Response to the Call for Evidence by the Independent Review of Administrative Law Panel, on the topic of:

"Does judicial review strike the right balance between enabling citizens to challenge the lawfulness of government action and allowing the executive and local authorities to carry on the business of government?"

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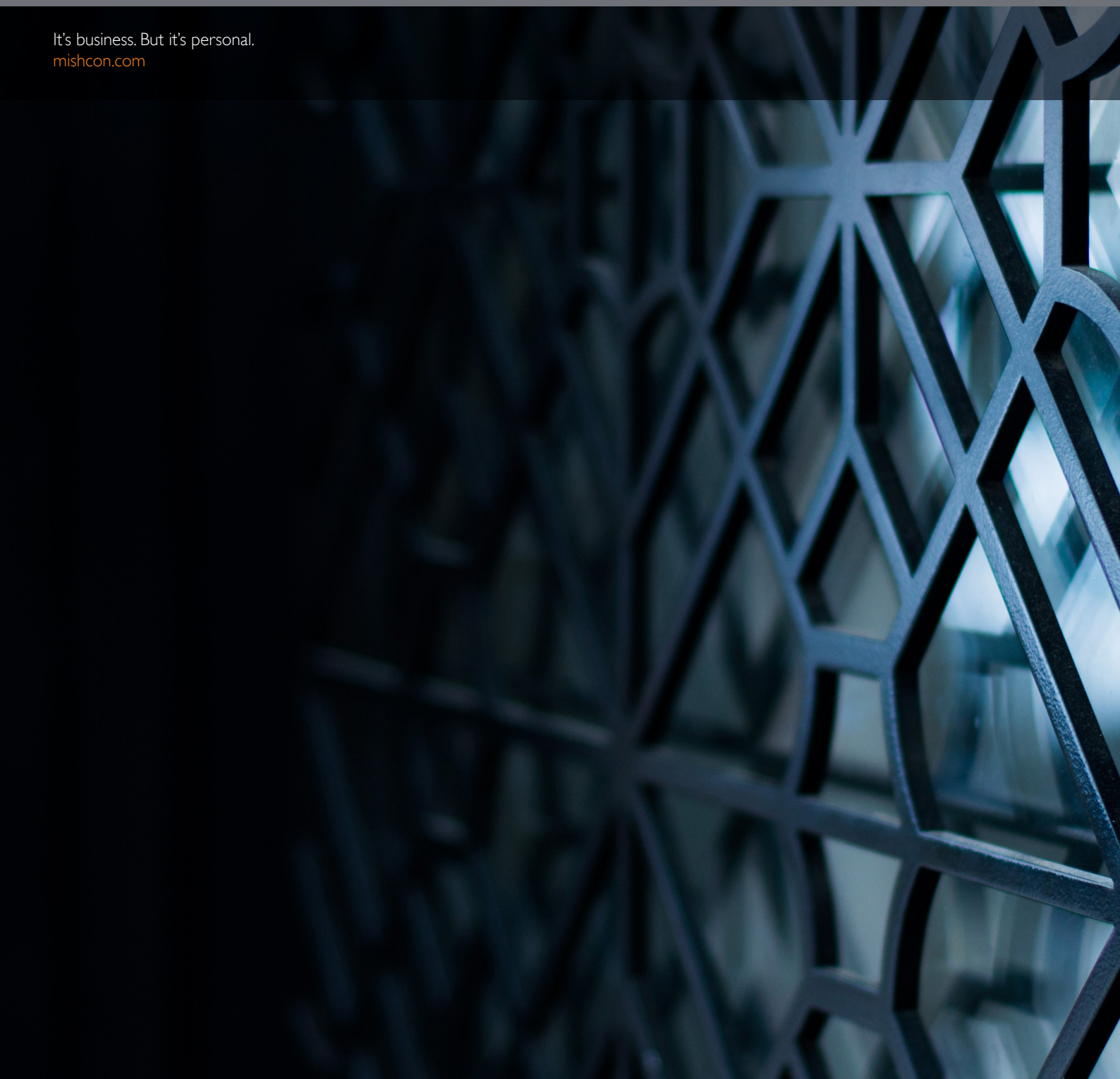


Introduction

Mishcon de Reya LLP ("**Mishcon**"/ the "**Firm**") is a dynamic and diverse London based law firm that has recently acted in two of the most prominent judicial review cases in memory: *R (Miller) v Secretary of State for Exiting the European Union* [2017] ("**Miller 1**") and *R (Miller) v The Prime Minister* [2019] ("**Miller 2**"). It has been widely speculated that these cases acted as a catalyst for the current Consultation[1] with critics of Miller 2 in particular arguing that the court overstepped its judicial boundaries in deciding that the Prime Minister had acted unlawfully when he advised the Queen to prorogue Parliament in August 2019. The Firm disagrees with this assessment, and is of the view that judicial review is an indispensable element of the system of checks and balances that govern our democratic society and that there is no evidential basis necessitating reform of the system. This conclusion is based on three separate sources of information: first, this Firm's breadth of experience in advising on judicial review cases; second, data analysis which this Firm has undertaken to prepare this response; and third, a comparative assessment of judicial review in Australia and the United States of America.

In relation to our experience, aside from the Firm's involvement in the Miller cases, it has represented applicants, respondents and interested parties across a wide range of sectors reviewing the decisions of regulators, local authorities and Government Departments. Notably, the Firm defended the rights of child immigrants, advising the Project for Registration of Children as British Citizens in its successful challenge to the Home Office in relation to the fees charged to process children's visa applications.[2] Other cases which highlight the breadth of the Firm's experience include acting for: a property developer in resisting a judicial review of a planning permission decision; an interested party in resisting judicial review proceedings being brought against the DPP; a firm of solicitors in reviewing the decision of a Recorder in the County Court;[3] and acting in successful judicial review proceedings brought in the BVI. The Firm also has experience of settling judicial review cases before they reach the hearing stage. Given the diverse nature of Mishcon's involvement in judicial review cases, from issues of immigration and human rights to planning, we believe that we are well qualified to comment on the fitness of the current system in relation to the question posed by this consultation.

As to data analysis, in partnership with vLex Justis[4], through access to published judgments from the Queen's Bench Division, Court of Appeal and Supreme Court over the past ten years, we have analysed the data for trends in judicial review.

On the basis of the above sources of information, we believe that judicial review is an essential element in the makeup and sustainability of the rule of law in this country. As the panel will be more than aware, the rule of law is known to be one of the *"twin pillars of the UK constitution"* along with Parliamentary Sovereignty - a key facet of which (as described by AV Dicey) is Government limited by established laws.[5] It is our view that any steps taken to limit the powers of the judiciary to scrutinise decisions of the Executive will be anathema to the fundamental constitutional law principle of the rule of law and may erode the constitutional basis of the entire democratic system. We expand upon this assessment in our responses to the consultation set out below.

