

# The Dynamics of Judicial Review Litigation:

The resolution of public law challenges  
before final hearing

Varda Bondy

Maurice Sunkin

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The public law project (PLP) is a national legal charity, founded in 1990 which aims to improve access to public law remedies for people whose access to justice is restricted by poverty, discrimination or some other form of disadvantage.

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- Enhancing the quality of public decision-making;
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To fulfil its objectives PLP undertakes research, policy initiatives, casework and training across the range of public law remedies.

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## **About the authors**

*Varda Bondy* – Solicitor; Research Director at the Public Law Project; Visiting Fellow in the School of Law, University of Essex; Visiting Senior Research Fellow in the Department of Law, Queen Mary, University of London.

*Maurice Sunkin* – Professor of Public Law and Socio Legal Studies, School of Law and member of the Human Rights Centre, University of Essex; associate member of Landmark Chambers; Trustee of the Public Law Project.

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# Summary and Overview

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The judicial review process lies at the heart of our system of public law and is central to the practical application of the rule of law in the UK. The growing importance of this process over the past 70 years, and in particular since the 1980s, is well documented. It is reflected both in the growth in the number of claims brought in the Administrative Court and the qualitative significance of the judicial review jurisdiction across a broad spectrum of decision-making from environmental issues to immigration and asylum.<sup>1</sup> Since the enactment of the Human Rights Act 1998, judicial review has become the principal route for testing the compatibility of public action with Convention Rights.<sup>2</sup>

Given its place in the UK's constitutional system, an empirically based understanding of the way the judicial review procedure operates is of the utmost importance to users of the system and policymakers. This project offers the first analysis of the process since the post-Bowman reforms were introduced in October 2000<sup>3</sup> and does so at a time when potentially major changes are taking place to the system in the form of regionalisation and the anticipated transfer of certain cases from the Administrative Court to the Upper Tier Tribunals.

The main focus of the research is upon the resolution and determination of cases before they reach final hearings, principally by settlement and by means of the permission filter. The research explores two main questions: first, whether the post-Bowman reforms have contributed to an increase in the likelihood that judicial review litigation will be settled at an early stage in the process without the need for formal adjudication? And second, whether the reforms have made it more difficult for claimants to obtain permission and to this extent whether they have adversely affected access to justice?

Our findings are based on a study of nearly 1500 judicial review claims from issue to conclusion, plus some 170 cases from first contact between the parties. We also interviewed 123 solicitors as well as barristers and judges. This provided

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<sup>1</sup> See, generally, L Bridges, G Meszaros and M Sunkin (1995) *Judicial Review in Perspective* (2nd edn), Cavendish, London.

<sup>2</sup> (2003) *The Impact of the Human Rights Act on Judicial Review: An empirical study*, The Public Law Project, London.

<sup>3</sup> (2000) *Review of the Crown Office List*, Lord Chancellor's Department, London.

us with a comprehensive picture of what happened to over 90 per cent of the challenges that were issued during our research period that did not reach a substantive hearing.

Section 1 of this report provides a more detailed discussion of the background to the work, the questions we asked, and our methods. Section 2 examines public law litigation prior to commencement, looking in particular at the characteristics of public law disputes, the way solicitors perceive the pre-commencement procedures and each other. It also provides new data on the number of disputes that are likely to be resolved before commencement. Section 3 focuses on settlement of claims once proceedings are issued. It includes a discussion of the quality of settlements and of obstacles to settlement based on our interview data. Section 4 concentrates on the permission stage, including the trends in permission grant rates and attitudes amongst practitioners to the process. It also provides new data on the question of judicial consistency. Section 5 summarises our conclusions.

# Section One

## Background, issues and methods

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### 1.1 Introduction

This report is concerned with the dynamics of public law litigation and the relationship between these and the procedure for seeking judicial review in England and Wales. It is primarily concerned with how judicial review claims are handled and resolved before they reach final hearing. Unlike much work on judicial review, our focus is not upon the decisions of the courts in public law cases or the principles enunciated by the judges; nor are we here concerned with the impact of judicial decisions, important as these matters are.

We concentrate on two particular and related features of the litigation process. The first is settlement and the second is the permission stage and its effects on the general dynamics of litigation, including settlement, and its more direct role in regulating access to judicial review.

Both settlement and the permission stage have long been important, if contentious, aspects of judicial review litigation.<sup>1</sup> As we shall see in Section 3, more than half of all judicial review claims that are filed with the Administrative Court are settled. As we shall see in Section 4, in recent years fewer than 30 per cent of cases that are considered at the permission stage are permitted to proceed.

These procedures, then, play a key role in saving judicial resources and helping to reduce pressures on the court system. They are also important to litigants: settlement reduces stress, saves time and resources and may lead to better and earlier outcomes than can be obtained through adjudication in the Administrative Court. The permission filter provides parties with an early authoritative neutral evaluation of the quality of claims and in this way saves time and money and may help to encourage settlement.

Yet both aspects have been considered to be problematic. Two types of concern have been raised about settlement in the context of judicial review.<sup>2</sup> The first is whether it is right to encourage settlement when disputes are typically between individuals and public bodies, given that settlement implies resolution

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<sup>1</sup> See V Bondy and M Sunkin, 'Settlement in judicial review proceedings' [2009] *Public Law* 237–259.

<sup>2</sup> M Sunkin (1997) 'Withdrawing: a problem in judicial review?' in *Administrative Law Facing the Future: Old constraints and new horizons*, P Leyland and T Woods (eds), Blackstone Press.

of disputes without the protection offered to relatively weaker claimants by formal adjudication.<sup>3</sup> The second is whether settlement between parties in judicial review is compatible with the public interest in having the legality of public actions determined in court.<sup>4</sup>

Our findings indicate that most settlements produce outcomes that favour claimants. If there is a concern about settlements in this regard, it concerns the timing of settlements rather than their substantive result. Although a high proportion of cases are settled prior to the permission stage, there is evidence that substantial numbers of cases are being settled later than their merits warrant and that much litigation could have been avoided. There were various reasons for this in our sample of cases, but one of the most common was that lawyers acting for public authorities often became involved at a relatively late stage, sometimes only once the case had been issued.

The permission stage has raised concerns of principle and practice. The main issue of principle is whether it can be right to require claimants in public law to obtain permission to gain access to courts, especially when this is not required in other types of proceedings, including those against public bodies. The main practical concerns relate to the clarity of the criteria used by judges when filtering claims, the consistency of their decisions and the fear that meritorious cases may be prematurely filtered from the system.

This report throws light on these issues and looks in particular at the impact of the procedural reforms introduced following the report of the *Review of the Crown Office List*, chaired by Sir Jeffery Bowman.<sup>5</sup>

Statistics, of course, can only tell a partial story, but two statistical snapshots may help set a context.

The official statistics indicate that in 1981 there were 533 applications for leave to seek judicial review, of which 376 (71 per cent) were successful.<sup>6</sup> In 2006, 25 years on, there were 6,458 applications for permission to seek judicial review. Of these 3390 were considered at the permission stage and 752 (22 per cent) were granted permission.<sup>7</sup>

Two things are immediately striking. The first is the substantial, and now well-documented, growth in the scale of judicial review litigation over this period: in 2006 there were more than 11 times as many applications to get into the judicial review system as there had been in 1981. Second, and perhaps even more striking, is the difference in the proportion of claims that were permitted access. Despite the 11-fold increase in applications, in 2006 only twice (exactly twice as it happens) as many cases were permitted to proceed beyond the permission stage than in 1981. Thus, in 2006 claimants had approximately one-sixth of the chance

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<sup>3</sup> O Fiss, 'Against settlement' (1984) *Yale Law Journal* 93:1073.

<sup>4</sup> It may be noted that while post-permission withdrawals need to be approved by the court, this appears normally to be a formality.

<sup>5</sup> A report to the Lord Chancellor, March 2000 (hereafter, the Bowman Committee Report).

<sup>6</sup> Since 2000 the leave requirement has been called the permission requirement. We also refer to it as the filter stage.

<sup>7</sup> See further Section 4, especially Table 4.1.

of obtaining permission to proceed as they had in 1981. We say more about the trends in leave/permission decisions later in the report. However, it is clear that they raise a number of questions, not least of which is the question: has it become harder to access justice in public law matters over the past few decades?

## 1.2 Historical background: from access to proportionate dispute resolution<sup>8</sup>

By the late 1980s and early 1990s a gap in approach had opened within the judiciary between, on the one hand, the principle of flexible access that had informed both the Law Commission's thinking when designing the new order RSC 53 and Lord Diplock's approach in *IRC v National Federation of the Self Employed and Small Businesses*<sup>9</sup> and, on the other hand, the emerging view that there was a need to manage pressures on the system by rationing access, even when this meant filtering out potentially arguable claims.<sup>10</sup>

The most unfortunate practical consequence of this tension between principle and pragmatism was uncertainty. It led to an impression that access to judicial review was a lottery that depended on the state of the list at a particular time and on the approach taken by individual judges. This impression was reinforced by research which revealed a 'surprising and worrying' level of inconsistency in judicial decisions at the leave stage during this period.<sup>11</sup> Le Sueur and Sunkin concluded the first study devoted to the leave stage by calling for reforms that would clarify the role of the judiciary at the leave stage and achieve a better balance between the interests of court management, respondents and applicants.<sup>12</sup>

The question of how to handle the growing pressure on the caseload continued to preoccupy judges and court administrators and in 1991 the Law Commission once again looked at the judicial review procedure. Its 1993 consultation paper posed a number of questions and, echoing its previous general approach, noted that it 'would be wrong to narrow the rules governing the availability of judicial review solely to meet problems of delay'.<sup>13</sup>

In its final report the Law Commission reiterated that the purpose of the leave requirement was to filter out 'hopeless applications' and that this was 'essential' for efficient caseload management.<sup>14</sup> The Law Commission did not recommend any substantial changes to the procedure and, in particular, was concerned not to 'front-end' costs 'in what is intended to be simply a filtering mechanism'. Significantly, given later developments, it did not favour requiring respondents

<sup>8</sup> See further the discussion of approaches to the leave/permission stage in Section 4.

<sup>9</sup> [1982] AC 617.

<sup>10</sup> *R v Panel on Takeovers and Mergers, ex parte Guinness plc* [1990] QB 146, 177–178.

<sup>11</sup> L Bridges, G Meszaros and M Sunkin (1993) *Judicial Review in Perspective*, Cavendish, Chapter 8, pp 166.

<sup>12</sup> A Le Sueur and M Sunkin, 'Applications for leave judicial review: the requirement of leave' [1992] *Public Law* 102–129, at p 127. Their recommendations included establishing an express presumption in favour of granting leave and the provision of a clearer statement of the grounds on which leave could be refused. They also called for a new test to replace arguability, namely that the applicant demonstrates that there is a 'serious issue to be tried'.

<sup>13</sup> Law Commission Consultation Paper No 126 (1993) HMSO, para 2.16. The Law Commission reported that delays were approaching two years in non-expedited matters.

<sup>14</sup> *Ibid.*, para 5.6.

(now called defendants) to provide information prior to the leave stage, although it did recommend that judges should be able to request (not require) respondents to provide advance information.<sup>15</sup>

In relation to the leave (now permission) criteria, the Law Commission noted that a large number of consultees had criticised the absence of clear criteria, as well as the wide disparities in leave grant rates across subject areas and between judges. It accepted that the criteria should be made explicit, noting that the Administrative Law Bar Association had argued that this 'would remove any opportunity for suspicion that the stringency of requirement for leave reflected the current state of the Crown Office List'.<sup>16</sup> Interestingly, in its recommended wording of these criteria it chose not to refer to arguability, but instead to the potentially more stringent requirement that 'unless the application discloses a serious issue which ought to be determined it should not be allowed to proceed'.<sup>17</sup> Other of its recommendations included that the name of the leave stage be changed to the 'preliminary consideration' stage and, more importantly, that brief reasons should be given when leave is refused.

The first formal response to this report was in February 1999 when Sir Jeffery Bowman's Committee was charged to look once again at judicial review, but this time specifically at questions of efficiency, especially given the predicted increase in cases following the coming into effect of the Human Rights Acts 1998.<sup>18</sup> Bowman was asked to come up with recommendations that would take account of the Law Commission's recommendations, the civil justice reforms and new Civil Procedure Rules. Bowman reported in March 2000, and the resulting reforms came into effect on 2 October 2000.<sup>19</sup>

In relation to the judicial review procedure, the Bowman Committee's main aims were to improve efficiency without 'compromising the fairness or probity of proceedings, the quality of decisions, or the independence of the judiciary'.<sup>20</sup>

Bowman recognised that the scale of judicial review litigation largely depended on factors other than the procedure, including the existence and quality of appeal systems, and endorsed the continuing need for a specialised and centralised court to deal with administrative and public law matters.<sup>21</sup>

Its overall conclusion was that the procedure was generally satisfactory from the point of view of fairness and the quality of judicial decision-making, but was wasteful of judicial resources. There were two long-standing problems: that of

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<sup>15</sup> Law Commission, n. 13 above, paras 4.8–4.11.

<sup>16</sup> *Ibid.*, para 5.14.

<sup>17</sup> In this it used the wording suggested by Le Sueur and Sunkin, but reversed the presumption so that the burden was to be on the applicant.

<sup>18</sup> Sir Jeffrey Bowman, formerly a senior partner in Pricewaterhouse Coopers, had previously chaired a review of the Court of Appeal.

<sup>19</sup> For comments on the Bowman Committee's recommendations and the resulting reforms, to be discussed below, see: M Fordham, 'Judicial review: the new rules' [2001] *Public Law* 4–10; T Cornford and M Sunkin, 'The Bowman Report, access and the recent reforms of the judicial review procedure' [2001] *Public Law* 11–20; T Cornford, <http://webjcli.ncl.ac.uk/2000/issue5/cornford5.htm>.

<sup>20</sup> Bowman Committee Report, p ii.

<sup>21</sup> Although Bowman was in principle in favour of devolving Crown Office business out of London: Bowman Committee Report, pp 57–58, paras 21–24.

keeping the caseload within manageable proportions; and that of making more efficient use of judges' time. While the Bowman Committee recognised the costs of the permission stage, it considered 'on balance' that the filter should be retained because, citing Lord Diplock in the *IRC* case, it filters out 'hopeless' claims; removes uncertainty; is advantageous to claimants 'who presumably would not wish to pursue . . . [claims] which had no reasonable prospect of success'; and provides a useful tool for case management.<sup>22</sup>

Like the Law Commission before it, the Bowman Committee did not consider radical reform necessary. The permission process, Bowman thought, should be rendered more efficient by removing the right of claimants to apply for permission to be considered at oral hearing. Instead, all permission applications would initially be dealt with on the papers, unless the court directed otherwise. The right to renew the application in open court was to be retained. And, like the Law Commission, the Bowman Committee said that the criteria should be made explicit in the rules.

However, the Bowman Committee disagreed with the Law Commission in three significant respects. Unlike the Law Commission, it recommended that there should be a presumption in favour of permission. Also, it did 'not accept the recommendation of the Law Commission that the threshold be raised from that of "arguable case" . . . to "serious issue to be tried"'.<sup>23</sup> In this regard, Bowman's approach urged a return to the emphasis on access that had been evident in the period up to the mid-1980s.

The Bowman Committee also fundamentally disagreed with the Law Commission's approach in relation to party involvement prior to the permission stage. The most significant aspects of the Bowman recommendations were derived from Lord Woolf's emphasis in his *Access to Justice* reports on the early, and preferably out of court, resolution of disputes. While there is 'ordinarily little scope for alternative dispute resolution [or for compromise] in judicial review',<sup>24</sup> Bowman argued, as did Lord Woolf, for the 'need for a change of culture' amongst many litigants and within the Crown Office. To this end, prospective judicial review claimants, it said, should follow the pre-action protocol used in ordinary litigation and send proposed defendants a letter before claim. They should also put defendants on notice when seeking permission. Moreover, in a significant departure from previous practice, Bowman said that defendants should be involved at the permission stage. Bowman argued that:

'The defendant's participation will enable the court to give fuller consideration to the merits of the application . . . and will, by requiring [the defendant] to consider the merits of . . . [its] case before the permission application, encourage earlier settlement of those cases which currently settle after permission has been granted.'<sup>25</sup>

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<sup>22</sup> Bowman Committee Report, p 64, para 12.

<sup>23</sup> *Ibid.*, para 12.

<sup>24</sup> *Ibid.*, p 67, para 17.

<sup>25</sup> *Ibid.*, p 68, para 19.



The committee believed that this would address the Law Commission's concern that the existing procedures operate as a 'disincentive to public authorities to review their decisions at an early stage with a view to reaching settlements'.<sup>26</sup>

Pausing here, we can see that Bowman recommended a package of reforms that were intended to reiterate the importance of access to justice, encourage earlier settlement and save court and judge time. The key message was that efforts were needed to bring about earlier resolution of disputes and that the permission stage was to play a key role in this. In the past, one of the key benefits of the permission stage had been the protection it provided defendants, who were not required to commit resources to respond to challenges until permission had been granted. This was now to change completely. Defendant involvement at permission, with its consequential costs, was to act as an incentive to settlement prior to permission. Bowman seemed to assume that the *inter partes* process would not lead to an increase in judge time spent at the filter stage, or, if it did, that any such increase would be outweighed by the savings that would flow from early settlements. Alternatively, it would be justified by judges' increased ability to manage cases, or by improvements in the quality of decisions, which might, in turn, lead to reductions in the number of renewed applications in open court.

While several empirical case studies were undertaken by the committee, it has been suggested that Bowman 'greatly over-estimated the savings in court time attributable to the permission stage'.<sup>27</sup> The Bowman proposals looked plausible, but they were untested and carried non-trivial risks that costs to defendants and to the court could be increased rather than saved.

In the event, elements of the Bowman package, but not its entirety, were accepted and introduced into the reformed judicial review procedure in October 2000.<sup>28</sup> Perhaps not surprisingly, the presumption in favour of permission was omitted from the reforms, as was an explicit statement of the permission criteria. The judicial review pre-action protocol (PAP),<sup>29</sup> introduced in March 2002, requires prospective claimants to send a letter before claim (LBC) to the defendant setting out the decision challenged, a clear summary of the facts on which the claim is based, details of the information sought and the issues in dispute. The purpose of the letter is to establish early communication between the parties and whether litigation can be avoided. Defendants must reply within 14 days.

Another aspect of early involvement of the defendant introduced by the reforms is the service of the claim form and accompanying documents on the defendants within seven days of issue, unless the court directs otherwise. The defendant who wishes to take part in the judicial review must file and serve an acknowledgment of service (AOS) setting out the summary grounds for contesting the claim. The availability of the AOS is a radical departure from the previous practice when

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<sup>26</sup> Bowman Committee Report, p 69, para 19.

<sup>27</sup> L Bridges, G Meszaros and M Sunkin, 'Regulating the judicial review caseload' [2000] *Public Law* 651–670, at p 664.

<sup>28</sup> The process for seeking judicial review is now contained in Part 54 of the Civil Procedure Rules: [www.justice.gov.uk/civil/procrules\\_fin/contents/parts/part54.htm](http://www.justice.gov.uk/civil/procrules_fin/contents/parts/part54.htm). See also, Judicial Review Practice Direction, supplementing CPR Part 54.

<sup>29</sup> See [www.justice.gov.uk/civil/procrules\\_fin/contents/protocols/prot\\_jrv.htm](http://www.justice.gov.uk/civil/procrules_fin/contents/protocols/prot_jrv.htm).



many applications for leave were considered without any input from defendants. As will be seen in Section 4, it is not uncommon for refusals of permission to be based wholly on information or arguments contained in the AOS.

