About the Public Law Project

The Public Law Project (PLP) is a national legal charity which aims to improve access to public law remedies for those whose access to justice is restricted by poverty or some other form of disadvantage.

Within this broad remit PLP has adopted three main objectives:

- increasing the accountability of public decision-makers;
- enhancing the quality of public decision-making;
- improving access to justice.

Public law remedies are those mechanisms by which citizens can challenge the fairness and/or legality of the decisions of public bodies and so hold central and local government and other public authorities to account. They include non-court-based remedies such as complaints procedures and ombudsman schemes and also litigation remedies, in particular judicial review.

To fufil its objectives PLP undertakes research, policy initiatives, casework and training across the range of public law remedies.

The Impact of the Human Rights Act on Judicial Review

An Empirical Research Study

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An Empirical Research Study

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List of Abbreviations

ACO	Administrative Court Office	**ECtHR**	European Court of Human Rights
ADR	Alternative Dispute Resolution	**HRA**	Human Rights Act 1998
AOS	Acknowledgement of Service	**IAT**	Immigration Appeal Tribunal
C	Claimant	**LB**	London Borough
COINS	Crown Office Information Network System	**LCD**	Lord Chancellor's Department
D	Defendant	**MHRT**	Mental Health Review Tribunal
ECHR	European Convention on Human Rights	**SSHD**	Secretary of State for the Home Department

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1.

Background to the research

This is the latest in a series of research projects on judicial review carried out by the Public Law Project. The first one, 'Judicial Review in Perspective - an Investigation of the Trends in the Use and Operation of the Judicial Review Procedure in England and Wales'[1], was published in 1993. It aimed to provide a picture of the volume and nature of applications for judicial review, and the processing and judicial determination of those applications. A revised and expanded version of that report was published as a book in 1995[2]. This was followed in 2001 by 'Third Party Interventions in Judicial Review – An action research study'[3] which aimed to "research and develop the legal practice and procedures for making third party interventions in judicial review cases raising issues of public interest"[4].

This current project was conceived from the need to monitor and gauge the effects of the Human Rights Act 1998 (HRA). Judicial review was considered to be a key jurisdiction for identifying and tracking cases raising human rights issues in light of the duty imposed on public bodies to act compatibly with rights under the European Convention on Human Rights (ECHR), and the project was able to utilise the research structure, methodology and questions arising from the previous projects. This also provided a timely opportunity to consider aspects of the Bowman reforms by looking at the data collected in the course of this project.

2.

Aims and objectives of the research

The project was designed to evaluate the impact of the Human Rights Act 1998 on the processing, decision-making and jurisprudence of judicial review, and in particular to assess the extent to which HRA grounds provide new opportunities for successful challenge to public authorities. This research was undertaken over two years after the implementation of the HRA on 2nd October 2000, and so it was anticipated that practitioners and the judiciary would have had sufficient time to become familiar with its use.

The research questions in respect of this aim were:

- Whether the inclusion of HRA grounds affects the rate of pre-permission settlement
- Whether the use of HRA grounds affects the rate of grant of permission
- Whether HRA grounds affect the rate of post-permission settlement
- The spread of the use of specific human rights articles
- Whether citation of HRA grounds adds value to a claim, i.e. does it significantly affect the substantive outcome of a case when pleaded alongside traditional grounds.

The reforms in the administrative court arising from the Bowman review, which were largely based on the premise that the Human Rights Act would lead to a substantial increase in the volume of

judicial review applications, were implemented at the same time as the Human Rights Act. They were designed to encourage the parties to proceedings to resolve disputes prior to permission rather than after permission had been granted. This project was designed to investigate whether this aim had been achieved.

The register of pending cases

An additional, but secondary, aim of this project was to continue to investigate the potential for third party intervention in judicial review cases. We wanted to assess the feasibility and value of providing information through the internet on permission decisions in cases raising public interest and/or human rights issues. The reason for this was that the Third Party Intervention report found that potential interveners' lack of awareness of pending cases which might benefit from intervention was one of the obstacles to interventions occurring. To this aim, we set up on the PLP website a separate register of pending judicial review cases which had been granted permission, with a view to providing practitioners and other interested bodies with wider access to information on forthcoming cases as a means of encouraging both interventions and the use of the HRA in judicial review.

In the course of collecting data for the main research purposes, 104 cases raising human rights and public interest issues were summarised and posted on the PLP website after grant of permission. A number of queries were received from practitioners with conduct of cases raising similar facts, but no queries were received from potential interveners in respect of pending cases. There were several general inquiries regarding procedures and costs implications, as well as about sources of funding of interventions, and copies of the Third Party Intervention report were sent out in response to many of those queries.

On average, cases appearing on the register site were accessed by users over 100 times each month. Publicising of the site was limited due to the short-term nature of the research project, but such a site could potentially be of significant benefit to practitioners were it long-term, comprehensive and widely advertised. However, an ongoing site of this nature would require regular access to court files specifically for the purpose of identifying relevant cases, tracking their progress and outcome. The preparation of case summaries for the website and the handling of queries arising from it also have resource implications. It seems unlikely that any one organisation will have the capacity to organise and maintain such a website on its own. Rather it would require a consortium supported by legal professional bodies and NGOs.

3.

Research method

Data collection

The project involved an examination of civil judicial review applications issued over a 3-month period from 28th January 2002[5] and those granted permission over a 6-month period from the same date[6]. This twin-tracked method of data collection was adopted in order to contain the research period, as otherwise tracking a single cohort of cases from issue to conclusion would have taken too long. This resulted in the creation of two databases of cases – one of all cases issued within the research period (referred to as 'permission stage' cases), which were tracked up to and including the grant or refusal of permission or pre-permission withdrawal, and the other of all cases granted permission (referred to as 'post-permission' cases) which were tracked from the grant

of permission until conclusion. Whilst there is some overlap between the databases, they had to be analysed separately.

Each file was examined individually and certain details were obtained from the claim form, Acknowledgment of Service (AOS) and orders in the court file and recorded in the database for later analysis. Transcripts of permission hearings and final hearings were also obtained whenever possible.

The project excluded criminal judicial review cases from the study, because at the time it was envisaged that a separate project would be carried out by another organisation. Town and country planning claims were also excluded from the sample for administrative reasons.

The Administrative Court Office (ACO) operates a computerised system, the Crown Office Information Network System (known as COINS). Information is entered on COINS about every claim as soon as it is issued and the information is updated as the case progresses. Reports can be produced which list all claims and the particular stage they have reached in the proceedings, called 'staging reports'. Staging reports were obtained on a regular basis in order to identify relevant cases issued, and those granted permission during the research period. Information on individual cases was obtained from COINS and from the court files.

Both databases recorded whether the claim raised HRA issues, and if so, which Articles. In respect of permission stage cases, details of refusals and grants of permission were recorded, and the orders were examined in order to ascertain whether any observation was made by a judge indicating the basis upon which the order was made. Such observations were found where there was a paper refusal. However, most orders granting permission contained no observations. In addition, transcripts of oral permissions were not always available. This made any substantive analysis of the impact of inclusion of HRA issues on grant of permission more difficult. This aspect was however considered by the expert consultants involved in the project (see below).

The final outcome of all cases in both databases was also recorded wherever available. Concluded claims are recorded on COINS as follows:

- determined by the court (i.e. concluded by a court order)
- not renewed (after refusal)
- fee not paid (after grant of permission)
- withdrawn
- discontinued

This classification does not indicate the substantive outcome of the case, i.e. in whose favour it was concluded. A large number of cases at the permission stage were withdrawn when the defendant agreed to reconsider the decision challenged or provided the remedy sought by the claimants. Other reasons for withdrawal were unavailability of public funding (notably asylum cases after a paper refusal), the claim having become academic for a variety of reasons and, occasionally, the claimant's reconsideration of the merit of the case following receipt of the AOS. Therefore, all available court files were re-examined at the end of the research period in order to ascertain the substantive outcome, wherever possible, of cases recorded on COINS as having concluded by consent or by withdrawal. Even examination of the file did not, in all cases, reveal the substantive outcome of a case. Where parties are merely seeking the withdrawal of a claim, they are not required to provide a reason. The outcome tables for permission stage claims show both substantive and procedural outcomes.

The data were subjected to both quantitative and qualitative analysis in order to address the research questions.

Due to the very large numbers of immigration/asylum claims issued, only one in four were recorded on the database at permission stage. (The tables reflect this by 're-weighting' the sample, namely multiplying the number of cases in this category by four.) However, all cases granted permission in this category were recorded and analysed.

Classification of case categories

In drawing up tables, regard was had to previous research projects and available statistics in the area of judicial review, in order to enable comparison of research findings. The Administrative Court reports, Lord Chancellor's Department (LCD) judicial statistics and previous research projects invariably divide judicial review claims into four categories, namely immigration, homelessness, criminal and "other" (which includes all other cases not falling into the first three categories). In addition, it is desirable to show a separate analysis for these categories as they each demonstrate different trends at various stages.

Previous research categories have been followed in comparing numbers of cases issued and case outcomes with limited exceptions. In looking at the incidence of Human Rights claims, a detailed categorisation of cases has been used, as this information has not previously been available. Further, in this project, the cases classified by the court office as "homelessness" and those classified as "housing" were treated as one category -"housing" – whereas, in other sources, "homelessness" has been treated as a separate category from "housing". It is not clear at this stage whether cases categorised in this research as "housing" are directly comparable with those recorded as 'homelessness' in earlier studies and statistics. Currently, the ACO utilises two separate categories of immigration claim – "immigration" and "immigration/asylum". "Immigration/asylum" claims are, in fact, asylum matters, whereas "immigration" claims concern other types of immigration issues such as entry clearance. This project has retained the ACO's classification as it appears on COINS, but for the purpose of outcome analysis has subsumed the relatively small number of "immigration" claims under the category "other".

Identifying a Human Rights Act claim - the problem of the "HRA box"

The claim form for judicial review must indicate whether an application concerns human rights issues. The claimant must also give details of the convention right alleged to have been infringed, the form of infringement and the relief sought. Many claims, however, provide very little detail regarding the alleged infringement and even less legal reasoning. In one housing case, the only reference to the HRA appears under "Details of remedies" and is: "C proposes to raise issues of human rights, which contend that the following Articles of the ECHR are raised: Article 8 and Article 2 of the First Protocol". There is no further reference to human rights in the pleadings and the claim was settled, presumably on the basis of traditional grounds raised. In another example, an immigration/asylum case alleging breach of Article 3, the only reference made to the breach was: "It is submitted that this is a clear representation that removal would be inhuman or degrading treatment of the claimant by the defendant and that the defendant did not consider this issue under Article 3 in the refusal letter".

Until March 2002, the claim form contained the question: "Does the claim include any issues arising from the Human Rights Act 1998?" and the claimant was required to tick a 'yes' or 'no' box. The new form expanded the question regarding HRA issues and added: "If yes, state the articles which you contend have been breached in the space below".

The ticking of these boxes appears to be less than entirely straightforward. Of 686 cases examined at permission stage, 371 boxes were ticked "yes", but 70 of these did not, in fact, raise HRA issues in the body of the claim form. In 15 claim forms, the box was ticked "no" or not ticked and HRA issues were, in fact, raised. Thus, HRA issues were actually raised in 316 cases.

Of 425 post-permission cases checked, in 45 cases the box was ticked "yes" yet there was no mention of the HRA in the body of the claim form. In 16 cases the box was ticked "no", but HRA issues were raised nonetheless. Forms were wrongly classified in 14% of these cases.

Initially, the staff at the ACO were required to record on COINS whenever the HRA box was ticked "yes". This was done in order to monitor the number of HRA cases issued immediately after the implementation of the HRA. Once it became clear that the anticipated deluge was not occurring, the recording of this information was not kept up. It is understood that, at present, only

cases raising substantive HRA issues are recorded on COINS as HRA cases, in contrast to this study which recorded a case as an HRA case provided that there was some reference within the claim form, other than the tick box, to an HRA issue, however brief.

The new format, which requires the relevant HRA Article to be specified on the claim form, may have somewhat alleviated the confusion.

Added value assessment by consultants

A panel of expert consultants were appointed to consider a selection of individual cases and to rate whether HRA grounds added value to the claim i.e. whether the HRA grounds increased the claimant's prospects of success in being granted permission and in the final outcome. Consultants were barristers and solicitors specialising in public law cases. They were asked to identify whether, in any specific case, human rights issues could have been raised prior to 2nd October 2000 and whether the prospect of success in obtaining permission and final determination were likely to have been improved by the inclusion of HRA grounds alongside traditional grounds. They were then asked to assess as a percentage the likelihood of success on final determination firstly on traditional grounds alone and secondly with the inclusion of HRA grounds. The results of those assessments are incorporated in the substantive analysis of the impact of the HRA on judicial review.

4.

Bowman and other changes

The Bowman report[7], published in March 2000, set out to provide a full review of the Crown Office List. Its aim was to put forward recommendations for improving the efficiency of the Crown Office List[8] without compromising "the fairness or probity of proceedings, the quality of decisions, or the independence of the judiciary"[9].

The review was required in light of the constant growth in the work load of the Crown Office and the anticipation that the coming into effect of the Human Rights Act 1998 on 2 October 2000 would lead to a further increase both in the number of claims brought and in the administrative burden upon the court office and judges. The HRA introduced a new, free-standing ground in challenging decisions of public bodies, namely breach of a Convention right (s.6 HRA). In addition, it was anticipated that the HRA was likely to result in raised public awareness of rights against the state.

The report's objectives included, inter alia, "ensuring that the system:-
(a) disposes of unmeritorious cases fairly at the earliest possible stage;
(b) encourages both parties to examine the strength of their case and to settle where necessary, at the earliest possible stage"[10]. Recommendations were made with regard to a pre-action protocol, the filing of an Acknowledgement of Service, determination of applications on paper and the service of a defence after grant of permission. These are discussed below.

