

This paper sets out in detail the methods and results of a research study into ombudsman judicial review. These results are referred to in the article 'The Adjustable Functions of Judicial Review: A Systematic Analysis of Activism in Ombudsman Case Law' xxxxx. Our data can be downloaded from this 'Datafile'. This paper details the claims made in the article. The claims are listed under the sub-headings that they appear in the article.

# A study into ombudsman judicial review

Online appendix: Evidence of  
Results

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# DESIGNING A CONTENT ANALYSIS STUDY

## Systematic Study and Content Analysis Studies

### A1. Methods

Our research used a content analysis methodology to interrogate systematically how judges make decisions, upon what grounds, and using which strategies. The technique was applied to a discrete area of case law: that involving ombud schemes operating in the UK.

The aim of content analysis studies is to analyse more comprehensively the content of judicial decisions.<sup>1</sup> Through content analysis ‘a scholar collects a set of documents, such as judicial opinions on a particular subject, and systematically reads them, recording consistent features of each and drawing inferences about their use and meaning’.<sup>2</sup> In other words, a fine-grained reading of judgments is attempted to establish the underlying factors used to justify a decision.

In our study, this approach entailed reading a series of cases, and recording and coding targeted aspects of the decisions made. In order to frame our approach to coding design, we drew upon previous research aimed at isolating factors that indicate judicial activism or restraint. This approach went some way to answering our first research question (whether the bench adopts a policy of deference towards the ombud sector), but also acted as useful framework to design a coding system that would comprehensively capture the modes of judicial reasoning employed. We hypothesised that judicial activism may be indicated by a judgment that:

- 1) *Readily circumvents ‘threshold’ hurdles*: where the court is willing to wield its discretion to get around barriers to hearing the case, such as out of time applications;
- 2) *Quashes or supersedes the decision of a public authority, or majoritarianism*: where policies or, for our purposes, schemes adopted through the democratic process are rendered invalid;
- 3) *Employs non-traditional approaches to legislative interpretation, or interpretive fidelity*: the degree to which legislation is interpreted beyond its ‘ordinary meaning’;
- 4) *Departs from precedent, also known as interpretive stability*: judicial activism can be measured by the degree to which earlier court decisions or interpretations have been departed from;
- 5) *Reliance on substantive, rather than, procedural, judicial reasoning*: greater readiness to rely upon substantive grounds, such as irrationality, over procedural grounds, implies a greater degree of activism;
- 6) *Develops the common law*: the judicial fleshing out of an area of law, particularly in relation to the restrictions and obligations upon a public authority, may well indicate a degree of judicial policy-making.<sup>3</sup>

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<sup>1</sup> Melanie Janelle Murchison and Richard Jochelson, ‘Canadian Exclusion of Evidence Under Section 24(2) of the Charter: An Empirical Model of Judicial Discourse’ (2015) 57(1) *Canadian Journal of Criminal Justice and Criminology* 115, 122-3.

<sup>2</sup> Mark A Hall and Ronald F Wright, ‘Systematic Content Analysis of Judicial Decisions’ (2008) 96(1) *California Law Review* 63, 64.

<sup>3</sup> Cohn and Kremnitzer (n 4); Brice Dickson, ‘Activism and Restraint within the UK Supreme Court’ (2015) 21(1) *European Journal of Current Legal Issues*; Bradley C Canon, ‘Defining the Dimensions of Judicial Activism’ (1983) 66(6) *Judicature* 236; and Keenan D Kmiec, ‘The Origin and Current Meanings of Judicial Activism’ (2004) 92 *California Law Review* 1441, 1463-1476. This list was adapted from, and influenced by, these studies, taking into account relevance for the purpose of our research question. For example, Canon’s work also includes separate indicators on the bench’s involvement in establishing and making policy (Canon, 239). This is unlikely to be relevant for a study of the courts in England and Wales. We take great inspiration from Cohn and

The general tenor of these indicators formed the basis for our approach to designing coding to capture the decision-making approach of the bench in navigating oversight of ombudschemes.

In terms of case selection, a number of challenges and choices were taken away from us by virtue of our selection of the discrete area of ombudsman case law. As well as raising a number of bespoke points of analysis connecting to the ombudsman institution, this choice of research focus offered the advantage of avoiding the need for sampling, which is required where the field of study deployed is too wide. Thus, as there were only 103 cases, the full dataset was manageable, given that the case range needed to study comprehensively one well-defined subset of cases is relatively limited.

The purpose of the content analysis method is to provide a systematic way in which to empirically record/test the questions that the study is designed to answer, or the position of ‘conventional’ scholarship that the researcher wishes either to prove or refute. The code system focuses the attention of the researcher while they read the cases.<sup>4</sup> In order to address our research questions, our coding was required to record:

- (i) the core outcomes of ombudsman judicial reviews, appeals, and permission hearings;
- (ii) the grounds of review used by the judiciary to resolve cases;
- (iii) the judicial strategies deployed in decision-making.

#### *(i) CORE OUTCOMES*

These coding questions involved recording basic facts about the cases in the data set, and required little by way of interpretation. Non-coded fields entailed recording: the case name, the date of the case, and the interested party. Coded fields included recording the type of claimant; the court; whether the parties had representation; whether the decision was judicial review, appeal, or permission; what stage of the ombudsman process was being challenged; whether permission to apply was granted; why permission was not granted; the outcome of judicial review; and the remedy.

#### *(ii) GROUNDS OF REVIEW*

The exercise of coding the basis upon which judges quash ombudsman decisions required some consideration of methods for choosing a taxonomy of administrative law. As a starting point, we relied upon Sarah Nason’s study of 482 cases heard in the Administrative Court during two periods, from 1 January 2013 to 31 July 2013, and from 1 January 2015 to 31 July 2015.<sup>5</sup> Instead of applying a prescribed taxonomy, Nason applied a method of constructive interpretation to ‘look from the bottom up and peel off a taxonomy of grounds by considering the legal arguments advanced and reasons for deciding in a sample of cases’.<sup>6</sup> In other words, she interrogated the grounds that the Administrative Court actually used in deciding cases, and from that derived a workable taxonomy. As Nason’s method most approximated our own, we used her taxonomy as a starting template for our study. Mirroring the best practice guidance on designing coding, as outlined above, we refined and added to Nason’s categories by subjecting them to a pilot test, which led to an adaptation of the coding scheme in order to make it more appropriate for the

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Kremnitzer’s traditional vision of activism, though our list is not as extensive as theirs. Ours is more limited, as we believed some aspects were captured under the broader headings we provided, and some by our mixed methods approach of combining content analysis with doctrinal analysis.

<sup>4</sup> Hall and Wright (n 2) 80-81.

<sup>5</sup> Sarah Nason, *Reconstructing Judicial Review* (Hart 2016) 25, 146.

<sup>6</sup> *Ibid* 146.

research questions being asked and more closely aligned to the detail of case law on the ombudsman. We further mirrored the approach of Nason, by tweaking categories based upon the actual reasons and language advanced by the court. Table 1 summarises the coding scheme developed.