Executive summary of responses

In summary, this Firm makes seven key points in response to the IRAL panel's call for evidence:

1. The majority of judicial reviews are brought against public bodies outside central government, and therefore any proposal for reform based only on the experience of central Government as defendants would be inappropriate;
2. We do not believe that codification of the judicial review process would lead to greater clarity or accessibility in the law, but instead will likely lead to increased and likely costly satellite litigation on procedural issues, ambiguity and Executive overreach, as has been seen in Australia;
3. In the event that IRAL identifies an evidential basis for a restrictive approach to codification, we believe that a more expansive and detailed comparative study on codification is required. However, we are concerned that any further restriction of the scope of or access to judicial review would undermine the very fundamentals of our constitution;
4. There is no basis upon which to conclude that "political decisions" or prerogative powers should be rendered non-justiciable, and in fact the courts provide Parliament and decision makers with wide discretion on decisions of a political nature. This margin of appreciation has only increased during the Covid-19 pandemic, during which the courts have recognised the requirement for Government to make difficult decisions quickly in crisis;
5. We welcome any recommendations generally to make court procedures simpler;
6. We do not support proposals that would make it harder for individuals to bring judicial review claims, and note that there already exist a number of safeguards in the judicial review procedure for deterring unmeritorious claims including strict time limits and the requirement for permission; and
7. We are in favour of greater focus on ADR in judicial review.

We expand upon these points in detail in our responses to the call for evidence, which follows a summary of the data analysis.

[1] https://www.theguardian.com/law/2020/feb/11/what-is-judicial-review-and-why-doesnt-the-government-like-it; https://www.lawgazette.co.uk/commentary-and-opinion/how-to-reconcile-the-supreme-court-with-politics/5105887.article

[2] *R (PRCBC & Ors) v Secretary of State for the Home Department* [2019] EWHC 3536 (Admin); https://www.mishcon.com/news/high-court-rules-home-office-1000-fee-for-children-to-register-as-british-citizen-is-unlawful; https://www.judiciary.uk/wp-content/uploads/2019/12/prcb-v-sshd.pdf

[3] *MRH Solicitors Ltd & Ors v The County Court Sitting at Manchester* [2015] EWHC 1795 (Admin)

[4] vLex Justis holds the world's largest collections of legal information on one platform: www.vlex.com

[5] *"That "rule of law," then, which forms a fundamental principle of meaning of the constitution, has three meanings, or may be regarded from three different points of view. It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness… [second] equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary Law Courts; the "rule of law" in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals…",* A.V. Dicey, Introduction to the Study of the Law of the Constitution, 8th edn. (London: Macmillan, 1915), p.120. Available at: http://files.libertyfund.org/files/1714/0125_Bk.pdfc

Summary of our data analysis

In the introduction to the call for evidence, the IRAL panel expressly requests evidence on trends in judicial review, which we welcome. In particular, the call for evidence notes that:

"The panel are particularly interested in receiving evidence around any observed trends in judicial review, how judicial review works in practice and the impact and effectiveness of judicial rulings in resolving the issues raised by judicial review."

On the basis of this request for evidence, this Firm has conducted a detailed analysis of published judicial review cases which have reached a hearing in the last ten years in the Queen's Bench Division, Court of Appeal and Supreme Court.[6] Our data science team has analysed this evidence and we have used this data in our responses to the questions set out below. We have included at Annex A an explanation of the methodology used to analyse this data, together with a more detailed explanation of the dataset reviewed.

We have also conducted an analysis of published reports on the trends in judicial review cases following the introduction of the Human Rights Act 1998, as this data was not captured in our review of the past ten years.

In summary, our findings demonstrate that:

- There has been a steady **decline** in judicial review cases reaching a hearing since 2013, with 1,388 cases heard at a hearing in 2013, compared with 528 in 2019;[7]
- Of the cases reaching a hearing, only a very small percentage (3.52% across the ten year period) reach the Supreme Court;[8]
- The declining trend in judicial review cases applies both to cases against central Government Departments and cases against other Defendants such as regulators, city councils, agencies and the court;[9]
- On average, central Government Departments represented by Secretaries of State are the defendants in fewer than half of all judicial review cases which have reached a hearing in the past ten years, with cases against central Government Departments representing an average across the ten years of 44.5% of all judicial review cases;[10]
- In 2019, the number of cases against central Government Departments as a proportion of all cases reaching a hearing was even lower, at 36.74%; [11]
- As to the impact of the Human Rights Act 1998 on judicial review, while there was an initial increase in the number of judicial reviews brought following its introduction, since then, however, the data shows that there has been no material increase in the number of judicial reviews as a result of the Human Rights Act 1998.[12]

In conducting our analysis, we wish to note that we have obtained and analysed as much data as we were able in the six week timeframe for providing a response to the call for evidence. We note that previous reviews of the judicial review arena have been conducted over much longer timeframes: for example, the Law Commission review of remedies in administrative law took five years (between 1971 and 1976), in part to account for the inclusion of an empirical study into the workings of the Queen's Bench Division.[13] In 1993, the Law Commission looked at judicial review again: this time there was a period of eighteen months between publication of its consultation paper[14] and its final report.[15] Then, in 2008, the Law Commission spent two years assessing remedies available against public bodies.[16] The time period in which previous reviews have been conducted highlights the complexity of ensuring the correct balance is struck between procedural efficiency and protecting the rule of law, and the need to ensure that any reforms are based on empirical data. As will be seen in some of our responses below, we believe that further analysis is essential for the IRAL properly to consider any potential reforms of judicial review.

Response to consultation questions

SECTION 1 – Questionnaire to Government Departments

We note that Section 1 and questions 1 and 2 are addressed only to Government Departments and are directed at whether judicial review impedes the effective discharge of their functions. Clearly, we are not placed to respond to the experience of Government Departments. That being said, we wish to make the following points based on our experience and data analysis.

Firstly, it is apparent from the data analysis that judicial review is concerned not only with the decision making of central Government Departments, but in fact is a much broader means by which to ensure that public bodies – whether Government Departments or otherwise – act in accordance with the law and follow proper procedures. We therefore believe that it is misplaced to direct an entire section of a consultation only to Government Departments, and indeed that it would be wrong for the panel to make recommendations in relation to limiting the scope of judicial review based solely or even predominantly on the experience of Government Departments.

[6] The published cases in the dataset analysed do not include cases from the Upper Tribunal

[7] See paragraph 2.2 of the Annex

[8] See paragraphs 2.1 and 2.3 of the Annex

[9] Explained in more detail below in Section 1 and Chart B; see also paragraph 2.5 of the Annex

[10] Explained in more detail below in Section 1 and Chart A; see also paragraph 2.4 of the Annex

[11] Explained in more detail below in Section 1 and Chart C; see also paragraph 2.6 of the Annex

[12] See the conclusions reached in the following papers: Maurice Sunkin, The Human Rights Challenge: Trends in Judicial Review and the Human Rights Act, Public Money & Management (2001), https://sci-hub.do/https://www.tandfonline.com/doi/abs/10.1111/1467-9302.00267; The Public Law Project, The Impact of the Human Rights Act 1998 on Judicial Review (2003), https://publiclawproject.org.uk/resources/the-impact-of-the-human-rights-act-1998-on-judicial-review/; The Constitution Unit, UCL, The Human Rights Act, Past Present and Future (2016), https://constitution-unit.com/2016/05/03/the-human-rights-act-1998-past-present-and-future/; Sangeeta Shah and Thomas Poole, The Impact of the Human Rights Act on the House of Lords (2009), http://eprints.lse.ac.uk/24565/1/WPS2009-08_Shah_Poole.pdf