It was considered that the Bowman reforms were likely to lead to an increase in pre-permission settlements, as the parties would have a greater awareness of each other's cases, and to more permission applications being refused as more evidence would be available from the defendants than previously. It was also considered possible that any increase in the number of cases following the enactment of the HRA need not necessarily lead to an increase in the number of permissions granted, since more cases would be likely to conclude at an earlier stage.

The Bowman reforms were designed to anticipate and counteract some of the administrative

effects of the Human Rights Act on judicial review, with their emphasis on early settlement and improved efficiency. The simultaneous implementation of the Bowman reforms and the coming into force of the HRA make it harder to assess some aspects of the impact of the Human Rights Act on judicial review.

Pre-action protocol

A pre-action protocol was published in December 2001 and came into force in March 2002. In accordance with the recommendation made in the Bowman report, the protocol requires the claimant to send a letter to the defendant setting out the decision challenged, a clear summary of the facts on which the claim is based, details of information sought, and issues in dispute. The purpose of the letter is to identify the issues in dispute and to establish whether litigation can be avoided. The claim form was amended to include a question on compliance with the pre-action protocol.

It is difficult to speculate upon the impact of the pre-action protocol. It has always been a matter of good practice, as well as a pre-requisite to obtaining public funding, for claimants to send a letter before action if at all possible, and it has always been the case that some cases were resolved following the receipt of the letter before action and before issue of a claim. This research project was not designed to assess whether the pre-action protocol has led to any significant reduction in the number of claims issued. A dedicated research project would have to be devised in order to assess this, although as pre-action protocols (and earlier letters before action) are conducted between the parties and not centrally recorded, such research would be difficult to mount.

Acknowledgement of Service

Another aspect of the early involvement of the defendant introduced by the Bowman reforms is the service of the claim form and accompanying documents on the defendant within 7 days of issue unless the court directs otherwise. The defendant who wishes to take part in the judicial review must file and serve an AOS setting out the summary of grounds for contesting the claim. Where no AOS has been filed, the defendant will need to obtain permission to take part in an oral hearing of the application for permission. The idea behind the AOS as expressed in the Bowman report is that "it requires the defendant to address his mind to the issues in the claim and his response" and further, to assist the judge "by providing a fuller understanding of the issues and arguments"[11].

The availability of a detailed AOS at the paper consideration stage is a radical departure from previous practice, when many leave applications were considered on an ex parte basis i.e. without any input from the defendant and, indeed, it is not uncommon for orders refusing permission to state that the refusal is based on information or arguments contained in the AOS. (Some of those claims later obtain permission at an oral hearing however.) It might be considered that clear-cut cases of substantial merit, or those of very little merit, would be least likely to be affected by the filing of an AOS. A defendant may be less inclined to file a summary defence against a strong claim, and the lack of merit in an intrinsically weak claim would, in any event, be apparent. It may be the arguable cases which are most likely to stimulate, and be affected by a response by way of an AOS.

The availability of an AOS is, undoubtedly, of assistance to the judges, as it provides information about the defendant's arguments in the case. Where previously, in the absence of any indication of the defendant's case, a judge might have given claimants the benefit of the doubt and granted leave, the additional information now available from the defendant may prompt judges to refuse leave where a persuasive summary defence is filed. The effect of this may be to increase the number of initial refusals of permission.

The AOS was designed, as was the pre-action protocol, to focus the parties' minds on the issues at an early stage and promote settlements. It is difficult, however, to measure whether this objective has been met. Claims are typically settled when the defendant agrees to review the decision challenged. A settlement will be negotiated and agreed between the parties and the claim withdrawn by consent. In those circumstances, it is not necessary for the defendant to file an AOS.

It is suggested, therefore, that an analysis of the timing of a settlement in relation to the date of service of the AOS will not necessarily indicate whether the AOS contributes to earlier settlement of claims. In order to achieve an understanding of how the AOS operates, and how it affects the process of judicial review, it may be necessary to conduct an in-depth analysis of how public authorities and others respond to claims, in what circumstances they choose to file an AOS, and how much detail they consider it necessary to provide in the summary defence.

What is clear is that the filing of an AOS can play a significant role at the paper consideration stage. For example, in refusing permission in an employment case[12], the judge said: "The primary legislation embodying the relevant 'policy' is plainly not susceptible to challenge on grounds of irrationality or other non-ECHR grounds advanced. As to the ECHR, I accept the submissions in D's AOS to the effect that i) an employment issue of this kind does not fall within the scope of Article 8; ii) nor does it fall within the scope of Article 6, since the complaint relates on analysis to the content of the substantive law (the absence of a right to be employed in the Civil Service) rather than to a restriction on rights of access to the court; iii) Article 14 cannot assist in relation to a matter falling outside the ambit of other Convention rights."

In a prisons case[13] the judge said: "I conclude that the application is not arguable for the reasons given in the AOS". Similarly, the judge in an Immigration/Asylum case[14]: "C's claim is unarguable for the reasons set out in the AOS…"

The effect of an AOS is not inevitably adverse to the claimant. In a case brought against the IAT[15], the judge, in granting permission, disapproved of a delay argument included in the AOS. He addressed several features of the case and concluded: "Overall I take the view that there is an arguable case for judicial review and that consideration should be given to looking again and more closely at the application for leave to appeal to the IAT".

Paper consideration

Another significant procedural change introduced following the Bowman reforms was a paper consideration of all claims by the judge prior to any oral hearing. Previously, such consideration of claims on the papers was an option for claimants and not a requirement in all cases. It was introduced in order to save court time. A paper refusal of permission automatically gives rise to a right to renew the application orally before a judge.

The Bowman objectives and Cowl

The Bowman report, whilst recommending the introduction of changes leading to early settlement of claims, does not consider alternative dispute resolution (ADR) to be suitable in the context of judicial review:

"Even assuming that the relief sought could be granted without a court order, a public authority is not likely to accept the views of a third person in preference to a ruling of the High Court. There is in addition generally little room for compromise in the public law field. This said, we would not wish to discourage any genuine attempts to use ADR where it appears to offer a realistic prospect of settlement"[16].

The pre-action protocol as per Bowman encourages the compliance by the parties with procedures prior to the issue of claims, which are designed to avoid unnecessary litigation where appropriate. This approach received a different emphasis in the judgment of Lord Woolf CJ in the Court of Appeal case of Cowl v Plymouth City Council[17]:

"Both sides must by now be acutely aware of the contribution alternative dispute resolution can make to resolving disputes in a manner which both meets the needs of the parties and the public and saves expense and stress".

The combined effect of the pre-action protocol and the Cowl decision is reflected in comments made in the course of permission decisions, encouraging both parties to reconsider their positions. For example, in an education case[18] the judge stated in adjourning the application for leave:

"I find it very difficult to see that litigation is at present a useful path to pursue the issues of the

claimant's education, in the light of the AOS. Quite apart from the defendant's careful and detailed response to the various complaints, this is a case in which compliance by the claimant with the pre-action protocol is procedurally required, and would be potentially very beneficial for the parties and the case. There is much force in the defendant's reference to Cowl. This matter should not come back before the court until the protocol has been complied with and the parties have sought to resolve their differences through some form of mediation…".

Permission was subsequently refused on paper, with the same judge remarking that "the mediation requirement was imposed so that issues, including many which were not necessarily legal issues, could be resolved rapidly to the benefit of (the child's) school education. Litigation seemed then to be the least beneficial route to deal with such issues as there were". Leave was refused as "none of the complaints give rise to an arguable point of law anyway in the light of what the defendant sets out in the AOS".

In another education case[19] the judge allowed the defendant a fortnight to file an AOS, despite having been in possession of a draft of the application for a long time "… in the hope that immediate steps can be taken to resolve this case without a continuation of these proceedings. Litigation is not the best way of dealing with a case of this kind. On the face of it, the matter calls for an urgent review by the defendant. Consideration might also be given to mediation…". This case was resolved by way of a consent order, with increased educational provisions agreed.

The judges' observations in these two education cases, both refer to the need for consideration of some form of mediation in order to resolve the dispute between the parties. However, it is not clear what type of mediation process the parties are expected to engage in, and who would take the role of mediator. Until such time as mechanisms for mediation between public bodies and individuals are developed and implemented, it is questionable how "mediation" as referred to in the above cases would differ, in fact, from the usual process of negotiation and reconsideration engaged in en route to a settlement.

The above cases can be contrasted with the approach taken in the following two cases.

In a Disciplinary Bodies case[20] the application for permission was adjourned pending a review and the judge observed that "it is to be hoped that the review will provide a basis for resolving the issues in this case".

In an asylum case[21], the judge said: "Overall I take the view that there is an arguable case for judicial review and that consideration should be given to looking again and more closely at the application for leave to appeal to the IAT".

In light of the apparent tension between the approaches to ADR taken by the Bowman review and by Lord Woolf in Cowl, the place and nature of mediation processes in public law disputes, particularly where human rights breaches are alleged, may merit further exploration.

5.

Patterns of use of the Human Rights Act in Judicial Review

Volume of claims

In the year 2000 a total 4811 claims were issued at the Administrative Court Office. The number of claims issued increased to 5364 in 2001 and to 6006 in 2002[22].

In his annual statement contained in the Administrative Court Report for the period April 2001 to March 2002, the Hon. Mr Justice Scott Baker (as he then was), the Lead Judge of the ACO[23] suggests that the increase of 11% in the number of cases issued in 2001 compared with those issued in 2000, was attributable in particular to asylum cases. The report states in paragraph 4.2 that "there is no evidence that the 1998 Act has increased the number of cases lodged, nor that hearing times have lengthened since the implementation of the Act".

The increases are by and large consistent with increases seen in previous years. Although there is no evidence to suggest that any part of the increase is directly attributable to the implementation of the Human Rights Act, it is possible that the debates resulting from it raised public awareness concerning accountability of public bodies. This accords with the Public Law Project's experience in operating an advice line on human rights and public law issues, where an initial query concerning the relevance of a human right to a potential claim frequently leads to a discussion of proceedings based on traditional grounds.

On the other hand, it is possible that the increase in the number of claims following the coming into force of the HRA merely retains an appearance of consistency with previous increases. It may be the case that there has been an increase in cases as a result of the HRA which was offset by a decrease in cases following the Bowman reforms. Further investigation would be required as to whether there has been any significant change in the pattern of case categories, and whether such change could be attributed to the HRA.

During the research period, Immigration/Asylum cases accounted for 63% of all cases issued. This compares with 55% for the period April 2001 to March 2002, and 46% in the year October 1999 to September 2000[24]. The increase may be attributable to the general increase in the number of asylum seekers arriving in the country. In addition, however, a number of changes occurred which affected both numbers and nature of claims brought.

Procedural changes in processing asylum applications were introduced simultaneously with the HRA. Firstly, the new s. 65 of the Immigration and Asylum Act 1999, which came into force on 2nd October 2000, introduced a free-standing right of appeal to an immigration adjudicator on human rights grounds from a decision relating to entitlement to enter or remain in the UK. The "one-stop" procedure, which was implemented at the same time, was designed to ensure that all appeal grounds are raised and dealt with at the same time, in order to prevent duplication of the appeal process. However, following the undertaking given by the SSHD in the Pardeepan case [2000] INLR 447, those asylum seekers whose appeals from pre-2 October 2000 decisions were dismissed, were permitted to raise human rights grounds in a fresh appeal. Judicial review claims arising from those re-opened cases may account for some of the increase in the number of cases, as may the improved efficiency in processing IAT appeals.

This report provides a detailed breakdown on the number of cases issued and granted permission in each category of civil judicial review claims within the research period. However, for the purposes of comparison with data from previous years in respect of claims issued, as well as in the analysis of outcomes, three broad categories have been used, namely immigration, housing (including homelessness) and 'other'.

The table below, based upon figures given in the Bowman report, shows the breakdown of case categories in civil judicial review claims issued between 1994 and 1999.

Table 1: Case category distribution 1994-1999[25]

Category	1994	%	1995	%	1996	%	1997	%	1998	%	1999	%
Immigration	935	32	1220	37	1748	48.5	1925	56	2518	60	2479	61
Homelessness	447	15.5	417	13	340	9.5	187	5	134	3	91	2
Other	1505	52	1646	50	1516	42	1343	39	1577	37	1513	37
Total (excl criminal)	2887		3283		3604		3455		4229		4083	

The table below shows the breakdown of case categories in civil judicial review claims issued between 2000 and 2002. The figures were obtained from COINS in respect of cases issued between January and June in each year, and have been re-weighted to give an annual figure for each category, for the purposes of comparison with the annual figures in Table 1.

Table 2: Case category distribution 2000-2002[26]

Category	2000	%	2001	%	2002	%
Asylum (including immigration)	2038 (1019)	55	2244 (1122)	53	3292 (1646)	63
Housing (including homelessness)	354 (177)	9.5	342 (171)	8	540 (270)	10
Other	1312 (656)	35.5	1676 (838)	39	1394 (697)	27
Total (excl criminal)	3704 (1852)		4262 (2131)		5226 (2613)	

Immigration/Asylum

The figures in table 1 show a year on year increase in the number of immigration cases, which also constitute an increasing percentage of cases overall. Table 2 also shows a year on year increase in the number of cases, most notably in 2002, when 3292 claims were issued.

Housing

Table 1 shows that between 1994 and 1999, there was a continuing decrease in the number of homelessness cases, with a marked decrease in 1997. The latter is attributed to the coming into force of the Housing Act 1996 which introduced the 'county court judicial review' in respect of homelessness appeals[27]. Some previous research has suggested that while homelessness claims decreased over this period, other housing cases have been growing in numbers[28].

Table 2 shows that in 2002 there was a 58% increase in the number of housing (including homelessness) cases (540 cases) compared with the previous year. The reasons for this increase are unclear, but the timing of it would suggest that it is not directly attributable to the coming into force of the HRA.

