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Does judicial review influence the quality of Local Authority Services?

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Does Judicial Review Influence the Quality of Local Authority Services?

Kerman Calvo, Lucinda Platt, Maurice Sunkin

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ABSTRACT

This paper raises some of the key issues that have emerged from our study of the impact of judicial review litigation on the quality of local government services in England and Wales. Judicial Review is the High Court procedure by which those with a 'sufficient interest' can challenge decisions of public authorities on the grounds that authorities have failed to meet their legal obligations, including human rights obligations; or have acted unfairly or exceeded or abused their legal powers (or threatened to do these things). The paper discusses whether or not a greater engagement with public law litigation, as experienced in the UK in recent times, may be leading to improvements or declines – in access to services and in service delivery for individuals and classes of services user, to improvements in the clarity and accountability of processes within local authorities, and to greater levels of legal awareness, including the furtherance of the practical application of the rule of law. We focus on two areas of local authority activity: housing and homelessness and children's services; and we distinguish in the paper between the impact of challenges, and the impact of judicial decisions. The paper draws on a series of qualitative interviews with 'key informants' in local authorities; and presents analyses of judicial review decisions of national significance in the area of children's services. Our conclusions at this stage are tentative and indicate areas that we intend to pursue further. Our most general observation is that judicial review is a significant aspect of an environment that over the past two decades has subjected local authorities to an increasing range of external regulatory and controlling mechanisms. Against this background, we observe that judicial review is distinctive in various ways. We identify several potentially distinctive features of judicial review from a quality perspective, including its focus on individual problems, its ability to subject decisions to close scrutiny and its ability to provide authoritative statements as to local authorities' duties. We also consider the circumstances under which decisions are likely to have most (or least) impact on the working and quality of local authority services.

NON-TECHNICAL SUMMARY

Does litigation affect the quality of services provided by local authorities to individuals? This is the question that informs the discussion in this paper. Our interest is in judicial review, a process of legal challenge whereby individuals question whether decisions taken by public authorities (in our case local authorities) in relation to them were carried out following appropriate procedure, on the basis of sufficient information and 'in a reasonable way'. The court does not decide on whether any given decision was 'correct', but rather on whether it was conducted properly. Judicial review litigation has increased over recent years, and some authorities now face a substantial number of challenges. For other authorities, however, judicial review challenge continues to be a rare event. At the same time two thirds of challenges are resolved before they reach the point of a decision in the high court. In the paper we explore first whether challenges have the potential to impact directly on the quality of services – and if so how; and second, whether particular decisions influence the quality of services. After outlining the different ways that quality can be defined, we concentrate on two dimensions of quality: as access to services and in relation to the way decisions are made. We focus on potential impacts in relation to two areas of service delivery: housing/homelessness and children's services. We draw on the findings from around 30 key informant interviews across five local authorities, and on detailed analysis of two key decisions. Our findings suggest that there is some impact simply of challenges on local authority delivery of services, but this impact is limited. Cases that reach the point of court judgments have the potential to be much more far-reaching, particularly when the decision is against the local authority, and can be relevant to authorities beyond the ones against which case was brought. Our case studies treat two such decisions and show how and in what ways they lead to change across authorities. We note that the pace and extent of impact – or implementation – of decisions will vary not only according to the nature of the decision, but also according to the characteristics of local authorities. Here we identify legal competence; organisational capacity; organisational culture, and local context as being critical factors influencing the speed and comprehensiveness with which individual local authorities can and do respond to significant decisions. We conclude by reflecting on the implications of our findings the motivating question of whether litigation affects the quality of public services.

Does Judicial Review Influence the Quality of Local Authority Services?

1. Background and Introduction

1.1 The Project

This paper raises some of the key issues that have emerged from our study of the impact of judicial review litigation on the quality of local government services in England and Wales undertaken as part of the ESRC's Public Services Programme.¹ To explore this we have adopted a three stage strategy, using both quantitative and qualitative techniques. First, we have investigated whether there are any significant correlations between the levels of public law litigation against authorities and the achievement of authorities as measured against the government's performance indicators.² To this end, we gathered information on all challenges that involved local authorities between 2000 and 2005, excluding immigration and asylum cases. For each local authority, as well as information on their challenges across this period, we collated information relating to official quality measures including CPA scores and data on various Best Value Performance Indicators (BVPIs). We also incorporated information on demographic characteristics from the Census, deprivation levels from the Indices of Multiple Deprivation, and data on local authority expenditure in order to build up a profile of the authorities.

The second stage of the research involved using the information from this challenges data base to identify pairs of authorities for qualitative investigation. We identified a pair of London Boroughs, where the members of the pair were comparable in terms of general profile (according to the characteristics in our data base), but differed in levels of judicial review challenge. Similarly we identified a pair of County Councils that were comparable except in terms of levels of challenge. In addition we identified a unitary authority with high and persistent levels of challenge as the final member of our case study authorities. In these five authorities, we carried out key informant interviews with those involved at different levels in service delivery, with a focus on children's (and to a lesser extent adult) services across all authorities and on housing and homelessness across the Boroughs and the unitary authority. Respondents in strategy and senior management, legal services, housing and

¹ RES-153-25-0081. See further www.publicservices.ac.uk

² Maurice Sunkin, Kerman Calvo, Lucinda Platt, Todd Landman, 'Mapping the Use of Judicial Review to Challenge Local Authorities in England and Wales', [2007] *Public Law* 545-567.

homelessness and children's and adult services were directly identified and access directly sought. In addition, we asked initial respondents to propose further potential interviewees in our areas of interest. We completed around 30 interviews with both senior and middle managers and some front line staff across the authorities. We also interviewed a small number of respondents from local and national NGOs and a couple of independent lawyers to identify client perspectives on service provision. In these interviews we explored understandings of quality; views on the constraints to high quality service deliver; perceptions of the role and impact of judicial review; issues of communication between legal and client departments, and general issues of legal awareness.

In the third phase, we used these key informant and 'expert' interviews to build up information on relevant cases for exploring our interests in impact of judicial review and quality of services.³ These case studies were based on key judicial review decisions in the areas of adult and child care and housing delivered during the period 2000-2005. We reviewed a number of cases that seemed particularly pertinent to our interests, and in this paper we specifically discuss two of these key cases: *R(Behre) v Hillingdon*⁴ and *R (on the application of B) v London Borough of Merton*⁵.

In what follows we draw predominantly on the second two stages (the qualitative phases) of the project to illuminate our emerging conclusions concerning the impact of judicial review on the quality of local authority services. The arguments we present and our tentative conclusions are deliberately presented in open terms, as we continue our analysis and refine our thinking.

1.2: Motivation and structure of the paper

There has been widespread concern about the growth in the so called 'compensation culture' and the linked perception that litigation is growing significantly. While this phenomenon may be considered to affect both the public and the private sectors, certain features are particularly pertinent to the public sector. These include the perceived substantial overall growth in resort to the courts, by way of judicial review, to challenge decisions of public authorities at

³ Our initial attempt to identify 'key cases' by a survey of all authorities in England and Wales could not be pursued due to very low response rates from the local authorities.

⁴ (2003) EWHC 2075 (*Hillingdon*)

⁵ [2003] 4 All ER 280 (*Merton*)

all levels.⁶ The increase in the incidence of public law litigation has been associated with the growing legislative demands on the public sector, increasing pressures on service providers, and with significant extensions in the scope of judicial review, including the enactment of the Human Rights Act in 1998.

Although there is little empirical data on the overall consequences of this trend, nor on the actual costs involved, there is anxiety in some quarters that the growth in litigation may be drawing resources from direct service delivery and thereby impacting adversely on the overall quality of local government.⁷ There is also concern that a growing preoccupation with litigation encourages service providers to become defensive, and to adopt approaches designed to safeguard decisions from challenge rather than to improve processes in any tangible sense.⁸ These are the negative implications that might follow from public law litigation.

More positively greater engagement with public law litigation may be leading to improvements in access to services and in service delivery for individuals and classes of services user; improvements in the clarity and accountability of processes within local authorities, and to greater levels of legal awareness, including the furtherance of the practical application of the rule of law.

It is in order to test these potential positive and negative correlates of public law litigation that we have embarked on our study. Our focus is on local, rather than central government, not only because it has been subject to much less investigation in relation to the role of judicial review, but, more importantly, because local authorities are responsible for the delivery of services of crucial importance to people's well-being, including determining housing needs and providing accommodation for eligible homeless as well as providing for

⁶ We say 'perceived substantial overall growth' because, while there clearly been a real increase in the scale of judicial review litigation in recent years: a) the trends in resort to judicial review vary across subject areas; and b) we must also be cautious about assuming a growth in litigation when the statistics do not necessarily provide a sound basis for comparing the scale of litigation across years; and c) the figures do not indicate the scale of litigation relative to the scale of public decision-making. Moreover, in relation to local government our findings show that during the period 2000-2005 the number of judicial reviews peaked in 2001: see Sunkin, Calvo et al., cited above.

⁷ See generally concerns about the "compensation culture" discussed in *Better Routes to Redress* (Better Regulation Task Force Report), May 2004.

⁸ I.D.Loveland, *Housing Homeless Persons: Administrative Law and the Administrative Process* (Oxford University Press, 1995), Chapter 11.

children in need and assuming responsibility to 'look after' children in certain circumstances. These two areas of housing/homelessness and children's services form the particular focus of our study. In these two areas, the influence of judicial review is potentially central to the work of local authorities. As well as finality in dispute resolution, judicial review provides authoritative determination of, and guidance on, the scope of service obligations, the level of service provision required, the procedures to be followed, and the approaches to be taken when authorities make decisions on individual cases. Judicial review, therefore, can determine the scope of service provision including individual gateway issues, as well as operational aspects of service delivery.

More generally judicial review identifies the legal duties of authorities and therefore the areas of service provision that are to be priorities from a legal perspective. In relation to the exercise of local authority discretions, judicial review reminds authorities that their decisions must be: principled and satisfy the tests of legal rationality; reasoned; based on a proper appreciation of the relevant considerations; and be capable of justification. This is particularly important where decisions deny individual access to fundamental provision such as housing or social care. In this way, judicial review decisions establish what might be called the requirements of individualised administrative justice. While such requirements are likely to infuse any quality agenda it is through judicial review that they are given a distinct and authoritative meaning, and hence status.

Assessing the extent to which judicial review impinges on the quality of services in areas such as homelessness and adult and children's services, however, is a complicated enterprise. One reason is that quality is a notoriously multi-faceted concept: its different dimensions reflect the expectations and normative evaluations of different actors, ranging from service users to official inspectors. Judicial review might, therefore, have different, even contradictory effects, in relation to different dimensions and perspectives of quality. One aspect of particular interest is the relationship between judicial review and quality defined as meeting performance targets (either national or local). We might expect that improvements following judicial review are unlikely to be directly reflected in achievement as measured by such targets. This may be for a variety of reasons. For instance, judicial decisions might force authorities to review their priorities in terms of resource allocation in ways that adversely affect their ability to meet certain targets. Responding to judicial review may

involve pulling resources from areas of service delivery, or using existing resources to meet the needs of a larger number of service users, thereby possibly diminishing overall performance. In this context one of our key interests is to determine whether judicial review re-enforces the official versions of ‘quality’ as realised through performance indicators or whether it emphasises alternative aspects of service delivery. There may also be a more substantive explanation: namely, that the impact of judicial decisions is not fully captured by current performance indicators. These place little weight upon the types of issues dealt with in judicial review, including qualitative factors such as the achievement of legal rationality and avoidance of unreasonableness and unfairness. We explore the different understandings of quality derived from our study in Section 2.