Commentators at the time thought that these reforms would make the permission stage more complex. It was still to be a filter, but it was now an *inter partes* process involving defendants: it was to become 'a vehicle both for mediating access to judicial review and managing the substantive dispute'.<sup>30</sup> Cornford and Sunkin, feared that:

'These two roles are hard to reconcile. They are likely to produce a complex procedure that is difficult to work with in practice, creates additional obstacles to access, and fails to achieve the expected gains in efficiency.'<sup>31</sup>

In passing it may be observed that whatever the post-Bowman reforms have achieved, pressures on the Administrative Court, including but not limited to judicial review, have continued to grow and judicial resources have not kept pace.<sup>32</sup> The number of nominated judges, those High Court judges who deal with judicial review work along with their other tasks, has grown from the initial 'cadre' of six in the late 1970s and 1980s to 39 in 2007.<sup>33</sup> There are also 19 deputy High Court judges authorised to sit in the Administrative Court.<sup>34</sup>

As at 30 April 2007, the waiting times were 'deteriorating at all stages of the judicial process with 277 cases in the warned list now over a year old, 139 between nine months to a year old and 169 between six to nine months old'.<sup>35</sup> According to the Administrative Court, during the period August 2007 to July 2008, it took on average 13.4 weeks for a claim to reach a permission decision on paper, 18.5 weeks to reach an oral hearing of permission, and 57.6 weeks to reach a substantive decision date.<sup>36</sup> These delays were substantially longer than in earlier years. In 2001, there was an 8-week average waiting time for a decision on permission and a 20-week waiting time for a substantive determination.<sup>37</sup> By contrast, between October 2002 to September 2003, paper applications took an average of 7 weeks to be dealt with and there was an average of 25.6 weeks from the start of proceedings to final hearing.<sup>38</sup>

<sup>30</sup> Cornford and Sunkin, 'The Bowman Report', n. 19 above, at p 15.

<sup>31</sup> *Ibid.*, at p 15.

<sup>32</sup> Perhaps most worrying in this context, is that the actual scale of judicial review litigation, large though it may appear from the perspective of the court, remains infinitesimal when placed against the scale of governmental decision-making.

<sup>33</sup> Of whom 34 are QBD judges and five Family Division judges.

<sup>34</sup> A report prepared by May LJ in April 2005 indicated a need for about eight additional judges, but apparently at that time '[A] policy decision was taken not to pursue this recommendation'.

<sup>35</sup> Evidence to *Justice Outside London* (HMCS, July 2007), Stephen Fash, para 3.1.

<sup>36</sup> Data provided by the Administrative Court. The averages were calculated over a 12-month rolling period and were generated only once a case was closed. They include urgent cases that may have been concluded on the day of issue, as well as cases that have been adjourned for months at the parties' request, and complex, multi-issue and multi-party cases that take months to resolve. Accordingly, the statistics provide no more than an indication of trends and tell us little about how long an individual case might take to reach a particular stage in the process.

<sup>37</sup> Annual Statement by the Hon. Mr Justice Scott Baker, [www.hmcourts-service.gov.uk/docs/annual\\_review\\_0102.pdf](http://www.hmcourts-service.gov.uk/docs/annual_review_0102.pdf).

<sup>38</sup> Administrative Office Newsletter November 2004 [2004] JR 237 at 238.

The progressive increase in waiting times was a cause for concern both to the Administrative Court and practitioners and, in early 2008, the Public Law Project threatened judicial review proceedings against the Ministry of Justice. Since then various steps have been taken to reduce the backlog of cases, including an increase in the number of deputy High Court judges and the number of sittings in the Administrative Court.<sup>39</sup> In addition, although unrelated, the regionalisation of the Administrative Court as from April 2009 may decrease the caseload of judicial reviews at the Royal Courts of Justice in London and thereby lead to a reduction in waiting times.<sup>40</sup>

The main theme of the recent history of the procedure is one of constant tension between apparent growing demand and the deployment of limited, and relatively diminishing, resources to cope with that demand. Without the ability to make substantial inroads into the causes for the demand or the ability to increase judicial resources, reformers have been obliged to focus on the procedure. In so doing they have sought to balance three potentially competing public interests, that is to say the need to protect access to justice for individual claimants; the need to make the most efficient use of judicial resources; and the need to protect public authorities from unwarranted litigation with its adverse consequences for public administration.

### **1.3 Research questions**

It is against this background that the current research was designed to explore two general questions:

- Have the reforms contributed to an increase in the likelihood that judicial review litigation will be settled at an early stage in the process without the need for formal adjudication?
- Have the reforms to the permission process made it more difficult for claimants to obtain permission to pursue judicial review claims and to this extent adversely affected access to justice?

### **1.4 Methods**

The research adopted both quantitative and qualitative approaches and drew on data derived from Administrative Court records, as well as a programme of interviews with lawyers and judges, augmented by information obtained by responses to questionnaires. These data and the resulting analysis provide the most comprehensive empirically based picture of judicial review litigation in the post-Bowman era.

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<sup>39</sup> [www.publiclawproject.org.uk/documents/AdministrativeCourtdelaypressrelease.doc](http://www.publiclawproject.org.uk/documents/AdministrativeCourtdelaypressrelease.doc). Consideration was also given to setting aside a number of days during the summer vacation for Administrative Court judges to deal with applications for reconsideration of decisions under section 103A of the Nationality, Immigration and Asylum Act 2002, which form the largest single category of cases in the Administrative Court.

<sup>40</sup> On 29 April 2009, Administrative Courts were opened in Cardiff, Manchester, Leeds and Birmingham. It is also planned to open a regional centre in Bristol. See *Justice Outside London* (January 2007) [www.judiciary.gov.uk/publications\\_media/media\\_releases/2007/3607.htm](http://www.judiciary.gov.uk/publications_media/media_releases/2007/3607.htm); [www.publiclawproject.org.uk/documents/AdCrt-PositionJuly08.pdf](http://www.publiclawproject.org.uk/documents/AdCrt-PositionJuly08.pdf).

*Data derived from the Administrative Court*

The Judicial Statistics for England and Wales are issued annually and provide statistics on various aspects of judicial review. These include the number of claims issued each year, the number of claims that have been granted permission, the number of cases that reached final hearing, and so on. Other statistical data have in the past been provided by the Administrative Court by way of annual reports, which, again, contained the above-mentioned information and more, for example, the number and outcomes of renewed applications for permission and of substantive hearings, with a breakdown into broad categories of subject matter, namely criminal, immigration, homelessness and other.<sup>41</sup> All those figures are derived from data collected by the Administrative Court and recorded on its computerised information system, known as COINS.<sup>42</sup>

In this report we use some figures from official statistics to illustrate broad trends in outcomes of claims over time. However, our method of tracking cases and noting the outcomes differs in several important respects to that used when compiling the judicial statistics. The latter provide information in relation to all cases that are in the system at any given period and, essentially, give a snapshot of the number of claims issued and the number of decisions taken by the court in each year. However, they do not reveal what has happened to particular cases or cohorts of cases. They do not, for instance, show how many of the claims issued in, say, 2006 were withdrawn, or were granted permission and then went on to be dealt with at substantive hearings.

By contrast, our method of tracking cases enabled us to follow cases through the system in order to see how and when they were concluded. It therefore provides a much more accurate reflection of what happened to claims. This knowledge is significant in relation to some of the most important aspects of the dynamics of judicial review litigation and, for example, enables us to identify at what stage in the process cases settled and to link decisions at the permission stage with the progress of cases beyond this stage.

The quantitative findings presented in this report are based on a database that was specifically compiled for the purposes of this research from relevant details of 1449 civil judicial review claims (excluding immigration/asylum cases) that were issued during the nine months between 1 April 2005 and 31 December 2005.<sup>43</sup>

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<sup>41</sup> The last published report as at the time of writing was for 2002–2003.

<sup>42</sup> Crown Office Information Network. The name has been retained from the days when the Administrative Court was called the Crown Office.

<sup>43</sup> We collected data in two stages. The first concentrated on the three-month period 1 September 2005 to 30 November 2005. During this three-month sample period we recorded information on: parties; subject matter; case details; orders made; judges; outcomes of the cases; details of the legal representatives; and the nature of observations made by judges when refusing claims for permission on the papers. The second sample covered civil non-immigration/asylum claims issued during April to August, and December 2005. For this sample we recorded: the subject matter; the progress and outcome of case; and the judges who were involved in making decisions on permission. The sample of cases had been extended from the originally planned three-month period in order to obtain a more comprehensive picture of various aspects of this research. The tracking period was also extended as too many of our cases were not yet concluded at the time envisaged due to delays in the system. The present report does not discuss the data collected on 918 immigration and asylum judicial review claims, which will be considered separately.

From this database we can present findings in respect of the following principal matters which will be presented in subsequent sections:

- the volume of cases according to their case category or subject matter;
- the volume of cases that concluded prior to the permission stage;
- the success/failure rates of paper applications for permission;
- the success/failure rates of applications for permission that were renewed for an oral hearing;
- the success/failure rates of applications that were only considered orally at the permission stage;
- variations in the rates of grant and refusal of permission as between judges;
- the outcome of cases that were pursued to final hearing, where the data were available within our research period.

*A note on classification of case categories*

In our statistical analysis we rely on the subject matter classification as it appears in the COINS database, for example, homelessness, housing, education, community care etc. It is not always easy to know in which category a case should be placed and this can give rise to certain oddities.<sup>44</sup> For example, cases concerning young persons released from detention without sufficient provision for their care being put in place by social services are classified variously as involving ‘sentencing’, ‘community care’, ‘care proceedings’, homelessness’ and ‘family, children and young persons’. Also, there can be overlap across categories, such as in relation to ‘housing’ and ‘homelessness’ cases, or claims involving ‘asylum support’ or ‘community care’. Not all cases lend themselves to neat categorisation and many involve more than one issue. While aware of these problems, we did not interfere with the classifications used by COINS when compiling the quantitative database. However, in some instances, based on our interviews, we have altered the classification when discussing the facts of particular cases where the COINS classification may be misleading.

There are other areas in which data entries on COINS may need to be further explained. For example, some cases where settlements occurred shortly before the permission stage were classified as having been ‘withdrawn by consent’; in other instances the same outcome was recorded as ‘permission refused’, even though it was clear from the actual papers that there had been a settlement in favour of the claimant. Despite these inconsistencies (and in order to avoid adding further inconsistency), here too our statistical database retains the entries as they appeared on COINS.

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<sup>44</sup> The classification of cases occurs at the time of issuing by case workers at the Administrative Court Office. Occasionally classifications are later amended by the case lawyers.

*Our meaning of settlement*

We treated a case as having settled if it was concluded by agreement between the parties rather than by a court determination. In later sections, in which we look at the progress of cases after proceedings have been commenced, we use the terms ‘withdrawn’ and ‘settled’ interchangeably, although we tend to use the term ‘withdrawn’ in the context of the quantitative findings in order to be consistent with the way cases are recorded by the Administrative Court.

*Negotiation*

In interviews, when claimant solicitors talked about negotiation, what they often meant was the maintenance of an ongoing dialogue with the defendant public authority in the hope that it could be persuaded that it had a legal obligation towards the claimant, that it should execute an obligation in a more favourable way or that it should reconsider a decision.

*The qualitative data: the interviews/questionnaires*

Statistics can only provide a limited picture of judicial review litigation. They tell us nothing about the actual cases or about the general dynamics of litigation; nor do they allow us to discover why cases are resolved and whether claimants achieve what they hoped for when they embarked upon the claim. In order to gain a more informed view of such matters and a feel for the way lawyers engage with, and view, the system, we pursued a qualitatively based study that involved a programme of questionnaires and interviews with solicitors, and with some barristers and judges.

The solicitor questionnaires and interviews had two aims. The first was to examine how particular cases were handled. Lawyers were asked to describe what happened at all stages of the case, from first contact with the other side through to the conclusion of the case. This required them to describe the interaction between the parties throughout.

The second aim of the interviews was to explore more general attitudes towards, and experiences of, the judicial review procedure. This aspect of the work has enabled us to produce the first study of judicial review litigation based on the attitudes of solicitors acting for claimants and defendants, including central government.

Practitioners were asked to describe their practices in respect of the main elements of the judicial review procedure, namely the LBC, the AOS and the ‘paper only’ consideration. Those who had been in practice prior to the post-Bowman reforms were asked to describe the effects of the changes, if any, on their practice and, where relevant, on the outcome of cases. They were also asked about their perceptions of the permission criteria applied by judges and their views and experiences of judicial consistency.

By asking practitioners to describe their actions in a particular case, as well as their practices in general, we were able to obtain a more textured picture of the dynamics of judicial review litigation and a fuller understanding of how the

procedural steps are utilised and of the factors that influence the timing and the nature of settlements.

Letters were sent to 395 lawyers requesting their participation in the project in relation to some 400 cases: 237 to claimants' representatives and 158 to defendants' representatives. These letters were followed up by phone calls and email contact where appropriate.

With the generous assistance of the Treasury Solicitor's Office (TSol),<sup>45</sup> we obtained the answers to 36 written questionnaires from 18 TSol solicitors, of whom nine were also interviewed face to face.

Ultimately, interviews (or, in the case of the TSol, completed questionnaires) were obtained with 123 solicitors (response rate of 31 per cent) in respect of 172 cases (43 per cent of the 400). Of the 123 solicitors interviewed, 61 acted for claimants (in relation to 75 cases)<sup>46</sup> and 62 for defendants (in relation to 97 cases).<sup>47</sup> In 37 cases, we interviewed both claimant and defendant solicitors. Those interviews were particularly helpful in gaining an understanding of the differences in perspective between the two sides in the dispute and the effect of these differences on the conduct and outcome of cases.

We also interviewed seven barristers who dealt with large volumes of judicial review cases (two of whom are also deputy judges) and two nominated Administrative Court judges.

Only 10 defendant representatives and three claimant representatives specifically declined to participate, some citing confidentiality, some lack of time and others giving no reason. Some of those who did not respond to the initial letter, nonetheless subsequently agreed to participate in response to followup letters or telephone calls.

It was easier to secure an interview with local authority lawyers when the identity of the relevant individual was known from the outset, but this information was not always available. Generally, it was easier to arrange interviews with solicitors acting for claimants (hereafter claimant solicitors), perhaps because most felt able to decide themselves whether or not to participate, whereas solicitors acting for defendants (hereafter defendant solicitors) often needed to obtain institutional approval, which was not always forthcoming. On the whole, all participants expressed interest in the project and engaged with the questions and gave generously of their time.<sup>48</sup> Nonetheless, our overall impression was that

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<sup>45</sup> The lawyers at TSol provide legal services to the majority of government departments in England and Wales.

<sup>46</sup> Eight solicitors were interviewed in respect of two cases and three in respect of three cases each. Thirteen of the interviews were face to face, seven were based on written email questionnaires and the rest were conducted by telephone, lasting on average 1.5 hours.

<sup>47</sup> This included 36 cases in relation to which we received written questionnaires from 17 solicitors in the TSol of whom nine were also subsequently interviewed face to face.

<sup>48</sup> The ratio of letters to interviews is in fact higher than it appears because individual letters were sent in respect of each case and in many instances solicitors who responded positively had more than one case within the sample. As most interviews lasted well over an hour, it was too time-consuming to interview solicitors in respect of more than one or, at most, two cases. Others who responded positively were not ultimately interviewed either because it proved difficult to arrange a time or because the interview phase had ended.



local authorities and solicitors acting for institutional claimants appeared more cautious and reluctant to participate, whereas legal-aid practitioners were the most accessible group of interviewees.

#### *The claimants and their lawyers*

In our sample of 75 cases in which we interviewed the solicitors who acted for claimants, all save two of the claimants appearing on the claim form were individuals. Of those who were not, one was a governing body of a school that challenged a decision to overturn their headmaster's and (on appeal) the governors' decision to exclude a pupil who had been caught smoking cannabis. The other non-individual claimant was the Commission for Revenue and Customs, which challenged a decision of the General Commissioner.

Additionally, there were three cases in which the claimant was not, strictly speaking, a private individual. In one of these, the claimant was a minister in a foreign country who challenged the decision to refuse him a visa to enter the UK; one was a sole practitioner who challenged a decision of the Legal Services Commission; and the other was a local authority councillor who challenged a planning decision on behalf of his local authority.

Of our 61 claimant solicitors, 47 were employed in private practice at 35 different firms of solicitors, of which 20 were situated in London and 15 outside London. Fourteen were employed by 12 organisations other than private firms, including law centres and charities. Of these organisations, while several are concerned with nationwide issues, eight are situated in London and four outside London.

#### *The defendants and their lawyers*

We interviewed, (or in the case of TSol obtained answers to questionnaires from) 62 defendant solicitors in relation to 97 cases. As can be seen from Table 1.1 (on page 14), 57 of the cases involved local authorities. Of these, 15 were London Boroughs and 16 were out of London local authorities. Of the 40 non-local authority cases, the single largest group involved the Home Office (16) and the rest involved a spectrum of departments, authorities and tribunals.

#### *The experience of the solicitors who participated*

Table 1.2 (on page 14) shows the levels of experience of our interviewees in terms of their stated number of years' experience of judicial review. All but two of the claimant solicitors interviewed indicated that they either specialised in public law generally, or in the subject area of dispute, such as housing, prison law or education. Of the two solicitors with little judicial review experience, one was a family law specialist and the other a personal injury specialist.

As can be seen from Table 1.2, overall, the claimant solicitors presented as having more years' experience of judicial review litigation than the defendant solicitors. Amongst this group, twice as many defendant solicitors had less than four years' experience of judicial review litigation as compared with those who acted for claimants, and only half as many defendant solicitors had 11 years' or more experience compared with claimant solicitors.

Table 1.1: Interviews with defendants' solicitors: the defendants

Authority	Number of cases
Local Authorities – London (15 authorities)	34
Local Authorities – out of London (16 authorities)	23
Secretary of State for the Home Department	16
Parole Board	7
Prisons	4
Mental Health Review Tribunal	3
Asylum Support Adjudicator	3
Financial Ombudsman	2
National Asylum Support Service	1
Criminal Injuries Compensation Authority	1
Chief Constable	1
Secretary of State for Works and Pensions	1
'First Secretary of State' <sup>49</sup>	1
<b>Total</b>	<b>97</b>

Table 1.2: The level of judicial review litigation experience (in years) of the solicitors who were interviewed

JR experience in years	Claimant solicitors	Defendant solicitors
1–3	11	22
4–7	22	12
8–10	8	6
11+	20	9
<b>Total</b>	<b>61</b>	<b>49</b>

Of course, length of experience is not necessarily an indication of scale of caseload being handled. Four claimant solicitors, for example, with over 18 years' experience, had issued fewer than five claims in the past year, whereas a solicitor with less than three years' experience had issued 15 claims in the past year. Equally, quantity does not necessarily reflect the complexity or difficulty of cases.

## 1.5 The disputes

*The subject matter of the claims that featured in our interviews*

The wide range of subjects that featured in our interviews is indicated in Table 1.3. The table also indicates who we interviewed. It may be noted that, whereas homelessness and housing cases constituted the largest areas of litigation in our samples overall, a high proportion of the cases in which we interviewed both sides involved prisons (11 cases). This is because of the relatively large number of interviews conducted with TSol lawyers. Additionally, Table 1.3 indicates the nature of the practice of claimants' legal representatives, whether private practice or otherwise.



Table I.3: The interviews: subject matter of claims and the number of cases

Interviews	Claimant					Defendant	
	No. of cases	National charity	Law centre	Private practice	Other	Subject matter	Both sides Subject matter
Asylum support	5	1		4		9	3
Care proceedings	1	1				1	1
Caravans & gypsies						2	
Criminal Injuries Compensation Authority	1			1		1	
Community care	6		1	5		5	3
Costs & legal aid	1			1			
Discipline						2	
Education	7	1		6		6	3
Family, children & young persons	3			3		4	3
Homelessness	9	1	1	7		19	3
Housing	14		5	9		13	6
Immigration/asylum	2			2		2	1
Inquiries	1			1			
Land						1	
Licensing	2			2		1	
Local government	1	1					
Mental health	3			3		4	1
Police	1	1				1	1
Prisons	13	2		11		22	11
Sentencing <sup>50</sup>	1	1					
Social security	1			1		1	1
Town & country planning	1			1		3	
Tax	1				1 <sup>51</sup>		
Transport	1						
<b>Total</b>	<b>75</b>					<b>97</b>	<b>37</b>

<sup>50</sup> In fact this case concerned care of a child on leaving detention.

<sup>51</sup> Her Majesty's Revenue and Customs.



