A legal and political paradox: how a government determined to restrict judicial review ended up expanding it

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Introduction

Judged only on its words, the UK Government is desperate to rein in judicial review. Boris Johnson's 2019 Conservative Party manifesto pledged to ensure that the tool – key to holding decision-makers to account – "is not abused to conduct politics by another means". The theme has outlived the political life of Prime Ministers, with Rishi Sunak also seeing "lefty lawyer[s]" as standing in the way of his government getting on with its work.

But there is a difference between words and deeds. And behind the rhetoric lies a trend that might surprise some Ministers and their supporters. The reality is that this government has in many respects ushered in a major expansion of judicial review, especially in new and high-profile areas. It has done this both as a government and as a litigant itself – a striking (though perhaps unusual) example being its challenge to the Covid Inquiry's demands for Johnson's WhatsApp messages.

What, exactly, is going on? This report explains that the causes behind this trend are multiple and complex. They range from short-term phenomena which may be peculiar to this government – such as Brexit, its appetite for legal risk and the influence of particular personalities – to longer-term, more structural changes in the legal and political environment.

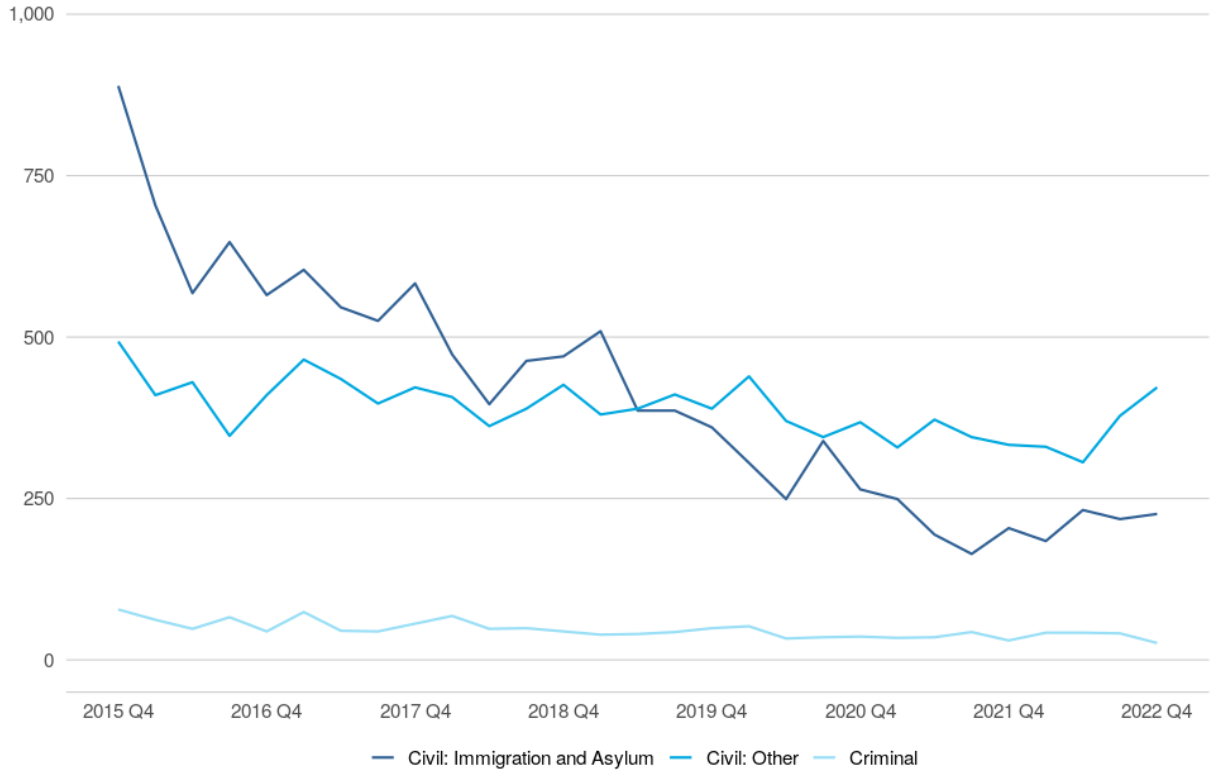
These longer-term changes include higher expectations of government and the services it delivers, the regulation of new technologies and measures to address climate change. The latter in particular show that, no matter how determined this or future UK governments may be to trim down legal challenges to their decision-making, judicial review will continue to play a crucial role in scrutinising it. The basic point is that, as Parliament confers ever wider and more complex powers on government and other public bodies, the courts will always have a role in determining and policing the limits of those powers.

The expansion

By some measures, the UK government did stem the growth of at least some kinds of judicial review in the mid-2010s. It introduced a number of reforms to procedure with the objective of limiting what it considered to be unmeritorious claims. These limitations included reducing time limits for bringing claims (from three months to six weeks in planning cases, and to 30 days in procurement cases), new fees for oral hearings on permission to proceed with a judicial review, and barring oral hearings for claims that judges deem to be totally without merit.