While this paper focuses on the implications for quality of judicial review decisions, we return briefly to the growth in levels of challenge in Section 3. Much of the putative growth in litigation at the level of challenges, and permissions granted, does not reach the decision stage. We therefore set out to ascertain if our qualitative material can amplify the ways in which volume of challenge itself can impact on service quality and delivery negatively by, for example, requiring resources dedicated to management and response, or positively by, for example, identifying pockets of procedural weakness or stimulating fuller accounts of decisions or more responsive engagement with those being refused services.

In Section 4, the implications of selected decisions for the operations of local authorities are explored in some detail. Judicial review decisions may confirm policy and practice, but they may also cause authorities to change their organizational systems, their training, their approaches to decision taking, the level and spread of legal awareness, and their more general working cultures and attitudes. The degree to which such changes cause friction within authorities is likely to vary. The degree to which authorities are familiar with judicial review and the extent to which it is accommodated within their systems is likely to be a relevant factor here. Such issues are touched on and are picked up in the final section of the paper. Full implementation of judicial decisions or guidance is inevitably shaped both by the particular nature of cases and, perhaps more importantly, by factors that are exogenous to litigation, such as the authority’s resources, legal capacity, organization and judgement about how best to reconcile the competing demands upon it, which may, of course, be affected by political considerations. While authorities may be able to respond quickly to certain judicial

requirements the influence of judicial review may only be manifest over time. Additionally, there may be genuine doubt about what implementation requires and genuine concerns about the best way to respond to decisions. These are some of the issues that are explored in Section 5.

2. Some Basic Definitions

2.1: Judicial review

Judicial Review is the High Court procedure by which those with a ‘sufficient interest’ can challenge decisions of public authorities on the grounds that authorities have failed to meet their legal obligations, including human rights obligations; or have acted unfairly or exceeded or abused their legal powers (or threatened to do these things). In the UK it is the principal legal route for ensuring that public authorities comply with the law and ‘the only mechanism which has been specifically developed to test the legality of public bodies in public law’.⁹ From the complainant’s perspective, it is the remedy of final resort used only when other avenues of redress, such as complaint or appeal, have been exhausted, or would be inadequate. It is, then, a unique and constitutionally extremely important process that can play a key role in providing redress for those aggrieved by the actions or inactions of public authorities. Our interest here is in the extent to which it influences the quality of public services more broadly.

One of our interviewees observed that judicial reviews may challenge aspects of decision-making that are ‘fundamental to [an authority’s] existence in many respects’ (R6—Legal—County Council). Nonetheless, judges operate within a fairly narrow constitutional remit. While having considerable interpretative capacity, they are in general formally constrained to apply primary legislation and must accept Parliament’s decision as to what services are to be provided by local authorities. The scope of judicial review is also limited. It is conventionally said to be concerned with matters of process rather than substance so that when reviewing a decision judges consider whether authorities have adopted the legally correct approach and not whether the decision is right or wrong, or one that they would have made, except in so far as it can be seen to match up to standards of ‘reasonableness’. As an

⁹ G. Richardson in *Judicial Review and Bureaucratic Impact* (eds. Marc Hertog and Simon Halliday, Cambridge Studies in Law Society, 2004), p104.

example of this oft-stated position, in *R(B) v Newham LBC*¹⁰, Gibbs J invoked what he said was a ‘fundamental principle of administrative law’:

(Judges) should not usurp the role of the decision-maker (...) The court, whilst it might form its own private view on these points, is not the expert, but it may intervene if satisfied that there has been some material error in law in the approach to determining these matters. Such an error may include a situation where a decision is made on the basis of a plain and material error of fact, or where an important relevant factor has not been taken into account. In the absence of any such material error or failure, the court may intervene if it is satisfied that no reasonable local authority could have reached the challenged decision.¹¹

Nevertheless, there are a range of ways in which judicial review can impact on both levels and process of service delivery – assuming that local authorities comply with the judgment.

2.2: Compliance and implementation

Even by comparison with other aspects of the court system judicial review decisions may appear rather short of coercive muscle.¹² Unlike proceedings in tort, for example, adverse judicial review judgments rarely lead to the imposition of financial liability. Moreover, while judges have a number of remedies available to them, which include the making of quashing, prohibiting and mandatory orders, they tend to prefer to use declaratory judgments where they can, or even to assume that formal remedies are not necessary. From the perspective of the Courts, enforcement, then, is essentially a matter of trust rather than coercion.

Nevertheless, local authorities generally regard judgments as being authoritative and, on balance, will endeavour to implement them, both in relation to the particular case, and more broadly. Respect for the law and for the standing of the court is an important motivation. On the other hand, in the context of implementation, more instrumental considerations also come into play that may militate against the ability, or even the willingness of authorities, to implement decisions. As Bradley C. Cannon explained in the context of the United States:

Court decisions requiring new agency policies or behaviour come into [the] mix of more permanent demands and dynamics only occasionally. Such decisions are analogous to strangers, they are the ‘new kid on the block’. As such, they have the

¹⁰ [2004] EWHC 2503 (Admin)

¹¹ Judgment para [50].

potential for upsetting an agency's mix of policies and routines ... Naturally, the greater the potential, the more wary or even hostile an agency becomes. ... court decisions are at best just one of the demands upon a bureaucracy, often of low level importance in the agency's overall scheme of things and occasionally upsetting or even dysfunctional. Such demands are likely to get as minimal attention or be candidates for as minimal behavioural adjustments as seems possible.¹³

While these comments are made in relation to a significantly different constitutional environment, and while the extent to which judicial review is a 'new kid on the block' will vary across local authorities, much in these comments rings true in the context of local authority reaction to judicial review.

Certainly compliance is a question of degree. Local authorities react with different degrees of enthusiasm to judicial decisions in a continuum that can theoretically range from perfect compliance to absolute defiance. We were told, for example, of situations in which, despite judicial review having identified duties, an authority considered it prudent for resource reasons not to fulfil the duties, perhaps assessing the risks of future challenge to be low. Given the connections between implementation, compliance, and impacts one of our aims is to establish the conditions that explain why authorities react differently to the same decisions. On the other hand, both challenges and negative decisions can have consequences for the reputation of a local authority. Incentives to comply can be increased if non-compliance will be felt as embarrassing or will cast the council (and its controlling political interest) in a poor light. We discuss this issue of reputation further below.

2.3: The phases of litigation and their scale

The most obvious route by which judicial review exerts its impact is through judgments, including their hortatory aspects. However we have been interested in the potential influence of the litigation process as a whole, including for instance in whether local authorities learn from challenges, even when these do not mature into court decisions.

¹² Of course in the most extreme cases non compliant local authorities may be held in contempt of court.

¹³ Bradley C. Cannon, 'Studying Bureaucratic Implementation of Judicial Policies in the United States: Conceptual and Methodological Approaches' in Hertogh and Halliday (eds), cited above, p 84

For our purposes judicial review litigation occurs in the following phases: the pre-litigation phase where a judicial challenge is threatened, usually indicated when a solicitor sends a letter before claim; the stage between filing the challenge with the Administrative Court and the permission decision (the pre permission stage); the permission stage (at which a judge decides whether or not the challenge may proceed to a final hearing on its merits); the post permission stage (between the permission stage and the final hearing); and finally, the decision stage. Cases may also go beyond the decision stage to appeal to the Court of Appeal and House of Lords and to Europe.

A detailed account of the incidence of judicial review against local government in England and Wales can be found elsewhere.¹⁴ For present purposes it is sufficient to note that levels of engagement with judicial review vary considerably across local authorities. For 80 per cent of local authorities, being challenged in judicial review proceedings is an exceptional event, often occurring less than three times a year. However, a comparatively high proportion of the cases that do arise against these authorities get to court. In other words, while relatively rare, judicial review is likely in these instances to have a potentially high impact; both because it is unusual and because it results in a court decision. Twenty per cent of authorities attract 80 per cent of the challenges. The largest proportion of these involve London Boroughs and concern housing related issues, in particular homelessness. As Table 1 shows, only a very small proportion of cases proceed to a court hearing, many being resolved prior to the permission stage.

In the most heavily challenged authorities, resort to judicial review reflects the chronic problems associated with allocating scarce housing in an area of high housing cost. As one of our respondents put it: ‘you’ve got people who cannot afford to buy but they cannot afford to rent either because the rents are very expensive as well. So what you get is then there’s more onus on the public sector so you get more people approaching as homeless’ (R3—Housing—London Borough). For the individuals concerned, resort to judicial review may play a vital role in securing urgently needed, if temporary, housing. Emerging evidence indicates that a vast majority of these cases are settled to the complainants’ advantage at an early stage in the

¹⁴ Sunkin, Calvo *et al.*, cited above.

proceedings.¹⁵ In this sense judicial review’s influence on access to services is vital for these claimants, at least in the short term.¹⁶

Table 1: Rates of Applications for permission; permissions granted; decisions at High Court, including those decisions unfavourable to the local authority. (Column %)

	All Authorities* *	The 50 most challenged authorities
Applications for permission against LAs in England and Wales, 2000-2005*	5100 (100%)	3752 (100%)
Applications granted permission to proceed	1587 (31%)	1118 (30%)
Number of substantive decisions at the High Court***	402 (8%)	230 (6%)
Number of decisions unfavourable to local authorities at the High Court	159 (3%)	85 (2%)

Notes: * Figures do not include cases labelled “immigration” or “asylum” at the Administrative Court; ** Does not include the City of London; *** Some of these decisions sprang from challenges brought before 2000

2.4: Meanings of Impact and the Dimensions of Quality

There has been much discussion in the literature regarding the meaning of impacts and problems associated with its definition.¹⁷ For present purposes it is sufficient to note that, in addition to their direct impact on the parties in relation to the issues adjudicated upon in particular cases, judicial review decisions may also exert broader influences. Our focus is principally upon the impact of judicial review on the quality of services. More specifically, we seek to discover whether judicial review can help to introduce a vision of quality that is not currently captured by government-inspired performance indicators, and the extent to which changes associated with judicial review proceedings are congruent with such

¹⁵ As yet, unpublished research by Varda Bondy and Maurice Sunkin on the Permission Stage of the Judicial Review Procedure, Nuffield Foundation.

¹⁶ We discuss access as an aspect of quality further below.

¹⁷ See Genevra Richardson and Maurice Sunkin, *Judicial Review: Questions of Impact*, [1996] *Public Law* 79-103; Maurice Sunkin, ‘Issues in Researching the Impact of Judicial Review’ in Hertogh and Halliday (eds), cited above.

performance indicators. In so doing we hope to provide a more sophisticated understanding of the role courts can play in contributing to the quality of public services.