[13] The Law Commission Report on Remedies in Administrative Law, Advice to the Lord Chancellor under Section 3(1)(e) of the Law Commissions Act 1965, page 2, available at: https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2016/08/LC.-073-REPORT-ON-REMEDIES-IN-ADMINISTRATIVE-LAW-ADVICE-TO-THE-LORD-CHANCELLOR-UNDER-SECTION-31e-OF-THE-LAW-COMMISSIONS-ACT-1965.pdf

[14] Law Commission Consultation Paper No. 126: Administrative Law: Judicial Review and Statutory Appeals, 5 April 1993

[15] The Law Commission Report on Administrative Law: Judicial Review and Statutory Appeals, 26 October 1994, available at: http://www.lawcom.gov.uk/app/uploads/2016/02/LC.-226-ADMINISTRATIVE-LAW-JUDICIAL-REVIEW-AND-STATUTORY-APPEALS.pdf

[16] The Law Commission Report on Administrative Redress: Public Bodies and the Citizen, 25 May 2010, available at: https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/lc322_Administrative_Redress.pdf

In particular, our data analysis demonstrates that (i) across the ten year period assessed, central Government Departments were the defendants in judicial review hearings in 44.5% of all cases (Chart A); (ii) comparing figures year on year, the number of cases brought against central Government Departments in comparison with other defendants has remained relatively stable, i.e. there has not been a sharp increase in cases being brought against Government Departments as assessed against cases being brought against other defendants (Chart B); and (iii) there has been a general decline in judicial review cases being brought since 2013, which is matched both for cases against central Government Departments and against other defendants (Chart C).

Chart A

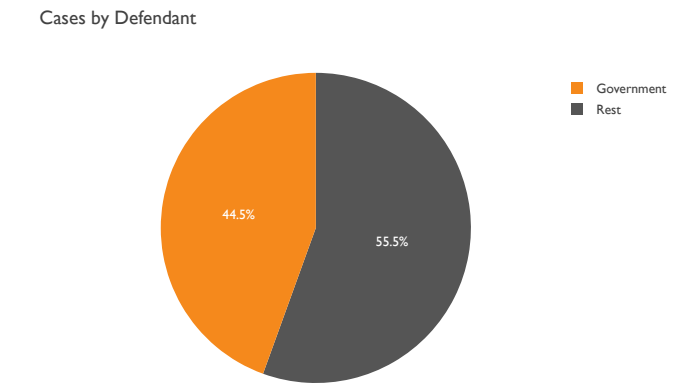


Chart B

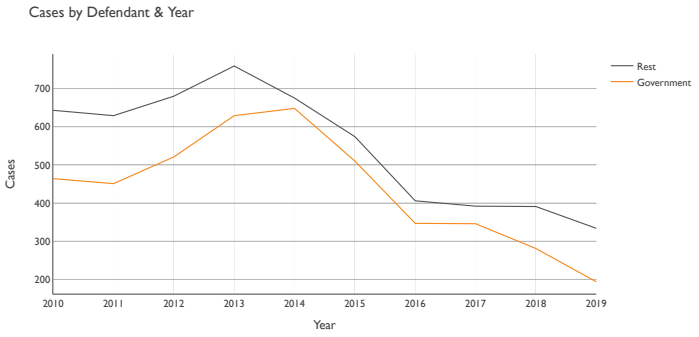
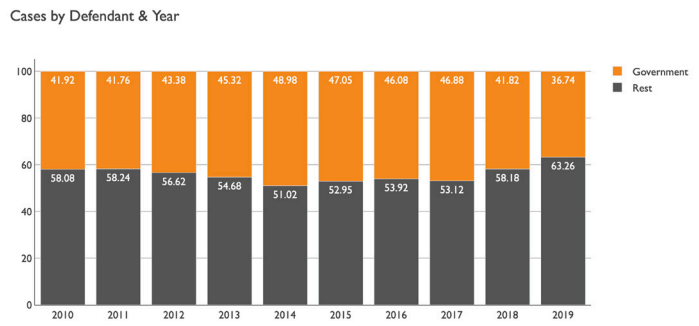


Chart C



Secondly, we welcome the panel's question 2 in italics that: "in relation to your decision making, does the prospect of being judicially reviewed improve your ability to make decisions?". To assist the panel, we refer you to the comments of Lord Pannick during a debate in 2015 in the House of Lords on the Criminal Justice and Courts Bill (which contained provisions for updating judicial review based on recommendations by Chris Grayling MP), in which he stated:[17]

"However inconvenient and embarrassing it is to Mr Grayling to have his decisions repeatedly ruled to be unlawful by our courts, however much he may resent the delays and costs of government illegality being exposed in court and however much he may prefer to focus on the identity of the claimant rather than the substance of their legal complaint, ***it remains the vital role of judicial review in this country to hold ministers and civil servants to account in public, not for the merits of their decisions but for their compliance with the law of the land as stated by parliament. The discipline of the law plays a vital role in promoting the high standards of administration in this country that we are in danger of taking for granted. It helps to concentrate—and rightly so—the mind of a minister or civil servant taking a decision whose legality he or she will be answerable for in public before an independent judge"****.* (emphasis added)

In other words the prospect of being judicially reviewed can be seen as objectively beneficial to both the quality of decision making and Ministerial accountability and needs to be viewed through that lens, rather than solely through the perception of the Government Department.

SECTION 2 – Codification and Clarity

3. Is there a case for statutory intervention in the judicial review process? If so, would statute add certainty and clarity to judicial reviews? To what other ends could statute be used?

By the Terms of Reference for the IRAL, the Review is directed to consider "in particular:

1. Whether the amenability of public law decisions to judicial review by the courts and the grounds of public law illegality should be codified in statute.
2. […]".

The notes to the Terms of Reference invite consideration of whether codification "would promote clarity and accessibility in the law and increase public trust and confidence in judicial review". We have considered these specific objectives of the Terms of Reference in our consideration of whether a case exists for a statutory framework for the judicial review process. We have not seen evidence which suggests a need for statutory intervention, and we do not believe that codification would lead to increased certainty or clarity in the judicial review field. We expand upon this below.

Codification in theory

As Professor Mark Elliot has described, there are three possible approaches to legislation codifying the grounds of review,[18] labelled:

1. 'Window-dressing';
2. 'All-encompassing'; and
3. 'Restrictive'

[17] https://hansard.parliament.uk/Lords/2015-01-21/debates/15012189000542/CriminalJusticeAndCourtsBill

[18] Public Law for Everyone "The Judicial Review Review II: Codifying Judicial Review – Clarification or Evisceration?" (August 2020) https://publiclawforeveryone.com/2020/08/10/the-judicial-review-review-ii-codifying-judicial-review-clarification-or-evisceration/

'Window dressing' does no more than reduce into statutory language high level principles of the law of judicial review derived from the common law. We struggle to see how codifying these abstract principles would achieve the aim of *"promot[ing] clarity and accessibility in the law and increase public trust and confidence in judicial review"*.

An 'all encompassing' approach, converting the entire corpus of judicial review common law, as it now stands, into statutory language would necessarily be a hugely detailed and highly technical exercise. We anticipate that such an approach would also singularly fail to *"promote clarity and accessibility in the law"*. In fact, we consider that such an approach would likely render the law of judicial review even less accessible to the public, consequently diminishing (rather than increasing) public trust and confidence. It will also likely involve time-consuming, costly and often – with the benefit of hindsight – unnecessary satellite litigation. An example of this can be seen in Australian administrative law, further details of which can be found below.

