MATRIX CHAMBERS

RESPONSE TO THE INDEPENDENT REVIEW OF ADMINISTRATIVE LAW CALL FOR EVIDENCE

Introduction

1. Matrix is a barristers' chambers located in Gray's Inn, London, Geneva and Brussels. We are a group of independent and specialist lawyers who work in a wide range of areas.

2. Our expertise in public law is extensive and highly regarded. We are routinely instructed in ground-breaking and important cases. We act for individuals, businesses and public bodies in all areas of public law, including where it intersects with human rights law, commercial law, criminal law and environmental law.

3. Matrix is proud to act for a wide range of clients. Our barristers act for claimants, the Equality and Human Rights Commission, central Government, local authorities and regulatory bodies. Fourteen members are presently members of the Attorney General's panel of counsel. Eight silks are former members of the panel.

4. We have set out our response to the questions below. We have also identified ten case studies that demonstrate the importance of judicial review to the good running of Government, and to upholding and maintaining the rule of law.

Are the procedures of judicial review so intrusive or inflexible that they "*seriously impede the proper or effective discharge of central or local government functions*" (Question 1)?

5. Contrary to the apparent implication of the first question put to Government departments, we do not think the procedures of judicial review are too intrusive or inflexible. On the contrary, we do not consider that any less intrusive or more flexible approach would be compatible with effective access to the Courts or the rule of law.

6. We would like to draw the attention of the IRAL to the fact that judicial review is in most respects the ***least*** intrusive and ***most*** flexible form of judicial supervision of public conduct. In particular, judicial review is much less intrusive and more flexible than the approach adopted by the Courts in relation to regulatory challenges or in ordinary civil litigation, both as a matter of substance and in respect of practical access bearing in mind costs implications, standing, limitation and disclosure.

7. In the field of economic regulation, for example, challenges to decisions made by the Competition and Markets Authority under the Competition Act 1998 and, until recently, by Ofcom under the Communications Act 2003, have been subject to appeal and review "*on the merits*". While the Competition Appeal Tribunal has been at pains to point out that it recognises the fact that the relevant economic regulator has been appointed by

Parliament as the primary decision-maker, it is able not only to review the legality of the decisions of the economic regulators but to substitute alternative decisions of its own.

8. Likewise, challenges in the field of public procurement (under the Public Contracts Regulations 2015) are in general conducted in accordance with the standard rules of civil litigation, including in respect of disclosure, subject to special rules on standing and delay to reflect the need for rapid decision-making in this area of law.[1]

9. In ordinary civil litigation, the position differs from the procedures of judicial review in a number of key respects:

   (1) there is no preliminary permission procedure (the onus is on the defendant to apply to 'strike out' unmeritorious claims);
   (2) the limitation period is generally six years, running from the relevant breach or loss caused by unlawful conduct;
   (3) the requirements of disclosure are relatively mechanical and can be extremely burdensome to satisfy; and
   (4) the Court has a narrow margin of discretion as to the remedies to be granted to the successful party – in particular, damages for loss and damage are the standard, and non-discretionary, remedy for most unlawful acts.

10. By contrast, in judicial review, the procedure inevitably differs from ordinary civil litigation because judicial review principally concerns the correction of public wrongs (the misuse of public power) rather than private rights.[2] In particular, the procedure is more flexible, not least to enable the Courts to respond to the imperative of efficient governance. Specifically:

    (1) the onus is on the claimant to demonstrate standing to call the alleged public wrong to the Court's attention and that permission should be granted to pursue the application;
    (2) the time limits for judicial review are stringent and allow no more than three months from the date on which the grounds for challenge arose, otherwise than in

[1] A number of these issues were explored in detail in *Stagecoach East Midland Trains Ltd and Others v. Secretray of State for Transport* [2020] EWHC 1568 (TCC), recent litigation concerning rail franchising. In that case, although four challenges were brought both by way of judicial review and as civil claims, the judicial reviews were stayed and the standard civil procedural rules were applied with the approval of the Court of Appeal: [2019] EWCA Civ 2259. This placed extremely onerous obligations on the Department, going far beyond those that would have been applied by the Administrative Court in a judicial review.