Quality, like beauty, is very much in the eye of the beholder: users want to receive services and want those services to be delivered in a clear, consistent and responsive fashion; front-line workers are often primarily concerned with their clients getting the service they would like for them, but may also be concerned to have a manageable case load, and thus clear criteria for inclusion and exclusion; middle-management may be very concerned with delivering to performance indicators and for being able to demonstrate the effectiveness of their team through monitoring systems; senior and strategic management may be concerned with the reputation of the authority and with balance of provision across services, to match the needs of the population as a whole; while politicians, also concerned with reputation, may additionally be reluctant to support the expansion (or reduction) of services which are salient to particular party-political positions, and will see quality as delivering to their perceived 'core' constituents.

Nevertheless, in our study, which covered respondents across the various areas of seniority within the organisation, we were able to identify a recurrent set of understandings of quality as (a) access to services; (b) process surrounding access to services; (c) delivery of service; (d) organisational culture; (e) performance indicators; (f) competence of staff; (g) compliance with legal requirements. We go on to explore these dimensions of and perspectives on quality and illustrate how they received different prominence across authorities. Such differences in prominence also gave scope for judicial review to impact – or fail to impact – on dimensions of quality to very different extents across authorities. This is an issue we take up in Section 5.

Some of these understandings of quality existed side by side for individual respondents; and there are clearly overlaps between them. For example, competence and expertise of staff (including whether or not they were effectively trained) has implications for process, delivery and also performance indicators, while organisational culture impacts on the extent to which performance indicators are met. In Sections 3 and 4, we look at the impact of judicial review on aspects of service concentrating on (a), (b) and (c), which are concerned very specifically with service delivery. We can re-interpret (d) and (g) as constraints on implementation or

delivery as much as representations of quality. They are aspects of the local authority which, even if perceived as being indicators of quality in some absolute sense, also mediate implementation and thus the possibility of judicial review to impact on quality of direct provision either positively or negatively. We therefore reserve discussion of these elements to Section 5. We regard (f) as being implicit in all the other measures.

Performance indicators (e) incorporate ‘official’ measures of quality as expressed for example in Comprehensive Performance Assessment (CPA) ratings and Best Value Indicators (BVIs). In earlier work we were able to illustrate some association between CPA as a measure of quality and levels of judicial review challenge, though we were cautious about the direction of effects.¹⁸ That is, whether it was ‘good’ authorities that were less frequently challenged or whether challenges led to an improvement in service. We also acknowledged that our measure of quality was a narrow one and only captured certain official dimensions. In this paper we return to consideration of performance indicators when discussing the effects of judgments in Section 4. A secondary question, and one touching upon the ‘cause’ or ‘effect’ issue is the extent to which monitoring systems enable local authorities to more effectively fight or resist judicial review challenges or adverse judgments. Overall, we anticipate that authorities that are highly ranked according to performance indicators will be better placed to respond to decisions, and to resist future challenge in cognate areas, but this remains an area for empirical demonstration.

Before we return to the question of volume of challenges, and relate it to these wider range of quality dimensions, let us consider these dimensions in more detail.

As discussed, access to services may be the primary interest of the user and certainly one of the main causes of challenge is that services are not delivered. Whether a particular service, be it social care or housing, is supplied or not was recognised as a fundamental issue of quality by both respondents within the local authority and among those representing user interests. One respondent emphasised that: ‘the customers in the job that we do are quite often not satisfied because of a negative decision’ (R3—Housing—London Borough). Another made a similar point: ‘if you’re going to make a decision contrary to the client’s objective you’re going to know that they’re likely to be unhappy’ (R5—Housing—London

¹⁸ Sunkin, Calvo, *et al.*, cited above.

Borough). The issue of resourcing was raised by a number of respondents, constraints on which meant that ‘we can’t meet all the needs that are out there’ (R2—Children and Families—London Borough). In the context of refusing services and evident issues of resource constraint, faith in the ‘rightness’ of the decisions taken was fundamental to staff managing regular disappointment in terms of access.

At the same time, while acknowledging that refusing access was a key part of the job, certain respondents argued cogently that ‘customer care’ was fundamental to quality, and that it was how you said ‘no’ rather than whether you said ‘no’ that was an indicator of quality:

I think you can be looking at the way in which you have delivered the negative decision and the way that you perhaps deal with enquiries on the negative decision. There’s no point being curt and unapproachable to someone on whom you’ve made a negative decision... you’ve got to look at issues around the customer care side of things as well. That to me is what quality is (R3—Housing—London Borough).

Another respondent made a similar point by saying ‘the clients’ needs are what we are about. Actually giving them the service that they should have, whether it’s a negative decision or a positive decision’ (R4-Homelessness-London Borough). These comments draw attention to the importance of appropriate and considerate ‘process’ as a fundamental marker of quality.

Organisational culture was an important element of discussion, particularly at more senior levels across authorities: ‘if you provide a good service then people aren’t going to complain. We do provide good services, we do consistently perform well... and part of that is because corporately we do work together, there’s lots of corporate momentum’ (R2—Legal—County Council). For some it was distinguished from what were regarded as the somewhat mechanistic performance indicators:

from my perspective, sitting here kind of central to the organisation, it’s a kind of cultural thing, it’s about encouraging people to do it rather than trying to devise some sophisticated mechanism.... The trouble with the monitoring feedback culture is you measure what you can measure and a lot of this is subjective and qualitative rather than numeric which makes it difficult and the targets therefore set distorting priorities (R1—Senior Management—County Council).

However, for others, the organisational culture and effective monitoring were embedded within one another.

Additionally, among a number of respondents, often at middle management level, quality and performance indicators were seen as one and the same. ‘Quality of service, to my way of thinking is about meeting [authority] core values’, one respondent says, before going on to enumerate seeing a client within 15 minutes, answering the phone within 5 rings, completing inquiries within 33 days and so on as illustrations of those core values (R7—Housing—London Borough). In a similar vein, another respondent itemised the target of 33 working days when asked to define quality; and when pressed for alternative definitions of quality fell back on ‘we monitor waiting times in reception, we monitor correspondence responses and time taken to respond, we monitor telephone calls... and the time it takes to reply to calls’ (R8—Housing—London Borough). The importance of monitoring, good indicators and good access to monitoring information as a management tool was also highlighted. One respondent referred to ‘a database which allowed me to generate performance data that assisted me in supporting my staff to attend to particular areas of weakness and acknowledge areas of strength’ (R2—Children and Families—London Borough); and added: ‘as a manager of a service, I am anxious to produce good performance data which shows that me and my team are working well’. The role of good performance indicator ratings in attracting good (competent) staff, with knock-on effects on quality of service delivery, was also raised. This position of support for performance indicators and good statistics was not without dissenters or qualifications: ‘in this day and age, quality is based on statistics, unfortunately and I don’t necessarily think that’s quality, I think that’s quantity’ (R3—Housing—London Borough); but even here, the relevance of some form of standard setting and related monitoring and reporting on performance was acknowledged as having an important role.

In Section 3 we go on to consider the ways in which judicial review challenge and the early stages of the process, relate to these different quality domains, focusing, as noted on whether access is achieved, the process of gaining or apply for access and delivery of services.

3. Challenge as a driver of performance in local authorities

3.1: Pre-empting the risks of challenge

It has been recently argued that the extension of judicial review and the ‘judges’ corresponding interposition of themselves between British governments and ... individuals clearly amounts to a major change in Britain’s constitutional structure’. A consequence is that:

ministers, civil servants, and other public officials no longer simply act and wait to see if their actions will be reviewed. They act knowing that their actions may be reviewed. Whenever they act, they need to take the possibility of judicial review into consideration.¹⁹

In central government this has led, amongst other things, to major efforts to increase awareness of judicial review and to the more proactive use of lawyers in decision making.²⁰ These trends have also affected the environment in which local authorities operate. The lawyers that we interviewed in particular explained how awareness of judicial review along with other external redress and regulatory mechanisms has grown over the past decade or so. This, they said, has influenced the organisation of local authorities and in particular increased the standing of lawyers. One senior lawyer, for instance, noted that he has worked in the local authority for ten years and that before then:

... the strategic role of legal services ... was lost a little, and I think people are realising that ... when you’re challenging a local authority you’re challenging the decision making which is fundamental to its existence in many respects and it’s the legal implications ... that come to the fore. And the reality is that most local authority functions have a legal underpinning and, you know, you need lawyers in there to say, actually this is the case law on that or you know, this is where that’s going in terms of the developments in that area (R6—Legal—County Council).

¹⁹ Anthony King, *The British Constitution*, (Oxford University Press 2007), 126. Note also the observation that: ‘The process has now reached the point where judicial review holds an equal place with parliamentary question and debate, resort to the ombudsman, and media pressure among the means by which both specific and general executive decisions may be routinely challenged ... in some areas judicial review holds a predominant place because of its ability to furnish ... definitive and ... speedy resolution’. Terence Daintith and Alan Page, *The Executive in the Constitution* (Oxford University Press 1998), p335

²⁰ For example, the publication of the pamphlet intended for civil servants: *The Judge over Your Shoulder*.

One reason why lawyers now play a more proactive role is that risk assessment has become a key element for at least some authorities.²¹ In part this is a consequence of Lexcel, the Law Societies Practice Management Standard, which establishes standards for solicitors including those working in local government. Lawyers in the county councils explained how, both as part of the accreditation process and as part of the authority's corporate policy, they must now identify and assess threats to the authority, including media threats and threats of litigation and then take steps to reduce these risks. One lawyer in a local authority that has a very low level of judicial review litigation and an estimated fewer 'than ten threats a year' explained the risk assessment strategy as follows:

We're Lexcel accredited which means that we have quality processes – we undertake risk assessment – if you like a specification of service that we provide to client departments and we have regular meetings with them so every client has a formal meeting with a member of our management team at least twice a year, sometimes more. Individual staff will have clients that they meet as regularly as every other week, once a month, so we're quite close to the department (R2—Legal—County Council).

This lawyer went on to explain that:

...one of the risks, the corporate risks, is about 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 and one of those things is that we have this regular review. We review what's up to on files – we review the client to ensure that everybody knows what's expected of them and if there's any difficulty in communication we can sort that out. And every department will be going through that same process they will be identifying their major risks and looking at ways of controlling them.

The possibility of judicial review is just one of the risks being assessed and for this particular authority appears to be considered in general to be low. In another authority a lawyer emphasised the unpredictability of certain risks in terms of reputation and media coverage:

So if there was a major bit of litigation that would be on the risk register because they would know that that is an issue that they're going to have to address at some stage.

²¹ While interviewees in our County Councils drew attention to corporate risk management strategies interviews in the London Boroughs did not.

That may be judicial review or it could be anything. I mean, the sort of amazing thing about local authorities is that ... a parking ticket could be major front page local news... because of some weirdness that happens in it. So you never quite know what is going to be a risk. (R6—Legal—County Council).

Assessment of the risk of judicial challenge, at least in the authorities we spoke to, is now routine. In the view of one respondent, this is a major contributory factor to their low levels of threat or challenge. If this is an accurate assessment and holds across authorities, then there does appear to be something of a virtuous cycle: if authorities are able to assess and reduce the threat of judicial review by ensuring that their processes would withstand judicial scrutiny then challenge will be reduced.²² In other words: high quality decision taking leads to low levels of challenge.