A 'restrictive' approach to codification is, by design, intended to constrain the operation and scope of the common law of judicial review by limiting the grounds on which an application could be brought. Given that judicial review is already quite restricted, with extremely short deadlines by which a claim is required to be brought and that Claimants do not benefit, in the majority of cases, from any public aid funding, we are of the initial view that further restriction to the scope of judicial review, or the ability of individuals to bring such a claim, would undermine the constitutional principle of the rule of law. As stated above there is no evidence of the "floodgates" principle in operation here. The jurisdiction has contracted, rather than expanded, in the last decade. However, before being able to express a detailed view on any specific proposals for a restrictive approach, we would need first to understand:

— precisely what curtailment is intended;
— how it is said that any such curtailment would be consistent with our fundamental constitutional principles (including the separation of powers and the rule of law); and
— on what evidential basis it is said that any such curtailment would *"promote clarity and accessibility in the law and increase public trust and confidence in judicial review"*.

Without such information and evidence, our view is that there is no basis for the introduction of a restrictive approach of codification, and indeed we would be concerned that any further restriction of the scope of or access to judicial review would undermine the very fundamentals of our constitution by limiting the effect of rule of law over Government.

Codification in practice

As to a general assessment as to whether codification might promote clarity and accessibility in the law and increase public trust and confidence in judicial review, a comparative study of jurisdictions which have legislated to place judicial review on a statutory footing is warranted. For reasons of brevity, and due to the limited time available to respond to this consultation, we consider just two such jurisdictions which have codified judicial review, Australia and the United States of America. A more expansive and detailed comparative study would, in our opinion, be a sensible outcome from the IRAL's call for evidence in order to fully inform its review.

Australia

Administrative law was reformed in Australia in 1977 with the introduction of the Administrative Decisions (Judicial Review) Act 1977 ("**the Australian Act**") as well as various state and territory equivalents introduced subsequently. The purpose of this legislation was to create and to simplify the remedies available to the court and simplify the procedure for judicial review.[19] The federal legislation codified the common law grounds of judicial review into a simple, non-exhaustive list of grounds and conduct that are reviewable.[20] It clarified that both "decisions" and "conduct" are reviewable.[21] It granted, amongst other things, a statutory right to reasons for a decision (which was not available previously).[22]

The reforms introduced by the Australian Act have been widely discussed by commentators. Some commentators consider that codifying grounds and procedures in statute has had a stultifying effect on the development of judicial review compared with a pure common law system.[23] In particular, criticism has been raised in relation to issues of (i) clarity; (ii) ambiguity; and (iii) potential for Executive overreach.

Commentators have criticised the Australian Act for lack of clarity. The grounds for judicial review are set out in section 5 of the Australian Act. Many of the grounds simply restate the common law position. In order to give meaning to the words used in the statute, it is necessary to refer to common law.[24] This would be no different in the UK. As Professor Elliot notes:[25]

"[…] judicial review and the application of the grounds of review is, at least often, part and parcel of the process of statutory interpretation. This function is, at least according to some judges — including some members of the Supreme Court in Privacy International[26] *— a necessarily judicial one that is a product of the concept of parliamentary sovereignty itself, the curation of statute law by an independent judiciary capable of interpreting such law in a consistent and principled manner being a precondition of Parliament's capacity to make 'law' in any meaningful sense."*

[19] Herbert Smith Freehills LLP (Andrew Lidbetter, Nusrat Zar, Jasveer Randhawa, Hannah Lau) "Government's terms of reference for review of the judicial review process" (Lexology, 27 August 2020) https://www.lexology.com/library/detail.aspx?g=880ff932-367e-43cb-8e5c-92203bc9265e#:~:text=The%20federal%20legislation%20codified%20the,and%20conduct%20that%20are%20reviewable.&text=Further%2C%20a%20separate%20avenue%20for,Constitution%20which%20is%20constitutionally%20protected.

[20] Ibid.

[21] Ibid.

[22] Ibid.

[23] Ibid.

[24] Judicial review and codification by Timothy H. Jones, Legal Studies, L.S. 2000, 20(4), 517-537, page 525

[25] Public Law for Everyone "The Judicial Review Review II: Codifying Judicial Review – Clarification or Evisceration?" (August 2020) https://publiclawforeveryone.com/2020/08/10/the-judicial-review-review-ii-codifying-judicial-review-clarification-or-evisceration/

[26] *R. (on the application of Privacy International) v Investigatory Powers Tribunal* [2020] AC 491

There are also criticisms on ambiguity. Section 5(1)(j) of the Australian Act permits review on the grounds that a decision was *"otherwise contrary to the law"*. This is an open ended ground, essentially allowing for common law developments to be incorporated in the Australian Act. This offers the same amount of precision as common law.[27] In considering codification of judicial review in England and Wales, Tim Buley QC considered how the statute would be written. He too considered that it would be necessary to include a ground for *"any other ground of judicial review"*, ultimately rendering illusory any certainty provided by codifying the grounds.[28]

Codification has also been said to have the effect of placing the content of the grounds of judicial review in the hands of the Government which can generally secure the passage of its legislative proposals.[29] A key example of the danger of placing the ground of judicial review in statutory form can be seen from the introduction of the Migration Reform Act 1992 (Cth) and the Migration Legislation Amendment (Judicial Review) Bill 1998 (Cth) (together, "**the Migration Acts**"). The Migration Acts were proposed to Australian Parliament by the Minister for Immigration. At the time, he was purporting to decide for himself the grounds on which judicial review of his actions would be available.[30] Conceptually, allowing the rules of review to be set by the reviewed undermines confidence in our democratic system. As Lord Neuberger has highlighted, *"the courts have no more important function than protecting citizens from the abuses and excesses of the executive"*, and therefore any prospect of reform requires very careful scrutiny, particularly when they *"come from the very body which is at the receiving end of JR"*.[31]

In considering whether the Australian Act provides a useful model to be adopted in England and Wales, Timothy H. Jones concludes that a large amount of Australian case law has become concerned with procedural issues, which are unrelated to the substantive justice of the cases under consideration. In adopting the same model in England & Wales *"the fear would be that codification of the grounds of judicial review might lead to the same difficulties"*.[32] This would not meet the objective set out by the IRAL to add certainty and clarity to the judicial review mechanism.

The United States of America ("USA")

Judicial review in the USA is codified in The Administrative Procedure Act 1946 ("**the US Act**"). In contrast to the Australian Act, the US Act looks at the principles of judicial review and sets out a number of grounds in statutory form based on fundamental principles.[33] It is a blend of codification of existing common and statutory law, with new legal standards to be enforced by the court.[34]

Much like the Australian Act, the US Act has been criticised by commentators as ambiguous.[35] By way of one example the US Act refers "substantial evidence", without any guidance as to what the test for "substantial" might be.[36] The meaning and effect of "substantial" has thus become the subject of judicial interpretation. Any similar lack of precision in the UK would similarly require judicial interpretation, impacting on the overarching aim of increasing clarity via codification.

On the basis of the above, it is our view that codification will not provide clarity and accessibility in the law, but is likely to lead to increased procedural issues, ambiguity and possibility for Executive overreach. That being said, in the event that the IRAL identifies an evidential basis which suggests that a 'restrictive approach' to codification is required, we recommend that a more expansive and detailed comparative study on codification is undertaken.