# Section Two

## From dispute to challenge – judicial review litigation prior to issue of proceedings

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### 2.1 Introduction

This section focuses on the early stages of judicial review litigation, from the initial threat to bring a legal challenge contained in the letter before claim (LBC) to the commencement of proceedings. Sending and receipt of a LBC and the commencement of proceedings are important legal landmarks which may influence the course of disputes and their resolution and have important practical consequences, not least in terms of possible future liability for costs. We can therefore expect the character of disputes to alter as complaints become threats to litigate, and then actual claims. During this process typically lawyers will become more involved on both sides and issues will become increasingly defined in legal terms. Such changes may alter the nature of contact between the parties and have more tangible effects on the actual claimants. However, while the legal landmarks may be influential, they do not necessarily coincide with actual changes in the character of disputes. For instance, judicial review proceedings are often commenced while dialogue between the parties continues and many disputes are settled shortly after commencement, for reasons which may or may not be attributable to it. This means that there is some inevitable overlap between the matters considered in this section and those dealt with in Section 3, which focuses on settlement after the commencement of proceedings.

Since in this section our concern is with disputes before the Administrative Court becomes involved we do not have the benefit of statistical data based on COINS. Instead, we draw on our interviews: first, to make observations on the nature of judicial review disputes; second, to examine differences between the perspectives of claimant and defendant solicitors; third, to explore practitioner attitudes to the PAP; and, fourth, to consider the relationships between defendant lawyers and their clients. Finally, in this section we offer an analysis of the likely incidence of settlement prior to the commencement of proceedings.

## 2.2 The nature of judicial review disputes

Galanter famously coined the expression ‘litigotiation’<sup>1</sup> to describe the overlap between litigation and negotiation where litigation, or its threat, is used in order to pressure the other side to concede. This resonates with the experience of judicial review litigators. As one claimant solicitor put it:

‘The ultimate aim is to secure for your client a resolution as quickly as possible and getting a decision maker . . . to voluntarily revisit their decision is always the better outcome . . . I therefore take a double-pronged approach of using judicial review as a threat whilst actively negotiating. Judicial review is a great incentive to settle, despite sometimes lacking probative value. On the other hand it can take . . . months to conclude a judicial review, unless matters are expedited, which sometimes is of no help. These different pressures lead me to pursue judicial review and negotiation simultaneously.’

### *Judicial review and crisis situations: time for dialogue is limited*

Judicial review litigation, however, often concerns crisis situations involving claimants in vulnerable circumstances where little time exists for dialogue:

‘There was no room for ADR/negotiations. A negative decision was made, there was a flurry of correspondence the following day, the defendant refused to provide accommodation and we had to get an out of hours order on Friday night. We then issued the papers the following Monday.’

### *The tight litigation timetable*

Moreover, even where the crisis is less immediate, litigation occurs against a tight timetable so that the possibility for claimants to negotiate prior to commencing proceedings is delimited by two opposing forces. On the one hand, claimants must exhaust other avenues of redress and allow defendants reasonable opportunities to respond appropriately. On the other hand, claimants must meet the tight limitation requirements imposed by the rules. Our claimant interviewees often referred to the requirement to issue speedily as having curtailed negotiations which might have resulted in settlement had there been sufficient time. The following quotations refer to situations that are typical of those confronting many claimant lawyers:

‘I am mindful of the obligation to issue promptly and of [*R (Cowl) v Plymouth City Council*].<sup>2</sup> I try to resolve through negotiations. It can be difficult to get the balance right. In a case of an ongoing breach it may be feasible to engage in a certain amount of negotiations, but where you have a clear decision, you have to apply promptly. *Cowl* didn’t deal with the need to act promptly. In this case, we entered correspondence, but the time factor was important as the client was approaching 16, after which age, certain duties become mere powers.’

And:

‘Our first contact with the council was by way of letter before action, as time was ticking on at the stage when the family approached us. There were time pressures for a variety of reasons: there was the risk of the [school]

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<sup>1</sup> M Galanter, ‘Words of deals: using negotiation to teach about legal process’ (1984) *Journal of Legal Education* 34:268–276.

<sup>2</sup> [2001] EWCA Civ 1935; [2002] 1 WLR 803.

placement going to someone else, the claimant was beginning to self-harm more frequently, the family unit was about to break down and it was turning into a desperate situation. It was August and the placement was due to commence in September. We constantly tried to avoid issuing . . . but in the end there was nothing left to get out of the negotiations. We encouraged the family to continue its relationship with the social workers, and there were frequent meetings between these parties. The solicitors did not attend, as it was felt a legal presence may not aid resolution. Of course the family would feed back to us about the meetings afterwards.’

*There is often little or nothing to negotiate about*

Even if urgency does not preclude negotiation, the nature of the issues raised in many judicial reviews mean that there may be little, if anything, that can be negotiated over. In many judicial reviews, the question is whether a public authority owes a duty to the claimant, or has abused or exceeded its powers or acted unfairly. Such matters cannot be negotiated and claimants cannot forego their legal entitlements or agree to reduce the level of their need. Where they occur, settlements are therefore rarely a product of compromise in relation to the substance of the dispute.

Our findings indicate that, in practice, settlement either follows a decision of the claimant to withdraw the claim, or, much more commonly, of the public body to concede the claim. Due to the limited nature of remedies in judicial review, a concession may amount to no more than an agreement on the part of the defendant to reconsider the case, without any promise of a substantive change in the authority’s position. A claimant cannot refuse to accept such a concession if it is all they could expect from a successful claim.

It may be noted that the perception that public law disputes are not amenable to compromise, or that questions of law are non-negotiable, lay behind our interviewees’ rejection of mediation as an option or as a beneficial process in dealing with their cases.<sup>3</sup>

Having said this, we saw several instances of negotiation, in the sense of dialogue and discussion, leading to creative outcomes where both sides were prepared to compromise in relation to some collateral aspects of the dispute, such as in relation to the way services were delivered. We shall return to these matters.

*The potential power imbalance between parties in judicial review proceedings*

A further factor that affects the nature of judicial review disputes is that of equality between the parties. At first sight, much judicial review litigation appears to be a contest between individuals who are likely to be inexperienced in litigation, on the one hand, and relatively well-resourced and experienced public bodies, on the other. This is certainly the case when unrepresented individuals bring a claim for judicial review. Where claimants are themselves large bodies, private or public, or when claimants are represented, the dynamic is more complex, not least because many claimant solicitors now have substantial experience of judicial

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<sup>3</sup> For full discussion see the V Bondy and L Mulcahy (June 2009) *Mediation and Judicial Review: An empirical research study*, PLP.

review, whereas many public bodies actually have relatively little experience of it, although levels of experience vary considerably.

Recent research has shown, for example, that 80 per cent of English local authorities only face two or fewer challenges annually.<sup>4</sup> This was reflected in our sample of interviewees, which showed that 33 per cent of claimant solicitors had 11 or more years of judicial review experience compared with only 18 per cent of the defendant solicitors who had this level of experience. Conversely, only 18 per cent of claimant solicitors had between one and three years' experience of judicial review litigation, compared with 45 per cent of defendant solicitors. For five defendant solicitors, the case which was the subject of the interview was their first judicial review despite having been in practice for a substantial number of years.

Nonetheless legal representation does much to redress other structural inequalities. Indeed, some defendant solicitors considered that publicly funded litigants were at an advantage in judicial review litigation because they have nothing to lose by pursuing a claim, whereas the defendants are unable to recover costs, even if successful, against legally aided claimants.

This 'advantage' was said by some to force reluctant concessions on the part of defendants. This was dramatically described by one London local authority solicitor in a homelessness case:

'The reality was that even though the defendant's case had merit, the financial risks [for the defendant] of establishing a point of principle were going to be too high, on the basis that permission of the court is needed to enforce a costs order against a publicly funded litigant, which is rarely forthcoming. Clients often have to fall on their swords because of financial implications, in cases which they feel they have good prospects of successfully defending. They are accountable to tax payers for use of public resources and so it is not possible to fight everything . . .'

However, as we shall see later, concessions based on costs considerations did not feature prominently as a motive in the settlements examined.

### **2.3 The perspectives of the parties: differing world views**

The dynamics of litigation, and approaches to settlement in particular, are likely to be affected by the way the lawyers on both sides see the issues, as well as by their respect for each other and their understanding of each other's motives. These factors in turn are influenced by whether the two sides have encountered each other before and the ease with which they feel able to communicate.<sup>5</sup>

Not surprisingly perhaps, our interviews indicated that it was common for the two sides to have very different views of the case. Although it was not always so,<sup>6</sup> it was also common for the parties to be suspicious of each other's motives and actions. Such perceptions may be natural in an adversarial process, but they are not

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<sup>4</sup> M Sunkin, K Calvo, L Platt and T. Landman, 'Mapping the use of judicial review to challenge Local Authorities in England & Wales' [2007] *Public Law* 545–567.

<sup>5</sup> See also Section 3.6

<sup>6</sup> See, e.g., the comment of the claimant solicitor who enjoys 'an excellent working relationship with a city council, p. 42 below.

necessarily conducive to settlement. The following provides insight into some of the more common differences of perception that were evident from the interviews.

#### *Different views of urgency*

Claimant and defendant solicitors often had different views as to the urgency of claims. Thus, defendants often accused claimants of being overly hasty in pursuing litigation, whereas claimants assumed that defendants were deliberately delaying for a range of reasons unconnected with the merits of claims.

For example, in a homelessness case brought against a London authority, the claimant solicitor said that he had done all he could to resolve the case without having to issue proceedings, but had no choice but to issue after promises made by the defendants to provide accommodation failed to materialise. He said:

‘Our counsel advised me that [this London council] tend to jump as soon as a case is issued, shifting from saying there is no problem to sorting something.’

The defendant solicitor, on the other hand, thought that there was no need to issue proceedings in the first place:

‘This case could have been avoided if they’d given us more time to work it out. The claimant wasn’t homeless and there was no real urgency.’

In another case that concerned the registration of approved foster parents, the defendant local authority accepted that it had followed an incorrect procedure and agreed to reconsider the decision. But here, too, the defendant solicitor viewed the proceedings as having been issued unnecessarily, while the claimant solicitor complained of an inadequate response by the authority.

The claimant solicitor said:

‘Although the defendants realised that they had made a mess of the decision, they didn’t offer to do anything in concrete terms to put it right until after we issued.’

The defendant solicitor said:

‘We would have conceded after the letter before claim had we been given more time to ascertain what the claimant wanted . . . Things would not have needed to proceed to the point they did, had they been more precise in the letter before claim and answered my calls. This was, in my view, an unnecessary judicial review, given our willingness to rectify matters once the merits of their claim were clear . . . In theory it could have [settled] sooner, had the claimant behaved differently.’

In another striking example of opposing perceptions, a claimant solicitor was perceived as having been unreasonable and combative by the other side:

‘We hoped to have the case resolved as a result of our reply, but our experience with [this] Law Centre is that they never back down, regardless of our response.’

Whereas the claimant solicitor said about herself:

‘I always try to resolve matters without having to issue. Litigation is expensive and the outcome uncertain.’

She also described a series of efforts to communicate and to resolve the case without issuing proceedings:

'I . . . wrote again explaining why the decision was wrong. I got no reply to this letter nor to a subsequent letter and only then did I send the pre-action protocol letter to the Homeless Persons Unit (HPU) with a copy to Legal Services. I tried again to settle just before issuing . . . I was trying to get the [council] to accept a fresh application and to make proper enquiries. I was still hopeful of a result at that stage.'

### *Perceptions of motives*

Some defendant solicitors see their opponents as having motives, other than a desire to obtain a good outcome for their clients, which lead them to pursue litigation rather than settlement. An out of London local authority solicitor expressed a rather jaundiced view of claimant solicitors' motives:

'Some parents have a bee in the bonnet and are quite intransigent and unwilling to consider anything other than what they are asking for. The attitude is 'it's my right' as opposed to what can be achieved. Solicitors in private practice don't necessarily help towards making clients' expectations more realistic. They will take the money. I would say that 50 per cent of claims brought are spurious . . . It feels sometimes as if claimant solicitors go in all guns blazing instead of having a mediation approach, explaining their views, identifying the problem and working with us to resolve it. Unfortunately, a lot of solicitors' firms, instead of writing a letter and asking a question, they issue a PAP letter.'

He was able to recognise, however, that there might be another aspect to this, and went on to say:

'In their defence, it has to be said that they may have been dealing with the client department first for some time. But they should know that it is best if correspondence goes through to legal at an early stage.'

A frequent complaint made by defendant solicitors was that claimant lawyers were motivated by profit considerations, both in issuing and pursuing proceedings.

'Because clients are publicly funded, this encourages solicitors to issue as they get their costs anyway. For some of them, the claimant being legally aided therefore influences their decision to jump the gun, when probably they would achieve the same result if they simply left matters for a day to give the defendants more time to investigate matters.'

'Solicitors, once they get funding, tend to string out cases to get their costs. Certain solicitors will send you 3 or 4 faxes in a day, quite unnecessarily.'

'I think that where there is public funding, it introduces a conflict between the claimant and their solicitors. The solicitors want to string things out. When I was in private practice, we often tried to settle, but I think that the climate has changed, and claimant solicitors now need to get costs orders made in order to survive. There is no appreciation that we are also publicly funded.'

'[Local solicitors] will rarely be budged, despite us clearly setting out a strong case in the AOS. Once they have legal aid-funding, I suppose there is no reason for them to stop the litigation.'



‘The cynical view is that the claimant’s solicitors are in a rush to issue JR because of the financial implications of so doing. If they get permission, the defendants will settle and they get their costs. Even if they lose, the defendants cannot recoup costs anyway.’

‘The claimants are almost always legally aided. I know that they must justify getting their legal aid. Perhaps that is why they all include human rights arguments in their claims, to help them get legal aid. These are usually just added for good measure.’

‘The claimant was legally aided. It has an impact. It means that it is not going to cost them, so they have no reason not to issue.’

The corresponding perspective on the part of claimant solicitors was that they were often compelled reluctantly to issue proceedings after repeated efforts to obtain redress pre-issue had either been ignored or had elicited an inadequate response.

#### *Establishing precedents and avoiding scrutiny*

The drive to maximise income, however, was not the only explanation suggested by defendants for why claimants might pursue litigation rather than negotiation. A solicitor for an out of London authority ‘accused’ one local firm of solicitors of bringing a claim in order to establish a precedent:

‘[The claimant’s solicitors] have a reputation for newsworthy cases and establishing principles; equally claimant’s counsel was certainly looking for a first reported case on the issue.’

Conversely, claimants accused defendants of engaging in tactical manoeuvres designed to frustrate public scrutiny of their decisions and policies:

‘My experience is that local authorities will cave in to avoid an issue being made in court – thus our work represents a gradual chipping away at the general practice/policy of local authorities of avoiding looking after children. It is costly for a local authority to fight judicial reviews, whereas if they deal with matters on a case-by-case basis, this keeps the broader issues under wraps, which is preferable to the force of a declaration.’

#### *Understanding resource constraints*

Judicial review litigation is often conducted in the shadow of severe resource and policy constraints that inevitably impinge upon the way individual cases are pursued and resolved. Such factors were regularly commented upon in the interviews. For instance, several defendant interviewees felt that claimant solicitors ought to have a better appreciation of the resource constraints under which local authorities labour:

‘Legal aid solicitors often [fail to see] that whenever we pay out money on legal action it is money away from doing other important things. I agree with some of my clients that it sticks in their throats to do that.’

‘All these peoples’ circumstances are dire but that does not mean the defendant owes them a duty. Sometimes claimant solicitors cannot distinguish that fact.’

Claimant solicitors were not necessarily unaware that local authorities faced significant difficulties in some circumstances. In a special educational needs case, the claimant solicitor accepted that:

‘There was an issue of shortage of school places. Even where the local authority has been convinced of the need for a place, there is often a practical issue which affects many . . . children.’

Despite this acknowledgment, the solicitor in that case complained that the defendant authority continued to question the legal claim on technical grounds and in a manner that unnecessarily prolonged the dispute to the detriment of the child.

#### *Understanding institutions*

It was widely felt among the defendant interviewees that claimant solicitors failed to appreciate how public authorities work, and in particular the nature of the relationship between legal departments and their client departments:

‘Most of the time, the LBCs arrive out of the blue, and claimant solicitors demand a response within one or two days. I try to explain to them that we need time to take instructions. Claimant solicitors don’t appreciate the time it takes us to get instructions and to make things happen.’

‘There was less than a week between the claimant approaching the council and the threatened eviction. This put the defendants under immense pressure to respond in a certain way or face issue. I would have appreciated more time to look at the claimant’s file, take instructions etc. Had the matter been given more time, we could have discussed more issues, and there was a greater chance of settlement.’

‘Solicitors ought to send LBCs directly to us, but not all do . . . Claimant solicitors don’t realise that there are so many parts to the council and that it takes time to identify the right office and the right officer to obtain instructions from. There is more of a chance to settle a case early when I receive the LBC directly.’

‘Claimant solicitors are good at sending faxes at 3 pm, expecting us to respond by 5 pm. Some solicitors go on fishing expeditions, digging around for stuff. We get all sorts. [A particular local firm] string things out so we end up paying a lot of costs.’

Although some claimant solicitors expressed awareness of the pressures that face hard-pressed authorities and how these may affect the way authorities conduct their cases, several argued that this had no bearing on how they conducted their client’s claim. One claimant solicitor commented in regard to a community care case:

‘[The city council] are so snowed under that it is difficult for them to get instructions from their client departments and we usually receive no response to pre-action correspondence. After issue, the claim is then settled before an AOS is served. This is not very cost-effective or sensible from a tactical point of view . . .’

## 2.4 The Pre-Action Protocol

We have already seen that the post-Bowman reforms were intended to encourage earlier identification of the issues in dispute, communication between the parties and involvement of defendant public bodies. It was recognised that these changes would increase burdens on the parties by making the process much more ‘front loaded’ than it had been previously. Nevertheless, it was considered that the costs would be outweighed by the expected benefits.

As mentioned earlier, parties are expected to comply with the judicial review PAP, except in urgent cases and where defendants lack the power to change their decision.<sup>7</sup> The PAP requires claimants to send an LBC setting out the essence of their challenge. Defendants should normally respond to the LBC within 14 days. Failure to do so may lead to sanctions imposed by the court at a later stage. The objective of the PAP is to avoid unnecessary litigation.

### *Attitudes to the Pre-Action Protocol*

Research in other areas of civil litigation, including personal injury and clinical negligence cases, has indicated that, in general, practitioners have responded well to the encouragement to engage earlier.<sup>8</sup> Our findings indicate that this is also true of practitioners involved with handling judicial review claims.

The majority of claimant solicitors interviewed who had pre-Bowman experience stated that they regularly sent LBCs even before the PAP requirements came into force in March 2002. This was done as a matter of good practice and for the very same reasons that led to the introduction of the PAP, namely to establish communication with the defendants with a view to exchanging information and promoting early resolution where appropriate. It was also pointed out by interviewees that early contact with defendants was required in order to obtain public funding. Some of these solicitors, therefore, took the view that the formalisation of the PAP had made little difference to their practice.

The overwhelming response on both sides, however, was that the increased formality of the PAP, and the requirement that public authorities respond to LBCs within 14 days, has helped focus minds on the issues at an early stage. Defendant solicitors with pre-reform experience noted that the quality of LBCs has improved. Claimant solicitors noted a corresponding improvement in the quality of responses. The general perception was that this improvement in the quality of pre-issue communications has led to greater understanding of the issues and increased clarity.

The following comments, by solicitors specialising in public law generally, education and community care, provide examples of the positive views towards the PAP amongst claimant solicitors with pre-Bowman experience:

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<sup>7</sup> [www.justice.gov.uk/civil/procrules\\_fin/contents/protocols/prot\\_jrv.htm](http://www.justice.gov.uk/civil/procrules_fin/contents/protocols/prot_jrv.htm). It is clear from interviews that the PAP may be of benefit even in situations that are exempt, for example, in enabling parties to reach an understanding in respect of a flawed tribunal decision which can lead to a consent order to quash a decision. This saves time and costs to both parties.

<sup>8</sup> T Goriely, R Moorhead and P Abrams (2002) *More Civil Justice? The impact of the Woolf reforms on pre-action behaviour*, Law Society, Research Study No 43, 420 pp.

'I am a fan of the reforms. We used to send a letter before action prior to the PAP, but the LBC now makes it clear that proceedings are contemplated, and it attracts more coherent responses from the other side. It acts similarly to putting a flag on an email – it changes the nature of the correspondence, and causes defendants to sit up and take notice.'

'The LBC has made a difference – the other side knows we are going to issue and are more alive to matters, resulting in more cases being likely to settle.'