[2] Although public wrongs do often invade private rights (see *R v. Somerset CC ex p Dixon* [1998] Env LR 111, *per* Sedley J).

exceptional circumstances. For judicial reviews under the Planning Acts the time limit is now only six weeks from the relevant decision;[3]

(3) disclosure of documents is a matter for the defendant rather than for direction by the Court, subject to the "*duty of candour*". While guidance as the scope of the "*duty of candour*" has varied over the years, and currently sets a relatively stringent standard of cooperation with the Administrative Court to ensure that litigation is conducted with *"the cards face upward on the table"*, it remains the case that there is no general right to disclosure of relevant documents in judicial review proceedings;[4]

(4) as a matter of substance, the Administrative Court is very careful not to substitute its own views or to adopt alternative decisions for those of the public bodies responsible for the relevant issue under UK public law, particularly on areas raising sensitive issues of public policy or specialist expertise;[5]

(5) so far as remedies are concerned, the Administrative Court has exceptionally broad and flexible powers, including in many cases the power to limit any remedy to declaratory relief (where, for example, other relief would cause detriment to good administration), and an action for damages under UK domestic law is excluded unless the conduct of the public body falls within the scope of a recognised tort;

(6) further, the Court ***must*** refuse to grant relief on an application for judicial review, and ***may not*** make an award of damages, if it appears to the Court to be highly likely that the outcome for the claimant would not have been substantially different if the conduct complained of had not occurred (section 31(2A) of the Senior Courts Act 1981); and

(7) likewise, the ability to grant injunctive relief against a public body is narrowly restricted to cases where it will not cause undue prejudice to third parties or to sound administration.

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[3] CPR 54.5(5) and see also procurement judicial reviews where the time limit is also six weeks, CPR 54.5(6).

[4] *R v. Lancashire County Council ex p. Huddleston* [1986] 2 All ER 941, cited in the Treasury Solicitor's *Guidance on Discharging the Duty of Candour and Disclosure in Judicial Review Proceedings*: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/285368/Tsol_discharging_1_.pdf

[5] For two recent examples in the Supreme Court, applying general principles of proportionality and equal treatment in a complicated factual context, see *R (Lumsdon and others) v. Legal Services Board* [2015] UKSC 41 at [40]: *"Where EU legislative or administrative institutions exercise a discretion involving political, economic or social choices, especially where a complex assessment is required, the court will usually intervene only if it considers that the measure is manifestly inappropriate"*; and *R (Rotherham Metropolitan BC) v. Secretary of State for Business, Innovation and Skills* [2015] UKSC 6: "*The importance of according proper respect to the primary decision-making function of the executive is particularly significant in relation to a high level financial decision such as that under consideration in the present case. That is because it is a decision which the executive is much better equipped to assess than the judiciary, as (i) it involves an allocation of money, a vital and relatively scarce resource, (ii) it could engage a number of different and competing political, economic and social factors, and (iii) it could result in a large number of possible outcomes, none of which would be safe from some telling criticisms or complaints.*"

11. Rather than impeding the function of Government, our experience is that judicial review (and its possibility) improves or enhances Government decision making. For example, the process of consultation, when carried out lawfully, improves decision making by ensuring that all relevant considerations are identified for the decision maker. But the process of consultation will not be effective if not carried out properly, for example, if the decision maker does not give "*conscientious consideration*"[6] to the responses received, whether welcome or not.

12. Similarly, the requirement to comply with the public sector equality duty contained in section 149 of the Equality Act 2010 requires decision makers to identify, and face up to, the effect of their decision on those with protected characteristics. If not done properly, and in accordance with the law, the quality of public decision making is likely to be diminished.

13. As well as improving the quality of decision making, judicial review ensures that the Government acts lawfully. Any restrictions on the ability of the Courts to review the legality of acts of the executive would undermine the rule of law and the separation of powers. It is for that reason that the Courts have always, and rightly, scrutinised carefully any attempts by the legislature or the executive to "*oust*" their supervisory jurisdiction. Further still, as we explain below, the costs regime applicable in judicial review proceedings is already seriously limiting to claimants. Legal aid is not always available, and is in any event subject to a stringent set of criteria. There is no equivalent of a small claims track for judicial review.

Would it be beneficial to codify the substantive principles of judicial review (Section 2—Questions 3-4)?

14. Question 3 in the Call for Evidence raises the possibility that the conduct of judicial review proceedings could be improved by the introduction of a statutory code setting out, and presumably limiting, the grounds on which judicial review of administrative action could be brought.

