

# The Value and Effects of Judicial Review:

The Nature of Claims, their Outcomes  
and Consequences

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Public Law Project



University of Essex



THE LONDON SCHOOL  
OF ECONOMICS AND  
POLITICAL SCIENCE

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- enhancing the quality of public decision-making; and
- improving access to justice.

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PLP undertakes research, policy initiatives, casework, and training across the range of public law remedies.

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Published by

The Public Law Project

150 Caledonian Road

London N1 9RD

[www.publiclawproject.org.uk](http://www.publiclawproject.org.uk)

ISBN 978-1-898421-16-0

Published in the United Kingdom in October 2015

## **Acknowledgements**

The research upon which this report is based was funded by the Nuffield Foundation. The Nuffield Foundation is an endowed charitable trust that aims to improve social well-being in the widest sense. It funds research and innovation in education and social policy and also works to build capacity in education, science and social science research. The views expressed in this report are those of the authors and not necessarily those of the Nuffield Foundation. More information is available at [www.nuffieldfoundation.org](http://www.nuffieldfoundation.org)



We thank Christopher Luff, the Senior Research Officer for the project. We also very gratefully acknowledge the assistance of all those who gave their time to participate in the research.

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## Summary

This report presents the findings of a study into the effects of judicial review (JR) in England and Wales which was funded by the Nuffield Foundation and undertaken by the Public Law Project and the University of Essex, with Maurice Sunkin as the Principal Investigator. The research:

- builds on previous work to throw additional light on how and why JR is used and what, if anything the parties, and in particular claimants, achieve from the process, whether challenges are successful or not;
- explores the tangible and intangible consequences for claimants of JR cases; whether judgments have implications beyond the parties, including in relation to the policies and procedures of public bodies; and JR's contribution to the clarification of the law, and to improving human rights protection; and
- provides significant fresh data on levels of costs, the nature of costs orders, and the relationship between legal aid funding and the outcomes for claimants.

## Principal findings

There are a number of widely held and influential assumptions about the costs and misuse of JR. First, that the past growth in the use of JR has been largely driven by claimants abusing the system, either deliberately or otherwise. Second, that the effect of JR on public administration is largely negative because JR makes it more difficult for public bodies to deliver public services efficiently. Third, that JR litigation tends to be an expensive and time consuming detour concerned with technical matters of procedure that rarely alters decisions of public bodies. These claims have been challenged for their lack of empirical basis and this study provides additional evidence which shows them to be at best misleading and at worst false.

In particular our findings show that:

- **Claimants for JR gained a wide range of tangible benefits:** the most common of which were conferment or retention of a service by a public body and getting the defendant public body to make a decision where prior to JR proceedings they had not done so.
  - When public bodies reconsidered decisions which had been found to be unlawful in JR proceedings, they often reached a fresh decision which favoured the

claimant, rather than merely correcting the process by which the original decision was made.

- In such cases JR makes a significant and substantive contribution to outcomes of disputes between claimants and public bodies. These outcomes were more than technical, formal, or symbolic: the public bodies generally appear to have genuinely engaged with the issues raised and their engagement was not wholly defensive or negative.
- **Legal aid played a significant role in enabling claimants to obtain tangible benefits**
  - Legally aided claimants were more likely to have obtained tangible benefits from their claims than privately funded claimants.
  - Higher cost to the legal aid fund was associated with greater benefit to claimants.
  - Higher costs, including to the legal aid fund, may therefore lead to ‘good value’, especially from the claimant’s perspective.
  - Restrictions on legal aid to support JR claims are likely to have a disproportionately adverse effect on those forced to resort to JR in order to obtain services to which they are legally entitled.
- **Claimants were said to have had a wide range of positive and negative reactions to the process and to the outcome of their cases**
  - The most common positive reactions were said to be an increased sense of empowerment and increased confidence in the legal system.
  - While these reactions were much more likely when claimants had been successful in court, they also occurred in a not insignificant proportion of the cases where the claimant was unsuccessful.
  - The most common negative reactions were said to be stress and frustration and lack of confidence in the legal system. Not surprisingly, these tended to arise when claimants were unsuccessful, but were not limited to such cases.
- **JR judgments are seen to have significant impact in relation to policy, procedure, the clarity of the law, and human rights protection**
  - While JR imposes costs on public bodies it is acknowledged to enable improvements in the quality of public administrative and assist public bodies to meet their legal obligations.
  - Even failed challenges were often considered to have led to improvements in the provision of services by public bodies and to more positive engagement between the parties.
- **Our findings do not indicate the existence of widespread abuse of the system by claimants seeking to use JR for public interest or political purposes, such as would justify a general restriction on access to the Administrative Court.**

- **Instead, they illustrate the varied ways by which JR may be considered to add value** in relation to the direct rights and interests of claimants, their experience of the legal system, and in terms of the wider contributions of JR to such matters as the clarity and development of the law.
- **Overall, the findings underscore the importance of access to the High Court's inherent supervisory jurisdiction**, for claimants, defendants, and for the wider public interest.

## Section One: Background and context

This report concerns the use and effects of JR in England and Wales.<sup>1</sup> It primarily focuses on JR from a claimant perspective. Judicial review provides a route by which legal redress may be obtained against public authorities, including in human rights cases, when no other suitable remedy is available. It also provides a means by which public bodies may be held accountable for the legality of their actions. For these reasons JR is constitutionally important as the principal means for giving practical effect to the rule of law.

In recent years JR has received growing public attention. This is partly because there is now a perception that the use and qualitative importance of JR has grown significantly particularly since the Human Rights Act 1998. Judicial review has also received attention because governments have been vocal in their criticisms of the process and have taken steps to curtail its use, and limit what they regard as being its undesirable consequences. There are also concerns about whether JR provides an appropriate and proportionate method of redress, and whether it is best suited to providing access to justice for the type of problems that are raised in JR proceedings.

A key motivation behind this study is to inform understanding and discussion by improving the quality and range of available evidence about the process and its effects or consequences. This is of particular importance given that much public discussion, including that generated by the government itself, is based on assumptions about the use and effects of JR which are either not grounded in evidence or inferred from research that has not been rigorously undertaken or is very limited in nature or scope.

Three untested assumptions have been particularly influential in the context of the previous coalition government's reforms aimed at curtailing the use of JR. First, that growth in the use of JR has been largely driven by claimants abusing the system, either deliberately or otherwise; second, that the effect of JR on public administration is largely negative because JR makes it more difficult for public bodies to deliver public services efficiently; and third, that JR litigation tends to be an expensive and time consuming detour concerned with technical matters of procedure that rarely alters decisions of public bodies. Empirically based research, to which that reported here makes a new contribution, shows that each of these assumptions is highly questionable.

### **Previous research**

There is a significant body of work on the impact of JR in relation to specific areas, including: prisons; social security benefits; Mental Health Review Tribunals; and housing. However, this is the first study to explore the effects of JR judgments across the caseload in England and

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<sup>1</sup> JR is a High Court process undertaken by the Administrative Court in London and in centres outside London, on which see further: S. Nason and M. Sunkin, 'The Regionalisation of Judicial Review: Constitutional Authority, Access to Justice and Legal Services in Public Law' (2013) *Modern Law Review* 76(2) 223-253.

Wales.<sup>2</sup> The current study builds on two previous pieces of research in particular. The first was funded by the Nuffield Foundation and its findings were reported in *The Dynamics of Judicial Review Litigation: the resolution of public law challenges before final hearing*<sup>3</sup> and elsewhere.<sup>4</sup> That study provided a detailed empirically based picture of contemporary JR litigation and mapped the litigation process from first contact between the parties until after the permission stage. It threw significant new light on the way JR claims are resolved prior to final hearing including on the nature of the settlement process in JR and the effects of settlements on the parties. However, the *Dynamics of Judicial Review* project did not deal with final hearings or their consequences. The current study extends that work by focusing on these matters.

The second investigation was funded by the ESRC under its Public Services Programme.<sup>5</sup> This was an interdisciplinary study which employed qualitative and quantitative methods to investigate the influence of JR on the quality of local authority services in England and Wales. The qualitative aspects of the research focused on case studies to explore in detail the various ways in which local authorities responded to and were affected by key JR decisions, that is, decisions that local authorities had identified as being of particular importance to them.

These case studies provide insight into the challenges posed by JR litigation for local government, especially when litigation compels a local authority to reassess budget priorities, procedures, training and culture. However, the work also showed the value of JR to local authorities, for instance in providing clarity and guidance on the law and an incentive to rethink approaches. In this connection, it showed that it is misleading to view JR as either wholly negative or wholly positive. The same case, for example, may be considered to help some departments in local authorities by providing clarity while posing real difficulties for other departments such as those responsible for budgets or wider policy. Moreover, the perceived effects of JR decisions may also vary over time; for instance decisions initially viewed as being negative and as impeding conventional practice may be later welcomed and acknowledged to have improved how things are done.

The quantitative work mapped the use of JR across England and Wales for example highlighting the demographic factors which are associated with the use of JR.<sup>6</sup> It also examined the relationship between JR and the performance of local authorities as measured

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<sup>2</sup> Cf Robin Creyke and John McMillan, 'The Operation of Judicial Review in Australia', in Marc Hertogh and Simon Halliday (eds) *Judicial Review and Bureaucratic Impact* (Cambridge University Press, 2004).

<sup>3</sup> *The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing*, Varda Bondy and Maurice Sunkin, (Public Law Project, 2009).

<http://www.publiclawproject.org.uk/data/resources/9/TheDynamicsofJudicialReviewLitigation.pdf>

<sup>4</sup> 'Accessing Judicial Review' Varda Bondy and Maurice Sunkin [2008] *Public Law* 647-667; 'Settlement in Judicial Review Proceedings', Varda Bondy and Maurice Sunkin [2009] *Public Law* 237-259.

<sup>5</sup> Res 153-25-0081: Maurice Sunkin, Kerman Calvo, and Lucinda Platt, *ESRC Public Services Programme, Discussion Paper Series: No. 0801*, March 2008.

<sup>6</sup> Maurice Sunkin, Kerman Calvo, Lucinda Platt, Todd Landman, 'Mapping the use of Judicial Review to Challenge Local Authorities in England and Wales', [2007] *Public Law*, 545-567.

by official indicators such as the Comprehensive Performance Assessment (CPA).<sup>7</sup> It showed that JR challenge is linked to improvements in the quality of local authority performance as measured by these indicators. The overall lesson of such research is that it cannot be assumed that the effects of JR on public administration are wholly negative and that JR may in fact benefit public authorities in ways which are not always appreciated or obvious.<sup>8</sup>

### ***The aims of this research***

The research reported here examined the consequences of final judgments in JR cases. It explored the value and effects of JR from the perspectives of claimants, their lawyers, and lawyers who acted for defendant public authorities; it assessed the tangible and intangible consequences of JR decisions for claimants; and how public bodies respond to decisions in relation to particular cases and more generally. In this report we focus on JR as experienced by the claimants and investigate what, if anything, they achieved, as well as issues relating to costs, funding and legal aid.

### ***Methods***

We adopted quantitative and qualitative approaches. We constructed a database (the judgment dataset) of all JRs that went to final hearing during a 20 month period from July 2010 to February 2012 inclusive. This dataset contains 502 cases. The information on the judgments was obtained from BAILII, supplemented from other sources, including Westlaw and information from solicitors where cases were unreported.

From the judgments we ascertained details of the parties and their representatives; the subject area; basic facts; issues in dispute; and the legal outcome. We also recorded and coded: the grounds of challenge; the remedies sought and awarded; the aims of the claimants; their achievements; and why the case was defended, where this information was identifiable from the judgment. We further included the geographical location of the hearing and the names of the judges.

The resulting data enable us to analyse such matters as the number of disputes in various subject areas and their outcome; the number and outcome of appeals; the distribution of outcomes by judge; the number and nature of claims brought in centres outside London; and the frequency of interventions. Where evident from the judgments, we were also able to analyse the grounds upon which challenges were based and what the parties achieved.

In addition, questionnaires were sent to solicitors who acted for claimants where the solicitor could be identified and remained active. Such questionnaires were sent regarding

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<sup>7</sup> The CPA was replaced by the Comprehensive Area Assessment in April 2009.

<sup>8</sup> 'Judicial Review Litigation as an Incentive to Change in Local Authority Public Services in England & Wales', Lucinda Platt, Maurice Sunkin, Kerman Calvo, *Journal of Public Administration Research and Theory*, 20:i243-i260 (2010).

407 (81%) of the cases in the judgment dataset (the claimant solicitor questionnaires). The questionnaires employed both closed and open-ended questions covering a range of information about what claimants expected to achieve in bringing the claim; what, if anything, was achieved; how the claimant perceived the process; whether the case had significant implications, and, if so, what these were. We also asked for information relating to sources of funding and costs. A copy of the questionnaire is to be found in Appendix B.

Completed claimant solicitor questionnaires were returned for 198 cases, a response rate of just under half (49%). From this we constructed the claimant solicitor dataset. Further semi-structured follow-up interviews were carried out with parties' representatives in respect of 56 these cases.

A similar questionnaire (defendant solicitor questionnaire) was sent in relation to 211 cases to solicitors who had acted for defendant public bodies (99 to local authorities, 73 to government solicitors, and 39 to others).<sup>9</sup> Despite multiple reminders and follow ups by email and phone, the response rate from defendant solicitors was significantly lower than that from claimant solicitors (just under 25%).<sup>10</sup> Fifty two defendant solicitor questionnaires were completed and returned: 22 from local authorities, 15 from government solicitors, and 15 from others. Low participation on the part of Treasury Solicitor's Department (TSol), citing client confidentiality as a barrier, was disappointing and marked a departure from TSol's willingness to engage with the *Dynamics of Judicial Review* project. While we had limited ability to analyse defendant solicitors' reactions to the outcome of cases or triangulate with the responses to the claimant solicitor questionnaire, we have drawn on the defendant solicitor's responses qualitatively, to amplify our discussion where possible.

In summary, then, the analysis in this report is based on:

- a) descriptive analysis of the judgment dataset;
- b) descriptive analysis of the claimant solicitor dataset linked to key information about the case in the judgment dataset;
- c) case studies of specific judgments illustrating particular points; and
- d) illustrative analysis of key points from interviews with solicitors who acted for claimants and defendants in the cases within the sample, and with other senior lawyers with knowledge of the post-judgment effects of JR.

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<sup>9</sup> Questionnaires were sent to defendant solicitors for fewer than half the cases in the sample for a number of reasons. The principal reason was that 292 of the 502 cases involved the Treasury Solicitor's Department (TSol), and TSol lawyers could not be expected to deal with so many cases. Following lengthy negotiations with a senior lawyer at TSol, 52 questionnaires were sent to them of which 15 were returned. In a number of other cases it was established from the outset (via initial telephone or email/letter approach) that there would be no cooperation, or it was impossible to identify a recipient, and in these cases no questionnaire was sent.

<sup>10</sup> In our experience it is more difficult to obtain the participation of defendants than claimants. We touched upon a possible reason in *Dynamics of Judicial Review*, where we suggested (p12) that unlike claimant solicitors, defendant solicitors may need to obtain institutional approval. An element of institutional secrecy is also likely to play a part. Nonetheless most defendant solicitors, who responded to the survey have been open and generous with sharing their insights.

## *Data quality*

To assess the extent to which the profile of the claimant solicitor and defendant questionnaires reflected that of the cases in the judgment dataset we compared the subject categories, claimant types, defendant types, scope of the issues raised, and the judicial outcomes across the dataset and questionnaires.

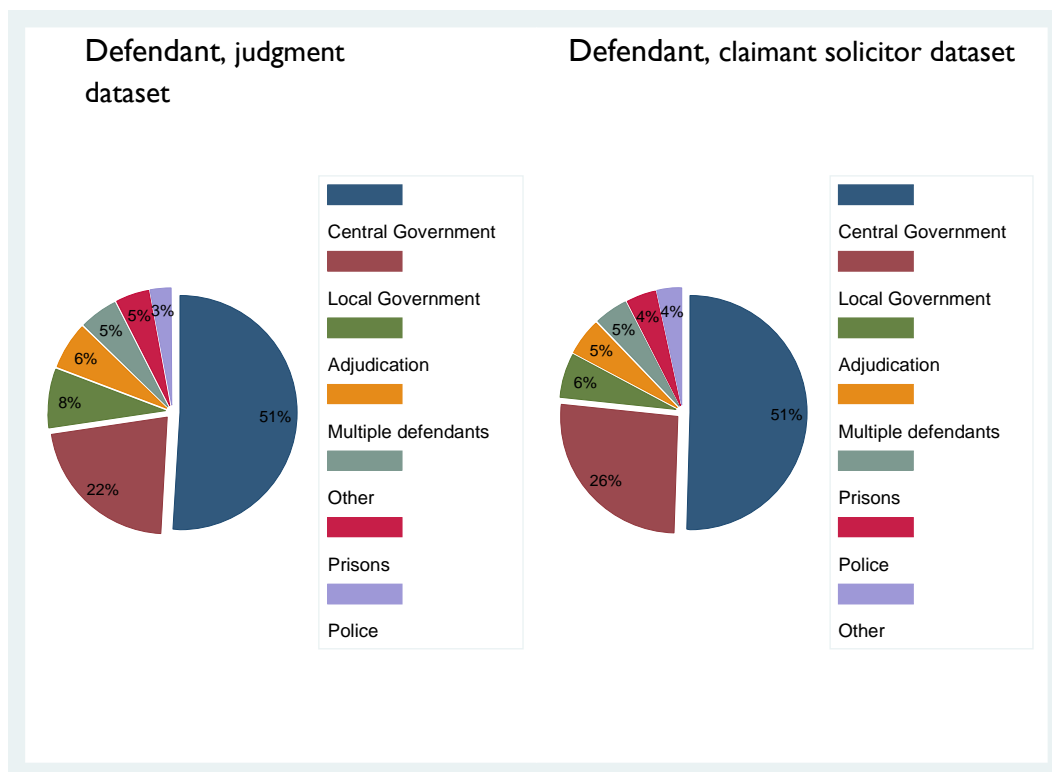
In relation to the claimant solicitor questionnaires across each of these categories we found the samples to be very similar, indicating the responses of the claimant solicitors to be a good reflection of the overall judgment dataset. For example, among the responses by claimant solicitors there was a slightly higher number of cases favouring the claimant, namely 48 per cent compared with 44 per cent in the judgment dataset. Once appeal cases were taken into account, the difference was 47 per cent favouring the claimant in the judgment dataset compared with 51 per cent in the claimant solicitor dataset. Individual claims made up 85 per cent of the responses, just slightly higher than the 78 per cent in the judgment dataset as a whole; and legal corporations were correspondingly slightly under-represented in the claimant solicitor dataset (9% compared to 16%). There was a slightly lower proportion of 'own fact' cases (69% compared to 74% overall) and a corresponding slightly higher proportion of JRs challenging 'procedure or policy' (24% compared with 18% overall), with a comparable share of 'wider public interest cases' (7% compared with 8%).<sup>11</sup> These differences are not of a scale to suggest systematic bias. The representation of defendants was also remarkably similar across the two sources, as Figure 1 illustrates.

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<sup>11</sup> For an explanation of these three categories of case, see Section 3, below.



Figure 1: Comparison of defendants in the judgment dataset (N=502) and the claimant solicitor dataset (N=198).



Overall, these comparisons lend confidence to the use of the findings based on the questionnaires. They suggest that what claimant solicitors told us about the outcome of cases may reasonably be assumed to represent outcomes across the judgment dataset generally.

