



# Public Law Project

## PUBLIC BILL COMMITTEE BRIEFING PAPER FOLLOWING ORAL EVIDENCE PART 4 CRIMINAL JUSTICE AND COURTS BILL MARCH 2014

### THE NUMBER OF JUDICIAL REVIEW CASES

In recent months, it has been stated time and again that judicial review cases are on the rise and, in the words of a Public Bill Committee member on 13 March 2014, “out of control”. The data that has been produced by the Government in support of this position is incomplete and incorrectly analysed. The Public Law Project has conducted an independent, academic, empirical analysis of the figures on judicial review.

**That analysis shows beyond doubt that, leaving aside asylum and immigration cases which are no longer dealt with in the Administrative Court, the numbers of judicial review cases have remained static for the last decade.**

The genesis of the claim that judicial review is on the rise can be found in the Government consultation paper *Judicial Review: Proposals for Reform*, where it was stated that, “There has been a significant growth in the use of judicial review to challenge the decisions of public bodies. In 1974, there were 160 applications for JR, by 1998 this had risen to over 4,500, and by 2011 had reached over 11,000.”

These figures are problematic for a number of reasons:

- **Comparisons with the use of judicial review that go back as far as 1974 are completely meaningless**, not least because prior to *O’Reilly v Mackman* [1983] 2 AC 237 claimants did not need to use judicial review in public law matters. We do not know how often government was challenged in the courts prior to the early 1980s and there is no data on this. This absence of data was recognised in the Bowman report, where he stated that the information required in order to make proposals with a proper factual basis, was “not readily available and was going to be difficult to obtain.”<sup>1</sup>
- **The increase in the scale of judicial review litigation is substantially attributable to immigration and asylum cases**. This is recognised by the Government and is not an expressly targeted area for reform in the Criminal Justice and Courts Bill 2014 because those JRs have now been transferred out of the Administrative Court.
- **Once asylum and immigration cases are placed to one side, there is no evidence of any significant change in the volume of judicial claims over the last ten years**: indeed, it is widely recognised that there has been none. The graph provided in the *Judicial Review: Proposals for Reform* consultation document<sup>2</sup> supports this: the number of judicial review applications in the ‘others’ category (i.e. not immigration and asylum or

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<sup>1</sup> The Bowman Report, *supra*, p.10 para.8.

<sup>2</sup> At page 10, figure 1.

criminal judicial reviews), have remained static since 2005. In fact, since the mid-1990s the number of claims has remained fairly stable at the 2000 per annum mark. As Harlow and Rawlings remind us, these numbers are “infinitesimal” compared with the scale of government decision making.<sup>3</sup>

- **According to the Ministry of Justice’s own statistics the number of substantive judicial review hearings is steadily decreasing.** In 2010 the number of substantive judicial review hearings decreased by 6% on 2009<sup>4</sup> and in 2011 the number decreased by 14% on 2010.<sup>5</sup>

Similarly misleading data was provided by the Government in a ‘web chat’ convened by the Ministry of Justice on 29 October 2013.<sup>6</sup> Richard Mason, Deputy Director – Administrative and Civil Justice, responded to a question challenging the Ministry’s assertion that judicial review claims were on the rise. He stated, “[...] There’s actually been a 27% increase in non-immigration and asylum cases – from around 2,300 in 2007 to around 3000 in 2012”.

PLP has analysed the complete database from the Administrative Court.<sup>7</sup> We examined all 12,434 issued JRs in 2012, and divided them according to subject matter into three sections: civil JR, criminal JR and immigration/asylum-related JRs. According to our calculation, and based on the MoJ’s own figures and records, we counted 406 criminal JRs and 9,868 immigration/asylum JRs. The remaining total for non-immigration related civil JRs is accordingly 2,160. This is 840 cases below that claimed by the Ministry on 29 October 2013 and demonstrates that judicial review remains around the 2000 per annum mark, where it has been since the mid-1990s.

## **THE NUMBER OF SUCCESSFUL JUDICIAL REVIEW CASES**

It has also been repeatedly stated that claimants and their lawyers bring too many weak and time-wasting judicial reviews. The figures do not back up this allegation either.

The *Transforming Legal Aid* consultation document stated that in 2011-12 “there were 4,074 cases where legal aid was granted for an actual or prospective judicial review. Of these, 2275 ended before applying for permission to the Court”. From this it appears that all 2,275 cases were concluded before being issued. From PLP’s research on settlement outcomes,<sup>8</sup> it is likely that a majority of these 2,275 cases were settled in favour of claimants. Such resolution will have been speedy and cheap, and cannot form part of the group of cases in which the Government considers that there has been waste of public funds. So already at this point, 56% (2,275 of 4,074) of legally aided cases benefit from the efficiency of the judicial review process which encourages early engagement between the parties leading to a high rate of settlement and withdrawal.

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<sup>3</sup> Harlow and Rawlings, *Law and Administration*, p.712.

<sup>4</sup> *Judicial and Court Statistics 2010*, Ministry of Justice (2011), p.145. Available at: [www.justice.gov.uk/downloads/statistics/courts-and-sentencing/judicial-court-stats.pdf](http://www.justice.gov.uk/downloads/statistics/courts-and-sentencing/judicial-court-stats.pdf)

<sup>5</sup> *Judicial and Court Statistics 2011*, Ministry of Justice (2012), p.65. Available at: [www.justice.gov.uk/downloads/statistics/courts-and-sentencing/jcs-2011/judicial-court-stats-2011.pdf](http://www.justice.gov.uk/downloads/statistics/courts-and-sentencing/jcs-2011/judicial-court-stats-2011.pdf)

<sup>6</sup> The chat can be viewed here: <http://www.justice.gov.uk/ministry-of-justice-webchats>

<sup>7</sup> Available here: [www.gov.uk/government/publications/court-statistics-quarterly-jan-mar-2013](http://www.gov.uk/government/publications/court-statistics-quarterly-jan-mar-2013)

<sup>8</sup> See *The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing* (<http://www.publiclawproject.org.uk/documents/TheDynamicsofJudicialReviewLitigation.pdf>)

The document went on to state that 1,799 cases were considered for permission of which 845 ended after permission was refused. This represents a success rate at permission of 53%, a very respectable success rate in addition to the many cases that had already settled positively at the earlier stage. According to the consultation, of the 845 cases that are known to have been refused permission, 39% (330 cases) were recorded as having had a positive outcome for the claimant.

This leaves only 515 cases out of the initial 4,074 legally aided cases (i.e. 13%) as having ended at permission without benefit to the client. **So at the end of the permission stage, 87% of the sample of legally aided cases relied upon by the Government had either been settled, had ended following the refusal of permission but with substantive benefit recorded to the client, or had been granted permission.**

On any reasonable view, therefore, the figures that have been made available do not support the assumption underpinning the reforms that there is serious waste in the legal aid funding of judicial review claims on account of weak cases being brought by claimant lawyers.

*If you have any questions about this briefing or would like to discuss the issues in more detail please do not hesitate to contact Martha Spurrier ([m.spurrier@doughtystreet.co.uk](mailto:m.spurrier@doughtystreet.co.uk)) or Jo Hickman ([j.hickman@publiclawproject.org.uk](mailto:j.hickman@publiclawproject.org.uk)).*