisions on particular agencies such as Mental Health Review Tribunals⁹ and the Independent Review Service of the Social Fund.¹⁰

4. Such studies provide important insights into the relationships between judicial decisions and public decision-making in particular areas. However, they are inevitably limited in their focus and do not provide a systematic source of data across institutions and policy areas and over time. Despite recent advances there remain significant gaps in our empirically based knowledge of the way our public law and courts influence government. This inhibits ability to fully understand law's influence on policy delivery and the quality of life of citizens; nor have we systematic data on how public bodies respond to the opportunities and obstacles presented by litigation and judicial decisions. In short, the practical importance of the rule of law is an issue that remains under researched.

Aims and general methods of work

5. The 'impact' project is intended to help fill this large gap, at least in the context of local government. Two principal questions are being explored:

- i) How, if at all, do levels of jr litigation reflect/affect the quality of services provided by local government?
- ii) How, if at all, do particular judicial decisions affect the quality of these services?

I am often reminded by my colleagues that in this work we are not aiming to develop a model of why challenges are brought. Rather our focus is on the effect of challenges on government and services. This is a matter to which I may need to return.

Quality and the problem of causation

6. Our essential concern is to investigate links between legal challenge and the quality of local government. Later in the research we may need to unpack what we mean by litigation, but for present purposes we are talking about challenges to local authority decisions (which includes both applications for permission and challenges granted permission) and court decisions.

⁵ See generally S. Halliday and M. Hertogh (eds) *Judicial Review and Bureaucratic Impact: International and Interdisciplinary perspectives*, Cambridge University Press, 2004, S. Halliday, *Judicial Review and Compliance with Administrative Law*, Hart Publishing, 2004.

⁶ I.D. Loveland *Housing Homeless Person: Administrative Law and the Administrative Process* Oxford University Press, 1995

⁷ M Loughlin & PM Quinn 'Prisons, Rules and Courts: A study in Administrative Law' (1993) *Modern Law Review* 497

⁸ R. Thomas 'The Impact of Judicial Review on Asylum', (2003) *Public Law* 479

⁹ G. Richardson & D. Machin. 'A Clash of Values? Mental Health Review Tribunals and Judicial Review', (1999) 1 *Journal of Mental Health Law* 3

¹⁰ M. Sunkin & K. Pick. 'The Changing Impact of Judicial Review: The Independent Review Service of the Social Fund, (2001) *Public Law* 753.

7. The term quality is rather more difficult to define. Overall we are assuming that 'quality' has three broad dimensions. It involves a combination: of efficiency factors, to do with speed and cost; of compliance factors, to do with satisfaction of legal norms; and, issues of perception and response, to do with how those involved and affected respond to decisions. 'Quality' then extends beyond matters of law and compliance and we might therefore anticipate that the affects of public law litigation will differ depending on the dimension of quality concerned. We can assume, for instance, that litigation might affect quality adversely if it generates costs for authorities in responding to challenges or when implementing court decisions. But these adverse affects might lead to improvements in legal compliance or in the levels of perceived fairness.

8. This multi dimensional aspect of quality will be important as the research progresses, but for present purposes when I talk about quality in this presentation I will be referring to the government's official assessments of the quality of local authorities. For current purposes these are based on the Comprehensive Performance Assessment (CPA).¹¹

9. Perhaps the greatest challenge in research of this type is to identify and isolate causal links between litigation/court decisions on the one hand and the quality of services on the other. There are two main problems. First, we know that there are many influences on local government, so how can we tell whether changes are caused, or influenced, by challenge or by court decisions, rather than say audits, or resources, or other stages in the life of the grievances, or by happenstance? Second, causal connections work in at least two directions. Authorities may attract challenge because their services are low in quality (although the incidence of challenge is likely to be much more affected by factors other than quality) but this does not necessarily help us to understand the affect that challenge has on quality, although we can of course speculate about these matters. I will offer some speculation in a moment.

Our methods

10. The research has three linked and overlapping components and employs a combination of quantitative and qualitative approaches.

i) The first component investigates whether there are any significant correlations between the levels of jr litigation against local authorities in England & Wales and key quality indicators, including the CPA. This aspect of the work is quantitative in nature. I shall say more about it.

¹¹ CPA is a system to measure how well LAs deliver services. It is based on information provided by a variety of sources, including the Audit Commission's inspectorates and information generated by the authorities themselves. CPA's comprehensiveness springs from the attention paid not just to standard concerns about value for money, but also to issues related to community leadership, future strategic planning and user satisfaction. In its current form, the CPA test produces a final outcome for each local authority in England (a similar mechanism is in placed for Wales) in the form of a star score (ranging from 1 to 4) in the case of one tier authorities, or in the form of a score in a 1 to 5 points scale in the case of two tier authorities

ii) The second component consists of a comparative study of three pairs of ‘frequently’ and ‘infrequently’ challenged authorities. In each authority area we shall conduct a series of interviews across those involved at different levels and impacted upon in different ways by issues of service quality (e.g. local authority decision makers, those delivering services and recipients of services).