The responses in the defendant solicitor questionnaires, however, cannot be taken as representative of the overall judgment dataset. While the distribution of the 211 questionnaires issued closely reflected outcomes in the judgment dataset, with 45 per cent favouring the claimant and 55 per cent favouring the defendant, of the 52 questionnaires returned, in only 14 cases (27%) was the judicial outcome favourable to claimants and in the other 38 the judicial outcome was favourable to defendants. Once the appeal outcomes are taken into account, there were only 13 cases that concluded in favour of claimants, with 39 (75%) that concluded in favour of defendants. The difference of 17 percentage points between the overall outcomes and the outcomes for which respondents returned questionnaires shows a much greater skew than the difference (in the opposite direction) of four percentage points in the claimant solicitor questionnaire.

### Caveats

This report must be read with the following caveats in mind. Much of our analysis is based on what lawyers told us were the effects of judgments. Lawyers are often best placed to know what happened in their cases and are likely to have contact with their clients after the

conclusion of the JR. Moreover, it has been observed that past empirical research on the impact of JR failed to take 'adequate note of how practitioners themselves view the role of law ...'.<sup>12</sup> However, relying on what lawyers say about their own cases carries risks, given that their perspective may be limited and that their objectivity and neutrality cannot be assumed. At various points this is a matter to which we draw explicit attention. We also explain what we did to verify the information, for instance by undertaking internet and legal publication searches to cross-reference what solicitors told us happened following judgments, such as whether policy was changed. What is said about benefits to claimants must also be read bearing in mind that lawyers may consciously or unconsciously stress positive outcomes for their clients. While this may be a risk, we found that in cases that did not result in the desired outcome, solicitors sometimes underestimated the positive effects of a case. Despite this caution, there can be little doubt that lawyers can offer valuable insight into, and comment on, the consequences of their cases; and had we received as many responses from defendant as claimant solicitors, we might have expected any biases to balance out, and be better placed to cross-check perspectives on outcomes across the cases.

This study seeks to provide an informed account of the principal effects of judgments across a cohort of JR cases which inevitably cover a broad spectrum of issues. While we have collected and analysed a range of information about individual cases, we have not undertaken in-depth case studies of the type undertaken in the earlier ESRC study. This means that while we may know how the decision directly affected and was perceived by the parties, we do not claim to be able to present the full story of individual cases including how the litigation may have influenced the work of different offices or levels within public bodies, or how the impacts of decisions may have changed over time.

A final caveat is that the interviews were undertaken on the basis that anonymity would be preserved. We are therefore unable to name individual participants. It also means that unless information is in the public domain, cases have been anonymised and factual information which might identify the case and interviewees has been removed.

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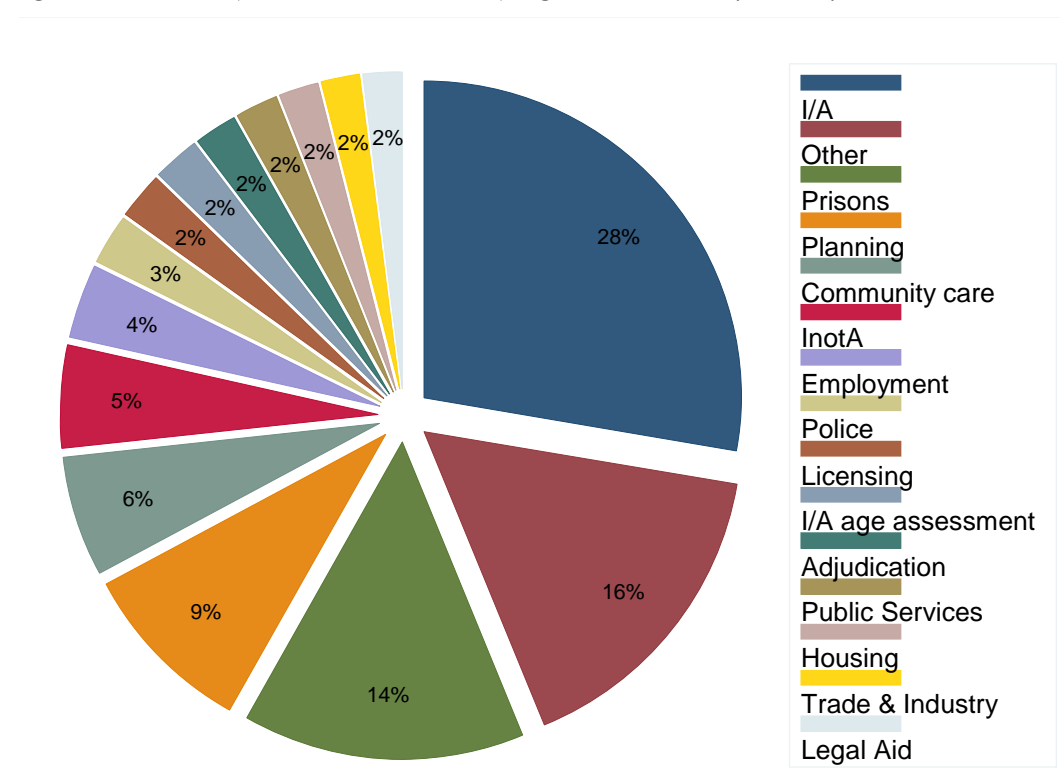
<sup>12</sup> Jeff King, *Judging Social Rights*, (Cambridge University Press, 2012), p 74.

## Section Two: The profile of the cases in the judgment dataset

### Subject categories

There were 502 cases in the judgment dataset. We classified the subjects of these cases using the categories used by the Administrative Court. Figure 2 shows the subjects in which there were 10 or more cases, with the remaining cases aggregated to 'Other'.<sup>13</sup> Age assessment cases are shown separately from immigration/asylum cases generally. The full distribution of categories is given in Appendix A.

Figure 2: The Subjects of cases in the judgment dataset (N=502)



Note: I/A = immigration/asylum. InotA = immigration, not asylum. I/A age assessment = immigration or asylum where age assessment was in issue.

Earlier research has shown there to be a difference between the subject profile of the caseload at the initial stage of the JR procedure (the issued claims) and at the final judgment stage.<sup>14</sup> This is primarily because the proportion of cases that settle or are refused

<sup>13</sup> The official statistics currently group JR cases under four topics: Criminal, Civil (other), Civil (Immigration and Asylum), and Unknown: see *Guide to Civil and Administrative Justice Statistics*, Ministry of Justice (last updated 13 August 2015). [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/453842/civil-administrative-justice-statistics-guide.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/453842/civil-administrative-justice-statistics-guide.pdf)

<sup>14</sup> Maurice Sunkin, Kerman Calvo, Lucinda Platt, Todd Landman, 'Mapping the use of Judicial Review to Challenge Local Authorities in England and Wales', [2007] *Public Law*, 545-567, 556.

permission varies across subject areas. For example, cases involving housing and homelessness have been found to form approximately 25 per cent of the overall number of cases issued,<sup>15</sup> yet such cases only formed two per cent of the cases in our judgment dataset. This is likely to be because a high proportion of housing matters are resolved prior to hearing.<sup>16</sup> By contrast, because planning claims settle more rarely they make up a higher proportion of the cases dealt with at final hearing than of the cases issued.<sup>17</sup> The variation is most striking in relation to immigration and asylum matters, which, unsurprisingly, constituted the largest group of cases in the database (35 %, when immigration / asylum, immigration not asylum and age assessment cases are combined). However, Administrative Court statistics for 2012 show that 82 per cent of all JRs issued in that year (9,868 out of 12,434) involved immigration/asylum. This suggests that a relatively high proportion of immigration JRs were resolved prior to final hearing.<sup>18</sup>

It therefore cannot be assumed that the dynamics of JR litigation will be the same across the spectrum of cases, or that claimants use JR for the same reasons, or that the consequences of the litigation for claimants and public bodies, will be the same. It also indicates that the burden on the court system varies between types of claim. For instance, housing and homelessness claims may constitute a numerically large category at the issue stage but since a very high proportion will be resolved early in the process they are not likely to contribute greatly to the general pressures on the court, nor will they cause significant delays to public administration. Planning matters by contrast are relatively few in number but because a relatively high proportion of these cases tend to proceed to final hearing they are likely both to be more costly to the court system and to have a more significant impact in terms of delay.

### **Judicial outcomes**

Of the 502 cases in the judgment dataset, 221 claims (44%) were allowed in whole or in part and 280 (56%) were dismissed. In one instance the case was referred to the ECJ and is excluded from the analysis of final status. Of the 221 claims which were allowed, defendants are known to have appealed in 29 cases (13%).<sup>19</sup> In 16 of these the appeal was unsuccessful and in 10 cases the appeal was successful (a 38% success rate). In three cases the outcome was not known at the time the dataset was finalised. Of the 280 cases in which the claim was dismissed, claimants are known to have appealed in 88 cases (31%). In 59 of these the appeal was unsuccessful and in 25 the appeal was successful (30%). In four cases the

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<sup>15</sup> *Ibid.*

<sup>16</sup> See *Dynamics of Judicial Review*, p 38: 62% of homelessness cases and 46% of housing cases were found to settle before reaching the permission stage. Others settle after permission and before final hearing.

<sup>17</sup> See *Dynamics of Judicial Review* p. 38, Table 3.1 showing that out of 109 planning claims issued in a nine month period, only 19 (18%) concluded prior to consideration of permission compared with 42% of homelessness and 63% of asylum support cases. This is partly because many planning challenges are *functus officio*.

<sup>18</sup> See further, Robert Thomas, 'Mapping Immigration Judicial Review Litigation: An Empirical Legal Analysis' [2015] *Public Law*, 652-678.

<sup>19</sup> In 109 cases we found no evidence of an appeal, and in 83 cases, we know from lawyers that there was no appeal.

outcome was not known. As we can see, claimants appealed more often than defendants but the success rate of appeals was fairly similar, though apparently slightly higher for defendants (30% for claimants and 38% for defendants).

There was, however, some variation in the success of appeals according to the nature of the defendant. From 23 appeals by claimants in local authority cases only two were successful: one was a dispute between two local authorities, the other was a case brought by a conservation association. Of the 21 unsuccessful appeals 10 were planning cases. Also, four community care appeals were rejected. None of the appeals brought by individual claimants was successful.

Where we can take account of known outcomes following an appeal, we find that overall 237 cases (47%) concluded in favour of claimants, while 264 concluded in favour of the defendant (see Table 1) This success rate for claimants is broadly in line with the claimant success rate at final hearing as shown in the official statistics, which has been fairly consistent over the years. This is an appropriate success rate to consider when evaluating whether JR is used in (non-)meritorious cases. It can be contrasted with a success rate based on comparing the number of final determinations in the claimant’s favour with the number of claims issued. Such a comparison is inappropriate as it fails to take proper account of the fact that only a relatively small number of claims will reach final hearing (and many claims will be resolved in the claimant’s favour prior even to the permission stage). Thus the Ministry of Justice’s (MoJ) interpretation of the official statistics as suggesting that only one or two per cent of claimants are successful in JR is grossly misleading.<sup>20</sup>

Table 1: Initial and post-appeal outcomes (as known at conclusion of research), judgment dataset (N=501)

		Final outcome (as known at conclusion of research)				
		Allowed	Row %	Dismissed	Row %	All (100%)
Initial outcome	Allowed (or in part)	211	95.5	10	4.5	221
	Dismissed	25	8.9	255	91.1	280
	Total	236	47.1	265	52.9	501

Note: The total of 501 excludes the one case that was referred to the ECJ.

In this report, we present most of the analysis in relation to the initial, rather than post-appeal, outcome. This is because in some cases the outcome of an appeal was still to be determined and, for the claimant solicitor survey, many of the responses are likely to have been collected prior to the appeal hearing.

<sup>20</sup> See e.g. MoJ’s overview of the *Civil Justice Statistics Quarterly (October – December 2014)* published 5 March 2015, which states: ‘The proportion of all cases lodged found in favour of the claimant at a final hearing has reduced ... to 1% in 2013 and has remained the same in 2014.’ For a critique see T. Hickman and M. Sunkin, ‘Success in Judicial Review: The Current Position’, U.K. Const. L. Blog (19 March 2014), available at <http://ukconstitutionallaw.org/>

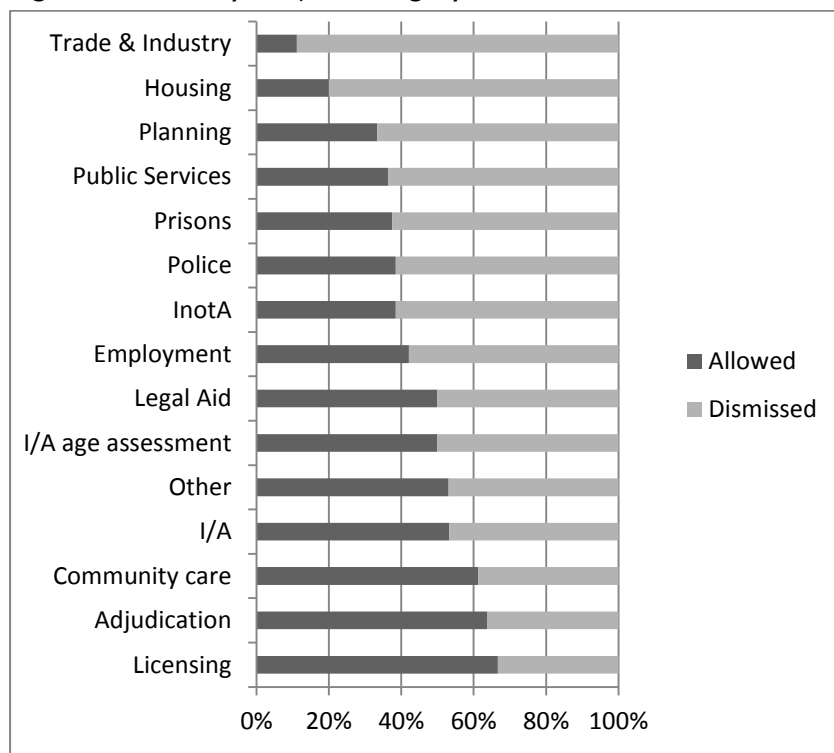
Figure 3 shows the judicial outcomes in the largest subject categories. Once again there is a warning against generalising about the success or failure of claims, which clearly vary significantly across subjects. Various systemic factors may at least partially explain this variation. For example, there may be a connection between the low success rate of housing cases and the high rate of pre-hearing determination, possibly because local authorities have earlier in the process conceded a high proportion of meritorious claims. By contrast higher success rates for claimants in other subject areas such as community care, may reflect unwillingness on the part of defendants to concede such cases prior to the final hearing, thereby allowing more meritorious cases to reach final hearing.

We can draw on the defendant solicitor responses and interviews to gain some insight into why successful claims were ultimately defended. In some cases, the defendant genuinely considered that the claim was without merit: one respondent suggested that a claim relating to the legality of a consultation concerning the reconfiguration of hospital services ‘was a mad challenge’, while another considered that the decision made by a disciplinary panel to allow hearsay evidence to be admitted at a fitness to practise hearing was ‘robust’.<sup>21</sup> In other cases there were concerns about the implications of the claim. For example, in a case concerning a decision by the public authority not to fund a college's capital project, it was decided to defend the challenge in order to ‘avoid floodgates of claims by other colleges affected by the same decision’. Similarly, in a case concerning a school rule policy, the defendant felt that if an exception were to be made for the claimant with regard to the enforcement of the policy, this could ‘open the floodgates’. In other cases public bodies defended claims in order to give effect to what they considered to be the requirements of the democratic process. For instance, in a case concerned with how a local authority implemented a policy based on its (disputed) interpretation of a consultation exercise, the defendant ‘considered it was appropriate to implement the will of the people’ as expressed in the consultation. That case was appealed, but the issues were rendered academic following local elections.

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<sup>21</sup> Interestingly, in both of these cases, the matter did not rest at the point of the claim being allowed. In the first case, the defendants appealed successfully, though ultimately the initial decision that gave rise to the JR was reconsidered at a policy level. In the second case, the defendants decided to call the witness to give oral evidence, and eventually succeeded in obtaining the desired outcome of disciplinary action. The defendant’s solicitor said that the JR clarified the law on the use of hearsay evidence in professional regulatory disciplinary proceedings.

Figure 3: Cases by subject category and whether allowed / dismissed (N=501)



Note: see note to Table 1.

### *The judges and judicial outcomes*

Earlier research has drawn attention to the variation in grant/refusal rates across the judges at the permission stage. Some variation is inevitable, and to be expected, at the permission stage where much depends on an early assessment of the claims. However, previous research had identified consistent and significant variations between the grant/refusal rates of judges which suggested that judges were applying different criteria or that the criteria were unduly uncertain or unclear.<sup>22</sup> Judicial decision-making at final hearing is likely to differ to decision making at the permission stage, not least because it will benefit from full argument. While there will be differences between the way judges approach cases including their propensity to accept or reject arguments, a relatively small statistical study such as this cannot identify whether factors independent of the merits of particular cases consistently affect outcomes. Having said this, we did find some variations which indicate that further work may be worth pursuing. For example we found that two judges decided in favour of claimants in only 25 per cent of their cases (each allowed two of their eight JRs), and two judges did so in more than 60 per cent of their cases (five of eight cases and six of nine cases respectively).<sup>23</sup> We also found that Deputy High Court judges were on average slightly

<sup>22</sup> See Lee Bridges, George Meszaros, Maurice Sunkin, *Judicial Review in Perspective*, (Cavendish Press, 2<sup>nd</sup> ed., 1995), Ch 8.

<sup>23</sup> We included judges who had eight or more final hearings in our sample. In London there were only 11 such judges (out of 63) in the 20 month period of the research. Disregarding the four judges referred to, the

more likely to find in favour of claimants than full-time High Court judges. There were 37 Deputy High Court judges in London during the period covered by the research. While an average of 44 per cent of cases were decided in favour of claimants, the deputies decided 49 per cent of their cases in favour of claimants.

#### *Court outcomes outside London*

In our judgment dataset, there were 110 cases heard in the centres outside London. The distribution was as follows: Birmingham (19), Cardiff (12), Leeds (33) Manchester (44), as well one each in Newcastle and Nottingham. We consider the Cardiff cases separately below. The 19 Birmingham cases included six immigration/asylum cases and cases across another 10 categories. In Leeds the largest category was prisons (10) and the second largest immigration/asylum (6). In Manchester, the largest case category was prisons (20), and the second largest, immigration/asylum (7). Overall, claimants were successful in 42 per cent of the cases heard outside London, a similar success rate to that for those heard in London (44%). Nineteen nominated Administrative Court judges dealt with 47 cases and 16 Deputy High Court judges dealt with 65 cases. Only two nominated judges and four deputies heard eight or more cases each.<sup>24</sup>

Table 2: JR success rates in centres outside London<sup>25</sup>

Centre	Hearings	Allowed	% allowed
Birmingham	19	9	47
Cardiff	12	4	33
Leeds	33	11	33
Manchester	44	21	48

Note: All percentages rounded to nearest percentage point.

#### *JRs involving public bodies in Wales*

During the 20 month period we identified 12 JRs that were heard in Cardiff. Two of these had no connection to Wales and are not included in the following analysis.<sup>26</sup> In addition, we identified four JRs heard in London that had a Welsh element; one was a claim against the Lord Chancellor brought by a Welsh local authority concerning court closures in their area.<sup>27</sup> The other three were claims against two Welsh local authorities<sup>28</sup> and the Swansea

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proportion of decisions in favour of claimants varied between one third and nearly half of the cases decided by the judge, and the average was 44%.