Other

The most striking aspect of these figures is the high number of cases issued in 2001 (1676), which is a 28% increase on the number issued in 2000. This is the only category where the figures might suggest the immediate impact of the HRA on the number of cases issued, as they appear to show a "surge" in proceedings. However, the figures fall back again the following year (1394 cases).

Permission stage

Turning now to data collected specifically for this research, the table below shows the subject matter of claims issued over a 3-month period in early 2002.

Incidence of HRA claims in different case categories

Table 3: Incidence of HRA per case category, permission stage

Case category	Cases issued	HRA raised	% of HRA within category
Immigration/Asylum*	852 (213)	448 (112)	53
Housing	144	45	31
Prison	56	26	46
Education	41	4	10
Disciplinary Bodies	22	11	50
Mental Health	21	17	81
Community Care	17	9	53
Land	15	10	67
Asylum Support	14	8	57
Immigration only	14	4	29
Social Security	13	7	54
Local Government	13	6	46
Housing Benefit	13	4	31
Police	12	2	17
Caravans & Gypsies	11	11	100
Costs/LA	10	7	70
County Courts	8	3	37.5
Rates/Community Charge	8	1	12.5
Licensing	6	2	33
Public Health	6	2	33
Tax	6	2	33
Coroners	5	5	100
Highways	5	1	20
Miscellaneous (no. of cases below 5) including the categories below	32	17	53
Family, Children & Young Persons	4	0	
Animals	3	3	
Terrorism	3	3	
Companies	3	2	
CICA	3	0	
Employment	2	2	
Road Traffic	2	2	
Criminal cases review**	1	1	
Criminal law general	1	1	
Crown Court	1	1	
E.C.	1	1	
PACE	1	1	
Agriculture & Fisheries	1	0	
Broadcasting	1	0	
Elections	1	0	
Food & Drugs	1	0	
Magistrates Court Procedure	1	0	
Public Utilities	1	0	
Transport	1	0	
Total	**1344 (705)**	**652 (316)**	

*These figures have been re-weighted as only 1 in 4 cases in this category were included in the sample. See methodology.

**Although criminal judicial review claims were excluded from sample, for reasons to do with the nature of the case or misclassification, a limited number of criminal cases appear in the sample.

Table 4: **Incidence of HRA per case category, permission stage-summary**

*These figures have been re-weighted as only 1 in 4 cases in this category were included in the sample. See methodology.

	I/A*		Housing		Other		Total	
	No.	%	No.	%	No.	%	No.	%
HRA	448 (112)	53	45	31	159	46	652	49
No HRA	392 (98)	46	98	68	174	50	664	49
N/K	12 (3)	1	1	1	15	4	28	2
	852 (213)	100	144	100	348	100	1344	100

At permission stage, Human Rights Act issues are raised in 53% of immigration/asylum cases, 31% of housing cases, 46% of cases excluding immigration/asylum and housing, and in 49% of all civil claims. Case categories showing notable incidence of HRA are: Caravans & Gypsies 100%; Mental Health 81%; Costs/Legal Aid 70%; Land 67%. Asylum Support 57%; Social Security 54%; Community Care 53% and Disciplinary Bodies 50%[29] were all slightly above average in this respect. Despite the low number of cases in the sample it is noteworthy that all claims in the coroners and terrorism categories at permission stage raised HRA points. Of categories showing below average incidence of HRA, it is interesting that only 10% of education cases raised HRA issues.

Use of Human Rights Articles

Table 5: **Use of Articles at Permission stage – immigration/asylum (total no.112)**

Article	No. of cases	% of HRA cases
3	83	74
8	48	43
6	24	21
5	19	17
2	17	15
14	8	7
Unspecified	5	4
9	4	4
10	3	3
4	1	1
11	1	1
13	1	1

Table 6: **Use of Articles at Permission stage – housing (total no.45)**

Article	No. of cases	% of HRA cases
8	34	76
6	18	40
3	3	7
14	3	7
5	1	2
9	1	2

Table 7: Distribution of human rights articles in permission stage 'other' HRA cases (total no.159)

Article	No. of cases	% of HRA cases
6	68	43
8	66	41
14	30	19
3	28	18
5	28	18
P1A1	21	13
2	12	8
P1A2	9	6
7	4	4
10	6	4
13	7	4
9	5	3
11	5	3
12	4	3
Unspecified	4	3
4	2	1
P1A3	2	1

It is apparent from the above tables that many case categories raised specific Articles above others. Thus, of those immigration/asylum claims that raised HRA issues, 74% raised Article 3 and 43% raised Article 8. Of housing cases involving HRA, 76% raised Article 8 and 40% raised Article 6. Of the remaining claims raising HRA issues, 43% involved Article 6 and 41% Article 8.

The table below provides a more detailed breakdown of the use of HRA Articles in selected case categories. In Caravans & Gypsies cases, all of which raised HRA points, Article 8 was cited in every case. In the 11 Disciplinary Bodies HRA cases, Article 6 was perhaps unsurprisingly cited in 82% of cases. Mental Health claims had the highest use of Article 5. It was cited in 76% of such cases raising HRA issues.

Table 8: Distribution of Human Rights Article according to selected case categories at permission stage

Category	No.	Human Rights Articles														
	cases	2	3	4	5	6	7	8	9	10	11	12	13	14	P1A1	P1A2
Asylum Support	**8**	1	5			3		7						3		
Caravans & Gypsies	**10**								10					1	1	3
Community Care	**9**	2	3					7								
Coroners	**5**	4	1													
Disciplinary Bodies	**11**			1		9								1		
Education	**4**								2		1	2				3
Housing	**45**			3	1	18		34	1					3	1	2
Immigration/Asylum	**112**	17	83	1	19	24		48	4	3	1		1	8		
Mental Health	**17**		2		13	4		4				1		1		
Prisons	**26**	1	3		10	12		8	1				1	2		

Post-permission stage

As noted, we collected data in respect of a separate sample of post-permission cases and the tables below show the incidence of HRA in such cases.

Incidence of HRA claims in different case categories

Table 9: Incidence of HRA per category post-permission*

Case category	No. of cases granted permission	Cases raising HRA	%
Immigration/Asylum	204	92	45
Housing	63	20	32
Education	23	5	22
Prisons	22	12	55
Mental Health	13	13	100
Land/Housing Benefit	11	7	64
Police	11	1	9
Asylum Support	10	7	70
Immigration only	9	3	33
Community Care	7	2	29
Coroners	4	3	75
Disciplinary Bodies	5	1	20
Public Health	5	1	20
Family, Children & Young People	4	0	0
Miscellaneous (no. of cases below 5) including the categories below:	36	23	64
Caravans & Gypsies	4	4	
Local Government	4	3	
Licensing	3	3	
Tax	3	1	
Road traffic	2	2	
E.C.	2	2	
Costs/LA	2	2	
Social Security	2	1	
PACE	1	1	
Magistrates Court procedure	1	1	
Criminal law General	1	1	
Council Tax	1	1	
Child benefit	1	1	
Transport	1	0	
Highways	1	0	
Consumer	1	0	
Companies	1	0	
CICA	1	0	
Broadcasting	1	0	
Air travel	1	0	
Total	**425**	**190**	

* The above figures do not include 7 immigration/asylum, 1 prison, 2 coroners, 1 disciplinary bodies, 1 family/children and 4 miscellaneous cases which could not be checked for the incidence of HRA as the files were not available.

The category "immigration/asylum" showed the largest number of cases granted permission, 45% of which raised HRA claims. This compares with 53% of "immigration/asylum" cases raising HRA at permission stage. Housing cases showed the second highest number of cases granted permission, of which 32% raised HRA. This rate of HRA claims is similar to the rate applying to permission stage housing cases (31%). Table 10 below shows that on average 47% of cases in the category "Other" raised HRA issues. At permission stage 49% of such cases did so.

Table 10: HRA incidence at post-permission stage summary (Immigration/Asylum, housing, other)

	Immigration/Asylum		Housing		Other		Total	
	No.	%	No.	%	No.	%	No.	%
HRA	92	45	20	32	78	47	190	43
No HRA	112	53	43	68	79	48	234	53
N/K	7	3			8	5	15	3
	211		63		165		439	

Use of Human Rights Articles

Table 11: Distribution of human rights articles in post-permission stage immigration/asylum HRA cases(total no. 92)

Article	No. of cases	%
3	65	71
8	42	46
5	20	22
2	11	12
6	8	9
Unspecified	5	5
9	4	4
13	4	4
14	4	4
10	2	2
P1A1	1	1

Table 12: Distribution of human rights articles in post-permission stage housing HRA cases (total no. 20)

Article	No. of cases	%
8	16	80
6	8	40
P1A2	3	15
3	2	10
14	2	10

Table 13: Distribution of human rights articles at post-permission stage 'other' HRA cases (total no. 78)

Article	No. of cases	%
8	36	46
6	34	44
5	18	23
14	11	14
3	10	13
2	8	10
P1A1	8	10
13	3	4
P1A2	2	3
12	2	3
9	1	1
11	1	1
P1A3	1	1

Table 14: Distribution of Human Rights Articles according to case category (post-permission)

Category	No.	2	3	4	5	6	7	8	9	10	11	12	13	14	P1 A1	P1 A2	Not spec
Asylum Support	7	1	3			5		5						4			
Community Care	2	1	1					2									
Caravans & Gypsies	4							4						1			
Coroners	3	3															
Education	5					1		2			1			1		1	
Housing	20		2			8		16						2		3	
Immigration/asylum	92	11	65		20	8		42	4	2			4	4	1		5
Mental health	13		3		10	4		6				1		1			
Prisons	12	1	1		7	7		2									

It can be seen from tables 11 to 14 that at post-permission stage, as at permission stage, the use of one particular Article predominated within many case categories. Article 3 was cited in 71% of immigration/asylum cases raising HRA points and Article 8 in 80% of HRA housing cases. Other examples include Caravans & Gypsies, Article 8 being cited in all such cases obtaining permission, and Article 5 in 77% of mental health HRA cases.

Tables 15 to 17 attempt to explore whether there is a change in incidence of particular Articles pre- and post-permission within the three main categories of case. The benefit of such a comparison is limited due to the fact that two different sets of data have been used, as explained in the section dealing with the methodology of the project. However, it is interesting to note that in the immigration/asylum category, the percentage of HRA cases citing Article 6 dropped from 21% to 9% as between the permission and post-permission samples.

Table 15: Use of HRA Articles at permission stage and post-permission (% of HRA cases) – Immigration/asylum

	A.2	A.3	A.5	A.6	A.8	A.9	10	A14
Pre-permission	15	74	17	21	43	4	3	7
Post-permission	12	71	22	9	46	4	2	4

Table 16: Use of HRA Articles at permission stage and post-permission (% of HRA cases) – Housing

	A.3	A.5	A.6	A.8	A.9	A14
Pre-permission	7	2	40	76	2	7
Post-permission	10		40	80		10

Table 17: Use of HRA Articles at permission stage and post permission (% of HRA cases) – other categories

	A.2	A.3	A.5	A.6	A.8	A.9	A.10	A.14	P1A1
Pre-permission	8	18	18	43	41	3	4	19	13
Post-permission	10	13	23	44	46	1	1	14	10

6.

Permission stage outcomes

In looking at outcomes of claims issued, data were collected in respect of cases withdrawn both before paper consideration by the Judge and after paper refusal. In addition, information recorded on the court file as to whether a case was withdrawn with a favourable outcome for the claimant (the "substantive outcome") was included as a separate figure. Other cases are shown as having "substantive outcome unknown". These cases may also have included cases settled in the claimant's favour. Cases shown as "other/not known" included those cases where the outcome information was not available, or where the outcome was adverse to the claimant, but where the matter did not reach the stage of consideration by a judge. Such cases include those in which the claimant's solicitor reconsidered the merits of their case following Acknowledgement of Service, or where the claim itself became academic, for example due to deportation of the claimant.

The outcome data are considered as follows:

- All case outcomes, regardless of case category, are compared as between HRA and non-HRA cases.
- Outcomes for different case categories – 'immigration/asylum', 'housing' and 'other' - are compared between categories, in respect of total outcomes, regardless of HRA/non-HRA distinctions.
- Outcomes for different case categories – 'immigration/asylum', 'housing' and 'other' - are compared between categories in respect of HRA/non-HRA cases.
- Outcomes for different case categories – 'immigration/asylum', 'housing' and 'other' - are compared within each category as between HRA and non-HRA cases.

All cases

Table 18: Permission stage – Outcome summary all cases: HRA and non HRA

	All cases					
	HRA		Non-HRA		All cases	
Outcome	**No.**	**%**	**No.**	**%**	**No.**	**%**
Withdrawn, settled in favour of C pre-consideration by Judge	70	11	82	12	152	12
Withdrawn, settled in favour of C after paper refusal of permission by Judge	14	2	15	2	29	2
Withdrawn, pre-consideration by Judge substantive outcome n/k	18	3	34	5	52	4
Withdrawn, after paper refusal of permission by Judge substantive outcome n/k	77	12	75	11	152	12
Refused, closed	282	43	289	44	571	43
Permission	132	20	141	21	273	21
Other/not known	59	9	28	4	87	7
Total	652		664		1316	

The project data, as set out in Table 18 above, show that, when all cases are taken together, there is virtually no distinction in outcomes between those cases which raise HRA issues and those that do not. Overall, 30% of cases were withdrawn. Of these, 16% were withdrawn prior to any consideration of permission by a Judge, and 14% were withdrawn following an initial paper refusal of permission. 43% of cases were closed following refusal of permission The total rate of claims refused is, however, higher - at 57% - if the claims which concluded by way of withdrawal after a paper refusal are included. Permission was granted in 21% of cases. Of those cases actually determined by a Judge at permission stage (i.e. excluding those withdrawn prior to judicial consideration and those with outcome "other/not known"), 73% were refused permission and 27% were granted permission.

This general picture alters somewhat when outcomes are considered by category (see Table 19).

