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Non-Technical Summary

Judicial review is the principal means by which people can challenge the legality of action taken by public authorities. As such it is an important tool for providing redress and holding government to account, but does it help to improve services or does it interfere with local authorities and detract from what they should be doing?

Many now believe that we are becoming too litigious and overly preoccupied with asserting our rights rather than accepting our responsibilities and that this is interfering with government's ability to act in the public interest. But in fact, our findings indicate that there is much less judicial review litigation against local authorities than is widely assumed and that much of it is concentrated on a small number of London Councils. We also found that, rather than detracting from the quality of local government, an increased level of challenge appears to lead to improvements in levels of performance and is therefore helpful to authorities, rather than a hindrance.

In this paper, using both analysis of a specially constructed database of litigation against local authorities and the results of a series of interviews with local authority officials, we investigate: the relationship between judicial review litigation and the quality of local authorities as indicated by the government's performance measures; the incentives to implementing judicial review judgments and the obstacles to doing so; and the difference that judgments make to local authorities.

There were two key findings from our quantitative analysis, which we were able to interpret using the interview data:

1. All things being equal better performing authorities (as measured by government indicators) were less likely to be challenged than worse performing authorities. This indicates that there is a connection between official measures of quality and the public perceptions of quality. It also suggests that challenge is linked to quality of services and is not unnecessarily stimulated by lawyers.

2. We also found evidence that authorities improve (at least in terms of the official measures) when the scale of challenge against them increases. We do not know why this is the case, but it indicates that authorities learn from challenges particularly when the pattern of litigation increases from levels that they have become accustomed to.

Overall, for most local authorities legal challenge remains a somewhat rare event. But far from being a negative irritant, our research indicated that judicial review may actually help authorities to improve. The findings also have important implications in relation to the funding of legal services. They highlight the extent to which judicial review is used to help meet the needs of the most vulnerable people who depend on having access to high quality and properly funded expert services. In short, they underscore the link, rather than the tension, between access to justice and improvements in the quality of local government.

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Abstract

In this paper we consider the relationship between levels of judicial review litigation and the quality of local government services. The findings indicate that judicial review may be making a positive contribution to local government in England and Wales. The paper also considers the way local government officials perceive judicial review and argues that reactions cannot be wholly understood in terms of incentives. Judicial review makes a positive contribution to public administration at least partly because it promotes values that are central to the ethos of public administration and assists officials in resolving tensions between individual and collective justice.

Key words: Public Law, Judicial Review, Local Authorities, England and Wales, Quality, Impact

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I Introduction and Overview of Argument

There is significant interest in many countries in the impact of litigation on public administration. This is in part associated with the international trend towards judicialisation of government (see eg Tate & Vallinder, 1995). In the UK this trend has been manifest in the growing use of judicial review to challenge public administration (Bondy and Sunkin, 2008); as well as legal techniques to define and regulate the duties and powers of public authorities (Loughlin, 2000); and, more broadly, the constitutionalization of the legal and political system by developments such as devolution and the enactment of the Human Rights Act 1998 (Hadfield 2007; Lester and Beattie 2007).

Public administration has become increasingly subject to legal controls and performance targets imposed by central government. It has also become increasingly susceptible to consumer oriented complaints and challenge systems (Department of Constitutional Affairs, 2004: National Audit Office, 2004/05). The perceived increase in resort to litigation, including judicial review, has been part of this picture. Even if welcoming the general trends, many in public administration are concerned about the costs of litigation and its potential adverse effects on ability to deliver services (Better Regulation Task Force, 2004). One response is that these concerns are overplayed and that threats posed by judicial review litigation must be placed in context. There are costs, but judicial review is still rare relative to the scale of decision-taking and its influence may be minimal in the wider scheme of things. Another more positive approach is to highlight judicial review's potential to benefit the actual and perceived quality of public administration (Audit Commission 2003).

Against this backdrop this paper considers whether, and, if so, how judicial review litigation acts as a lever for change in the delivery of services by local authorities in England & Wales. The paper engages with two disparate fields of study. One relates to the incentives for local authorities to enhance their performance and the quality of their service provision. Interest here has generally focused on the influence on local authority performance of explicit monitoring or audit arrangements established by

central government as a 'virtual consumer' to enforce particular standards or performance measures, with associated costs for non-compliance.

The other concerns the influence of judicial review litigation on public authorities and the services they deliver.[1] The dominant message of much of the work on the influence of judicial review has been to emphasise its limited ability to influence administrative decision-making (Richardson 2004, 112). Courts may be well suited to adjudicate upon disputes, but their decisions are widely considered to be ineffective drivers of change in the quality of services provided by public bodies. Moreover, where courts do exert influence research indicates that this tends to be negative in various ways (Richardson 2004, 113; Halliday 2000; Loveland 1995, Chapter 11; for an overview of the US literature on impact, see Canon 2004).

This paper, in a new departure, brings together the incentive effects of judicial review litigation and its impact on service delivery. Employing a mixed methods study of litigation involving public authorities it presents new quantitative evidence indicating that judicial review does act as a driver to improvements in the quality of local authority services. It also explores perceptions of judicial review litigation amongst local authority officers to throw light on these findings.

Important differences exist between judicial review as it is commonly understand in the US and in the UK. Given the absence of a written constitution judicial review in the UK has not been concerned to ensure that public authorities comply with constitutionally imposed obligations and the role of judiciary is limited by comparison with other countries (for an overview of the role of judicial review in the US, England & Wales, Canada and Australia, see Cane 2004). In orthodox theory the judicial review court has no general ability to question the constitutional standing of, or the legality of organisations and systems established by, primary legislation.[2] Rather, its role is to uphold Parliament's will and to ensure that public authorities do not exceed or abuse the powers conferred upon them by primary legislation. For the most part

[1] In this paper we are not considering situations in which local authorities use judicial review as a resource when then they commence judicial review proceedings, see eg the *Hillingdon case* below.
[2] The courts may 'disapply' primary legislation that conflict with European Community/European Union law: eg *R v Secretary of State for Transport, ex parte Factortame Ltd* (No5) [2000] 1 AC 524; Courts may also declare primary legislation to be incompatible with rights and freedoms set out in the European Convention on Human Rights: s 4 Human Rights Act 1998.