<sup>24</sup> The percentage of their caseload which judges allowed varied between 22% and 75%.

<sup>25</sup> These are for illustration only due to the relatively small number of cases involved.

<sup>26</sup> One was a homelessness case brought by a 17 year old against Cornwall County Council, and the other was a challenge to the Legal Services Commission's tendering exercise for a contract relating to legal aid provision. The claimant solicitors were based in Truro and Bristol respectively, and may have used the Cardiff court to obtain a quicker hearing date than would have been likely in London.

<sup>27</sup> *Vale of Glamorgan Council v The Lord Chancellor* [2011] EWHC 1532 (Admin): challenge to a decision of the Lord Chancellor to close Barry Magistrates Court.

<sup>28</sup> *Western Power Distribution Investments Ltd v Cardiff County Council* [2011] EWHC 300 (Admin): landowner challenged defendant's decision to designate land it owned as a nature reserve. The designation was held to be unlawful and the decision was quashed. *CJ v Cardiff County Council* [2011] EWHC 23 (Admin): challenge to a local authority's decision that an illegal entrant to the UK was over 18 on arrival and therefore not entitled to assistance under the Children Act 1989.



Magistrates Court.<sup>29</sup> Altogether, therefore, there were 13 cases against Welsh public bodies and one brought by a Welsh local authority against the Lord Chancellor. As these numbers indicate, the majority of cases with a Welsh dimension were brought against Welsh local authorities (eight of the 14 Wales cases<sup>30</sup>).

#### Overview by nature of claimant

It is worth noting that only two of the 13 cases which concerned Welsh public authorities were claims brought by individuals; the other nine were claims by corporations/legal persons. The overall figure is obviously small, but the very low number of claims by individuals is nevertheless striking, especially when compared with the judgment dataset as a whole, in which 78 per cent of the cases had been brought by individuals and only 16 per cent by corporations/legal persons. Why individuals brought such a low share of the claims heard in Cardiff during this period is unclear, but may be indicative of a low level of awareness of JR as a form of redress among potential claimants and legal advisers.

#### The subject matter of the Welsh cases

Community care: There were four community care cases, all commercial JRs regarding payments to care homes by local authorities in Wales, all brought by the same firm of solicitors based in Bristol (two were allowed and two dismissed). Here again Welsh cases present a different profile to the overall picture. Only six of the 31 community care cases in the complete sample were brought by a corporation/legal person, and four of these were Welsh cases. Given the specific nature of these challenges though, it is likely that this is not a typical distribution of cases and it is unlikely that the same pattern would occur at other times.

Local government: There was one local government JR brought by a firm of solicitors based in Manchester on behalf of a commercial body (National Association of Memorial Masons) that had broken away from a national scheme of accredited masons, and denied registration by the defendant Cardiff City Council.

Planning: There were three planning cases, two of which were brought by (separate) commercial firms that are not based in Wales, and one by a firm that has offices in South Wales (Western Power Distribution).

Schools: There were two cases concerning schools, both of which concerned challenges to decisions to close schools. One was brought by governors of the schools, the other by an individual. Each of the cases were brought by law firms based in Wales, and in each the claimant had been represented by London-based counsel, although the defendant and interested parties (Welsh government and Cardiff County Council) briefed barristers based in Wales.

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<sup>29</sup> *Clive Rees Associates, Solicitors v Swansea Magistrates Court* [2011] EWHC 3155 (Admin).

<sup>30</sup> Cardiff CC (3); Pembrokeshire CC (2); Caerphilly CBC (1); Neath Port Talbot CBC (1); and Newport C, (1).

Trade & Industry: under this heading one JR was brought by a manufacturer of electronic shock collars, which had been banned from use by new regulations.

In addition, there was one age assessment case and one case brought by a firm of solicitors challenging a decision of a Magistrates' Court to authorise transfer of legal aid to another firm of solicitors. The case, which concerned the claimant's credibility and the reliability of the documents he produced, was dismissed, and affirmed on appeal. In passing it may be noted that case presents an example of an unsuccessful challenge that had a clear positive impact in clarifying the law and the role of the court: it established that the court has an inquisitorial function in reviewing the local authority's decision on age assessment and that it was not appropriate to impose a burden of proof on the claimant to establish that he was under 18.

### ***The parties***

#### *The claimants*

Of the 502 cases in the judgment dataset, 77 per cent (388 cases) were brought by individuals and 22 per cent by non-individual claimants. The number of cases by claimant type is shown in Table 3. We will return later to these figures and, in particular, the small number of cases which had been brought by interest groups and charities.

Table 3: Claimant type, judgment dataset (N=502)

	Number	Per cent
Individual	388	77
Interest groups	14	3
Corporation/ legal person	78	16
Public authority (not LG or CG)	4 (a)	1
Central government	1 (b)	0
Local government	17 (c)	3
Total	502	100

Notes: (a) An NHS trust, a school, a Chief Constable, and a Commissioner of Police. (b) The SSHD concerning whether sensitive security service information can be considered by a coroner in closed session. (c) Includes 4 claims by local authorities challenging central government's decision to abandon the school building programme. All percentages rounded to nearest percentage point.

#### *The defendants*

The categories of defendants are given in Table 4.

Table 4: Defendant type, judgment dataset (N=502)

	Number	Per cent
Adjudicatory body	41	8
Central Government	256	51
Local Government	109	22
Prisons	23	5
Police	15	3
Multiple defendants	32	6
Other	26	5
Total	502	100

Note: All percentages rounded to nearest percentage point.

As can be seen from Table 4, over half the cases (256) were brought against central government; and of these, 133 were immigration/asylum cases involving the Home Office. Most such cases have since been moved to the Upper Tribunal. The remaining central government cases<sup>31</sup> were spread across more than 30 departments or agencies, and covered 23 subject areas, the largest being prisons (31 cases). Fifteen subject areas attracted only one or two claims. After excluding immigration cases, and those involving multiple departments, the Home Office (SSHD) and the Ministry of Justice (SSJ) attracted the largest number of central government challenges (29 and 30 respectively). The Legal Services Commission attracted nine challenges, the Secretary of State for the Environment seven, and the Department of Communities and Local Government, six. The remaining 32 cases brought against central government departments were spread across the other departments, none of which had more than three JR hearings over the twenty month period covered by the research.

The next largest group of defendants was local authorities (109 cases, excluding those with multiple defendants). This comprised 69 authorities, of which only 20 had more than one JR final hearing over the 20 month period covered by our research. This accords with earlier findings that very few local authorities experience more than one or two JR challenges a year.<sup>32</sup> The areas of local authority activity most frequently dealt with at final hearing were planning (35 cases), community care (30 cases), age assessment (10 cases) and housing (10 cases). It may be noted in passing that the success rate for claimants in cases against local authorities at 46 per cent was consistent with the average claimant success rate of 44 per cent, though, as noted above, there was substantial variation according to the subject matter of the case.

The remaining challenges were to a wide range of bodies, including adjudicatory bodies, prisons, police, health authorities, regulators, professional bodies, Welsh Ministers and schools.

<sup>31</sup> The figures exclude cases where there were multiple defendants.

<sup>32</sup> Maurice Sunkin, Kerman Calvo, Lucinda Platt, Todd Landman, 'Mapping the use of Judicial Review to Challenge Local Authorities in England and Wales', [2007] *Public Law*, 545-567.

These figures indicate that no single public body or department were engaged in a strikingly high number of final hearings. The most litigated against government departments (SSHD and SSJ) were involved in an average of 1.5 final hearings per month over the period of the research.

## Section Three: The scope of the issue: individual redress and wider public interests

Judicial review is used both by claimants seeking legal redress against public bodies in relation to a specific grievance where no other suitable legal remedy exists, and to bring issues of wider public interest to the courts. While it has for long been recognised that JR is used both to seek redress in individual cases and as a means of pursuing broader policy and law reform objectives there is little empirically based information quantifying the various ways in which JR is used. This is an important issue for several reasons. Without such information it is difficult, for example, to know to what extent JR is used in order to resolve matters that could be resolved by other procedures. Better information on why JR is used will also throw light on the broader public interest roles of JR. To take one example, the previous coalition government made much of their concern that JR is abused by pressure groups, in particular those on the left, who the government claimed exploit and abuse the process for political ends in order to subvert and delay government decisions.<sup>33</sup> The then Lord Chancellor and Minister for Justice, Chris Grayling MP, took the unusual step of publishing an article in the *Daily Mail* in September 2013, in which he presented the need to introduce reforms intended to curtail the use of JR as part of a war on such groups:

One essential part of the campaigner's armoury is the judicial review, through which it is possible for them to challenge decisions of government and public bodies in the courts ... In proposing these changes, I will no doubt be accused of killing justice and destroying Magna Carta ... [but] ... Britain cannot afford to allow a culture of Left-wing-dominated, single-issue activism to hold back our country...

In fact, there were no published data indicating how often JR is used by campaigning groups or others for public interest purposes or how often it is used by those seeking redress in relation to their own problems. JR cases are not categorised by the Administrative Court, or in the official statistics, according to the scope of the issues raised or the claimants' motives. These were matters that we were therefore interested in exploring more closely.

We have already seen that the vast majority of cases in our judgment dataset had been brought by individuals and only 14 (3%) of the 502 cases had been brought by interest groups or charities. However, by itself this information only provides a very rough indication of how often JR is used to seek individual redress or to raise wider public interest issues because, for example, individuals may pursue JR on behalf of a group. In some cases it will be clear that the individual claimant is claiming on behalf of a group, but in others it will not. *Djangoly v LB Westminster*<sup>34</sup> is an example of where it was clear: here the claimant was the

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<sup>33</sup> This concern was behind the government's proposal, subsequently withdrawn, to narrow the test of standing. See S. Sedley, 'Not in the Public Interest' 36:5 *London Review of Books* 29-30 (2014). Also, Alex Mills, 'Reforms to Judicial Review in the Criminal Justice and Courts Act 2015: Promoting Efficiency or Weakening the Rule of Law?' [2015] *Public Law* 583-595.

<sup>34</sup> [2010] EWHC 1825 (Admin).

chairman of a campaign group formed to oppose charges for motorcycle parking in the City of Westminster. By contrast in *Griffin v LB Newham*<sup>35</sup> it was not obvious from the judgment whether the claimant, who sought to quash the Newham LBC's decision to permit variation of conditions to planning permission for operations at London City Airport, was part of an organised group.

In order to gain a better idea of the scope and nature of the issues raised by claims it was necessary to look closely at the judgments in the light of what we were told about the claims. This is probably the first time that such an exercise has been systematically undertaken across a significant cohort of JRs. The exercise was by no means straightforward, not least because: a) the motives of the claimant are not always clear from judgments; b) whether a claim will have ramifications beyond the particular claimant's case is not always easy to determine; c) while some JRs are clearly brought in order to raise public interest issues, cases that end up having significant public interest impacts may start out as claims brought by claimants who were only seeking redress for themselves.

We approached this aspect of the study by analysing the cases in the judgment dataset, drawing where necessary, on the questionnaire responses to gain further information about the cases, with a view to identifying the scope of the issues involved. In particular we distinguished between three types of claim: 'own fact' cases, 'procedure or policy' cases, and 'wider public interest' cases.<sup>36</sup>

'Own fact' cases are those in which the claimant challenged how law, policy, or procedure, had been applied to their particular circumstances, rather than the legality of policies or procedure themselves. Here, typically, claimants sought redress in a matter which directly concerned them in order to secure a service or benefit which a public authority had failed or refused to provide.

It may be noted that while 'own fact' cases concerned particular decisions, such cases may have broader ramifications, for instance by establishing a precedent or revealing a pattern of error. The following are examples of such cases, obtained from questionnaires and interviews with claimant solicitors.

- In a case concerning the legality of immigration detention following a prison sentence, the claimant's solicitor considered that the case helped to clarify Home Office practice relation to Home Detention Curfews and their overlap with the detention regime under the UK Borders Act 2007.
- A case concerning the early withdrawal of nursing and social care by the NHS before a compensation package became payable, set a precedent establishing that PCT/GP consortia are unable to decline statutory care on the basis that an individual has the ability to pay.

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<sup>35</sup> [2011] EWHC 53 (Admin).

<sup>36</sup> Our categorisation was supported by later findings of the study, see p. 42, below.

- A challenge to the legality of detention pending deportation of a person suffering from mental illness became the first case in England and Wales to establish that conditions of immigration detention breached Article 3 of the ECHR. According to the claimant solicitor, it was also significant in pointing to systemic issues with regard to detention of mentally ill people by the UKBA.

Repeated ‘*own fact*’ challenges can have a cumulative effect upon policy and practice. In our sample, for example, there are 14 cases brought by prisoners challenging refusals to allow oral hearings before the Parole Board. Eight of these challenges were allowed and six were dismissed. A barrister who acted for the defendants in several of these cases told us that, in one of them, the judge had stressed that granting an oral hearing was exceptional but, in his experience, such challenges were not, in fact, all that rare. He thought that such cases were likely to lead to more oral hearings ‘as prisons see the way the courts are leaning’. Not long after that comment was made, in *Osborn & others v Parole Board*, the UK Supreme Court established that oral hearings should normally be held.<sup>37</sup> It is impossible to measure the influence of the earlier cases on this change of approach by the courts, but the repeated attempts to challenge the status quo suggests that lawyers for prisoners had identified an area where change was needed and that JR was a means by which this could be achieved.

In another example, an experienced solicitor specialising in prison cases told us about policy changes introduced following one of his (dismissed) cases:

I can’t say that this came about as a direct result of the case, but there is a cumulative effect whereby JRs lead to changes in procedure and practice. For example, in one JR the judge said that the minutes of Category A meetings ought to be disclosed. I ask for it every time, and never get it, but things change in small incremental steps...

While ‘*own fact*’ cases challenged how law, procedure or policy had been applied in a particular claimant’s case, in ‘*procedure or policy*’ cases the claimant directly challenged the legality of procedures and/or policies themselves. Here, too, claimants will have typically been seeking individual redress. However judicial decisions in such cases are likely to have ramifications beyond the individual case in addition to their potential value as precedents. The following are examples of this type of case:

- A case challenging the lawfulness of kettling during peaceful demonstration was the first to establish that kettling was unlawful, and reversed the trend of earlier litigation.
- A case brought by one local authority against another on the question of which authority was responsible for the after-care of a mental health patient on her release from hospital clarified the law on the meaning of ‘resident’ under the MHA 1983

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<sup>37</sup> *Osborn & others v Parole Board* [2013] UKSC 61.

s.117(3) for the benefit for all local authorities in England and Wales. Both authorities agreed that this was a difficult and important area of law, and agreed to share the cost of litigation.

'Wider public interest' cases were brought by claimants for wider public interest reasons without seeking remedies for themselves. The ramifications of such cases would typically extend beyond individual decisions, although the claimants may have a direct interest in the outcome. Examples from our sample include *Hurley & Moore v SSBS*<sup>38</sup>, which concerned the legality of an increase in fees for higher education, and *Bone & National Secular Society v Bideford Town Council*<sup>39</sup> which concerned the legality of the requirement that prayers be said at the commencement of local council meetings.

Of the total 502 challenges, by using information from a variety of sources we identified 374 (75%) as 'own fact' cases, 88 (18%) as 'procedure or policy' cases, and 40 (8%) as 'wider public interest' cases.

### **The scope of the issue and judicial outcomes**

The judicial outcomes across the three types of case are summarised in Table 5.

Table 5: Outcome by interest, judgment dataset, (N=502)

	Own facts	Column %	Procedure/ policy	Column %	Wider public interest	Column %	All	Column %
Allowed	159	43	44	50	18	46	221	44
Dismissed	215	58	43	49	22	55	280	56
Total	374	100	88	100	40	101	502	100

Note: All percentages rounded to nearest percentage point.

As can be seen from Table 5, the highest success rate (50%) was achieved by claimants whose challenge concentrated on the legality of the procedure or policy (rather than on how procedure or policy was applied to their specific case), although the differences in judicial outcomes as between the three types of claim are not great. That claimants in 'procedure or policy' cases fared marginally better overall may suggest judicial reluctance to become embroiled in particular decisions. On the other hand, it is striking that the claimant success rate in the *wider public interest* category at 46 per cent is higher than the average success rate. It does not appear that judges are significantly more cautious about intervening where wider public interests are engaged; nor do these figures indicate that such challenges are considered by judges to be less meritorious or worthy of judicial intervention than those in the other categories.

<sup>38</sup> [2012] EWHC 201 (Admin).

<sup>39</sup> [2012] EWHC 175 (Admin).



### **The scope of the issue and the nature of the claimant**

Because we were unable to ascertain the nature of the claim by looking only at the type of claimant (for example, individuals may bring ‘*own fact*’, ‘*procedure or policy*’ or ‘*public interest*’ claims) we explored how the three types of case were distributed across claimants (see Table 6).

Table 6: Claimant category by type of claim, judgment dataset, row percentages (N=502)

	Own facts		Procedure/ policy		Wider public interest		Total (100%)
	N	Row %	N	Row %	N	Row %	N
Individual	312	80	64	17	12	3	388
Interest groups	1	7	0	0	13	93	14
Corporation / legal person	53	68	18	23	7	9	78
Public authority (not local/ central government)	3	75	1	25	0	0	4
Central government	0	0	0	0	1	100	1
Local government	5	29	5	29	7	41	17
All	374	75	88	18	40	8	502

Note: All percentages rounded to nearest percentage point.

Table 6 shows that, as we would expect, individuals were overwhelmingly likely to bring ‘*own fact*’ cases (80%). However, a substantial share (14%) of ‘*own fact*’ cases was also brought by corporations. As Table 6 shows 68% of cases brought by corporations were ‘*own fact*’ cases. Such cases were typically intended to protect financial or other interests. For example, a college challenged a decision to suspend it from the list of licensed sponsoring organisations for migrant students. Three of the four cases brought by public bodies, other than central or local government, were ‘*own fact*’ cases: a commissioner of police challenged a tribunal’s consideration of allegations of gross-misconduct; a chief constable challenged a decision to reduce punishment for serious misconduct; and a school challenged the legality of a time limit for compliance attached to a planning enforcement notice. It is interesting to note that 12 ‘*wider public interest*’ challenges were claims by individuals, (this only amounted to three per cent of all individual claims), and only 13 (out of the total of 40) were brought by interest groups. ‘*Wider public interest challenges*’ did however constitute the most common type of claim brought by interest groups. It is also interesting that seven of the ‘*wider public interest*’ cases were, in fact, claims by local authorities, and one was a claim by central government.<sup>40</sup>

Overall, two main conclusions can be drawn from the above findings. First, they confirm that JR is commonly used by individual claimants to seek redress in relation to specific disputes where no other effective legal remedy exists. It is arguable that such disputes could

<sup>40</sup> This concerned whether interested parties, bereaved families in particular, can be excluded when sensitive security service information is considered by the coroner: *SSHD v Assistant Deputy Coroner for Inner W London* [2010] EWHC 3098 (Admin).

be more proportionately dealt with by courts and tribunals other than by way of JR in the Administrative Court; and in the past provision has been made for dealing with such cases in alternative ways. For example, rights of appeal were established in certain homelessness situations so that they could be heard in the County Court. Moreover, since our research was undertaken, most immigration JRs have been transferred to the Upper Tribunal. Such developments may be applauded if they allow cheaper, quicker and more local methods of resolving legal disputes.