4. Is it clear what decisions/powers are subject to Judicial Review and which are not? Should certain decisions not be subject to judicial review? If so, which?

Given the Firm's involvement in the Miller cases, and our in depth understanding of the underlying issues, we have focused our answer to this question on the justiciability of what are perceived to be 'political decisions'. This accords with Note D of the Terms of Reference which makes clear that the panel is to consider the justiciability of prerogative powers,[37] and in response to the comments from The Lord Chancellor, Robert Buckland QC MP, in the press release announcing the independent review of judicial review that:[38]

"Judicial review will always be an essential part of our democratic constitution – protecting citizens from an overbearing state. This review will ensure this precious check on government power is maintained, while making sure the process is not abused or used to conduct politics by another means."

For the vast majority of cases, the question as to whether a case is justiciable is relatively straightforward to determine. Generally speaking, the decisions of bodies or individuals who exercise Executive powers, delegated or otherwise, are subject to judicial review – there are, of course, the inevitable caveats that complicate matters. One such area is in relation to perceived questions of 'politics'. As Peter Crane noted in the Modern Law Review,

"Administrative law is, by common agreement, at the interface between law and politics. Judicial control of governmental action in general, and judicial review applications in particular, often raise fundamental issues about the distribution of decision-making power between the courts and the executive, between central and local government, between the UK and the EC, and so on."[39]

[27] Judicial review and codification by Timothy H. Jones, Legal Studies, L.S. 2000, 20(4), 517-537, page 526

[28] Reflections on the Faulks review: should judicial review be codified? Tim Buley QC (Landmark Chambers) presentation 2020

[29] Judicial review and codification by Timothy H. Jones, Legal Studies, L.S. 2000, 20(4), 517-537, page 534

[30] Ibid, page 534

[31] "Justice in an Age of Austerity", Tom Sargant Memorial Lecture 2013, 15 October 2013 http://supremecourt.uk/docs/speech-131015.pdf, paragraphs 37 and 38

[32] Ibid, page 519

[33] Ibid, page 519

[34] Ibid, page 522

[35] Ibid, page 522

[36] Ibid, page 523

[37] Limited to those prerogative powers in 3.34 of the Cabinet Manual

[38] https://www.gov.uk/government/news/government-launches-independent-panel-to-look-at-judicial-review

[39] The Law Commission on Judicial Review by Peter Cane, Modern Law Review 1993, Volume 56, Issue 6, pages 887 to 888, available at: https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.1468-2230.1993.tb01915.x

However, it is this Firm's view that while certain judicial review judgments necessarily touch on issues of political interest, this does not represent judicial overreach which requires a restriction on justiciability, and nor does it represent the conduct of politics by other means. This is principally because judicial review is concerned not with the merits of a decision, but whether the decision maker (i) had the power to make that decision; and (ii) did so in a lawful manner. Put simply, judicial review is about process, not politics, which is especially important when the rights of individuals are affected.

By way of notable example, the decision in Miller 2 addresses issues relating to the scope of power and the manner of exercise of power, whilst avoiding making any comment or judgment on the motivation for the prorogation. The court in Miller 2 was focussed on the process and exercise of the Government's powers, not the politics of why those powers were being used. The Supreme Court held that there is a legal limit in relation to the power to prorogue. Lady Hale explained that the limit exists insofar as the Executive cannot prorogue Parliament for as long as it wants if the effect is to prevent Parliament from carrying out its supervisory role. Accordingly, the Supreme Court's concern in Miller 2 was to ensure that Parliament's powers were not improperly impeded by the Executive.

In Miller 2, the Supreme Court also noted that the responsibility of the independent courts to determine whether or not the legal limits conferred on each branch of Government have been exceeded should not be avoided purely because the underlying question or decision is political. This is reflective of a centuries-old approach which provides that, although prevented from deciding political questions, the court has a historic role in exercising supervisory jurisdiction over the Executive's decisions when a dispute concerning the conduct of politicians or political controversy arises.[40] The Supreme Court's decision on Miller 2 was unanimous and, given the unpartisan makeup of the bench of 11 justices, the consensus on this case is telling.

The court's deference to Parliament is not limited to the Miller cases, and has been highlighted by three recent judgments, summarised below:

1. In *R (on the app of (1) National Farmers Union (2) T&G Stone Ltd) v DEFRA*, a case concerning the legality of decision not to issue a licence to cull badgers, Mrs Justice Andrews held that complex political and ethical value judgments of this type were quintessentially matters for a democratically elected decision-maker.[41] It was held to be correct that the decision had been taken on political, and not purely scientific grounds and the judicial review was refused.

2. Similarly, in *R (on the app of Friends of Antique Cultural Treasures Ltd.) v Secretary of State for Environment, Food and Rural Affairs*, in which the proportionality of the decision to ban ivory was challenged, the Court of Appeal held that in circumstances where a value judgment was unquantifiable and conjectural, a considerable degree of deference to Parliament was required by the courts. The judgment confirmed that Parliament was "eminently well placed" to evaluate the political and diplomatic dimensions of the issue.[42]

3. Finally, in *R (on the application of Christie Elan-Cane) v Secretary of State for the Home Department*,[43] the Court of Appeal upheld the decision of the High Court that current passport policy providing for no third gender did not breach an individual's human rights. The Court of Appeal noted that the issue of a third gender on a passport was part of a broader issue concerned with gender identity, on which there was no consensus between European states, and accordingly that this issue lay within the Government's margin of appreciation in implementing positive obligations under Article 8 (right to private life) of the ECHR.

In all three cases, the court demonstrated a commitment to preserving the separation of powers in accordance with which it is the proper jurisdiction of Parliament and democratically elected decision-makers to determine issues that fall outside the scope of the court's own jurisdiction. This appropriate deference to Parliament has arguably only increased during the current Covid-19 pandemic. For example, in *R (Adiatu) v HMRC*, a judicial review of the Coronavirus Job Retention Scheme failed on the basis of the court's view that it was for the Government to find the right balance between the competing societal interests involved during times of crisis. Lord Justice Bean and Mr Justice Cavanagh stated that:[44]

"176. In our judgment, in the present case, the Defendant had a broad margin of discretion. The Government had to respond, with almost unprecedented speed, to a national emergency which threatened the health and livelihoods of millions of workers, and the economic security of hundreds of thousands, if not millions, of businesses. It had to decide what to do, in relation to a very wide range of problems, and then to work out how to achieve what it had decided to do, within a very few days. In so doing, the Government had to balance a very wide range of economic, social and political considerations. So, for example, the Government sought to find a way to provide for as much financial support for workers as possible, without imposing financial burdens that would undermine the future viability of the businesses that employed them. The Government also had to take account of the state of the public finances and the level of debt that could be taken on. The Government had to do so at a time when the duration and scale of the pandemic were not known.