However, as well as internal systems, levels of challenge are likely to be determined by several factors beyond the authorities' control, including the local availability of appropriate legal services. This was certainly one of the reasons given for the relatively high level of judicial review challenge against our other county council. In this authority the lawyer commented that:

[F]our or five years ago we had a firm move into the area [...] and they have community care and asylum specialists and ... they took a number of claims against us – I don't know that they were massively more- but certainly in terms of the threat of judicial review it was almost every case. Their final line of their letter was “this is the letter before action” or “if you don't respond within 'x days' we will be making an application for judicial review against you” (R6—Legal—County Council).

The perception that the level of judicial review challenge is driven by a small number of specialist solicitors was held by interviewees in other heavily challenged authorities. In one particularly heavily challenged authority a senior lawyer told us that: ‘the pattern I've come across, you know, there are a handful of solicitors out there who actually do specialize in this

²² This account of the way in which lawyers are involved at relatively high level in providing strategic and proactive advice contrasts with comments made by some working in client departments in London Boroughs. An officer concerned with children and family assessment, for instance complained that their legal team are ‘heavily overstretched and you may not get a timely response or timely advice’, (R2—Children and Families—London Borough). The implication, not surprisingly, is that proactive thinking about the legal implications of decisions is far more difficult in day to day routine work where time pressures are greatest.

work, tend to target various parts of the service So I wouldn't say there's a body out there particularly of dissatisfied citizens who are not being able to access legal advice to challenge the local authority'. (R1—Legal—Unitary Authority).

Here the interviewee is making the point that we should not assume that high levels of threat or challenge are indicative of high levels of dissatisfaction with local services, though the ability to target areas of weakness suggests that procedures are, at the very least, not water tight. We go on to consider the relationship between levels of challenge and quality next.

3.2: Levels of Challenge and Performance

Only a very small proportion of challenges give rise to substantive decisions (see Table 1). Many challenges, especially those concerning housing issues, are resolved soon after the judicial review proceedings are filed, and only approximately 30 per cent obtain permission to proceed; of these a significant proportion are withdrawn prior to the substantive hearing. This does not mean that authorities can ignore litigation at its early stages. Handling disputes creates a huge workload for local authorities. Letters before claim must be responded to, cases will need to be reviewed, legal options must be considered, and decisions made about whether to settle or dispute claims. Most challenges require service providers to revisit previous decisions, reflect on the merits of the situation, and liaise with their lawyers so that a decision can be made as to the strategy to follow. In other words threats and challenges, even where these do not proceed very far along the judicial review process, can absorb considerable resources. But, do they have any other tangible consequences for authorities?²³ Four questions in particular may be posed. (1) Is there any discernable relationship between levels of challenge and quality of services? (2) Do challenges have anything to teach authorities about the quality of the specific services being delivered? (3) Do they encourage measurable changes in procedures, decisions or organization? (4) Can authorities learn generally from the threats or challenges that are brought against their own or other authorities?

We have investigated the first question elsewhere and have shown that there appears to be some correlation between volumes of litigation and the performance of authorities in relation

²³ For a discussion of the impacts of threats to challenge, see Sunkin, in Hertogh and Halliday, cited above, pp 48-50.

to the official indicators of quality.²⁴ Authorities scoring well, when controlling for population size, tend to endure lower levels of challenge than those with lower scores (who suffer from the brunt of challenge). Those authorities with higher levels of challenge also tend to be those with more complaints to the local ombudsman. This reinforces the impression that poorly performing authorities are the ones that are challenged. Threats of challenge, then, are most frequent in authorities that still have considerable room for improvement in a number of areas of service delivery, and are struggling to meet targets.

The second question concerns the possibility that challenges may help in supplying local authorities with new information about flaws in service delivery. In the current management framework, one might expect troubled local authorities to have direct knowledge of their shortcomings in service delivery, at least in relation to the areas of service delivery where they feel most vulnerable, though we can note the earlier comment that solicitors are able to exploit areas of weakness. The implementation of performance management techniques has succeeded in providing authorities with useful and reliable information about the weakest links in service delivery. However, the efficacy of performance management systems was itself questioned in one of the more heavily challenged authorities: ‘the tools we use in this borough don’t allow us to do it [demonstrate how efficiently we are working]’ (R2—Children and Families—London Borough).

It was also in heavily challenged authorities where there was a perceived tendency to respond inappropriately to challenges, for example defending the indefensible. Speaking of another authority one respondent expostulated ‘[the case] should never have gone to court – [the authority] was so out of the field it was ridiculous’ (R8—Housing—London Borough). This also suggests a lack of real awareness of strengths and weaknesses. Gaps were also identified between those dealing with challenge and complaint and those on the front line whose decision precipitated the challenge. One respondent dealing with reviews of previous decisions commented: ‘I don’t think sufficient time is given to interview a client... a caseworker has decided on the format’, adding ‘your decision is only as good as the information and the basis of the information is the client’ (R5—Housing—London Borough). Another respondent, meanwhile, resisted the suggestion that they could spot a challenge

²⁴ See Sunkin, Calvo *et al.*, cited above, pp 558 and 563-566

coming, on the grounds that their decisions were ‘watertight’, thus resisting any reflexive response to threat or challenge or the ability to learn from it: ‘The initial reaction is one of surprise. I say that because we try to be very thorough when we make a decision’ (R7—Housing—London Borough). The respondent could only understand the challenge in terms of ‘new information’ that had subsequently come to light. The partitioning of knowledge and responsibility can therefore be problematic for authorities and can mean not only that they have less scope to reduce challenge, but also that practices may be resistant to change and that the ‘problem’ is not one that is recognised throughout the authority or section. Those who are most sensitive to the impacts of judicial review judgments, such as those in strategic roles and most closely related to the reputation of the authority, may be far removed from those whose practice is subject to the challenge.

Moreover, even when authorities are aware of their limitations, challenges *remind* authorities about the areas of their provision in which flaws are more likely to occur. They also *remind* them of developments of the law that may have been ‘filed’ but as a consequence of the challenge must be activated. These effects of challenges are not of inconsequential value. We may also speculate that as with any process of complaint, threats and challenges may also highlight specific problems that have not been detected, including issues associated with complaint handling.

The third question involves the relationship between challenges and changes in methods of service delivery. Authorities may well reconsider individual cases in response to challenge and concede that their original decision was wrong, for example in relation to homelessness applications and decisions not to house pending review. However, we are more interested in whether challenges prompt more general change in service delivery. Previous research has indicated that public authorities do on occasion make changes when challenged, or even threatened, but the likelihood of their doing so will depend on specific circumstances, including factors such as the legal credibility of the claim being made and the reputation of the claimant’s lawyers.²⁵ Challenges, however, carry no actual legal weight and therefore exert no formal legal force and we may assume that authorities will generally be disinclined to expend resources unless and until compelled to do so. An exception appeared to be in the

²⁵ See Sunkin in Hertogh and Halliday, cited above.

case of housing, already discussed, where the challenge often seemed sufficient to ensure at least temporary accommodation ‘pending review’ for the complainant.

In any case, in a number of situations authorities have little if any room for manoeuvre. For instance, many legal challenges are attempts to compel authorities to provide services when authorities either deny that they have the obligation to do so, or are only too well aware of the pressures they face and of their inability to significantly improve provision. We have just observed that challenges might confirm known flaws in provision. In such situations challenges, and even multiple similar challenges, seem unlikely to prompt reconsideration of basic decisions on service delivery. The majority of challenges to many London Boroughs, for instance, are brought by people seeking temporary housing. These probably have little new to tell authorities about shortages in terms of the number of dwellings available for those making a claim as homeless. It is however possible that some Boroughs may be interested in whether their strategies for handling these cases are affecting the level of litigation. One respondent argued that attempts to reduce the number of people applying as homeless in the first place potentially generate new threats of litigation.

In relation to our fourth question and the wider learning that can take place from challenges and threats, when there is room for, and willingness to, compromise, challenges may be helpful in a number of ways. We have, for instance, learnt of a handful of situations where local authorities have introduced procedural changes as a result of threats. These have occurred when authorities have consciously adopted a “proactive outlook” and see challenges as an opportunity to pre-empt future legal problems. The chances of this happening increase when challenges concern problems connected to the implementation of previous judicial decisions. A good example would be the problems associated with the implementation of the *Merton* decision on age assessment.²⁶ As we shall see in the next Section, the implementation of this decision has been fraught with difficulties. However, exposure to possible further legal challenge has acted as a spur to increase the pace of its implementation.²⁷

²⁶ See above, note 5.

²⁷ Exposure to challenges also seems to prompt improvements in dispute handling. For instance, an authority studied in this project, being concerned about the number of threats that arrived at the desk of the legal department at the very last minute, and determined to work out a more systematic way of handling letters before claim, made an effort to remind local solicitors about the ‘access points’ to the authority. This was intended to centralise the information in relation to threats in the legal department. Authorities might also react to high volumes of challenge by strengthening their legal departments.

It is also clear, however, that early reaction to litigation is heavily mediated by the scale of the problem. When local authorities are systematically exposed to high volumes of judicial review, there are a number of hurdles to proactive engagement with challenges.

First, there are *cultural considerations*. Our interviews suggested that in the most heavily challenged authorities the volumes of challenge are internalised and normalised, in a process that sees legal conflict as an everyday, and largely unavoidable, collateral aspect of local government work: ‘the challenge to the authority, is well articulated, very strongly supported and resourced and therefore our way of life is to expect that as the norm and to respond to it accordingly’ (R1—Senior Management—County Council). Such an approach may militate against the taking of proactive steps in relation to individual challenges.

A further obstacle has to do with *capacity*: authorities may lack the capacity to resolve the underlying conflicts that generate the litigation. Social service departments, for instance, may be aware of the obligations they have to provide care-leavers with a dedicated personal advisor, and they may know that looked after children are meant to have regular access to a social worker. However, they may have cut levels of provision due to resource constraints, although they may not be certain about the level of service provision that is legally required. If challenged by those claiming that they have fallen below the legal standard, such authorities are more likely to seek to fix the individual situation than to use the challenge as a prompt to increase investment in the number of social workers.

Lastly, *lack of information, and problems of communication*, may also inhibit proactivity. The lack of information and defects in the flow of internal communication can hinder the prospects of learning about, or from, the early stages of litigation. We have, for example, found significant variations in the amount and quality of the information that local authorities collect on threats and challenges. It appears that many authorities do not keep reliable information on levels of challenge or the type of cases being brought against them. Even if they have data on their own situation, authorities are unlikely to know about volumes of threat endured by other similar authorities. In short, authorities might simply not know whether there is a problem or not.

In relation to internal communication, service departments and legal departments do not always keep in close touch, with the result that lawyers are only involved with particular cases, and then only when a case is actually brought. Some authorities are likely to obtain information about new issues of law that are likely to be contested, including areas of vulnerability, from complainant solicitors who are active in their areas. Where information is shared it tends to be about individual problems rather than the more systemic lessons that can be learnt.