Second, we found fewer explicitly public interest claims than we might have expected given the recent expressions of concern by government to which we have referred. When taken together with the information on the profile of claimants, our findings do not indicate the existence of widespread abuse of the system by claimants seeking to use JR for public interest or political purposes, such as would justify general restrictions on access to the Administrative Court.

## Section Four: The consequences of judicial review

So far, we have concentrated on the profile of the cases in the judgment dataset and the judicial outcomes. We now turn to consider the consequences of court decisions in JR cases and in particular how these affected claimants. Here we are concerned with three types of consequence: first, whether the JR gave rise to tangible benefits; second, whether claimants experienced any intangible consequences; and third, the perceived wider consequences, if any, of the judgments, such as whether decisions were considered to have affected policy or procedures, or human rights protection. The findings in this part of the report are primarily based on the claimant solicitor dataset and interviews with claimant solicitors and those who represented defendants. The sources of information were augmented by searches of the internet and legal publications in particular to cross-reference what we were told about the consequences following judgments.

The backdrop to this aspect of the study is the fact that little is known about the value of JR as experienced by claimants and what, if any, outcomes are achieved by claimants following judgments in JR cases. Despite the paucity of robust evidence relating to outcomes there is a widely held and influential assumption that JR is unlikely to provide claimants with an effective route to tangible benefits even when their claim succeeds in court. There are several reasons for such an assumption. One lies in the process-oriented nature of JR proceedings, which means that when a body has been found to have acted unlawfully in the public law sense, the court will only very rarely substitute its decision for that made by the defendant: normally the matter is referred back to the public body for it to make a fresh decision in the light of the judgment. As we shall see, it is widely assumed that public bodies tend to reach the same decision on the substance of the matter as they had originally made, albeit this time in conformity with the law. In other words, even when claimants win their JR they may obtain little more than knowledge that the court has decided in their favour. A second related factor concerns the nature of remedies. JR offers a range of potential remedies that enables the court to: prevent unlawful action; require the performance of duties; quash unlawful decisions; and, to declare the legal situation. However, the court has only limited ability to require a public body which has been found to have exceeded or abused its powers to pay compensation or damages.<sup>41</sup> It is largely because of factors such as these that some, including the government, have argued that much JR litigation tends to be concerned only with technical matters of process and that even when claimants win the end result is often a decision that is substantively the same as one originally made. In other words, so the argument runs, JR is rarely worth the time, money and the fuss. As we will see our findings provide a rather different view of the effects of JR.

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<sup>41</sup> Damages may be awarded where there has been non-compliance with EU law and where a public body has been found to have breached human rights requirements: S 8 Human Rights Act 1998. The Law Commission, amongst others, has recognised that the absence of damages is a serious gap in the range of remedies available in public law: The Law Commission, *Administrative Redress: Public Bodies and the Citizen*, Law Com No 322, (2010). See further, David Feldman (ed) *English Public Law*, (2<sup>nd</sup> edn. 2009, Oxford UP), Ch 18.

## Tangible benefits

We first consider whether claimants gained what we refer to as tangible benefits, such as having a decision made (for example on an assessment of needs, when previously a public authority had refused to make a decision) or obtaining a service or benefit which an authority had previously decided against providing. Other tangible benefits considered included financial compensation and, perhaps more contentiously, obtaining an apology.

Table 7: Type of tangible benefit by outcome, claimant solicitor dataset, (N=198)

	Allowed (N=95)		Dismissed (N=103)		All cases (N=198)	
	Number	%	Number	%	Number	%
Provision / retention of service	23	24	10	10	33	17
Grant / retention of licence	7	7	3	3	10	5
Conferment / retention of status	8	8	4	4	12	6
Conferment / retention of state benefit	2	2	1	1	3	2
Compensation	20	23	1	1	21	12
Getting decision	21	22	7	7	28	14
Preventing closure of facility	1	1	1	1	2	1
Apology	2	2	3	3	5	3
Other	33	35	24	23	57	29
No benefit	20	21	62	60	82	41

Note: percentages sum to more than 100 as multiple responses can apply (apart from 'no benefit' which is exclusive). Percentages rounded to nearest point.

Table 7 summarises the principal tangible benefits that were obtained both when claims were allowed and when they were dismissed, according to the options offered on the questionnaire completed by the claimants' solicitor. See Appendix B for full text of question and response categories.<sup>42</sup>

If the solicitor ticked 'other', they were asked to specify what tangible benefit or benefits were obtained. 'Other' benefits so specified included: release from detention; release and damages to be agreed; ending of a deduction from a welfare benefit; reduction of bail curfew; members of The Law Society retained contracts that they had lost pursuant to an unlawful tender exercise, and a new exercise was put in place; case re-opened to a social worker and assessments remitted; continued employment; a (protracted) period of around two and a half years before being evicted.

As we can see from Table 7, the most common tangible benefit to be obtained was the conferment or retention of a service. This was true for both allowed and dismissed cases, although, unsurprisingly, the frequency was much higher in allowed cases. Getting a decision made was the second most common benefit for both allowed and dismissed cases.

<sup>42</sup> The questionnaire listed possible tangible benefits and invited open responses for 'other' tangible benefits that were not listed.

## *Judicial review and financial compensation*

In view of what was said above regarding the limited availability of monetary relief in JR proceedings it is perhaps surprising that Table 7 shows that obtaining compensation was indicated as a tangible benefit almost as frequently as retention of a service among allowed cases. Amongst the 502 cases in our judgment dataset, there were 43 cases in which financial compensation was known to have been claimed.<sup>43</sup> In 21 of those, we know from completed questionnaires or transcripts that damages had been awarded at the time of responding, or were expected to be awarded shortly thereafter, although details of the level of awards were not always provided. These were typically human rights claims in prison and immigration cases, involving detention and infringements of liberty. Often the cases involved avoidable delays.

In 14 of those cases we have details of the amount awarded (see below), although obtaining actual figures for awards made proved more of a challenge than anticipated. First, because in many cases this aspect was dealt with separately at a later stage, by consent or by a different court, and details were not available at the time of questionnaires or interviews. Second, solicitors and barristers often appeared somewhat reluctant to elaborate on the level of awards. This may partially be explained by the fact that a majority of these cases concerned the legality of detention or removal of asylum seekers, which tend to attract negative media coverage.<sup>44</sup> In any event, the issue of compensation appeared to be a delicate matter. One barrister told us that: ‘Neither party is interested in establishing a precedent, so it is a bit of a lottery and cases are negotiated on their own facts.’ Much of the information below detailing the level of awards was therefore obtained from the transcripts of judgments, rather than from the parties’ representatives.

As is to be expected, when compensation was awarded this was usually when the claimant had been at least partially successful. However, in one case an award of damages was made, albeit for a nominal £1, following an unsuccessful appeal from a dismissed JR. Here the court accepted that the claimant had been unlawfully detained and made a nominal award because the claimant would have been detained in any event.<sup>45</sup> Nominal damages of £1 for unlawful detention were also awarded in an allowed case where the claimant would have been detained in any event.<sup>46</sup>

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<sup>43</sup> These were cases in which either the transcript of the judgment or the completed questionnaires showed that compensation was claimed. The actual number is likely to be higher.

<sup>44</sup> One of the cases, *Mjemer v SSHD* [2011] All ER (D) 134 (May), attracted several virulent newspaper reports: *The Sun* referred to ‘Asylum Sickener... Judge gives illegal immigrant crook £17k’.

<sup>45</sup> [2011] EWCA Civ 909.

<sup>46</sup> [2012] EWHC 126 (Admin).

## Levels of awards

The following are examples of the issues and levels of awards in our sample. The details were obtained from transcripts as well as questionnaires and interviews. Where the information is in the public domain we provide a citation to the case.

### Prison cases:

- Issue: six month delay in holding a parole board hearing. HRA damages for six months delay: £300 awarded (£50 for each month of delay).
- Issue: delay in holding a review hearing following the expiry of a two-year minimum term imposed as an indeterminate term of imprisonment for public protection: £1,200 awarded equally against the SSHD and the Parole Board for mental distress.
- Issue: failure to recommend transfer to open prison: £1,250 awarded.

### Immigration/asylum cases:

- Issue: whether or not there was a realistic prospect of removal; awarded £75 per day of unlawful detention over 82 days, total £6,150. This is a rare example in which the court spelt out the level of damages. The judge also set out the appropriate facts to be taken into account. In this case, the fact that the claimant in effect chose detention in the UK over liberty in Iran was a relevant factor.<sup>47</sup>
- Issue: legality of detention pending removal of a mother who had previous dishonesty convictions: £8,500 awarded.
- Issue: detention of a failed asylum seeker: £1 nominal damages awarded for unlawful detention as claimant would have been detained in any event.
- Ditto, in a case that was dismissed.
- Issue: unlawful detention: £17,000 awarded.<sup>48</sup>
- Issue: age assessment affecting asylum decision leading to detention pending removal: £7,500 ordinary damages awarded plus £2,500 aggravated damages for unlawful detention.<sup>49</sup>
- Issue: unlawful removal of family from UK: £10,500 aggravated damages awarded plus £10,000 compensation for damage to property.<sup>50</sup>
- Issue: unlawful detention of failed asylum seekers and their children pending their removal in breach of Articles 5 and 8 ECHR: 'substantial damages' awarded.

### Other:

- Issue: refusal of accreditation for two power stations on the basis that they fell within exclusions under the statutory scheme for accreditation of non-fossil fuel

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<sup>47</sup> [2011] EWHC 1191 (Admin).

<sup>48</sup> *Mjemer v SSHD* [2011] All ER (D) 134 (May).

<sup>49</sup> [2011] EWHC 3073 (Admin).

<sup>50</sup> [2011] EWHC 3667 (Admin).

generating stations. The claimant claimed losses totalling £2,750,197. This amount subject to mitigation was awarded.<sup>51</sup>

- Issue: disclosure of personal information, particularly concerning children. Compensation was expected to be the £300 the council had refused to pay as recommended by the Local Government Ombudsman.
- Issue: compulsory detention of person with psychiatric health problems: £1,250 awarded.

### *Tangible benefits for claimants, winning in court*

While claimants are more likely to gain tangible benefits when their claim is allowed than when it is dismissed, it can neither be assumed that successful claimants will always gain such benefits, nor, as we have just seen in relation to financial compensation, that unsuccessful claimants will never do so.

Of our 198 completed claimant solicitor questionnaires, 95 related to cases in which the claimant had been fully or partially successful in court (excluding any further appeals). Table 8 shows that in 75 of these 95 cases, claimants were deemed to have obtained one or more tangible benefits. In over half the cases they obtained two or three such benefits, and in three per cent of cases, four or five such benefits. However, there were 20 cases (21%) where the claimant was at least partially successful in court, but in which there appears to have been no tangible benefit. Given what has already been said about the assumed ineffectiveness of JR as a route to tangible redress, that a substantial number of successful claimants obtained no tangible benefits was unsurprising. Indeed, if anything, this proportion might have been expected to have been somewhat higher since it indicates that in nearly 80 per cent of these cases at least one tangible benefit had been obtained.

Table 8: One or more tangible benefits by judicial outcome

	Allowed	Col %	Dismissed	Col %	Total	Col %
No tangible benefits	20	21	62	60	82	41
One or more tangible benefits	75	79	41	40	116	59
<b>Total</b>	<b>95</b>	<b>100</b>	<b>103</b>	<b>100</b>	<b>198</b>	<b>100</b>

Note: All percentages rounded to nearest percentage point.

In fact when we looked more closely at the cases and at the solicitor responses we found there to be several further cases where no tangible benefits were identified in the questionnaire, even though they appeared to have arisen, perhaps because the benefits were not a direct consequence of the JR judgment. An example was a case in which the court had

<sup>51</sup> [2011] EWHC 1873 (Admin).

quashed a decision to return a vulnerable individual to Turkey where they might have faced interrogation. The judgment halted the removal but it was a later tribunal that allowed the appeal against the removal. In our view, the halting of the removal could have been considered to be a tangible benefit, as could the ability to access the tribunal and its eventual decision. None of these plausible benefits were indicated as such by the claimant's solicitor. It is also worth noting that in all but seven of the 20 cases where no tangible benefits were indicated, the claimant was said to have experienced positive intangible consequences (on which see below). Finally in this context, it also needs to be recognised that not all cases are brought in order to achieve tangible benefits. For example, in a successful case against the Commissioner for Police, we were told that the claimant had not sought damages but wanted and 'achieved vindication and "closure" '.

#### *Tangible benefits for claimants after losing in court*

We now turn to look more closely at the cases in which claimants were deemed to have obtained tangible benefits despite their claim being dismissed. In 40 per cent of dismissed cases in our sample (41 out of 103 cases) we were told that claimants had obtained at least one tangible benefit, and in four of the cases they were said to have secured more than one such benefit. Even allowing for the possibility of some bias on the part of claimant solicitors, this is a striking indication that tangible benefits may be achieved despite failure in the court. Examples were provided by both claimant and defendant lawyers of different types of benefit arising directly and indirectly from dismissed JRs. These range from specific benefits to the individual claimants such as the continued provision of community care services to broader changes in policy. In one community care case, for example, engagement in the JR process, led the defendant public body to reconsider its policy to reduce respite care for disabled people. While the challenge to the reduction in services was unsuccessful the council nonetheless altered its approach as a result of the challenge and continued to provide the services. The claimant solicitor reported that:

None of the clients who remained at home were reassessed, so the level of respite care remained as it was ... [the council] seem to have accepted that this [i.e. their previous decision to reduce respite care] was the wrong approach...

Indeed, in that case, an appeal was withdrawn by the claimant following the introduction of a new policy.

In another successfully defended challenge to cuts in a local authority's community care budget the defendant authority nevertheless decided not to proceed with some aspects of the cuts and to revise its process. The local authority told us:

Despite the fact that this challenge was unjustified and unsuccessful, it made us alive to the fact that this sort of challenge wasn't going to go away so we sat back and looked at the procedure again. We revised the equality analysis template, provided



bespoke training to decision-makers and to those drafting the reports and updated the guidance going out to offices. We'd rather go too far and do too much than be accused of wasting resources. The procedure prior to the case wasn't bad, as shown by the fact that we won the case, but we got a better toolkit to address issues as a result. Previously the focus was on decision making. Now we developed other aspects to help managers deliver services, to assess if there are better ways to deliver in the spirit of the legislation, help measure and analyse the process, so it now works better.

Another example is a case in which the court decided that the defendant local authority had not breached the disability equality duty under section 49A of the Disability Discrimination Act 1995 when deciding to reduce its budget for adult social care. However, during the proceedings the local authority 'clarified' the intention behind its decision and confirmed that all eligible needs would continue to be met. Despite losing their claim, therefore, the claimants benefited from this, as did a large number of disabled people living in the area who received support from the local authority for their non-personal care needs.

Real, if indirect, benefits arose from a failed challenge brought by a learning-disabled adult prisoner to the manner in which a prison had handled his complaint that he had been sexually assaulted. The JR led the prison authorities to recognise that they had not correctly recorded the claimant's disability. His needs were then properly reviewed and a plan to meet them proposed.

Indications that defendants have changed their approach during the course of proceedings can also be found in judgments. For example, in giving judgment on a JR challenge to a consultation in a planning matter the judge found the flaw in the consultation process to be insufficient to justify impugning the process and therefore dismissed the claim. Nonetheless, the judge noted that 'in due course the claimant's objection did cause the defendant to change its mind'.<sup>52</sup>

A further example of an unsuccessful challenge achieving a positive outcome for claimants was a challenge by US prisoners to the Secretary of State's failure to prevent the export of sodium thiopental to the United States where there was strong reason to believe that the drug would be used in executions. The claim was dismissed, but the challenge led to the government changing its policy, thereby stopping the export of the drug. While the challenge failed on the law, it succeeded in its intention.

*Tangible benefits when public bodies are required to reconsider their decisions or actions*

A successful legal challenge often means that public bodies are required to reconsider the challenged decision. Arguably this represents JR at its strongest and most coercive,

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<sup>52</sup>JL & AT Baird v The Environment Agency [2011] EWHC 939 (Admin), at [20].

especially when a quashing order reflects the court's emphatic view that the illegality warrants removal of the decision. On the other hand, the situation may also display the profound weakness of JR as a provider of effective redress. As we have already seen, it is widely assumed that when public bodies are required to reconsider their decision following a successful challenge they will tend to remake 'the same decision, though taking care to avoid the earlier legal error'.<sup>53</sup> If this were the normal consequence of JR litigation it would undoubtedly strengthen arguments to the effect that much JR litigation is not worth the bother, fuss or cost and that JR is an expensive and time consuming detour to a predictable outcome. Preventing the use of JR where it is highly likely that the litigation would not alter the final outcome of decisions was a prime motivation for the new requirement that relief or leave be refused where 'it is highly likely that that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred'.<sup>54</sup>

Research both in the United States and Australia has suggested that the value of JR in this context is greater than may be assumed. In the US Peter Schuck and Donald Elliott found that remand of decisions back to US agencies resulted in 'major changes' in the petitioner's favour in 40 per cent of cases.<sup>55</sup> In Australia, Robin Creyke and John McMillan found that in about 60 per cent of the cases in which the Australian Federal Court set aside an agency's decision, the applicant ultimately obtained a favourable outcome. Creyke and McMillan conclude that the belief that after being successfully challenged administrative bodies will routinely seek to re-make their original decision 'has been disproved'. They conclude that:

If theories are built upon facts, then the value of judicial review in producing a favourable outcome to an applicant has been demonstrated.<sup>56</sup>

The factors explaining these findings are no doubt complex and, as Professor Peter Cane warns, we should not assume that studies of JR in one jurisdictional context help to understand its influence in other jurisdictional contexts.<sup>57</sup> Our research provided an opportunity to look at the issue across the spectrum of JR in England and Wales and produced findings consistent with those summarised above.

In our study, among the 100 cases in which the claimant was successful in court either at first hearing (without it being overturned) or on appeal, there were 43 cases in which we were told that a decision of a public authority had been invalidated either by a quashing order or a declaration. The largest single subject area of the cases was immigration/asylum

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<sup>53</sup> Creyke and McMillan, in *Judicial Review and Bureaucratic Impact: International and interdisciplinary perspectives*, (Marc Hertogh and Simon Halliday, eds. Cambridge University Press, 2004), p 186.

<sup>54</sup> Section 84 Criminal Justice and Courts 2015.

<sup>55</sup> P.H. Schuck and E. D. Elliott, 'To the Chevron Station; An Empirical Study of Federal Administrative Law' [1990] *Duke Law Journal* 984, at 1059-60.

<sup>56</sup> *Judicial Review and Bureaucratic Impact: International and interdisciplinary perspectives*, (Marc Hertogh and Simon Halliday, eds. Cambridge University Press, 2004), p. 186.

<sup>57</sup> P. Cane, 'Understanding Judicial Review and its Impact', *Judicial Review and Bureaucratic Impact: International and interdisciplinary perspectives*, (Marc Hertogh and Simon Halliday, eds. Cambridge University Press, 2004), p 31.

(13 cases). There were also seven community care and seven prisons cases. In nine of these 43 cases no fresh decision had been made by the authority by the date the questionnaire had been completed. There were therefore known final outcomes in 34 of the cases. In only four of these 34 cases were we told that the public body had made the same decision on the substance as it had originally made.

Interestingly, in each of the four cases where the authority had reached another decision that was unfavourable to the claimant, the claimant was nevertheless said to have obtained either tangible or intangible benefits. In two of the cases the fresh decisions were retaken in a manner that complied with the equality duties; in a third case, concerning adoption, although the fresh decision was substantively the same as that which had been quashed, the judgment was said to have improved policy and clarified the law; and in the fourth case there was a second unfavourable asylum decision; but here too the claimant solicitor said that the judgment improved human rights protection and provided a helpful precedent and the claimant's experience of JR was said to have given a sense of empowerment and led to increased confidence in the system.