UK judges focus on the legality of past actions rather than on what public authorities must do to comply with the law in the future, and the range of remedies available to judges is much less extensive, some would say intrusive, than that available to judicial review courts in the US (see generally Lewis 2004). In particular, UK judges do not appoint monitors or masters directly to oversee compliance with their judgments. For the most part judicial review is concerned with the process of administration and not with the merits of administrative action and judges do not review decisions to establish whether action is right or wrong and they will not upset decisions because they disagree with them; and nor will they replace an authority's decision with their own. Typically when an authority is found to have acted unlawfully it will be expected to retake its decision. Finally, in this context, note that in England & Wales, the jurisdiction in which our work has been undertaken, the judicial review procedure has two key stages: the permission stage and the final hearing stage. [3] At the permission stage an Administrative Court [4]judge will consider whether the challenge is arguable; the claimant has satisfied the time limits; has standing, and has exhausted other remedies. If satisfied, permission will be granted and the claim listed for final hearing and judgment. (For a recent study of the permission stage and relevant statistics, see Bondy and Sunkin 2008). Litigation may exert influences whether or not cases reach judgment and we therefore adopt the holistic approach that has been encouraged by others and bring together consideration of impact at both these stages of judicial review litigation (Gambitta 1981; O'Leary 1989; Richardson and Sunkin 1996, Richardson 2004, 112).

We can, nonetheless assume that it is by way of judgments that judicial review exerts its greatest formal influences. While this may be so, it has been observed that even when it produces judgments that are adverse to authorities, judicial review is short of coercive muscle and 'hardly functions as a sanction' (Halliday 2004 103-105; Richardson 2004, 119). There are two particular factors here. One is that remedies granted to successful claimants are normally non-coercive declarations that public authorities are trusted to respect. The second is that claimants cannot obtain compensation solely because they have suffered as a consequence of an authority's

[3] The procedure in Scotland is different.
[4] The Administrative Court is part of the Queen's Bench Division of the High Court.

excess or abuse of power.[5] The absence of compensation is widely considered to be a serious gap in the armoury of remedies available to claimants. The gap is significant because it means that judicial review rarely imposes a direct cost, in the form of compensation liability, on public authorities (see generally: Law Commission, 2008; cf Audit Commission 2003, noting that litigation costs usually exceed damages awarded).

Given the absence of sanctions, why should authorities change in response to judicial review? In posing this question we argue that it would be misleading to assume that local authorities only change in response to judicial review to the extent dictated by financial penalties including the desire to save litigation costs. Our research reinforces the view that factors other than the desire to maximise gains or minimise costs are likely to be significant (eg Levinson 2000; Rosenthal 2006). In particular, in understanding how judicial review can encourage change, our findings highlight the influence of what is referred to the public service ethos. Such an ethos may be defined in various ways and posses various attributes. For us the most pertinent are those concerned with fidelity to the law and achieving a just balance between the needs of the many and the claims of the individual (for a recent discussion of the literature, see Needham, 2006, 846-848). An authority's reputation for success can also be significantly damaged by litigation, especially when its outcome is adverse and widely publicised.

In addition, the particular nature of judicial review may increase the susceptibility of local authorities to engage positively with litigation. For one thing local authorities ought to be much more aware of judicial review than they might have been thirty or forty years ago. Also, while judicial review is one of many constraints upon local government, it is distinctive in several significant ways. First, it focuses exclusively on the legal duties and powers of public authorities and is the principal means for providing authoritative determination on these matters. Second, unlike audit and target techniques used by government to check and direct authorities, judicial review judges draw on common law principles that are not rooted in government policies and

[5] Supreme Court Act 1981, s31(4); Civil Procedure Rules, r 54 r 3. There are limited situations where judicial review proceedings can lead to monetary remedies as when there has been a breach of European Community/Union law (*Francovich and Bonifacti v Italy* [1991] ECR 1-5357), and when an authority has breached 'Convention rights': s 8 Human Rights Act 1998.

goals. Third, litigation is typically instituted by people with grievances arising from actions of public authorities. Fourth, judicial review challenges may be very difficult to predict and have the capacity to take authorities by surprise in ways that other accountability and inspection process may not. It is, in these senses an independent process that is motivated by peoples' experience of service delivery and grounded in judicially determined understandings of the constraints that operate upon public administration.

Judicial review is also distinctive in the way it subjects public decisions to scrutiny, in particular, in its regard for what might be called individualised administrative justice. It is concerned with applying legal principles to ensure that administration has legal power to make decisions and that decisions that affect particular people are justified, properly reasoned and fairly taken. In this respect it focuses on dimensions of quality that are not central to other accountability regimes.

Broadly speaking two types of message are typically given by the courts. One is to confirm authority action. The other is to condemn it as being unlawful. Of course, condemnation may be unwelcome and called for changes will not necessarily be fully and enthusiastically implemented. Much research has highlighted the complexities involved when bureaucracies seek to implement judicial decisions (see, for example, the essays in Hertogh & Halliday 2004). It shows that reactions are heavily dependent on the degree to which judgments fit with authority goals, policies, priorities, engrained cultures and professional values, or authority perceptions of how justice and fairness should be balanced (see further, Halliday 2004). The extent to which they do so is likely to vary across different aspects of an authority's work and between authorities. We found similar variation. Within authorities a judgment may fit better with the priorities of some service sections than with others; and they may support the efforts of some but frustrate the goals of others. They may, for instance, provide clarity to front line social workers but real problems to managers and budget holders.