If judicial review litigation is to influence authorities that are not directly involved in the specific dispute these other authorities must learn about the litigation. Later we shall touch on some of the issues associated with the ways in which authorities learn about judicial review decisions. While learning about decisions is far from systematic, there is substantial evidence that news of significant cases does spread at least in relation to specific areas of service delivery. By contrast, there is very little opportunity to learn about the experiences of other authorities in relation to challenges. We doubt therefore that much is learnt across authorities from early stage litigation or that this has any real impact.

3.3: Concluding comments

In looking at the extent to which local authorities learn from challenges as opposed to judgments we must acknowledge that we may be imposing an artificial barrier between cases that are resolved at or prior to the permission stage and those that proceed to the high court. Which challenges are allowed to proceed and which the authority actively attempts to resolve have their place in the strategic context, culture and information flows within the authority. The process of resolution can be seen as a concession in the face of recognised bad practice – a remedial action – or as a direct strategy, resulting from learning, for ensuring that problematic or potentially embarrassing cases do not come to court: ‘one of the ways of defending judicial reviews is if you’ve identified that you’ve got it wrong is to say, “Well actually, we’re reviewing our processes; we’ll make the decision again.” And that would mean the judicial review might not go forward, if you could show that you’ve learnt, are improving’ (R2—Legal—County Council). Across our respondents we found a high level of sensitivity to the implications of losing a case for their and their authority’s reputation: ‘winning at court is everything!’ (R4-Legal—County Council); ‘I decided I wasn’t going to make bad cases because I don’t want to be paraded in court by the cases. I like my name to be

paraded by good cases. That has been my life strategy and my ambition and my mission’ (R4—Housing—London Borough).

In this context, conceding a case in which the claimant had a high chance of success was taken to be prudent, whereas refusing to concede such a case was regarded as evidence of incompetence: ‘this council’s view has been to defend actions only when we’re absolutely certain of success, at least 75 per cent certain of success. We wouldn’t defend a case in court that we thought we were going to lose’ (R8—Housing—London Borough). In such a strategic approach, the possibility of learning from challenges to improve procedures and minimise the risk of them going to court is a much more likely outcome: ‘we’ve always been guided by legal to be a reasonable authority’ (R8—Housing—London Borough). This position is contrasted with an authority which ‘were seemingly always in court and always losing’ (R8—Housing—London Borough). Of course, the outcome in court is not entirely predictable, some cases were seen as 50:50, and there was some acknowledgement that decisions could appear arbitrary or heavily influenced by the actual judge. Nevertheless, there did appear to be a substantial degree of confidence that many outcomes were highly predictable and thus that the authority could be proactive in determining which ones went to court.

On the other hand, some decisions were seen as ultimately trivial, as getting ‘legs slapped’ for making a single specific mistake, with no further ramifications, except reinforcing the already poor reputation of the authority: ‘the judge thinking you’re crap – another [authority] case going to dust’ (R3—Housing—London Borough). In such situations, a strategic response at the challenge stage might be irrelevant, while implications for implementation are restricted to the individual case.

4. Judicial review judgments as drivers of performance in local authorities

Threats and challenges, then, appear to provide only limited incentive for authorities to expend resources reacting to alleged deficiencies in their service provision, particularly where challenges are a part of the daily routine of those who are most highly challenged. There is likely to be much greater incentive to react to judicial decisions, particularly those

critical of authorities, and it is such ‘negative’ decisions that we concentrate on here.²⁸

Nevertheless, positive decisions were also cited by our respondents as providing effective learning opportunities:

you can learn from positive decisions as well..... There’s been one or two cases where you’ve looked at the decision letter and thought, well, that’s so good, it’s fully detailed, it goes into everything and then you can say that’s the way decision letters should be. They won the case because they put through in the decision letter that they’d taken all relevant matters into account and properly dealt with them (R8—Housing—London Borough).

Another interviewee commented: ‘we’ve recently won one... the court said “yes, your process is right”; but then looking at it we’ve actually identified ways in which we can make the process better’ (R2—Legal—County Council). Nevertheless, while positive decisions may reinforce good practice, the influence of negative aspects of decisions is potentially much more far reaching and it is in relation these aspects that that the problems of implementation are likely to be greatest. We consider that impact here in relation to two specific cases.

A generalised effect of judicial review decisions on service delivery cannot be established. Much depends on the context and on the matters being determined by the courts.²⁹ Some decisions while of indisputable importance in relation to the specific issues will have no measurable effect on service delivery. And, of course, as we have observed earlier, the implementation of judicial decisions and consequently their influence, inevitably depends on numerous factors exogenous to the decisions themselves, an issue we take further in the next Section. Nevertheless, even judgments that are exclusively concerned with resolving disputes affecting only the interests of single claimants may have consequences beyond that case. Obvious examples are where the decisions involve statutory interpretation, or explanation of the way previous case law should be applied, or where the judge provides guidance to public authorities. In considering two cases which have been highlighted as significant in our study, we examine both the judgments themselves and the tasks being performed by the judge. From these we arrive at a number of conditions *internal* to the decision that may affect the extent to which it is taken up more widely.

²⁸ Decisions are not always wholly positive or negative in relation to parties: even a positive decision may have negative aspects.

²⁹ See further discussion in Richardson & Sunkin, cited above, pp 88-91.

Broadly speaking in our two illustrative cases show the courts involved in two overlapping activities. The first is to determine issues concerning the scope of service programmes: what services must be provided and who is eligible? (our quality measure (a) in Section 2). The second involves determining, or providing guidance on, matters concerning the implementation of service programmes (our quality measure (b) in Section 2).³⁰ While these are single instances we believe that the cases do provide more general lessons.

In relation to each of the studies we will: say a word or two about the context in which the decision was taken; summarise the core elements of the judgment; identify the main issues that appear to arise in relation to local authority services; comment on what is known about the extent to which the decisions have been implemented by local authorities. Finally we will summarise the main issues of service quality that seem to have been affected by the decisions.

4.1 Judicial review and access to service programmes: The Hillingdon decision

Judicial review is often used to challenge the refusal to provide services on the ground that there is no duty owed to the claimant. In such cases the courts must consider whether the authority has properly understood the nature of its duties and, by implication, the range of those entitled to access the service programme. *R (Behre) v Hillingdon*,³¹ provides a striking example of a decision that an authority had acted unlawfully in refusing to provide the appropriate range of services, in this case to former unaccompanied child asylum seekers (UASCs).

4.1.1 Background

In March 2005 there were estimated to be around 6,000 asylum seeking children who have been separated from parents or guardians being supported by local authority social services departments especially in the South East.³² These children are assisted as ‘children in need’ under section 17 Children Act 1989 or are accommodated under section 20 of that Act (in which case a proportion of the costs incurred by local authorities are reimbursed by central government).

³⁰ We are developing analysis of a further case study that complements these first two and illuminates issues relating to delivery – our quality measure (c) from Section 2.

³¹ See above, note 4.

³² Home Office Asylum Statistics United Kingdom 2004, London: Home Office. See generally Heaven Crawley, *Child First, Migrant Second: Ensuring that every child matters*, Immigration Law Practitioners’ Association Policy Paper February 2006, especially pp 21-25.

If the child is accommodated under section 20 a wide range of services and support will be provided. Crawley explains that under this section ‘children may be placed with a foster carer or in a residential home and they should have an allocated social worker and, if over 16, a personal adviser, a care or pathway plan and financial support’. Those assisted under section 17 may receive more limited financial support and accommodation, ranging from supported lodgings to bed and breakfast in a shared house or hostel.³³ Moreover, if children were assisted under section 17, when they become 18 they are not entitled to leaving care services and are treated as adults under the responsibility of the National Asylum Support Service (NASS).

4.1.2: The case

The four claimants had arrived in Heathrow Airport during 2000 when they were minors. Being destitute they were assisted by Hillingdon under the Children Act 1989 until they were 18.³⁴ When they became 18, the Council claimed that it no longer had any responsibility to them because it had only provided services for them under section 17 and had not looked after them under section 20: it accepted that had it done so it would have continuing duties under the Children (Leaving Care) Act 2000. Sullivan J held that the expression ‘looked after’ in the context of the 1989 Act was a ‘term of art’ and whether the council had acted under section 17 or section 20 in providing the children with housing and other services, it had ‘looked after’ them. Hillingdon then was held to have a duty to provide the claimants with a range of after-care services, including, for those with leave to remain, subsistence support to undertake further and higher education courses.³⁵

It may be noted that in June 2003, that is after the relevant decisions were made in this case but before Sullivan’s judgment, the Home Office had issued guidance indicating that authorities should presume, unless specific factors indicated otherwise, that children separated from anyone who has parental responsibility for them should be accommodated under section 20. As Sullivan J observed in the case, Hillingdon’s practice effectively reversed this presumption in so far as it assumed that children over 16 should be assisted

³³ Crawley, 2006, p 22.

³⁴ Hillingdon, because of its proximity to Heathrow, is responsible for large numbers of UASCs, in February 2003 it assisted 620 of UASC’s or 13% of the total number of 4.762 in London at the time: Sullivan J at para [3].

under section 17. Sullivan J said that Hillingdon ‘will clearly have to reconsider its present practice in the light of the light of the Guidance and ...this judgment’.³⁶ In effect Sullivan J’s judgment indicated that this aspect of the Guidance had to be applied by local authorities. This was important because Hillingdon was not alone in using section 17 in this way.³⁷

4.1.3: The impact

From the perspective of this group of claimants the judgment was clearly an important step in securing access to a wider range of services. From the perspective of service providers the issues raised by the judgment were inevitably more complex. In operational terms, as several of our interviewees commented, the judgment provided clarity: ‘Certainly the attitudes expressed to me from the people who were consulting me – they didn’t see it as a big problem – they saw it as: “Right we’re clear about that.” Again, it’s clarity we know what our responsibilities are, we know how we’re supposed to deal with these things...’ (R10—Children Services—Unitary Authority).

Within this authority at least, the key operational aspect of the judgment was that social services retained responsibility for making assessments:

... the judgment was not that any asylum seeker should be looked after by Section 20 inappropriately because if we feel it’s inappropriate then we don’t accommodate them or we don’t continue to accommodate them because the judgment is that it is actually an assessment. Without an assessment and a proper assessment you cannot judge. The default position is their need ...if there is a care component then quite clearly you would agree they need Section 20. If there’s not a need for a care component, quite clearly they do not need to be Section 20.

Another interviewee who works with children in a London Borough, said that this decision stands out as ‘...one that dictates the way that we would deal with an unaccompanied minor’ (R2—Children’s Services—London Borough). At a broader level the most significant

³⁵ Since 2004/5 The Department for Education and Skills (now the Department for Children, Schools and Families) has contributed to the costs of care leavers arising from the *Hillingdon* judgment, where authorities have the equivalent of 44 eligible claimants.