(iii) The third component will consist of case studies in these authorities based on significant judicial decisions that might have general implications for quality.

Some early speculation

11. Speculation upon the possible outcomes of research before the work is completed is often unwise and I would not want to offer any hostages to fortune. However, one or two speculative comments might help to focus our minds on what the emerging data are saying.

12. First, challenges may be a response to low quality performance by authorities and this will certainly be the case from the claimant’s perspective. However, whether challenges are actually brought is likely to depend on factors such as access to appropriate legal advice, legal aid, and claimant energy levels. Poor decision-making is much more likely to go unchallenged than challenged. As I indicated earlier our purpose is not to construct a model to explain the incidence of litigation. Second, judicial decisions should help to improve quality, at least in the second and third senses of the term (compliance and perception). If this is so, challenged authorities should see consequential benefits if they are able to respond to judicial decisions appropriately. Third, it might follow from this that poorly performing authorities that are unchallenged will not ‘improve’ as much – at least in relation to those matters that are the subject of litigation - as similar authorities that are challenged. I am certain that others will be able to offer much further speculation.

Early findings

The general picture: levels of litigation against local authorities in England & Wales

13. We are now nearing the completion of the first stage of the work. This has involved gaining information on every jr challenge to every local authority in England & Wales for the years 2000 -2005 inclusive. The basic source of the information has been the Administrative Court records and for this we are grateful to Lynne Knapman and her staff. We are augmenting this with a range of data on each of the local authorities including location of solicitors, a variety of demographic information, levels of complaints to the Local Government Ombudsman and, data on quality: both the CPA and other performance indicators. In due course that information will be analysed more precisely than has so far been done.

14. Even at this stage we have gained a far clearer and nuanced picture of jr activity involving local government than has previously been possible. The emerging picture is providing fascinating fresh insights into the use of jr and posing a wealth of questions, many of which are strictly beyond the scope of this particular study.

15. *An overview*

Table 1 – Over view of the Dataset

Data on all non-immigration/asylum challenges during the period 2000-2005, drawn from the Administrative Court records.

The numbers of cases can be seen in Table 1. 46.1 directly concerned local authorities. Note that these figures are applications filed in the Admin court. We have also noted applications granted permission, as there may be important differences between the number of challenges and the number accepted as being meritorious. Overall 31% of the challenges obtained permission.

Table 2
Distribution of applications between types of local authority

The relatively high numbers against London Boroughs will surprise few here. Note that we compare raw numbers of cases with populations within areas. Here we see that the London Borough cases were 59.6% of the sample, but London constitutes only 14% of the population in England & Wales.

Table 3
The subject matter of challenges¹²

This pie chart summarises the overall picture from the perspective of topics litigated. Again few here will be surprised to see that housing constitutes the largest single area of challenge. When added to homelessness and housing benefit, housing-related issues were of concern in approximately 51% of the local authority cases.

Table 4
The distribution of topics by type of authority.

Against Counties community care generated 58% of the jr litigation. In London nearly 70% of the cases concerned housing related issues.

16. *The geographical distribution of jr litigation*

Histogram: Applications for permission 2000-2005

The histogram provides a graphic summary of the distribution of challenges. It shows that 85% of local authorities experienced less than two challenges annually during the period 2000-2005 and that 15% of the local authorities attracted 77% of the challenges.

Geographical representation of the most highly challenged authorities

¹² The classification of subject areas is that used by the Administrative Court.

The map provides another way of seeing this. It shows the ‘hot’ spots of litigation over this six year period (although the geographical representations are rather approximate). It also shows the vast tracts where challenge was rare.

Amongst the interesting things thrown up by these ‘hot spots’ is the contrast between authorities and the absence of ‘heat’ where one might have anticipated it. For instance, while Birmingham and Liverpool were ‘hot spots’, Manchester is not.¹³

The most challenged authorities

The next table lists the 15 most heavily challenged authorities. Note that the list is based on the size of the population per challenge, it does not use actual numbers of cases. In this way arguably it provides a more reliable basis for comparison than would the raw numbers. But in so doing we find that some authorities that have high numbers of challenge are excluded from the list because they are also very highly populated. Birmingham is the prime example.¹⁴ It also means that some authorities with very small populations are included, such as the Scilly Isles.

Anomalies aside, it is clear that certain London Boroughs are overwhelmingly the heaviest challenged authorities: as we have seen most of their challenges concerned housing related issues. I shall return to the quality column in a moment.

These data demonstrate that whatever developments may have occurred in jurisprudential terms, judicial review remains a service that is typically very patchily used. The patchy profile of challenge poses several obvious questions. What explains the distribution of challenge and why are some authorities so heavily challenged and most so rarely? What, if anything does this have to do with the quality of their services? Is the distribution simply attributable to the location of lawyers who think in terms of judicial review? In the context of this research there is also the question of whether those who are challenged gain from the experience and whether those who are not lose out?

We are not yet able to provide answers to these the questions, but the data we have provide some interesting clues. I shall now look a little more closely at the profiles of the local authorities,

17. Profiles of Local authorities

The next group of tables summarise the incidence of jr against some of the principal demographic and other characteristics of the authorities.