Inevitably, judicial review has potential to cause the greatest change when it conflicts with what is currently happening but is most likely to do so with minimum resistance when it strikes a chord with the needs of officials. We found substantial evidence, for instance, that authorities and officials welcome decisions especially where they offer

clarity and provide 'answers' to the perennial tensions between achieving individual justice and general fairness, or between particularism and universalism (Hoggett 2005). Similarly, judicial review challenges that have become institutionalised as a means of accessing scarce resources (such as housing) are less likely to lead to reconsiderations of service provision or uncomfortable awareness of gaps and failings than challenges in new areas or those that break the equilibrium in the management of risk or resources.

In the next section (Part II) we explore this latter issue by using quantitative data, amplified by qualitative responses, to examine the relationship between levels of challenge and quality of local authority services. The question of implementation of judgments and their potential for positive impact is examined in Part III using two examples of 'high impact' judgments. In Part IV, we provide a framework within which we can understand the findings from the previous two sections; before offering a brief summary and conclusion in Part V.

II Judicial review challenge and 'quality' of local authorities: what does our quantitative analysis tell us?

To investigate an association between levels of challenge and local authority performance ratings, we constructed a specific data set. This contained a range of data from the period 2000-2006 for the 409 English local authorities. It comprised, at the level of the local authority: judicial review challenges filed with the Administrative Court (as well as permissions granted, decisions, and the subject areas of challenges) for 2000-2005;[6] Comprehensive Performance Assessment (CPA) scores for higher level local authorities for the years 2002-2006;[7] presence of legal firms carrying out publicly funded work in relevant areas of law; and a range of contextual features relating to local authorities, such as population size and diversity, deprivation (as measured by the official indices of multiple deprivation), levels of ill-health, and the numbers of carers. In this paper we analyse those data for which we have observations on both our measure of litigation – judicial review challenges and on our measure of

[6] We have described the data on judicial review challenge in some detail in our earlier paper (Sunkin et al. 2007).

[7] Local authorities are either unitary, metropolitan, London Boroughs, county councils or district councils. Counties are divided into districts and share responsibilities between the two levels. The other authorities are solely responsible for all main areas of service provision. Higher level authorities exclude districts.

quality – CPA scores. This means we focus on the years 2002-2005 and on the 149 higher level local authorities.

Our measure of 'quality' is not uncontentious as there is much criticism of the adequacy and reliability of CPA scores. For example, Miller (2005) argues that audit processes do not necessarily serve the public but reorient energy and attention upwards to centrally driven monitoring arrangements. McLean et al. (2007) demonstrate the extent to which they are manipulable and out of line with broader policies; while (Jacobs and Goddard 2007) show the instability of composite measures more generally. Clarke (2005) argues that evaluation processes are based on a very narrow conception of public interests and concerns, and inhibit the (re)establishment of confidence in public services.

Nonetheless CPA scores may be related to authority reputation, with the consequent impact for elected officers and for management of poor performance. Achievement of high CPA scores reflects attention to performance and efficacy in instituting and monitoring effective processes. It is also linked to a range of alternative interpretations of 'quality' as our earlier work has shown (Calvo et al 2008). Judicial review litigation also has a clear bearing on reputation, as many of our respondents indicated. Both low CPA scores and judicial review challenges are regarded as 'risks to be managed': 'one of the risks, the corporate risks, is … the risk of litigation... we identify the potential risk, the fact that we might get legal costs, the fact that it may affect our reputation. All the different sorts of risks we have and then we look at how we can control those risks' (IDNO2). While we would not claim that authorities that deal poorly with risks necessarily also deliver poor services, we think it is reasonable to posit – and to test – whether authorities who experience challenges that reveal gaps in service provision or procedural problems are thereby enabled to improve their performance and consequently their CPA scores. Conversely, if risks are being poorly managed on a number of fronts this probably tells us something about the efficacy of internal systems, management and leadership.

We therefore interrogated our quantitative data to establish whether poor performance, as indicated by levels of judicial review challenge, reflected poor performance as measured by CPA scores. We then built on this estimation of an

association between quality and level of challenge by exploring our primary question: whether judicial review challenge can stimulate change – specifically improvement – in internal procedures and systems sufficient to increase CPA scores. We therefore examined whether a *change*, specifically an increase, in judicial review result in a significant improvement in CPA score.

Before going on to consider the ways in which we estimated these relationships, it is worth highlighting some key features of our litigation and quality variables. (A full table of descriptive statistics can be found in the Appendix.) Over the period 2002-2005, there was an average of five challenges per authority per year. But there were substantial differences between authorities with some having no challenges, and the most highly challenged authority in 2002 having 103 challenges.[8] There was a slight but not significant decline in the average number of challenges over the period. By contrast, CPA scores, which can take a value between 0 and 4 stars showed a steady improvement, with the proportion of authorities gaining 4 stars rising from 14 per cent to 26 per cent over the period and only one authority getting a zero score in 2005, down from 12 authorities (8 per cent) in 2002.

To model the relationship between levels of judicial review challenge and change in judicial review challenge and CPA score, we employed random effects order probit models (Fréchette 2001) to model the rank of the CPA score. Random effects models allow correlation between the errors over the different observations (years) for each case (local authority). This takes account of unobserved heterogeneity, or unmeasured differences between authorities that may be associated with the outcome (here the CPA score) but which are not associated with the explanatory variables. These might include differences between the cultures of local authorities or levels of staff morale. The use of an ordered probit took account of the ranking clearly implied in the score, but did not make assumptions about linearity.

[8] For a more detailed account of the distribution of challenges, see Sunkin et al. (2007) which also covers the distribution across district councils.

We explored the association between levels of challenge and the impact of a change in levels of litigation controlling for a range of local authority characteristics.[9] Table 1 provides the main estimates from the model. The correlation of errors within cases can be found in the rho which is very large and highly statistically significant, indicating that specific, unobservable characteristics of authorities play a substantial part in their CPA score, as we might expect, even when we are controlling for differences in type of authority.