Table 1: Coding scheme for the grounds used in ombudsman case law

| <b>1. Ordinary common law statutory interpretation</b>  | <b>2. Mistake</b>  | <b>3. Discretionary impropriety</b>   | <b>4. Quality of decision</b>  |
|---|--|---|--|
| 1.1<br>Did the Ombudsman act within their statutorily delegated power/jurisdiction (including abuse of discretion)<br>1.2<br>Did the Ombudsman misinterpret statute/law | 2.1<br>Error of fact<br>2.2<br>Mistaken  | 3.1<br>Relevant/ irrelevant considerations<br>3.2 Failure to exercise discretion<br>3.3<br>Fettering discretion   | 4.1<br>No reasons given<br>4.2<br>Inadequate reasons given<br>4.3<br>Incorrect remedy<br>4.4<br>Irrational<br>4.5<br>Incorrect application of fair and reasonable test |
| <b>5. Procedural impropriety</b>  |  | <b>6. Significant claims based on common law constitutional values, rights, or allocation of powers</b>   | <b>7. Breach of ECHR</b>   |
| 5.1<br>Unfair Hearing<br>5.2<br>Lack of hearing<br>5.3<br>Bias<br>5.4<br>Independence<br>5.5<br>Undue delay   | 5.6<br>Inadequate notice<br>5.7<br>Refusal to review decision<br>5.8<br>Right to reply<br>5.9<br>Bad service<br>5.10<br>Legitimate expectation<br>5.11<br>Duty to disclose | 6.1<br>Breach of fundamental constitutional values (e.g. democracy, dignity, access to justice, judicial independence, rule of law)<br>6.2<br>Turns upon allocation of powers between particular institutions of the state (Abuse of Power) |  |

*(iii) MODES OF JUDICIAL REASONING*

Overlaying the doctrinal grounds deployed in administrative law cases, our study sought to examine the modes of judicial reasoning adopted within judgments. The most relevant prior content analysis study for this purpose is that conducted into the decision making of the Court of Justice of the EU on copyright law by Favale et al.<sup>7</sup> Through coding, Favale et al capture two sources of information: (a) the extent to which the CJEU used precedent in its decision-making

<sup>7</sup> Marcella Favale, Martin Kretschmer and Paul C Torremans, ‘Is There an EU Copyright Jurisprudence? An Empirical Analysis of the Workings of the European Court of Justice’ (2016) 79(1) *Modern Law Review* 31 (tracing patterns of legal reasoning in the Court of Justice of the European Union towards copyright and database right cases), 52.

and (b) the interpretive techniques it used to apply legislation within its decisions. Both questions we explored in this study through the coding scheme outlined in Table 2.

Table 2: Coding scheme for recording modes of judicial reasoning deployed in ombudsman case law

| Cases cited   | Case law interpretation                                    | Statutory interpretation                  |
|---|--|---|
| 1. General legal principle case law (non ombudsman) only<br>2. Ombud Scheme (OS) specific case law only<br>3. Other ombudsman case law only<br>4. 1+2<br>5. 1+2+3<br>6. 1+3<br>7. 2+3 | 1. Confirm case law<br>2. Distinguish<br>3. Reject/reverse | 1. Literal<br>2. Textual<br>3. Contextual |
| Judicial strategy   | Any authoritative judicial statements                      |   |
| 1. Judicial guidance with finding against Ombudsman<br>2. Judicial guidance without finding against Ombudsman   | 1. Law<br>2. Good practice                                 |   |

Overall, the categories of coding that we deployed strived to record interim conclusions on the way judicial reasoning, and decision-making strategy, has been exercised in the case law, and whether it displays any obvious indicators of activism.

In relation to statutory interpretation, generally, instances of the last category, *contextual*, would indicate a greater degree of ‘activism’ on the part of the court, for it gives the bench considerable space in their interpretations, and leaves the court open to criticism over the wielding of this interpretive power. Such decision-making strategy may be applied by fleshing out the contours of the obligations upon the ombudsman to conform to a particular standard in a judicial review grounds, or it may involve taking a contextual or purposive approach to the statutory parameters of the ombudsman’s powers and obligations. Where such initial findings were made, we then fact-checked them through a more doctrinal reading of the judgment. The coding also records instances where the court has given authoritative statements on the law, and on good practice, relating to the ombudsman sector. Statements on the law may take the form of conclusive interpretations of the ombudsman’s power, as outlined by its constitutive legislation. It can also be witnessed through common law development of the ombudsman’s obligations under various review grounds, for example by fleshing out to what extent the ombudsman is required to comply with the duty to give reasons. Statements on good practice, or obiter dicta, may not carry the same authoritative weight, but take a more speculative tone about the standards that the ombudsman may be expected to reach. Such coding gave an indication of the role or function of judicial review in respect of ombudschemes. If there was evidence of statements of law or practice, the coding acted as a flag in order for us to return to the case to give it a more doctrinal reading.

## A2. Ombudschemes chosen for analysis

In content analysis studies the sample of the decisions selected for analysis should be ‘similarly weighted’<sup>8</sup> and reducible to an easily repeatable selection of cases.

To provide an organising theme, the field of study for this research has been confined to one body of cases: namely the case law on the ombudsman institution. As well as raising a number of bespoke points of analysis connecting to the ombudsman institution, this choice of research focus offers the advantage of avoiding the need for sampling, which is required where the field of study deployed is too wide. Thus because the case range involved in studying comprehensively the ombudsman sector is relatively limited, it was viable to code them all. Through a survey of three law databases and legal digests,<sup>9</sup> 103 cases were identified in which a determination of an ombudsman had been challenged in the senior courts *and* heard by way of a full hearing. A further 101<sup>10</sup> cases were identified in which a permission for judicial review had been heard by way of an oral hearing.

A number of points of qualification need to be raised regarding the sample.

- In UK law there is no one definition of what an ombudsman is, whilst many public bodies that are not labeled as an ‘ombudsman’ offer a complaint-handling service. For the purposes of this study the title was not deemed an important consideration, instead we included in our study all schemes that we perceived met the definition deployed by the International Ombudsman Institute:<sup>11</sup> namely an ombudsman is a body which ‘offers independent and objective consideration of complaints, aimed at correcting injustices caused to an individual as a result of maladministration’. Maladministration was broadly interpreted to include all instances of ‘service failure’. Adopting this definition, we identified in the UK 19 statutory complaint schemes that fit the definition and that have operated over the period of study,<sup>12</sup> and 2 non-statutory schemes that might in principle be challengeable by way of judicial review.<sup>13</sup>

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<sup>8</sup> Hall M. and Wright R. (2009) ‘Systematic Content Analysis of Judicial Opinions’ (2008) 96 California Law Review 63, 66.

<sup>9</sup> British and Irish Legal Information Institute, Westlaw and LexisNexis

<sup>10</sup> One case, *Mcdonald v Judicial Appointments & Conduct Ombudsman & Ors* [2013] EWHC 1755 (Admin), involved both the Parliamentary Ombudsman and the Judicial Conduct and Appointments Ombudsman. This case was only coded once.