In the remaining 30 cases the public bodies made fresh decisions which favoured the claimant. The outcomes included the following: continuation of statutory care including the purchase of needed equipment; a fresh care plan with appropriate placement and an increased budget; a fresh assessment of needs with appropriate provisions and a dedicated social worker; retention of appropriate level of respite care; an increase in the budget for residential care and accommodation services for the elderly; entitlement to police injury pension; a grant of humanitarian protection and social services support; release from detention pending deportation and the grant of damages; a statutory plan and a personal adviser provided in an age assessment case; a fresh inquest into a death in custody; the continuation of a Legal Services Corporation contract; retention of a licence by a language school; the carrying out of an environmental impact assessment; the removal of days wrongly added to a prison sentence for disobeying rules; access to education in prison; release from prison following a fresh parole review.

The range of situations is clearly diverse and the factors leading to the particular outcomes are likely to have been dependent on the case. In some, the authorities will have reconsidered the matter in the light of the court's decision; in others, the fresh decision will have followed changes in circumstances, or the emergence of new information; in some, authorities may have decided to concede the matter in order to avoid future litigation or cost; and in some they may have simply accepted that their initial decision was wrong. Whatever the precise factors, it seems reasonable to argue that in these cases JR litigation made a significant and substantive contribution to the outcome and that the process was more than purely technical, formal or symbolic. Certainly the public authorities appear to have genuinely engaged with the consequences of the litigation and we found no evidence that in these cases that they responded in ways that were wholly negative or ritualistic. Bearing in mind that in such cases JR is likely to have been used as a last resort when no

other mechanism of redress was available, these findings reinforce the importance of access to the High Court's inherent supervisory jurisdiction. They also indicate that it may be far from easy to establish the ultimate outcome of cases at the permission stage.<sup>58</sup>

### ***Intangible consequences***

Whether or not JR leads to tangible benefits for claimants is important, but provides only limited insight into how litigants experience and are affected by JR litigation and the overall value of the process, including its non-instrumental contributions to the quality of justice and redress.<sup>59</sup> In this section we explore the intangible consequences of JR for claimants, as reported by their lawyers.

The claimant solicitor questionnaire asked about both positive and negative intangible consequences.<sup>60</sup> In relation to the former it asked whether judgments led to any of the following consequences for their client: a sense of empowerment; confidence in the legal system; or improved communication between the parties. The questionnaire offered an 'other' category and respondents were invited to provide specific details if they selected this option.

The questionnaire also asked whether the judgment had any of the following negative intangible consequences: a sense of disempowerment; lack of confidence in the legal system; worsened communication between the parties; and whether the process led to a sense of stress and/or frustration; whether the costs were considered disproportionate to the benefit gained. Here, too, solicitors were invited to indicate 'other' negative intangible consequences.

While for the most part the intangible consequences identified are self-explanatory, it might be useful to provide a brief explanation of why we asked about the effects of the case on communication between the parties. How parties to a dispute communicate with each other may significantly affect whether disputes arise and, when they do, how they are resolved. In particular *Dynamics of Judicial Review Litigation* showed that the quality of communication between parties to JR proceedings has a significant effect on early resolution of cases, on the quality of settlement, as well as on post-dispute dealings.<sup>61</sup> The better the communication between parties, the greater the likelihood that matters will be resolved before trial. Poor communication increases both the likelihood of matters getting to court and the potential for future disputes to arise.

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<sup>58</sup> As may be required by S 84 of the Criminal Courts and Justice Act 2015.

<sup>59</sup> Lord Reed stressed the importance of procedural justice in the context of the need for the Parole Board to adopt fair procedures in *Osborn & others v Parole Board* [2013] UKSC 61, paras.67-71. See also Lord Hoffmann in *Secretary of State for the Home Department v (AF) (No 3)* [2009] UKHL 28; [2010] 2 AC 269, para 72. There is a huge literature on procedural justice; the work of Tom Tyler is of particular pertinence here: T. R. Tyler, *Why People Obey the Law* (2<sup>nd</sup> ed. Princeton University Press, 2006).

<sup>60</sup> See Appendix B for the full text of the questions and the response options. In this section we refer interchangeably to intangible 'consequences', 'effects', or 'outcomes'.

<sup>61</sup> *Dynamics of Judicial Review Litigation*, pp. 27, 31, and 42.

This was stressed by one local authority lawyer who said:

It is right ... that public services are challenged. JR is a good mechanism for access to justice. We robustly defend challenges where there is no justification [for them], but if there is any aspect that could be dealt with, we do. In nine out of ten cases the problem arises from poor communication and therefore resolved through better communication.

We cannot assume that solicitors can always accurately gauge their clients' responses to the outcomes of litigation, and it is possible that solicitors would tend to present a rather rosier image than would their clients, especially in cases where claims have been unsuccessful. Nonetheless, as we shall see, the findings are rather more mixed than we might have expected if such bias was driving the reporting. Moreover, the questionnaire was designed to provide sufficient opportunity for solicitors to report the negative as well as the positive aspects. Also, as noted earlier, that the participating solicitors responded across such a balanced sample of successful and unsuccessful cases provides *prima facie* reassurance that there was no explicit effort to present only the 'best' outcomes. The size and scale of the data base also allows less scope for individual (biased) respondents to overly influence the overall findings.

#### *Intangible consequences: complexity and variety*

Before exploring how specific claimants reacted to their case it is worth noting both that claimants across the sample were said to have experienced a wide range of positive and negative reactions to judgments and that their reactions were often mixed, with both positive and negative consequences mentioned. Since responses are likely to be strongly affected by whether the case was allowed or dismissed we first consider the overall range of intangible consequences, and how they varied depending on the outcome.

As we can see from Table 9 below, about half of all cases were deemed to have resulted in no positive intangible consequences for the claimant regardless of the court outcome, while Table 10 shows that in around 60 per cent of cases there were no negative intangible consequences. In other words, in around half of the cases there were positive intangible consequences and in around two-fifths of cases the claimants were reported to have experienced negative intangible consequences. The exploration of these aspects of the process, beyond the more obvious tangible benefits discussed above, while limited because the claimants' perceptions are filtered and interpreted by their solicitors, nonetheless offers a starting point for further consideration of these previously unexplored aspects of the JR process. As would be expected, for allowed cases, it was more likely that there would be positive intangible effects while for dismissed cases it was more likely that such effects would be negative. However, it cannot be assumed that success in court was always associated with positive intangible effects or that failure was always associated with negative

effects. On the contrary, we found a considerable degree of cross-over: 29 per cent of dismissed cases were associated with one or more positive intangible effects, while 18 per cent of allowed cases were associated with one or more negative intangible effects.

Table 9: Number of positive intangible effects of case by allowed or dismissed, claimant solicitor dataset (N=198), column percentages

	Allowed		Dismissed		Total	
	Number	Per cent	Number	Percent	Number	Percent
0	23	24	73	71	96	48
1	31	33	22	21	53	27
2	30	31	7	7	37	19
3	11	12	1	1	12	6
Total	95	100	103	100	198	100

Note: All percentages rounded to nearest percentage point.

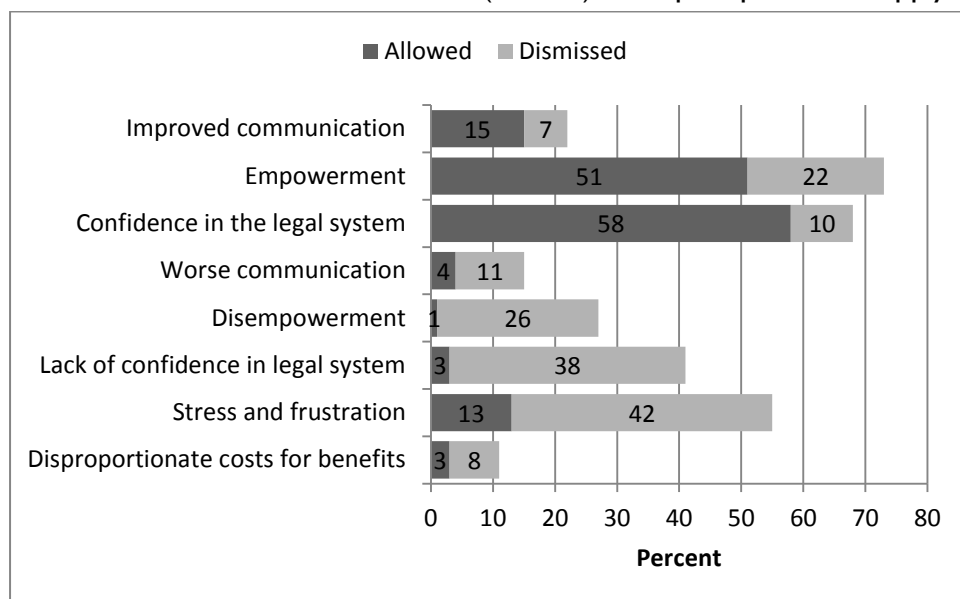
Table 10: Number of negative intangible consequences by whether allowed or dismissed, claimant solicitor dataset (N=198), column percentages

	Allowed		Dismissed		Total	
	Number	%	Number	%	Number	%
0	78	82	44	43	122	62
1	12	13	20	19	32	16
2	3	3	18	17	21	10
3	2	2	15	15	17	9
4	0	0	6	6	6	3
Total	95	100	103	100	198	100

Note: All percentages rounded to nearest percentage point.

When we come to consider the nature of the intangible outcomes and how they vary across allowed and dismissed cases, we see from Figure 4 that the most common positive intangible consequences were said to be an increased sense of empowerment and increased confidence in the legal system. While these consequences were much more likely to arise when claimants had been successful, they also occurred in a not insignificant proportion of cases where the claimant was unsuccessful. That around one in five claimants were regarded as having been empowered by the process despite losing in court underscores the perceived value of JR as a redress mechanism.

Figure 4: Positive and negative intangible consequences for claimant, by allowed and dismissed, claimant solicitor dataset (N=198), multiple options can apply to a single case

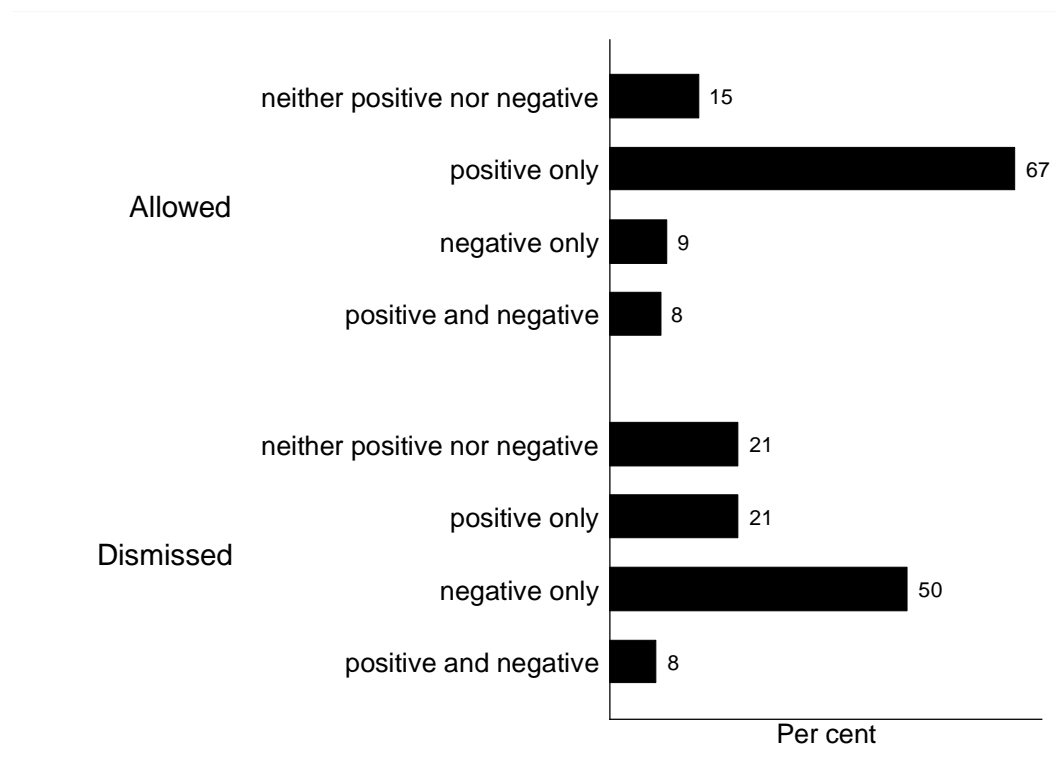


Note: Respondents could specify as many positive and/or negative intangible consequences as they chose.

The most common negative intangible consequences were said to be stress and frustration and lack of confidence in the legal system. Not surprisingly, these tended to arise when claimants were unsuccessful. However, as indicated winning in court did not necessarily mean that all reactions were positive. For example, a not insubstantial share of successful claimants were said to have experienced stress and frustration. There were relatively few cases in which it was suggested that claimants considered the costs to be disproportionate to the benefits, especially when compared with the number of cases where stress and frustration was identified. The relationship between costs and benefits is a matter to which we turn in the next section.

A single case can result in a combination of both positive and negative intangible consequences. Figure 5 therefore illustrates how all the cases mapped out across the following dimensions: neither negative nor positive intangible consequences; negative consequences only; positive consequences only; and, both negative and positive consequences. Only a minority of cases were said to result in both positive and negative consequences, which is not surprising since some of the consequences are mutually exclusive: the same case cannot, for example, result in both empowerment and disempowerment. Nevertheless, in 16 cases (8%) there were said to be a combination of positive and negative intangible consequences. This illustrates the complexity of the experience of JR and the difficulty of prejudging positive or negative intangible outcomes.

Figure 5: Composition of intangible consequences by allowed and dismissed, claimant solicitor database (N=198), percent within outcome



Note: All percentages rounded to nearest percentage point.

For the most part, the findings are unsurprising. It is, for instance, to be expected that significant numbers of successful claimants would have gained confidence in the system and/or felt empowered by the experience. It is also to be expected that many unsuccessful claimants would be disappointed and therefore experience loss of confidence in the system and would feel disempowered or frustrated. Two particular matters are noteworthy, however. First, we expected to find more evidence indicating that successful claimants are frustrated by having to walk away from court without a fresh and favourable decision when public bodies are found to have acted unlawfully. The findings suggest that this sense of frustration amongst claimants is not widespread. If this is an accurate reflection of how claimants feel, it may be due to the care solicitors take to explain the process to claimants, or it may be that solicitors are underestimating the level of dissatisfaction, or a combination of both.

Second, we were struck by the number of claimants who were said to have experienced the process as positive despite losing in court. In particular, almost as many unsuccessful claimants were said to have gained a sense of empowerment (20) as were said to have experienced a sense of disempowerment (24). This is a further indication that the worth of JR cannot be assessed solely in terms of the tangible outcomes achieved following litigation. There are clearly a number of issues here that we were not able to investigate, including those associated with the nature of the process and how claimants engaged with it. It is also worth stressing that our work focused on claimants who were represented and research is



needed on to look more closely at the experience of self-representing claimants, especially given that self-representation is becoming more common.

The above findings from the questionnaire responses were fleshed out in our follow-up interviews. These threw additional light on how claimants experienced JR and its implications. As the following examples illustrate the reactions ranged from the very positive to those which were mixed and equivocal.

A claimant who was one of a group of parents who successfully challenged the reduction in the level of care for their disabled children gave the following positive account:

As a result of the case my son got back the level of care and respite that he had before the changes... I quite enjoyed going to court. I ...found it very interesting. We didn't know what would happen until the judge said it. It was quite emotional. It was quite amazing that we've done it... There were four of us involved in the case... We felt we were dealing with the same problems, and we became a support group for each other.

A claimant solicitor in another case told us that: 'the client was very pleased with the outcome. It has provided him with an actual resolution. He no longer has to disclose the caution, and he is now in employment'. Another solicitor said that although his client, a prisoner, had been unsuccessful in his challenge to a re-categorisation, he nonetheless had a positive view of the process:

He felt that the JR, despite losing, was a positive experience and gave him a sense of empowerment. He was very down, feeling that he is never going to be released, and the case gave him the feeling of being listened to; the judge's comments, especially, gave him hope and increased confidence on the basis of that reasoning.

A claimant solicitor said that following a successful challenge to unlawful detention of severely mentally ill men by the UKBA their client's 'condition is greatly improved. He is now receiving support from the Community Mental Health Team. He is very pleased with the outcome'. Others were said to have had mixed feelings about their experience of JR. A claimant solicitor who acted for a group of minors seeking asylum said that the claimants experienced:

...empowerment as well as frustration with the process: on the one hand, they couldn't believe how they were able to challenge that the way they were treated was wrong. One of them said that he assumed that the Home Office could do whatever they wanted. They felt empowered by being able to voice their experiences and challenge and to make a difference to the way that all children were treated on arrival. But there was also frustration due to the length of the process, the ongoing

changes in the position of the Secretary of State, the RMJ [Refugee and Migrant Justice] going into administration.

Another solicitor reflected their client’s frustration with the process: ‘the claimant had won but was no closer to the situation being resolved for a long time’.

***The wider effects of decisions: the claimants’ perspective***

We have been considering how JR decisions are said to have affected the claimants directly, both in terms of their tangible benefits and intangible consequences. We now consider what claimant solicitors told us about the wider consequences of the court decisions, and in particular their benefits and costs in relation to policy; procedures; the clarity of the law; human rights protection; and their value as precedents.<sup>62</sup>

First, as before, we can look simply at the number of positive and negative wider consequences of the cases. These are illustrated in Table 11 for positive consequences and Table 12 for negative consequences. We can see that overall a little over 60 per cent of cases were seen to have at least one positive wider consequence and around 30 per cent were considered to have at least one negative wider consequence. In a few cases (12) as many as five positive consequences were attributed to the judgment (all in which the claimant had been successful), while in three cases (in which the claimant had been unsuccessful), five negative wider consequences were attributed to the judgment.

Table 11: Number of positive wider consequences by whether allowed or dismissed, claimant solicitor dataset (N=198), column percentages

Number of consequences	Allowed		Dismissed		Total	
	Number	Column %	Number	Column %	Number	Column %
0	12	13	64	62	76	38
1	17	18	20	19	37	19
2	22	23	7	7	29	15
3	19	20	8	8	27	13
4	13	14	4	4	17	9
5	12	13	0	0	12	6
All	95	101	103	100	198	100

Note: Percentages rounded to nearest point

<sup>62</sup> See the claimant solicitor questionnaire in Appendix B for wording of questions and response categories.