Table 1: Relationship between Judicial Review (JR) litigation and CPA Score: Coefficients from random effects ordered probit (standard errors in brackets).

Variable	Coefficient (SE)
Litigation	
Number of challenges	-0.0508 (0.011)***
Change in challenge	0.0316 (0.013)*
Number of lawyers	0.0099 (0.016)
Year (base is 2002)	
2003	0.3051 (0.152)*
2004	1.3542 (0.169)***
2005	1.5157 (0.170)***
Local authority type	
(base is Unitary/Metropolitan)	
London Borough	2.1602 (0.511)***
County Council	1.7733 (0.364)***
Deprivation score	-0.0305 (0.022)
Cutpoints	
Cutpoint 1	-0.1894 (1.840)
Cutpoint 2	1.5687 (1.830)
Cutpoint 3	3.7175 (1.826)*
Cutpoint 4	7.1666 (1.858)***
rho	0.8747 (0.013)***
LR chi2(df)	160.18 (15)***
N	596

Notes: Standard errors in parentheses; + p<.10, * p<.05, ** p<.01, *** p<.001; additional controls: population size (logged), age and ethnic composition; proportion long-term ill; proportion of carers.

[9] We also investigated different specifications, and carried out a range of sensitivity tests. Treating the dependent variable as interval rather than ranked, still using a random effects approach led to similar conclusions. In addition we were able to compare this random effects regression model with a fixed effects model, which indicated, via a Hausman test, similarity of coefficients across the two models, leading us to prefer a random effects specification. In relation to our key independent variable, we used the lag of litigation as an alternative to the contemporary measure, and found largely similar results. Given that we had observations for judicial review going back further than the observations for CPA score, we did not lose observations in the lagged model, however, as it gave no further information we stuck with the simpler specification.

We found, first, that lower levels of challenge corresponded to higher CPA scores. There was a statistically significant negative association between levels of challenge and CPA scores, controlling for type of authority and a range of other characteristics of the authority that might be thought to influence quality. This finding appeared robust to a range of alternative ways of modelling the data (see note 11) and suggests that judicial review challenge reflects problems with local authority service provision. The inference that poorly performing authorities experience greater levels of challenge is reinforced by the finding that judicial review challenge is closely correlated with levels of complaint to the local authority ombudsman,[10] which implies that rates of challenge reflect a genuine level of dissatisfaction. The association is estimated in the context of an overall trend to improved CPA scores which can be identified from the Year dummies in Table 1.

Nevertheless, it is still possible that there is an element of reverse causation here. That is, that judicial review litigation causes the problems in local authority services by diverting resources from the provision of services, and it is this that results in poorer CPA scores and an increase in complaints to the ombudsman. However, even if this were the case we can see a measurable association between levels of judicial review challenge and local authority performance. This provides an important link between these two aspects of our investigation.

Moreover, our second finding challenges the idea of reverse causation, since it indicates that a *change* in challenge, holding the *level* constant was significantly and positively associated with CPA score. That is an increase in challenge was indicative of some improvement in performance, as we can see in the second row of Table 1. This means that, since the underlying level of litigation is held constant, we can see this positive effect of change as representing a shock or impulse that is beyond the typical experience of the authority. The effect may be quite small, but it is significant, even within the relatively small data set and after controlling for unobserved heterogeneity. This important finding indicates that challenges have the potential to drive improvement. In this case there seems no potential for reverse causation, since if litigating diverted resources from core functions, an increase in litigation could only

[10] This correlation was estimated in a separate analysis of the data.

make things worse. Instead, the two findings together indicate that the shock of an increase in the scale of challenge will affect authorities, whether they generally experience lower or higher levels of challenge.[11] We can, then, with some caution, interpret this finding as litigation acting as a driver for (positive) change in authorities' performance.

Our main cautions would be, first, the difficulties of inferring either causality even from panel data and despite attempting specifications with lagged variables (see note 11). Moreover, the time taken for the impact of litigation to work through into system change is hard to determine very precisely and is likely to take longer in different departments and for different authorities. This leads to the second caution, which is that the apparent association between litigation and CPA score may actually be a spurious one. That is, we may be seeing, in the change effect, the impact of a separate factor that is simultaneously driving the increase in litigation and the improvement in CPA score. Nevertheless, we consider these findings to be highly suggestive and while they may stand to be refuted or refined they are certainly consistent with the interpretation we have put on them – an interpretation which we attempt to understand in more depth in Part III.

Judicial review challenges concern a very wide range of matters. In the context of local authorities the most numerous are challenges relating to housing decisions (for example, regarding authorities' refusal to accept claimants as unintentionally homelessness); adult or child care (for example, regarding decisions that children are not in need); planning (for example, regarding refusals to permit development or to impose conditions); education (for example, challenges to school exclusions). In view of this range we also explored the extent to which there might be variation across the various types of litigation: did planning, for example, seem to have the same sort of relationship as licensing? Or was the relationship driven by the much more numerous housing cases? We therefore repeated the models breaking litigation down by type.

The analysis indicated that the negative association was driven by education related challenges and, to a lesser extent housing (though not homelessness) related

[11] As noted, we specifically tested for whether this effect was different at lower and higher levels of litigation and found no evidence to support such a position.

challenges.[12] This may be partly a consequence, though, of insufficient numbers of certain types of challenge to result in a clear pattern of association. This makes it hard to present a clear interpretation of these findings. However, issues of education, if they relate to children's services more generally, may reflect the sorts of concerns about provision of services for vulnerable young people that were highlighted in the judgments that were identified through our research as 'high impact' and which, in *Caerphilly* (discussed below) led to a judgment which identified significant failings of practice and care within the local authority. Thus it may be relevant that it is only certain areas of litigation that show an association with the CPA score of the authority. Other areas of litigation, such as those in the area of planning may, conversely, be generated by claimants concerned with excess regulation rather than conformity to a clear regulatory framework.