Profiles of Groups of LA according to their jr litigation

¹³ During the period 2000-2005 there were 131 challenges recorded against Birmingham, 79 against Liverpool and 20 against Manchester.

¹⁴ The population of Birmingham is approximately 970,000. The average population of London Boroughs is approximately 250,000.

This table provides an overview of authorities grouped according to the levels of challenge against them by reference to: their multiple deprivation index (the higher the number the more deprived they are); the number of complaints made against them to the Local Government Ombudsman during 2004/5; the percentage of Whites in their population; and, the proportion of the group that obtained the highest Comprehensive Performance Assessment rating.

The following observations may be made. First, it seems that deprivation levels are highest in the heaviest challenged areas. Second, the incidence of complaint to the LGO is also highest in these areas. Not surprisingly perhaps the proportion of Whites is also lowest in these areas. We can also see that these heavily challenged, deprived, heavily complained against authorities are also least likely to be amongst those with the highest rankings for their quality, although ten percent of them are.

So here we have a hint that high levels of challenge may be associated with levels of (lower) quality and high levels of deprivation, but the link is by no means clear and other factors may well be far more important.

Before looking more closely at deprivation and quality, let me flag one factor that does seem to be significant, namely the location of solicitors with expertise in public and administrative law.

Litigation and Public Lawyers outside London

The next scatter chart represents the relationship between the annual number of challenges and the number of public law solicitors in the areas, based on Law Society data.¹⁵ It excludes London, for which data are yet to be analysed.

The chart indicates what most might expect: that where there are more lawyers there is likely to be a higher incidence of challenge, although once again this may not be the case (as South Gloucestershire shows). This finding is interesting in part precisely because it reminds us to expect a tenuous connection between the incidence of challenge and quality.

The final aspects that I shall briefly look at are deprivation and quality.

18. Deprivation

We have three scatter graphs dealing with the relationship between challenge and deprivation (again as indicated by the index of multiple deprivation¹⁶). The first of these looks at those authorities that fall into the lower half of our list of challenged authorities. The second looks at those authorities falling into the top half of our list challenged authorities. These charts do not include authorities in Wales, as the deprivation measures for Wales are not directly comparable.

¹⁵ The Law Society has provided us with information about lawyers per region, not per district (region as defined by the pre-1996 classification).

¹⁶ Deprivation is more general than poverty (although it includes it). It is called “multiple” because it taps on several “kinds” of deprivation, educational, cultural, financial, etc.

Litigation and deprivation. England only Authorities below the 50% threshold

Litigation and deprivation. England only Authorities above the 50% threshold

When all authorities are compared there is no single pattern that might, for instance, suggest that the authorities that are least challenged are those that are also least deprived. On the contrary, these lightly challenged authorities extend across the whole spectrum of authorities in terms of the index of multiple deprivation. So while deprived authorities constitute some of the most heavily challenged authorities, we can see that some of the least heavily challenged are also the most deprived authorities.

Litigation and deprivation in London

The third of the charts dealing with deprivation concentrates on London. Here there is a clear correlation between deprivation and challenge with the more deprived authorities attracting the highest levels of jr litigation, although the most deprived are not necessarily the most heavily challenged.

19. Quality (The Comprehensive Performance Indicators)

The final charts deal with the relationship between the quality rankings (the higher the better) and the incidence of challenge first in London and second elsewhere.

Litigation and Quality: London

In London, from the perspective of quality, the picture appears to be mixed. The majority of authorities that have relatively low levels of challenge (for London) have high or very high quality scores (3 and 4). However, there is no clear picture here. Indeed, perhaps the most interesting issues for our research concern the contrasts between authorities. Hackney performs badly and attracts quite high levels of challenge whereas Southwark performs better but attracts similar levels of challenge. Lambeth is the most heavily challenged and its quality is judged to be same as several authorities who attracted very low levels of challenge. These are the types of comparison that will be important to us when we come to sample those authorities for the next stage of our study.

Litigation and Quality : Unitary authorities, Metropolitan Councils and County Councils

This chart only deals single tier authorities.¹⁷ Here too the overall picture is somewhat unclear, again the opportunity for comparison will help inform the next stage of the research: contrast, for example, Birmingham and other authorities that have similar quality ratings but which attract less litigation.

Conclusions

¹⁷ In relation to Districts no clear pattern emerged and the relevant chart is not shown.

20. It is premature to draw any conclusions from the research, which still has a long way to go.

What is clear is that the incidence of judicial reviews against local government is extremely patchy.

There is evidence, especially in London, that the heavily challenged authorities are also the most deprived and amongst the least likely to obtain the highest rating in the official CPA. They are also likely to be the authorities with some of the most severe housing problems.

On the other hand, there are many relatively poorly performing authorities with similar problems that are rarely challenged, if at all. There are also highly performing authorities with comparatively low levels of disadvantage that are equally rarely challenged.

From these variations we will now endeavour to select our three pairs of like authorities for the next stage of the research.