It is worth noting that, of the 16% of cases which were withdrawn prior to judicial consideration (204 cases), 75% of those (152 cases) were known to have been settled in the claimant's favour. Of the remaining 25% (52 cases) some may also have been settled in the claimant's favour. This suggests that only a minority of cases are withdrawn by claimants persuaded of the lack of merit of their cases as a result of information contained in the AOS.

Cases by category

Table 19: Permission stage outcomes by category – All categories

	Immigration//asylum		Housing		Other	
Outcome	**No**	**%**	**No**	**%**	**No**	**%**
Withdrawn, settled in favour of C pre-consideration by Judge	48 (12)	6	53	37	51	15
Withdrawn, settled in favour of C after paper refusal of permission by Judge	16 (4)	2	7	5	6	2
Withdrawn, pre-consideration by Judge substantive outcome n/k	32 (8)	4	7	5	13	4
Withdrawn, after paper refusal of permission by Judge substantive outcome n/k	136 (34)	16	2	1	14	4
Refused, closed	432 (108)	51	26	18	113	34
Permission	128 (32)	15	42	29	103	31
Other/not known	48 (12)	6	6	4	33	10
Total	840 (210)		143		333	

Table 20: Permission stage outcome summary – Grants, refusals and withdrawals: all categories

Category	Grant of permission	Refusal of permission*	Withdrawn (all stages)
	%	%	%
Immigration/asylum	15	51	28
Housing	29	18	48
Other	31	34	25

*These figures refer to cases which were closed following a refusal, and do not include cases which were refused permission but were then withdrawn by consent.

When cases are considered by category, differentials in the rates of pre-permission withdrawal emerge. The average rate of withdrawal prior to judicial consideration is 16%. The average percentage rate of total withdrawals (including both pre- and post-judicial consideration) is 30%. However, by far the highest rate of withdrawal occurs in housing cases, at 48% overall with a particularly high rate of withdrawals (42% of all claims) before any judicial consideration.

Of all the housing cases withdrawn (69 cases), 87% are known to have been settled in the claimant's favour (60 cases), 77% before any judicial consideration (53 cases) and a further 10% (7 cases) notwithstanding a paper refusal of permission by a judge.

In the immigration/asylum category, 10% of cases are withdrawn prior to judicial consideration, and 18% are withdrawn after a paper refusal. The latter may be attributable to a large extent to a withdrawal of funding by the Legal Services Commission which compels the claimant to withdraw. Of all immigration/asylum cases withdrawn (232 cases), 28% (64 cases) were known to have been settled in the claimant's favour, 21% (48 cases) before any judicial consideration.

In the remaining case categories, 25% were withdrawn prior to permission, 19% prior to consideration by a judge and 6% after a refusal on paper. There is evidence to show that the majority of withdrawals were in favour of claimants.

There were high rates of refusal of permission in immigration/asylum cases. When account is taken of cases withdrawn after paper refusal, a total of 69% of immigration/asylum claims could be said to have been refused permission, compared with only 24% of housing claims and 40% of others. Rates of refusal of permission (i.e. claims refused on paper and not renewed and those refused permission following full oral consideration by a judge) were 51% in immigration/asylum, 18% in housing and 34% in other cases.

HRA and non-HRA

Table 21: Permission stage outcomes summary: Cases by category (HRA and non-HRA)

	Immigration/asylum				Housing				Other			
	HRA		Non-HRA		HRA		Non-HRA		HRA		Non-HRA	
Outcome	**No.**	**%**	**No.**	**%**	**No.**	**%**	**No.**	**%**	**No.**	**%**	**No.**	**%**
Withdrawn, settled in favour of C*	48 (12)	11	16 (4)	4	15	33	45	46	21	13	36	21
Withdrawn, substantive outcome n/k*	84 (21)	19	84 (21)	21	0	0	9	9	11	7	16	9
Refused, closed	212 (53)	47	220 (55)	56	17	38	9	9	53	33	60	34
Permission	64 (16)	14	64 (16)	16	11	24	31	32	57	36	46	26
Other/not known	40 (10)	9	8 (2)	2	2	4	4	4	17	11	16	9
Total	448 (112)		392 (98)		45		98		159		174	

*Withdrawals here include cases withdrawn following a refusal of permission on the papers.

Immigration/asylum cases

Table 22: Permission stage outcomes – Immigration/asylum (HRA and non HRA)

Immigration/asylum						
	HRA		Non HRA		All cases	
Outcome	No.	%	No.	%	No.	%
Withdrawn, settled in favour of C pre-consideration by Judge	36 (9)	8	12 (3)	3	48 (12)	6
Withdrawn, settled in favour of C after paper refusal of permission by Judge	12 (3)	2.5	4 (1)	1	16 (4)	2
Withdrawn, pre-consideration by Judge substantive outcome n/k	12 (3)	2.5	20 (5)	5	32 (8)	4
Withdrawn, after paper refusal of permission by Judge substantive outcome n/k	72 (18)	16	64 (16)	16	136 (34)	16
Refused, closed	212 (53)	47	220 (55)	56	432 (108)	51
Permission	64 (16)	14	64 (16)	16	128 (32)	15
Other/not known	40 (10)	11	8 (2)	2	48 (12)	6
Total	448 (112)		392 (98)		840 (210)	

Tables 21-24 show the outcomes at permission stage for the main categories of case, dividing them between claims raising HRA points and non-HRA claims.

Asylum claims involving HRA issues had a slightly higher rate of overall withdrawals at the permission stage (29%) than non-HRA claims (25%). The main difference in this respect is that 10.5% of HRA asylum cases were withdrawn in favour of claimants compared with only 4% of non-HRA asylum claims. By contrast, a higher proportion of non-HRA asylum claims ended in a refusal of permission following an oral hearing (56%) than those involving HRA points (47%). These findings could suggest that there may have been some tendency to settle more readily in asylum cases raising HRA issues but to let non-HRA asylum claims (where presumably the defendants would be more familiar with the traditional grounds of challenge) to proceed to judicial consideration on the basis that most would be refused permission. On the other hand, asylum cases which are strong on Article 3 grounds would frequently also be good on established Refugee Convention grounds, and this finding may, therefore, not necessarily indicate that it is the human rights arguments which sway defendants to settle.

There was very little difference in the proportions of HRA and non-HRA asylum claims that were granted permission.

In this category, therefore, the most notable differences in the outcome of HRA and non-HRA cases at permission stage is in respect of claims settled in favour of the claimant. The rate of settlement in favour of the claimant in HRA asylum cases is more than double that of non-HRA asylum cases, although rates of settlement in asylum cases are low in comparison with other categories. The pattern of higher settlement rates in favour of claimants in HRA cases is not seen in other categories, where the rate of settlement at permission stage is higher in non-HRA cases.

At permission stage, 16% of asylum claims were withdrawn after paper refusal, a higher percentage than in any other category. The high rate of withdrawals after paper refusal is most likely due to lack of funding, as legal aid is often denied by the Legal Services Commission after paper refusal of permission in immigration/asylum cases, even where advisers hold that the case has good prospects of success. It is not uncommon for renewal applications to be made by claimants' representatives on a pro-bono basis.

Further, at the time this research was being carried out, it was anticipated that the Nationality Immigration and Asylum Act 2002 would remove the Administrative Court's jurisdiction in respect of challenges brought against the refusal by the Immigration Appeal Tribunal (IAT) of permission to appeal decisions of the SSHD to the IAT, with effect from 1st April 2003 (now 1st October

2003). Instead, such claims are to be dealt with by way of a statutory review by a single High Court judge whose decision is final. The application is to be considered on paper only, and at present, in contrast to the judicial review procedure, the new procedure does not include a provision for filing an AOS. For these reasons, it was of interest to establish the current rate of success of oral applications made after paper refusal in the full judicial review procedure.

A partial analysis of this kind was conducted during this research in relation to judicial review claims brought against the IAT. Our research demonstrated that a significant number of claims which were refused permission on paper were subsequently granted permission at oral hearing. We analysed 81 claims brought against the IAT which were granted permission. Of these, 40 claims (49%) were granted permission on paper, 36 (45%) were granted permission on renewal at oral hearing, and 5 cases (6%) were granted permission at an oral hearing listed following a direction made by a judge, having considered the papers. Of the 36 cases granted permission at oral hearing after paper refusal, the outcome of 24 cases was known at the time the research was conducted. Of these, 22 claims settled by consent, 1 was allowed and 1 withdrawn.

This is a striking degree of success for claimants whose claims were initially refused on paper, and suggests that the projected removal of an oral hearing before a judge in the new statutory review procedure will be likely to have an adverse impact upon claimants who might have been successful under the judicial review procedure. This potential disadvantage to future claimants may to some extent be offset by the combined effect of the absence of any provision for the filing for an AOS within the statutory review procedure, and the lack of any right to an oral hearing. In those circumstances, judges may be more cautious in refusing claims, and may be inclined to give claimants the benefit of the doubt.

Housing Cases

Table 23: Permission stage outcomes – Housing (HRA and non-HRA)

Housing						
	HRA		Non-HRA		All cases	
Outcome	No.	%	No.	%	No.	%
Withdrawn, settled in favour of C pre-consideration by Judge	15	33	38	39	53	37
Withdrawn, settled in favour of C after paper refusal of permission by Judge	0	0	7	7	7	5
Withdrawn, pre-consideration by Judge substantive outcome n/k	0	0	7	7	7	5
Withdrawn, after paper refusal of permission by Judge substantive outcome n/k	0	0	2	2	2	1
Refused, closed	17	38	9	9	26	18
Permission	11	24	31	32	42	29
Other/not known	2	4	4	4	6	4
Total	45		98		143	

Of all categories, housing cases show by far the highest rate of settlement in favour of the claimant after the claim has been issued, but before any consideration by a judge, at 37%, as compared with 6% in immigration/asylum cases and 15% in "other" cases. Non-HRA housing claims have a higher withdrawal/settlement rate in favour of the claimant (46%, including 7% following a paper refusal) than HRA housing claims (33%). Non-HRA housing cases have the highest total withdrawal rate of any type of case, at 55%, and HRA housing cases have the second highest withdrawal rate of all types of case (33%).

HRA housing cases have a refusal rate four times higher (38%) than non-HRA housing cases (9%). This is partly due to the higher rates of pre-permission settlement in non-HRA housing cases, but it is also the case that non-HRA housing cases were more likely to be granted permission

(32%) than those raising HRA points (24%). These findings may suggest that in housing cases there may be a tendency for defendants to resist HRA claims more strongly, perhaps because they perceive the HRA being used to bolster otherwise weak cases.

Other cases

Table 24: Permission stage outcomes – 'Other' (HRA and non-HRA)

Other						
	HRA		Non-HRA		All cases	
Outcome	No.	%	No.	%	No.	%
Withdrawn, settled in favour of C pre-consideration by Judge	19	12	32	18	51	15
Withdrawn, settled in favour of C after paper refusal of permission by Judge	2	1	4	2	6	2
Withdrawn, pre-consideration by Judge substantive outcome n/k	6	4	7	4	13	4
Withdrawn, after paper refusal of permission by Judge substantive outcome n/k	5	3	9	5	14	4
Refused, closed	53	33	60	34	113	34
Permission	57	36	46	26	103	31
Other/not known	17	11	16	9	33	10
Total	159		174		333	

The 'other' case category is similar to housing in that non-HRA cases have a higher rate of withdrawal prior to any judicial consideration (22%) than HRA cases (16%), and, amongst cases withdrawn, more non-HRA cases settle in favour of the claimant (20%) than HRA cases (13%). On the other hand, there was little difference in the rate of refusal of permission between HRA and non-HRA cases (33% and 34% respectively). There is a higher permission rate (36%) in HRA cases, compared with non-HRA cases (26%), due to the higher settlement rate of the latter. This is the only case category which shows a higher rate of grant of permission in HRA cases than in non-HRA cases.

Data from previous studies

So far, comparisons have been made between the outcomes of permission stage cases which raised HRA issues and those that did not, in order to see what differences, if any, emerged. Another method of measuring the impact of the Human Rights Act on judicial review would be to compare the outcomes of cases as shown in this project with outcomes of cases found in previous studies and in the Crown Office annual reviews.

The simultaneous implementation of the Human Rights Act and the Bowman review meant that a complex analysis would be required in order to ascertain the relationship between these two factors. Due to differences in the classification of case categories in the various studies, the figures in previous studies, as well as the current figures, would have to be reconsidered and adjusted in such a way as to ensure that a 'like with like' comparison was being made. Such analysis is outside the scope of this paper and it is intended to publish separately on this topic.

It is possible, however, to show the figures as they appear in previous research, bearing in mind the above proviso. For example, it can be seen in table 25 below that the refusal rate in immigration and asylum cases has been consistently higher than in the other categories in those years for which figures are available.

Table 25: Refusal of leave/permission – comparison with previous years

Category	1987*	1988*	1989*	1991 Jan-Mar*	1994/5 Nov-Feb*	Jan 02-July 02
	%	%	%	%	%	%
Immigration/asylum	31	46	41	60	39	51 (69)**
Housing	18	14	16	17	11	18 (24)**
Other	31	31	30	41	30	34 (40)**

* Figures taken from "Judicial Review in Perspective" (Bridges, Meszaros & Sunkin 1995) and "Dynamics of Public Law Litigation – Report of Research Activities and Results"(ibid, unpublished). The categories used in those studies are 'immigration', 'homelessness', and 'other'.

** Figures not in brackets represent claims where the refusal of permission was the last step in the proceedings prior to closure. Figures in brackets represent refusal rates of all cases including those subsequently settled or withdrawn.