We have been suggesting that low quality leads to litigation rather than vice versa. Nonetheless, it is often suggested that litigation is generated by lawyers, or that its occurrence is largely arbitrary, and that it has a detrimental effect on local authority services. Although our examination of the data indicated that the causal effect was unlikely to be in the direction of litigation lowering quality, we felt that this was a sufficiently important issue to warrant separate investigation.

We explored this issue by examining the relationship between the location of legal services publicly funded to undertake work in relevant fields of law and levels of litigation in local authorities. Using random effects estimation methods, we modelled this relationship between legal services and levels of litigation, controlling for other relevant factors, such as population size, demographics of the local population, deprivation score and type of authority. We also investigated whether the relationship was mediated by the quality of the authority.[13] The results from the models did not indicate a statistically significant association at conventional levels between the location of law firms and the prevalence of litigation, once we controlled for basic

[12] Models available from authors on request.

[13] An issue with this model was the skew in the distribution of applications across authorities. We therefore explored various specifications of the dependent variable and the results were robust to all of them. When including the potential role of authority quality as a mediating factor, we again explored various specifications of these models, for example including CPA as both a continuous variable and a set of dummies. The same conclusions were indicated by the different specifications. Tables available from authors on request.

demographic characteristics of the authority. That is, there appeared to be an absolute and positive correlation between the presence of law firms carrying out legally aided work in relevant fields and levels of litigation; but this effect reduced in size and became statistically non significant once we controlled for the age composition of the authority population, its deprivation, the proportion with long term illness in the authority and ethnic diversity. This suggests that the common claim that it is lawyers eager for work which determines the levels of litigation, a claim also repeated by certain of our respondents, is at best overstated and at worst groundless.

Interestingly, level of deprivation was positively and significantly associated with levels of judicial review challenge, even controlling for presence of lawyers. This is consistent with Buck et al's (2008) findings that those on benefit are more likely to seek advice in relation to justiciable problems but contrasts with the widely held view that those in this group are more likely to be 'lumpers' or sceptical of the worth of complaining or challenging public actions (Genn 1999; Cowan and Halliday 2003; Simmons et al 2007). The finding also indicates that law firms are attracted to areas of need, in terms of deprivation and marginalisation, rather than that they 'create' litigation regardless.[14]

This discussion of our quantitative study reveals associations between judicial review challenge and the quality of local authorities as measured by CPA. Significantly, it also indicates that increases in challenge appear to be connected to improvements in quality scores, and are not simply the consequence of lawyers making work for themselves. The findings provide a quantitative basis for arguing that judicial review challenges may contribute to improvements in local government services and therefore that the effect of judicial review is neither insignificant nor wholly negative.

The analysis does, however, raise the question as to how and why judicial review acts to change the quality of local government services. One important element may be the ways in which challenges are resolved at the judgment stage and the implications of judgments for authorities. This is the issue we therefore turn to next in Part III,

[14] Contrast with our early finding in Sunkin *et al*. (2007). The finding in our earlier paper used a sample of all authorities, including districts, to explore the role of the lawyers. Part of the difference here may be the different sample (we exclude districts from this analysis) as well as the different estimation methods.

drawing on two particular judgments and exploring the processes by which they are resisted and drive change at local authority level. In this discussion we return to our reflection that resistance and change are intimately intertwined as responses to judgment: it will be the most difficult or challenging decisions which simultaneously have the greatest potential to change the ways that authorities deliver services and attract the most resistance. We can only touch upon the complex processes, pressures and counter pressures involved in the implementation of judicial decisions by local authorities; but through these case studies we aim to shed light on some of the ways in which judgments can 'matter'.

In Part IV we bring these two sets of findings from the challenge data and from the judgment case studies together, when we draw on both our interviews[15] and the wider literature to throw light on how judicial review can act, not simply as an irritant to local authorities but as a resource that contributes to the goals of local authorities as public service providers.

Part III: Judicial review: public service and positive change

During our research we looked closely at several decisions that officials identified as having been 'key', that is to say decisions that have had significant impacts on local authorities beyond the particular parties to the case. These provide graphic illustrations of judicial review's potential impacts and a useful backdrop to our more general investigation of official perceptions to the process. Two cases are particularly interesting for the purposes of this paper.

[15] We conducted a total of 42 interviews with key informants – primarily local authority officers at different levels of managerial responsibility from selected local authorities. The authorities were selected on the basis of their particular profile including the degree of litigation against them, and by type. We conducted semi-structured interviews with respondents to explore our key research questions relating to understandings of quality, awareness and experience of litigation, perception of judicial review, and using our information on litigation as a prompt. We also used the interviews to help us identify 'key cases', and, having explored the details of, and literature on, these cases, we used follow-up interviews to gain an understanding of the potential ramifications of those cases from the perspective of local authority officers. Interviews were recorded and transcribed, and core team members read all the transcribed interviews. We shared our readings in a series of discussions on an iterative basis. We then coded the interviews on the basis of emergent themes, which formed the basis of our analysis. But we continued to return to the original transcripts as our analysis developed to link the themes back to the context and to verify the interpretation we were putting on them. The profile of our interviewees and our inductive approach is discussed more fully in Calvo et al. 2007 and in our end of award report (see: http://www.publicservices.ac.uk/research/impact-of-litigation-and-public-law-on-the-quality-and-delivery-of-public-services/). Parts of the discussion in Parts III and IV of this paper draws on this iterative process of interview and analysis; and the quotations used for illustration are embedded in shared understandings derived from our close engagement with our data.

The first is the decision in *R(on the application of Behre) v London Borough of Hillingdon.*[16] Here the court held that the authority had mistaken the scope of its duties to former unaccompanied asylum seeking children who had been 'looked after' by the local authority. It held that the authority had an obligation under the relevant legislation to continue to provide after care services, which could include the provision of accommodation, until the claimants were 21 years old or beyond if they stayed in full time education.