<sup>11</sup> International Ombudsman Institute (2012) *Bylaws*, Adopted by the General Assembly in Wellington, New Zealand, 13 November 2012, preamble. See also the definition of the Ombudsman Association -

<sup>12</sup> The Parliamentary Ombudsman (Parliamentary Commissioner Act 1967); Northern Ireland Assembly Ombudsman (The Ombudsman (Northern Ireland) Order 1996); Commissioner for Complaints in Northern Ireland (The Commissioner for Complaints (Northern Ireland) Order 1996); Local Government Ombudsman (Local Government Act 1974, as amended); Health Services Ombudsman (Health Service Commissioners Act 1993); Pensions Ombudsman (Pension Schemes Act 1993); Housing Ombudsman (Housing Act 1996, section 51 and Schedule 2); Police Ombudsman Northern Ireland (Police (Northern Ireland) Act 1998, 2000, 2003); Financial Ombudsman Service (Financial Services and Markets Act 2000 (as amended)); Scottish Public Services Ombudsman (Scottish Public Services Ombudsman Act 2002); Independent Police Complaints Commission (Police Reform Act 2002); Office of the Independent Adjudicator for Higher Education (Higher Education Act 2004); Judicial Conduct and Appointments Ombudsman (Constitutional Reform Act 2005); Public Services Ombudsman for Wales (Public Services Ombudsman (Wales) Act 2005); Police Investigations and Review Commissioner (Police, Public Order and Criminal Justice (Scotland) Act 2006, Police and Fire Reform (Scotland) Act 2012); Scottish Legal Complaints Commission (Legal Profession and Legal Aid (Scotland) Act 2007); Legal Ombudsman (Legal Services Act 2007); Service Complaints Ombudsman (Armed Forces Service Complaints and Financial Assistance Act 2015); Northern Ireland Judicial Appointments Ombudsman (Northern Ireland Public Services Ombudsman Act 2016, s.58 and sch.6); Northern Ireland Public Services Ombudsman (Northern Ireland Public Services Ombudsman Act 2016).

<sup>13</sup> The Prisons and Probation Ombudsman, and Ombudsman Services.

- For this study we chose to *include* the Scottish Legal Complaints Commission (SLCC) which contains a built-in statutory appeal process within its scheme arrangements. This choice was made because the grounds that can be used in appeal broadly map the grounds of law available in judicial review.
- We also chose to *include* some schemes that operate multiple functions, including the SLCC, the Legal Ombudsman and the Independent Police Complaints Commission. In order to retain the consistency of the overall sample, with these schemes particular care had to be taken to identify for analysis only those cases which relate to a complaint about ‘services’, and to exclude those cases which were dealing predominantly with matters outside the standard ombudsman template, such as disciplinary or conduct complaints.
- For this study we chose to *exclude* the case law on the Pensions Ombudsman. The Pensions Ombudsman also operates a statutory appeal process<sup>14</sup> but the appeal remit is potentially broader than judicial review being on ‘any point of law’, and operated through a different court (namely the Chancery division as opposed to the Administrative Court). A further consideration were the numbers of appeal cases from the Pensions Ombudsman, which were in excess of 100 ie more than the entire collection of appeal/judicial review cases from the other ombudsman schemes put together. There was a concern that this scale of cases might warp the overall result. Finally, the remit of the Pensions Ombudsman is subtly different in a number of respects to other ombudsman schemes,<sup>15</sup> and a view was taken that the comparison would be less robust as a result.
- We also chose to *exclude* the case law on the Northern Ireland Police Ombudsman. We took the view that the complexity of the office’s jurisdiction made comparisons with other ombudsman schemes difficult to sustain. Older complaint handling schemes in the legal and police complaints sector were also excluded from this study on the basis of material differences in the manner and form in which these former processes operated, such as different functions and status of independence.
- Due to the lack of full harmonisation in the way that cases are reported, it is not possible to verify that all cases on the ombudsman have been captured, particularly for the pre-2000 period when cases were not published online as a matter of routine. However, only one scheme in the sample, the Local Government Ombudsman, was involved in judicial review proceedings that led to a full hearing prior to 1993, and existing legal databases have been expanded to include pre-internet era case law. Hence the margin for missing cases is small. Further, where possible, the amount of cases uncovered has been verified with the ombudsman scheme concerned.

#### *Possible limitations of the sample*

Any sample choice will have drawbacks which the researcher needs to be aware of and ideally transparent about. For instance, an objection to the sample selected in this study might be that within it there will be significant variances in judicial decision-making which are entirely explainable by the function-specific or design-specific nature of the schemes under scrutiny. To compensate for this possibility, within this study such variances were sought out at the analysis stage and in part drove a follow-up research stage in which interviews were conducted with relevant staff within ombudsman schemes.

An additional limitation to framing a study around all ombudsman case law is that content analysis studies work best when the collection of decisions being analysed (ie the sample frame) ‘hold

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<sup>14</sup> Pensions Schemes Act 1993, s. 151(4).

<sup>15</sup> Eg the Pensions Ombudsman can ‘investigate and determine ... any dispute of fact or law ... in relation to an occupational or personal pension scheme ...’ (Pensions Schemes Act 1993, s.146(1)(c)).

essentially equal value'.<sup>16</sup> As already noted, although most of the cases under study were heard by way of judicial review, legal proceedings against one scheme included in the study (the SLCC) are heard through a different process, an appeal. This inclusion is justified because of the heavily constrained form of appeal which operates within the SLCC scheme, through which the legal grounds for appeal in essence match those available in judicial review.<sup>17</sup>

There is also a problem in analysing all judicial review of ombudsman cases in that cases will be resolved at different levels of the court structure. Whilst most cases are resolved at first instance, a significant number are dealt with on appeal. Plausibly, therefore, some of the decisions in the sample will achieve a greater impact than others by virtue of the different levels of the court hierarchy. It may even be that cases about certain schemes hold greater value than others. Such variances were taken account of and explored in the analysis stage.

Another objection might be that within the sample there will be significant variances in judicial decision-making entirely explainable by the function-specific or design-specific nature of the schemes under scrutiny. Within the study such variances were sought out and in part drove a follow-up research stage in interviews with relevant staff within ombudsman schemes.

Another possibility is that the main sample of cases under scrutiny deliberately excludes from the analysis other relevant cases on ombuds that may tell a different story about the role of the judiciary. For instance, the work of the ombudsman has been challenged in employment law and under the Freedom of Information Act. Perhaps most significantly, there are now a series of cases in which the response of public bodies to decisions of ombudsman schemes has been challenged in public law. To capture these cases, our study does layer onto the project an additional stage of research to consider their impact and the response of the judiciary. This second sample is small and includes only 4 case, but is potentially very significant in terms of its influence on practice in the sector.

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<sup>16</sup> Ibid, 66

<sup>17</sup> Legal Profession and Legal Aid (Scotland) Act 2007, s. 21(4) provides:

The grounds referred to in subsection (1) are -

- a. that the Commission's decision was based on an error of law;
- b. that there has been a procedural impropriety in the conduct of any hearing by the Commission on the complaint;
- c. that the Commission has acted irrationally in the exercise of its discretion;
- d. that the Commission's decision was not supported by the facts found to be established by the Commission.