15. This is not a new idea. To take a relatively recent example, it was raised in 2013 in the statutory context of challenges to the decisions of Ofcom under the Communications Act 2003, when the possibility was raised that the ability to challenge such decisions might be codified as follows, by introducing the following wording as a new section 195(2A) of the Communications Act 2003:

> "*The Tribunal may allow an appeal only to the extent that it is satisfied that the decision appealed against is wrong on one or more of the following grounds-*

[6] See the principles derived from the submissions of Stephen Sedley QC, as he then was, in *R v. Brent London Borough Council, ex p. Gunning* (1985) 84 LGR 186 approved by the Supreme Court in *R (Moseley) v. London Borough of Haringey* [2014] 1 WLR 3947 *per* Lord Wilson at [25].

(a) that the decision was based on a material error of fact;
(b) that the decision was based on a material error of law;
(c) because of a material procedural irregularity;
(d) that the decision was outside the limit of what Ofcom could reasonably decide in the exercise of a discretion;
(e) that the decision was based on a judgment or a prediction which Ofcom could not reasonably make."

16. In the event, this proposal led to significant criticism and was not pursued. Instead, the Digital Economy Act 2017 ultimately made a different statutory change, introducing a new section 194A to the 2003 Act, including the following wording as section 194(2):
"*The Tribunal must decide the appeal, by reference to the grounds of appeal set out in the notice of appeal, by applying the same principles as would be applied by a court on an application for judicial review*".

17. While the terms of the proposed new section 195(2A) above, and in particular section 195(2A)(a)-(d) refer to a number of established principles that are in practice applied by the Administrative Court in judicial review proceedings, the legal profession, affected businesses and the judiciary have in general regarded such a proposed change as not only unnecessary but potentially damaging, essentially for two reasons:

(1) The introduction of a "materiality" threshold in the proposed sub-sections (a)-(c) raises the possibility that there could be legal argument at an initial stage as to whether it was satisfied, leading to unnecessary complication and delay to the preliminary leave procedure, thereby adding to rather than reducing delays and costs.
(2) More generally, the principles applicable to judicial review, developed over decades, are well understood by the Administrative Court and by claimants and defendants, as reflected in the statutory reference in the new section 194(2) of the Communications Act 2003 (and equivalent references in other legislation, such as section 120(4) and 179(4) of the Enterprise Act 2002). The introduction of a statutory code would inevitably lead to argument as to whether the code was wider or narrower in scope, or both wider and narrower in different respects, which would again be likely to lead to additional litigation and delay as the relevant statutory provisions were reviewed and the relevant principles modified or re-established.

18. In this respect, many of the relevant issues were addressed by the President of the Queen's Bench Division in its response to the above consultation, in particular at §§ 13-24:

"*15 … it is not immediately apparent why setting out the grounds of judicial review in legislation would be desirable. Domestic law on judicial review is already well established. …*

"20 … there is no particular reason for setting out a materiality requirement since one already exists in the common law.

"21 A risk with a statutory list of grounds of challenge is that it permits decisions which are not sound to escape scrutiny and review because the list of permitted grounds is thereby constrained. It also provides fertile ground for ingenious arguments by lawyers wishing to draw fine distinctions. … It maybe that the availability of judicial review might not be overly popular with regulators but, in broader policy terms, it should nonetheless be viewed as conducive to good decision-making.

"22 It is also important to recognise that judicial review is a flexible instrument and can be of varying degrees of intensity which will vary according to the circumstances of each particular case, a point recognised in the context of competition law by the Court of Appeal in IBA Health v. OFT [2004] EWCA Civ 142.

"23 Accordingly it is difficult to perceive that there is any need for a list of grounds of judicial review. However, if one is to be created it needs to reflect existing principles of judicial review and not leave lacuna or gaps such that bad decisions become immune from challenge because of a constraint in the statutory regime of judicial review."[7]

19. Questions 4 and 5 raise the question of whether the decisions that are subject to judicial review are sufficiently well defined and also whether the procedures for judicial review, including appeals, are sufficiently clear.

20. On the first issue, it is inherent to both the concepts of parliamentary accountability and the rule of law that the Government must act within the law, so that all public law decisions should in principle be open to challenge as unlawful[8]. In addition, the range of public law decisions is so wide and varied that it would not be sensible to try to classify them. The relevant safeguards for the public authorities are twofold:

    (1) Judicial review is a remedy of last resort, so the Administrative Court will not normally grant permission where some other judicial or administrative remedy is available to the claimant.