'I think that the PAP has had an effect of reducing the number of claims issued . . . The local authorities used to ignore our letters. Now, more cases settle as a result of the LBC.'

'I always sent out letters before action, but nothing like as focused as now and it didn't have the same effect. The PAP looks like a formal document and defendants know we mean business. I think it is taken more seriously.'

Defendant solicitors were also generally positive towards the PAP. For example, a solicitor with 15 years' experience of judicial review in a London local authority said:

'We used to get letters before action prior to the introduction of the PAP, but the current format is more detailed and more formal and it improved the quality of the content.'

Practitioners on both sides agreed that LBCs help to concentrate minds and, in particular, help parties to identify and articulate their positions. An education specialist acting for claimants said:

'It is a good way for focusing my mind on what I want to achieve, specifying breaches, what action is expected and on what the court is likely to give the claimant.'

Claimant solicitors also perceived the PAP as helping to concentrate the mind of the defendant, as described by a solicitor specialising in mental health law:

'I was taught to send pre-action letters by my supervisor and have not changed this practice. They are always good and necessary, in terms of getting more information/facts on the case, and allow resolution before issue. I do feel that the introduction of the protocol has changed things: most of the 'big boy defendants', such as the Parole Board, Metropolitan Police, Mental Health Trusts, are now clued up on challenging judicial reviews and . . . I am certain that the PAP has focused their minds on this, providing a more substantial structure for dealing with claims in an aggressive/proactive way.'

Corresponding views were expressed by defendant solicitors acting for a London local authority and TSol respectively:

'It speeds up the process. The need to respond within a time limit helps focus our minds on the issues.'

'The LBC makes the lawyer and client (department) . . . take the bull by the horns and establish the defendant's position. In this way, it is good for weeding out bad cases.'

These effects are thought to promote early resolution by enabling the solicitors on both sides to make better-informed decisions. The defendant's response may, for instance, shed new light on a case and cause the claimant's solicitor to review the merits of the claim:

‘It allows you to make a judgment on the strength of your case in advance of issuing. It can flesh out issues, and help you decide whether to proceed.’

Equally, and possibly more importantly, the PAP encourages defendants to re-examine their decisions or actions and to take steps that satisfy the claim and render the litigation unnecessary.

In a challenge to the fairness of the process by which the authority had decided the claimants to be unfit to be foster parents, the authority’s solicitor described his response to the LBC:

‘I [reacted] straight away when it became clear that judicial review was an issue. I had a high level meeting with the Director and senior managers involved to update them. Their initial view was that everything had been done properly. It took time to get all the files together, find out what had gone on and discover the precise line the Department was taking. Only at this stage did it become clear that the procedure was not entirely above board. As a lawyer, you cannot really get proper instructions until this stage, when you know the reality of the case, and can thus evaluate what a court may decide and advise your clients accordingly.’

As this quotation indicates, the formal threat of judicial review makes a significant difference to the way matters are handled within public authorities and in particular to the weight given to the legal dimension of the problem:

‘It was the LBC which was the key indication that [the claimants] were seriously contemplating judicial review and prompted action on our part. I suspect this is the case in most claims, as prior to this point it’s really a matter of dealing with ‘complaints’, some of which are justified, some not . . .’

A claimant solicitor with seven years of housing and community care judicial review experience articulated a view also held by many other interviewees in saying:

‘I think that the PAP has helped immensely . . . The other side can glean more quickly what is required of them. I would say that as many as 90 per cent of my cases come to an end after the LBC, mostly as a result of the local authority agreeing to do what they are supposed to do, such as carry out an assessment.’

The overall impression given by interviewees was that the PAP, if used properly, operates to establish a channel of communication between the parties that leads to the conclusion of many disputes without recourse to litigation. Even where appropriate remedial action is not taken promptly, this early contact often sets in motion a process that enables speedy resolution shortly after commencement of proceedings, and before any further procedural steps need be taken. We will return to this issue in Section 3.

## **2.5 Relationships between defendant lawyers and their clients<sup>9</sup>**

The quality of communication between defendant lawyers and their client departments is a factor that undoubtedly influences the timing and nature of

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<sup>9</sup> See also p. 45 below.

responses to threats of litigation. It can lead to unnecessary delay in responding appropriately to potential challenges and, consequently, to avoidable litigation.

The size and complexity of public authorities may have problematic consequences for both claimants and defendants. Ideally, public authority lawyers and their client departments would have close working relationships and be able to liaise swiftly when disputes arise. In some situations, something approaching this ideal is achieved.

A solicitor acting for a London borough with a large homelessness judicial review caseload told us that it had reorganised the way it handled housing disputes by establishing a duty rota of lawyers within the Homeless Persons' Unit, so that lawyers could work much more closely with the unit and advise on cases as they arose. We were told that this had reduced the volume of claims issued against this authority.

More generally, however, lines of communication were far less clear. Many defendant solicitors told us, for instance, that often they do not get to see LBCs because these are sent directly to their clients and not passed on, or that delays exist in responding to LBCs because of the time it takes to obtain instructions from client departments. Several defendant solicitors related situations in which claimant solicitors had sent LBCs to client departments rather than to the lawyers.

There may be internal financial pressures militating against timely communication between defendant bodies and their legal advisers. This is clearly illustrated in the situation described below by a TSol solicitor, in which internal business accounting systems were at play:

'In theory, the Prison Service could send every LBC to TSol, but it costs them to instruct us . . . so they deal with things on their own . . . But I am not sure this is viable. The key with any big bureaucracy is speaking to the right person in time, with the intellectual confidence to make firm decisions.'

Budgetary factors may also inhibit the resolution of cases in other ways, as described by a solicitor acting for a London borough:

'The client departments have chains of command, and the instructions depend on who is dealing with the case. We find that those on the front line tend to know what they are doing and are quite sensible. Some senior managers tend to focus on budget, so they may not follow our advice if we advise to pay up. They don't seem to appreciate the greater cost of proceedings down the line.'

A TSol solicitor spoke of how 'frustrating' it can be not to 'get the letter before claim sooner because we could gather the necessary information for ourselves and get proper instructions'. He went on to say that:

'By being involved in cases from the LBC stage, we would be able to advise the clients on how to respond. For example, in many cases the challenge is that inadequate reasons have been given for a decision: we could tell them how to write a good response and make the case go away, as such challenges can often be addressed at an early stage.'

These sentiments were echoed by a claimant solicitor who said that:

‘When I deal with TSol, things tend to improve once the case gets to them after dealing with the prison service or the parole board. The TSol are more detached and professional, whereas the prison service hates us. When we have a case against a private prison we deal with private solicitors. They tend to be more cut throat. They seem to take things more personally for some reason.’

The quality of communication between defendant solicitors and their clients is reflected in the experiences of claimant solicitors who expressed frustration at the lack of substantive responses to claims. One claimant solicitor suggested that it would be: ‘helpful if TSol had a department to specifically deal with pre-action correspondence’.

Another commented:

‘TSol do not operate like normal lawyers, in the sense that they do not seem to advise their clients unless it is a really big case. They operate as a post box between their client and counsel. The standard response you get if you approach them direct is: “I’ll chase my client.” It is not possible to have a sensible conversation to sort out matters one way or another. Their letters are aggressive and tend to pick on procedural points.’

That communication difficulties exist is unsurprising. More surprising is that understandings of appropriate practice can vary significantly between solicitors within the same public authority. Practice in relation to claims involving tribunal decisions that are *functus*<sup>10</sup> is an example. One solicitor in TSol told us that:

‘Because I do a lot of tribunal work, (involving bodies which are *functus*), letters before claim are not usually necessary or appropriate, save in cases where the problem is a delay in listing, in which case we usually look at such letters, accept the fault and agree to settle matters.’

By contrast another TSol solicitor said that:

‘TSol have a policy of encouraging letters before claim even where the defendant is *functus*. Claimant solicitors who regularly deal with us know it is helpful to be in touch pre-issue, even though they are not obliged to send us such letters under PAP. If our client agrees to quash the decision, TSol can then help draft the consent order etc, and, thereby, minimise the extent of the litigation.’

## 2.6 Settlement before commencement of proceedings

In the absence of previous data, and in order to assess the scale of settlement prior to court proceedings, we asked our interviewees how many letters before claim they had sent or received during the 12 months preceding the interview, and how many of these had matured into judicial review challenges.

Claimant solicitors found it difficult to provide accurate figures in response to these questions, except where the number of cases they were dealing with was very small. Most, however, were able to give estimates. The figures below are based on these estimates. While they cannot provide a precise indication of the scale of pre-judicial review disputation, they do reflect the experiences of many

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<sup>10</sup> That is where a tribunal’s decision cannot be altered by that tribunal.



public law practitioners and provide the best snapshot yet obtained of the scale of activity, including settlement, at this stage.

From the figures provided by the 56 claimant solicitors who responded to these questions, it can be estimated that in the previous 12 months they had together sent 2122 LBCs. Of these, 807 (38 per cent) materialised into proceedings for judicial review and the rest (62 per cent) were either settled or abandoned.

On this basis we can say that for every 10 threats of litigation, approximately six are resolved without proceedings being commenced.

These figures underscore the importance of the LBC in formally indicating the seriousness of the claimant's position, establishing the parameters of the dispute from the claimant's perspective and encouraging the public authority to consider or reconsider its position.

More broadly, the figures also indicate that most public law disputes that come to be dealt with by lawyers are resolved without litigation.

Of course, significant variations are likely to exist across cases. One solicitor, for example, who deals mainly with *functus* cases in the field of immigration, commenced judicial review proceedings twice as often as he sent LBCs. By contrast, two housing lawyers said that only eight per cent and 14 per cent respectively of the LBCs they sent to defendants turned into issued challenges. In the remaining cases, the defendants conceded.

Our overall impression is that the majority of threats were resolved when the public authorities accepted the claim made in the LBC and a minority were abandoned when it was demonstrated that the claims lacked merit. This is reflected by the following comments of solicitors on both sides.

The experience of one London-based housing lawyer is not atypical:

'[in most] of the unissued cases, the local authority caves in . . . Judicial review is like a game of chess in that respect.'

This was echoed by a London local authority lawyer who said:

'[the letter before claim] helps reduce the number of issued claims as the defendant can respond early – concede or explain.'

A response from a solicitor in the TSol suggests that in this department's experience most LBCs have merit:

'The [pre action protocol] is important in most of our cases as it affords us an opportunity to advise a client to concede a case prior to issue, thus avoiding the client and the claimant incurring costs.'

As we have already observed, several interviewees complained that there was insufficient time to conclude negotiations before issuing, either because of the need to respond to emergencies or because of the need to meet the tight deadlines. In other cases, defendants were unable to take the necessary steps in time to avert proceedings, whether due to their tardiness or because the resources to meet the claim were not available or easily secured, for example, a place in a particular school.



Whatever the reason, it is clear that in a substantial number of cases dialogue was continuing when proceedings were commenced. This, however, does not indicate that a relaxation in the limitation period would necessarily lead to an increase in pre-commencement settlement and to a decline in the number of cases issued. This is because commencement of proceedings was also an important trigger to settlement.

It does, however, indicate that the standard guidance on the PAP is often unrealistic in relation to judicial review litigation. The guidance says that: ‘The Courts take the view that litigation should be a last resort, and that claims should not be issued prematurely when a settlement is still actively being explored.’

## **2.7 Conclusions**

This section has highlighted several features that are of importance in understanding those dynamics of public law litigation that affect opportunities for early resolution.

Public law disputes concern a very broad spectrum of issues and, obviously, individual cases each have their own features and histories. Often, the opportunity to resolve disputes by dialogue is limited by the urgency of the issues, as when the legal challenge is prompted by a crisis such as imminent homelessness, or by the fact that there is nothing to negotiate over, as when a public authority simply denies the existence of the duty that the claimant says is owed.

Room for dialogue and compromise may also be limited by the different perceptions of the parties to the case and by factors such as poor communication between them. Other limiting factors include the late stage at which defendant solicitors become involved, or, where they are involved at an early stage, the unwillingness or inability of their client departments to concede the legal position before a claim is actually issued.

The tight limitation period is another factor that can militate against settlement before the commencement of proceedings, although the discipline it imposes almost certainly means that cases are settled earlier than would otherwise be the case were the limitation period to be extended.

Nevertheless, despite these obstacles to early resolution, in approximately 60 per cent of cases in which an LBC was sent, the dispute was resolved before the issue of proceedings. While we can only speculate about the precise reasons why particular cases are resolved at this stage, it is manifest that solicitors generally value the PAP and believe that it plays a positive role in enabling early settlement by improving channels of communication between the parties and helping to clarify issues.

Certainly, our evidence indicates that public bodies were galvanised into thinking seriously about making concessions once they received the LBC.

They were also galvanised into responding to the claim when proceedings are commenced. The ‘foster parents’ case discussed earlier, which settled in the claimants’ favour shortly after issue, for example, demonstrates how the commencement of proceedings can lead to a change of pace in the defendant’s

response, even where the defendant has already accepted the seriousness of the threat following the LBC. The defendant solicitor in that case told us that:

‘Once the judicial review was issued, things immediately kicked-off in terms of the overall review of the Panel. There were concerted efforts to correct mistakes along the way, at the same time as the litigation was unfolding.’

We therefore turn to examine more closely the progress of cases once judicial review proceedings have been commenced. Section 3 focuses on settlement and Section 4 on the permission stage.

# Section Three

## Settlement of judicial reviews after commencement of proceedings<sup>1</sup>

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### 3.1 Introduction

In Section 2 we estimated that over 60 per cent of potential judicial reviews are resolved by dialogue between solicitors before the commencement of proceedings. However, defendants may fail to pay sufficient attention to meritorious claims or are unable to respond in time to avert proceedings. Consequently, proceedings are often commenced while dialogue continues and are then settled shortly afterwards. In other matters, commencement itself acts as a catalyst for dialogue and early settlement. Either way, in our sample, 34 per cent of issued cases ended before reaching the permission stage. Many cases, however, settle much later in the process and after permission has been granted. In our sample, 56 per cent of cases that proceeded beyond the permission stage were settled before final hearing. Before looking more closely at the figures, we make some observations on the procedure and on what solicitors told us about the AOS. But, first some comments on incentives to settle and attitudes to litigation itself.

#### *Incentives to settle*

Our interviews indicated that the most common direct ‘incentive’ to settle judicial reviews was recognition by the defendant that a claim had legal merit.<sup>2</sup> The point at which this occurred was largely driven by the pace of the litigation, in particular by key stages such as the commencement of proceedings, the AOS procedure, the obtaining of permission to proceed, and by impending hearing dates. The stage at which defendant lawyers became involved was a significant factor affecting the timing of settlements prior to permission, as it was at this point that close attention was given to the legal strength of claims.

We saw many examples of cases that were settled on their merits on the advice of defendant lawyers, who told us that the claims could have been settled earlier had they known about them and been involved sooner. Other contextual

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<sup>1</sup> See V Bondy and M Sunkin, ‘Settlement in judicial review proceedings’ [2009] *Public Law* 237–259.

<sup>2</sup> Here we rely in particular on the interviews in the 24 settled judicial reviews in which we spoke to both sides, 16 of which settled pre-permission and eight settled post-permission. The subjects involved were: prisons (9); homelessness (5); education (3); family children and young persons (2); and one each of community care, asylum support, care proceedings, housing and police. The defendants were: TSol (10); London local authority (9); out of London authority (4); Police (1).

factors were also said to affect attitudes to settlement and timing, such as levels of mutual respect and the defendants' desire to avoid costs, but the overriding reason why cases were conceded was recognition that the claim was likely to succeed in court.

*Litigation is a last resort*

We have already seen that many lawyers, including those acting for claimants, view litigation as a last resort. In each of the non-emergency situations, where we interviewed both sides, the claimant solicitors said that they had done their utmost to secure a resolution without litigating. For instance, the claimant solicitor in a homelessness case referred us to the long history of contact with the HPU and explained that eventually she had no choice but to issue proceedings, although she still hoped for a settlement.

In a special educational needs case, the claimant solicitor told us that the child's mother had tried to obtain appropriate educational provision for a long time prior to instructing solicitors.

In a case brought by a prisoner challenging a failure of the Home Office to act on a recommendation of the Parole Board, the claimant's solicitor said that her 13 letters, written over a period of seven months, had generated no response. In the same case, which was settled following the issue of proceedings, the defendant solicitor explained that it had to settle because, in his view, a court would have considered the delay to have been serious and unjustified. As in most of the other cases, the defendant lawyer had not become involved until after the claim had been issued.

The incentive to commence proceedings comes both from the desire to resolve the dispute and from the obligation to proceed promptly and within the limitation period, although the need to commence proceedings may also arise for other reasons. For example, in one of the prison cases, the claimant was about to face a criminal trial, which made it necessary to have the judicial review resolved because the challenge concerned his ability to communicate with his lawyers over his defence. In several of the cases, the claimant solicitors suggested that they would have allowed more time for the authority to reconsider the claim had it not been for the pressing limitation period.

Defendants, of course, are not subject to the same time constraints. Moreover, as we have already observed, they may also have a very different view of the urgency of the need to resolve the substantive issue.

### **3.2 The procedural background**

The judicial review procedure was not designed to encourage early resolution of disputes. The structure of the pre-trial procedure was principally intended to enable weak cases to be filtered from the system, in order to protect the court from unwarranted litigation and to save defendants from having to expend resources responding to unarguable cases. While these aims were laudable in themselves, they led to a system that did little to promote early engagement between the parties. As the Law Commission observed in 1994: 'The present

procedures . . . operate as a disincentive to public authorities to review their decisions at an early stage with a view to reaching settlements with prospective applicants for judicial review.’<sup>3</sup>

The passive approach to early settlement in judicial review came to sit uneasily with the emphasis on early resolution that lay at the heart of Lord Woolf’s *Access to Justice* programme. This was recognised by the Bowman Committee which, as we have noted, called for a change of culture and led to reforms designed to achieve this end, including the adoption of the AOS procedure.

Claimants have to prepare their claim in a manner that is sufficiently robust to persuade a judge to grant permission despite any objections that are likely to be expressed by the defendants in their acknowledgement of service (AOS). The defendant public authority is notified of the claim and is required to file an AOS, setting out their response to the claim, within 21 days. The AOS is then available to the judge together with the claim at the permission stage. The AOS plays a significant role in the pre-permission procedure. Before turning to settlement, therefore, we examine what our interviewees told us about the AOS procedure.

#### *Acknowledgement of service*

The AOS is widely perceived by practitioners to be an important element in the process that encourages parties to re-examine the strength of their case. To this extent its aims are generally considered to have been achieved:

‘The AOS has changed the lie of the land. It ensures that the defendant gets to grips with cases at the issue stage, compared with the old days when they would wait to see whether permission was granted, dealing with applications as soon as they receive them. This helps settlement.’

‘The AOS probably has affected the interaction between the parties, as defendants can no longer just do nothing in response. Either they have to fold properly or take a decision as to whether to fight the case. So, the AOS sharpens their focus.’

Claimant solicitors surmised that it is at the stage when the AOS must be drafted that counsel first becomes involved on the defendants’ behalf, leading to a fresh and more expert evaluation of the merits of the claim:

‘I am in favour of as much information as possible passing between the parties at the early stages of a claim. The AOS sometimes moves us forward if it represents a shift in position or is the first detailed response which makes the defendants’ position clear. Crucially, it makes local authorities go to counsel at an earlier stage, such advice leading to concessions. To this extent, I think the AOS promotes settlement as it may be difficult for an internal local authority solicitor to advise their own departments as forcefully as outside counsel.’

The majority of responses concentrated on the usefulness of the AOS to defendants in providing an opportunity to demonstrate the weakness of claims, either causing the claimants to back down which, it was noted, is uncommon, or convincing the judge to refuse permission which, as we shall see later, often does happen.

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<sup>3</sup> Law Commission (1994) *Administrative Law: Judicial review and statutory appeals*, Law Commission No 226, at para 1.11.

Defendant solicitors also commented on the opportunity to reconsider their clients' position afforded by the need to file an AOS.

A solicitor at TSol said:

'I don't know what the system was before, but certainly from a case lawyer's viewpoint, the AOS is extremely useful in focusing upon whether the claim is to be contested or conceded. A weak case with little or no prospect will be conceded at this early opportunity.'

A solicitor at a London local authority expressed a similar approach:

'The AOS focuses everybody's minds and allows us the opportunity to rectify matters where we have not done something appropriately. For example, we get the chance to send out a decision letter with fuller reasons, as requested by the claimant.'