³⁶ Sullivan J [75]

³⁷ Crawley, 2006, comments that: ‘despite this guidance many local authorities continued to provide assistance to separated children seeking asylum under section 17’ (p 23).

implications of the judgment were financial, and the financial implications may well have additional unforeseen consequences.³⁸

Certainly, it has been reported that ‘Some Councils are still not always adhering to legislation and guidance as clarified by the Hillingdon judgment’.³⁹ Research by the Refugee Council and Save the Children also show implementation of the judgment to have been uneven.⁴⁰ Most local authorities seem to have promptly complied with the obligation to ‘file’ UASCs as section 20 cases, instead of section 17. However, at the time of that research some authorities were still routinely using section 17, although most of these indicated that they planned to shift towards section 20 in the near future. A problem, of course, is that ‘transferring support from section 17 to Section 20 support does not automatically mean that standards of care have risen’.⁴¹ The nominal change to section 20 may introduce issues of partial fulfilment under section 20, in areas that have become mandatory through the transfer. Many local authorities, for instance, have failed to appoint a personal adviser to young asylum-seekers, despite this being an entitlement under section 20. Similar shortcomings exist in relation to after-care services, with there being serious doubts concerning, for example, about the quality of the accommodation provided. In their second report, the Chief Inspectors said that ‘There is also evidence that some social services are placing looked after unaccompanied asylum – seeking children in other council areas without notification. As with all looked after children placed out of area, this puts them at risk of poor support and safeguarding.’⁴² However, the practice of Hillingdon was picked out by the Inspectors as providing examples of good practice, including its dedicated residential unit for unaccompanied asylum – seeking young people.

The local authorities studied in the reports by Save the Children and the Refugee Council blamed inadequate funding from central government for the shortcomings in this particular area of service delivery. Lack of resources was held responsible specifically for the shortage

³⁸ It has been observed that one consequence of the judgment is that it has exacerbated the tendency of managers in social service departments to regard themselves as ‘defenders of the local purse’: Crawley, 2006, p79.

³⁹ Safeguarding Children: The Second Joint Chief Inspectors’ Report on Arrangements to Safeguard Children, Commission for Social Care Inspection, (2005), p 78.

⁴⁰ Ringing the changes: The Impact of guidance on the use of Sections 17 and 20 of the Children Act 1989 to support unaccompanied asylum-seeking children. Refugee Council, 2005; Free, Elli. Local Authority Support to Unaccompanied Asylum-Seeking Young People: Changes since the Hillingdon Judgement (2003). Save the Children, 2005.

⁴¹ Free, 2005, cited above, p 16.

⁴² Second report of the Chief Inspectors, cited above, p78.

of personal advisers (for looked after children), social workers (for care-leavers), poor housing and education support.⁴³ More broadly, insufficient funding was also seen to affect the possibility that care-leavers would be transferred to mainstream leaving care teams. According to the authorities participating in our research, an important reason why local authorities cannot meet their legal obligations regarding UASCs is a growing gap between the obligations imposed on local authorities and the size (and management) of the grants provided by the Home Office to pay for these services. One of our NGO interviewees told us that even when authorities wanted to comply with the judgment ‘the problem was their funding because funding for that kind of people services comes from the Home Office so it’s sort of beyond the power of the local authority to implement the judgment’ (R4—Voluntary Organisation).

But lack of resources is not the only factor that contributes to the uneven implementation of the Hillingdon decision. Other factors include: the lack of staff capacity; staff attitudes; lack of senior management and local councillor support (manifested in the related lack of local funding); and, despite the greater clarity provided, there was nonetheless still some confusion about the precise legal obligations following Hillingdon. For instance, the legal situation of the so-called ‘end of line cases’ remained unclear with authorities being confused as to whether or not the decision forced them to offer leaving care support on a retrospective basis.⁴⁴

There is one further consequence of the decision that needs to be mentioned. One of the questions we are asking is whether judicial review decisions help authorities meet their performance targets. In this context Hillingdon appears to have had mixed results. In relation to the target requirement to reduce the number of looked after children, full compliance with the decision has posed some difficulties in so far as it created a group of new looked after children. On the other hand, as one of our interviewees commented it has ‘helped authorities meet targets in the area of the educational achievements of UASCs’. (R11—Children’s Services—County Council).

⁴³ Free, 2005 cited above pp 16 and 25.

⁴⁴ Reproducing the words of a local government official who participated in the investigation by Save The Children: ‘... The solicitors attack us because they don’t see us as being helpful to their clients. We feel we are trying to comply with the law but we are not quite sure what the law is’ (p 26). In addition, inspired by the rationale used to justify the decision, a number of local authorities seem to be harbouring plans to move young asylum-seekers, when they turn 16, from section 17 support directly into leaving care support (thus skipping looked-after services).

In the light of the various obstacles confronting authorities, the following comment gives an interesting insight into what might provide an incentive to authorities to do their utmost to implement the decision in the face of the obstacles that have been referred to: ‘in the main they’re 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’ (R6—Legal—County Council).

4.1.4: Concluding Comments: Hillingdon and the quality of services

The case graphically illustrates the various complex influences that judicial review may have on the quality of services. As well as providing clarity in relation to a very difficult area of work, the decision had a clear positive impact in relation to the claimants’ access to section 20 services. These claimants clearly benefited from the decision. Whether others in the same position as the claimants but in different areas of the country also benefited is less clear. As our discussion indicates, implementation of the judgment has varied across authorities and its practical effect both on access and on the actual quality of services provided has been patchy. In this context timing is an important consideration. This decision was not anticipated and authorities had to find ways of responding to the judgment without prior planning. Many authorities were taken by surprise and inevitably it took time to digest its implications and to work out a response. While its financial implications were very significant for some authorities, other factors, such as the ability to provide appropriate levels of care were also important.

In this context, the decision is said to have led to, or encouraged, other changes in social service departments. For instance, it is said that following the decision social workers have considered themselves as budget holders rather than service providers. It is not for us to determine whether and how changes of this sort might be affecting quality, but it is interesting to see connections being made by those more expert in the field between the judgment and such developments.

We have questioned the extent to which judicial review is capable of affecting local authority performance as measured by the government’s performance indicators and have seen that at

least one of our interviewees considered *Hillingdon* to have had both negative and positive influences here.

4.2 *Judicial review and the quality of process of assessment: Age assessment: R (on the application of B) v London Borough of Merton*

4.2.1 Background

The second of our key cases also emerged from the situation of young asylum seekers seeking the help of local authorities. Like *Hillingdon* it also broadly concerned access to services and the nature of the duties owed by authorities to these claimants. However, here the court was called upon to determine specific questions relating to the way authorities should decide the age of claimants where this is in dispute. For our purposes, then, this case is primarily concerned with a key operational aspect of service delivery, albeit it one that is vitally important in determining the level of services to be provided. The decision focused on the procedures to be adopted by authorities when making a decision that although ‘difficult’ is not ‘complex’.⁴⁵ This is the type of issue that judges are well qualified to determine and they should be well placed to make a real contribution in terms of the quality of the decision-making process.

4.2.2: The case

The claimant was an asylum seeker with no means of support in this country. He claimed to be 17 years old. As a minor he would not be the responsibility of the Secretary of State under the provisions of the Nationality, Immigration and Asylum Act 2002. Instead, if in need the local authority in whose area he was in would have duties under Part III of the Children Act 1989, including, under section 20, a duty to provide accommodation. When he initially applied for asylum the National Asylum Support Service (NASS) decided that he was not a minor and that he should be treated as an adult. They also refused him support on the grounds that he had not made his claim as soon as reasonably practicable after his arrival in this country.

Following a reference by the Refugee Council he sought assistance from Merton LBC. Here he was interviewed by a social worker, with the help of translator who was in phone

⁴⁵ Stanley Burnton J [36].

contact.⁴⁶ The social worker agreed with the Home Office that he was not a child. In her witness statement she stated: '(B) has the physical appearance of a person older than 17. He does not have a youthful appearance and in my view is at least 18-20 years old. Throughout the interview (B) was very mature and confident. I am of the view that (B's) level of confidence is unusual for an unaccompanied minor'.

The claimant sought judicial review of this decision claiming i) that the defendant had made inadequate enquiries and ought to have arranged for a medical examination and not relied on appearance alone; ii) that the procedures were unfair in that the claimant had insufficient chance to respond; and iii) that the authority had not made its own decision, but had adopted the decision of the Home Office. Merton argued that its assessment process was rational and adequate and that it had made a reasonable decision on a matter of fact. The judge upheld the challenge on the grounds that the assessment had been unfairly conducted in a number of respects.

Interestingly, both parties had requested the court to give guidance as the requirements of a lawful assessment given that there was no statutory procedure or guidance setting out how local authorities should conduct an assessment in cases of this type. In response to this Stanley Burnton J noted that making a precise assessment of age may be extremely difficult, particularly when the young person concerned is of 'an ethnicity, culture, education, and background that are foreign, and unfamiliar, to the decision-maker.'⁴⁷ He went on to provide the following general guidance:

[36] The assessment of age in borderline cases is a difficult matter, but it is not complex. It is not an issue which requires anything approaching a trial, and judicialisation of the process is in my judgment to be avoided. It is a matter which may be determined informally, provided safeguards of minimum standards of inquiry and of fairness are adhered to.

[37] [...] except in clear cases, the decision maker cannot determine age solely on the basis of the appearance of the applicant. In general, the decision maker must seek to elicit the general background of the applicant, including his family circumstances and history, his educational background, and his activities during the previous few years.

⁴⁶ The duration of the interview was disputed: the council said it lasted for 45 minutes but the claimant said that it took between 25-30 minutes.

Ethnic and cultural information may also be important. If there is reason to doubt the applicant's statement as to his age, the decision maker will have to make an assessment of his credibility, and he will have to ask questions designed to test his credibility.

[38] [...] there is in the present context no legislative provision placing an onus of proof on the applicant. The local authority must make its assessment on the material available to and obtained by it. There should be no predisposition [...] to assume that an applicant is an adult, or conversely that he is a child. Of course, if an applicant has previously stated that he was over 18, the decision maker will take that previous statement into account, and in the absence of an acceptable explanation it may, when considered with the other material available, be decisive. Similarly, the appearance and demeanour of the applicant may justify a provisional view that he is indeed a child or an adult. In an obvious case, the appearance of the applicant alone will require him to be accepted as a child; or, conversely, justify his being determined to be an adult, in the absence of compelling evidence to the contrary.

[39] However, the social services department of a local authority cannot simply adopt a decision made by the Home Office. It must itself decide whether an applicant is a child in need [...] A local authority may take into account information obtained by the Home Office; but it must make its own decision [...]

He also said that because decisions on age may have drastic consequences claimants are entitled to know why an unfavourable assessment has been made. These reasons, however, need not be 'long or elaborate'. In the present case it would have been sufficient to have explained that the decision was based 'on the appearance and behaviour (or demeanour) of the claimant'⁴⁸ and on various factors that led the social worker to doubt the credibility of the claimant. In this case inadequate reasons had been given. He considered it unnecessary to obtain a medical report or to give support for a period of days so as to allow an opportunity to observe the claimant.⁴⁹ Where an interpreter is used, he said that the interpreter should be present at the interview, but that there was no need for a verbatim note of the interview, although this might assist a court.⁵⁰ In this case he was not satisfied that the claimant had been given sufficient opportunity to address concerns about his credibility. He was

⁴⁷ Stanley Burnton J [24].

⁴⁸ Judgment [48].