    (2) As noted above, judicial review is an extremely flexible procedure, with substantial discretion vested in the Court at all stages – as such, it is able to tailor the nature and extent of its review to the particular character of the decision at issue, including not only the power to refuse permission to bring unmeritorious or

[7] https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Consultations/qbd-bis-response-streamlining-regulatory-competition-appeals.pdf

[8] There is one notable exception that has been consistently recognized by the Administrative Court, that it should fully respect the constitutional role of Parliament in accordance with article 9 of the Bill of Rights of 1688 – however, the scope of that exception is necessarily for the Court rather than the executive to interpret: see *R v. Chaytor* [2010] UKSC 52; [2011] 1 AC 684.

premature applications but also, at the extreme, a refusal to entertain a challenge to the merits of a policy decision where the decision maker enjoys a very wide margin of discretion.

21. On the second issue, the procedures for making and responding to an application for judicial review are clear (at least for those who bring claims with the assistance of specialist legal representation) but again retain substantial flexibility. We do not currently see any reason to amend or change them. We note that, by contrast, although some guidance is given on judicial review appeals from the High Court, it is possible that the rules on appeals against refusals of permission could usefully be clarified.

Process and Procedure (Section 3—Questions 6-13)

22. So far as the issues of costs and delays occasioned by judicial reviews are concerned (Questions 6-8), again the Administrative Court's procedures are both faster and less costly than other forms of litigation, and can be tailored to the demands of a particular case, both in terms of procedure and evidence. For example, given the particular urgency of the first *Miller* litigation, and notwithstanding the large number of parties involved, a full hearing was arranged not only in the Divisional Court but also in the full Supreme Court within six months of the case being commenced, and there are many examples of rolled up hearings being arranged at very short notice to address issues of permission and substance together where necessary.

23. In our experience, a factor that can in practice increase costs and delay is the practice of the Government asserting in their Summary Grounds that a claim is unarguable when it is obviously arguable and/or raises points of wider public interest. For example, in *R (K) v. Secretary of State for the Home Department* [2018] 1 WLR 6000 the Secretary of State invited the Court to refuse permission to apply for judicial review and to certify the case as being "*totally without merit*" despite there being a number of other cases which raised the same, or a similar point of law [103]-[107].

24. The effect of this approach is unnecessarily to require the Court to hear the same case twice, first at a contested permission hearing and then at the substantive hearing. It would obviously be more efficient and cost-effective for such cases to be heard on an agreed, and where appropriate expedited, timetable. Defendants should be encouraged to concede the grant of permission where a case is obviously arguable and/or raises issues in the wider public interest. A box could be included in the N462 form to allow a defendant to indicate that permission is not opposed.

25. We also consider that consideration should be given to adopting a system equivalent to that in oral permission hearings in the Court of Appeal, that a defendant is not expected to attend a permission hearing unless invited to do so by the Court (as indeed used to be the position in judicial review). Further, costs could broadly follow the event at a

permission hearing so that if permission is granted in the face of the defendant's opposition, the claimant should be awarded their costs.[9]

26. On timing, the current rules are applied sensibly and flexibly by the Courts. CPR 54.5 permits the Court flexibility to grant an extension of time if appropriate when a claim is issued more than three months after a decision has been made, but also allows that time to be shortened if, on the particular facts of that case, the claim has not been issued promptly.

27. We do consider, however, that further clarity could be achieved by making it clear that time does not begin to run against a claimant until the relevant decision is either given suitable publicity or notified to affected individuals.

28. We consider that costs are a serious barrier to justice in legal aid claims, but that this barrier arises primarily in respect of claimants rather than defendants. Funding their own lawyers, as well as meeting the defendant's costs if unsuccessful, is beyond the reach of most private individuals. In particular, the following factors make funding claims for claimants problematic:

    (1) recent further reductions in the availability of legal aid;
    (2) delay in obtaining legal aid is not necessarily held by courts to be a good reason for delay in bringing an application for judicial review;
    (3) if permission to apply for judicial review is refused, the practitioners responsible for bringing a claim funded by legal aid will not be paid (which risks disincentivising representation for claimants);
    (4) even where a claim is conceded by a defendant, and the claimant has been wholly or mostly successful, courts do not always order costs in favour of the claimant - this causes real funding difficulties for legal aid firms, which operate on extremely narrow profit margins;
    (5) protective cost orders cannot be obtained until the grant of permission, see section 88(3) of the Criminal Justice and Courts Act 2015: in our experience, the risk of an adverse costs order being made prior to the grant of permission is too great; protective cost orders are, in any event, only available in public interest cases and may still require a claimant to take significant (if certain) financial risks which may be prohibitive for many claimants.

