

Impact case study (REF3)

Institution: University of Essex		
Unit of Assessment: 18 – Law		
Title of case study: The use of empirical research in the reform of judicial review in the UK		
Period when the underpinning research was undertaken: 2005 to 2015		
Details of staff conducting the underpinning research from the submitting unit:		
Name(s):	Role(s) (e.g. job title):	Period(s) employed by submitting HEI:
Maurice Sunkin QC	Professor of Public Law and Socio Legal Studies	From 1988 to present
Period when the claimed impact occurred: 1 August 2013 to 31 December 2020		
Is this case study continued from a case study submitted in 2014? N		
1. Summary of the impact		
<p>Sunkin’s research, including that conducted with the Public Law Project (PLP), has established the most comprehensive independent evidence base on the use, operation and effects of judicial review (JR) in the UK. This work has led to changes in the law and the legal process, including the introduction of a permission stage in Scottish JR proceedings (2014) and reforms to the time limit for seeking JR in Northern Ireland; influenced the Government regarding JR reform (2014-16); improved the UK Parliament’s ability to scrutinize government reforms (2014, 2020); assisted civil society groups and professional associations when responding to reform proposals; and informed parties and judges in legal proceedings (2015).</p>		
2. Underpinning research		
<p>Judicial review is the principal means for obtaining legal redress against public bodies and holding government legally accountable and is therefore central to the enforcement of the rule of law in the UK. The research, funded by the ESRC and the Nuffield Foundation [G1, G2, G3], has established the most comprehensive independent evidence base in the UK regarding: how, by whom and why JR is used; the operation of the JR process; and the effects of JR on claimants and public bodies.</p> <p>Having sound empirically based evidence on these matters is vital for an accurate understanding of how JR functions in our system. This has been particularly important since 2012 when the UK government embarked on a controversial programme of reforms designed to limit the use of JR. The reform programme is based on government concerns that: use of JR has ‘grown massively’; the system is widely abused; JR impedes good administration; and that judges too readily interfere with government decisions. Given that limiting JR may reduce government accountability and threaten the rule of law, Sunkin’s research has provided important independent empirical data and analysis enabling objective assessment of whether reforms are justified and proportionate.</p> <p>Contrary to government claims regarding “massive growth”, the research, confirmed by the official statistics, shows that, beyond immigration, there has been no significant growth in JR and that the number of non-immigration JRs has remained consistent at around 2,000 per year and has declined more recently. Sunkin’s research highlights that rather than growth, JR may be underused due to obstacles to access. For example, research on the geographical and demographic factors associated with the use of JR revealed very low levels of use beyond London and the South East, which was shown to be linked to difficulties accessing appropriate legal advice as well as financial barriers [R1, R2].</p> <p>Government concern that JR is widely abused by claimants with weak claims appears supported by the decline over the past two decades in the proportion of claims accepted as arguable by</p>		

judges and granted permission to proceed. But Sunkin's research provides evidence that this decline cannot be attributed to a lowering in the quality of claims [R2, R3, R4]. Also important are the use of stricter criteria to assess the arguability of claims and growth in the incidence of settlement prior to the permission stage. Since strong claims tend to be settled before the permission stage, higher proportions of weaker claims are dealt with, and rejected, at permission. Significantly, such pre-permission settlements often favour claimants, but because these outcomes are not captured in official statistics, they remain invisible and the true level of claimant success is obscured.

Government is also concerned that JR impedes good administration and tends to focus on procedural technicalities so that much litigation is not worth the effort or cost. Sunkin has led innovative quantitative and qualitative analysis questioning these concerns. This work found: i) a correlation between increases in JR against local authorities and improvements in the quality of local authority performance as measured by official general performance indicators [R5] and ii) that JR enables improvements in service quality by providing guidance and clarity and also triggering reassessment of working practices [R5]. Importantly, these findings suggest that rather than impeding good administration JR helps improve the quality of decision making. Sunkin's research also shows that public bodies often alter decisions in favour of claimants following successful JR challenges, indicating that JR drives meaningful change and is not concerned only with technicalities of process [R6].