At one level this was a straightforward case. The authority now knew that it had not been doing what it should. It could now improve by doing what the legislation required. In this sense, while critical of the Council, the judgment had operational benefits in providing clarity. As one lawyer put it: 'Certainly the …the people who were consulting me … didn't see it as a big problem, they saw it as: "right we're clear about that." Another interviewee in children's services echoed this: 'it's clarity we know what our responsibilities are, we know how we're supposed to deal with these things…' (IDNO19).

The problem was that funding to deliver the services came from central government and Hillingdon and other authorities believed that the level of funding was inadequate (Free 2005; Refugee Council 2005). Here then is a somewhat typical problem of judges interpreting the law in a way that requires the provision of services that authorities say they cannot afford. The decision affected authorities across the country, but was particularly important for those close to airports and other entry points because there are more asylum seekers in these areas (Hillingdon is close to Heathrow). It appears that the additional costs were such that many authorities were unable to fully respond to the judgment and some appear not to have done so at all (Commission for Social Care Inspection, 2005, 78). As one of our NGO respondents, told us: lack of funding meant … it's sort of beyond the power of the local authority to implement the judgment' (IDNO40). Where authorities have responded many have done so formally (by listing claimants as falling under the relevant statutory provision) but without significantly altering the level of service provided. Free, for

[16] [2003] EWHC 2075

example, has observed that 'transferring support from section 17 to Section 20 support does not automatically mean that standards of care have risen' (2005, 16). As one local authority lawyer, put that: 'in the main [USAC claimants] are going to fall within Section 20, and you'd be foolish not to take that route in most of the cases. And I certainly think there was a sense in which we thought if we didn't go down that route [a local firm of solicitors] will be on to us and we'd be in difficulty further down the line' (IDNO5).

From the perspective of authorities the fundamental problem was that prior to the judgment they had already been doing what they considered possible given their budgets and the judgment did not deliver additional funds. If that were true the litigation drew attention to a real and important gap between legislative (and governmental expectations) and funding to enable effective delivery. Given the increase in the number of asylum seekers this gap was likely to grow. On one view it was the judgment that created the problem. But the judgment applied the legislation and in this sense it drew attention to a deeper problem that central government funding was inadequate to enable authorities to deliver the services that Parliament required. While it created problems for authorities it also acted as a catalyst for intensive lobbying by local authorities for improved levels of funding. [17]

Our second case is *R (on the application of J) v Caerphilly County Borough Council.*[18] Here it was held that the local authority had failed in its duties to a minor who had left a young offender institution. In delivering his judgment, Munby J repeated his past criticism of the '"mindset" and "culture" of local authorities who exclude families from decision making about establishing care plans for children[19]. This he said 'may well involve breach of the family's rights, under art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms'. He went on to say that it is 'depressing to see the same attitude in the present case' and 'because the point is so important, and a clear statement of what is

[17] See eg www.londoncouncils.gov.uk/CSR2007youngasylumseekers; the case was also discussed in Parliament: HC Deb 13 February 2004 vol 418 c23W. Since the decision Councils have continued to push for better funding and Hillingdon has even brought judicial review proceedings against central government, albeit unsuccessfully: *London Borough of Hillingdon v Secretary of State for Education and Skills* [2007] EWHC 514

[18] [2005] EWHC 586

[19] para [34] of the judgment

required may assist not merely this but other local authorities', Munby J spelt out what must be done by authorities in such cases. [20]

No judgment could be more critical, nor more specific as to what authorities should do in the future. The judge recognised that the authority faced real difficulties having to deal with a young person who refused to cooperate or engage with it, but said that: 'The fact that a child is uncooperative and unwilling to engage, or even refuses to engage, is no reason for the local authority not to carry out its obligations under the Act and the Regulations. After all, a disturbed child's unwillingness to engage with those who are trying to help is often merely a part of the overall problems which justified the local authority's statutory intervention in the first place. The local authority must do its best.' It must at least document what it has done and failed to do, and why, in detail. [21]

We were told that the decision 'came out of the blue for' and was 'a shock to a lot of local authorities'. A respondent spoke of the judgment's 'harshness'. Within our interviews more generally, we noted the extent to which both challenges and judgments could pose difficulties for officers involved and managers, not least in relation to the lowering of morale. (see also Sunkin and Pick 2001, 756-758). There is a strong feeling from the interviews that officials doubted that the judge could really appreciate what it is like to have to deal with a young person who has a long history of difficulty. Officials considered that they just did the best they could for a young person who would not cooperate with them. When asked whether, despite its initial devastating effect on the officials and the reputation of the authority, and an initial period when officials found it difficult to respond, the judgment came to be helpful, we were told that: 'It's taken a long time to become helpful, yes. And I think 'yes''.

With hindsight, the judgment is seen to have had a 'a massive effect', and to have contributed to the improvement of services and in particular to an improvement in the robustness of care plans. In 2006 a major conference for authorities in Wales was held to discuss its implications and to showcase good practice and assist authorities that were still not compliant. Those in the authority directly affected are now proud of their achievements.

[20] [34]
[21] [57] and [56]

Both *Hillingdon* and *Caerphilly* presented very real problems for authorities. Neither were predicted and both called for major reassessments, in *Hillingdon* focusing on budget and service priorities, and in *Caerphilly* focusing on changing established professional practice. Both cases illustrated how judgments may have different impacts across authorities both in the short and longer terms. Both also illustrate how views of judicial review within authorities will vary depending on perspective. What some may see as a threat others will see as a benefit. What appears to be a threat in the short term is later recognised as having helped to improve matters. Consistent with our quantitative analysis, we can see, though, that judicial review can act as a form of shock, alerting authorities to gaps or responsibilities that demand a much more conscious reflection on what is delivered and the systems in place to deliver services.

In both our cases judicial review was clearly recognised as being serious and important: and its importance was presented in two ways. On the one hand it constitutes a threat to be resisted, but on the other hand it is also an opportunity to change. How we can understand these twin aspects of judicial review litigation are the focus of the next section where we draw on conceptions of public service ethos and local authority 'culture' and the evidence from our interviews to understand the ways in which judicial review can make a difference.