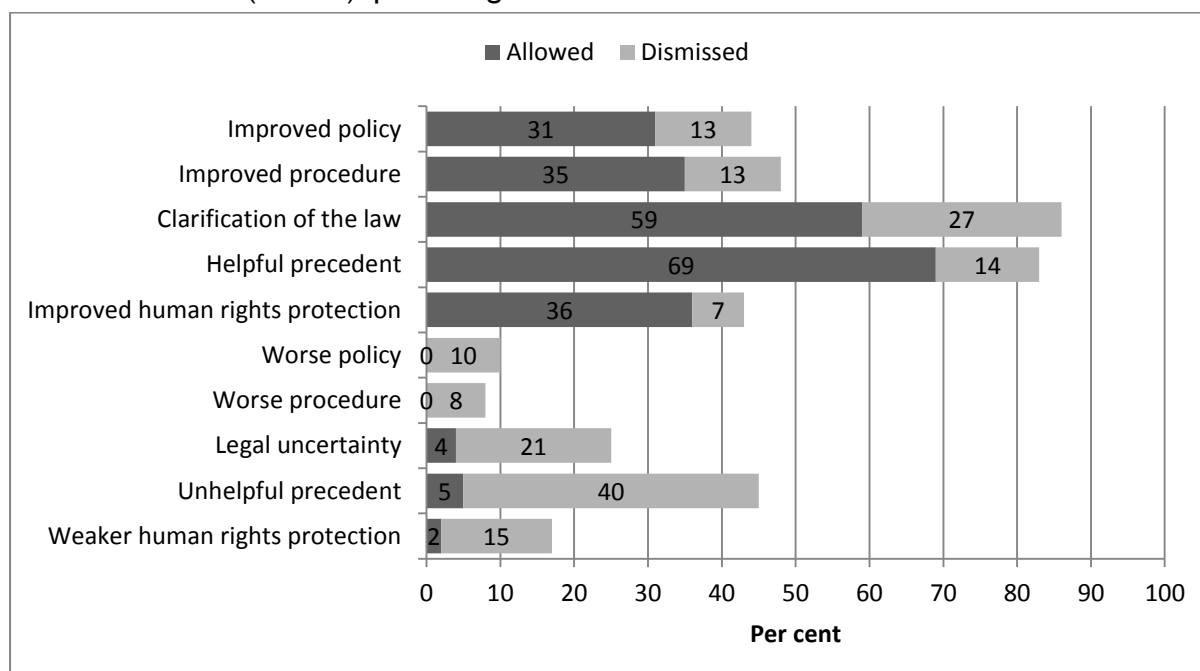
Table 12: Number of negative wider consequences by whether allowed or dismissed, claimant solicitor dataset (N=198), column percentages

Number of consequences	Allowed		Dismissed		Total	
	Number	Column percent	Number	Column percent	Number	Column percent
0	86	91	52	50	138	70
1	7	7	28	27	35	18
2	2	2	12	12	14	7
3	0	0	5	5	5	3
4	0	0	3	3	3	1
5	0	0	3	3	3	1
All	95	100	103	100	198	100

Note: All percentages rounded to nearest percentage point.

Figure 6 provides more information on the nature of these positive and negative wider consequences and how they are distributed across cases in which the claimant was successful or unsuccessful. According to claimant solicitors, in 86 per cent of cases the judgment had clarified the law; and in a similar percentage of cases from their perspective a helpful precedent had been set. Not surprisingly, negative consequences were more strongly associated with challenges that were dismissed, with unhelpful precedents and legal uncertainty featuring most prominently.

Figure 6: Positive and wider consequences by whether allowed or dismissed, claimant solicitor database (N=198), percentages



Note: Multiple responses allowed. All percentages rounded to nearest percentage point

Table 12 shows that only around one in five cases were regarded as having no wider consequences, a quarter of dismissed cases and only around one in eight of the allowed cases. Over a third of dismissed cases were regarded as having only negative consequences,

such as the creation of legal uncertainty or the establishment of an unhelpful precedent, while over three-quarters of allowed cases were seen as having only positive consequences. Nevertheless, as many as a quarter of dismissed cases were regarded as having only positive consequences and a further 13 per cent as having a mixture of positive and negative consequences. By contrast one in ten of the allowed cases were considered to have a mixture of positive and negative wider implications.

Table 13: Distribution of positive and negative consequences by whether allowed or dismissed, claimant solicitor dataset (N=198), column percentages

	Allowed (or in part)		Dismissed		All	
	Number	Col %	Number	Col %	Number	Col %
No consequences	12	13	26	25	38	19
Positive only	74	78	26	25	100	51
Negative only	0	0	38	37	38	19
Positive and negative	9	9	13	13	22	11
Total	95	100	103	100	198	100

Note: All percentages rounded to nearest percentage point.

#### *The wider consequences of ‘own fact’ and ‘wider public interest’ cases*

Finally in this section, we also investigated whether cases were particularly likely to have wider consequences of one sort or another when the case itself had wider public interest implications. In the claimant solicitor dataset there are only 15 cases which were categorised as *wider public interest* (7.6% in line with the 7.9% in the judgment dataset). Nevertheless, as Table 14 shows, all these cases were said to have had wider impacts. This, incidentally, would seem to confirm our categorisation of this class of case. The classification is further confirmed by the finding that 87 per cent of ‘procedure and policy’ cases were said to have wider consequences. Given this confirmation of our categorisation it is interesting that 76 per cent of the ‘own fact cases’ were also said to have wider consequences.

Table 14: Distribution of wider consequences by type of case, claimant solicitor dataset (N=198), column percentages

	Own facts		Procedure/ policy		Wider public interest		Total	
	Number	Col %	Number	Col %	Number	Col %	Number	Col %
No consequences	32	24	6	13	0	0	38	19
Positive only	61	45	29	62	10	67	100	51
Negative only	33	24	3	6	2	13	38	19
Positive and negative	10	7	9	19	3	20	22	11
Total	136	100	47	100	15	100	198	100.0

Note: All percentages rounded to nearest percentage point.

Overall, the responses suggest that JR judgments are seen by claimant solicitors to have significant consequences beyond the immediate effects on their clients. These are considered to be both positive and negative in relation to policy, procedure, the clarity of the law, and human rights protection. Together with the earlier discussion of tangible and intangible outcomes these findings further underscore the varied ways by which JR may be considered to add value not only in relation to the direct rights, interests and experiences of claimants, but also in terms of its wider effects on such matters as clarity and development of the law. Such findings highlight the complexities of attempting to assess the costs and benefits of JR. As indicated, we return to the issue of costs later in the report.

### ***The effects on public bodies***

We now turn briefly to what defendant solicitors told us about the effects of judgments on public bodies. The responses to the questionnaires and interviews highlighted the range of ways in which JR judgments affect public bodies. They confirm the findings of previous research showing that it cannot be assumed that JR is only viewed negatively by defendant public bodies and that JR only exerts a negative impact on the quality of public administration.<sup>63</sup>

As might be expected, we were told that JR litigation imposes significant costs on public bodies. A lawyer who regularly acts for defendants told us, for example, that even where a case has no merit it can absorb substantial resources.

The local authority solicitor had spent at least a week working on [one case] even though it has no merit: so they try to be very careful in their decisions to avoid [challenge] as best they can. ... Although local authorities win most of their consultation cases, the fact that challenges are brought makes authorities more careful, as the mere fact of a JR challenge is such a pain to them.

When asked whether being 'more careful' and taking steps to 'avoid' future challenge is purely about seeking to proof against JR, or whether there is a genuine concern to introduce improved practices, the lawyer responded that 'it is a combination of the two. Authorities make an effort to get better evidence to base their conclusions on'. Expanding on this they said that: 'The view of most defendants is that if they don't like a [court's] decision they will do only what they absolutely have to'. However they also stressed that:

JR is about fairness. This is not a bad thing... Indeed the standards of consultations have gone up tremendously in the last 10 years, partly due to legal challenges, plus greater guidance which leads to a better process and better decisions.

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<sup>63</sup> 'Judicial Review Litigation as an Incentive to Change in Local Authority Public Services in England & Wales', Lucinda Platt, Maurice Sunkin, Kerman Calvo, *Journal of Public Administration Research and Theory*, 20:243-260 (2010).

Both the value of JR and its potentially adverse effects on skewing priorities was emphasised by an experienced local authority solicitor:

[The department] sees JR as a nuisance in terms of having to run around and deal with things out of turn. It causes inconvenience, having to prioritise some case over another. This is the Council's perspective. I appreciate that it looks differently from the perspective of a person who has been waiting for a decision... I wouldn't like it to be made more difficult to bring a JR; it is a good check on authorities, ensuring that public bodies do things as they should.... We have a law centre in the borough, and I'd be very sorry not to have them. It is important for people in the borough to have somewhere to go to when they think that something is wrong.

These comments reflect some of the underlying tensions in relation to JR. Legal challenges are highly confrontational and responding to them is resource intensive; they are also often difficult for public authorities to predict and therefore to plan for. Challenges also focus attention on particular decisions and can oblige public bodies to give priority to certain claims on their resources. Whether JR drives improvements in the quality of public decision-making largely depends on the willingness and ability of public bodies to learn from their experience of JR. As previous research has shown, this can be difficult, especially when it involves introducing new decision making cultures or revisiting policy and adopting new budgetary priorities.<sup>64</sup> However, as that research shows, JR can enable significant improvements to be achieved.<sup>65</sup> While in this study we did not test this further there were clear indications of instances where JR had led public bodies to review and improve their systems and approaches. On several occasions, for example, we were told that while public bodies were confident that their decisions were reasonable and rational they 'took on board the judge's comments' and recognised that they could have approached the matter in a better way.<sup>66</sup>

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<sup>64</sup> 'Judicial Review Litigation as an Incentive to Change', (above).

<sup>65</sup> *Ibid.*

<sup>66</sup> See e.g. The effects of the unsuccessful community care challenge referred to above (p 30).

## Section Five: Costs and funding

In July 2015, the Ministry of Justice noted in a consultation document that the available data on the costs relating to JR litigation:

...is not particularly substantial or quality assured, and comes from various sources. The methodologies used are not always clear, and nor is the sample size or approach... Further evidence of the total costs for claimants, including legal costs and associated matters, would be welcomed.<sup>67</sup>

Obtaining robust data on costs and funding has never been easy and much discussion has therefore been based on anecdotal information. So far as we are aware the research presented here is the first independent academic study to investigate the costs of JR proceedings in England and Wales. In this section we look at the level of costs incurred by claimants as reported by participating claimant solicitors, whether the claims were funded by legal aid or privately, and at the cost orders made by the court. In addition we investigate the relationship between benefits obtained by claimants, the level of costs, and the source of funding. See Appendix B for the text of questions and response categories.

As in the earlier sections of the report we provide a descriptive account of our findings. However, we also provide a more detailed quantitative analysis than previous sections. Specifically, we test whether the relationships between costs and sources of funding and the consequences of cases are ‘statistically significant’.

At the risk of becoming overly technical it is necessary to say a few words about our approach to the quantitative analysis. As well as looking at relationships between pairs of variables we examine whether associations between two variables stand when account is taken of the possibly confounding influence of other factors (such as whether an apparent association between legal aid funding and the achievement of tangible benefits, is in fact driven by whether or not legally aided cases are ‘own fact’ cases). We also assess whether these ‘net’ associations are statistically significant. We use the conventional cut-off for statistical significance of five per cent: that is, we expect to find the relationship simply by chance in only five per cent of cases or fewer. On occasion we also identify where the relationship is significant only at the 10 per cent level: that is we might find the relationship simply due to chance in one in ten cases. We specify where we are using the less stringent 10 per cent level. We discuss our approach further, and the questions it can be used to answer, as we proceed.

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<sup>67</sup> *Reform of Judicial Review Proposals for the provision and use of financial information*, Ministry of Justice, Consultation Paper, July 2015, Cm 9117, paras. 69-71.

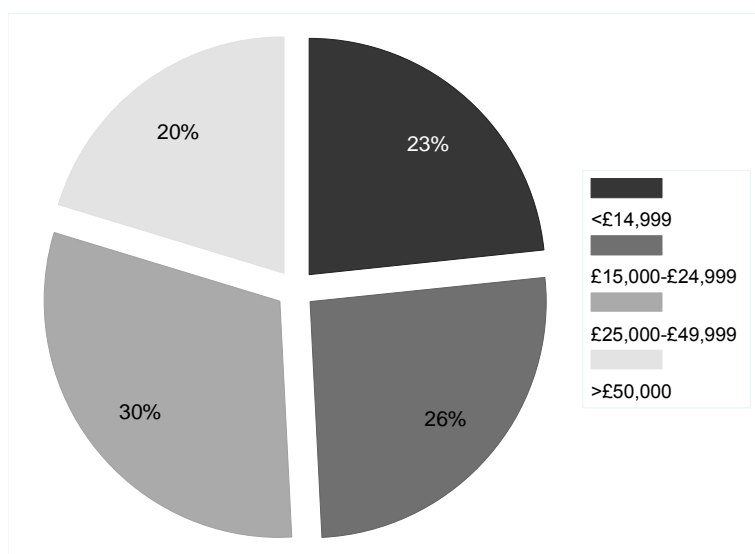
## Sources of funding

Legal aid funded 71 per cent of cases for which we obtained solicitor responses. As we noted earlier this is likely to be indicative of the judgment dataset as a whole.<sup>68</sup> It may have been that our sample was skewed, that is, that legally aided solicitors were more (or less) likely to respond, exaggerating (or understating) the apparent share of cases so funded. But there is no evidence that this was the case. It is also worth noting that the distribution was the same for allowed and dismissed cases. That is, 71 per cent of cases that were ultimately allowed, as well as 71 per cent of cases that were ultimately dismissed, were publicly funded.<sup>69</sup>

## Levels of costs

Respondents were asked to identify whether the costs were less than £14,999, between £15,000 and £24,999, between £25,000 and £49,999, or greater than £50,000. Figure 7 shows that similar proportions of cases, around one-fifth, fell into the top and bottom bands, with slightly larger proportions falling into the middle bands.

Figure 7: Distribution of costs, banded, claimant solicitor dataset (N=198)



It may be noted in passing that no case in our study involved costs anywhere near the level considered disproportionate in *Tesco plc v Competition Commission* where Tesco plc incurred costs of £1,391,904 in bringing JR proceedings and which is widely cited as an example of a case in which the costs were disproportionate.<sup>70</sup>

<sup>68</sup> See above for data quality, p 8.

<sup>69</sup> It should be noted, however, that ‘other funding’ cannot be read as the ‘counterfactual’ in the absence of legal aid, since it is most likely that the case would not be brought when legal aid is not available.

<sup>70</sup> [2009] CAT 26. The respondent incurred costs of £242,605. See e.g. *Review of Civil Litigation Costs, Final Report*, (Rupert Jackson TSO, December 2009), at para 4.4.



### Legal aid and levels of costs

Table 15 shows that legally aided cases tend towards the lower bands; the differences were statistically significant (at the 10% level).

Table 15: Costs amounts by whether or not legally aided claimant solicitor dataset (N=198) row percentages

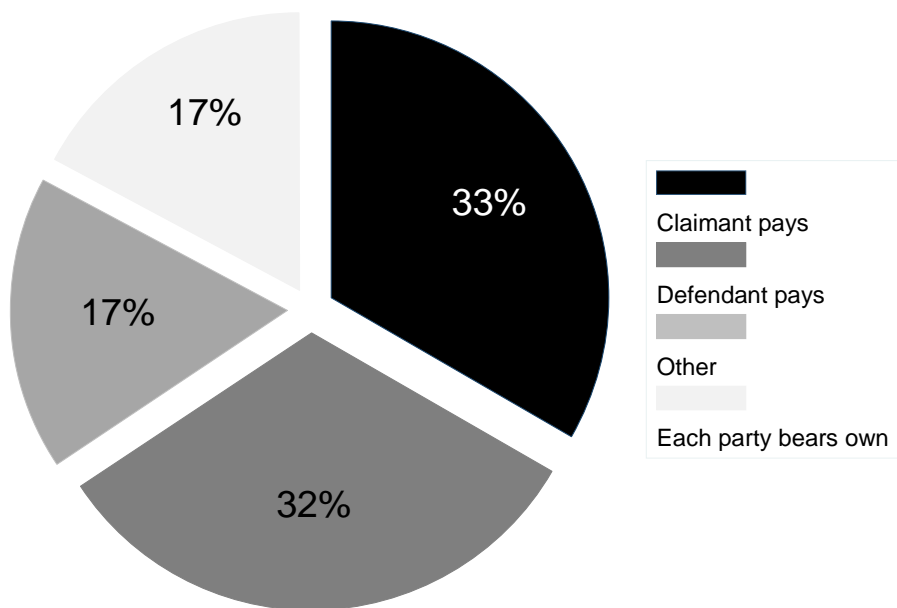
	<£14,999		£15,000-£24,999		£25,000-£49,999		>£50,000		Total	
	N	Row %	N	Row %	N	Row %	N	Row %	N	Row %
Legal aid	34	24	43	31	40	28	24	17	141	100
Other funding	12	21	8	14	20	36	16	29	56	100
Total	46	23	51	26	60	31	40	20	197	100

Note: All percentages rounded to nearest percentage point.

### Costs orders

Turning to costs orders, Figure 8 shows the distribution of costs orders. We can see that the claimant and defendant were each ordered to pay in one-third of cases. The remaining third was split equally between each party bearing their own costs and some other arrangement.

Figure 8: Distribution of costs orders, claimant solicitor dataset (N=198)



It is instructive to ascertain if, as might be expected, cost orders reflect the outcomes of the cases. Table 16 breaks down the distribution of costs orders by judicial outcome. We see that relatively fewer allowed than dismissed cases result in orders for each side to bear their own costs, while relatively more allowed cases invite some ‘other’ arrangement.

Table 16: Costs orders by judicial outcome, claimant solicitor dataset (N=198)

	Allowed		Dismissed		Total	
	Number	Column %	Number	Column %	Number	Column %
Each party bears own	8	8	26	25	34	17
Claimant pays	2	2	64	62	66	33
Defendant pays	60	63	4	4	64	32
Other	25	26	9	9	34	17
Total	95	100	103	100	198	100

Note: All percentages rounded to nearest percentage point.

We can also explore whether the nature of the cost order is influenced by the type of case being brought. Table 17 shows this breakdown, though here we have to be alert to the relatively small numbers of ‘wider public interest’ cases. Overall the differences are not statistically significant and it appears that success or otherwise, rather than whether, for example, cases concern their own facts or wider public interests is likely to be shaping the pattern of costs orders here. When we tested to see if there was any relationship between the scope of the case and the cost order, controlling for whether the case was allowed or dismissed, we still found no distinct pattern.

Table 17: Costs orders by the scope of the issues in the case, claimant solicitor dataset (N=198)

	Own facts	Column %	Procedure/ policy	Column %	Wider public interest	Column %	Total	Column %
Each party bears own	20	15	10	21	4	27	34	17
Claimant pays	51	38	10	21	5	33	66	33
Defendant pays	45	33	15	32	4	27	64	32
Other	20	15	12	26	2	13	34	17
Total	136	101	47	100	15	100	198	100

Note: Percentages rounded to nearest point

### **Protective costs orders**

Some specific comments need to be made about one species of costs order, Protective Costs Orders (PCOs) established by the Court of Appeal in *R (Corner House Research) v*

*Secretary of State for Trade and Industry*.<sup>71</sup> A PCO set a cap on the claimant's liability for the defendant's costs in order to ensure that claimants were not prevented from bringing matters of public importance to the court by the prospect of having to pay the costs of defendant public bodies. The Criminal Justice and Courts Act 2015 replaced PCOs with a new system of Costs Capping Orders.<sup>72</sup> The initial impetus for abolishing PCOs was government concern that judges had been too ready to grant these orders. The MoJ complained that the liberal approach taken by judges had: 'tipped the balance too far' and enabled 'PCOs to be used when the claimant is bringing a judicial review for his or her own benefit'<sup>73</sup> as well as facilitating 'the use of judicial review as a campaign tool with challenges brought by groups which do not have a direct or tangible interest in the claim'.<sup>74</sup>

Having examined the 502 cases in our judgment dataset and having asked solicitors to tell us whether a PCO was granted, we identified only seven cases (of which only three were not environmental cases) in which a PCO had been made.