3. References to the research (Available from the HEI on request)

R1 Calvo, K., Platt, L., Landman, T and Sunkin, M. "Mapping the use of Judicial Review to Challenge Local Authorities in England and Wales", (2007) *Public Law* 545-567. ISSN 0033-3565 (Available from the HEI on request)

R2 Bondy, V and Sunkin, M. "Accessing Judicial Review", (2008) *Public Law* 647-667. ISSN 0033-3565 (Available from the HEI on request)

R3 Bondy, V and Sunkin, M. "Settlement in Judicial Review", (2009) *Public Law* 237-259. ISSN 0033-3565 (Available from the HEI on request)

R4 Bondy, V and Sunkin, M. "The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing", (with V. Bondy) (2009) *Public Law Project* 74 pp plus i-vii ISBN: 978-1-989421-10-8.

R5 Calvo, K., Platt, L and Sunkin, M. "Judicial Review Litigation as an Incentive to Change in Local Authority Public Services in England & Wales", (2010) *Journal of Public Administration Research and Theory*, 20:i243-i260. <https://doi.org/10.1093/jopart/muq027>

R6 Bondy, V., Platt, L and Sunkin, M. "The Value and Effects of Judicial Review in England and Wales", *Public Law Project* (2015), 70 pp plus i-iv. ISBN: 978-1-898421-16-0. <https://www.nuffieldfoundation.org/wp-content/uploads/2019/11/Value-and-Effects-of-Judicial-Review.pdf>

Funding

G1 PI: Sunkin in collaboration with Public Law Project, Nuffield Foundation, *The Permission stage of the JR procedure*, £115,974, 2005 - 2007.

G2 PI: Sunkin; Co researchers: T. Landman and L. Platt, ESRC, *The Impact of JR on the quality and delivery of public services*, £131,865.45, 2006 - 2008.

G3 PI: Sunkin; Co researchers: V. Bondy and L. Platt. In collaboration with the Public Law Project Nuffield Foundation, *The Value and Effects of JR*, £223,401, 2011 - 2014.

4. Details of the impact

The quality and importance of Sunkin's "pioneering empirical research on JR" [S1] was corroborated in 2018 when Sunkin was made QC Honoris Causa in recognition of his "major contribution to the law of England and Wales". This body of work has led to changes in the law; improved Parliament's ability to scrutinize the UK Government's proposed JR reforms; assisted civil society groups, professional associations and others to respond to reform proposals; guided government decisions regarding the JR process; and informed judicial decisions.

Leading to reforms to JR procedure in Scotland and Northern Ireland: Drawing on Sunkin's research [R2] that "*suggests that [in England & Wales the pre-trial protocol and permission stage] ...works well in filtering out unmeritorious applications and in prompting early concessions where claims are well founded*", the Scottish Civil Courts Review (2009) recommended adoption of the permission requirement for JR in Scotland (Scottish Civil Courts Review (2009) Vol 2, paras 50-51). The Scottish Government accepted this recommendation in 2010. While the recommendation was made and accepted prior to this REF period, the full impact occurred in 2014 when the permission requirement was introduced into the Scottish JR procedure by S 89 of the Courts Reform (Scotland) Act 2014. Sunkin's research [R4, R6] was also relied upon by the Northern Ireland Department of Justice to support the removal of the obligation to seek JR "promptly", thereby reducing pressure on claimants and giving more time for settlement [S2]. This significant reform was introduced in January 2018 (Rules of the Court of Judicature (NI) (Amendment) 2017).