[…]

178. In our judgment, the circumstances of this case give rise to the ***widest margin of discretion available to Government and public authorities under EU law****, but this does not mean that there must be no scrutiny at all. The aims must be "at least rational" (McCloud) and it must be reasonable to take the view that the means adopted* may *be appropriate to achieve the aims (Rosenbladt).* ***But this does not entitle a court to substitute its own view of what the aims and means should have been in the particular circumstances. Allowances must be made for the fact that it is for Government to make these political and economic choices, and for the speed with which the Government had to act."*** *(emphasis added)*

[40] *Case of Proclamations* [1611] EWHC KB J22)

[41] *R (on the app of (1) National Farmers Union (2) T&G Stone Ltd) v DEFRA* [2020] EWHC 1192 (Admin), paragraph 98

[42] *R (on the app of Friends of Antique Cultural Treasures Ltd. v Secretary of State for Environment, Food and Rural Affairs* [2020] EWCA Civ 649, paragraph 78

[43] *R (on the application of Christie Elan-Cane) v Secretary of State for the Home Department* [2020] EWCA Civ 363, paragraph 101

[44] *R (Adiatu) v HMRC* [2020] EWHC 1554 (Admin), paragraphs 176 and 178

Notwithstanding the examples from case law as to judicial restraint on such matters, the media actively promotes the notion that judicial decision-making has become politicised. This criticism is not restricted to the Miller cases but applies to cases that cover politically 'hot' topics such as social policy and human rights. Sensationalised reporting is inevitable given the partisan nature of the mainstream media and indeed the coverage is itself inevitably political in its arguments as a result. However, it can be argued that this ignores the straightforward reality that Parliament retains ultimate control through its ability to enact correcting legislation in light of a court decision. Indeed, there is a legitimate argument that judicial decisions strengthen the legitimacy of the Executive and legislature by interpreting and clarifying legislation through case law or identifying weaknesses or loopholes that need to be addressed through amended or new legislation.

On the basis of the above, we do not believe therefore that there is any proper cause for limiting the scope of judicial review for perceived 'political decisions'. Case law more than adequately provides for limits to judicial intervention on such matters; and in fact there has been wide misinterpretation of the court's decisions in the Miller cases, which upheld key constitutional law principles of the separation of powers and Sovereignty of Parliament.

5. Is the process of i) making a Judicial Review claim, ii) responding to a Judicial Review claim and/or iii) appealing a Judicial Review decision to the Court of Appeal/ Supreme Court clear?"

We do not believe that the process is clear, particularly to litigants in person. However, this failing is common of the rules of court across the entire justice system of England & Wales and the Supreme Court of the United Kingdom. As Sir James Munby observed:[45]

"Our present court processes, our rules, our forms, our guidance, is woefully inadequate to enable litigants in person – even educated, highly articulate intelligent litigants in person – to understand the system. That's a shocking reproach to us. That's a current reality."[46]

See also Lord Briggs in Barton v Wright Hassall LLP:[47]

"If, as many believe, because they have been designed by lawyers for use by lawyers, the CPR[48] *do present an impediment to access to justice for unrepresented parties, the answer is to make very different new rules (as is now being planned) rather than to treat litigants in person as immune from their consequences."*

We would support any initiative by which the Rules Committees were charged with making the rules of court governing the process and procedure across the entire justice system simpler and easier to navigate, including in relation to judicial review.

SECTION 3 – Process and Procedure

General responses

As set out in our response to question 5, this Firm welcomes general recommendations that make bringing litigation simpler and more cost effective. That being said, in relation to questions 6 to 13, we have the following general comments in relation to the process and procedure of judicial review;

1. Measures have already been introduced in recent years which have sought to restrict the number of judicial review claims being brought, including increasing court fees, reducing the timeframe in which to issue a judicial review claim for planning and procurement cases, and amending rules relating to the disclosure of information about how cases are funded;
2. As Lord Denning expressed in 1983: *"When considering the merits of judicial review - as against an ordinary action - it is important to notice that judicial review has some safeguards against abuse, which are not available in ordinary actions."*[49] Such safeguards include the requirement to obtain permission to bring judicial review proceedings, limited disclosure and limited use of cross-examination; and
3. Our analysis suggests that the trend in relation to judicial review is actually a reduction in cases reaching a hearing year on year, since 2013.

We also make the following specific comments on questions 11 and 13:

11. Do you have any experience of settlement prior to trial? Do you have experience of settlement 'at the door of court'? If so, how often does this occur? If this happens often, why do you think this is so?

In relation to settlement, our experience is that this occurs most often in relation to cases on delay, in which a decision maker has failed to make a decision within a defined timescale with no clear explanation. We have experience of settling such cases before a hearing (at any point between the initial pre-action letter and the hearing itself), which also often forces the public body to make a decision. Of course, such cases would be avoided if the delay had not occurred in the first place, but we welcome the appetite of public bodies to settle such procedural cases.

More generally, in our broad experience of litigation our view is that ADR is useful and settlement should be encouraged where possible before and during litigation. We note the role of ACAS in employment tribunal cases and it is possible that a similar type of third party intervention or assistance in settlement discussions may be helpful in judicial review cases as well. This is not least because of the number of litigants in person in judicial review (and Employment Tribunal) cases. Of course, many judicial review cases are brought on a point of legal or procedural principle which may render settlement difficult, but a significant number relate to matters which should be capable of settlement between the parties, and any measures that can be taken to enable fair and appropriate settlement discussions to take place should be encouraged.

[45] In the context of the Family Court, but in our experience apt in relation to the entire justice system

[46] Jamies Grierson, "Access to justice family courts 'inadequate', says outgoing head" (The Guardian, 27 July 2018) https://www.theguardian.com/law/2018/jul/27/access-to-justice-in-family-courts-inadequate-says-outgoing-head

[47] *Barton v Wright Hassall LLP* [2018] 3 All ER 487 (at paragraph 42)

[48] Part 54 and PD 54(A) – (E) of which contain the rules of court for judicial review in the Administrative Court

[49] *O'Reilly v Mackman* [1983] 2 A.C. page 256

13. Do you have experience of litigation where issues of standing have arisen? If so, do you think the rules of public interest standing are treated too leniently by the courts?

On the question of standing, we wish to draw the panel's attention to the previous assessment of this issue by the 2010-2015 coalition Government, in the consultation on judicial review under Chris Grayling MP. As summarised in the Government response to the consultation:[50]

"105. The majority of respondents did not support a tighter approach to standing. The senior judiciary identified this as an area which caused them "particular" concern in respect of preventing meritorious challenges, and this was a view echoed widely. The Bar Council, individual chambers and barristers, the Law Society, and a range of solicitors' firms (including large commercial ones) also registered their concern as did NGOs."

Taking into account these concerns, the Government reached the following conclusion:[51]

"33. This suggestion [on changes to rules on standing] was largely opposed, particularly by lawyers and their representative groups and NGOs, who argued that claims brought by groups or organisations without a direct interest in the outcome should continue to be possible. The case for change was challenged, given that there were few such claims brought (as a percentage of total applications) and that Government figures indicate those cases tend to be more successful than on average. Many respondents argued that a change would impact upon meritorious claims which hold the executive to account where it has acted unlawfully and therefore shield the executive from challenge.

[…]

34. It was also argued that requiring a direct interest might be counter-productive – causing multiple individuals to bring challenges whereas, under the current test, a single challenge by an expert group would have been brought, with a focus on the key issues.

35. The Government is clear that the current approach to judicial review allows for misuse, but is not of the view that amending standing is the best way to limit the potential for mischief."

While we have not seen evidence of misuse of judicial review proceedings, we do agree with the conclusion reached by the Government in 2014 that the rules on standing should not be amended.