29. By contrast, the Government is able to obtain the services of specialist counsel at a cost significantly below market rates.

[9] Some of these suggestions were made by the Bingham Centre for the Rule of Law, in its report "*Streamlining Judicial Review in a Manner Consistent with the Rule of Law*" (February 2014)

30. As to settlement, our experience is that the pre-action protocol process works well, and does often lead to a defendant reconsidering their decision without a claim being issued (we give examples of this below in our case studies). Even where claims are issued, very many of them settle either after issue, or after a grant of permission. It is rare, in our experience, for judicial review claims to settle "*at the door of the court*". Rather, there are particular points in the cycle of the claim where that is more likely to happen. We note in particular that comments made by a judge on the grant of permission may cause a defendant to reflect on whether a case should continue.

31. So far as ADR is concerned, the Administrative Court has made some efforts to promote ADR where there is a recurrent issue, for example in the case of closure of care homes for the elderly: see *R (Cowl) v. Plymouth City Council* [2002] 1 WLR 803 (CA). However, we are doubtful that this can be significantly expanded or that it would be a practical alternative for many claimants, given the flexibility inherent in the judicial process at both the application stage and at the final hearing – in practice, our experience suggests that the public body will amend or withdraw a challenged measure in a way that renders the application unnecessary or academic in character. Moreover, where there is a serious dispute as to the legality of a public body's action, which may affect people or bodies other than the claimant, there is a wider public interest in judicial clarification of the law, which can make ADR inapposite.

32. In our view, the rules of standing are applied flexibly and sensibly by the Courts. We do not consider that any further clarification is needed. We set out below the example of *R (DSD) v. Parole Board of England and Wales* [2018] 3 WLR 829 in which the Divisional Court concluded that the Mayor of London did not have standing to challenge the decision to release the convicted rapist, John Worboys, on parole.

Conclusion

33. For the above reasons, we do not consider that the procedures for judicial review impose an excessive burden on public bodies. On the contrary, they are exceptionally flexible procedures that have been deliberately designed to interfere with the conduct of public business as little as possible consistently with upholding the rule of law.

34. Indeed, the fact that public bodies may on occasion lose judicial reviews, including in high profile cases, should not be allowed to obscure the fact that the procedures of judicial review confer very substantial advantages on the defendant, as a matter both of substance and of procedure, when compared to the normal rules of civil litigation.

35. Likewise, we do not think that it would be a beneficial reform to codify the relevant principles, which are well established and need to retain their flexibility, if they are to avoid unnecessary and time-consuming disputes as to their limits and interpretation.

36. So far as the other issues are concerned, we do not consider that the practice and procedure of judicial review requires amendment, save for the limited instances we give above.

37. We have set out below some case studies, drawn from our own professional experience, to illustrate the points we have made above.

CASE STUDIES

CASE STUDY ONE
R (DSD & NBV) v. Parole Board [2019] QB 285

This is the John Worboys case, where two victims of Worboys (the black cab rapist) challenged the decision of the Parole Board to release him. They challenged, first, the secrecy of that decision (which meant they could not see the reasons for what was, on its face, a very surprising decision) and then, when they received those reasons, the decision itself.

The claim succeeded. It is absolutely clear that for a number of reasons the Parole Board had got it badly wrong. Easily available information about the real extent of Worboys' offending was ignored. The evidence there was had not properly been probed. Worboys himself has since been charged with a number of further offences.

No-one now disputes, therefore, that these two victims were absolutely right to bring this claim, and that they "saved" the position. A significant wrong was righted. But they needed judicial review to achieve that; there was no other route. They succeeded on behalf of all Worboys' victims (thought to exceed 100), including, it may be noted, Carrie Symonds, herself a Worboys victim and a supporter of the action. The case is also notable for the Court taking a strict view of standing; and concluding that the Mayor of London (who challenged the decision along with DSD and NBV, two of Worboys' victims) did not have standing to bring the claim.

CASE STUDY TWO
The criminal records checks cases and the right to move on

There are two sets of these cases, which altered the law in favour of those, including children and the mentally ill, who have offences in their past, where no-one could reasonably consider that the offences are now relevant, but where the law still required them to disclose and talk about those offences in employment applications, often many years later.