Influencing Parliament and the conclusions of the Joint Committee on Human Rights on JR reforms: In November 2012 the then Prime Minister, David Cameron, told the Confederation of British Industry that: "*[JR] is a massive growth industry in Britain today ...so many [JRs] are completely pointless...we urgently need to get a grip on this*". The Government then embarked on reforms to reduce use of JR. In April 2014 Parliament's Joint Committee on Human Rights (JCHR) investigated this reform agenda and invited Sunkin to give oral expert evidence, on whether the Government's concerns regarding JR were justified. Drawing on his extensive body of research on JR [R1-R6], Sunkin gave evidence, which profoundly influenced the work of the JCHR and the conclusions reached. In its 2014 report [S3] the JCHR commented that: "... Sunkin's evidence in particular was that: *the statistics do not justify the claim that [JR] is being abused or that it is increasing*" [para 24]: "*We therefore do not consider the Government to have demonstrated ... that [JR] has "expanded massively" ... as the Lord Chancellor claims, [or] that there are real abuses of the process taking place...*" [para 30]. More specifically in relation to abuse of JR, the JCHR noted that the government acknowledged the absence of official data on why JR claims are withdrawn prior to the permission stage. Drawing directly on Sunkin's research [R2, R3, R4] the JCHR echoed the finding that: "*in the absence of such information, statistics about the proportion of cases in which permission is granted cannot tell us anything reliable about the scale of abuse of judicial review.*" [S3 para 29]. Sunkin's research was also used in a House of Commons Library briefing to inform MPs in general about JR, thereby improving their ability to assess and debate reforms in Parliament [S4].

Strengthening the responses of civil society groups and professional bodies to Government consultations on JR: Sunkin's research has been widely relied upon to strengthen responses to government consultations on JR reform and thereby to benefit the respondents and the substance of reforms. For example when responding to the November 2013 consultation on 'Judicial Review: Proposals for further reform' The Children's Society (leading UK Children's charity) [S5a:R4,R6], The Equality and Human Rights Commission [S5b:R4,R6], JUSTICE, (UK law reform and human rights organization) [S5c:R4], and the Police Action Lawyers Group (UK organisation of lawyers representing claimants against the police) [S5d:R6] were amongst those who drew on the research. The Equality and Diversity Forum (a network of organisations which promotes and protects rights) drew upon the findings in [R6] when responding to the JCHR consultation 'Implications: Access to justice of Government's proposed legal aid reforms' in November 2013 [S6].

Research [R5] led by Sunkin assisted the Law Society of England & Wales prepare its evidence to the Independent Review of Administrative Law (the IRAL), established by the Government in July 2020 [S7a]. Other organisations drawing on this work in their evidence to the IRAL include: the Bar Council [S7b: R4, R6]; Doughty Street Chambers [S7c:R4, R6]; Hackney Community Law Centre [S7d:R4, R6] and JUSTICE [S7e:R4,R6]. The IRAL's report is awaited.

Influencing Government decisions on the costs threshold for Judicial Review: The Government consulted on proposals to deter litigation by increasing cost burdens on claimants, including requiring claimants to explain the source of their funding if their costs were likely to be above £1500. In its response to its consultation [S8a] the Government referred specifically to

Sunkin's research [R6] noting that some "questioned the evidence base for reform arguing that the Government had put forward no evidence that there was a problem in this area and that change was necessary or desirable". Further consultation on this proposal "welcomed" Sunkin's research [R6] [S8b, para 31-32]. Given the evidence the Government accepted that its "estimate of the costs of a judicial review" had been "low" [S8b para 31], and was "persuaded" that "a higher than suggested threshold" should be adopted [S8b para 35, para 73 c; Annex A paras 20, 23]. Sunkin's research was clearly a significant factor in the Government's decision to reconsider the costs threshold.

Informing judicial decisions: Sunkin's research has informed numerous court decisions in England and Wales, benefiting both claimants and courts. For example, in *Ben Hoare* (2015) claimant solicitors who challenged the legal aid regulations drew on the research [R4] to show that the legal aid eligibility criteria are too uncertain [S9]. Sunkin's research was also used by Lord Kerr in the UK Supreme Court in *Michael and others* (2015). Responding to fears that imposing tortious liability on police would have adverse operational effects, Lord Kerr notes the paucity of empirical evidence for such fears citing Sunkin's research [R5] suggesting that, contrary to having adverse operational effects, JR litigation may act as a "driver to improvements in the quality of local government services." [S10 para 185].