She went on to reveal another useful aspect of the AOS requirement that probably did not form part of the policy considerations in its introduction:

'From an in-house [lawyer's] point of view, it also assists us in getting a response from client departments. Some clients are subject to such frequent litigation that they are adopting a 'devil may care' attitude. However, asking them for comment on the claim form usually prompts some action. It is good to know that a High Court judge still motivates my clients to do what they're supposed to!'

The same theme was picked up by another out of London local authority solicitor:

'The short timetable can be quite difficult, especially when you are based so far away from the court and you need to get the papers to the court within that time. There is, however, also an advantage to the short time limit for filing the AOS – it is good for focusing your clients' minds on the case and getting the instructions speedily.'

Numerically, the most prevalent group of cases that settled prior to permission were homelessness cases, in which the claimants used the judicial review process to seek an injunction to secure interim accommodation pending review of a decision on whether the full housing duty is owed. Once obtained, authorities rarely seek to have the injunction set aside and when the interim accommodation is provided the judicial review claim tends to be withdrawn.

In a typical case of this type in which we interviewed both sides there was a judicial review of the defendants' refusal to provide accommodation pending review of their decision that the claimant was not homeless. According to the claimant's solicitor, since the claimant had nowhere to live there was no time for anything other than the service of an LBC setting a tight deadline for response. No response was received and the claimant sought and obtained an injunction. At this point the defendants provided the interim accommodation. The matter was resolved, and the claim withdrawn. As to why the defendant did not fight the case, the claimant's solicitors commented that:

'usually once [defendant] solicitors . . . consider our case they agree to settle. This may be because they consider that we will win or simply that they do not want such cases going to full hearing with the risk that a precedent will be set for further such applications and costs incurred.'

The defendant solicitor provided a view of the situation from the authority's perspective, explaining the rationale for settling these cases:

'What, in pragmatic terms, were the defendants likely to achieve by resisting the judicial review? They were unlikely to get the injunction booted out quickly enough to make any difference. Plus, by the time the case got into court, the claim would be academic as the section 202 [Housing Act 1996] decision [on the homelessness application] would likely have been made and actioned. Given the risk that the court may have upheld the broad terms of the order, the defendants were prepared to pay the claimant's costs for the sake of trading an open-ended order for the certainty of one with a known, finite end.'

These pragmatic considerations for conceding claims once injunctions are obtained were echoed by most of the other defendant representatives. The following quotation reiterates their importance and provides a sense of the frustration that was expressed by some local authority lawyers, including a solicitor for a defendant city council:

'[W]e have to do a costs benefit analysis in every case as we do not get our costs back even when we win. This means that we do not often ask for injunctions to be set aside. An urgent injunction to provide interim accommodation can be a problem for us . . . The injunction is invariably made to stand until further order which puts the ball in our court. It costs us £2000 to apply to discharge an injunction, and it takes weeks to get a case before a judge . . . Normally, the homelessness review will take place long before that, and this makes the whole thing academic in any case. It makes you feel cynical . . . You may just as well house all who threaten to issue . . .

### 3.3 Settlement after commencement and prior to the permission stage

Our finding that 34 per cent of the claims were withdrawn prior to the permission stage<sup>4</sup> indicates that the rate of pre-permission settlement has more than doubled since the early 1990s.<sup>5</sup> This trend reflects the increased emphasis on early resolution. While there is evidence that the trend was already apparent prior to the post-Bowman reforms, in our view there can be little doubt that the reforms have been successful in helping to encourage early settlement.

However, we found considerable variation in the rates of pre-permission settlement across different types of case category. Table 3.1 below shows, for instance, that whereas 62 per cent and 61 per cent of the homelessness and asylum support cases respectively were concluded prior to permission, in planning cases and in challenges to disciplinary bodies, the early conclusion rates were much lower,

<sup>4</sup> Of the 1449 cases in our Administrative Court sample, 496 were recorded as having been withdrawn prior to the permission stage.

<sup>5</sup> In a 1991 sample analysed by Bridges *et al.*, 13 per cent of applications were withdrawn prior to permission, and in a 1994–1995 sample the figure was 20 per cent. L Bridges, G Meszaros and M Sunkin, 'Regulating the judicial review caseload' [2000] *Public Law* 651–670. These researchers commented that these figures ' . . . showed that even prior to Bowman, "early settlement" of judicial review cases was already a significant feature of the procedure'. Bowman did not specifically identify the extent of pre-permission settlement, noting only that: '[s]ome of the settlements take place even before the permission to proceed stage', Bowman Committee Report, p 59 (para 2, Chapter 7).



at around 18 or 19 per cent respectively. In licensing and police cases, the pre-permission conclusion rates were only 9 per cent and 5 per cent respectively.

Table 3.1: Pre-permission settlement by case category

Case category	No. of cases in 9-month sample	Ended prior to consideration of permission %
Homelessness	149	62
Asylum Support	96	61
Community Care	99	48
Housing	154	46
Mental Health	52	40
Education	107	37
Prisons	156	29
Planning (T&CP)	107	19
Disciplinary Bodies	67	18
Social Security	52	17
Licensing	32	9
Police	74	5

A range of factors may explain these differences. For example, the high rate of early resolution in homelessness cases may be because many of these cases were withdrawn once injunctions were granted requiring authorities to provide interim accommodation pending review of the housing authority's decision on the claimant's substantive homelessness application. Where failure to provide interim accommodation is challenged, and the claimant obtains an injunction from the Administrative Court, the substantive housing application will invariably be speedily reviewed by the local housing authority. This will effectively bring the judicial review to an end, as any further challenge to the authority's decision on the housing application must be made to the County Court.

By contrast, the low rate of early settlement in the planning and discipline cases is probably because many of these cases involved challenges to decisions that could not be altered without the intervention of the court, for example due to the *functus officio* status of the decision-making body. In social security and police cases, the low levels of settlement may, at least in part, be due to the high percentage of litigants in person bringing such claims in comparison with housing or community care challenges.<sup>6</sup> The absence of legal representation for the claimant significantly changes the dynamic between the parties and is likely to affect the nature of their communication and the possibility of settlement.

Finally, in this context, it is to be noted that in all but one of the cases in our sample that settled pre-permission and in which we interviewed both sides, the

<sup>6</sup> We have only partial data on claimant representatives and litigants in person, but the following figures are still indicative of prevalence of litigants in person in various case categories: homelessness, four unrepresented litigants out of 48 cases; asylum support, two out of 28; community care, no recorded litigants in person. In social security cases, nine out of 14 were unrepresented. In the police cases five of the 13 were unrepresented.



defendants' concession followed reassessment of the dispute in the light of legal advice provided by their lawyers. Moreover, in most of the cases, the lawyers accepted that from the point of view of the legal merits at least, the disputes could have been resolved earlier

### 3.4. Settlement after permission has been granted

In our Administrative Court sample, 382 cases were granted permission<sup>7</sup> and we were able to identify recorded outcomes in 320 of these cases by the end of the research period. Of these, 179 (56 per cent) were withdrawn after having been granted permission. This figure is consistent with findings of earlier research.<sup>8</sup>

As well as reiterating the high incidence of settlement, the finding indicates that the increase in the rate of settlement prior to permission has not been at the expense of post-permission settlements. In other words, settlement activity as a whole has increased and, while cases may be settling earlier, the historical rates of settlement post-permission continue.

### 3.5 The outcome of settlements: settlements vindicate claimants

Our interview data indicate that the vast majority of cases that settled did so in favour of claimants. We interviewed solicitors in 77 cases that were withdrawn by consent.<sup>9</sup> Of these, 54 were withdrawn pre-permission, 22 after the grant of permission, and in one case the claimant withdrew on the day of oral hearing when it became clear that the claim lacked merit.<sup>10</sup>

Table 3.2 summarises the nature of settlements in the 54 cases that ended prior to permission. It shows that, apart from eight cases in which the claimant obtained no benefit directly as a result of the settlement, in each of the other cases the claimant achieved at least what they would have achieved had the judicial review proceedings been successful at final hearing.

The known reasons why cases ended with no direct benefit to the claimant included: loss of contact with the client; the claim becoming academic due to the passage of time; acceptance on the claimant's part that the claim was misconceived or premature, and adjournment of the case pending a Court of Appeal decision.

Twenty-one cases (39 per cent) were settled when the defendants agreed to reconsider earlier decisions or to carry through decision-making processes that they had previously failed to complete. This group covers a broad range of circumstances. In one of the homelessness cases, for instance, the dispute concerned the defendant's refusal to consider a fresh application for housing and this was resolved when the authority agreed to do so. In two of the mental

<sup>7</sup> Altogether, 953 cases were considered for permission; of the 782 paper considerations, 237 were granted permission, of 214 renewed applications 44 obtained permission, and a further 101 cases out of 162 were granted permission following oral-only permission hearings.

<sup>8</sup> Bridges *et al.*, 'Regulating', n. 6 above, at 667.

<sup>9</sup> In 25 cases we interviewed claimant solicitors, in 28 defendant solicitors, and in 24 cases we interviewed both sides.

<sup>10</sup> Of the 54 cases that settled pre-permission, in 17 we interviewed the claimant solicitors, in 21 the defendant solicitor, and in 16 we interviewed both sides.

health cases, the settlement consisted of an agreement to obtain a consent order effectively quashing a decision of the Mental Health Review Tribunal and remitting the matter to another tribunal. Since, in this type of situation, the claimant would have sought judicial review in order to obtain an initial, or fresh, decision, they will have achieved their objective, even when that decision proved to be unfavourable to them (as in four cases in this group).

In 25 of the cases (46 per cent), the defendants agreed to provide the substantive service or benefit that had been at the core of the dispute. In all four education cases, for example, an appropriate school place was found; in the community care case the drug Herceptin was made available; in seven of the homelessness cases the defendants accepted that they owed the full housing duty to the claimants and provided permanent accommodation. In another nine of the homelessness cases, following the grant of an injunction, the defendants agreed to provide interim accommodation pending their review of the claimants' housing applications.

*Table 3.2: Pre-permission settlement by outcome*

<b>Subject</b>	<b>No. of cases</b>	<b>Review or reconsideration of earlier decision</b>	<b>Substantive benefit to claimant</b>	<b>Withdrawn without benefit</b>
Homelessness	20	10	7	3
Prisons	11	4	5	2
Asylum support	5	2	2	1
Child care	2		1	1
Education	4		4	
Mental health	3	2	1	
Housing	4	2	1	1
Community care	1		1	
Fostering	1	1		
Inquiries	1		1	
Disciplinary bodies	1		1	
Police	1		1	
<b>Total</b>	<b>54</b>	<b>21</b>	<b>25</b>	<b>8</b>

Table 3.3 summarises the findings in relation to the outcome of settlements reached after permission had been obtained. Once again, most of these settlements favoured the claimant, which, of course, is unsurprising given that the claims were known to have been arguable by this stage.

That such a high proportion of cases are settled in favour of claimants, both before and after the permission stage, is striking. It highlights the importance of dialogue in the conduct of public law litigation. It also raises questions about why these matters were resolved at these stages and not earlier. In particular, why was it that public authorities agreed at this stage to do what they had previously refused or failed to do? It is to this issue that we now turn.

Table 3.3: Post-permission settlement by outcome

Subject	No. of cases	Review or reconsideration of earlier decision	Substantive benefit to claimant (more than JR)	Withdrawn without benefit/other	Not known
Homelessness	4	3		1 *	
Prisons	4	1		1	2
Asylum support	2				2
Child Care	1	1			
Education	4	2	1	1 †	
Housing	5	2	2	1	
Community Care	2		1	1	
Total	22	9	4	5	4

\* resolved in claimant's favour but for unrelated reasons

† resolved other than by JR

### *The importance of permission in settlement*

The most obvious reason why cases were settled after the claimant had obtained permission was that defendants now knew that the claim had legal merit. Our interviews confirmed the force that a grant of permission can exert in encouraging public bodies to reassess their attitude to a dispute and its utility as a powerful lever for claimants. For example, in a challenge to a decision concerning a school admission, the defendant education authority agreed to re-hear an appeal against the decision only after permission was granted:

'We knew that the decision letter was inadequate, but we thought that the other documents we provided could be relied on. The judge didn't seem to accept that.'

The claimant solicitor in the same case said:

'Once we had sent the LBC, I tried to engage in negotiation via correspondence. However, the defendant made it clear that they were not interested – they maintained that their position was lawful and refused to be swayed. My experience is that the chance of negotiations being successful is always higher post-permission.'

### *Permission strengthens the hand of lawyers*

The grant of permission may also have an effect within public bodies to strengthen the hand of lawyers who are at odds with their client departments in their approach to settlement. In a dispute concerning the placing of a child on the 'at risk' register, the members of the child protection conference decided that the child's name should be removed from the register, but their decision was overruled by the conference chair. One of the central questions in the judicial review was whether the chair had this power.

It was clear from the interview with the authority's solicitor that there was a difference of views between the client department and the legal team as to how the case should be handled. Apparently, the client department refused to accept legal advice to concede the case and instructed the lawyers to defend proceedings:

‘The client department did not accept the advice obtained from counsel that we should concede the case, so the response stated that the Chair was entitled to make the decision he made, and that in addition, the claimant had not suffered any loss as a result.’

In the event, permission was granted on the papers and the judge made observations that in the defendant solicitor’s opinion ‘helped focus the client department’s mind on the issues’ and led to a settlement.

Indeed, in that case, the authority finally settled on terms that were much more favourable to the claimant than could have been achieved by adjudication in that, exceptionally, the defendant agreed to pay the claimant £1000 damages, as well as to change the policy at issue.

### **3.6 Communication and the early involvement of defendant lawyers**

The likelihood and appropriateness of settlement are obviously fact and context dependent. Nonetheless our interviews threw light on the importance of two general factors in achieving timely settlement. The first is effective communication, both between lawyers acting for the parties and between defendant lawyers and their clients. The second is the early involvement of defendant lawyers.

*The quality of communication between claimant solicitors and defendants and mutual understanding and respect*

Although not typical, the quote below illustrates the potential value and importance of good working relations between the parties in resolving disputes without the need for litigation:

‘We have established an excellent working relationship with [the] City Council and we hold regular meetings with them. We air our concerns over recurring issues, and they take our concerns on board, even to the point of restructuring the practices in departments so as to ensure that people are not turned away when they seek help . . . Whilst we send out quite a lot of letters before claim, the issues get resolved most of the time without recourse to judicial review. The legal department are helpful, though I believe that they were forced into this cooperation, knowing that it is in their interest to deal with the issues we raise. If we disagree on the legal issue or merit of a case, we agree that it should be considered by a judge. There is no animosity. Also, there is good cooperation between HPU and legal. I approach HPU when I first see a client, and they work closely with legal from an early stage if we can’t reach an understanding straight away. Once it gets to LBC stage, I copy the letter to legal. We speak to legal before we think to challenge. This is very different from how it was when I worked in London.’

It was more typical for claimant solicitors to comment on the difficulties they faced in obtaining responses from defendants in time to resolve matters before commencement of proceedings. But experience varies. The following quote demonstrates the contrasting experiences of a claimant lawyer who deals with a number of authorities, with regard to the speed and responsiveness of their communication:

‘Often . . . we are forced to issue proceedings out of sheer frustration at the lack of response. We find that with [London Borough A] we have to issue, because they are not responding. If they engaged with us, it would save us and them time and money. As a lawyer, I don’t want to have to issue when all that is needed is a bit of courtesy or a chat. A lot of issuing is almost being forced upon us because the client needs a decision or a service, and the local authority is not responding to that.

[London Borough B] are very good in responding well and quickly. They know us and there is good communication between us. [London Borough C] are also very good at responding. [London Borough D] respond, but not sensibly. They adopt an adversarial approach. [London Borough E] are particularly bad both in the way and the content of their response. Outside London authorities tend to respond more positively. Perhaps they are under less pressure. Frankly, I am at the end of my tether with local authorities. Here I am, dealing with a serious and urgent case which requires immediate action. I send a letter, I ring, and there is no one to talk to. If the person responsible is not in the office, there is no one else covering for them. I have to plead with anyone I get to speak to deal with the matter, or find someone above their head to complain to, or issue proceedings. I can’t understand it. If I am sick, or on leave, there is always someone in the office who covers my cases. In local authorities, you have a named lawyer. If they are not at their desk, or away from the office, there is simply no backup.’

Defendants too commented that a good working relationship with claimant solicitors facilitated early resolution of disputes. For example:

‘one local firm of solicitors we get along with quite well . . . You can get on the phone to them saying ‘OK, let’s see how we can sort this out.’ With another firm . . . we do not have that kind of relationship. With them we respond to everything in writing to make sure that there is a record. The impression we get is that they have a dim view of [the] local authority. Of course you mess up sometimes. We are not perfect, but we try to put things right. If we find out that we have made a mistake, we want to put it right.’

#### *The early involvement of defendant solicitors*

Many claimant solicitors told us that they are relieved when lawyers for the defendants become involved as they often take a fresh view of the merits of the case that leads to resolution of the dispute. In prison cases, for instance, several solicitors commented on the difficulty of establishing a dialogue with defendants until their lawyers become involved:

‘Any attempts at discussion were met with a brick wall i.e. no response from the Prison Service. Treasury Solicitors on the other hand are very wily: when they realized that they were dealing with a ‘hot potato’, they urged the defendant not to pursue matters and my impression is that they were trying to get the case settled in the best way possible.’

Similarly, in a challenge to the defendant’s failure to provide a mental health assessment, matters were swiftly concluded after solicitors became involved and the defendant agreed to complete an assessment and to pay costs:

‘The defendant began back-peddling after issue [of judicial review], once the lawyers got on the job, and conceded in the end. I am unsure why they did not take advice before this stage. Prior to this time, it was a matter of

‘functionaries’ dealing with [the] case, i.e. untrained council workers, who had no idea of what decisions they could lawfully make.’

The frustration expressed by claimant solicitors at the unnecessary litigation resulting from lack of adequate response on the part of lay defendants was mirrored by defendant solicitors who expressed frustration at not being instructed before cases escalated.

‘Most of the time, LBCs are copied to legal, or alternatively, the client department alerts legal to a threat of proceedings, although not always. On one occasion a[n] LBC was sent to social services and it did the rounds before anybody thought to send it to legal and we lost 14 days in the process.’

In some cases, it is clear, at least to the defendant’s lawyers, that the matter must be settled. A case concerning the Home Office’s delay in responding to the Parole Board’s recommendation is an example. Here the defendant solicitor was absolutely clear that:

‘This was certainly a matter which could have been resolved prior to issue had the SSHD [Secretary of State for the Home Department] merely provided a substantive response to the claimant’s queries, as the case arose from a procedural error and a failure to communicate properly with the claimant.’

Early involvement of defendant solicitors can, of course, also lead to resolution by way of substantive response to the complaint which demonstrates that the complaint lacks merit, as explained by a solicitor acting for defendants:

‘There is a mixture of the LBC being sent to the clients and direct to [us]. This is very unhelpful, partly because the clients usually make a pig’s ear of their responses. I would prefer all the letters were sent directly to me as this would give me more time to (i) get early instructions and (ii) more importantly, understand the case better. Sometimes, it is the case that upon receipt of the LBC, I can present a factual response which operates to kill C’s claim.’

Some defendant authorities had recognised the advantages of early lawyer involvement and closer cooperation between client departments and their legal advisers. One creative model is illustrated by a London local authority that is heavily litigated against, which had reformed its practices by establishing an on-site legal adviser at HPU. The proactive involvement of a lawyer as soon as actual or potential disputes arise helps to reduce litigation by obviating the unnecessary escalation of such disputes.

A prison case provides an interesting example of the defendant lawyers in effect brokering an agreement that would be acceptable to both the client department and the claimant. The case arose when a prisoner challenged a decision not to allow accumulated visits at a high security prison and the legality of the underlying policy. The case was settled when the claimant was allowed to take accumulated visits but at a different prison. The solution suggested by TSol did not involve a climb-down on the policy challenge nor did it give the claimant all that was asked for, but it was sufficient to resolve the case. The claimant’s solicitor explained that:

‘The case settled after TSol provided a draft consent order which suggested a viable alternative . . . that visits would take place in [a different prison] . . . the settlement offer was not the best deal for my client, but nonetheless we accepted as I am obliged to report any fall in a case’s merits (i.e. the offer

of settlement and an emerging factual dispute), meaning funding may have become questionable.’