In the first case, *T v. Chief Constable of Manchester* [2013] 1 WLR 2515, T had two cautions for stealing bicycles in a park aged just 11. He had no other offending before or afterwards. However, because (now in his twenties) he wanted to be a teacher, he had to disclose and explain what had happened. That would continue forever.

He changed the law, as the Supreme Court held that the regime was contrary to Article 8 of the European Convention on Human Rights ("ECHR"). The new law, however, was also quite draconian. It retained the requirement to disclose when there was more than one offence (because that was said to disclose a pattern of offending).

In the case of *P v. Secretary of State for the Home Department* [2018] 1 WLR 3281 that requirement caught a woman who had had undiagnosed schizophrenia. She shoplifted a book. Because she was still unwell, she also failed to turn up at court. That, however, was charged as a separate offence and so she was caught by the requirement. Like T, she wanted to work in a school. She had to talk about what was to her a very shameful part of her past every time she applied. So she stopped applying for jobs.

P also succeeded, along with others in linked cases. Both had to use judicial review; there was no alternative. All the judges, all the way up to the Supreme Court, thought the rules went too far. The only way of overturning them, however, was judicial review. It may be noted that these were also human rights cases, and cases where the Government caused the litigation by taking both sets of cases all the way. In *T*, that was despite having already agreed to change the law before the case reached the Supreme Court.

CASE STUDY THREE

***R (End Violence Against Women) v. DPP* (full hearing 26 January 2021)**

From about 2009, the CPS' leadership made a concerted effort to increase the terribly low charging rates in rape cases. Policy guidance was introduced to help prosecutors apply the evidential test in the Crown Prosecution Code, known as 'the merits based approach'. This was seen as particularly important in the context of rape cases because the introduction of myths and stereotypes into the evaluation of the merits of a case was prevalent and highly damaging especially in the context of date rapes or other cases where the rapist and complainant were not strangers. The work proved hugely successful in driving charging rates up and a virtuous circle was created as more women felt encouraged to come forward with complaints.

Then, in 2017, the numbers began to fall precipitously, causing huge concern and a disastrous loss of confidence in victims. The drop followed two events both of which occurred under and were driven by a new Director of Legal Services. The first was the unannounced removal of all references to and guidance on the application of the merits based approach. The second was a series of 'roadshows' conducted by the Director in the course of which he told prosecutors that they should be aiming for a conviction rate of 60% and that this could only be achieved if 350 of the weakest cases were not charged.

EVAW is an NGO made up of a coalition of women's organisations working to tackle violence against women. EVAW has been granted permission to bring a judicial review which focuses on the manner in which a change in policy or practice was brought about. It includes failures to consult, a lack of transparency and irrationality. In theory a rape victim whose complaint the CPS had refused to charge could have brought a challenge. But practically this was impossible. EWAV spent over a year gathering evidence through its network of connections. It did so spending its own resources. Legal aid would simply not have covered those costs and only a very wealthy privately paying person could have funded that work and taken on the costs

risk of bringing the challenge. EVAW crowd funded and a costs capping order under which both its and the defendant's costs are capped at £70,000 has been granted. This judicial review is plainly one which it is overwhelmingly in the public interest for the Court to determine. Any narrowing of the rules on standing or changes to the costs regime is liable to make such a claim impossible to bring in the future.

CASE STUDY FOUR

***Commissioner of Police of the Metropolis v. DSD and NBV* [2019] AC 196**

This was a private law claim brought by two women who were victims of John Worboys (and who later challenged the decision of the Parole Board to direct his release). They successfully argued that the Metropolitan Police had breached their human rights by failing, contrary to Article 3 of the ECHR and section 6 of the Human Rights Act 1998, to conduct an effective investigation into their complaints that they had been raped by Worboys.

DSD was attacked in May 2003 and was, at the time, thought to be one of his earliest victims. It has since become clear that Worboys' offending started earlier. NBV was attacked in July 2007 and was thought to be his 75th victim. He went on to attack another 29 women in the following six months before being caught.

The claim was brought by way of a private law claim because the investigations had been completed by the time the case was brought, but a challenge made in the course of the investigations would have been by way of judicial review seeking remedies to ensure the failings in the investigations were rectified. Had that happened in DSD's case, it is entirely possible that Worboys could have been stopped in his tracks.

CASE STUDY FIVE

***Regina (Tigere) v. Secretary of State for Business, Innovation and Skills* [2015] UKSC 57; [2015] 1 WLR 3820**

The claimant moved to and was educated in the UK from the age of six. She performed well in her exams and was head girl of her secondary school. She was culturally and socially integrated into British society. However, upon obtaining a place to study at an English university, she was refused a student loan, which she needed in order to study.