5. Sources to corroborate the impact

S1 Lord Chancellor's introductory speech at the ceremony held on 26 February 2018 at which QCs were formally appointed.

S2 Northern Ireland Department of Justice, Proposals to change the time limits for bringing a judicial review: consultation (2015) (paras 3.14, 3.4).

S3 *The implications for access to justice of the Government's proposals to reform judicial review*, 13th Report of Session 2013-14, HL Paper 174, HC 868, 30 April 2014 Report of the JCHR (paras 24,30,29) <https://publications.parliament.uk/pa/it201314/jtselect/jtrights/174/174.pdf>

S4 House of Commons Library Briefing Paper Number 6616 (4 June 2015), (p7): <https://researchbriefings.files.parliament.uk/documents/SN06616/SN06616.pdf>

S5 Judicial Review Further Reforms Responses:

S5a. The Children's Society Response to Judicial Review Proposals for Further Reform (November 2013) (esp paras 11 and 19) (PDF available on request)

S5b Equality and Human Rights Commission (November 2013) (f/ns 8; 12; 21;50).

<https://webarchive.nationalarchives.gov.uk/20170206170656/https://www.equalityhumanrights.com/en/legal-responses/consultation-responses>

S5c JUSTICE (November 2013) (f/n 6; pp 12-13; f/n 18; p 19; p 34) <https://justice.org.uk/wp-content/uploads/2015/01/Judicial-Review-Further-Reforms-JUSTICE-Response-FINAL-Nov-2013.pdf>

S5d Police Action Lawyers Group

<http://www.palg.org.uk/app/download/10385567/Judicial+Review+Proposals+for+further+reform%2C+PALG+consultation+response.pdf>. (pp4-5)

S6 Equality and Diversity Forum (26 November 2013) (para 2) <http://www.edf.org.uk/wp-content/uploads/2013/11/EDF-JCHR-response-FINAL.docx>.

S7 Independent Review of Administrative Law Responses:

S7a Law Society

<https://www.lawsociety.org.uk/en/campaigns/consultation-responses/independent-review-of-administrative-law-call-for-evidence-law-society-response>

S7b Bar Council (f/n 9, 10, 12, 14, 21, 40)

<https://www.barcouncil.org.uk/uploads/assets/d0bf3966-9772-4205-81c63d3bb91cc188/Bar-Council-IRAL-response.pdf>

S7c Doughty Street Chambers (f/n 9, 12)

<https://www.doughtystreet.co.uk/sites/default/files/media/document/IRAL%20-%20FINAL%20DSC%20Response%20-%20261020%20SUBMISSION.pdf>

S7d Hackney Community Law Centre (p11)

https://hcl.org.uk/downloads/5044_hcl-response-to-iral-judicial-review-consultation.pdf

S7e JUSTICE (notes 71, 81,144,146,149)

<https://justice.org.uk/wp-content/uploads/2020/10/JUSTICE-response-to-IRAL-October-2020.pdf>

S8 Judicial Review Further Reforms:

S8a. MoJ, Judicial Review – proposals for further reform: the Government response (CM 8811 Feb 2014) (paras 137-138, p38)

<https://consult.justice.gov.uk/digital-communications/judicial-review/results/judicial-review---proposals-for-further-reform-government-response.pdf>

S8b. Reform of judicial review Proposals for the provision and use of financial information Government response and Request for further views on the provision of financial information to other parties, 7 July 2016 Cm 9303) (paras 31-32, and 33d; p 14, 15, 22, 23, 35, 36)

https://consult.justice.gov.uk/digital-communications/judicial-review-request-for-further-views/supporting_documents/reformjudicialreviewconsultationresponse.pdf

S9 *R (Ben Hoare and others) v The Lord Chancellor* [2015] EWHC 523. (Note 20)

<http://www.bailii.org/ew/cases/EWHC/Admin/2015/523.html>

S10 *Michael & Ors v The Chief Constable of South Wales Police & Anor* [2015] UKSC 2 (para 185) <https://www.supremecourt.uk/cases/docs/uksc-2013-0043-judgment.pdf>