## Case Selection

### A3. Judicial Review and Appeal cases heard by way of full hearing in which the determination of a UK based ombudsman scheme has been considered:

1978-May 2018

NB. List obtained from publically accessible legal databases and legal digests. Where possible this list has been verified with the relevant ombudschemes. Due to the absence of a formal commitment to publish all High Court cases over the period, it is likely that there will be a small body of cases involving ombudschemes that have not been identified in this list, but our view is that it is unlikely to be a significant number. See [Methodology](#) for a full description of the choice of schemes (and nature of cases) to include in the sample and for a discussion of the search methods.

|   | Name   |
|---|--|
| NORTHERN IRELAND COMMISSIONER FOR COMPLAINTS                            |  |
| 1   | Armagh City Council, Re Judicial Review [2014] NICA 44   |
| 2   | JR55 [2016] UKSC 22  |
| LOCAL GOVERNMENT OMBUDSMAN  |  |
| 3   | R v Local Commissioner for Administration ex parte Bradford MBC [1979] 1 QB 287                |
| 4   | R v Commissioner for Local Administration ex p Eastleigh BC [1988] QB 855                      |
| 5   | R v Commissioner for Local Administration ex parte Croydon LBC [1989] 1 All ER 1033            |
| 6   | R. v Commissioner for Local Administration Ex p. Blakey; [1994] 1 All E.R. 961                 |
| 7   | R. v Commissioner for Local Administration for England Ex p. Odds [1995] E.G. 168 (C.S.)       |
| 8   | R. v Commissioner for Local Administration Ex p. S [1998] EWHC Admin 1062                      |
| 9   | R v Local Commissioner For Local Government Ex p Liverpool [2000] EWCA Civ 54                  |
| 10  | R. (Hughes) v Local Government Ombudsman [2001] EWHC Admin 349;                                |
| 11  | R v Local Commissioner For Local Government Ex p Turpin [2002] JPL 326                         |
| 12  | R v Local Commissioner For Local Government Ex p Doy [2001] EWHC Admin 361                     |
| 13  | R v Local Commissioner For Local Government Ex p Maxhuni [2002] EWCA Civ 973                   |
| 14  | R v Local Commissioner For Local Government Ex p Scholarstica Umo [2003] EWHC 3202             |
| 15  | Taylor v Commission for Local Administration In England [2003] EWHC 1126 (Admin) (01 May 2003) |
| 16  | R v Local Commissioner For Local Government Ex M [2006] EWHC 2847 (Admin)                      |
| 17  | R v The Commission for Local Administration In England & Ors Ex p Adams [2011] EWHC 2972       |
| 18  | Akanho v Local Government Ombudsman [2014] EWHC 766 (Admin)                                    |
| 19  | R (on the application of ER) v Local Government Ombudsman [2014] EWCA Civ 1407                 |
| PARLIAMENTARY COMMISSIONER FOR ADMINISTRATION (PARLIAMENTARY OMBUDSMAN) |  |
| 20  | R v Parliamentary Commissioner for Administration ex p. Dyer [1993] EWHC Admin 3               |
| 21  | R v Parliamentary Commissioner For Administration, ex p Balchin (no.1) [1996] EWHC Admin 152   |
| 22  | R v Parliamentary Commissioner for Administration, ex parte Balchin (No 2) [2000] JPL 267      |
| 23  | R. (Balchin) v Parliamentary Commissioner for Administration (No.3) [2002] EWHC 1876           |
| 24  | Rapp v PHSO [2015] EWHC 1344   |
| 25  | Campbell v Parliamentary Ombudsman [2017] EWHC 3729 (Admin)                                    |
| HEALTH SERVICE COMMISSIONER   |  |
| 26  | Hession v Health Service Commissioner for Wales [2001] EWHC Admin 619                          |
| 27  | Cavanagh & Ors v Health Service Commissioner [2005] EWCA Civ 1578                              |
| 28  | R (Kay) v Health Service Commissioner [2008] EWHC 2063   |
| 29  | Atwood v The Health Service Commissioner [2008] EWHC 2315                                      |
| 30  | R. (Mencap) v Parliamentary and Health Service Ombudsman [2011] EWHC 3351                      |
| 31  | Jeremiah v Parliamentary and Health Service Ombudsman [2013] EWHC 1085                         |
| 32  | Morris v Health Service Commissioner & Anor [2014] EWHC 4364                                   |
| 33  | Newman v The Parliamentary and Health Service Commissioner [2017] EWHC 3336 (TCC)              |
| 34  | Miller & Anor v The Health Service Commissioner for England [2018] EWCA Civ 144                |
| SCOTTISH PUBLIC SERVICES OMBUDSMAN                                      |  |
| 35  | Argyll & Bute Council, Re Judicial Review [2007] ScotCS CSOH_168                               |
| FINANCIAL OMBUDSMAN SERVICE   |  |
| 36  | Norwich and Peterborough Building Society v Financial Ombudsman Service Ltd. [2002] EWHC 2379  |
| 37  | R (Green) v Financial Ombudsman Service Ltd [2003] EWHC 338 (Admin)                            |
| 38  | IFG Financial Services Ltd v Financial Ombudsman Services Ltd & Ors [2005] EWHC 1153           |
| 39  | Garrison Investment Analysis v Financial Ombudsman Service [2006] EWHC 2466                    |
| 40  | Bruce v Financial Ombudsman Services Ltd & Ors [2007] EWHC 1646                                |
| 41  | R (Brinsons (A Firm)) v Financial Ombudsman Service [2007] EWHC 2534 (Admin)                   |
| 42  | R (Heather Moor & Edgecomb Ltd) v Financial Ombudsman Service [2008] EWCA Civ 642              |
| 43  | Williams v Financial Ombudsman Service [2008] EWHC 2142  |