Conclusion

The evidence and case law do not indicate an encroachment on Executive power by the judiciary, and the number of judicial reviews reaching a hearing continue to decrease year on year. That, combined with the already onerous process for bringing a judicial review – a short timeframe to issue proceedings with pre-action requirements, an additional permission stage and reduced disclosure and cross examination of witnesses – means that the process is already extremely difficult and pared back. We have not seen any evidence that would indicate that further restrictions on the use of judicial review or the process would be justified or lead to greater clarity. Instead, we are concerned that potential reforms may significantly undermine the fundamental constitutional law principle of the rule of law. Our constitution must of course be protected, and the principle that Government decisions are subject to the law as interpreted by the independent courts is a fundamental part of that.

Mishcon de Reya LLP
19 October 2020

[50] Judicial Review – proposals for further reform: the Government response, Annex A: Summary of consultation responses, https://consult.justice.gov.uk/digital-communications/judicial-review/results/judicial-review---proposals-for-further-reform-government-response---annex-a.pdf

[51] Judicial Review – Proposals for Reform: the Government response, February 2014, https://consult.justice.gov.uk/digital-communications/judicial-review/results/judicial-review---proposals-for-further-reform-government-response.pdf

ANNEX – DATA ANALYSIS METHODOLOGY

1. THE ORIGINAL DATASET

The original dataset produced by vLex Justis comprised: (i) all judgments from 2010 onwards published by the official transcribers for the High Court, Queen's Bench Division (Administrative Court) (12,987 judgments in total); (ii) all judgments from 2010 onwards published by the official transcribers for the Court of Appeal (Civil Division) (13,360 judgments in total); and (iii) all judgments from 2010 onwards published on the Supreme Court website (1,392 judgments in total).

The initial dataset then underwent an analysis (the "**Initial Filter**") to identify cases potentially related to judicial review to assist in our understanding of the distribution of judicial review cases from 2010 – 2020 in the above-named courts by applying the following conditions (the "**Conditions**"):

1.1 Condition A

Any case with the citation "[year] EWHC number (Admin)" as well as all appeals to the Court of Appeal and the Supreme Court.

1.2 Condition B

Any case including a government agency/department, public body or authority as a party

1.3 Condition C

Any case containing any of the following phrases (the "**Content Phrases**"):

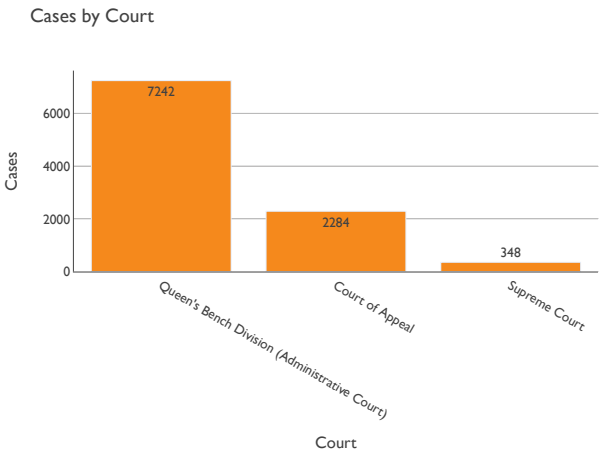
"judicial review"
"mandamus"
"prohibition"
"certiorari"
"mandatory"
"prohibiting and quashing orders"
"intra vires"
"ultra vires"
"mandamus prohibition"
"prohibition order"
"mandatory order"
"order quashing"
"quashing order"
"writ of prohibition"

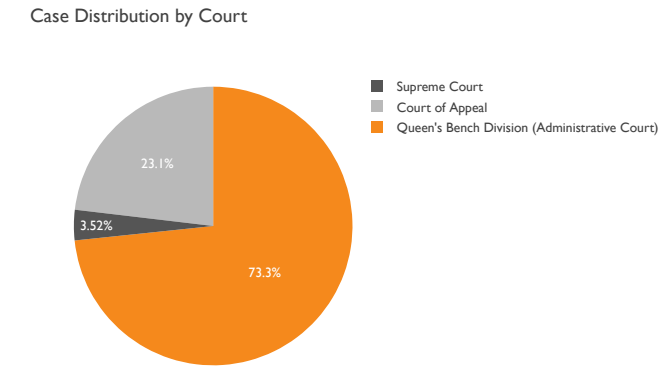
For the purposes of the Initial Filter, at least two of the Conditions had to be met in relation to cases in the Queen's Bench Division (Administrative Court) for a case to be included. vLex Justis also included Court of Appeal cases featuring the relevant party names (Condition B) and all Supreme Court and Court of Appeal containing one of the Content Phrases.

Once the Initial Filter had been applied, there were a total of 10,153 judgments. These cases comprised the original JavaScript Object Notation (the "**Original JSON**") provided by vLex Justis to this Firm. On receipt, this Firm applied a second filter to the Original JSON so as only to include cases from 2010 – 2019 rather than also include an incomplete year for 2020. These judgments totalled 9,874 (the "**Updated JSON**").

2. METHODOLOGY BEHIND CREATION OF VISUAL GRAPHICS THROUGHOUT THE REPORT

2.1 Cases by Court



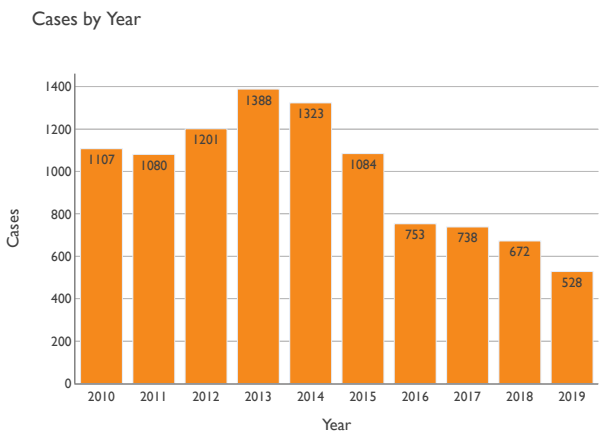


The Updated JSON included an "issuer" column. This identified the relevant court giving the judgment: High Court, Queen's Bench Division (Administrative Court), Court of Appeal (Civil Division) or Supreme Court.

The cases were then grouped by "issuer" and coded to calculate the number of cases per court group.

The graph was then generated as a visual comparison tool to assess the number of cases per court.

2.2 Cases by Year



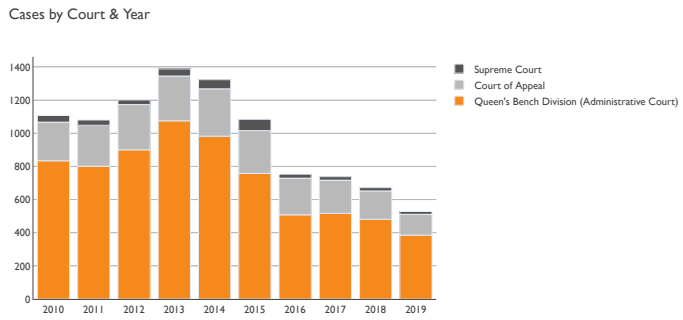
The Updated JSON included a "judgmentDate" column in the form YYYY-MM-DD.

The year ("YYYY") was extracted from the "judgmentDate" column and included in a new column, "Year". in a new column, "Year".

These cases were then grouped by year using the new "Year" column and coded to calculate the number of cases per year group from 2010 - 2019.