The figure below shows the number of judicial review applications per quarter since 2015. At first glance, it suggests a substantial decrease in immigration and asylum-related judicial review (although that is in part explained by the transfer of most immigration cases to the Upper Tribunal from late 2013).

Judicial Review Applications, by type: Q4 2015 to Q4 2022



Source: Civil Justice Statistics Quarterly: October to December 2022 - GOV.UK (www.gov.uk)

Moreover, anecdotally at least, many public lawyers report that courts have been increasingly deferential to government in judicial review lately. Some recent judgments have, for example, adopted a stricter approach to claimants' standing to bring a judicial review claim than previously.

A consistent trend of deference towards government is hard to quantify, and it is even harder to identify a cause. It may, for example, be driven by a change in personnel in the senior judiciary. Some had suggested that the Supreme Court under the presidency of Lord Reed was becoming 'softer' on government than under his predecessor, Lady Hale. That view will have to be revisited in the light of the court's recent unanimous judgment that the government's Rwanda scheme was unlawful.

But what is most striking about the statistics – especially for those who follow commercial judicial reviews – is that the number of cases has remained high despite the government's reforms.

In fact, the most recent data show a substantial increase in non-immigration judicial review claims, despite the government's efforts to curtail them. Over the longer term, the trend is dramatic: the earliest statistics on judicial review suggest that, in the early 1980s, there were around 550 cases per year (including immigration cases).

The figure above shows that that there are now almost that many civil, non-immigration applications for permission alone per quarter. And the developments outlined below suggest that the trend will continue despite the government's efforts.

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The forces driving the expansion

What lies behind this? Why has this government, after 13 years in office, failed to achieve its goal of curtailing judicial review? From the government's perspective, there's hardly been a shortage of examples demonstrating why reform is needed. Those "lefty lawyer[s]" have apparently frustrated its policy programme in a number of high-profile instances, ranging from the Rwanda deportation scheme to net zero commitments.

The government felt so strongly that it commissioned the Independent Review of Administrative Law in 2020, where Lord Faulks KC led an examination of the issues. The difficulty for the government was that Lord Faulks and his panel came back with answers that it clearly hadn't anticipated – it did not recommend any wholesale changes to the system of judicial review.

Inevitably, picking up hugely expanded roles in a short timeframe resulted in more incorrect, or at least more challengeable, decision-making.

The short term

Some of the reasons driving the expansion in judicial review are peculiar to this government, its behaviour, and exceptional events over the last 10 years.

Brexit is the most obvious of these. It meant the relocation of a vast number of decisions from Brussels to Whitehall, covering fields in which the UK lacked recent experience. Inevitably, picking up hugely expanded roles in a short timeframe resulted in more incorrect, or at least more challengeable, decision-making.

The manner in which Brexit was carried out exacerbated this, particularly in its speed and the lack of a clear endgame: policies were prepared, and decisions taken, without knowing what the UK's future relationship with the EU would be. The civil service was sometimes asked to carry out, in a matter of months, law reform projects that would ordinarily take years.

Alongside the need for speed, the UK was trying to institutionally educate itself on these new regimes. From subsidies to trade remedies, the UK was beginning from nearly a standing start.

It is therefore unsurprising that the detail of those laws and regulatory regimes – established under circumstances that could hardly be described as ideal – will need to be tested in the courts. It is also why judicial review, being concerned only with process and legality, and not the policy substance of a decision, becomes relevant in these circumstances.

Added to all this is the personality and professional circumstances of the individuals driving these decisions.

The UK has had five prime ministers in eight years, and the lifespan of other ministers in that time has been even shorter: eight justice secretaries, seven chancellors of the exchequer and seven secretaries of state for business. Many ministers over the last few years were in place only for a matter of days or weeks before resigning or being promoted.

A lack of experience at the top matters, especially when it is combined with a fraying of relationships between ministers and civil servants (referred to derisively by some ministers and political advisers as "the blob"), and scepticism of official advice.

A government that is behind in the polls and staring down the barrel of a General Election after a long period in office needs to find new ways to connect with voters. And so it is no surprise that 'big bang'

policies make their way through – the approach to small boats and climate change, already mentioned, are clearly being targeted in an attempt to draw a dividing line for the Conservatives. Ministers' appetite for risk seems to have some correlation to the voters' appetite for the politicians – and none of this is a recipe for decision-making that is robust against legal challenge.

The longer-term forces

There are, however, longer-term forces at play too, which would probably have led to more judicial review under any government. Four factors stand out.

First, governments are having to regulate in new areas, which means more scope for challenge. Underlying this are not only new technologies and behaviours – although they play a role – but also a long-term, international phenomenon in which individuals expect significantly more from their governments than they once did.