Part IV: The value of judicial review

Judicial review as threat

As a threat judicial review may encourage authorities to do what they can to avoid the possible consequences of further litigation and its collateral costs. Responding, however, may be costly and unsettling and involve revisiting conventional practice, and policies or budgeting priorities that have been carefully arrived at. But judgments may be opaque or ambiguous, and authorities might fear investing resources responding to one decision only to find that others provide a different steer. They may be reluctant to make changes in one service area that at the expense of performance elsewhere and thereby their ability to meet other audit priorities. Miller (2005), for instance, has argued that audit tools are at their weakest in dealing with 'the diversity of populations', particularly ethnic minorities and poverty. Reluctance to embrace judicial decisions may also exist for local political reasons, as when decisions are

perceived to further minority interests and possibly politically unpopular causes, typified by asylum seekers or the homeless, or travellers.

Moreover, reluctance to respond to litigation is likely to be enhanced at the pre-judgment stage and in response to challenges. Challenges carry no legal weight and exert no formal coercive force, and we might assume that authorities would be disinclined to expend resources making changes when not compelled to do so. Their disinclination might be greater if they consider challenges to reflect individualised problems deriving from particular litigious individuals (Hoggett 2005), or if they see as being stimulated by lawyers, rather than as indicative of systemic shortcomings that need attention. In the experience of one of our respondents, 'it's often the child's solicitor rather than the child's parents in my experience feel particularly strongly about something' (IDNO3).On the other hand, we know that in relation to individual cases authorities are often willing to reconsider decisions and settle challenges in favour of claimants (see also research from Australia: Creyke and McMillan 2004). This, indeed, is a major reason why a substantial proportion of challenges drop from the jr process early on (Bondy and Sunkin 2008). Our research also found evidence confirming that authorities also alter their systems or policies in response to challenges (Sunkin in Hertogh & Halliday 2004). At least one London Borough has undertaken a radical reorganisation designed in part to improve its ability to respond to its jr caseload. This has involved getting lawyers more involved at the initial decision – making stage so that they could be more pro-active in spotting problems and better placed to improve levels of legal awareness amongst front-line decision makers. This strategy appears to have helped reduce the scale of litigation involving that authority.

Given all this it is hardly surprising that judicial review has been widely perceived as a threat that is largely negative in nature to be defended against. But the cases also show that judicial review can be perceived more positively. There is certainly evidence that it enables authorities to learn and to improve their performance.

Judicial review as resource

Our interviews also showed judicial review to be viewed in a positive light by officials. It was striking that our respondents, who were engaged in judicial review at

a variety of levels and in different ways, stressed their desire to do the 'right thing', which included desire to do their best to comply with the law, even if that was not easy. As one respondent put it: 'local authorities tend to respond ultimately to what the court orders them to do, because that's how local authorities operate' (IDNO42). Our respondents expressed a high degree of legal conscientiousness and a desire to comply with the law because it is right to do so, rather than because there are extrinsic reasons for doing so (cf Halliday 2004). On the other hand, it is interesting to note that lawyers, in particular, commented on the need to comply with judgments in order to reduce the risk of further litigation. Overall, officials expressed a strong desire to respect judicial review not out of self-interest or because of coercion, but is part of the way in which professional identities within local authorities are understood. As one official put it:

'As a general point we were not sitting around worrying about judicial review and its not making us defensive, we're much more proactive about doing things right than defensive about trying to avoid making mistakes.' (IDNO42).

This is compatible with the conventional wisdom regarding public service motivations in contrast with private sector motivations (Houston 2000). There is a substantial literature indicating that bureaucracies are underpinned by a range of values which drive service delivery. Paul du Gay has been at the forefront of the 'defence' of bureaucracy (du Gay 2000); and more recently he edited a collection supporting the concept (and existence) of a 'public service ethos' (du Gay 2005). du Gay has argued that the bureau, (which encompasses public administrations such as local authorities) is a moral institution which embodies values, such as 'fairness' or impartiality. Its proceduralism is necessary for 'allocating scarce resources… by using consistent, fair and therefore legitimate means' (Hoggett 2005, 169). And these values are central to the 'professional identity' of the bureaucrats who work there and are expressed through their actions. As Miller (2005) points out, the public service ethos remains of fundamental importance to many public servants and a core part of their professional identity: 'If you work in education and medicine you do not need to establish your identity as a public servant; if you work in generic public service this is exactly what you are inclined to do' (p.249). Furthermore, Gregg et al. (2008) have demonstrated that those in the not-for-profit sector have higher levels of 'pro-social' behaviour, as measured by voluntary work.

Certainly, there are reasons why judicial review might be experienced as helpful to public officials. Hoggett (2005), develops du Gay's argument by proposing that it is discretion that is fundamental to the role of public servants. He makes the case that it is not impartiality that characterises the public servant so much as the need to reconcile tensions between competing claims with fairness and justice. This tension, he argues, is unavoidable given that the claims of universalism and of particularism are inevitably at odds with one another; and that the ideals of the welfare state will coexist with its disciplinary aspects, leading to the distinctions made by officers between 'deserving' and 'undeserving' claimants . Moreover,' there are other value contradictions that must be reconciled by public officials on a daily basis. Besides the tension between universalism and particularism, perhaps the most crucial is the inherent tension between an ethic of care and an ethic of justice. Public officials must balance a compassionate concern for the individual's plight against the needs of potentially equally worthy cases which, because they are not immediately and physically present, can only be considered abstractly (Hoggett 2005, 175). He argues that while such tensions are irresolvable it is essential to the health of public life that they are worked through. Given the continuous presence of such competing tensions, judicial decisions can offer clarity by upholding the claims of the abstract many behind the individual claimant. This was made clear by an interviewee who explained the effect of a judgment on the vulnerability of a particular client group for purposes of housing. The decision saved officers from having to ponder each case in order to determine what would be a fair outcome. 'I think as the law has been clarified we've been clearer as to what our advice to the client department should be and we'll be saying "you've got a duty to meet needs here" …' (IDNO5).