The graph was then generated as a visual comparison tool to assess the number of cases per year.

2.3 Cases by Court and Year



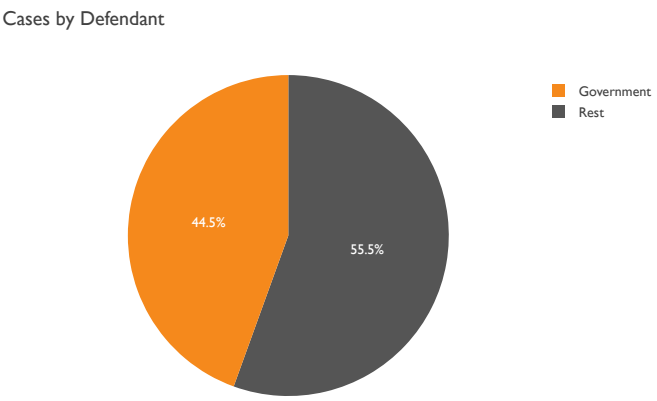
All cases were first grouped by "Year" using the new column described at 2.2 above.

Within each year from 2010 -2019, the cases were grouped by "issuer" (i.e. the relevant court) using the column from the Updated JSON.

The results were coded to calculate the number of cases per year per court.

The stacked bar chart was then generated to assist in visualising the distribution of cases by court and year. The total height of each bar corresponds to the total number of cases for each year. The colour of each bar corresponds to the number of cases per court within that year.

2.4 Cases by Defendant – Chart A



The Updated JSON included a "title" column. The Defendant from each case was extracted from this column and a new "Defendant" column was create.

The "Defendant" column was then filtered into two groups: cases with the Government as Defendant (the "**Government Group**") and the remaining cases with other Defendants (the "**Rest Group**"). A list of content phrases was created to capture all variations of names of Defendants (including misspellings) that fell into the Government Group ("**Government Content Phrases**"):

"secretary of state"
"secretrary of state for justice"
"secrtary of state for the home department"
"secetary of state for business, innovation and skills"
"secrtary of state for the home department"
"secreatary of state for the home department"
"secretrary of state for the home department"
"the secreatary of state for the home department"
"secrtary of state for communities and local government and another"
"ecretary of state from the home department"
"ecretary of state for the home department"
"sectretary of state for the home department"
"seretary of state for the home department"
"secretry of state for the home department"
"ecretary of state for the home department"
"lord chancellor"
"prime minister"
"chancellor of the exchequer"
"attorney general's office"
"sshd"
"home office"
"uk border force"
"secretary of state for the home department"
"ministry"

A new "Gov Defendant" column was then created. This was created to connect to the "Defendant" column. The two columns were then coded as follows:

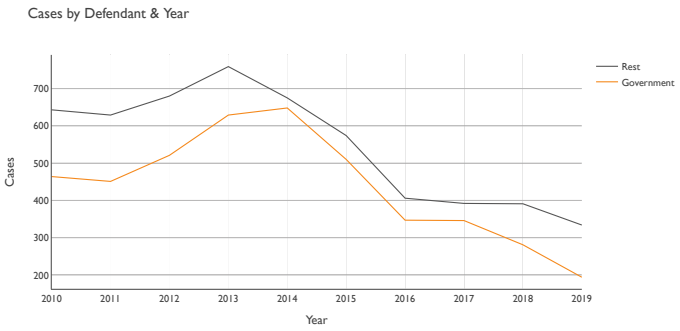
2.4.1 Any Defendants in the "Defendant" column including one or more of the Government Content Phrases was categorised with the value "Government" in the "Gov Defendant" column.

2.4.2 Any Defendants in the "Defendant" column not including any of the Government Content Phrases was categorised with the value "rest" in the "Gov Defendant" column.

The results were then coded to calculate the number of cases with defendants in the Government Group as compared with the Rest Group.

The pie chart was then created to assist in visualising the percentage distribution of Defendants in the Government Group versus the Rest Group.

2.5 Cases by Defendant and Year – Chart B



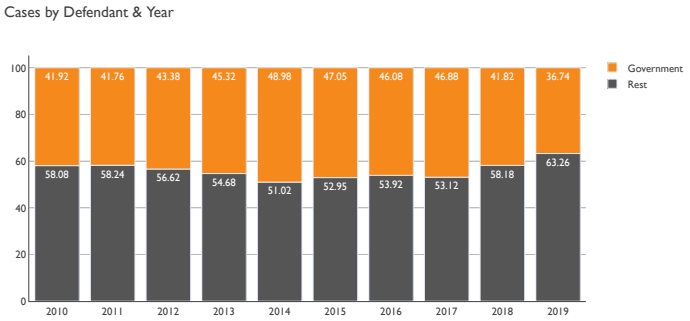
All cases were first grouped by "Year" using the new column described at 2.2 above.

Within each year from 2010 - 2019, the cases were grouped by "Gov Defendant" (the new column described at 2.4 above).

The results were then coded to calculate the number of cases in each year with Defendants in the Government Group as compared to the Rest Group.

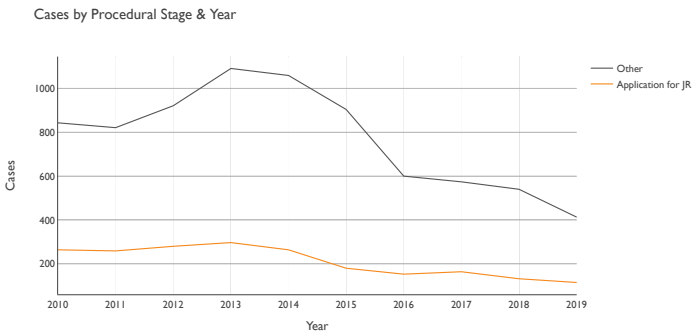
The line chart was then generated as a visual comparison tool to assess the distribution of cases per year with Defendants in the Government Group versus the Rest Group. The height of the red line on the graph at each year represents the number of cases with Defendants in the Government Group. The blue line represents the number of cases with Defendants in the Rest Group.

2.6 Cases by Defendant and Year – Chart C



The cases were grouped as above at 2.5 but the results were analysed to produce percentage results to show the number of Defendants in the Government Group as compared to the Rest Group in each year from 2010 - 2019.

2.7 Cases by Procedural Stage & Year



The Updated JSON included a "justisCategory" column identifying the classification of the case in the Justis Legal Taxonomy. This column included 10-15 tags/ keywords for each case. One of the tags included was "applying for judicial review" (the "**Judicial Review Tag**").

A new "ApplicationJR" column was created. This was created to connect to the "justisCategory" column. The two columns were then coded as follows:

2.7.1 Any cases including the Judicial Review Tag in the "justisCategory" were categorised with the value "Application for JR" in the "ApplicationJR" column (the "**Judicial Review Group**").

2.7.2 Any cases including the Judicial Review Tag in the "justisCategory" were categorised with the value "Other" in the "ApplicationJR" column (the "**Other Group**").

All cases were first grouped by "Year" using the new column described at 2.2 above.

The cases were then grouped using the "ApplicationJR" column and coded to calculate the number of cases in each year in the Judicial Review Group as compared to the Other Group.

The line chart was then generated to assist in visualising the distribution of Judicial Review cases per year as compared to any other cases per year.

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