Table 26: Withdrawal of claims pre-judicial consideration – comparison with previous years

Category	1987*	1988*	1989*	1991 Jan-Mar*	1994/5 Nov-Feb*	Jan 02-July 02
	%	%	%	%	%	%
Immigration/asylum	24	6	13	15	29	10
Housing	11	5	11	19	25	42
Other	7	4	5	10	14	19

* Figures taken from "Judicial Review in Perspective" (Bridges, Meszaros & Sunkin 1995) and "Dynamics of Public Law Litigation – Report of Research Activities and Results"(ibid, unpublished). The categories used in those studies are 'immigration', 'homelessness', and 'other'.

Table 27: Grant of leave/permission – comparison with previous years

Category	Oct 99-Sept 00*	Apr 01-Mar 02*	Jan 02-July 02*
	%	%	%
Immigration/asylum	27	15	15
Housing	54	65	29
Other	53	43	31

* Figures taken from ACO Annual Reports. The categories used in those reports are 'immigration', 'homelessness', 'criminal' and 'other'.

7.

Post-permission outcomes

The outcome data are considered as follows:-

- All case outcomes, regardless of case category, are compared as between HRA and non-HRA cases.
- Outcomes for different case categories – 'immigration/asylum', 'housing' and 'other' - are compared between categories, in respect of total outcomes, regardless of HRA/non-HRA distinctions.
- Outcomes for different case categories – 'immigration/asylum', 'housing' and 'other' - are compared between categories in respect of HRA/non-HRA cases.
- Outcomes for different case categories – 'immigration/asylum', 'housing' and 'other' - are compared within each category as between HRA and non-HRA cases.

Table 28: Post-Permission outcome HRA/non HRA – All cases

All cases				
	HRA		Non-HRA	
Outcome	**No.**	**%**	**No.**	**%**
Withdrawn by consent, or consent order	102	54	168	72
Allowed	29	15	19	8
Dismissed	44	23	29	12
Other/not known	15	8	18	8
Total	190		234	

In contrast to the pre-permission cases (Table 18), the post-permission results show more differences between outcomes for HRA and non-HRA cases when all cases are taken together. Almost three-quarters of non-HRA cases are withdrawn or otherwise settled by consent following the grant of permission, many presumably with an outcome favourable to the claimant. Just over half of the HRA cases were similarly withdrawn. This may suggest that defendants are less likely to settle an HRA case, notwithstanding a grant of permission, perhaps because of the developing nature of HRA jurisprudence, and the possibility that they may be more familiar with traditional grounds of challenge, and are therefore more confident about when it is appropriate to settle a case.

Only 8% of non-HRA cases granted permission had a successful substantive outcome, in comparison with 15% of HRA cases. Similarly, a higher proportion of HRA than non-HRA cases were dismissed. However, these results appear to be a by-product of the higher rates of post-permission settlement in HRA cases. When the comparison is made based solely on the cases that did reach the point of a substantive judgment (and excluding those where the outcome was not known), 40% of both HRA and non-HRA claims were allowed and 60% of both were dismissed.

Table 29: Post-Permission outcomes – All cases regardless of HRA/non-HRA

	Immigration/asylum		Housing		Other	
Outcome	**No.**	**%**	**No.**	**%**	**No.**	**%**
Withdrawn, consent	143	70	50	79	77	49
Allowed	14	7	3	5	31	20
Dismissed	29	14	7	11	37	24
Other/not known	18	9	3	5	12	8
Total	204		63		157	

Housing cases had the highest rate of withdrawal at post-permission stage (79%), but post-permission settlement rates for immigration/asylum cases were not much lower at 70%. Only 49% of 'other' cases granted permission were eventually settled. Cases in the 'other' category had the highest rate of success at a substantive hearing (20% of all cases granted permission, and 46% of those cases which reached a substantive hearing), compared with housing (5% of those cases granted permission and 30% of cases which reached a substantive hearing) and immigration/asylum (7% of those cases granted permission and 33% of those which reached a substantive hearing).

Table 30: Post-Permission – Outcome summary: Cases by category (HRA and non-HRA)

	Immigration/asylum				Housing				Other			
	HRA		Non-HRA		HRA		Non-HRA		HRA		Non-HRA	
Outcome	**No.**	**%**	**No.**	**%**	**No.**	**%**	**No.**	**%**	**No.**	**%**	**No.**	**%**
Withdrawn, consent	60	65	83	74	13	65	37	86	29	37	48	61
Allowed	9	10	5	4	2	10	1	2	18	23	13	16
Dismissed	15	16	14	13	4	20	3	7	25	32	12	15
Other/not known	8	9	10	9	1	5	2	5	6	8	6	8
Total	92		112		20		43		78		79	

Post-permission outcomes show consistent patterns regardless of case category:-

- In respect of settlements, the rate is higher in non-HRA cases than HRA cases;
- In respect of claims allowed, the rate is higher in HRA cases than non-HRA cases;
- In respect of claims dismissed, the rate is higher in HRA cases than non-HRA cases.

However, all of these differences are less pronounced in respect of immigration/asylum claims than in the other categories. It is worth noting that because of the large number of housing cases withdrawn (HRA and non-HRA) both at permission and post-permission stages, only few go through to a substantive hearing and their numbers are too small to be statistically meaningful.

The general pattern of post-permission results may well provide a further indication of a tendency amongst defendants to resist HRA claims more than claims that do not raise HRA points. This could be due to a number of factors, such as lack of familiarity with HRA jurisprudence, a reluctance to see new grounds for judicial review based on the HRA become established (although this could also lead to a wish to settle such cases earlier), or a perception that the HRA is being used to bolster otherwise weak cases.

8.

Case category analysis

Table 31: Consultants' 'added value' assessments of post-permission HRA cases

Case No.	Category	HR Article/s	% estimate of prospects of success without HRA	% Added value	Outcome
CO/124/02	Prisons	6	60	0	Allowed
CO/2052/02	Asylum support	3, 6, 8	50	0	Withdrawn*
CO/2168/02	I/A**	3, 8, 14	65	0	Withdrawn
CO/875/02	Housing	8	60-80	0	Withdrawn
CO/131/02	I/A	3	65	0	Dismissed
CO/1893/02	Housing	6	50	0	Withdrawn
CO/541/02	Prisons	6	60	0	Withdrawn
CO/83/02	I/A	3, 5, 6, 8	65	0	Withdrawn
CO/58/02	I/A	8	50	0	Withdrawn
CO/1314/02	I/A	2,3,5,10	60	0	Quashed,consent
CO/170/02	I/A	8	85	5	Withdrawn
CO/2395/02	Housing	8	60-70	5	Withdrawn
CO/4756/01	Housing	6, 8	80	5	Adjourned generally
CO/1321/02	I/A	3	60	5	Withdrawn
CO/1970/02	Costs/legal aid	6	60	5	Withdrawn
CO/1296/02	I/A	3	60	5	Dismissed
CO/5118/01	I/A	3	60	5	Allowed
CO/5141/01	Housing	3, 8, 14	50-55	5	Dismissed
CO/4891/01	I/A	3	65	5	Allowed
CO/1170/02	I/A	3, 5	55	10	Allowed
CO/879/02	Housing	6, 8	30	10	Dismissed
CO/437/02	Housing	8	40	10	Dismissed
CO/1268/02	Housing	8	40	10	Dismissed
CO/5037/01	I/A	3, 5	60	10	Withdrawn
CO/1303/02	Housing	8	60	10	Withdrawn
CO/1892/02	Land/HB***	6	40	20	Dismissed
CO/180/02	I/A	Not specified	30	30	Allowed
CO/917/02	Asylum support	3, 8	30	20	Dismissed
CO/3084/02	Mental health	5, 6, 8	30	20	Dismissed
CO/354/02	I/A	3, 6, 8	35	20-25	Withdrawn
CO/2581/02	I/A	3, 8	40	25	Withdrawn
CO/887/02	Housing	6, 8	0	25	N/K
CO/1716/02	Asylum support	6	50	25	Allowed
CO/3608/01	I/A	3, 5, 8, 14	55	25	Withdrawn
CO/1336/02	Housing	6	55	25	Withdrawn
CO/59/02	Housing	6, 8	0	50	Withdrawn
CO/3923/01	I/A	2, 3, 5	0	55	Consent
CO/3938/01	Prisons	5	0	60-70	Dismissed

*Withdrawn by consent in favour of claiment

**Immigration/asylum

***Housing benefit

Immigration/Asylum[30]

Asylum cases form the largest category of cases in terms of claims issued, in this sample 852 out of 1344 claims.[31]

Use of HRA and outcome of cases – permission stage

- At permission stage, 53% of immigration/asylum cases raised HRA issues. Of these, 74% of cases raised Article 3 and 43% raised Article 8[32]. Although the numbers of claims withdrawn and settled in favour of the claimant were nearly 3 times higher in HRA cases (11%) than in non-HRA cases (4%), this is in the context of a low permission stage withdrawal rate overall in comparison with other case categories. This low rate of pre-permission settlement may indicate that the Home Office are still relying on the judges to reject most claims at the permission stage, although somewhat less so in immigration/asylum claims raising HRA points.
- Certainly, at permission stage, 69% of cases raising HRA claims and 73% of cases not raising HRA claims were refused permission. These figures included all cases in which refusal was the last judicial act, whether it was a paper refusal or at a hearing. These figures indicate that, once pre-permission withdrawals are taken into account, the inclusion of HRA issues made little difference to the generally very high refusal rates in this type of case. However, not all paper refusals concluded in a negative outcome for the claimant. Surprisingly, some, albeit few, cases settled in favour of the claimant following a paper refusal (2.5% in the case of HRA cases and 1% in the case of non-HRA cases)[33].
- There was no difference in the rate of grant of permission between HRA cases and non-HRA cases.

The following are some examples of immigration/asylum cases raising HRA arguments which were refused permission.

CO/648/02: C, in challenging the Special Adjudicator's decision to dismiss his appeal and to uphold the SSHD's certificate, argued, inter alia, that D failed to consider whether C would be subjected to ill treatment in violation of Article 3, breach of Article 2, detention in breach of Article 5 and unfair trial in breach of Article 6. In his refusal of leave, the judge made no specific reference to the HRA arguments, stating: "The fact that a wish to prevent Western ideas coming into Iran was behind the criminalisation of the activity does not make the likely prosecution of C on his return to Iran a prosecution for political opinion, which can be the only (Refugee) Convention reason relied on, and it was open to D to find on the evidence that C's trial would be sufficiently fair and his sentence sufficiently appropriate as not to amount to persecution".

CO/690/02: C sought permission, out of time, to challenge the Special Adjudicator's decision to dismiss his appeal against refusal of his asylum application and to uphold the SSHD's certificate. He argued, inter alia, that D failed to consider Article 3, despite it being pleaded in the appeal notice, and that D's conclusion that C would suffer no breach of his Article 8 rights was not reasoned. In refusing permission, the judge observed that, apart from being out of time, "…the AOS indicates that there is no obvious basis on which the claim could succeed". In the AOS, D stated that Article 3 had, in fact, been considered.

CO/694/02: C, a Romanian Roma, challenged the IAT's refusal of leave to appeal the refusal of his asylum application. He argued that D erred in finding that there would be no violation of his Article 3 and Article 5 rights if he were to return to Romania. The judge observed that D was entitled to conclude on the evidence that there would be no such violation.

CO/732/02: In this case, the judge observed that "the Adjudicator gave cogent reasons why he considered that C did not have a well founded fear of persecution if returned to Sri Lanka, and

also why there would be no infringement of Article 3. As to the Article 5 ECHR argument, this was not put before IAT and in my judgment it is too late to raise it now… In any event, I do not see that this would have any prospect of success even if it were run".

At the post-permission stage, the following patterns were evident in immigration/asylum cases:

- Of cases granted permission, 45% raised HRA issues. Of these, 71% raised Article 3 and 46% raised Article 8[34]. The rate of cases withdrawn by consent post-permission was relatively high at 70%. Non-HRA cases had a somewhat higher rate of withdrawal (74%) compared with HRA cases (65%).
- There was a somewhat higher rate of immigration/asylum claims being allowed at substantive hearings where HRA points were raised compared with non-HRA cases.
- Assuming that cases withdrawn are settled in favour of the claimant, and combining claims settled and claims allowed, the success rates of HRA and non-HRA cases post-permission are nearly identical (75% and 78% respectively). However, the fact that non-HRA cases have more withdrawals and fewer claims allowed, may again suggest that the defendants in immigration/asylum cases are more inclined to settle on the basis of familiar grounds in non-HRA claims.

Qualitative analysis by consultants

Seventeen asylum cases which had been granted permission were sent to consultants for qualitative analysis[35]. As not all cases included in this research were considered by consultants and as cases considered by the consultants were not selected systematically, the results can be treated as illustrative only.

In 5 cases out of the 17 cases considered, the inclusion of HRA arguments was said to have made no difference, and the prospects of success were valued at 50%-65%. Of these cases, 4 were settled by consent and 1 was dismissed.

In a further 7 cases, the inclusion of HRA claims was said to have made a little difference and may have increased the prospects of success by 5%-10%. Of these, 3 were settled by consent, 3 were allowed and one claim was dismissed. The prospects of success of cases in this group were all considered to be above average even before inclusion of HRA.

In the remaining 5 cases, the inclusion of HRA issues was considered to have added significant value to the prospects of success. In 3 cases the 'added value' was estimated to have increased the prospects of success by 25%, and in another case by 20%-25%. All four of these cases were settled. In the fifth case, the consultant considered that the prospects of success were increased from 30% to 60%. This case was allowed on the basis that the dismissal of the asylum claim by the Adjudicator was not sufficiently reasoned in the circumstances.