*The quality of communication between defendant solicitors and their client department.*

A central factor for defendant lawyers was said to be the ease or difficulty with which they were able to obtain speedy instructions from their client departments. Inability of defendant lawyers to get speedy instructions from their client departments may well lie at the root of many complaints made by claimant solicitors that defendants did not respond to them:

‘We get a lot of threats of proceedings. Some get missed because the clients are slow in giving instructions. I nearly had one issued against us today. I told the clients about it on Friday, and got no response until [Tuesday] when we were able to agree to accommodate the person. Mostly we get things sorted either by way of putting pressure on the client department or we ask questions of the claimant’s solicitor which they have to answer before the case can proceed.’

Response to a threat of proceedings may require defendant lawyers to obtain instructions from officers further up the organisational structure:

‘Some sections are easier to get instructions from than others. I go to the very top if I have a problem. That can cause friction with the client department. However, my primary duty is to the local authority, not to social services, so if a social worker is difficult, or does not appreciate the urgency of the need to respond, I have to do what I can to ensure that my job is done properly.’

And also:

‘I get copies of all LBCs. We send them out to the relevant departments, asking for instructions. We send copies of our requests to the head of children and family division as they can help fast-tracking the process of obtaining instructions.’

As a solicitor at TSol summarised: ‘The key with any big bureaucracy is speaking to the right person in time . . .’

*Tensions between lawyers and their client departments*

Defendant solicitors also commented that tension can arise when their client department wants to contest a case, and the legal advice is to settle.

‘Legal and client department see the world differently. Generally speaking, they will try to push their position forward, but ultimately they accept our advice. They see the facts and circumstances of the applicants, but they don’t necessarily understand the legal issues involved.’

Where differences between the client department and the lawyers as to how a case should be handled cannot be resolved, defendant lawyers said that it may be:

‘easier to fight a case, than to settle: if a judge takes a rum view of the evidence, it is, nonetheless, objective, and you can tell your client that you did your best on the basis of their instructions.’

These quotations reinforce those set out in Section 2 and provide some insight into the dynamics of the relationship between lawyers and client departments, especially where tensions exist between service priorities on the one hand and



the lawyers' assessment of how a case might be regarded by a court on the other. In this regard it is worth noting that unlike claimant solicitors who often drive the litigation and who tell their clients what can and cannot be done, defendant solicitors are bound by their client department's instructions and may find themselves defending cases that they consider indefensible.

Even where there is good communication between lawyers and clients, the reality is that it can take time to establish the appropriate communication and dialogue with clients. It can also take time to set up the service provisions required, especially if these involve complex needs and responsibilities on the part of multiple departments or agencies.

### **3.7 Conclusions**

Most judicial review claims are settled and most settlements satisfy the claims made in the judicial review. The evidence indicates that the rate of settlement has increased since the post-Bowman reforms and that a growing proportion of claims are settled prior to the permission stage. These findings indicate that the post-Bowman reforms have been successful in achieving a higher incidence of earlier settlement. Whether or not there has been a change of litigation culture, the research identifies that there is a widespread conscientious concern amongst both claimant and defendant solicitors to resolve disputes in a timely fashion. Moreover, concerns that settlement may disadvantage individuals in dispute with relatively well-resourced and powerful public bodies appear to be unfounded.

However, while early settlement has become more common, a substantial number of cases nonetheless settled later than they could, and perhaps should, have done. The research, for instance, revealed that a number of significant obstacles to dialogue and communication continue to exist which operate to hinder and delay settlement. Of particular importance in this regard is the persistence of the 'wait and see' attitude to litigation in some authorities. This hinders their ability and willingness to consider settlement until permission has been granted.

The late involvement of lawyers acting for defendants is another significant factor that reduces the ability of public authorities to make an early and accurate assessment of the legal merits of claims. In this regard, we have noted comments by defendant solicitors to the effect that cases could have been resolved sooner had they been aware of them earlier.

The research also underscores the importance to claimants of having access to the services of skilled and expert lawyers who are able to, literally, negotiate their way through the procedure and communicate effectively with defendants.

Certainly our impression is that involvement of expert lawyers on both sides is conducive to timely settlement and is therefore likely to save considerable resources for all concerned, not least the taxpayer.

This is a significant consideration at a time when there is a growing shortage of solicitors taking on legal aid work and legal aid eligibility is being eroded.



We have also seen how communication within defendant public bodies, including the problems facing lawyers in obtaining instructions from client departments, can delay settlement.

Public bodies are complex organisations and many judicial review claims can only be resolved with the cooperation of different sections within the organisation. This may involve internal arrangements such as clarification between departments of their respective responsibilities in a case, the views of senior management and decisions about resource implications. Such matters, of course, cannot be directly affected by court procedures.

This is not to say that authorities are necessarily reluctant or unable to take a more proactive approach to resolution of legal disputes. We saw, for example, that one of the most heavily challenged London Boroughs has reformed its system so that lawyers and housing advisers can work more closely with each other so as to resolve potential legal claims at the earliest stage. We also saw how mutual respect and effective communication between a law centre and a city council enabled disputed decisions to be reconsidered and rectified early on where appropriate, thus benefiting both claimants and defendants, as well as saving the public purse. We suggest that awareness of such innovative and creative schemes could be raised with a view to developing good role models for other public bodies to adopt.



# Section Four

## The permission requirement<sup>1</sup>

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### 4.1 Introduction

The permission stage of the judicial review process in England and Wales plays a critical role in determining the general dynamics of public law litigation and, more specifically, access to public law remedies. Its place in the system, although at times controversial, has for long been regarded as necessary in the interests of protecting public bodies from unwarranted and costly challenge and maintaining the efficiency of the court system.<sup>2</sup>

While the roots of the procedural requirement are to be found in reforms introduced in the 1930s, we have noted already that the post-Bowman reforms introduced two important changes to the procedure that were designed to improve its efficiency and to encourage earlier settlement of disputes. Firstly, unless the court otherwise directs, initial applications for permission must be made in writing and considered on the papers, although claimants retain the right to renew refused paper applications in open court. Secondly the AOS procedure was introduced, whereby defendants, once served with applications for permission, may present summary grounds for contesting claims which are then considered by the judge dealing with the application.

A main aim of the project was to examine how these changes have affected the operation of the permission stage and, in particular, to explore whether they have affected, or are perceived to have affected, access to justice in judicial review proceedings.

### 4.2 The decline in leave/permission grant rates

The *Judicial Statistics for England and Wales* show that over the years it has become increasingly difficult to obtain permission to seek judicial review. For instance, we saw earlier that in 1981 71 per cent of claimants whose cases were considered at

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<sup>1</sup> See V Bondy and M Sunkin, 'Accessing judicial review' [2008] *Public Law* 647–667.

<sup>2</sup> For an historical account of the requirements, see: A Le Sueur and M Sunkin, 'Applications for judicial review: the requirement of leave' [1992] *Public Law* 102–129, esp. pp. 107–111. On the Bowman reforms, see T Cornford and M Sunkin, 'The Bowman Report, access and the recent reforms of the judicial review procedure' [2001] *Public Law* 11–20.

the leave stage were permitted to proceed, whereas in 2006, the equivalent figure was only 22 per cent.<sup>3</sup>

The downward trends in the permission grant rate during the years 1996 to 2006 inclusive in ‘all categories of judicial review’, in ‘immigration cases’, and in ‘civil non-immigration/asylum’ cases, are shown by the graph in Figure 4.1.

The numbers from which the graph in Figure 4.1 is derived are set out in Tables 4.1, 4.2 and 4.3 and are based on the *Judicial Statistics for England and Wales*. Table 4.1 gives the figures relating to all categories of judicial review; Table 4.2 gives the figures relating to ‘immigration cases’; and Table 4.3 gives the figures relating to ‘civil non-immigration/asylum’ cases.

Figure 4.1: Permission grant rates 1996–2006: all cases, non immigration civil and immigration

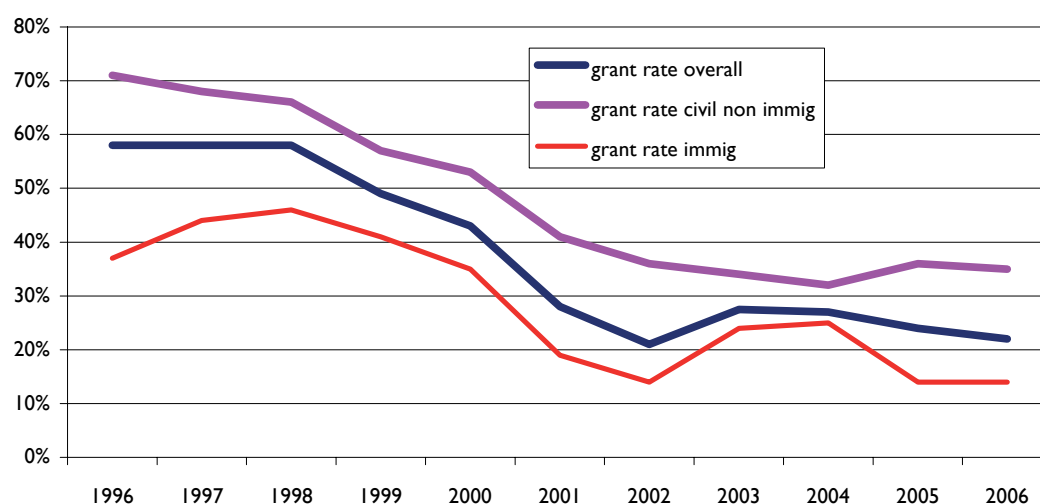


Table 4.1: Claims, permission decisions and grant rates in all categories of judicial review: 1996–2006

Year	Claims filed (receipts)	Permission decisions	Permission grants	Grants as a % of permission decisions <sup>4</sup>
1996	3901	2169	1257	58%
1997	3848	2209	1278	58%
1998	4539	1767	1020	58%
1999	4959	2798	1373	49%
2000	4247	3403	1464	43%
2001	4732	4967	1400	28%
2002	5377	5330	1124	21%
2003	5949	5232	1440	28%
2004	4207	3772	1036	27%
2005	5381	3140	744	24%
2006	6458	3390	752	22%

<sup>3</sup> See Section 1.1. In 1981, 533 applications for judicial review were considered at the leave stage and of these 376 were granted leave. The figures for 2006 are given in Table 4.1.

<sup>4</sup> The percentages given for the years 2000, 2002 and 2005 differ to those shown in the official statistics which appear to be errors.

Table 4.2: Claims, permission decisions and grant rates in immigration judicial reviews: 1996–2006

Year	Claims filed (receipts)	Permission decisions	Permission grants	Grants as a % of permission decisions
1996	1748	823	301	37%
1997	1925	980	435	44%
1998	2518	826	381	46%
1999	2769	1440	597	41%
2000	2120	1820	641	35%
2001	2421	2679	507	19%
2002	3286	3437	476	14%
2003	3848	3404	829	24%
2004	2221	1897	469	25%
2005	3149	1742	242	14%
2006	4084	2021	278	14%

Table 4.3: Claims, permission decisions and grant rates in civil non-immigration/asylum cases: 1999–2006<sup>5</sup>

Year	Claims filed (receipts)	Permission decisions	Permission grants	Grants as a % of permission decisions
1996	1856	1168	835	71%
1997	1639	1042	706	68%
1998	1711	803	532	66%
1999	1852	1103	629	57%
2000	1791	1272	675	53%
2001	1981	1873	766	41%
2002	1842	1551	558	36%
2003	1856	1548	525	34%
2004	1685	1519	490	32%
2005	1981	1145	412	36%
2006	2121	1131	397	35%

Several observations on the figures in the above tables may be made in passing. First, as we observed when describing our methods in Section I, the official statistics provide snapshots of the number of cases or decisions at various stages of the process during each year, but they do not show how particular cases proceed through the system. In other words, the permission decisions made in say 2005 do not necessarily concern claims filed in that year. With this in mind, Table 4.1 shows that during the period 1996–2006 the number of claims for judicial

<sup>5</sup> These figures include homelessness cases which are shown separately in the official statistics for the years 1999–2003.

review grew by some 65 per cent (from 3901 to 6458),<sup>6</sup> but the number granted permission only grew by approximately 28 per cent.

Table 4.1 also indicates that there was no correlation between the pattern of claims and the actual number of permission decisions in any one year. For instance, in 1998 there were 1767 permission decisions taken and 4539 claims, whereas in 2001 there were actually more permission decisions than claims issued. The explanation for such variations is not clear from the official statistics, although it may lie in factors such as the rate of pre-permission withdrawals, delays in processing applications, or changes in the availability of judge time to deal with permission claims.

Also noteworthy are the figures on the number of final hearings. The number of final hearings grew between 1996 to 2000, from 822 to 1414, but then declined, so that there were only 296 final hearings in 2006. As a percentage of claims filed, the number of final hearings therefore fell from 21 per cent in 1996 to just 5 per cent in 2006.<sup>7</sup>

### **4.3 Explaining the decline in the permission grant rate and its significance**

The decline in the grant rate is striking and raises two key questions: why has it occurred and what is its significance in terms of the quality of access to justice in judicial review proceedings? The downward trend in the grant rate is somewhat perplexing given i) the growing constitutional importance of public law over this period; ii) the trend to greater liberality of access in relation to other aspects of judicial review, including standing and third-party interventions; iii) that we might expect lawyers to have become more experienced in using the process; iv) that a very high proportion of claims are prepared and submitted by expert counsel; and v) that most claims will have been supported by public funds on the basis that they have merit.

The long-term decline in the grant rate broadly corresponds with the shift in the judicial approach to the permission requirement from the open approach that prevailed in the early 1980s to the more cautious approach that has dominated since the mid to late 1980s. The steep decline in the permission grant rate from 1998 to 2002 (during which the overall grant rate fell by 37 percentage points from 58 per cent to 21 per cent) broadly corresponds with the 'deck clearing' initiatives that took place in the Administrative Court, prompted by the Bowman Committee Report. The continued decline since 2003 almost certainly reflects the continuing impact of the reforms introduced following the Bowman Committee Report.

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<sup>6</sup> Although year-on-year growth was not constant and there were declines in the number of claims between 1999 and 2000 and between 2003 and 2004.

<sup>7</sup> The number of final hearings for each of the years 1996–2006 inclusive and the number of final hearings as a percentage of receipts (in brackets) were as follows: 822 (21%); 762 (20%); 909 (20%); 712 (14%); 1414 (33%); 1028 (22%); 436 (8%); 394 (7%); 334 (8%); 273 (5%); 296 (5%).

*The historical context: establishing the criteria*

Aside from the limitation period and the requirement to show a sufficient interest, the permission criteria are not spelt out in legislation or in the rules, but are left to judicial discretion.<sup>8</sup>

It is convenient to distinguish broadly between two classes of criteria. On the one hand are the criteria that relate to the appropriateness of the process and concern matters such as delay, standing, and the exhaustion of alternative remedies. On the other hand are the criteria (or possibly the criterion) that concentrate on the quality of the claim itself and whether the claim is sufficiently arguable. In quantitative terms, this is by far the most significant element of the permission test and failure to satisfy the judge that the claim is sufficiently arguable is the most common reason why permission to proceed is refused.<sup>9</sup> While there may have been changes to the first group of criteria, especially in relation to standing, changes in the requirements relating to arguability will have had a far more significant impact on the general statistical trend. It is therefore upon arguability that we focus.

*From hopelessness to actual arguability*

Lord Diplock early on emphasised that the aim of the ‘new’ RSC Order 53 procedure, which modernised the judicial review procedure in 1978, was to improve access to remedies in public law proceedings and to sweep away the old technicalities and restrictions. The new procedure, he said, offered both an accessible, speedy and flexible route to justice in public law cases and at the same time protected defendants.<sup>10</sup> Within this scheme the purpose of the leave requirement was to:

‘... prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers would be left whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived.’<sup>11</sup>

**He said that:**

‘The whole purpose . . . of . . . leave . . . would be defeated if the court were to go into the matter in any depth at that stage. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting . . . the relief claimed, it ought . . . to give . . . leave to apply for that relief.’<sup>12</sup>

<sup>8</sup> See above Section 1.2.

<sup>9</sup> See Le Sueur and Sunkin, ‘Applications’, n. 2 above. In our research we analysed the observations made by judges when refusing permission in a sample of claims. The following were the reasons given: insufficiently arguable (49 cases); delay (19 cases); hopelessness (12 cases); judicial review inappropriate (24 cases); insufficient standing (2 cases).

<sup>10</sup> *IRC v National Federation of the Self-Employed and Small Businesses* [1982] AC 617; *O’Reilly v Mackman* [1983] 2 AC 237.

<sup>11</sup> *IRC v National Federation of the Self-Employed and Small Businesses* [1982] AC 617, 643–644.

<sup>12</sup> *Ibid.*

This open approach was echoed by others, including by Donaldson LJ (as he then was) when he famously opened his judgment in *Parr v Wyre BC* by declaring that:

‘The citizenry of this country ought to appreciate better that the Divisional Court . . . provides a means of obtaining speedy assistance if they think that they are oppressed by authority or that they are failing to receive the assistance which Parliament has required authorities to afford them.’<sup>13</sup>

That it was Donaldson LJ who admonished the citizenry for their failure to appreciate the potential availability of judicial review is striking given his reputation for efficiency, his role in clearing the backlog of cases that had developed in the late 1970s, his streamlining of the leave process in the early 1980s, and his later statements.

These heady days, however, were not to last. By the mid-1980s the mood within the senior judiciary towards leave had changed markedly as judges became increasingly anxious about the scale of judicial review litigation, especially involving ‘genuine visitor’ cases and homelessness. The mood change was clearly indicated by Lord Brightman in *Puhlhofer v Hillingdon LBC*<sup>14</sup> when he rebuked homelessness claimants for making ‘prolific use’ of judicial review and said that in such cases leave should only be granted exceptionally. The Court of Appeal issued a similar message in *Swati v Secretary of State for the Home Department* in relation to challenges brought by those disputing decisions that they were not ‘genuine visitors’ to the United Kingdom.<sup>15</sup>

In this climate, the leave requirement came to be regarded as a safeguard that would enable judges to maintain the overall efficiency of the system by filtering out not only hopeless cases, but also claims that would have satisfied Lord Diplock’s test of potential arguability. The high water mark of this approach was indicated by Donaldson, then Master of the Rolls, in 1990 when he conveyed a message very different to that given in his *Parr* judgment, less than 10 years earlier. ‘The public interest,’ he said:

‘normally dictates that . . . the judicial review jurisdiction is to be exercised very speedily and, given the constraints imposed by limited judicial resources, this necessarily involved limiting the number of cases in which leave to apply should be given.’<sup>16</sup>

That those with claims that would previously have been considered arguable might be refused access of the length of the case list was uncomfortable to say the least and attracted criticism from practitioners.<sup>17</sup> Donaldson expressed himself in rather less controversial terms in *R v Legal Aid Board ex parte Hughes*, when he observed that:

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<sup>13</sup> *Parr v Wyre BC* [1982] HLR 71, 80.

<sup>14</sup> [1986] AC 484.

<sup>15</sup> [1986] 1 WLR 477.

<sup>16</sup> *R v Panel on Takeovers and Mergers, ex parte Guinness plc* [1990] QB 146, 177–178.

<sup>17</sup> The prospect that access to the justice depended on the length of the court list was of concern to practitioners, e.g. Law Commission, *Administrative Law: Judicial Review and Statutory Appeals*, Law Com No 226, at para 5.14. See also Sir Konrad Schiemann, ‘Locus standi’ [1990] *Public Law* 342–353, at 394.



'Things have moved on since . . . [Diplock's opinion in the *National Federation* case] . . . leave ought only to be given if *prima facie* there was already clearly an arguable case for granting the relief claimed. That was not necessarily to be determined on a "quick perusal of the material", although any in-depth examination was inappropriate.'<sup>18</sup>

One important consequence of this was to encourage a more finely calibrated test at the permission stage. Whereas Diplock's approach assumed there to be a bold line separating 'hopeless' cases and cases that were 'potential arguability', Donaldson's approach required judges to draw a much finer distinction between claims that were '*prima facie* clearly arguable' (to be granted leave) and claims that were potentially arguable (to be refused leave). Such distinctions were unlikely to be easily made, especially before the October 2000 reforms, by judges with relatively little information about the overall quality of the substantive issues and who were therefore somewhat dependent on their intuitive reactions to the claim. Moreover, Donaldson's comment that judges should be prepared to do more than 'quickly peruse' the claim but avoid an 'in-depth examination' gave judges little practical guidance on how to proceed.