The loan was refused on two grounds: she did not have indefinite leave to remain (she had discretionary leave to remain and would be eligible in three years for indefinite leave to remain); and she had not been lawfully resident in the UK for the three years prior to the commencement of study (she was then lawfully in the UK, but her mother had previously overstayed with her).

The judicial review challenged the two grounds of refusal, alleging breach of Article 14 of the ECHR, which prohibits discrimination in the enjoyment of other rights within the Convention (in this case, the right to education under Protocol 1, Article 2 of the Convention).

The Supreme Court found for the claimant on the first ground: requiring students to have indefinite leave to remain pursued a legitimate aim of granting aid to students likely to stay in the UK and contribute to the UK economy after their studies; but the rule prohibiting students like the claimant, who had lived as a UK resident since the age of six, who was integrated into British society, who on the evidence was just as likely to remain in the UK as a student with indefinite leave to remain, and who would suffer severe consequences of effectively being locked out from university for a number of years, was disproportionate. The Court found for the government in relation to the second ground: the requirement of lawful residence prior to study was proportionate.

As remedy, the Court did not quash the relevant regulations; nor did it read language into them. Rather, it deferred to the Government to devise appropriate lawful grounds of refusal. The Court also gave important guidance on whether and in what circumstances "*bright line rules*" are lawful when reaching decisions.

In addition to the value of the guidance, and the positive outcome, the case demonstrates the importance of interveners. Just for Kids Law, a charity, intervened in the case and provided valuable evidence about other children and young people in the same predicament as the claimant: those who had no idea of, and were not responsible for, their immigration status, but who had studied alongside other British students and wanted to study at university.

CASE STUDY SIX

***R (Wright) v. Secretary of State for the Home Department* [2001] EWHC Admin 520**

The claimant's son ("PW") died in prison as a result of an asthma attack. At the inquest, his treating doctor was not called to give evidence. The jury returned a verdict of death by natural causes.

It subsequently emerged that the treating doctor had been found guilty of serious professional misconduct by the General Medical Council, had been banned from working in general practice, and had neglected two patients who had later died. The defendant, responsible for the prison service, subsequently admitted that it had treated PW negligently. However, it refused to establish an investigation into the causes of PW's death.

The claimant brought a judicial review relating to the defendant's failure to conduct an investigation and its failure to disclose information relating to PW's death.

It was only as a result of bringing the claim, and the defendant's duties of candour, that the defendant disclosed an important expert report. The report concluded that the treating doctor's treatment of PW was "*too little, too late and his understanding of this area seriously flawed*". The Court provisionally observed itself that PW's treatment was "*seriously deficient*" and that PW had endured "*considerable pain and suffering*". The defendant still declined to conduct an independent investigation into PW's death.

The Administrative Court determined that an independent investigation was required under Articles 2 and 3 of the ECHR. The Court gave guidance applicable to the Government and coroners on when an independent investigation is required. It recognised that the form the investigation should take remained a matter for the defendant to decide.

The case demonstrates not only the importance and effectiveness of the current disclosure obligations in judicial review, but also the value public bodies can derive from court guidance on important matters of public administration.

CASE STUDY SEVEN

***R (Raja and Hussain) v. London Borough of Redbridge* [2020] EWHC 1456 (Admin)**

The claimants were two adult brothers with severe physical and learning disabilities. They sought judicial review of the local authority's failure to provide them with urgent night care and support under section 19(3) of the Care Act 2014 pending a full needs reassessment. The claimants' mother and primary carer was no longer able to support her sons at night due to her own deteriorating health conditions. The local authority repeatedly refused her requests for urgent assistance and denied it had the power to provide interim care under section 19(3).

The High Court found that the local authority did have the power to provide care and support under section 19(3) and it acted unlawfully in failing to do so. The sole justifiable response to the claimants' unmet needs was to fund 10 hours of care per night and the Court made a mandatory order to that effect.

The Court observed that this case was a good example of when it is appropriate for a claim to be brought as a "*rolling judicial review*" because there was an "*ongoing failure*" to provide interim care. This is a good example of the existing flexibility of judicial review. The Court specifically recognised that the approach taken allowed procedural flexibility while maintaining public law rigour.

The defendant was ordered to pay the claimants' costs because it failed to take the "*sensible and pragmatic approach*" of making a decision on interim relief, which could have avoided legal proceedings.