Judicial review similarly offers opportunities to reallocate resources to under-resourced areas that have suffered from budget setting driven by more populist concerns. Thus they offer potential to reorient or rebalance systems of allocation in a more 'just' fashion. As one of our respondents expressed it when discussing the situation in relation to care leavers prior to *Caerphilly*: 'local authorities would probably tell you it was because they weren't resourced to do it, but actually the reality was they weren't educated' (IDNO39). Here the reference to being 'educated' seems to imply both a lack of direct knowledge, but also a failure to recognise the

merits of claims that could be made by care leavers. In addition, such court rulings will enable politically sensitive allocations to be pursued, in line with the overall goals of public provision: 'the council would rather have the court telling them they have to do it because then they can say "…the budget will have to be constructed to enable this work to be done"' (IDNO15).

While judicial review litigation, at both the challenge and the judgment stage can clearly result in a defensive response and be regarded as having little bearing on the main work of the local authority, we have also highlighted the ways in which it can stimulate more positive responses and the rationale for such a perception of judicial review as a resource. Moreover, we have shown that it does not necessarily make sense to separate out the defensive elements of response and the positive. At the level of litigation, lower 'quality' authorities are more highly challenged suggesting that certain authorities may become enured to particular levels of challenge and regard them as irrelevant to improvement of processes. On the other hand, an increase in litigation can apparently challenge them to change. Similarly at the judgment level, authorities may be most resistant where judgments are most severe or the implications for reorganisation of resources are most dramatic. But it is in just such cases that judicial review may provide the biggest resource, whether it be for renegotiation with central government or for leading to a thorough overhaul of the ways in which the organisation responds to particular client groups. Judicial review, far from being an irrelevance, has the potential to provide opportunities for authorities to develop in ways which are consistent with an underlying (if occasionally well-hidden) public service ethos.

V Conclusions

Our quantitative analysis shows that judicial review litigation may act as a driver to improvements in the quality of local government services, at least in so far as quality is defined by the government's performance indicators.

Our interviews also show that judicial review litigation matters to local authorities, although it is seen to matter in different ways to officials depending on their level and the nature of their engagement with it. There were certainly many indications in our interviews that judicial review is considered to have improved the quality of decision

making: ‘it has made our decision process more solid. We’re also probably making better decisions and the right decisions where perhaps before we weren’t’ (IDNO10).

It is also clear that the influence of judicial review cannot be understood solely in terms of coercive sanctions or its ability to impose costs. Nor should judicial review be viewed as constraint to which authorities react in predominantly defensive ways. Judicial review has the capacity to challenge and to do so from an awkward and often unpredictable angle. It may create significant problems for authorities and may also undermine morale. Responding to litigation may also be felt to distract from service delivery:

> ‘ the big problem for local authorities is that the stoplight goes on one case, you have to invest a great deal of time and effort in supporting it and actually that’s the time when the other things start to fall apart and then somebody else comes along and says you’re not doing your job properly and they’re probably right because of the disproportionate allocation of time and attention’ (IDNO3).

And as a County Council lawyer explained when describing the effect of a spate of threats:

> …it’s taken quite a resource out of the Legal Section, quite a resource from the social workers to respond to these threats of review, not even actually getting to judicial review. … where for example it’s about a young person who’s coming out of a young offender’s institution that may take up two or three members of a reception and assessment team who would otherwise be dealing with child protection issues and we have only got a set number of social workers able to do anything in any one day and the same goes for the legal provision of course. So other things become slower and we’re not as flexible in the way that we can respond to individuals from another service area.

But it would be misleading to view judicial review as being an external threat that is wholly negative. Typically, the literature on incentives assumes a rather instrumental equation: poor practice must be penalised by sanctions, largely seen as financial penalties, if good practice is to be encouraged. Our research provides a picture that is rather less monotone and reveals attitudes that are much more nuanced in their approach to judicial review.

There are strong associations between the values of public service and fidelity to law and both are intimately connected with the responsibility of local authorities to serve the public interest. And it is not surprising that officials should view judicial review

litigation in a positive light. The connections between the gaols of public administration and the courts has been emphasised by judges, most famously by Lord Donaldson MR when he referred to the partnership between judges and public authorities '… based on a common aim, namely the maintenance of the highest standards of public administration' [22] The mutuality of the aims of the law and of public administration provides a fundamental reason for authorities to respect judgments: it is in the public interest and therefore in their interest to do so.

Moreover, judicial review is also an important resource for local authorities enabling change in response to judgments that are themselves rooted in grievances arising from peoples' experience of services and giving expression to claims that might otherwise be neglected as being politically unpopular. As well as guiding authorities as to their legal duties, judgments give expression to the needs of individualised administrative justice; to the requirement that public authorities are able to justify their actions in law and that they act fairly and in a manner that is compatible with human rights. These requirements are not foreign to public administration. On the contrary they accord with the ethos of public service and are of value to administrators as they resolve tensions that lie at the heart of their tasks. Such values are endogenous to the way authority construct their best interests. The image of judicial review that is provided by our research is rather more positive than is commonly presented.

[22] Lord Donaldson MR in *R v Lancashire CC ex parte Huddleston* [1986] 2 All ER 941.

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Appendix: Descriptive Statistics

Means and proportions of variables in regression models across authority-year observations (N=596)

	Mean (sd)	Proportion with characteristic (%)
Litigation	4.7 (9.6)	
Change in litigation	-.3 (4.9)	
Number of lawyers	10 (17.2)	
CPA score		4
0		4
1		11
2		24
3		40
4		21
Local authority type		
London Borough		23
County Council		21
Metropolitan / Unitary Authority		56
Logged population	12.5 (0.7)	
Aged 0-15		20
Aged 75+		7
Long term ill		18
Carers		10
White ethnicity		84