⁴⁹ Judgment [51].

⁵⁰ Judgment [54].

particularly unhappy that there may have been misunderstandings in part caused by the use of the telephone to involve the interpreter.⁵¹

Here then, at the request of the parties, Stanley Burnton J seeks to provide guidance that is sensitive to the difficult issues and to the realities confronting decision-makers and which is designed to inject key elements of procedural fairness into the assessment process. In quality terms it illustrates precisely the sort of contribution that might be expected of courts. But to what extent has the decision contributed to an improvement in the quality of decision-making in this context? Are local authorities making assessments in line with principles laid down in *Merton* and are things improving on the ground?

4.2.3: Impact

Before considering these matters we may note that recent research shows that where the age of asylum seekers is disputed obtaining a social services assessment ‘can be a significant problem’.⁵² Crawley’s study has shown that although age disputed applicants are supposed to be referred to a local authority for an age assessment this does not always happen, sometimes because of the particular circumstances or as a result of failures in the referral process. Even when age is disputed and the asylum seeker is in touch with a local authority, the approach of local authorities varies. Many authorities, it appears, ‘do not have the resources to routinely undertake formal assessments of age’.⁵³ In some cases, despite *Merton*, they may rely on an earlier Home Office assessment. Other local authorities, she says, will only make an assessment when pressurized to do so by a legal representative. Crawley also points to evidence that some local authorities simply accept the child’s age on the basis of their appearance and then provide the services.

When assessments are carried out, are the procedures used ‘*Merton* compliant’? As with *Hillingdon*, responses to *Merton* have been patchy. There appears to be no single uniform process for assessing age and authorities tend to adopt their own approach without much regard to experience elsewhere. Our research has found that some inner London Boroughs have yet to draft precise guidelines to guide the work of front-line staff when making age assessments. Crawley says that the *Merton* judgment has had both positive and negative

⁵¹ Judgment [52].

⁵² Heaven Crawley, *When is a child not a child?* Immigration Law Practitioners’ Association, May 2007, p 67.

implications. While it called for decision-makers to take account of a range of factors beyond physical appearance, she says that the judgment ‘has encouraged some local authorities to focus disproportionately on the credibility of the asylum seeker’s account’.⁵⁴ At least one of our interviewees with direct experience, by contrast, considered that physical appearance carries too much weight.

While *Merton* and subsequent cases have gone some way to guide social workers these judicial statements only provide guidance on matters of general approach. It would not be surprising to find that those having to deal with particular cases want more specific assistance. For instance Stanley Burnton asks local authorities to elicit ‘the general background of the applicant including his family circumstances and history, his educational background, his activities during the previous few years’.⁵⁵ How precisely are they to do this? What type of further enquiry is necessary, what evidence should they require, and how is this to be verified and assessed? Several of our interviewees acknowledged that *Merton* went a long way to improve the general framework for assessment, but they remained concerned about the continuing need for more particular assistance. This, of course, is not to criticise the decision but rather to point to the inherent limitations of judgments in guiding front line operations. Even in relation to matters in which judges have a very high level of expertise, here the requirements of procedural fairness, High Court judges, like legislatures, can only provide procedural frameworks that must be developed by those closer to the ground.

Lack of resources also militates against the influence of the judgment.⁵⁶ For the authorities with a high number of applications for assessment, the provision of the necessary staff (whose duties extend beyond interviewing to include a significant amount of paper work and also co-ordination work with the Home Office) is an obvious burden. As well as delays, lack of resources also leads to deficiencies in the training of those responsible for assessments and authorities that have a smaller number of cases may have disproportionate burdens because

⁵³ Crawley, 2007, cited above, pp70-71.

⁵⁴ Crawley, 2007, cited above, p 99.

⁵⁵ Judgement para [37].

⁵⁶ Crawley,2007, cited above, p 71

they lack infrastructural support.⁵⁷ Resources, however, affect the implementation of the *Merton* decision in a third, and perhaps more important way.

As mentioned above, the outcome of the age assessment process has very important consequences in terms of service provision. When an applicant is declared to be a minor by a local social service department, he or she becomes the responsibility of that local authority. This poses a serious conflict of interests for authorities: on the one hand, most authorities care for the rights and interests of children; on the other hand, they have performance targets to meet, and limited budgets. Crawley, for instance, points to evidence that in some situations service managers put pressure on officers to classify applicants as adults in order to avoid the authority having to take responsibility for their needs.⁵⁸ Conversely, however, our interviewees also noted the alternative situation that authorities may accept that a person is a minor to eliminate the risk of having to expend resources defending judicial review proceedings.

4.2.4: Concluding comments: *Merton* and quality

Crawley finds that despite pockets of good practice ‘the quality of the age assessment process undertaken by social workers is often poor’.⁵⁹ Her view is that ‘legal remedies do not necessarily deliver outcomes’ that are better for claimants and that whilst judicial review enables challenges to be made in individual cases ‘there is no evidence that ... [this is]...leading to a better process for assessing age’.⁶⁰ Her argument is that a thorough reform of the procedures is needed so that claimants have more opportunities to respond to local authority assessments so that problems can be resolved without resort to judicial review. The use of judicial review in cases of this sort is a sign that a quicker and more accessible means of resolving disputes is needed. Something is going wrong if High Court judges are needed to sort out operational procedures, albeit in difficult situations of this sort. Indeed, as we have suggested, even where judges are well qualified to help their contribution is likely to be limited to matters of general approach. In *Merton* the judge was in effect talking directly to front line social workers and trying to assist them with decisions that are inevitably difficult and important. If judicial guidance is to be effective it must be translated into more

⁵⁷ Crawley, 2007, cited above, p 77.

⁵⁸ Crawley, 2007, cited above, p 78.

⁵⁹ Crawley, 2007, cited above, p 112.

⁶⁰ Crawley, 2007, cited above, p 129

precise procedural guidance and supported by training and other resources. Here the evidence is that while some authorities have done precisely this, reactions have been very patchy, even amongst authorities where there is a need to undertake age assessments on a regular basis. Having said this, *Merton* highlights the distinctive way in which judicial review underscores values of procedural fairness and their particular importance where public bodies are obliged to make difficult decisions that have ‘drastic’ implications. This in itself is an important contribution to the quality agenda.

5. Understanding local authority responses to judicial review

In this section we explore how decisions are or are not translated into policy and practice. Judicial review generates opportunities for change. Whether judges are seeking to clarify the law, determining matters of process, or clarifying general principles or norms to be adopted, their judgments open a window of opportunity that can result in change, and, perhaps, enhance the quality of local services. But whether or not these opportunities are identified, and seized upon, will depend on a number of factors. First there are factors internal to the decision, which have been indicated in previous discussion. We rehearse these in the first part of this section. Then there are the factors exogenous to the decision that will mean that the same decision is unevenly implemented across authorities. These factors may be divided into those which affect the *speed*, and those which affect the *comprehensiveness*, of implementation. We conclude by reflecting on the implications for full or limited implementation of judicial review decisions for the quality agenda in local authorities.

5.1 Nature of decisions and implementation

Several commentators have explored the ways in which the various legal principles developed by the judges might work to influence future conduct.⁶¹ The overall conclusion is that:

...different forms of legal principle ...[may] ... have different implications for decision makers. The implications extend from the narrowly legal, as in cases turning on precise statutory wording, to matters impinging upon broader administrative

⁶¹ D. Feldman, discussed by Richardson & Sunkin, cited above.

practice and culture, typified by judicially imposed obligations to respond to legitimate expectations or to provide reasons for decisions. Such obligations might reach deep into the heart of administrative systems.⁶²

Decisions of the type considered in the previous section will hold different resourcing implications for local authorities and will impact on different levels of the organisation. The decisions that are likely to have the greatest general impact on authorities are those such as *Behre* that tell an authority that services must be extended to a new group or class of people. Where such decisions carry a heavy financial cost the impacts will be felt throughout the authority and across the sector. Here it is the resource aspect of the case that is likely to be the greatest obstacle to implementation. As one respondent commented: ‘judicial review decisions are fine and we often love what the judges say: but decisions do not come with the necessary resources (R11—Children’s Services—County Council).

The impact of decisions that are essentially concerned with operational matters inevitably will be more specifically focussed on the service programmes involved, although the clarifications and guidance may extend across the sector. For the most part these judgments provide clarity and their principal effects will be to encourage authorities to review their systems. They will feel their effect most strongly among middle-management and front line decision-makers.

Broadly speaking clarity is welcomed as it enables criteria to be put in place, rules to be followed, and decisions, especially if unfavourable to the client, to be more easily justified. In contested areas, clarity may also reduce the threat of judicial review. Reflecting on the consequences of a judicial judgment that clarified the criteria for vulnerability, a respondent commented that: ‘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 the needs here.” And the judicial review never gets off the ground’ (R6—Legal—County Council). Nevertheless, as with *Merton*, original clarification may require further elucidation and reinterpretation as new situations arise over time.

⁶² Richardson & Sunkin, cited above.

Cases concerned with the way authorities approach decisions involving particular claimants, especially in relation to identifying and meeting need are most likely to directly impact upon front line service delivery. While they may have resource implications the most challenging aspects generated by these decisions will have to do with changing routine practice and with enabling decision-takers to meet new requirements, in other words with matters such as providing suitable training, guidance, and, most importantly perhaps, the space and time to adopt the type of rigorous approaches expected by judges.

5.2: Local authority context and implementation

If decisions hold different implications for implementation, they are also likely to trigger a number of reactions depending on the attitude and circumstances of authorities ranging from full compliance, to partial compliance, through to non-compliance. In addition, they may be implemented at different speeds, although delay in implementation may be caused by factors other than resistance, and speedy implementation does not necessarily equate with comprehensive implementation.

These two dimensions, then, of comprehensiveness and timing can characterise: (a) the pattern of implementation of a given decision within an authority; (b) the implementation of the decision across authorities; and, (c) the general pattern of implementation of judgments within an authority. Here we briefly consider the aspects of local authorities that will tend towards slow rather than swift implementation and to partial rather than comprehensive implementation, although in doing so we note that these dimensions will also be influenced by the characteristics of the particular judgment.

The factors that we have identified from our study as being critical to the speed and comprehensiveness of implementation fall into four types: legal competence and conscientiousness; organisational capacity; organisational culture, and environment or context. Legal competence and conscientiousness refers to the extent to which an authority is aware of the judgment and capable of understanding the judgment and its implications and able to determine an appropriate response.⁶³ Legal conscientiousness also implies a respect for the law. Higher levels of competence and conscientious will tend towards more comprehensive implementation. They will not necessarily have an impact on speed if delay is

⁶³ See more generally, Simon Halliday, *Judicial Review and Compliance with Administrative Law*, (Hart Publishing, 2004), esp pp 53-4, and 68-9.

caused by seeking further clarification. By organisational capacity, we refer to those aspects of an authority which tend towards effective internal functioning: good communications systems, transparent and effective management structures, effective procedures for training and retention of staff and so on. We also include here a general notion of resources.