CASE STUDY EIGHT

***R (Somerset County Council) v. Secretary of State for Education* [2020] EWHC 1675 (Admin)**

A claim for judicial review was brought by Somerset County Council ("SCC") who in early 2019 had initiated a formal review process to consider the organisation of education in its area due to existing problems and challenges in the three-tier school system (lower, middle and upper schools). The consultation process sought to build a necessary consensus between stakeholders on a solution to the unviable three-tier school structure in the area, which was wasting scarce public funds and threatening educational standards in the area as a whole.

During this consultation process, the Regional Schools Commissioner ("RSC") authorised a maintained middle school to join a Multi-Academy Trust under the Academies Act 2010. The SCC claimed that the effect of the RSC's decision was that it severely curtailed the options in terms of the re-organisation of the school system and it effectively lost its ability to control or re-organise education in the area. The application by the school for academy status was said to have been made specifically by the school to protect its status in the consultation.

The Administrative Court allowed the judicial review claim and quashed the RSC's decision. The Court concluded that the RSC had failed to consider the prejudicial impact of its decision on the SCC's consultation process and the RSC had failed to make reasonable inquiries about the impact, resulting in it failing to make a rational assessment about the impact of its decision. Further, the RSC failed to follow its published policy and failed to give adequate reasons for its decision.

Throughout its judgment, the Court emphasised that its role was not to substitute its own views for whether the middle school should become an academy trust. The Court's role was limited to reviewing the lawfulness of the RSC's decision and in so doing courts will recognise the institutional competence of the decision maker (§§10 & 85-87). The Court did not intervene lightly. It concluded its judgment with a warning to future litigants as to the unusual factual matrix and an exhortation to the parties to avert from litigation in future (§§178-181).

The case shows the important role of judicial review in ensuring relevant individuals and even public bodies (in this case, SCC) have access to the Courts to uphold basic standards of good administration in the public interest.

CASE STUDY NINE

Change of policy following threat of judicial review to challenge price-discrimination against part-time commuters on grounds that it indirectly discriminated against women

Commuting costs are an important aspect of the gender pay gap, since women are disproportionately likely to work part-time, but rail operators seldom offer proportionate discounts for regular part-time travel that offer the same savings as discounts for regular full-time season tickets.

A group of commuters took legal advice on this in 2018. They had been lobbying on the issue for some time without success.

Lawyers then wrote pre-action letters to the Department for Transport, explaining how the policy of granting franchises to train operating companies which did not offer equivalent savings on fares for part-time workers might amount to indirect sex discrimination against women, and asking what steps the Department had taken to consider the potential discriminatory implications of the decision, as required by the public sector equality duty.

The Department for Transport argued that the claim would be premature as the franchise had not been awarded, but that future consideration would be given to how flexible ticketing could be provided. The train operator then did come up with flexible ticketing proposals which offered broadly equivalent discounts for regular part-time travel in comparison with regular full-time travel.

The legal arguments about the public law duty to give due regard to the need to eliminate unlawful discrimination and advance equality of opportunity succeeded in changing a policy with particular adverse effects on women without the need for litigation.

CASE STUDY TEN

R (Ousalice) v. Secretary of State for Defence

Joseph Ousalice, a bisexual man, served in the Royal Navy for over 17 years until his discharge on 11 November 1993 for a service offence arising from his sexual orientation (at the time LGBT people were banned from serving in the Armed Forces). He served in the Falklands War, did six tours of duty in Northern Ireland, was posted to the Middle East and was seconded for 2.5 years to a NATO task force. Mr Ousalice was awarded a number of medals during his period of service, but upon his discharge from the Royal Navy, those medals were removed from him.

Mr Ousalice tried, over a number of years, to have his medals returned. In the absence of any positive response, he issued proceedings for judicial review in May 2019, challenging the Secretary of State's failure to return his medals. The claim was resisted strongly by the Secretary of State until permission was granted by the Administrative Court. Before detailed

grounds of resistance were served, the Secretary of State agreed to return Mr Ousalice's medals at a ceremony, apologised for his treatment of him, and agreed to introduce a policy to restore medals to all LGBT veterans whose medals had been removed when discharged on the grounds of their sexual orientation.

This is a good example of the judicial review process encouraging early settlement, rather than waiting until the *"the door of the court*". Without judicial review, Mr Ousalice would have had no other means of retrieving his medals.