As we noted above, the MoJ has subsequently acknowledged the paucity of robust evidence relating to costs of JR; the abolition of PCOs appears to provide an example of a potentially significant change being introduced on the basis of anecdotal impression rather than robust evidence and on consequential false assumptions about the use of PCOs.

### **Costs and Benefits**

We now consider costs and sources of funding alongside the benefits, if any, which accrued to claimants as a consequence of the litigation. In particular we address the following questions:

1. Are publicly funded cases associated with higher levels of tangible benefits and intangible positive consequences?
2. Do risks of intangible negative consequences vary depending on the source of funding?
3. Do such benefits and risks vary depending on the level of costs?
4. Is there any association between the cost order and wider benefits gained from the case?

We first look at these questions using simple tables, as have been used to describe the results from the datasets in the preceding sections of the report. We are interested in how far observed differences in our data are due to chance or can be considered 'statistically

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<sup>71</sup> [2005] EWCA Civ 192.

<sup>72</sup> The Criminal Justice and Courts Act 2015, ss 85-90. See Alex Mills, 'Reforms to Judicial Review in the Criminal Justice and Courts Act 2015: Promoting Efficiency or Weakening the Rule of Law?' [2015] *Public Law*, 583-595.

<sup>73</sup> Judicial Review: Proposals for further reforms, September 2013, Cm 8703, para 158.

<https://consult.justice.gov.uk/digital-communications/judicial-review>.

<sup>74</sup> *Ibid.* para 159.

significant', that is, to represent real differences. We then extend the analysis in order to evaluate whether there is a link between the nature of the costs order and the benefits of the case, controlling for other factors (funding source and judicial outcome). Again we use measures of statistical significance to distinguish those associations that appear to be 'real' from those that appear to be due to chance. Results are reported in simple summary form, for ease of interpretation, but full tables of results are available on request.

#### *Legal aid and tangible and intangible benefits*

Table 18: Positive consequences of case by source of funding (legal aid or other): any benefits, tangible benefits, intangible benefits, positive wider benefits and any of these, claimant solicitor dataset (N=198), cell percentages

	Legal aid (N=141)		Other funding (N=57)		Significantly different?
	Number	%	Number	%	
Any benefit	112	79	46	81	No
Tangible benefit	92	65	24	42	Yes
Intangible benefit	70	50	32	56	No
Wider benefit	86	61	36	63	No

Note: Percentages rounded to nearest point. Statistical significance was defined as  $P \leq 0.05$  in a  $\chi^2$  test.<sup>75</sup>

As Table 18 shows, tangible benefits are obtained in a higher proportion of cases funded by legal aid compared to those funded from other sources, and this difference is statistically significant (65% compared to 42%;  $p=0.003$ ). However, there is no difference in the rate of overall benefits (including tangible, intangible and wider benefits) obtained between the various types of funding. In other words, legally aided claimants are more likely to obtain tangible benefits from their claims than non-legally aided claimants, but legal aid funding is not specifically associated with other positive consequences.

We can speculate as to why legal aid is associated with tangible benefits. One factor is that this class of claimant is particularly likely to use JR in order to secure the provision of services from public bodies. It is worth noting in this regard that while 75 per cent of 'own fact' and 'procedure and policy' cases were funded by legal aid only a third of wider public interest cases were publicly funded; and despite the small numbers of wider public interest cases, this difference is statistically significant.

<sup>75</sup> A  $\chi^2$  test is a standard statistical test for a sample table to ascertain how likely that the values of two variables (e.g. source of funding and whether a tangible benefit obtained) are independent of each other or are actually associated. It tests this by comparing the values that would be expected if the variables were independent with those observed in the data. It also takes account of the size of the sample to determine if any differences in the sample are due to chance in this sample or are likely to reflect actual associations. A P-value of less than 0.05 indicates that there is a less than 5 per cent chance that the variables are not genuinely associated.

Whatever the reasons, it suggests that legal aid is enabling JR to be used in order to obtain services to which claimants are legally entitled, where no other avenue of legal redress exists. An implication is that a reduction in the availability of legal aid for JR is likely to have a particular adverse impact on those seeking to obtain services which have been refused but to which they are legally entitled.

#### *Funding source and negative intangible consequences*

In relation to intangible negative consequences, we classify the absence of a tangible benefit as a negative tangible consequence, and then combine this with information we gained on negative intangible consequences (e.g. disempowerment) and wider negative consequences (e.g. unhelpful precedent). Again we show whether these differ by funding source, in Table 19.

Table 19: Negative tangible, intangible and wider consequences of cases by source of funding (legal aid or other), claimant solicitor dataset (N=198)

	Legal aid (N=141)		Other funding (N=57)		Significantly different?
	Number	%	Number	%	
Any negative consequences	76	54	43	75	Yes
Lack of tangible benefit	49	35	33	59	Yes
Negative intangible consequence	45	32	31	54	Yes
Negative wider consequence	40	28	20	35	No

Note: Percentages rounded to nearest point. Statistical significance was defined as  $P \leq 0.05$  in a chi<sup>2</sup> test.

We see both that the absence of tangible benefits is negatively associated with legal aid funded cases (consistent with Table 16) and also that in legally aided cases there are significantly fewer negative consequences overall. The differences in the rates of wider consequences by funding source are not, however, statistically significant. In other words, amongst legally aided cases there tend to be relatively more claims that generate tangible benefits and which have no intangible negative consequences.

#### *The relationship between costs and benefits*

We now turn to the question of how costs relate to benefits. Do more costly cases deliver greater returns or is the opposite in fact true?

We examine whether and how the presence of a benefit (or a negative consequence) varies with the level of the costs. That is we look at a series of tables where the level of cost in the four bands is set against, in turn: having any type of benefit (tangible, intangible, wider); the specific type of benefit; having any type of negative consequence; and the specific type of negative consequence. We perform standard statistical tests to assess whether any resulting relationships are likely to be real, rather than occurring by chance in our sample, and only report such ‘statistically significant’ relationships. We summarise the results in Table 20.

Table 20: Summary of relationship between positive and negative consequences of case and the rate of costs (according to the bands), claimant solicitor dataset (N=198)

<b>Benefit / Negative consequence</b>	<b>Nature of relationship</b>
<i>Positive consequences</i>	
Any type of positive consequence	More positive outcome for higher cost cases
Tangible benefit	More positive outcome for higher cost cases
Intangible benefit	More positive outcome for higher cost cases
Wider positive consequences	More positive outcome for higher cost cases
<i>Negative consequences</i>	
Any negative consequences	No significant difference by costs
Lack of tangible benefit	Fewer negative consequences in higher cost cases
Negative intangible consequences	No significant differences by costs
Wider negative consequences	More negative consequences in middle cost bands

Note: Statistical significance was defined as  $P \leq 0.05$  in a chi<sup>2</sup> test.

Interestingly, Table 20 reveals a largely consistent pattern whereby higher costs are related to more positive consequences. It therefore suggests that the more costly cases are generally associated with greater benefits and could be argued to be ‘good value’, if this is the measure of value. The pattern for negative consequences is less consistent and suggests that there is no real relationship between the cost of the case and whether the case leads to disadvantages from the claimant’s perspective.

The analysis summarised in Table 20 was repeated for legal aid only cases. The results can be found in Table 21. Even with the smaller number of cases, the results are the same as for Table 20. One general observation then is that there is an association between higher levels of cost to the legal aid fund and the tangible and intangible benefits obtained by claimants: in short, higher cost to the legal aid fund is associated with greater overall benefit to the claimant

Table 21: Summary of relationship between positive and negative consequences of case and the rate of costs (according to the bands), claimant solicitor dataset legal aid cases only (N=141)

<b>Benefit / Negative consequence</b>	<b>Nature of relationship</b>
<i>Positive consequences</i>	
Any type of positive consequence	More positive outcome for higher cost cases
Tangible benefit	More positive outcome for higher cost cases
Intangible benefit	More positive outcome for higher cost cases
Wider positive consequences	More positive outcome for higher cost cases
<i>Negative consequences</i>	
Any negative consequences	More negative outcomes for lower costs cases
Lack of tangible benefit	Fewer negative outcomes in higher cost cases
Negative intangible consequences	No significant differences by costs
Wider negative consequences	More negative outcome in middle cost bands

Note: Statistical significance was defined as  $P \leq 0.05$  in a chi<sup>2</sup> test.

### *Costs orders and benefits*

We now look at how positive and negative consequences are linked to particular forms of cost orders. The findings are summarised in Table 22. Again we test whether differences from tabulations of negatives / positives against cost orders are significant and then inspect the tables to ascertain the direction of the association.

Table 22: Summary of relationship between positive and negative consequences of case and the type of costs order, claimant solicitor dataset (N=198)

<b>Benefit / Negative consequence</b>	<b>Nature of relationship</b>
<i>Positive consequences</i>	
Any type of positive consequence	Lowest where claimant bears costs
Tangible benefit	Lower where claimant bears costs or where each party pays own
Intangible benefit	Lower where claimant bears costs or where each party pays own
Wider positive consequences	Lower where claimant bears costs or where each party pays own
<i>Negative consequences</i>	
Any negative consequences	Highest where claimant pays and lowest when defendant pays
Lack of tangible benefit	Higher were claimant pays and where each party pays own
Negative intangible consequences	Highest where claimant pays and lowest where defendant pays
Wider negative consequences	Highest where claimant pays and lowest where defendant pays

Note: Statistical significance was defined as  $P \leq 0.05$  in a chi<sup>2</sup> test.

Analysis of the relationship between the positive and negative consequences of cases on the one hand and costs orders on the other provides remarkably consistent results. These show that when costs orders are against claimants they tend to achieve fewer benefits and experience more intangible negative consequences. This is unsurprising given that these cases would tend to be those in which the claimant has been unsuccessful in court.

However, these relationships are still potentially confounding different aspects of the case. Therefore we now look at relationships between costs, cost orders and obtaining any benefit, taking account of other important aspects of the case that are likely to influence the level of costs, the type of order and the potential benefit. We estimate the net associations of each relevant factor with a) the level of costs; b) the costs order; c) any type of benefit; and d) tangible benefits, holding the other aspects constant. Specifically we investigate:

1. the *level of the costs*, controlling for whether the claim was allowed or dismissed, the scope of the issues in the case ('own facts', 'procedure or policy' or 'wider public interest'), whether any type of benefit had been obtained, and the source of funding.
2. The *nature of the costs order*, controlling for whether the claim was allowed or dismissed, the scope of the issues in the case and the source of funding. Here, for ease of interpretation (and because of small numbers) we just look at cases where the claimant bears the costs, rather than all other possible outcomes (defendant paying costs, each paying their own costs, or other).
3. *Whether any benefit was received*, controlling for whether the claim was allowed or dismissed, the costs order, the scope of the issues in the case, the source of funding and the cost of the case. In relation to the scope of the issues in the case, we only include 'own fact' and 'procedure and policy' cases, as all 'wider public interest' cases result in some benefit being received and therefore cannot be estimated.
4. *Whether any tangible benefit specifically was achieved*, controlling for whether allowed or dismissed, the costs order, the scope of the issues in the case, the source of funding and the costs of the case.

In this report we simply summarise our findings, though the full tables of results are available from the authors on request.

In relation to (1), we find for *level of costs*, holding the other factors constant:

- 'procedure or policy' and 'wider public interest' cases are associated with higher costs when compared to cases that turn on their own facts;
- cases that are dismissed are associated with higher costs;
- the source of funding and whether any benefit was received are not associated with levels of costs, once we take account of the outcome and the scope of the case

This reinforces the perception that challenges to decisions based on the specific facts of the case are likely to be more specific and focused, and therefore less costly than those which



focus on the legality of procedure or policy, or which concern broader public interests. It is, however, interesting that ‘own fact’ cases that are dismissed are relatively more expensive, when taking account simultaneously of level of benefit, source of funding and type of case.

Turning to (2) and the *nature of the costs order*, we find, as can be expected, that holding the other factors constant, the outcome of the case is the main influence on whether the claimant is expected to pay costs. But we also find that:

- being non-publicly funded is associated with a higher chance that the claimant will be required to pay costs (at the 10% level);
- ‘procedure or policy’ cases are less likely (at the 10% level) than ‘own fact’ cases to result in the claimant being ordered to pay the costs, controlling for outcome and funding source.

Next, when inspecting (3), the link between *any positive consequence* (i.e. tangible, intangible or wider) from the case and the other factors, we find that:

- the claimant having to bear the costs is negatively associated with the case generating any type of benefit .
- Interestingly, ‘procedure or policy’ cases and ‘wider public interest ‘ cases are more likely to be associated with any benefit compared to ‘own fact’ cases, once other factors are held constant, even though, as we saw in the tables above, tangible benefits are more likely to derive from ‘own fact’ cases.
- Source of funding is not associated with *any positive consequences*, when these consequences are all grouped together. This is consistent with the finding in Table 18, which shows a positive association specifically for tangible benefits, but not for other types of benefit (or any benefit). We explore the relationship further with tangible benefits only below.
- Whether the case was dismissed is negatively associated (at the 10% level) with any benefit.<sup>76</sup>
- When taking account of the cost order and the source of funding we find no association between the cost of the case and the chances of benefit. While this appears to contrast with the relationship found from the simple tabulation of costs and any benefit reported in Table 21, the difference stems from the fact that we cannot estimate the relationship for wider public interest cases net of other factors because *all* such cases are deemed to have some form of positive consequence. This means we could not include these cases in this extended analysis taking account of multiple factors simultaneously. Moreover, because ‘wider public interest’ cases tended to be more costly, the relationship between cost and *any* benefit was disguised. However, below, we can see that even if the relationship between cost

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<sup>76</sup> Note that this is also controlling for the costs order, which already picks up much of the negative association.

and *any* benefit may have been driven by ‘wider public interest’ cases, the relationship between cost and *tangible* benefits held across all types of case.

- Nevertheless, if we restricted the analysis to publicly funded cases, we found, consistent with the results in Table 21, that higher cost was, for such cases, significantly associated with a greater chance of receiving any benefit, independent of whether the case was allowed or dismissed, the costs order, or whether it was an ‘own fact’ or a ‘procedure and practice’ case.

Because these results related to any form of positive consequence, which are linked in complex ways to the scope of the case, their outcome and the nature of the costs order, and also because they necessarily excluded the 15 ‘wider public interest’ cases from the analysis, we focused separately on whether the claimant gained a *tangible benefit* (4), using the full 198 cases.<sup>77</sup> From the claimant’s perspective gaining a *tangible benefit* is arguably the most significant outcome, and hence it is worth understanding what factors are associated with it.

Holding other factors constant we found that in relation to tangible benefits:

- whether the case is dismissed is (unsurprisingly) negatively associated with getting a tangible benefit; but net of this the costs order has no association with tangible benefits.
- Legal aid is positively associated with a tangible benefit compared to other sources of funding (note that is net of whether the case was allowed or dismissed and of the scope of the case).
- Higher costs are associated with increased chance of a tangible benefit being achieved (and again, note that this holds across types of funding and the scope of the case).
- Whether or not tangible benefits are obtained is not independently associated with whether the case is concerned with its ‘own facts’, ‘procedure or policy’, or ‘wider public interests’.

### ***Conclusions in relation to costs, sources of funding and benefits***

In terms of value for the claimant these regression results support the earlier descriptive analysis that legal aid cases and more costly cases are likely to achieve the greatest immediate benefits. Our evidence indicates that legal aid plays a significant role in enabling claimants to obtain tangible benefits given that these tend to concern services provided by public bodies to those likely to be dependent on legal aid when litigating. Put another way, the evidence here tends to confirm that restrictions on legal aid are likely to have a disproportionate adverse effect on enabling those dependent on public services to obtain benefits to which they are legally entitled.

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<sup>77</sup> Even though the wider public interest cases were all associated with some form of benefit, they were not all associated with a tangible benefit so could be included in this second analysis.

## **Section Six: General conclusions and summary of findings**

This report has considered the effect and value of JR principally from the perspective of represented claimants. It has provided new information on a number of aspects which, while central to an understanding of the process and impact of JR, have not previously been systematically researched and on which empirically based evidence has been lacking. In particular the report throws new light on:

- the nature of the JR caseload at the final hearing stage and in particular the distribution of cases according to whether they focus on their own facts, issues of procedure or policy, or concern wider public interests.
- The extent to which JR enables claimants to obtain tangible benefits, such as access to services which have been refused by public bodies, but to which they are legally entitled.
- The intangible consequences of JR litigation, including whether JR reduces or increases confidence in the legal system, or gives rise to a sense of empowerment or disempowerment.
- The cost and funding sources of JR claims, including the relationship between legal aid funding and whether tangible or intangible benefits accrued to claimants.

The research upon which this report is based concentrated on the effects of court decisions in 502 JR cases over a 20 month period. While our main information on these cases was compiled from court records and the judgments, our detailed information was obtained mainly from solicitors and barristers who acted for claimants or defendant public bodies.

The study would have benefitted had we been able to secure the involvement of a larger number of government lawyers. However, the response of claimant solicitors in particular provided an extremely rich source of information about how those who are closely engaged in the process view the effects of JR for their clients and for the wider public.

### ***Principal general conclusions***

At the outset of this report we outlined a number of charges that have been levelled against JR. These include claims that JR is a disproportionate and costly form of redress that is wasteful of public resources, provides little substantive benefit to successful claimants, and is frequently hijacked by interest group for political purposes. We posited that these claims were not substantiated, and in this study set out to add to the evidence by which they can reasonably be evaluated. To do so, we collected and compiled a comprehensive set of data addressing these issues. We found no empirical support for such widely repeated claims, but rather a substantial body of evidence supporting the value of JR as a means to obtaining substantive redress where no other form of legal remedy exists.

This research also highlights the value and importance of legal aid to securing tangible benefits in JR proceedings. The link between legal aid funding and obtaining tangible redress is of considerable importance, not least because it reminds us of the importance of ensuring that those who are most dependent on public services, often the most vulnerable, have effective access to JR. It also indicates that restrictions on access are likely to have a disproportionately adverse effect on the most needy.

We welcome the government's recognition of the need for more robust empirically based evidence relating to JR. Future work will no doubt augment and develop this study. To take one example of a matter that we do not touch on in this report but which is clearly of increasing importance: here we have concentrated on claims brought by those who are represented, but there is a growing need to understand the process from the perspective of unrepresented claimants and also to understand how the process is catering for such claimants.

### ***A summary of specific findings***

#### *The profile of cases: parties and type of claims*

Of the 502 cases in the judgment dataset, 78 per cent (388 cases) were brought by individuals and 22 per cent by non-individual claimants.

More than half the cases (256) were brought against central government. After excluding 133 immigration and asylum cases, the Home Office and the Ministry of Justice attracted the largest number of these challenges (29 and 30 respectively). The majority of other departments had three or fewer JR hearings over the twenty month period covered by the research.

Local authorities were the next largest group of defendants (109 cases, excluding those with multiple defendants). However, only 20 local authorities had more than one JR final hearing over the period covered by our research.

We distinguished between three types of claim: 'own fact' cases, 'procedure or policy' cases, and 'wider public interest' cases. Of the 502 cases in the judgment dataset, we considered 374 (75%) to be 'own fact' cases, 88 (18%) to be 'policy or practice' cases, and 40 (8%) to be 'wider public interest' cases.