Overall, despite our comments on the resource implications of judgments, we do not consider financial resources as being a critical factor in determining whether and how authorities implement decisions. Many non-eligible claimants for services are potentially 'worthy causes', and are acknowledged as such and yet the authority cannot and does not provide for them. The opening up of new avenues of 'worthiness' or the closing down of others, may certainly mean a transfer of resources between areas that is difficult to manage in the short-term, but it is hard to consider either an optimum level of services where no aspect of provision felt the pinch or, within the large budgets handled by local authorities, a change in eligibility that was fundamentally unsustainable by the authority. In other words, judgments may force authorities to make hard decisions but it is extremely unlikely that an absence of resources will inevitably prevent an authority from implementing a judgment.

Higher levels of organisational capacity would be expected to affect whether a decision was partially or comprehensively implemented, and, to a lesser extent the speed with which that was achieved.

Organisational culture refers to those aspects of an authority which are affected by the political complexion of the authority and by the particular perception the authority holds of itself and its priorities, which are disseminated throughout the organisation. Respondents in our interviews clearly had particular perceptions about the culture of their and other authorities. One commented on a new appointee from a different authority having to lose her 'hard as nails' approach associated with the other authority in order to then be an effective member of the team. Other respondents were keen to stress either the competence, the communication culture of their authorities or its responsiveness to the user-led agenda. A culture which is resistant to particular types of claimant, or to being instructed by the courts, or which has a combative approach to cases, may tend to delay implementation altogether, as far as is possible, either through non-compliance or through appeal. We have discussed the importance of judicial review in terms of its impact on an authority's reputation. But sensitivity to reputation and adverse media coverage may also work against implementation,

or lead to attempts to control the timing of it, when issues become highly politicised. Such resistance may be represented in terms of lack of resources, but that does not necessarily mean that resourcing is the fundamental issue.

Finally, the local context of the authority can be critical to the speed, in particular, of implementation. Specifically, whether the population of the authority includes those to whom the judgment applies in any number (for example UASCs), may well impact on the extent to which procedures are put in place to respond to the decision. Another important factor that has come up already in the discussion is the presence or absence of solicitors who make extensive use of judicial review. Such solicitors are acknowledged by local authorities to perform a kind of monitoring role – and in that context swift implementation will obviate follow-up challenges and reduce the associated costs. They may also make full rather than partial implementation more likely, but it is the impact on speed which has been emphasised in our research.

Thus we have four factors that influence the two dimensions of implementation, with legal competence and organisational capacity being particularly (though not exclusively) pertinent to the comprehensiveness of implementation and organisational culture and environment impacting to a greater extent on speed, though not without their effects on comprehensiveness.

In order to render this characterisation more definitive and less speculative, a further stage in this analysis would be to attempt to map decisions and authorities according to their characteristics. In this way we could explore the extent to which these characteristics can help us predict the ways in which key decisions are or are not implemented. However, that is beyond the information we currently have available to us, and could only really be achieved by a comprehensive survey of local authorities and of decisions.

In relation to our understandings of quality, all four factors influencing implementation could also be taken as measures of quality *of the authority*, and thus to have implications for quality of services. Moreover, the ability – or not – of an organisation to respond to, and implement, a judicial decision could itself be an indicator of quality. The position of an authority on both the speed and the comprehensiveness axes, could then tell us something about the functional quality of an authority. And the extent to which any judgment or level of challenge shifts it

further up one or both of the axes may thus indicate a positive effect of judicial review on services. At a less abstracted level, if an authority is able to understand a judgment, to transmit its implications throughout the authority, has a culture that is responsive to the demands of judicial review for rationality and reasonableness, then it is likely to have good grounds for claiming to be able to deliver quality services. However, the external factors of the demands made on it in relation to particular judgments – and thus the need for reallocation of resources, as well as the role of particular solicitors' firms in bringing cases or monitoring responses, can say less about the quality of the authority.

6. Conclusions and discussion points

In this largely exploratory paper our purpose has been to raise issues and indicate tentative conclusions as we continue our analysis and refine our thinking. Perhaps our most general observation, and one that will be uncontroversial, is that judicial review is a significant aspect of an environment that over the past two decades has subjected local authorities to an increasing range of external regulatory and controlling mechanisms. Against this background, we observe that judicial review is distinctive in various ways. Our paper has identified several potentially distinctive features of judicial review from a quality perspective, including its focus on individual problems, its ability to subject decisions to close scrutiny and its ability to provide authoritative statements as to local authorities' duties.

If judicial review is distinctive it seems plausible to argue that its contribution to the various dimensions of quality is also likely to be distinctive. It seems to us that several important issues flow from this. One is the extent to which judicial review works to add to and complement other drivers of quality. In this paper we have, for instance, argued that judicial review makes explicit core values such as those associated with fairness and legal rationality that are not explicitly associated with other influences on quality. These, we argue, if inculcated into authority practice, contribute positively to the quality of the procedures within local authorities, although not necessarily to the quality of outcomes.

However, our research indicates that from the perspective of local authorities such inculcation is unlikely to be cost free. Investment in new processes, new training, and so on may detract from achievement of other goals and have unforeseeable and potentially negative

effects, such as the development of a defensive or gatekeeper approach to services. In this sense while improving some aspects of quality, judicial review may directly or indirectly undermine the ability of local authorities to deliver high quality services. If this is correct we would be interested in further exploring the consequential tensions this generates for authorities and the ways in which these are balanced.

In this paper our analysis has been focused around the influence on quality of threats of judicial review, challenges and judicial decisions.

6.1 Threats and challenges

In the paper we posed four questions in relation to challenges: (1) Is there any discernable relationship between levels of challenge and quality of services? (2) Do challenges have anything to teach authorities about the quality of the specific services being delivered? (3) Do they encourage measurable changes in procedures, decisions or organization? (4) Can authorities learn generally from the threats or challenges that are brought against their own or other authorities?

The first of these questions was considered in another paper where we have shown that there appears to be some correlation between volumes of litigation and the performance of authorities in relation to the official indicators of quality. In relation to the second question we have suggested that challenges are unlikely to tell local authorities, particularly poorly performing ones, much about the overall quality of their services that is not already evident. Challenges do, however, draw attention to particular shortcomings and areas in which flaws are likely to occur. In terms of the third question, then, challenge can result in more systematic ways of dealing with areas of weakness or vulnerability to challenge. They can also remind authorities of duties, which might not be implemented – or might be implemented more slowly – without the threat of judicial review. To this extent, they can move particular issues up the ‘list’ of priorities of an authority.

The fourth question was concerned with the ability of authorities to learn from challenges. In the paper we drew attention to the shortcomings in the information kept by authorities in relation to threats and challenges against them and to the probability that they are unlikely to know much if anything about the experience of other authorities. We argue, then, that

authorities lack information on the incidence of challenge against them and against other authorities; this, then, hinders their ability to usefully learn about actual or potential deficiencies in service delivery

We also argued that the most heavily challenged authorities are for a variety of reasons, including those to do with their capacity and culture, often poorly placed to react proactively to threats and challenges in a way that uses these as a resource upon which to build future changes. These authorities are likely to find it most difficult to ‘manage’ challenge – either by failing to resolve cases early or by lacking generally understood mechanisms for ensuring that appropriate personnel deal with challenges, so that front-line workers and lawyers work together especially in relation to areas of vulnerability or stress. They may also have difficulty ensuring appropriate or sensitive responses to claimants.

We identified then a number of ways that challenge may increase access or make services more responsive (both important elements of quality). There also appeared to be some relationship between relative levels of challenge and ratings on performance indicator style measure. Nevertheless, overall the effect of threat and challenge on quality of services according to any given conception was not found to be substantial.

6.2. Judgments

There is evident greater incentive to invest resources in responding to judgments than in responding to threats or challenges. The role of decisions as both a marker of quality and a driver to improvement, was found to be much greater, particularly for those authorities they related to, but also for other authorities.

Nonetheless we have noted that decisions are implemented with different degrees of ‘fullness’ and we could not identify a generalised effect of judicial review judgments.

The extent to which there was an impact and the particular dimension(s) of quality on which that impact was exerted tended to be specific to the judgment. In this paper we have considered two types of judgment, one directed at the scope of service delivery and the other that was more directly concerned with the manner of service delivery. In both cases the judgments in effect instructed authorities to change. In relation to the first, the change required providing a new range of services to client groups and in the second the change

required adopting new approaches when making decisions. Potentially both these decisions had direct positive implications for quality: in relation to access and in relation to the process of service delivery. Both decisions, however, also had potentially negative implications for aspects of quality. The most obvious being consequential on the shifts they required in the allocation of resources. While the claimants and those within their class stood to gain, other service users may have lost. One of interviewees, for instance, suggested that while *Hillingdon* increased the numbers within the class of 'looked after children' it did not increase the budget and may have diminished the overall quality of service for this now larger class of recipient.

One immediate question posed by this is the extent to which judicial review decisions carry weight when authorities decide how to allocate resources across sectors of service delivery and when managers allocate resources within their own section. We have discussed this as a key factor affecting judgments

In relation to both cases we saw that actual implementation of the decisions has been very patchy. For a complex variety of reasons they have not been fully implemented by many authorities, and even when they have been formally implemented research has indicated that in some cases implementation has focused on matters of form rather than on the spirit of the judgment. It is something of a truism to say that whatever their potential importance judgments will not lead to change unless they are actually put into effect. Moreover, the events following judgments set in train a range of interactions, communications, reflections, and decisions that may themselves have impacts on quality that are quite independent of the original decisions. These unintended effects, like the judgments themselves, may influence the various dimensions of quality in positive or negative ways. We saw, for instance that both *Hillingdon* and *Merton* have been said to have indirectly encouraged a budget holding mentality amongst social work managers: a change that at least some observers view as being negative in so far as it raises the possibility that it obliges social workers to have conflicting interests.

These two decisions also highlight the way that different judgments may generate messages for different levels of local authority organisation. Whereas *Hillingdon* 'spoke' to budget holders and to a lesser extent front line decision makers *Merton* was principally directed at those responsible for deciding age issues. Both judgments required new systems, new

guidance and more training; but *Merton* required social workers to operationalise new approaches when making inherently difficult decisions. Here it is clear that approaches can only change with adequate training and the availability of very practical matters such as the availability of adequate time and support for the decision-maker. A question for future consideration is the extent to which it is accurate and useful to think in terms of the audience within local authorities to whom judgments ‘speak’. Judgments may send different messages to different groups within the organisation, something that might shape that links between judicial review and quality.

Certainly implementation was found to vary to a large degree across authorities and so we attempted to characterise the conditions that would affect both speed and comprehensiveness of implementation. Even under perfect conditions for implementation, the relationship between judicial review decisions and quality improvement was not clear cut, partly because the full implications of the most far reaching judgments will only be felt over time. Nevertheless, we did identify that in the short term judicial review could draw attention to relatively neglected areas of service provision and smooth access by clarifying procedures and processes. Moreover, while experience of a negative (or indeed, on occasion, a positive) decision may make an authority more ‘risk averse’, it may also lead to greater consistency within areas of delivery. Consistency was endorsed throughout our interviews as a critical element of quality through its associations with ‘fairness’ from both the client and the authority perspective. We argue that this too underscores judicial review’s potentially distinctive contribution to quality.