|   |  |
|---|--|
| 44  | Cook & Anor v Financial Ombudsman Service [2009] EWHC 426  |
| 45  | Green v Financial Ombudsman Service Ltd [2012] EWHC 1253   |
| 46  | Bankole v Financial Ombudsman Service [2012] EWHC 3555   |
| 47  | Walker, Re Judicial Review [2013] NIQB 12  |
| 48  | Calland v Financial Ombudsman Service Ltd [2013] EWHC 1327   |
| 49  | London Capital Group v The Financial Ombudsman Service Ltd [2013] EWHC 2425  |
| 50  | Fisher v Financial Ombudsman Service (unreported - 15 October 2014)  |
| 51  | Bluefin Insurance Services Ltd v Financial Ombudsman Service Ltd [2014] EWHC 3413  |
| 52  | Westscott Financial Services Ltd CBHC Llp & Anor v Financial Ombudsman Service [2014] EWHC 3972                            |
| 53  | Chancery (UK) LLP v The Financial Ombudsman Service Ltd & Anor [2015] EWHC 407   |
| 54  | R (Full Circle Asset Management Ltd) v Financial Ombudsman Service [2017] EWHC 323 (Admin)                                 |
| 55  | R (Aviva Life & Pensions UK Ltd) v Financial Ombudsman Service [2017] EWHC 352 (Admin)                                     |
| 56  | R (Marazona Properties Ltd) v Financial Ombudsman Service [2017] EWHC 1135 (Admin)   |
| 57  | Kelly v Financial Ombudsman Service Ltd [2017] EWHC 3581 (Admin)   |
| 58  | Tenetconnect Services Ltd v Financial Services Lts & Anor [2018] EWHC 459 (Admin)  |
| OFFICE OF INDEPENDENT ADJUDICATOR FOR HIGHER ADJUDICATION |  |
| 59  | Siborurema v Office of the Independent Adjudicator [2007] EWCA Civ 1365  |
| 60  | Arratoon v Office of the Independent Adudicator for Higher Education & Anor [2008] EWHC 3125                               |
| 61  | Budd v Office of the Independent Adjudicator for Higher Education [2010] EWHC 1056   |
| 62  | Maxwell v The Office of the Independent Adjudicator for Higher Education [2011] EWCA Civ 1236                              |
| 63  | Sandhar v Office of the Independent Adjudicator for Higher Education & Anor [2011] EWCA Civ 1614                           |
| 64  | Cardao-Pito v Office of the Independent Adjudicator for Higher Education & Anor [2012] EWHC 203                            |
| 65  | Mustafa v The Office of the Independent Adjudicator for Higher Education [2013] EWHC 1379 (Admin)                          |
| 66  | Burger v Office of the Independent Adjudicator for Higher Education [2013] EWCA  |
| 67  | Wilson v The Office of the Independent Adjudicator for Higher Education & Anor [2014] EWHC 558                             |
| 68  | Gopikrishna v The Office of the Independent Adjudicator for Higher Education & Ors [2015] EWHC 207                         |
| 69  | R (AC) v OIAHE (2017) (Claim Non.CO/5366/2016) – copy available on OIAHE website   |
| 70  | R (Thilakawardhana) v OIA [2018] EWCA Civ 13   |
| LEGAL OMBUDSMAN   |  |
| 71  | Layard Horsfall Ltd v The Legal Ombudsman [2013] EWHC 4137   |
| 72  | Crawford v The Legal Ombudsman & Anor [2014] EWHC 182  |
| 73  | Hafiz & Haque Solicitors, R (On the Application Of) v Legal Ombudsman [2014] EWHC 1539                                     |
| 74  | Rosemarie v The Office for Legal Complaints [2014] EWHC 601  |
| 75  | Kerman & Co Llp v Legal Ombudsman [2014] EWHC 3726   |
| 76  | Stenhouse v The Legal Ombudsman & Anor [2016] EWHC 612 (Admin)   |
| 77  | Ejiofor (t/a Mitchell And Co Solicitors) v Legal Ombudsman [2016] EWHC 1933 (Admin)  |
| SCOTTISH LEGAL COMPLAINTS COMMISSIONER                    |  |
| 78  | Kerr Stirling LLP v Scottish Legal Complaints Commission [2012] ScotCS CSIH_98   |
| 79  | Saville-Smith v Scottish Legal Complaints Commission [2012] ScotCS CSIH_99   |
| 80  | STEWART & MCISAAC v. SCOTTISH LEGAL COMPLAINTS COMMISSION [2014] ScotCS CSIH_3   |
| 81  | Bartos v A Decision of The Scottish Legal Complaints Commission [2015] ScotCS CSIH_50                                      |
| 82  | Sneddon & Anor v Scottish Legal Complaints Commission [2015] ScotCS CSIH_62  |
| 83  | Anderson Strathern v SLCC [2016] CSIH 71   |
| 84  | Council of The Law Society of Scotland v The Scottish Legal Complaints Commission (SLCC) [2017] ScotCS CSIH_36             |
| INDEPENDENT POLICE COMPLAINTS COMMISSION                  |  |
| 85  | Dennis v Independent Police Complaints Commission [2008] EWHC 1158   |
| 86  | R(Crosby) v IPCC [2009] EWHC 2515  |
| 87  | Morrison v The Independent Police Complaints Commission & Ors [2009] EWHC 2589 (Admin) (26 October 2009)                   |
| 88  | Herd v Independent Police Complaints Commission [2009] EWHC 3134   |
| 89  | Muldoon v Independent Police Complaints Commission [2009] EWHC 3633  |
| 90  | North Yorkshire Police Authority v The Independent Police Complaints Commission [2010] EWHC 1690                           |
| 91  | Rutherford v Independent Police Complaints Commission [2010] EWHC 2881 (Admin)   |
| 92  | Driver v Independent Police Complaints Commission [2012] EWHC 1271   |
| 93  | Cubells v Independent Police Complaints Commission [2012] EWCA Civ 1292  |
| 94  | Durowoju v Independent Police Complaints Commission (IPCC) [2013] EWHC 837 (Admin) (11 April 2013)                         |
| 95  | Burke v Independent Police Complaints Commission & Anor [2013] EWHC 2291 (Admin) (26 July 2013) ; [2013] EWHC 4119 (Admin) |
| 96  | R. (M) v Independent Police Complaints Commission [2012] EWHC 2071 (Admin)   |
| 97  | R. (Erenbilge) v Independent Police Complaints Commission [2013] EWHC 1397 (Admin)   |
| 98  | R (Conaghan) v Independent Police Complaints Commission [2013] EWHC 3994 (Admin)   |
| 99  | Ramsden v Independent Police Complaints Commission & Anor [2013] EWHC 3969 (Admin)   |
| 100   | McNeany v IPCC [2014] EWHC 1873 (Admin)  |
| 101   | Campbell v IPCC [2015] EWHC 3424;  |
| 102   | Miah v IPCC [2017] EWCA Civ 2108   |
| JUDICIAL APPOINTMENTS AND CONDUCT COMMISSION              |  |
| 103   | R. (on the application of Dickie) v Judicial Appointments and Conduct Ombudsman [2013] EWHC 2448 (Admin)                   |

**A4. Judicial Review and Appeal cases heard by way of hearing at the permission stage in which the determination of a UK based ombudsman scheme has been considered, but where the case did not proceed to full hearing:**

*1970-May 2018*

NB. List obtained from publically accessible legal databases and legal digests.

Due to the absence of a formal commitment to publish all High Court cases over the period, and a lack of clear policy as to which permission hearings are published, it is likely that there will be a large body of permission hearing cases involving ombudschemes that have not been identified in this list, plus there will be a considerable number of written permission cases that are not included. This sample, therefore, cannot be considered fully representative of the work conducted by the court and we have not made excessive claims as to its comprehensiveness in the articles and papers that have followed from this study. However, it is indicative of the nature of the work performed by the court in permission hearings and could found the basis for future research.

See [Methodology](#) for a full description of the choice of schemes (and nature of cases) to include in the sample and for a discussion of the search methods.