Housing

Housing (including homelessness) is the second largest category of cases in terms of claims issued (144 in this sample out of 1344 claims) and claims granted permission (63 out of 439 cases). The key statistical findings in relation to this category of cases were:

- At permission stage, one third of housing claims raised HRA issues. Of claims raising HRA issues, 76% of cases raised Article 8, and 40% of cases raised Article 6.
- This category showed the highest rate of withdrawals at permission stage. Nearly one half (48%) of all claims in this category were withdrawn by consent, 42% being withdrawn prior to any judicial consideration. This is twice the rate of withdrawals prior to judicial consideration compared with cases in the 'other' category (19%), and four times the rate of withdrawals prior to judicial consideration compared with immigration/asylum cases (10%).
- The rate of non-HRA claims withdrawn and settled in favour of the claimant was 46% and was

higher than the settlement rate of HRA housing cases which was only 33%. On the other hand, more HRA claims in this category were refused permission (38% compared to 9% non-HRA housing claims). As a result, fewer HRA housing claims obtained permission (24%) than non-HRA claims in this category (32%).

The higher settlement rates in non-HRA cases may suggest that defendant local authorities will settle more readily in cases raising well established areas of law and perhaps seek more guidance from the court in respect of claims raising novel issues. It is very rare, however, for a housing judicial review claim to raise human rights grounds alone, and nearly all housing cases raising HRA issues rely also on traditional grounds, thus making a settlement based on familiar areas of law possible in many of the HRA cases. This might also explain the high rate of settlement of HRA cases compared with other categories, notwithstanding any reluctance to settle novel claims.

In this project's sample, out of 20 post-permission housing cases raising HRA issues, 2 were allowed and 4 were dismissed. The outcome of 1 case was not known. Of 43 non-HRA cases considered, 1 was allowed, and 3 were dismissed. The outcome of 2 cases was not known.

- At post-permission stage, one third of housing claims raised HRA issues. Of post-permission housing cases raising HRA issues, 80% involved Article 8 and 40% raised Article 6.
- At post-permission stage, housing cases also exhibited the highest rate of settlement (79%) compared with other categories. Non-HRA cases had a higher rate of withdrawal/settlement (86%) than HRA cases (65%). The number of housing cases which proceeded through to substantive hearing was too small, however, to be statistically meaningful in making comparisons, and is in itself indicative of the high rates of settlement in this category.

Consultants considered 12 housing cases raising HRA issues for 'added value' out of the 20 cases in this sample. In 9 cases, the inclusion of HRA issues was said to make no difference or very little difference. Of those 9 cases, 5 were withdrawn and 3 were dismissed. In the remaining case the outcome was not known at the time of analysis. Of the 3 cases in which consultants considered that HRA issues added value of 20-25%, one outcome is unknown (but the value added was from zero to 25% only) and the other two were withdrawn. (See Appendix 4 for case summaries.)

Given the large proportion of housing cases withdrawn at permission stage before any judicial consideration, and the large number of claims settled after grant of permission, questions are raised regarding the possible reasons why such cases were not resolved prior to the issue of proceedings. The high withdrawal rate of non-HRA claims rules out any possibility that the novelty or complexity of HRA grounds could be a factor. Are defendant local authorities using the issue of proceedings as a gate keeping mechanism? If so, could this indicate a failure to integrate the spirit of the Bowman reforms, or a lack of resources to deal substantively with threats of judicial review, thus prioritising a response to cases which result in the issue of proceedings?

The answer to that, at least in part, may be found in the relationship between the local authority decision-making department, in this case the housing department, and the legal department which, although it is part of the same local authority, must be instructed by the housing department before it can respond to any threat of proceedings. Where there is a delay in such instruction, opportunities to settle cases prior to the issue of proceedings may be lost. Reasons for such delays might include budget considerations in respect of in-house legal costs in those authorities which operate cross-departmental charging, and lack of sufficient staff resources in the face of numerous claims, only a minority of which proceed to court action.

If this analysis is correct, procedural reorganisation of the judicial review process, or educating lawyers to consider alternatives to proceedings, may make only a marginal difference in addressing this problem.

'Other' cases

This category includes all civil judicial review claims excluding immigration/asylum and housing. The type of cases included, and the incidence of HRA in each individual category can be found in tables 3 (permission stage) and 9 (post-permission). The distribution of human rights Articles in some of these individual categories can be found in tables 8 (permission stage) and 14 (post-permission).

- At permission stage the rate of settlement in HRA cases (13%) is lower than that of non-HRA cases (21%). This reflects the pattern seen in the housing category, and could suggest that here too, defendants are more confident in dealing with traditional grounds, perhaps because there is more familiar case law to refer to in assessing the strength of the claim.
- The rate of grant of permission in HRA cases (36%) is higher than it is in non-HRA cases (26%). This result is unique to this category but may largely reflect the higher rate of pre-permission settlement in non-HRA cases.
- There is no difference in refusal rates between HRA (33%) and non-HRA (34%) cases.
- Post-permission, HRA cases have a noticeably lower rate of settlement (37%) compared with non-HRA cases (61%), but a higher rate of claims allowed and claims refused.

Three asylum support cases were considered by consultants. In one case, which was withdrawn before the substantive hearing, counsel considered that the Article 3 and Article 6 arguments did not add value to the claim. In another case, counsel considered that HRA arguments raised the prospects of success by 20%. Although the claim was dismissed, the judge held that the treatment to which the family were exposed did fall within Article 3. Human rights arguments were considered to have improved the prospects of success of the third case by 25%, and the claim was allowed. In a mental health case counsel considered that the inclusion of HRA arguments increased the prospects of success from 30% to 50%.The claim in that case was dismissed. Of the 3 prison cases considered by consultants, in one case, which was allowed by consent, the HRA argument was said to have strengthened the case but did not alter the prospects of success. In another case, based entirely on HRA arguments, the prospects of success were considered to be increased from 0% to 60%-70%, but the case was dismissed. In a third case which was withdrawn by consent, the inclusion of an Article 6 argument was said to have added no value to the claim. A claim in the costs/legal aid category with 5% 'added value' was settled and a housing benefit case with 20% 'added value' was dismissed.

9.
Conclusions

There is little evidence that the introduction of the Human Rights Act has led to a significant increase in the use of judicial review. Therefore, although the number of judicial review claims does continue to rise steadily year on year, the Bowman reforms have not been tested against the anticipated deluge of cases that they were designed to address. Nevertheless, this research suggests that the reforms may indeed have led to an increase in early settlement of cases, and also to higher rates of refusal of permission. In particular, initial paper refusals resulting in the withdrawal of public funding by the Legal Services Commission may have led to an overall decline in the rates of claimants' success in judicial review, either by way of settlement or in terms of substantive judgments. This research found that this was relevant in asylum cases, but this factor may also have a similar impact in other areas. This project was able to consider only limited aspects of the Bowman reforms, and further dedicated research on the impact of Bowman is required.

The research established that the Human Rights Act is cited in just under half of all claims, although this varies considerably according to the subject matter of the application. When taken together with the evidence that the HRA has not led to a major increase in case numbers, it would appear that the HRA is most often being used to supplement established grounds for judicial review in cases that would have been pursued in any event on such grounds prior to the introduction of the HRA.

It may be difficult to distinguish the effect of the HRA on case outcomes, especially at the permission stage, from the impact of other changes, in particular the Bowman reforms. Nevertheless, a comparison of outcomes as between HRA and non-HRA cases suggests that:

- At permission stage, there was a somewhat greater tendency to settle cases raising HRA points prior to judicial consideration in immigration/asylum (although settlement rates in this category were much lower than in any of the other categories). The reverse was true in housing and other areas of judicial review. This suggests that the Home Office may have approached the advent of the HRA in immigration/asylum somewhat differently than other public authorities, perhaps being less confident that the very high rates of refusal of permission that have been traditional in this area would be maintained in HRA cases. Other defendant bodies appear to have been more likely to resist HRA claims than non-HRA ones.
- The significantly higher settlement rate of non-HRA housing cases, and the corresponding higher refusal rate in HRA housing cases, may suggest a tendency for defendants to resist HRA claims more strongly, perhaps because they perceive the HRA being used to bolster otherwise weak cases, or because they wish to avoid establishing local precedents.
- When all case categories are taken together, there is little evidence to suggest that, of those cases reaching a judicial determination on permission, HRA cases fared much differently from non-HRA cases.
- There was a clear pattern in post-permission decisions (but one less pronounced in immigration/asylum than other areas) that settlements were more likely in non-HRA cases and HRA cases were therefore more likely to end in a substantive judgment. However, the numbers of cases reaching judgment was small, especially in housing. Of cases where there was a judgment, HRA immigration/asylum claims were more likely to be allowed than non-HRA cases, but the reverse was true in the 'other ' category.
- Qualitative analysis of cases, including the results of assessments by project consultants, tended to show that in many cases HRA arguments did not add significantly to the case or the prospects

of success of claimants. However, there was a minority of cases where consultants considered that HRA arguments did lead to significant 'added value', increasing the prospects of success by up to 20%-30%. There were only 3 cases in the sample which could not have been brought prior to the HRA, and their prospects of success were considered to be increased from 0% to between 50% and 70%. It is difficult to correlate these findings with the actual outcome of cases, since the latter could be so varied once settlements and withdrawals are taken into account.

Wider lessons

It is evident from the fact that half of all judicial review claims referred to the Human Rights Act that the publicity and training surrounding the introduction of the HRA has had an impact, and many practitioners are aware of, and are raising, human rights issues in judicial review applications. However, examination of the claim forms filed in the cases comprising the research samples suggests that references to the HRA are frequently cursory or are not pleaded in detail, and this raises the question whether there has been 'over-use' of the HRA. In the sense that there appears to be no significantly greater chance of success for claimants in cases citing the HRA, it may be said that it has not greatly assisted their cases in most instances. On the other hand, there is no evidence either that it has harmed them, insofar as the findings do not suggest, for instance, that judges are more likely to reach adverse decisions on claims raising HRA points, although there is evidence that defendants may be more likely to resist cases involving HRA claims.

Thus the research suggests that training now needs to be directed less at raising awareness of the HRA among practitioners and potential applicants and rather at achieving a more discriminating use of HRA in judicial review. This in turn raises questions about how training on the HRA conducted by or for professional groups and non-governmental bodies can best be developed to achieve a more targeted use of the HRA in judicial review.

It is also worth considering the role of the judiciary in wider education on the use of the HRA. In this context, we observed from the case papers that, even when HRA grounds were cited in the application, judges frequently failed to make detailed reference to these when either granting or refusing permission. This may suggest reluctance on the part of judges fully to engage with HRA jurisprudence in ways that will send clear lessons to practitioners about how best to use (and possibly not to use) the Act in judicial review.

Finally, even if the number of judicial review claims has not increased significantly as a result of the HRA, nevertheless half of all cases pleaded HRA grounds. Of these, one third succeeded at permission stage, and two-thirds of those granted permission were successful thereafter either in terms of reaching a settlement or being allowed. Notwithstanding that alleged human rights abuses were not the sole cause of action in most of these cases, this does suggest that decision makers in public bodies have yet to absorb and incorporate in their decision-making processes the values inherent in the HRA.

End notes

1. L. Bridges, G. Meszaros, and M. Sunkin, Judicial Review in Perspective - an Investigation of the Trends in the Use and Operation of the Judicial Review Procedure in England and Wales (Public Law Project 1993).
2. L. Bridges, G. Meszaros, and M. Sunkin, Judicial Review in Perspective (Cavendish Publishing Ltd, London 1995).
3. Deana Smith, Third Party Interventions in Judicial Review – An action research study (Public Law Project 2001).
4. ibid. p.3.
5. The period ran from 28th January until 29th April 2002.
6. The period ran from 28th January until 29th July 2002.
7. Review of the Crown Office List (Lord Chancellor's Department, London, 2000). (The Bowman Report.)
8. The Crown Office was renamed as the Administrative Court Office in October 2000.
9. The Bowman Report p.ii.
10. ibid. p. 10.
11. ibid. p. 71.
12. CO/725/02.
13. CO/882/02.
14. CO/946/02.
15. CO/2021/02.
16. The Bowman Report pp. 67-68.
17. [2001] EWCA Civ 1935.
18. CO/1322/02.
19. CO/575/02.
20. CO/654/02.
21. CO/2021/02.
22. These figures, taken from COINS, include the total number of all claims, including civil and criminal claims as well as statutory appeals.
23. In October 2002, Mr Justice Scott Baker was replaced as the Lead Judge by Mr Justice Maurice Kay.
24. Figures taken from Administrative Court Report for the period April 2001 to March 2002.
25. Figures taken from Bowman Report p.3.
26. Figures taken from COINS. Figures were obtained for the first six months of each year, and re-weighted by doubling to give annual figures. These figures are not directly comparable with the figures in Table 1. The category 'homelessness' in Table 1 probably does not include other 'housing' cases. It is not clear whether the category 'immigration' in Table 1 includes asylum cases as well as immigration cases.
27. The Bowman Report pp.3-4.
28. L. Bridges, G. Meszaros, and M. Sunkin Regulating the Judicial Review Caseload (Public Law, Winter 2000, 651)
29. Only categories with more than 10 cases are included.
30. In this project, the category 'Immigration/asylum' refers, in fact, to asylum cases. It does not include immigration only claims (such as entry clearance and work permits), which are a very small category compared to asylum claims. They appear as a separate category and are subsumed within the category 'other'. For the number of claims issued see table 3. For those granted permission in each category see table 9.
31. Due to the number of claims issued in this category, this project examined only one in four immigration/asylum cases. Thus, 213 issued claims were examined, being one in four of claims issued during the 3-month research period. Of claims granted permission, 211 out of 439 cases were examined. The figures have therefore been re-weighted in order to account for this.
32. For a full breakdown of use of Articles, see table 5.
33. For a breakdown of outcomes at permission stage, see table 22.
34. For a full breakdown of use of Articles, see table 11.
35. See Appendix 2 for a copy of the questionnaire to which consultants were asked to respond. See Appendices 3 to 5 for case summaries and consultants' evaluations.