Nevertheless, these statements marked a step change from Lord Diplock's approach and that they continue to represent the appropriate approach has been reiterated, albeit with some refinement, by senior judges. including by Lord Bingham and Lord Walker in delivering the opinion of the Privy Council in *Sharma v Brown-Antoine and Others*.<sup>19</sup> Here they said that:

'the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy . . . But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application . . . It is not enough that a case is potentially arguable . . .'<sup>20</sup>

It may be noted that while Lord Diplock's view of the leave criteria has been repudiated, some judges still return to Diplock to emphasise the summary nature of the process.<sup>21</sup>

In the light of this shift from Diplock's light touch to Donaldson's more rigorous filtering, it is unsurprising that the leave grant rates declined significantly between the early 1980s to the mid-1990s.<sup>22</sup> Whether this shift in approach could have contributed to the decline in grant rates since the mid-1990s is less clear, however.

It should not be assumed that the change in approach indicated by the senior judges over this period was immediately and consistently adopted by the High Court

<sup>18</sup> *The Times*, 29 October 1992.

<sup>19</sup> [2007] 1 WLR 780.

<sup>20</sup> Para 14(4).

<sup>21</sup> See e.g. Sedley LJ in *Davey v Aylesbury Vale District Council* [2008] 1 WLR 878, at para 11, where he is critical of Burton J's preference 'for the maximum amount of material on a contest at the permission stage'.

<sup>22</sup> Research in the early 1990s had found there to have been 'a general trend over recent years toward higher rates of refusal of [leave]', although substantial variations existed between different subject areas of judicial review: L Bridges, G Meszaros and M Sunkin, *Judicial Review in Perspective* (1995) Cavendish, London, p. 135.

judges. On the contrary the evidence shows that a high level of inconsistency existed across the judges in relation to their permission grant/refusal rates suggesting that judges were adopting different standards when assessing the quality of claims. The continued decline in the overall grant rate after the mid-1990s may indicate that more judges were coming to adopt the Donaldson approach. However, as we shall see, our findings in this research indicate that inconsistency remains an issue.

#### *The post-Bowman situation*

The reforms introduced in October 2000 following the Bowman Committee Report did not formally alter the criteria. Nonetheless it was predicted that the reforms would increase claimant failure rates.<sup>23</sup> The two main reasons were that claimants lost the right to elect an oral hearing at the permission stage and that decisions were now to be made with the benefit of responses by defendants. The statistics indicate that these predictions have proved to be true.

#### *The impact of the removal of the right to an oral hearing*

Confirming earlier research, our findings show that the success rate of permission applications on the papers is significantly lower than the success rate when a hearing occurs. In our sample,<sup>24</sup> of the 782 claims initially dealt with on the papers, only 30 per cent obtained permission, whereas of the 171 claims dealt with initially in open court, 63 per cent obtained permission.<sup>25</sup> Given the difference in success rates between the written and the oral procedures, and the fact that many more claims are now dealt with on the papers than orally, it is unsurprising that the statistics show the grant rate to have declined.

In our study, 45 per cent of applications refused on paper were renewed, and 21 per cent of the renewed applications were granted permission at the renewed oral hearing. These figures underscore the importance of the right to renew, an aspect that was also emphasised in interviews, especially with claimant solicitors (see Section 4.4 below).

As well as giving claimants a second chance to seek permission following an oral hearing, the right to renew also has another important benefit. The meeting of the parties at court leads to settlements being reached.

The combined effects of settlement and success at the renewed oral hearing meant that almost a quarter of the claims which had been initially rejected on the papers either succeeded in obtaining permission or were settled without the need for further argument in court. This is a significant proportion and shows the importance of the right to an oral hearing on renewal. It also suggests that this element of the procedure may go some way towards ironing out the variations in rates of initial grant of permission as between individual judges.

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<sup>23</sup> Cornford and Sunkin, 'The Bowman Report', n. 2 above.

<sup>24</sup> Of 953 cases that were considered for permission.

<sup>25</sup> In our sample, 82% of the initial considerations were on the papers and 18% were dealt with orally. 214 of the paper claims were renewed applications and 44 of these were successful.

*The impact of the Acknowledgment of service*

Prior to the introduction of the AOS, the vast majority of claims were considered for permission without any input from defendants. Since its introduction, the AOS has in most cases given the defendants the last word on the merits of claims for permission.<sup>26</sup>

The AOS has a potential effect on refusal rates in various ways.

- It may provide a ‘knock-out blow’ to the claim rendering it clearly unarguable.
- The additional information may make it easier for a judge to reach a confident conclusion to refuse permission, rather than giving a claimant the benefit of the doubt.
- The judge’s ability to consider arguments from both sides may have raised the threshold of arguability.

*Observations*

In the absence of oral hearings in the majority of cases, the only source of information available to practitioners on why permission claims are successful or unsuccessful are observations made by the judges who deal with the claims.

A QC offered a defendant perspective on the role of observations:

‘Judges should give some summary indications on paper applications. This is a matter of good decision-making: it ensures public accountability by affording [a] visible explanation to the claimant, and also [indicates] that the decision-maker has applied his mind to the relevant test. In my cases, I don’t imagine reasons make a huge difference to decisions to renew, but I would hope that generally it makes a difference for the judge (as opposed to the defendant who is the object of hatred) to tell a claimant that their case is hopeless.’

Analysis of observations made by judges when refusing permission confirms the significance of the AOS.

We examined 99 observations in civil judicial reviews, other than immigration and asylum cases. The majority of the observations gave succinct explanations for decisions to refuse permission. The AOS was specifically mentioned as being relevant to the decision to refuse permission in 40 observations. In 26 of these, judges referred to the information contained in the AOS as part of the explanation for the refusal, and in the remaining 14 observations judges relied on the AOS alone without further elaboration,<sup>27</sup> other than perhaps specifying the relevant paragraph in the AOS. The following observations are typical of the last of these:

‘The points made in para 4 of the AOS are of particular importance. Overall and for the reasons set out in the AOS, I do not regard this claim arguable.’

‘For reasons set out in AOS the case is not arguable.’<sup>28</sup>

<sup>26</sup> Claimants rarely avail themselves of the possibility of filing a reply to a strong AOS.

<sup>27</sup> Including one that referred to the defendant’s pre-action response.

<sup>28</sup> In this case, permission was subsequently granted when the application was renewed and the case was then settled.

Judges vary in the style and in the detail they provide; they do not, for example, employ a common format and certainly there appears to be nothing resembling a tick box sheet. To give some idea of how observations vary in their presentation we can contrast the short statements provided above with the following more detailed summary of why the judge refused permission in a human rights claim against a local authority:

‘Quite apart from the issues under Art 8.2: (a) these proceedings have not been brought promptly or within 3 months of the exclusion notices. Given their duration, greater urgency was required. (b) As a result, the notices have expired. Unless they have been renewed or extended (and there is no evidence that they have been), the issues raised have become academic. The first defendant appears to be a private body exercising rights of property. The only indication that it may be a public authority is in para 2.3 of the constitution. Having regard to the above, it is unnecessary to come to a firm conclusion on this.’

The solicitor involved in this case told us that:

‘The observation made clear what the issues were which concerned the judge. It is one of the better observations I have seen.’

Detailed observations on refusals can enable both parties to make better-informed decisions on renewals and settlements. Several defendant solicitors told us that they would also welcome detailed observations on grants of permission so as better to understand how criteria are applied.

#### *Observations and the filter criteria*

The observations provide the best source for identifying the actual factors considered by judges in their decisions and therefore the criteria employed by the judges. By comparing findings based on the observations with earlier studies of the permission stage where the reasons given by judges in open court for refusing permission were analysed, we can obtain insight into whether, and if so how, the filter criteria have changed over the years.

The main reasons given for refusing permission in our sample of cases are summarised in Table 4.4.<sup>29</sup>

*Table 4.4: Observations: reasons given for refusing permission*

Reason	No. of times referred to
Insufficiently arguable	47
Delay	19
Hopeless claim	12
JR inappropriate	24
Absence of standing	2

While delay is mentioned in 19 observations, it is always combined with an additional ground or explanation, such as the absence of arguability, failure to show an error of law, or hopelessness. Similarly, the absence of standing

is mentioned in two cases, but in neither was it the only ground upon which permission was refused.

The inappropriateness of judicial review, either because there was an alternative remedy, or because no public law grounds were established, was cited in 24 cases, although the inappropriateness of judicial review on its own was cited in only four cases.

Twelve claims were considered to be hopeless and various terms were used, such as ‘misconceived’, ‘fundamentally misconceived’, ‘totally without merit’, ‘confused and making little sense’, ‘unrealistic’, ‘untenable’, and ‘perverse’. One judge expressed his exasperation with one claim by saying, that “the claim that the decision was perverse itself deserves that sobriquet’.

It is somewhat disconcerting to note that only half of these ‘hopeless’ claims were brought by litigants in person. Interestingly, while four litigants in person unsuccessfully renewed their applications, one case described as being ‘totally without merit’ was successfully renewed and was eventually successful at substantive hearing.

It is also interesting to find that both the grounds on which our sample of claims were refused permission and their recurrence across the cases are very similar to those noted by Le Sueur and Sunkin in their 1992 study of the leave requirement.<sup>30</sup> Le Sueur and Sunkin analysed 86 cases in which leave was refused. Of these, 57 were said to be unarguable, a slightly higher proportion than in our study; in 13 there was delay; in two there was an insufficient interest; and in 20 cases judicial review was considered to be inappropriate. The main differences are that in the 1992 study there were only two ‘hopeless’ cases; and in 11 cases the claims were considered to be premature, a consideration that was not specifically identified in our sample.

Although there is a difference of nearly 15 years between these two studies, there appears to have been little significant change in the reasons given by judges for filtering cases from the process apart, that is, from the regular references in the observations to the defendants’ AOS.

#### *Settlement and the decline in the grant rate*

The above discussion concerns the direct effects on the permission grant/refusal rate of the reforms introduced in October 2000. The reforms may also have had indirect effects insofar as they may have altered the nature and quality of claims reaching the permission stage.

One of the main objectives of the October 2000 reforms was to increase the rate of early settlement. As we saw in Section 3 the reforms appear to have been successful in this regard. In that section, we saw that a substantial proportion of cases in our sample settled prior to the permission stage and also that, in the vast majority of these, the settlement appeared to be favourable to the claimant.

<sup>30</sup> Le Sueur and Sunkin, ‘Applications’, n. 2 above.

Given these findings, it is plausible that the decline in the success rate at the permission stage since Bowman may be linked to the increase in the rate of pre-permission settlement.

Our findings indicate that the PAP for judicial review,<sup>31</sup> coupled with the AOS requirements work to encourage defendants to review claims before they reach the permission stage and to concede claims that would have previously proceeded to permission. In other words, compared with the current position, the pre-Bowman permission caseload included a relatively high proportion of claims that would have been accepted by defendants as having merit had they looked at them. Judges, therefore, are now dealing with a higher proportion of weaker or more contentious claims at the permission stage than they would have done prior to Bowman.

If this is correct, it means that we should not assume that a higher permission failure rates indicates that claimants have become less successful in their claims for judicial review. On the contrary, it may be more accurate to argue that because greater numbers of cases are being resolved earlier, and resolved in favour of claimants, judicial intervention is becoming less necessary, at least in cases that have merit and are likely to be non-contentious.

#### **4.4 Practitioners' perceptions of the permission process**

We now turn to explore how the permission stage is viewed by practitioners and, in particular, by solicitors. The material presented here is drawn from our interviews.

We focus on two main aspects. As well as attitudes to the procedure, we look at perceptions of the way judges approach permission decisions, including the issue of judicial consistency. In relation to this aspect, we also report on the findings of a statistical study that we undertook as part of the research.

##### *Attitudes to the written procedure*

One of the more controversial aspects of the post-Bowman reforms was the removal of the right to a hearing for an initial decision on permission (as opposed to a right to renew an application orally). We anticipated that practitioners would be critical of a reform that removed choice in this regard. We asked: 'What, in your experience, has been the effect, if any, of the initial paper-only consideration on the outcome of permission applications?'. Contrary to our expectations, the majority of interviewees (including the majority of claimant solicitors) expressed satisfaction with the paper process.

Of the 39 claimant solicitors who responded to this question, 24 (62 per cent) gave the paper procedure at least a qualified thumbs up,<sup>32</sup> and 16 of these approved of the procedure because it saves costs and/or time.

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<sup>31</sup> [www.justice.gov.uk/civil/procrules\\_fin/contents/protocols/prot\\_jrv.htm](http://www.justice.gov.uk/civil/procrules_fin/contents/protocols/prot_jrv.htm).

<sup>32</sup> 24 said it was "good", 11 said it was "bad", two said it was "vaguely okay", and two gave other, unclassifiable responses.

Interestingly, given that these were solicitors acting for claimants, some added that the process had the benefit of filtering out the ‘rubbish’ cases.

Four solicitors considered that the permission requirement is helpful in providing an early neutral (and authoritative) evaluation of weak applications. One solicitor in an out of London firm, specialising in prisons and in human rights law, said:

‘I am happy with the paper application. It is helpful because in borderline cases you get an indication of whether . . . a challenge will fly or not.’

This aspect of the permission process has for long been considered to be a valuable aspect from the perspective of claimants and it is perhaps somewhat surprising that so few claimant solicitors explicitly referred to this consideration, either in response to this or other questions.<sup>33</sup>

A particularly enthusiastic endorsement of the written process was given by a solicitor, with more than 20 years’ experience, in a London law centre specialising in housing and asylum. She said that she regularly obtained permission in her cases:

‘The paper only consideration is a brilliant idea – it has reduced the applicant’s work in trying to get a response from the other side. I do not often get refused on the papers and the process puts pressure on the defendant i.e. you expect a permission grant to lead the defendant to consider caving, unless a matter of policy is in issue (e.g. asylum support). This is particularly so with ‘private’ judicial reviews where there can be a low key resolution without the risk of setting any precedent.’

Of the 11 claimant solicitors who disapproved of the paper-only procedure, all but one did so because they considered the loss of oral advocacy to have adversely affected the prospects of obtaining permission. The following are typical examples:

‘It is disappointing that every application has to go through a paper stage. In oral applications counsel can make a better case. I believe many cases would have a better chance in oral consideration.’

‘An oral hearing allows you to see the white in the judge’s eye. Paper applications increase the chance of a weird decision, but that is fine providing there is an oral hearing as of right.’

References of this sort to the right to renew were common with many claimant solicitors making it clear that their approval of the paper procedure was conditional on the availability of the right to renew applications orally where permission was initially refused.

Many solicitors expressed anxiety as to whether judges sufficiently understood the claims being made on reading the papers.<sup>34</sup> A solicitor with six years’ experience specialising in education cases expressed her concerns in the following way:

‘I think the paper stage is a real shame from the claimants’ point of view. Sometimes judges simply do not understand the case you are trying to put, and miss the point completely. If there was an automatic oral hearing, it

<sup>33</sup> Respondents may have seen this as a factor associated with the permission stage in general rather than a particular characteristic of the written process.

<sup>34</sup> Another objection was that it creates more work and slows down the process.



would enable counsel to see the judge's concerns and put them straight, leading to a fairer, quicker result for the client.'

This solicitor gave an example of a case in which the judge refused to abridge time for serving the AOS and to order a substantive hearing to be listed straight after permission was granted. She said that the judge failed to grasp that the client was going to miss his GCSEs and would have to repeat a year of schooling as a result. She felt that the lack of interaction with the judge created uncertainty as to the basis of the judge's conclusions:

'You can also never be sure what of the essential reading a judge has actually read unless you have an oral hearing.'

It is significant that even amongst those who were critical of the paper procedure most accepted that there were good policy reasons for the written process.

Not surprisingly, perhaps, solicitors acting for defendants approved of the paper-only procedure in even greater numbers than claimant solicitors. They did so because they thought it saved money, and/or time, and helped to filter out hopeless cases.<sup>35</sup>

On the other hand, the fact that a significant minority of defendant solicitors were critical of the process, was somewhat unexpected. The reasons given by the seven defendant solicitors who held this minority view were that the process wastes time when claimants renew applications regardless of merit, that it is unsuitable in complex cases, and that it can lead to uncertainty over whether judges have understood the papers. It was also said that advocacy generally benefits both parties and that oral hearings provide a better opportunity to respond effectively to claims presented by claimants.

Several solicitors acting for defendants believed that the paper procedure was advantageous for defendants, although this, they felt, did not adversely affect the interests of justice because any defendant bias was balanced by the claimants' right to renew. A London Borough solicitor with 15 years' experience said that:

'My experience is that having an oral hearing is likely to favour the claimant rather than the defendant. High Court judges are quite conservative and need some persuading to grant permission for a judicial review, which it is easier for the claimant's advocate to accomplish in person. Therefore, the initial paper-only stage is probably a good thing for defendants.'

It may be added that several, although not all, of the out of London defendant solicitors preferred the paper procedure on grounds that it saves travel time.<sup>36</sup>

Overall, then, the paper procedure received approval from the majority of the interviewees, but with stronger endorsement from defendant solicitors and with greater regret over the loss of advocacy on the part of claimant solicitors. Consistent across both groups of solicitors was an emphasis on the importance of the right to renew orally as a check on the quality of decision taking at the written stage.

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<sup>35</sup> 34 of 46 interviewees (74%) approved of the paper-only procedure, a 12% higher approval rate than that amongst claimants.

<sup>36</sup> This aspect is likely to have been addressed by the regionalisation of the Administrative Court.



A leading QC who acts for claimants as well as defendants summed up the pros and cons of the loss of oral hearing from an advocate's perspective:

'You can't beat looking the judge in the eye, finding out where the concerns are or what has or hasn't been understood, and being able to respond orally. But it's costly and involves a lot of hanging around waiting to get on . . .'

#### *The clarity of the criteria*

While most of the practitioners understood the basic criterion at the permission stage to be the need to establish an arguable case, there was widespread disquiet both about the uncertain nature of the test and the related issue of judicial inconsistency. Many of the claimant solicitors, for instance, when noting that claimants have to satisfy judges that their claim is arguable, then qualified their answers by comments such as:

'but judges have different sympathies, and the outcome of permission decisions is unpredictable . . .'

'but, judges take different views . . .'

'but the actual test applied depends on which judge you get . . .'

#### Others added:

'[I]t is a political question, as some judges hold certain political views about particular claimant groups.'

'[permission] is a mystical operation – you send your prayer and see how God answers . . .'

It seems, then, that while these solicitors accepted that the formal test focused on the need to show an arguable case, judicial approaches were perceived to vary and to be influenced by factors beyond the legal merits of claims.

#### *Arguability is conceptually vague*

One of the most common responses was to the effect that the arguability test is conceptually vague, rendering it difficult to know precisely what the criteria entails from a claimant's perspective. It was also widely thought that judges look not simply at whether claims are arguable, but also at whether they have merit in a more substantive sense. As one solicitor commented:

'[The criteria] should be "arguable grounds", however, judges often look more at the merits, which defeats the purpose of a permission hearing and can be problematic in "borderline" cases.'

Several interviewees said that 'clearer criteria would be helpful', although there was concern that attempts to pin down the criteria would not necessarily improve the quality of the process. One interviewee argued that the vagueness of the test was necessary, and even desirable, especially in relation to more unusual claims that might not fit within a more codified system:

'A more structured test would probably result in the court becoming bogged down with verbiage, when we know in general terms what we are talking about in terms of viable cases. An unstructured test also allows through other cases, which need to be heard in the public interest, despite having "slim" grounds.'

Defendant solicitors similarly referred to the differences in the approach taken by judges, but with a somewhat different emphasis to that of the claimants. Several commented that the arguability requirement was ‘not a strong’ test, or that the threshold was ‘low. One suggested that the test is:

‘incredibly subjective. Having to meet a list of five criteria would be more helpful in weeding out the hopeless cases.’

This uncertainty was said to cause some defendants to invest a lot of effort in the AOS, thereby incurring expenses early on:

‘it is often difficult to tell what criteria are actually being applied. As a result of this uncertainty, we put quite a lot of work into the AOS to try and knock a case on its head at any early stage.’