|    | Name   |
|----|--|
| 1  | Bennett v Independent Police Complaints Commission & Anor [2008] EWHC 2550 (QB) (24 October 2008)                    |
| 2  | Jebb (R on the application of) v IPCC (2009) [2009] EWHC 3660 (Admin)  |
| 3  | Bain, R (on the application of) v IPCC [2009] EWCA Civ 961   |
| 4  | Evans (R on the application of) v IPCC (2010)  |
| 5  | Williams (R on the application of) v IPCC [2010] EWHC 2963 (Admin)   |
| 6  | Bates v IPCC [2010] EWHC 3823 (Admin)  |
| 7  | R (on the application of Molyneux-Herbert) v Independent Police Complaints Commission & another [2011] EWCA Civ 1055 |
| 8  | R (on the application of Karia ) v Independent Police Complaints Commission [2011] EWHC 3051 (Admin)                 |
| 9  | R (on the application of Karasaka) v Independent Police Complaints Commission (2011) [2011] EWHC 2638                |
| 10 | R (on the application of Turner) v Independent Police Complaints Commission & Ors [2011] EWHC 3939 (Admin)           |
| 11 | R (on the application of Cook) v Independent Police Complaints Commission [2011] EWHC 3802 (Admin)                   |
| 12 | Friday v Independent Police Complaints Commission [2011] EWHC 4007 (Admin)   |
| 13 | R (on the application of Moo) v Independent Police Complaints Commissioner & Anr [2012] EWHC 819 (Admin)             |
| 14 | Bauer-Czarnmoski v IPCC [2012] EWHC 1938 (Admin)   |
| 15 | Busby v IPCC [2012] EWHC 4268 (Admin)  |
| 16 | Gayle v IPCC [2012] EWHC 4121 (Admin)  |
| 17 | Bartosik v IPCC [2012]EWHC 4003 (Admin)  |
| 18 | R (on the application of Cartwright) v IPCC [2013] EWHC 3339 (Admin)   |
| 19 | R (on the application of Hart) v IPCC [2013] EWHC 4451 (Admin)   |
| 20 | Lannas v IPCC [2014] EWHC 4921 (Admin)   |
| 21 | Markos v IPCC [2014] EWHC 360 (Admin); 2014] EWCA Civ 1706   |
| 22 | Williams v A Decision of the Scottish Legal Complaints Commission [2010] ScotCS CSIH_73                              |
| 23 | Semple v Scottish Legal Complaints Commission [2011] ScotCS CSIH_74  |
| 24 | Olipphant, Re Leave To Appeal against a decision of The Scottish Legal Complaints Commission [2014] ScotCS CSIH_94   |
| 25 | Matthews v A Decision of the Scottish Legal Complaints Commission [2015] ScotCS CSIH_68                              |
| 26 | B v The Scottish Legal Complaints Commission [2016] ScotCS CSIH_48   |
| 27 | Price v Scottish Legal Complaints Commission [2016] ScotCS CSIH_53   |
| 28 | X LPP v SLCC [2017] CSIH 73  |
| 29 | R (Goldsmith IBS Ltd) v Parliamentary and Health Service Ombudsman [2016] EWHC 1905 (Admin)                          |
| 30 | R (Hicks) v Parliamentary and Health Service Ombudsman [2017] EWHC 1569 (Admin)                                      |
| 31 | Mcdonald v Judicial Appointments & Conduct Ombudsman & Ors [2013] EWHC 1755 (Admin)                                  |
| 32 | Walker v Parliamentary and Health Service Ombudsman [2012] EWHC 535 (Admin)  |
| 33 | R (Sharma) v Parliamentary an Health Service Ombudsman [2011] EWHC 2609 (Admin)                                      |
| 34 | Winsor v Parliamentary Ombudsman [2010] EWHC 3410 (Admin)  |
| 35 | R (Senior Milne) v Parliamentary and Health Services Ombudsman [2010] EWCA Civ 585                                   |
| 36 | R (Williams) v Parliamentary Ombudsman [2010] EWHC 1432 (Admin)  |
| 37 | R (Came) v Parliamentary Ombudsman [2009] EWHC 3641 (Admin)  |
| 38 | R (Murray) v Parliamentary Commissioner for Administration [2002] EWCA Civ 1472                                      |
| 39 | R (Jackson) v Parliamentary Ombudsman [2002] EWCA Civ 120  |

|     |   |
|-----|---|
| 40  | R v Parliamentary Commissioner for Administration ex parte Lithgow & Anor [1990] Lexis Citation 2824  |
| 41  | Re Fletcher's Application [1970] 2 All ER 572   |
| 42  | Sherric, Re Judicial Review [2013] NICA 18  |
| 43  | Walji (R on the application of) v Judicial Appointments & Conduct Ombudsman [2010] EWHC 468 (Admin)   |
| 44  | Simon John Griffin v The Judicial Conduct Investigations Office (formerly the Office for Judicial Complaints), Judicial Appointments and Conduct Ombudsman [2014] EWCA Civ 66 |
| 45  | R (on the application of McBride) v Judicial Appointments & Conduct Ombudsman [2014] EWHC 4368 (Admin)  |
| 46  | Vlad v Judicial Appointments And Conduct Ombudsman [2016] EWCA Civ 951  |
| 47  | R (Nair) v OIA [2008] EWHC 1989 (Admin)   |
| 48  | R (Ahilathirunayagam) v OIA [2012] EWCA Civ 205   |
| 49  | R (Duddle) v OIAHE [2013] EWHC 4918 (Admin)   |
| 50  | R (Emery) v OIAHE [2014] EWCA Civ 109   |
| 51  | R (Alexander) v OIAHE [2014] EWCA Civ 1566  |
| 52  | Peat v OIAHE [2015] EWHC 4169 (Admin)   |
| 53  | R (Ogunkoya) v OIA [2016] EWHC 1486 (Admin)   |
| 54  | R v LGO, ex parte Thompson-Holland [1998] EWHC Admin 302  |
| 55  | R v Commissioner for Local Administration in England, ex parte Jones and another  |
| 56  | R v Commissioner for Local Administration, ex parte H - [1998] All ER (D) 783; [1999] E.L.R. 314  |
| 57  | R. v. CLA ex parte Colin Field [2000] COD 58.   |
| 58  | R v LGO ex parte Mortimer [1999] EWHC Admin 601   |
| 59  | R. LGO, ex parte Bowen-Griffith [1999] EWHC Admin 206   |
| 60  | R v Local Government Ombudsman ex parte Apps - CO/2884/99   |
| 61  | Starr v LGO [2001] EWCA Civ 2024  |
| 62  | Abernethy v LGO [2002] EWCA Civ 1520  |
| 63  | Abrams - R. (on the application of Abrams) v Local Government Ombudsman[2005] EWHC 3358 (Admin)   |
| 64  | Mahajan v LGO [2007] EWHC 1135 (Admin)  |
| 65  | Tian, R (on the application of) v Commission for Local Administration in England & Anor [2009] EWHC 920   |
| 66  | Lewis (R on the application of) v Local Government Ombudsman [2009] EWHC 1543 (Admin)   |
| 67  | Ruddock (R on the application of) v Local Government Ombudsman [2009] EWHC 3295 (Admin)   |
| 68  | R (on the application of Francois) v Local Government Ombudsman [2009] EWHC 3355 (Admin)  |
| 69  | Hargreaves (R on the application of) v Local Government Ombudsman [2010] EWHC 2472 (Admin)  |
| 70  | Boland (R on the application of) v Local Government Ombudsman [2010] EWHC 2937 (Admin)  |
| 71  | Blue Flash Music Trust (R on the application of) v Local Government Ombudsman [2010] EWHC 3140 (Admin)  |
| 72  | Evison v LGO [2011] EWHC 3698 (Admin)   |
| 73  | R (on the application of Tesfamicael) v Local Government Ombudsman and Another [2013] EWCA Civ 1183   |
| 74  | R (on the application of Feliciello) v Local Government Ombudsman [2014] EWHC 4628 (Admin)  |
| 75  | R (on the application of Fadiga & Co Solicitors T/a Harding Mitchell) v Legal Ombudsman [2013] EWHC 2814  |
| 76  | Universal Solicitors (a firm) v Legal Ombudsman [2013] EWCA Civ 1848  |
| 77  | R (on the application of Harold) v Legal Ombudsman [2013] EWHC 4761 (Admin)   |
| 78  | R. (on the application of Williams) v Legal Ombudsman [2013] EWHC 4780 (Admin)  |
| 79  | R (on the application of AFP Sam and Co Solicitors) v Legal Ombudsman [2016] EWHC 3172 (Admin)  |
| 80  | R v Health Service Ombudsman ex parte Megarry [2001] EWCA Civ 730   |
| 81  | R (Blackmore) v Parliamentary and Health Service Ombudsman [2008] EWHC 3469 (Admin)   |
| 82  | R (Mencap) v Parliamentary Health Service Ombudsman [2010] EWCA Civ 875   |
| 83  | R (Gill) v PHSO [2009] EWHC 2877 (Admin)  |
| 84  | Jayawardhana v PHSO [2010] EWHC 3262 (Admin)  |
| 85  | R (Marshall) v Parliamentary and Health Service Ombudsman [2011] EWHC 2124 (Admin)  |
| 86  | R (Brooks) v Parliamentary and Health Service Ombudsman [2012] EWHC 1167 (Admin)  |
| 87  | R (Sobolewska) v Parliamentary and Health Service Ombudsman [2014] EWHC 3784 (Admin)  |
| 88  | R (Andews) v Parliamentary and Health Service Commissioner [2016] EWHC 2150 (Admin)   |
| 89  | R (Young Ridgway & Associates) v Financial Ombudsman Service Ltd [2004] EWHC 3371 (Admin)   |
| 90  | R (Towry Law Financial Services Ltd) v FOS & Anor [2004] EWCA Civ 1701  |
| 91  | R (Ropaigalach) v Financial Ombudsman Service [2005] EWCA Civ 269   |
| 92  | R (Duff) v Financial Ombudsman Service [2006] EWHC 1704 (Admin)   |
| 93  | R (Bamber and BP Financial) v Financial Ombudsman Service [2009] EWCA Civ 593   |
| 94  | R (Heather Moor & Edgecomb Ltd) v Financial Ombudsman Service [2009] EWHC 2701 (Admin)  |
| 95  | R (Williams) v Financial Ombudsman Service [2010] EWHC 3920 (Admin)   |
| 96  | R (Goff) v Financial Ombudsman Service [2011] EWHC 1112 (Admin)   |
| 97  | R (Richard Bamber & Co) v Financial Ombudsman Service [2011] EWHC 3161 (Admin)  |
| 98  | R (Nichols) v Financial Ombudsman Service [2012] EWHC 2129 (Admin)  |
| 99  | R (Evans) v Financial Ombudsman Service [2012] EWCA Civ 1061  |
| 100 | R (Shaw) v Financial Ombudsman Service [2015] EWHC 1657 (Admin)   |
| 101 | R (Clifford) v Financial Ombudsman Service [2016] EWHC 2724 (Admin)   |