Appendix 1

Article 2	Right to life
Article 3	Prohibition of torture or inhuman or degrading treatment or punishment
Article 4	Prohibition of slavery and forced labour
Article 5	Right to liberty and security of person
Article 6	Right to fair trial
Article 7	Prohibition on punishment without law
Article 8	Right to respect for private and family life
Article 9	Right to freedom of thought, conscience and religion
Article 10	Right to freedom of expression
Article 11	Right to freedom of peaceful assembly and association with others
Article 12	Right to marry and found a family
Article 14	Prohibition of discrimination

Protocol 1:

Article 1	Protection of property
Article 2	Right to education

Appendix 2
HRA Questionnaire

(Please continue on a separate sheet if necessary)

Name of expert: Date:

Case number: CO/

Claimant:

Defendant:

Case Category:

1. Does the case raise arguments based on the HRA 1998? If yes, what are they?

2. Could any or all of these arguments have been made prior to the HRA 1998 coming into force?

3. In your opinion, were the prospects of success in obtaining permission likely to have been improved by the inclusion of HRA arguments?

4. In your opinion, are the prospects of success in final determination likely to have been improved by the inclusion of HRA grounds alongside traditional grounds?

5. What, in your opinion, is the claim's likelihood of success on final determination:
a) On traditional grounds alone %
b) With the inclusion of HRA grounds %

6. If successful, would the HRA grounds entitle the claimant to a remedy that would not otherwise be available on the traditional grounds alone? If so, please give details.

7. In your opinion, are there any human rights arguments which could have been raised, but which do not appear in the claim, which would have affected the outcome of the case?

Return to: Varda Bondy, Public Law Project, 14 Bloomsbury Square, London WC1

Appendix 3

Added Value Evaluation by Consultants – Immigration/asylum

Cases where HRA issues are said not to have made any difference

CO/2168/02
C, a Czech citizen of Roma ethnicity, challenged D's refusal of leave to appeal a determination of Special Adjudicator upholding a decision of SSHD refusing C leave to remain on human rights grounds. C contended that his removal would be in breach of Article 3, Article 8 and Article 14, and that in light of the factual findings, the Adjudicator's determination on Articles 3 & 8 was perverse. Leave was granted on the specific issue of whether the Special Adjudicator and the IAT failed properly to consider whether the evidence of assaults by police officers and C's reaction to them as recorded in the determination meant that the authorities in the Czech Republic could not give proper protection to C. Outcome: consent.
Consultant: HRA grounds make no difference. Analogous grounds could have been made out under Refugee Convention.

CO/1314/02
C, a Zimbabwean national whose appeal against refusal of asylum was dismissed, claimed that D failed to deal with background information and to apply anxious scrutiny despite accepting that C's family may have been harassed by the security forces. D further failed to take into account news reports that MDC supporters suffer breaches of Articles 2 and 3 on return to Zimbabwe and to address breaches of Articles 5 and 10 raised by C. Decision quashed by consent.
Consultant: HR Articles could not have been raised separately pre-HRA, but they make no difference as the issues in this case concern persecution and internal flight.

CO/131/02
C, a Czech national of Roma ethnicity sought asylum on the basis of fear of persecution on account of his ethnic origin. The application was refused, as was leave to appeal. Leave to appeal to the IAT was also refused. C contended that D failed to have regard to the fact that state officials were involved in C's ill treatment, and that D failed to give adequate reasons for its view that the Adjudicator was entitled to find that incidents complained of did not amount to persecution. D erred in failing to consider the Adjudicator's failure to have proper regard to the discriminatory aspects of ill treatment suffered by C. C submitted that the treatment was degrading for the purpose of Article 3 because it was as a result of discrimination on account of ethnicity.
In dismissing the claim, the judge made no reference to the HRA. He found that there was no failure to consider that ill treatment occurred by state agents and there was no failure to give sufficient reasons.
Consultant: Article 3 arguments are the same as those under Refugee Convention.

CO/1296/02
C, a national of the Ivory Coast was refused asylum by SSHD. His appeal was dismissed by the Adjudicator and leave to appeal refused by D. The Adjudicator made an adverse credibility finding based on C's delay in claiming asylum and because he was in possession of false documents, and rejected the claim on the basis that there was no likelihood of risk to C following a change of government since the events complained of. C submitted that the adjudicator applied the wrong test in assessing future risk of persecution. In reaching the conclusion that there had been a fundamental change, he failed to take into account evidence from HR Watch, failed to consider that C was arrested and ill treated subsequently to change of government and irrationally concluded that C was not at risk of repeat persecution and ill treatment contrary to

Article 3. The judgment makes no reference to Article 3 arguments. The claim was dismissed.
Consultant: All issues could have been raised pre HRA under the Refugee Convention, and they do not add value to the claim.

CO/3923/02
C claimed that D erred in law in applying the wrong test on the issue of 'serious risk' and 'sufficiency of protection' in respect of his Article 2 and Article 3 rights, and also failed to consider whether his detention on return to Pakistan would be excessive or prolonged in breach of his Article 5 rights. Final outcome: consent.
Consultant: all aspects could be argued under guise of Refugee Convention, and HR aspects appear to add little to established arguments.

CO/83/02
C, an Iranian national, left Iran after being sought by the authorities for his participation in student demonstrations. SSHD refused the application for asylum and certified the appeal under para 9(4)(a) of Sch.4 1AA 1999. He certified that no convention ground had been shown. The Adjudicator dismissed the appeal. C challenged the findings on credibility and D's failure to consider whether removal would be in breach of his rights under Articles 3,5,6 and 8. D argued that the claim did not show fear of persecution for a convention reason.
Permission was granted on basis that D did not give adequate reasons for doubting C's credibility and D did not address the question of whether, if C's account was true, he had a well-founded fear of persecution for a (refugee) convention reason if he was returned to Iran. Determined by consent.
Consultant: Inclusion of HRA makes no difference.

CO/58/02
C, a Turkish Kurd, applied for asylum on the basis that he would face arrest and punishment in Turkey for draft evasion. He challenged D's approach to the evidence and also argued that his removal would interfere with his Article 8 rights as he had married a UK national. The interference would not be justifiable. He would be unable to conduct his family life in Turkey on the basis of anticipated risk of suffering ill treatment. Case was settled by consent.
Consultant: Article 8 right argument could not have been made pre HRA, but it adds nothing to the prospects of success because the family life argument will not succeed unless C can show he will suffer serious problems if returned to Turkey.

Cases where HRA issues are said to have made a small/marginal difference (5-10%):

CO/170/02
C, a refugee, claimed that the SSHD's failure to determine her application for entry clearance for her family for over 18 months was unlawful. In addition, it amounted to an interference with her family life in depriving her of being with her family in the UK. The claim was withdrawn following grant of permission.
Consultant: prospects of success on traditional grounds alone are 85% and with inclusion of HRA grounds are 90%. Delay in itself was a strong ground for review.

CO/1321/02
C, an Algerian national, claimed asylum on the basis of fear of persecution from an Islamic group as a result of his refusal to perform military service on medical grounds and fear of ill treatment by the authorities as a result of suspicion of assisting a terrorist group. The Adjudicator dismissed the appeal, having found C's case not credible. C contended inter alia that D failed to take into account relevant evidence and that D adopted the Adjudicator's error in relation to Article 3. The conclusion was irrational in view of the medical report submitted by C.
Outcome: consent.
Consultant: HRA argument could not have been made pre-HRA as the IAT had no jurisdiction to consider this kind of argument. The added value is assessed at 5%.

CO/5118/01
C, an Iraqi Kurd, was refused asylum and removal directions were given. His appeal was dismissed by an Adjudicator and his asylum support was terminated. C contended that he would be in danger were he to be expelled through Baghdad and that he should be granted exceptional leave to enter. Withdrawal of support in

circumstances when he cannot be removed engages Article 3. Support was granted after the court ordered D to determine whether to provide support. Exceptional leave to enter was refused. The issues at the hearing were whether temporary admission was still lawful in the present circumstances, whether a time came when it was unreasonable to decline to grant exceptional leave to enter, and whether the decision to decline was in itself unlawful. Mr. Justice Crane found that, at a time when removal would not be possible for longer than 12 months, removal was not still "pending" and temporary admission was no longer lawful. He ordered that the SSHD decision be quashed and that consideration be given whether to grant exceptional leave to enter, possibly on a limited basis. An appeal by SSHD was allowed, as meanwhile the Nationality, Immigration and Asylum Act 2002 was enacted, which provided for grant of temporary admission in these circumstances, and the Act specified that this provision shall be treated as always having had effect. (Article 3 was not relied on at the hearing, as the support aspect had been resolved by that time).
Consultant: Article 3 argument in respect of destitution could not have been raised pre-HRA. Prospects of success are likely to have improved even though the application was about delay in processing an application, as Article 3 was relevant to the impact of delay in the context of no support.

CO/1170/02
C applied for JR to quash IAT's refusal of leave to appeal against determination of Adjudicator which dismissed C's appeal against the decision of DHSS. C, an ethnic Russian from Latvia, claimed asylum on basis of fear of persecution base on his ethnic origin and his political association. C argued that, if returned, he would expect to be detained without trial for a lengthy period in sub-standard conditions amounting to breach of his Article 3 and Article 5 rights. The court found that the Adjudicator's determination failed to make clear the basis of its conclusion on a significant issue, namely whether it accepted C's contentions as to the facts but rejected that they amounted to breach of Article 3, or whether it rejected the contention and held that the background material relied on was not relevant. An error of law was found in the IAT's approach and the decision was quashed on that basis.
Consultant: HRA added value of 10%, from 55% to 65%. Arguments would not have been available separately from the asylum claim but would have been subsumed within it. HRA arguments are helping in giving more precise standards by which to assess the claim and the tribunal's approach.

CO/4891/01
C, a Turkish national, came to the UK in 1996 on a 6 month visa and made a claim for asylum. The SSHD rejected the claim, a Special Adjudicator dismissed his appeal and the IAT allowed C's appeal. A year later, following a BBC programme alleging that C's asylum claim was false, D served C with notice of intention to deport him on the ground that his continued presence in the UK was not conducive to the public good. C had been charged in Turkey with the murder of his British girlfriend, which C denied. C argued that D should have applied to the Court of Appeal out of time in reliance on the fresh evidence contained in the BBC programme, and that it was an abuse of process to start separate proceedings. Mr Justice Moses allowed the claim on the basis that the Secretary of State did not ask himself whether the evidence from the BBC programme was of sufficient cogency to set aside the determination of the IAT, giving rise to a right to refugee status which could only be set aside by clear evidence that the right was obtained by fraud.
Consultant: The Article 3 argument could have been made pre-HRA. It plays a part in obtaining permission and increases the prospect of success to a small extent.

CO/ 5037/01
C challenged a decision of the IAT to refuse permission to appeal to the IAT against a determination of a Special Adjudicator. C argued that the Adjudicator erred in refusing to inspect scars on the basis that C did not give evidence, relied on an old case for assessing the situation in Sri Lanka and erred in his approach to consideration of whether return of C to Sri Lanka would constitute a breach of Article 3 and Article 5 of the ECHR. Determined by consent.

Consultant: added value of 10%, from 60% to 70%

CO/3608/01
C, a national of Sri Lanka, applied for asylum. He was refused by the SSHD. Special Adjudicator dismissed the appeal and the IAT refused leave to appeal. C argued that D failed to into account relevant factors in assessing future risk, that he misdirected himself with regard to findings as to Article 3, Article 5 and Article 14, and failed to consider whether C's separation from wife and child, which interfered with his Article 8 rights, was justified and necessary. D failed to give reasons as to why C could pursue his family life in Sri Lanka without undue interference, absent his family. D argued that the adjudicator assessed Article 8 on the basis that the family would be together in Sri Lanka, and D agreed not to remove C until C's wife's application was determined. Case was settled by consent.
Consultant: Prospects of success marginally improved.

Cases where HRA issues are said to have made a difference

CO/2581/02
C's original human rights claim that his return to Kosovo would result in him being subjected to Article 3 violation was rejected as part of the one-stop process. SSHD refused to consider a subsequent human rights claim that C's return to Kosovo would breach his Article 8 rights. Permission was granted on the basis that the Article 8 issue arose after the initial consideration of C's claim and it was therefore arguably not covered by the by the one-stop notice. Claim withdrawn.
Consultant: the prospect of success increased from 40% to 65% as a result of raising human rights arguments. The success of this claim gave rise to a remedy that would not otherwise be available on traditional grounds, namely a further human rights appeal.

CO/354/02
C claimed asylum on basis of persecution suffered for suspected association with Kurdish parties, including torture, intimidation and assaults. The claim was refused on third party ground as France had accepted responsibility for his application. C appealed on the basis that his removal would be in breach of s.6(1) of the HRA and Articles 3 and 8. D concluded that human rights allegations were manifestly unfounded since C was to be returned to France, not to Turkey, noting that France would not return C to Turkey in breach of his human rights. C provided medical reports on his physical and mental state confirming his need for support from family in the UK which would not be available in France, and that removal would hold up his treatment and was likely to lead to mental breakdown. In granting permission Mr Justice Richards expressed concern about the fragility of C's mental state, saying, inter alia, that "it is just about arguable that the decision to remove C is in breach of his Convention rights". Claim withdrawn.
Consultant: HRA arguments could have been raised before, arguing breach of fundamental rights, yet their inclusion was essential and added value to the prospects of success from 35% to 55%.

CO/180/02
C, who suffered persecution as a Bihari, fled Bangladesh and moved to the Ukraine, where he married a Ukrainian national. His asylum claim was rejected. C produced evidence on the treatment of Biharis and claimed that his removal together with his wife and 2 children – none of whom had ever been to Bangladesh- would be a breach of their rights under the ECHR. Claim was allowed on the basis that "a claimant such as this claimant, when presenting this kind of material to an Adjudicator, is entitled to a more carefully reasoned dismissal of his appeal even if in the end result is, as so indicated, a dismissal". Claim allowed.
Consultant: HRA arguments could have been made pre-HRA. They did however add value to the prospects of success from 30% to 60%.
Although the claim was allowed on the basis of inadequate reasons, permission was granted on the question of whether or not there was real cause for concern in relation to the Adjudicator's conclusions on Articles 3 and 8.