While some claimant solicitors considered judges to have more sympathy with local authorities than with claimants, two solicitors acting for local authorities thought the reverse was true:

‘where there is any uncertainty about the strength of a case, I think the benefit of the doubt is given and permission granted.’

The following comments on the permission criteria, made respectively by a QC, a QC who is also a deputy High Court judge, and an Administrative Court judge, echo what practitioners said regarding the inevitably vague nature of the permission test:

“‘Arguability’ is a hazy standard which gives a lot of scope to judges’ discretion. Nevertheless, it is still a legal criterion and my impression is that the judges apply it as such and as best as they can . . . “Arguability” is an inevitable standard if permission is to be a quick and dirty process. Otherwise, each permission would become a mini-substantive hearing. So, the reality is that you paint with a broad brush at permission, filling in the fine detail thereafter.’

‘I don’t know that you can define arguability any more precisely than “knowing it when you see it”.’

‘Arguability? It’s very difficult to describe it as more than that the case is arguable, but you have got to go a little further than that; you have got to say that it is possible from looking at what’s been put forward that a successful result will come.’

## 4.5 Judicial consistency

Judicial inconsistency has been a concern in relation to the permission stage since research in the early 1990s revealed there to be a ‘surprising and worrying’ level of inconsistency leaving the impression that obtaining leave was something of a lottery that depended on the judge who dealt with the matter.<sup>37</sup> The above quotations indicate that perception of judicial inconsistency at the permission stage is still widespread and this was an issue that we explored more specifically in the research.

We asked solicitors: ‘In your experience, are [the permission] criteria applied consistently?’ The responses of the 71 solicitors who answered this question were

fairly evenly balanced between those who considered judges to be consistent and those who considered them to be inconsistent in their application of the permission criteria, although a slight majority (56 per cent) believed judges to be inconsistent in this regard.

However, when the responses were analysed, according to whether the solicitors acted for claimants or defendants, the picture changed quite dramatically. As Table 4.5 shows, over three-quarters of claimant solicitors and just over a quarter of the defendant solicitors said that judges were inconsistent in their application of the permission criteria. Interestingly, these proportions broadly reflect the relative success rates of claimants and defendants at the permission stage, and this probably explains why defendants have less cause to question the process.

*Table 4.5: Perceptions amongst claimant and defendant solicitors of judicial inconsistency at the permission stage*

	No. of responses	Consistent	Consistent %	Inconsistent	Inconsistent %
Claimant solicitor	41	9	22%	32	78%
Defendant solicitor	30	22	73%	8	27%

As we have seen, many of the claimant solicitors view inconsistency as an everyday, even inevitable, aspect of judicial review litigation. Moreover, we were told that it is not necessarily undesirable and, indeed, may be valuable, especially where judges are presented with novel and unusual claims. In this context, inconsistency may be viewed as a sign that judges are prepared to be open to new arguments and to be creative and dynamic in their approach to public law litigation.

#### *Forms of inconsistency*

Having said this, several overlapping forms of inconsistency were referred to, including, in particular, inconsistency in the test applied, in the approach adopted and in relation to the outcomes of decisions. The following is a selection of comments that illustrate some of the elements of inconsistency:

‘[the test is] . . . supposed to be an arguable case, but completely different approaches are taken. This is demonstrated by the fact that there are very similar cases which result in different outcomes.’

‘The actual test applied depends on which judge you get – some simply will not give my type of case a favourable reception. Such judges have very firm views that local authorities screw up and must be given some scope for reform. On the other hand, there are the technical admin lawyers, who, though I wouldn’t necessarily count on them for compassion for my clients’ plight, accept there is a legal point in the cases which they cannot avoid and thus grant permission.’

‘The outcome [at the permission stage] depends on the judge. You often know that if you get a certain judge you are going to win or lose . . .’

There was concern expressed that judges have different views of certain classes of case, especially in relation to asylum and human rights matters. A solicitor with

18 years' experience in claimant judicial review work in a law centre as well as in private practice commented, for example, on how judges' political views might influence outcomes and how judicial inconsistency could indirectly inhibit access to justice:

'Grant [of permission] is undoubtedly affected by the particular judge hearing the case. With [asylum support] cases, for example, some judges are always more likely to refuse permission. It is a political question, as some judges hold certain political views about particular claimant groups. This is fine, as long as you retain the safety net of a renewal before a different judge. However, this safety net is undermined if the Legal Services Commission treat refusal of permission as a sign that the case is *definitively* unarguable [and denies funding]. Then the inconsistency of outcome becomes an access to justice issue.'

Echoing the view, expressed in an earlier quotation, that claimants and their lawyers are in the lap of the Gods, one interviewee with specialist experience in prison law said that she made a point of not checking who the presiding judge would be in advance of a hearing. Few claimant solicitors, however, shared this fatalism. Several lawyers suggested that it was not surprising that different judges took different approaches to social and political issues and one interviewee went as far as to suggest that judges were not immune to the influence of the media and criticism of the judiciary by politicians:

'The judges are definitely influenced by the asylum-seeking vitriol there is in the tabloid press. It is easy for them to get case-hardened. Plus, they are only human and not immune to the criticism they receive from the Prime Minister/press if they get involved.'

A solicitor in a national charity with specialist interest in prisons reiterated this and explained the importance of knowing as much as possible about the judge. He also gave some insight into the way lawyers on both sides might use their knowledge of the judges to determine their strategy and tactics.

'In reality, there is pressure on judges to get cases out of the list because they do not want cases blocking up the High Court and so where it is possible to find a non-arguable case, judges do. Some judges are clearly interested in tackling certain issues when we know which judge is listed to hear our case, we will conduct a . . . search to see their background – this allows us to go for an adjournment (on the basis of whatever small reason we can find) in front of the wrong judge, and permission in front of the right judge. The former tend to be commercial silks with no background of the day-to-day grind of public law in practice . . . Treasury Solicitors, who employ counsel . . . who are usually alert to such nuances of the judiciary, will likely seek to fight an adjournment as they would rather the listed judge deals with the case. By contrast, local authorities, using in-house lawyers, are mostly happy to have the extra time an adjournment allows, to go back to the local authority and seek to make further progress on the case, in the hope that this avoids litigation.'

Of the eight defendant solicitors who considered judges to be inconsistent, four focused on the inherent uncertainty of the permission criteria and one commented that inexperienced judges tend to be less consistent than more experienced judges.

Others referred to the political leanings of judges: a solicitor for a County Council, for instance referred to a particular judge as being ‘a big leftie . . . [who] is not going to assist us, even if we have an arguable case’; another said that ‘[a] lot of the time, if judges are swayed by their emotions, they’ll find for the applicant’.

For this group of solicitors, inconsistency seems to be an accepted, if not an acceptable, element in litigation. Like many claimant solicitors, they also indicated that this needs to be factored into the preparation and presentation of cases. As one of the solicitors in the TSol’s department commented:

‘Where I have similar cases, I speak to . . . the Administrative Court to try and arrange for the same judge to hear the cases. This is important: not only is it helpful for the judge because if he has read the papers in the first case, the second will largely be the same, but it also helps both parties in terms of consistency.’

Yet, despite these concerns, nearly three-quarters of defendant solicitors (as shown in Table 4.5 above) considered that the permission criteria were applied consistently by judges. The following quotations are typical of the vast majority:

‘I am very impressed with the High Court judges. They are sensible and consistent.’

‘. . . we appear in the same court, before the same set of judges who see these cases day in, day out, I think the criteria are applied consistently.’

‘Yes, the criteria are applied consistently. In view of our success rates, I have no complaints.’

#### *Consistency: decision outcomes: statistical findings*

Perceptions of judicial inconsistency are compatible with our statistical findings. For the purpose of this aspect of the study, we recorded the names of judges against their permission decisions wherever possible and calculated the permission and refusal rates for each judge. Fifty-nine judges were included in our sample of civil claims (excluding immigration and asylum) during the period April–December 2005; although for the purposes of the current exercise we eliminated those with very small caseloads and only analysed the records of judges who dealt with more 25 or more paper claims for permission.

An overview of our results is shown in Table 4.6. As the table shows, there was a wide variation in the permission grant rates. The judge (A) with the highest grant rate on the papers granted 46 per cent of his claims, whereas the judge (H) with the lowest rate only granted permission in 11 per cent of the claims dealt with. In other words, claimants whose claims came before judge H had less than a quarter the chance of being granted permission than those whose claim came before judge A. There were no obvious factors to do with the nature or type of cases involved that would readily explain this wide variation.<sup>38</sup>

We also looked at the grant rate of these judges in the immigration/asylum cases that they dealt with during the same period.<sup>39</sup> These results are set out

<sup>38</sup> Overall, these findings support the view that the permission process has been tightened over the years. Previous research showed that in 1987, the variation in grant rates between judges on initial applications for permission was between 21% and 82%: Bridges et al, *Judicial Review*, n. 22 above.

<sup>39</sup> Judge C dealt with no immigration/asylum cases in this period, but is included for completeness.

in Table 4.7. They show that in immigration and asylum cases the overall grant rate was significantly lower than it was in other civil judicial review cases. However, here too there was a significant gap of 31 percentage points between the highest grant rate (judge D) and the lowest grant rate (judge H). Here too, it was judge H who granted permission in the lowest proportion of claims: in none of his 18 cases.

Table 4.6: Grant rates by judge: paper considerations: civil non-immigration /asylum (April–December 2005)

Judge	No. of cases	Percentage of grants
A	26	46%
B	38	42%
C	26	42%
D	61	38%
E	52	35%
F	31	26%
G	29	14%
H	27	11%

Table 4.7: Grant rates by judge: paper considerations: immigration/asylum cases (April–December 2005)

Judge	No. of cases	Percentage of grants
D	32	31%
A	26	12%
G	26	12%
E	34	9%
F	25	8%
B	21	5%
H	18	0%
C	0	N/A

## 4.6 Conclusions

It is clear from the statistics that there has been a long-term decline in the success rate of claimants at the permission stage. Why this has occurred, and its significance, is less clear. We have argued that there is an association between the decline in the grant rate and the shift from the open approach to permission that drove the reforms of the mid-1970s and the early 1980s to the more restrictive approach that has prevailed since the early 1990s.

However, that history does not explain the steep decline in the grant rate that has been evident since around 2000. This appears to have been a direct and indirect consequence of the reforms introduced in October 2000.

The greater use of the written process and the greater involvement of defendants at the permission stage, in particular, have made it more difficult for claimants to persuade judges that their claims are sufficiently arguable, and have enabled the judges to be more discriminating in their assessment of the quality of claims for permission. While there has been no formal change in the permission criteria, the consequence has been to heighten the *de facto* barrier facing claimants.

This, however, is only one aspect of the picture. As we saw in Section 3, following the reforms, greater numbers of claims are being resolved in favour of claimants prior to the permission stage.

While the October 2000 reforms may have made it more difficult for claimants to clear the permission hurdle in matters that get to that stage, this does not mean that it has become more difficult for claimants in general to obtain satisfactory outcomes.

We have asked: what is the significance of the decline in the grant rate in terms of the quality of access to justice in judicial review proceedings? The findings discussed in this and the previous section indicate that despite the diminishing grant rate, the overall picture does not indicate that claimants have become less likely to achieve satisfactory outcomes. On the contrary, there is strong evidence that access to justice, in terms of achieving outcomes that are at least as beneficial as those possible had cases been pursued to final hearing, has, if anything, improved.

This may well explain one of the puzzles that emerged from our interviews. In the light of the statistics on permission failure rates, we would have expected claimant solicitors to have been quite critical of the permission process and especially of the removal of the right to an initial oral hearing. In fact, as we have seen, although there was some criticism, there was on the whole widespread approval of the process. Lawyers, including claimant solicitors gave the impression that they considered the process worked reasonably well.

The evidence indicates that judicial inconsistency at the permission stage continues to be an issue of concern, although clearly many practitioners see it as a fact of life for litigators in this area. A degree of inconsistency must be inevitable in a system such as this, and it has been remarked by some that this could also have a positive aspect. The view expressed by interviewees that the judge in the case makes a difference to the prospects of success at permission is certainly compatible with our findings on the variations in grant rates in immigration and non-immigration cases.

Consistency may be an issue of even greater importance with the regionalisation of the Administrative Court. In London, there is access to a relatively large pool of judges and, while inconsistency affects the relative chances of individual claimants obtaining permission, more systemic biases are likely to be ironed out by the number of judges involved.

As a smaller number of judges take responsibility for judicial review in the regional centres, variation in grant and refusal rates may become a greater concern. Some may argue that, if inconsistency occurs, this may reflect desirable and legitimate variations across the regions. Having said this, it is difficult to see how significant regional variation in access to public law remedies might be justified. And we would argue that great care must be taken to ensure that access to judicial review does not become a regional lottery.





# Section Five

## Conclusions

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The report discusses the findings of the first major independent study of the judicial review procedure carried out since the Bowman Committee Report. It is also the first study to have undertaken a comprehensive investigation into how lawyers for claimants and defendants view the judicial review process and engage with each other when handling judicial review claims. The analysis of the way cases are resolved at various stages in the process and the qualitative interview data provide significant new insights into the workings of the procedure and the dynamics of judicial review litigation, especially in relation to settlement and access to public law.

### 5.1 The questions

The research explored two general questions about the effect of the reforms that were made to the judicial review procedure following the Bowman Committee's Report.

- Have the reforms contributed to an increase in the likelihood that judicial review litigation will be settled at an early stage in the process without the need for formal adjudication?
- Have the reforms to the permission process made it more difficult for claimants to obtain permission to pursue judicial review claims and to this extent adversely affected access to justice?

### 5.2 On settlement

We have seen that most judicial review claims are settled and most settlements satisfy the claims made in the judicial review. Moreover, the statistical evidence indicates that the rate of settlement has increased since the post-Bowman reforms and that a growing proportion of claims are settled prior to the permission stage.

These findings indicate that the post-Bowman reforms have either led to, or encouraged, earlier settlement. We have identified the existence of a widespread conscientious concern amongst both claimant and defendant solicitors to settle claims in a timely fashion, although parties have different perspectives on the issues and weigh the merits and urgency of claims differently.

Having said this, we found that a substantial number of cases settled later than they could and, perhaps, should have done.

There remain significant obstacles to dialogue and communication between parties that hinder and delay settlement. Of particular importance in this regard is the persistence of the 'wait and see' attitude to litigation on the part of some public authorities. This hinders their ability and willingness to consider settlement until permission has been granted.

The late involvement of lawyers acting for defendants is another significant factor that reduces the ability of public authorities to make an early and accurate assessment of the legal merits of claims. In this regard we have noted comments by defendant solicitors to the effect that cases could have been resolved sooner had they been aware of them earlier.

The research underscores the importance to claimants of having access to the services of skilled and expert lawyers who are able literally to negotiate their way through the procedure and communicate effectively with defendants.

Involvement of expert lawyers on both sides is conducive to timely settlement and is therefore likely to save considerable resources for all concerned, not least the taxpayer.

This is a significant consideration at a time when there is a growing shortage of solicitors taking on legal aid work and legal-aid eligibility is being eroded.

We have also seen how communication within defendant public bodies, including the problems facing lawyers in obtaining instructions from client departments, can delay settlement.

Public bodies are complex organisations and many judicial review claims can only be resolved with the cooperation of different sections within the organisation. This may involve internal arrangements that are complex and time-consuming: where several departments or sections are involved in a case, their respective responsibilities may have to be clarified, lawyers may need to obtain the views of senior management as to how the case should be handled; and budget holders must make decisions about the resource implications of settling or disputing claims. Such matters, of course, cannot be directly affected by court procedures.

This is not to say that authorities are necessarily reluctant or unable to take a more proactive approach to resolution of legal disputes. We saw, for example, that one of the most heavily challenged London Boroughs has reformed its system so that lawyers and housing advisers can work more closely with each other so as to resolve potential legal claims at the earliest possible stage. We suggest that awareness of such innovative and creative schemes could be raised with a view to developing good role models for other public bodies to adopt.

### **5.3 On permission**

There has been a long-term decline in the success rate of claimants at the permission stage. The full explanation for this is unclear although there is likely to be an association between the decline in the grant rate and the shift from the

open approach that drove the reforms of the mid-1970s and the early 1980s to the more restrictive approach that has prevailed since the early 1990s.

That history, however, does not explain the steep decline in the grant rate that has been evident since around 2000. This appears to have been a direct and indirect consequence of the reforms introduced in October 2000.

The greater use of the written process and the greater involvement of defendants at the permission stage, in particular, have made it more difficult for claimants to persuade judges that their claims are sufficiently arguable, and have enabled the judges to be more discriminating in their assessment of the quality of claims for permission. While there has been no formal change in the permission criteria, the consequence has been to heighten the *de facto* barrier facing claimants.

This, however, is only one aspect of the picture. We have shown that greater numbers of claims are being resolved in favour of claimants prior to the permission stage.

The 2000 reforms may have made it more difficult for claimants to clear the permission hurdle in matters that get to that stage, but this does not mean that it has become more difficult for claimants to obtain satisfactory outcomes to their claims.

On the contrary, the settlement evidence strongly suggests that access to justice (in terms of achieving outcomes that are at least as beneficial as those possible had cases been pursued to final hearing) has, if anything, improved.

This seems to explain one of the puzzles that emerged from the interviews. Given the statistics on permission failure rates, we might have expected claimant solicitors to have been critical of the permission process, and especially the removal of the right to an initial oral hearing. In fact, although there was criticism, there was widespread approval of the process amongst solicitors on both sides.

Certainly there was widespread feeling amongst solicitors on both sides that the AOS procedure and the permission stage work to focus minds on the merits of claims and thereby encourage settlement.

For claimants another particular advantage of the permission stage is that it provides a relatively cheap and speedy method of obtaining an early neutral evaluation of the strength of claims.

The ability of the permission stage to filter out unarguable cases is also important, although there was disquiet expressed regarding the clarity of the criteria.

In this context, it is important to note that many of the claimant solicitors who expressed approval of the permission procedure qualified their comments by emphasising the importance of the right to renew unsuccessful applications in open court. The right to an oral hearing has always been a significant safeguard and our evidence underscores its continued importance.

In this context, the judicial inconsistency in permission decisions continues to be an issue of concern, although clearly many practitioners see it as a fact of life.

Consistency may become more important with the regionalisation of the Administrative Court. In London, there is access to a relatively large pool of judges and, while inconsistency affects the relative chances of individual claimants obtaining permission, more systemic biases are likely to be ironed out by the number of judges involved.

As a smaller number of judges take responsibility for judicial review in the regional centres, variation in grant and refusal rates may become a greater concern, especially if significant variations in access to public law arise between the regional centres.

## **5.4 Further research**

In analysing the data obtained for this study, we found that, although we were able to describe and analyse the dynamics in some of the main aspects and stages of judicial review post-Bowman, several important matters merit further targeted exploration.

Firstly, we would have liked to know more about the cases that are filtered from the system after being refused permission on the papers. Why were over half the unsuccessful claims which were refused permission to proceed on their papers not renewed? We established that claimant solicitors are on the whole experienced and specialised, that where claims are publicly funded solicitors have to satisfy the Legal Services Commission that the claim has merit, and that expert barristers are also usually involved in the preparation of claims. Therefore, we might have expected lawyers to be sufficiently confident to try arguing the case at oral hearing. There were, however, insufficient data on the nature of these claims, including on how many of these claimants were represented, and if so, on how their claims were funded. Quantitative as well as qualitative research is needed to fill in these gaps in our knowledge of the dynamics of judicial review.

We were also unable to address the special aspects that arise when claimants are unrepresented. There is a different relationship between the individual litigant in person and defendants in terms of power imbalance and opportunities for informed dialogue. It is likely that the fact that a claimant is unrepresented would have an effect on the prospect and outcome of any settlement, which in turn could also have resource implications for defendant public bodies as well as the court.

Although we were able to identify various factors that contribute to or inhibit settlements, we still need to know more about those cases that reach final hearings.

Why are these cases not settled? Do they have particular characteristics that are intrinsic to the issues or the nature of the dispute? Do they involve issues of law or policy that require legal determination, or do other factors impact on this, such as the nature and quality of legal representation?

Finally, we are interested to observe and to follow how the regional courts take shape and develop their own dynamics of judicial review litigation.