# PROTECTING INDIVIDUAL INTERESTS

## Tendency to Readily Circumvent ‘Threshold’ Hurdles

### B1. Evidence on success rates at permission stage for all Judicial Review and out of court settlement

Obtaining summarised statistics for judicial review proceedings is not made easy by the diverse manner in which they are reported by the Ministry of Justice. The most recent ‘summarised’ set of data provides data for 2015, [A Guide to Civil Justice Statistics](#), p.14.

From this can be extrapolated the following data:

|   |       |
|---|-------|
| Application lodged for permission at the Administrative Court | 4,680 |
| Less claims withdrawn pre-permission                          | 3625  |
| Permission granted (written and renewal)                      | 765   |

This suggests a permission grant rate of 21%.

However, for the purposes of this study we borrow the more detailed analysis of Robert Thomas in his study of immigration judicial review in 2015.<sup>18</sup> Thomas breaks down the Civil Justice quarterly statistics to isolate the permission success rate for non-immigration cases at over 30%.

### B2. Oral permission hearings in which permission was granted and case settled before full hearing

There were six cases in the sample for which permission was granted for judicial review but which were never reported as being heard subsequently. The most likely explanation for this is that the cases were settled out of court:

*R v Commissioner for Local Administration in England, ex parte Jones and another*;

*R (Towry Law Financial Services Ltd) v FOS & Anor* [2004] EWCA Civ 1701;

*Bennett v Independent Police Complaints Commission & Anor* [2008] EWHC 2550 (QB)

*Williams (R on the application of) v IPCC* [2010] EWHC 2963 (Admin);

*Walker v Parliamentary and Health Service Ombudsman* [2012] EWHC 535 (Admin);

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<sup>18</sup> Thomas, R. 2015. ‘Mapping immigration judicial review litigation: an empirical legal analysis’ *Public Law* 652-678.

R (*Duddle*) v OLAHE [2013] EWHC 4918 (Admin).

In additional case heard by way of oral hearing at the permission stage, R (*Mencap*) v *Parliamentary Health Service Ombudsman* [2010] EWCA Civ 875, permission was granted and the matter proceeded to a subsequent full hearing.

## Majoritarianism

### **B3. Statistics on turnover of complaints in ombudsman schemes for latest reported year as of study (2017)**

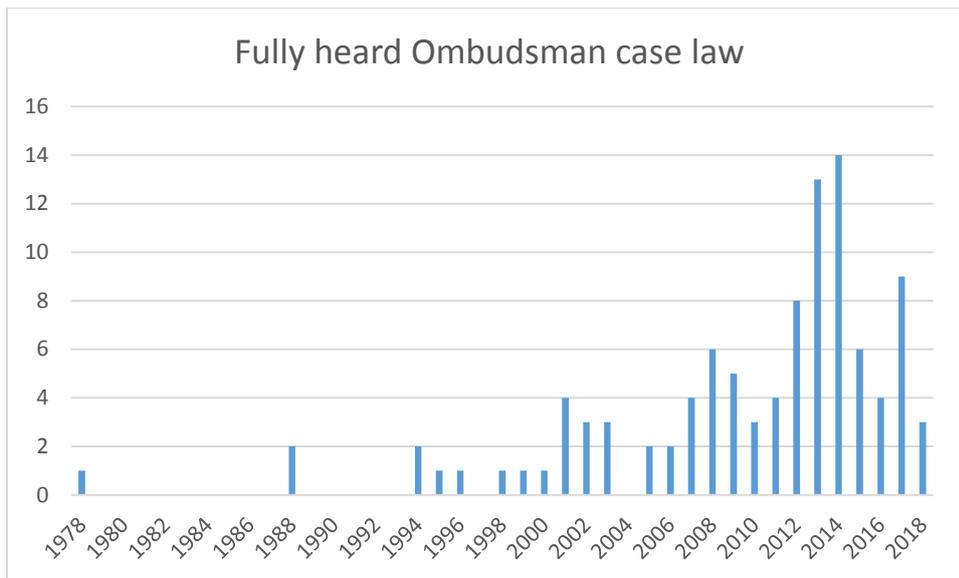
The following statistics are taken from the Annual Reports of latest reported year, as of April 2018. The statistics are taken from the annual reports of each ombudscheme for which judicial review/statutory appeal has either occurred or could in principle occur. The statistics provide an approximation of ombudsman activity because for each individual scheme (a) the reporting timeline varies and (b) the reporting method varies. Thus the overall figure should be taken as an illustrative ‘best estimate’ of the complaint-handling workload of the ombudsman sector rather than a perfect account. Nevertheless, if anything the figures under-estimate the workload of the ombudsman sector as for most schemes they do not include the large numbers of ‘contacts’ that the sector processes – namely enquiries made to the office by way of letter, email or phone call that do not result in a formal complaint being made.