Governments are therefore having to think about new ways of regulating and providing public services – and when designing regulation in these new fields, this government has frequently chosen to build in judicial review mechanisms. To take a few prominent examples:

- Large tech companies – through the Digital Markets, Competition and Consumer Bill – will be subject to wide-ranging but business-specific regulation. Much of that regulation will not lie in primary, or even secondary legislation, but rather in individual decisions by the Competition and Markets Authority's Digital Markets Unit, which are likely to be subject to judicial review.

- The same companies will have to grapple with regulation of online harms – a term which barely existed when this government was elected – given that the Online Safety Act has now passed. It gives major new powers to Ofcom and, again, provides for judicial review as the mechanism for challenging its decisions.

- Investors in specified UK industries have, since 2022, been subject to new forms of screening by the government. The National Security and Investment Act allows the government to block certain investments, with disappointed investors able to rely on judicial review as a means to challenge.

- Economic regulation – particularly licences for electricity, gas and water companies – has increasingly entailed a judicial review (or a judicial review "plus") standard of review.

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Second, climate change and the difficulty in decarbonising the economy. The judge in a recent climate change-related judicial review (another important trend) poetically described regulators as being caught between the Scylla of the energy crisis and the Charybdis of climate change. The spending, building and behavioural changes which decarbonisation will require represent an immense challenge, and the state will be at the heart of it. Its decisions will create winners and losers in the short term – who receives a subsidy and who does not, whose land is affected by construction, and differing views on whether any of this is happening quickly enough. It is not surprising when losers turn to the courts.

A third factor making all this more difficult is the state of public finances. New regulation and programmes are easier if the state picks up the bill, but much harder when money is tight. The immediate cause of this in many countries is the pandemic, but longer-term trends suggest that this

could be a problem for decades: notably, a reduction in income tax revenue due to ageing populations and, potentially, a workforce and economic output dramatically changed by generative AI.

The government will therefore, whatever its make-up, be forced to think creatively about how it bridges the expectation gap between what the public expects of its public services and what the state can both afford and actually deliver. The likely reshaping of public services in years to come will require yet more policy heft and political leadership – which will deservedly attract its own scrutiny and challenge.

The fourth factor – and the most fundamental reason for judicial review's longevity – is that it has largely achieved, and continues to achieve, exactly what it was designed to do. For as long as the law confers rights and imposes duties, it is the role of the courts, through judicial review, to protect those rights and enforce those duties.

Judicial review will remain in the frame

Could Parliament take that role away from the courts? The question of "ousting" judicial review arises perennially. Inevitably some politicians reacted to the government's Supreme Court loss on the Rwanda policy by arguing that the courts should be taken out of the picture altogether. The High Court [in the Oceana case] and Court of Appeal [in LA (Albania)] have both upheld a limited ouster of judicial review in respect of certain immigration decisions by the Upper Tribunal. But this is a highly specific category of case which is already subject to senior judicial consideration.

Generally speaking, governments have rightly been hesitant to go down the path of excluding judicial review altogether, accepting (however reluctantly) that where Parliament enacts laws, it is the job of the courts to interpret and apply them.

The courts' ability to review government decisions is fundamental to the rule of law. It is particularly important in political systems where power is highly concentrated, as it is in the UK. When scrutiny makes life uncomfortable for government – that is the point of it. And there is every reason to think that judicial review will remain a necessary tool to do just that.

Biographies

Sir Jonathan Jones KCB KC (Hon) (Linklaters LLP)

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From his work at the heart of government, Jonathan has deep experience of all aspects of public and constitutional law, the workings of government and Parliament, and the development and implementation of policy, including: judicial review, public inquiries, primary and secondary legislation, EU and international law. He is based in Linklaters' London Litigation, Arbitration & Investigations practice, where his work includes judicial review and public law generally, advice on legal, policy and constitutional developments, the workings of government and parliament, and public & parliamentary inquiries.

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Alex is a Managing Associate in Linklaters' London office. He spent much of 2018 and 2019 on secondment at the UK Government, assisting the Department for International Trade in the establishment of its new trade law regime post-Brexit. Before joining Linklaters, Alex served on the staff of various Members of Parliament in Australia as an advisor and speechwriter. He also worked as a researcher in international arbitration at Monash University and at the International Court of Arbitration at the ICC in Paris.

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Ed specialises in the interface between public affairs, regulatory and public law issues. Prior to joining DRD, he spent six years as a public lawyer working on judicial reviews, regulatory investigations and public policy development for both public and private sector clients. In the UK, he worked at a leading City firm and was involved in litigation across a wide range of policy areas including building standards, environmental regulation and digital regulation. Ed previously worked as a political advisor to a senior Cabinet member in his native New Zealand.

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