The success rate for claimants was similar in each of these types of case: 43 per cent in 'own fact' cases; 50 per cent in 'procedure and policy' cases; and 46 per cent in 'wider public interest' cases. These figures therefore indicate that the overall quality of claims across these categories was similar. In particular, they do not point to high levels of abuse in wider public interest cases, nor a particular judicial reluctance to uphold claims in such cases

Individuals were overwhelmingly likely to bring ‘own fact’ cases (80%), although 14 per cent of such cases were brought by corporations, typically to protect financial or other interests. This confirms the expectation that JR is commonly used by individual claimants to seek redress in relation to specific disputes where no other legal remedy exists.

Our findings do not indicate the existence of widespread abuse of the system by claimants seeking to use JR for public interest or political purposes, such as would justify a general restriction on access to the Administrative Court.

### *Tangible benefits*

Claimants are more likely to gain tangible benefits when they win in court than when they lose. However, it cannot be assumed that successful claimants will always gain such benefits or that unsuccessful claimants will never do so.

Of our 198 completed claimant solicitor questionnaires 95 related to a case in which the claimant had been fully or partially successful in court (excluding any further appeals). In 75 of these 95 cases, claimants were deemed to have obtained one or more tangible benefits. In over half of the cases they obtained two or three such benefits, and in three per cent of cases, four or five such benefits. However, there were 20 cases (21%) in which the claimant appears to have gained no tangible benefit despite being at least partially successful in court.

Claimants may also obtain tangible benefits despite losing in court. In 40 per cent of the cases where claimants failed in court (41 cases) we were told that they had obtained at least one tangible benefit, and in four of the cases they were said to have secured more than one such benefit.

Claimants gained a wide range of tangible benefits, the most common were conferment or retention of a service by a public authority and getting the defendant public body to make a decision.

Among the 100 cases in which the claimant received a successful outcome either at first hearing or on appeal, there were 43 cases in which we were told that a decision of a public authority had been quashed and had been retaken. There were known final outcomes in 34 of these cases. In only four of these were we told that the public body had made the same decision on the substance as it had originally made (and in each of these the claimant was nevertheless said to have obtained tangible or intangible benefits from bringing the case). In the remaining 30 cases the public bodies made fresh decisions which favoured the claimant.

In these cases the JR litigation made a significant and substantive contribution to the outcome which was more than purely formal or symbolic. The public authorities appear to have genuinely engaged with the consequences of the litigation and we found no evidence in these cases of the authorities having responded in ways that were wholly negative or ritualistic.

These findings reinforce the importance of access to the High Court's inherent supervisory jurisdiction. They also show that JR can provide effective redress and cannot be assumed to be an expensive and time consuming detour to a known and predictable outcome.

#### *Intangible consequences*

Claimants appear to have a wide range of positive and negative reactions to judgments. The most common positive intangible consequences were said to be increased empowerment and increased confidence in the legal system. While these consequences were much more likely to arise when claimants had been successful in court, they also occurred in a not insignificant proportion of the cases where the claimant was unsuccessful.

The most common negative intangible consequences were said to be stress and frustration and lack of confidence in the legal system. Not surprisingly, these tended to arise when claimants were unsuccessful, but were not limited to such cases.

We expected to find more evidence indicating that successful claimants are frustrated by having to walk away from court without a fresh and favourable decision when public bodies have been found to have acted unlawfully.

And we were struck by the number of claimants who were said to have experienced the process as positive despite losing in court.

#### *Wider benefits*

In 86 per cent of cases, claimant solicitors considered the case to have contributed to clarifying the law, and in nearly as many cases, to creating a helpful precedent, from the claimant's point of view.

Overall, our findings suggest that JR judgments are seen to have significant impact in relation to policy, procedure, the clarity of the law, and human rights protection.

#### *Effects on public bodies*

The findings reinforce earlier research which shows JR to have mixed effects on public bodies which cannot be considered to be wholly negative. For example, while JR may cause costs and delay it also helps to clarify the law and assist public bodies to meet their legal obligations.

### *Costs and legal aid*

Legally aided claimants were shown to be more likely to have obtained tangible benefits from their claims than non-legally aided claimants.

We found higher cost to the legal aid fund to be associated with greater overall benefit to the claimant and also that the more costly cases tend to be those which have greater tangible benefits for claimants. Higher costs, including to the legal aid fund, may therefore lead to 'good value', especially from the claimant's perspective.

Our evidence thus indicates that legal aid plays a significant role in enabling claimants to obtain tangible benefits and indicates that restrictions on legal aid to support JR claims are likely to have a disproportionate adverse effect on those forced to resort to JR in order to obtain services to which they are legally entitled.

## Appendices

### Appendix A: Additional tables

Table A1: Categories of cases overall (judgment dataset) and in claimant solicitor dataset

	In claimant solicitor dataset		In judgment dataset	
	Number	Per cent	Number	Per cent
Adjudication	4	2.0	11	2.2
Agriculture	1	0.5	2	0.4
Asylum Support	1	0.5	1	0.2
Broadcasting	0	0.0	2	0.4
Cemeteries	0	0.0	1	0.2
Community care	22	11.1	31	6.2
Criminal Procedure	0	0.0	2	0.4
Customs/Excise	0	0.0	1	0.2
DisBod	0	0.0	7	1.4
EC	0	0.0	1	0.2
Education	2	1.0	7	1.4
Elections	0	0.0	2	0.4
Employment	6	3.0	19	3.8
Environment	2	1.0	2	0.4
FCYP	1	0.5	4	0.8
Financial services	0	0.0	3	0.6
Fostering/Adoption	0	0.0	1	0.2
Health	3	1.5	6	1.2
Housing	5	2.5	10	2.0
Immigration /Asylum	62	31.3	139	27.7
I/A age assessment	6	3.0	12	2.4
Immigration Not Asylum	3	1.5	26	5.2
Inquests	3	1.5	5	1.0
Inquiry	1	0.5	2	0.4
Land	0	0.0	2	0.4
Legal Aid	4	2.0	10	2.0
Licensing	5	2.5	12	2.4
Local Government	2	1.0	5	1.0
Magistrates Court Procedure	1	0.5	1	0.2
Mental Health	1	0.5	2	0.4
Ombudsman	2	1.0	2	0.4
Pensions	0	0.0	2	0.4
Planning	11	5.6	45	9.0
Police	8	4.0	13	2.6
Prisons	28	14.1	72	14.3
Public Funding	1	0.5	8	1.6
Public Services	6	3.0	11	2.2
Road Traffic	0	0.0	2	0.4
Tax	1	0.5	2	0.4
Trade & Industry	2	1.0	10	2.0
Utilities	1	0.5	2	0.4
Welfare Benefits	3	1.5	4	0.8
<b>Total</b>	<b>198</b>	<b>100.0</b>	<b>502</b>	<b>100.0</b>



Table A2: Success of Claims by Category (N=501)

	Allowed (or in part)		Dismissed		Total	
	Number	Row %	Number	Row %	Number	Row %
Adjudication	4	36.4	7	63.6	11	100.0
Agriculture	2	100.0	0	0.0	2	100.0
Asylum Support	1	100.0	0	0.0	1	100.0
Broadcasting	1	50.0	1	50.0	2	100.0
Cemeteries	0	0.0	1	100.0	1	100.0
Community care	17	54.8	14	45.2	31	100.0
Criminal Procedure	2	100.0	0	0.0	2	100.0
Customs/Excise	0	0.0	1	100.0	1	100.0
DisBod	3	42.9	4	57.1	7	100.0
EC	0	0.0	1	100.0	1	100.0
Education	4	57.1	3	42.9	7	100.0
Elections	1	50.0	1	50.0	2	100.0
Employment	8	42.1	11	57.9	19	100.0
Environment	1	50.0	1	50.0	2	100.0
FCYP	2	50.0	2	50.0	4	100.0
Financial services	1	33.3	2	66.7	3	100.0
Fostering/Adoption	0	0.0	1	100.0	1	100.0
Health	1	16.7	5	83.3	6	100.0
Housing	2	20.0	8	80.0	10	100.0
I/A	70	50.4	69	49.6	139	100.0
I/A age assessment	7	58.3	5	41.7	12	100.0
InotA	8	30.8	18	69.2	26	100.0
Inquests	2	40.0	3	60.0	5	100.0
Inquiry	0	0.0	2	100.0	2	100.0
Land	0	0.0	2	100.0	2	100.0
Legal Aid	4	40.0	6	60.0	10	100.0
Licensing	7	58.3	5	41.7	12	100.0
Local Government	5	100.0	0	0.0	5	100.0
Magistrates Court Procedure	1	100.0	0	0.0	1	100.0
Mental Health	1	50.0	1	50.0	2	100.0
Ombudsman	2	100.0	0	0.0	2	100.0
Pensions	0	0.0	2	100.0	2	100.0
Planning jr	14	31.1	31	68.9	45	100.0
Police	3	23.1	10	76.9	13	100.0
Prisons	28	38.9	44	61.1	72	100.0
Public Funding	7	87.5	1	12.5	8	100.0
Public Services	4	36.4	7	63.6	11	100.0
Road Traffic	1	50.0	1	50.0	2	100.0
Tax	1	50.0	1	50.0	2	100.0
Trade & Industry	2	22.2	7	77.8	9	100.0
Utilities	1	50.0	1	50.0	2	100.0
Welfare Benefits	3	75.0	1	25.0	4	100.0
Total	221	44.1	280	55.9	501	100.0

## Appendix B: Questionnaire

Below we supply the Claimant Solicitor Questionnaire.

Questionnaires issued to defendant solicitors were very similar and only slightly modified to reflect the different position of defendants, with slight variation among them depending on whether Treasury Solicitor or not.

Copies of the defendant questionnaires can be supplied on request.

CO



Name of CASE:

Date of Judgment:

Your name:

Organisation / firm:

Tel:

Email:

Date completed (dd mm yyyy)

The questionnaire should take no longer than 10-15 minutes. Most of the questions simply require you to click in the relevant box, while a few ask you to write in some additional information. Please complete electronically and return by email. Alternatively you can return a hard copy to [to PLP]

If you have any questions about it, please contact Varda Bondy at the Public Law Project [...]

**PLEASE RETURN by**

**Section1: Case details and progress**

1. Briefly, what was the case about?

2. Apart from the Pre-Action Protocol were any steps taken before the JR hearing to resolve the dispute?

Yes  → **Go to 3**  
No  → **Go to 5**

3. What steps were taken to resolve the dispute? PLEASE TICK AS MANY AS APPLY

- |                   |                          |                                 |                          |   |
|-------------------|--------------------------|---------------------------------|--------------------------|---|
| a Complaint       | <input type="checkbox"/> | Ombudsman                       | <input type="checkbox"/> | d |
| b Appeal          | <input type="checkbox"/> | Mediation                       | <input type="checkbox"/> | e |
| c Internal Review | <input type="checkbox"/> | Attempt to negotiate settlement | <input type="checkbox"/> | f |
|                   |                          | Other (Please specify)          | <input type="checkbox"/> | g |

4. Why were they unsuccessful?

**Section 2: Case Outcomes**

5. (a) What was your client hoping to achieve as a result of the judicial review, both by way of legal and practical outcomes?

(b) Regardless of the judicial outcome, as far as you are aware, what practical effect(s), if any, did the judgment have for your client post-hearing?

6. Was the claim:

- |                        |                          |                  |
|------------------------|--------------------------|------------------|
| Allowed?               | <input type="checkbox"/> | → <b>Go to 8</b> |
| Dismissed?             | <input type="checkbox"/> | → <b>Go to 7</b> |
| Other (please specify) | <input type="checkbox"/> | → <b>Go to 7</b> |

7. Even though the claim was not allowed, has the claimant achieved any of the following benefits as a result of bringing the claim?

PLEASE TICK AS MANY AS APPLY

- |   |  |                          |                                       |                          |   |
|---|--|--------------------------|---------------------------------------|--------------------------|---|
| a | provision of a service                   | <input type="checkbox"/> | Retention of a service                | <input type="checkbox"/> | g |
| b | Grant of a licence/permission            | <input type="checkbox"/> | Retention of a license/ permission    | <input type="checkbox"/> | h |
| c | conferment of a status or categorisation | <input type="checkbox"/> | Retention of status or categorisation | <input type="checkbox"/> | i |
| d | conferment of a welfare benefit          | <input type="checkbox"/> | Retention of a welfare benefit        | <input type="checkbox"/> | j |
| e | Financial compensation                   | <input type="checkbox"/> | Preventing closure of facility        | <input type="checkbox"/> | k |
| f | Getting a decision made                  | <input type="checkbox"/> | An apology                            | <input type="checkbox"/> | l |
|   |  |                          | None of the above                     | <input type="checkbox"/> | m |
|   |  |                          | Other (please specify)                | <input type="checkbox"/> | n |

→ Now go to 11

**Questions 8-10 deal with cases which were allowed**

8. If allowed, what, if any, remedy was awarded?

PLEASE TICK AS MANY AS APPLY

- |   |                             |                          |                                |                          |   |
|---|-----------------------------|--------------------------|--------------------------------|--------------------------|---|
| a | Quashing order              | <input type="checkbox"/> | Declaration                    | <input type="checkbox"/> | f |
| b | Prohibiting order           | <input type="checkbox"/> | Declaration of incompatibility | <input type="checkbox"/> | g |
| c | Mandatory order             | <input type="checkbox"/> | Damages                        | <input type="checkbox"/> | h |
| d | Injunction                  | <input type="checkbox"/> | No remedy                      | <input type="checkbox"/> | i |
| e | Reconsideration of decision | <input type="checkbox"/> | Other (please specify)         | <input type="checkbox"/> | j |

9. If the challenged decision has been reconsidered, was the fresh decision:

- |                              |                          |
|------------------------------|--------------------------|
| Favourable to your client?   | <input type="checkbox"/> |
| Unfavourable to your client? | <input type="checkbox"/> |
| Other (please specify)?      | <input type="checkbox"/> |

10. Has the **claimant** obtained any of the benefits set out below from the judgment or from decisions taken by the authority in compliance with the judgment?

PLEASE TICK AS MANY AS APPLY

- |   |  |                          |                                       |                          |   |
|---|--|--------------------------|---------------------------------------|--------------------------|---|
| a | provision of a service                   | <input type="checkbox"/> | Retention of a service                | <input type="checkbox"/> | g |
| b | Grant of a licence/permission            | <input type="checkbox"/> | Retention of a license/ permission    | <input type="checkbox"/> | h |
| c | conferment of a status or categorisation | <input type="checkbox"/> | Retention of status or categorisation | <input type="checkbox"/> | i |
| d | conferment of a welfare benefit          | <input type="checkbox"/> | Retention of a welfare benefit        | <input type="checkbox"/> | j |
| e | Financial compensation                   | <input type="checkbox"/> | Preventing closure of facility        | <input type="checkbox"/> | k |
| f | Getting a decision made                  | <input type="checkbox"/> | An apology                            | <input type="checkbox"/> | l |
|   |  |                          | None of the above                     | <input type="checkbox"/> | m |
|   |  |                          | Other (please specify)                | <input type="checkbox"/> | n |

**Answer questions 11 and 12 whether or not the claim was allowed**

11. In your view, has the judgment given rise to any of the following?

PLEASE TICK AS MANY AS APPLY

- |                                    |                          |                                      |                          |   |
|------------------------------------|--------------------------|--------------------------------------|--------------------------|---|
| a Improved policy                  | <input type="checkbox"/> | Worse policy                         | <input type="checkbox"/> | f |
| b Improved procedure               | <input type="checkbox"/> | g Worse procedure                    | <input type="checkbox"/> |   |
| c Clarification of the law         | <input type="checkbox"/> | h Legal uncertainty                  | <input type="checkbox"/> |   |
| d Helpful precedent (to claimants) | <input type="checkbox"/> | i Unhelpful precedent (to claimants) | <input type="checkbox"/> |   |
| e Improved human rights protection | <input type="checkbox"/> | J Weaker human rights protection     | <input type="checkbox"/> |   |
|                                    |                          | K None of the above                  | <input type="checkbox"/> |   |
|                                    |                          | L Other (please specify)             | <input type="checkbox"/> |   |

12. With regard to the claimant's **experience**, has the outcome given rise to any of the following?

PLEASE TICK AS MANY AS APPLY

- |  |                          |   |                          |
|--|--------------------------|---|--------------------------|
| a Improved communication between the parties | <input type="checkbox"/> | d Worsened communication between the parties                          | <input type="checkbox"/> |
| b A sense of empowerment                     | <input type="checkbox"/> | e A sense of disempowerment   | <input type="checkbox"/> |
| c Confidence in the legal system             | <input type="checkbox"/> | f Lack of confidence in the legal system                              | <input type="checkbox"/> |
|  |                          | G Stress and frustration with the process on the part of the claimant | <input type="checkbox"/> |
|  |                          | h Disproportionate costs for the benefit gained                       | <input type="checkbox"/> |
|  |                          | I None of the above   | <input type="checkbox"/> |

### Section 3: Compliance

13. Was the defendant authority required to take any steps to comply with the judgment?

- Yes  → **Go to 14**  
No  → **Go to 18**

14. Briefly, what were these steps?

15. As far as you are aware, have these steps been taken?

- Yes  **Go to 18**  
No  **Go to 17**  
In part  **Go to 16**

16. What steps are still to be taken?

17. In your view, are enforcement proceedings likely?

Yes   
No

#### Section 4: Appeal

All answer the next question

18. Has there been an appeal or an application to appeal?

Yes  → Go to 19  
No  → Go to 20

19. At what stage is the appeal?

- a Awaiting appeal hearing date
- b Appeal concluded (successful)
- c Appeal concluded (unsuccessful)
- d Other (please specify)

#### Section 5: Funding and costs All answer this question

20. How was the case funded?

- |           |                          |                                       |                          |
|-----------|--------------------------|---------------------------------------|--------------------------|
| Legal aid | <input type="checkbox"/> | Legal Aid with community contribution | <input type="checkbox"/> |
| Privately | <input type="checkbox"/> | CFA                                   | <input type="checkbox"/> |
| Pro-bono  | <input type="checkbox"/> | Other (please specify)                | <input type="checkbox"/> |

21. What costs order was made in this case?

- Each party bears its own costs
- Claimant to pay defendant costs
- Defendant to pay claimant costs
- Other (please specify)

22. Can you provide an estimate of the claimant's costs in this case? E.g. costs claimed on certificate, privately, paid by other side?

- £0
- Under £14,999
- £15,000-24,999
- £25,000- 49,999
- £50,000 or more

23. At what rate is the above costs figures calculated:

- Legal aid rates
- Inter partes rates
- CFA
- Other (please specify)?

24. Was a protective costs order made in this case?

- Yes
- No

### Section 6 General

25. Are there any aspects of this case that you consider to be significant in terms of their impact or effect which have not already been referred to? If so, please describe below.

26. Would you be happy to be contacted further about this case to answer a few more questions, either over the telephone or in person? (interviews anticipated to last up to 30 minutes)

- Yes
- No
- Maybe

27. We plan to contact defendant solicitors as part of this project. It would be helpful if you could provide us with the name/reference of the defendant solicitor in this case, or details of relevant department.

28. We are also hoping to speak to some claimants directly with a view to understanding the impact of JR from their perspective. Would you be willing to put us in touch with your client for them to be interviewed? We are able to offer £15 as a thank you to any individuals who agree to be interviewed.

Yes, I'd be willing to try to put you in touch with the client(s) if requested to do so

29. Do you wish to be acknowledged as a participant in this project in the final report?

- Your name and firm's name
- Firm's name only
- No

THANK YOU FOR COMPLETING THIS QUESTIONNAIRE.