Appendix 4

Added Value Evaluation by Consultants – Housing

Cases where HRA issues are said not to have made any difference

CO/875/02
C claimed that the local authority acted in breach of his Article 8 rights by failing to discharge its duty to investigate his homelessness and to secure suitable accommodation. The claim was withdrawn by consent shortly before the hearing.
Consultant: this was a straightforward case of breach of duty by local housing authority. HRA argument made no difference.

CO/1893/02
C challenged a decision made by Newham LB that there had been no material change of circumstances since a previous offer of accommodation was made and refused. C raised an argument as to the procedural fairness under Article 6 in the refusal to accept her application. The case was withdrawn by consent after grant of permission.
Consultant: the procedural fairness and statutory duty arguments were free- standing, and the inclusion of the Article 6 argument made little or no difference.

Cases where HRA issues are said to have made a small/marginal difference (5-10%):

CO/2395/02
C was placed in B&B accommodation which was wholly unsuitable. She pleaded breach of statutory duty to secure suitable accommodation, and included a breach of Article 8 argument as part of the submission as to why the accommodation was unsuitable. Permission was granted and the case was then withdrawn.
Consultant: the 'suitability' argument was strengthened by the presence of Article 8. The added value was assessed at 5% in a case which already had good prospects of success.

CO/4756/01
C sought a mandatory order for D to provide a suitable property. She was a secure tenant and suffered from disabilities which made the property she was occupying unsuitable for her needs and those of her family. The need for re-housing had been acknowledged by D in 1994. C argued, inter alia, that no reasonable local authority would have failed to secure accommodation for such a long time, breach of duty arising by operation of the principle of legitimate expectation and infringement of convention rights in that failure to provide accommodation and inordinate delay constituted an infringement of Article 8 owing to the impact of such delay on home and private family life of C. She argued that D had more than a negative duty not to interfere and it continued to infringe Article 8 by failing to act. D had failed to conduct a fresh assessment under s.184 of Housing Act 1996, thereby depriving C of her right to a fair and public hearing regarding the promise made of a decent home and respect for her private and family life, in breach of Article 6 and Article 8. The case was adjourned generally.
Consultant: breach of Article 6 argument slightly strengthened an already strong case.

CO/879/02
This was a challenge to the allocation scheme adopted by Lambeth LB under Part VI of the Housing Act 1996, in which an applicant's priority for accommodation depended upon waiting time. C argued that the policy was perverse, and also that Article 6 and Article 8 were engaged by the manner in which an authority allocates accommodation, and anxious scrutiny was therefore required. The claim was dismissed and no reference was made to HRA.
Consultant: the bulk of the challenge rested on perversity and the prospects of success were "not particularly" improved

by the inclusion of HRA arguments.

CO/437/02
C challenged the refusal of Southwark LB to allow her to remain in a property with her 4 children. She moved into the property after the tenant, the children's father, had moved out. C argued that she was entitled to assistance under Part VII of the Housing Act 1996, and that she was a qualifying person for the tenancy of the same property under D's allocation scheme following a relationship breakdown. She sought an order requiring D to grant her a secure tenancy in accordance with its policy. C also contended that the eviction was an interference with her Article 8 rights and that it was for D to prove that these had not been unlawfully violated. D sought to rely on the justifiable restrictions set out in Article 8. D claimed that C was an unauthorised occupier whose entitlement was brought to an end by obtaining a possession order for rent arrears. As to the refusal to grant a tenancy, D submitted that C did not fulfil the requirements of a grant under the relationship breakdown policy. D accepted that they would have an obligation to house her in suitable alternative accommodation. The claim was dismissed by the judge, having considered the allocation policy and the relationship breakdown policy. There was clearly no stable relationship which could bring C within the relationship breakdown policy entitlement. HRA issues were not mentioned in the judgment.

Consultant: prospects of success increased from 40% to 50%. Substantive grounds could have been made out pre-HRA.

CO/5141/01
C, a destitute Dutch national, came to the UK to escape a violent husband. Income support was refused as she was not habitually resident in the UK, although she was lawfully resident as an EU national. D offered repatriation assistance, or alternatively to take the children into care. C contended that:
a) the decision to terminate assistance under s.21 NAA was unlawful as she was a nursing mother. Moreover, repatriation assistance did not fall within s.21;
b) availability of assistance in Holland was an irrelevant factor. It offended against EC law and/or discriminated against separated mothers who came to the UK to live and work;
c) decision to stop assistance for the children was contrary to ss17-20 of the Children Act;
d) D acted contrary to Article 3, Article 8 & Article14, as well as contrary to Sex Discrimination Act 1975, and to Race Relations Act 1978;
e) the decision to terminate support was incompatible with Article 6(1) as there was no appeal to an independent tribunal.
Ds did not contest the grant of permission but argued that the decision was consistent with R(G) v. Barnet and R(A) v. Lambeth. There was no breach of Article 3 as the treatment of C by D was not sufficiently serious and no Article 8 violation as there was no right to housing as per Chapman v UK. Further, there had been no determination of a civil right and hence no Article 6 breach nor had there been any discrimination. The claim was dismissed. The judge held that neither s.17 Children Act nor Article 8 gave rise to a right to accommodation for C and the children. The offer to fund a return to the Netherlands was in accordance with the council's policy, was justified as being for a legitimate objective necessary in a democratic society and it was a proportionate response to a pressing social need. The judge found no discrimination under Article 14 combined with Article 8, and no breach of Article 6 in respect of the independence of the complaints panel, which the judge held to be HRA compliant combined with the availability of judicial review.
Consultant: prospects of success improved, but not substantially.

CO/1268/02
C challenged D's failure to provide suitable accommodation pursuant to its duty under s.193 of the Housing Act, seeking a declaration that D was in breach of statutory duty, a mandatory order directing D to secure accommodation and damages under Article 8. Accommodation was provided prior to final hearing and the remaining issue was considered, namely whether a homeless person is entitled to damages against a local authority for failure to perform its statutory duty under s. 193 (2) of the Housing Act 1996 in circumstances such as those suffered by C. The judge, on the basis of authorities cited,

proposed that Article 8 did not impose on a public authority a duty to provide a home to a homeless person, homelessness by itself cannot found a claim for breach of Article 8, a homeless person has no right in tort to recover damages against a local authority for failure to provide accommodation , and absent special circumstances which interfere with private or family life, a homeless person cannot rely on Article 8 in conjunction with Pt VII HA 1996 to found a claim for damages for failure to provide accommodation. No breach was established in this case. Dismissed with leave to appeal.
Consultant: the Article 8 argument was additional to statutory entitlement and could not have been made pre-HRA. It added 'a little' to prospects of success.

CO/1303/02
C challenged D's decision not to provide accommodation, having found him to be intentionally homeless, and to terminate temporary accommodation pending a s.204 County Court appeal. C submitted, inter alia, that Article 8 was engaged and that the decision to evict him required anxious scrutiny.
Consultant: Most arguments relied on were not related to HRA. The Art 8 argument added "only a small percentage" to the prospects of success.

Cases where HRA issues were said to have made a difference

CO/887/02
C challenged the review procedure in s.202 Housing Act 1996 homelessness appeals by reason of its lack of independence and impartiality, and sought a declaration that the procedure was incompatible with Article 6 and Article 8, and a further declaration that s. 203(2) and s. 204(2) were Article 6 incompatible. Outcome not known.
Consultant: This case rested on HRA arguments alone, and could not have been brought pre HRA. Its prospects of success were, however, assessed at 25% only.

CO/59/02
C challenged D's decision to reject his application for housing on the basis of allegations of anti-social behaviour. C argued that D, a housing association, was a public body for the purposes of s.6 HRA and that a consideration of his request for housing was a determination of his civil rights, engaging Article 6 and Article 8. C also pleaded breach of rules of natural justice.
Consultant: This could have been an important case had it not been settled, if only on the issue of bringing a case against a housing association which previously was not a possible defendant. Inclusion of HRA argument added value from 0% to 50%.

CO/1336/02
C requested a review of a decision that she was not homeless but received no notification of a review decision. C claimed that D had acted in breach of its duty to notify her of the review decision pursuant to s.203 of the Housing Act 1996, and in breach of her Article 6 right to a fair hearing. She sought an order requiring D to carry out a lawful review. Claim was withdrawn by consent after grant of permission.
Consultant: inclusion of Article 6 argument was additional to that of statutory entitlement to a review and increased the likelihood of success.

Appendix 5

Added Value Evaluation by Consultants –'Other'

Asylum Support

CO/2052/02

C, a refused asylum seeker awaiting appeal, had his NASS support terminated after he had left accommodation provided by NASS. After he was no longer able to stay with friends he applied for support and was rejected on the basis that there was no material change of circumstances since his support was terminated. C argued that change of address was a material change of circumstances, as was the fact that he had ceased to be destitute before becoming destitute again. Denial of support was breach of Article 3 as he had no other means of support, and breach of Article 8 as lack of support constituted a serious risk to his physical integrity. He also argued breach of Article 6 as he was prevented from receiving appropriate assistance from solicitors. Claim was withdrawn just before the substantive hearing.

Consultant: HRA grounds did not add value to the claim

CO/917/02

C, a Turkish Kurd, sought asylum. He suffered torture and other human rights abuses resulting in psychiatric problems. He approached NASS for assistance and was told that he and his family would be dispersed to Glasgow, and that refusal to go would lead to withdrawal of financial support. C was placed in a neighbourhood where a Kurdish asylum seeker had been murdered in the previous month. He and his family were subjected to abuse and threats and finally were attacked in their home. C's 13-year-old son was threatened with a knife. C returned to London and was refused accommodation and financial support by NASS unless he returned to Glasgow. C brought proceedings challenging D's failure to provide temporary accommodation and support pending enquiries, the decision to disperse the family to Glasgow and the failure to take steps to prevent exposure to circumstances leading to destitution, contrary to common law and/or Article 3 & Article 8.

The judge held that the treatment to which the family were exposed fell within Article 3. However, the harm was not inflicted by the State or State agents. The question was what level of protection the State should provide. In this case, prior to the incidents concerning C, the police had not advised that asylum seekers should not be housed on the estate and NASS had been under no obligation to discontinue the use of the accommodation. The decision to disperse C did not, therefore, amount to a failure to provide adequate protection against treatment falling within the scope of Article 3.

Consultant: the inclusion of HRA issues added value to the claim, increasing the prospects of success from 30% to 50%.

Mental health

CO/3084/02

C was a restricted patient, detained under ss 37 and 41 MHA 1983. He requested that the MHRT considering his case disapply Rule 11 of the MHRT Rules 1983, which provides that the tribunal's medical member conduct an examination of the patient and form a view as to his/her mental state. C objected to being seen by the medical member prior to the hearing, but the chairman responded that s.11 was mandatory. C contended that the rule was unlawful and incompatible with his Article 5(4) right to an independent and impartial judicial determination of his detention. Rule 11 required that the doctor form an opinion. That opinion could not be cross-examined by the patient. Article 5(4), Article 6 and Article 8 were engaged, the latter in respect of protection of confidentiality. It was disproportionate to require that the medical member of the

tribunal be given unlimited access to records. The claim was dismissed, the court finding that rule 11 was not inconsistent with Article 5(4). Impartiality in this context required a member of the tribunal not to have a pre-conceived concluded opinion on the merits of the case, and a provisional view formed before the commencement of the hearing was not necessarily objectionable.
Consultant: a similar argument based on bias could have been made pre- HRA, but the HRA argument increased the likelihood of success from 30% to 50%.

Prisons

CO/124/02
C challenged a decision of the Parole Board to reject written representations submitted against recall to prison and to revoke his license without holding a hearing. C argued that the evidence against him had not been tested sufficiently to safeguard the interests of justice as provided by Article 6. Permission was granted on paper and no observation was made by the judge. After grant of permission, D accepted that the material before the Board when it made its decision was incomplete and that the decision should be quashed.
Consultant: prospects of success in obtaining permission improved in that Article 6 arguments strengthen the case, but prospects of success at substantive hearing were unaltered at 60%. Article 6 was argued alongside breach of principles of natural justice.

CO/3938/01
C, a post-tariff discretionary life prisoner awaiting his suitability for release to be considered, challenged the Parole Board's interpretation of s.28 (6)(b) of the Crime (Sentences) Act which provides that it has to be shown that the risk is low enough to release the prisoner, not that it is high enough to justify continued imprisonment. He argued that this was tantamount to placing the burden of proof on the prisoner and that this reversal of the burden of proof was incompatible with his rights under Article 5(1) and (4). The court referred to many ECtHR cases as well as domestic HRA cases. The case was distinguished from R(H) v North London and East Region MHRT [2001]3 WLR 512. The judge found that the application was premature. C was not a victim as there has not yet been an act by the panel and declined to make a declaration stating: "…this court should not make a ruling outwith any factual context when the result could be to declare that there should be a radical alteration of the test laid down by Parliament". Claim dismissed.
Consultant: This was a claim which could not have been made pre-HRA. The prospects of success were considered to be 60-70% based on HRA grounds alone.

CO/541/02
A disciplinary hearing for threatening behaviour resulted in 7 days being added to C's sentence. C, who denied the allegations, submitted that D failed to exercise discretion in respect of his request for legal representation and that the hearing was unfair and in breach of his Article 6 rights. He was not allowed to conclude his cross-examination of an officer, and named witnesses to the incident were not called. He argued that although Article 6 did not apply to disciplinary proceedings in prison, and so there was no right to legal representation, there was discretion to allow it and the discretion did not appear to have been exercised. Claim withdrawn by consent.
Consultant: the right to legal representation argument could have been made pre-HRA. The Article 6 argument did not add to the prospects of success as at the time both ECtHR and domestic law indicated that Article 6 did not apply to internal prison disciplinary hearings.