### **Annual reports reported complaint numbers**

|   |         |               |
|---|---------|---------------|
| FOS   | 2016/17 | 321283        |
| LGSCO                                       | 2016/17 | 11526         |
| Ombudsman Services                          | 2016    | 72652         |
| Legal Ombudsman                             | 2016/17 | 17220         |
| Housing Ombudsman                           | 2016/17 | 15112         |
| Judicial Appointments and Conduct Ombudsman | 2016/17 | 915           |
| OIA   | 2017    | 1517          |
| NIO   | 2016/17 | 3385          |
| PHSO  | 2016/17 | 29574         |
| SLCC  | 2016/17 | 1145          |
| SPSO  | 2016/17 | 4104          |
| PSOW  | 2016/17 | 2292          |
| Independent Police Complaints Commission    | 2016/17 | 34103         |
| <b>TOTAL</b>                                |         | <b>514828</b> |

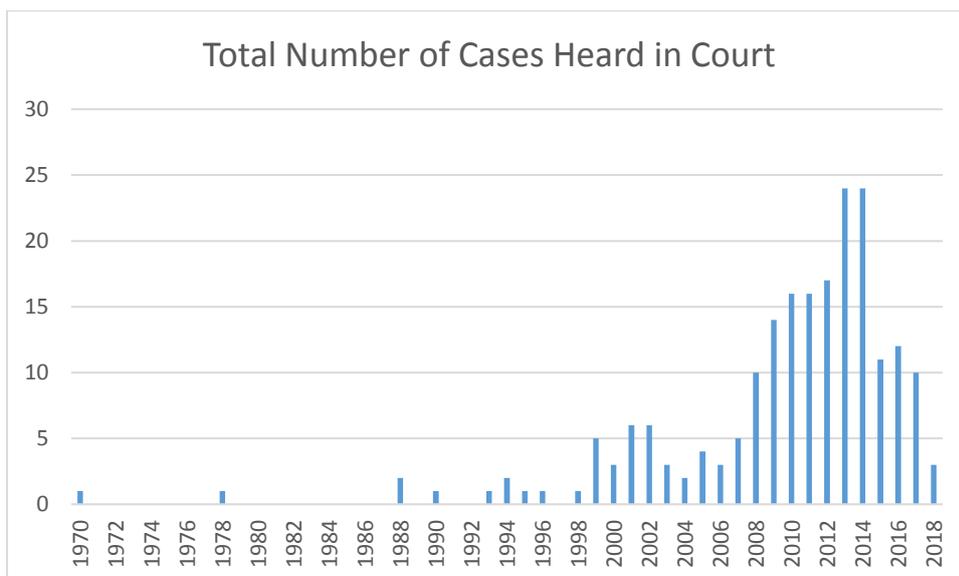
#### B4. Judicial review/statutory appeal of ombudschemes: statistics over time (1970-2018)

The numbers of judicial review or statutory appeal (SLCC) proceedings brought against ombudschemes has increased in frequency over time.

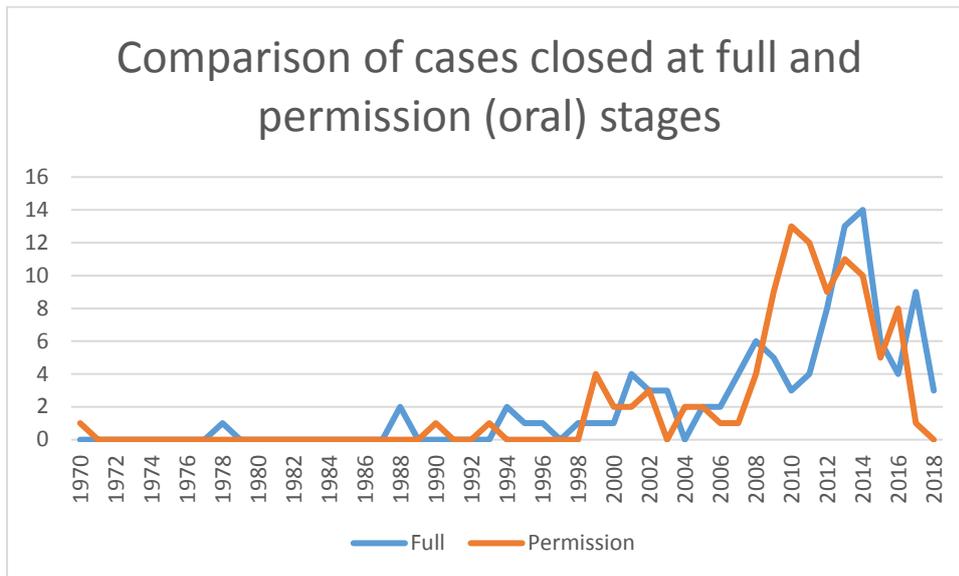


The numbers of JR/appeal cases heard from January 2013 to December 2017 is 47, hence a rate of almost 10 per year. Apart from 2001, no previous year saw more than 3 hearings.

The pattern is similar once the number of recorded oral permission hearings is factored in.

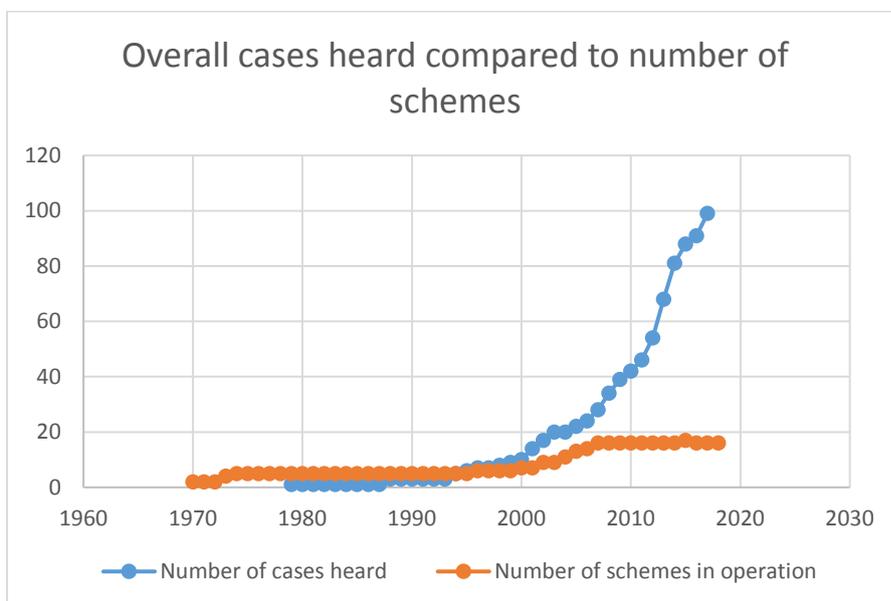


Although our sample of permission hearings cannot be taken as complete, it does follow a very similar pattern of activity to fully heard cases.



These figures illustrate that the number of JR/appeal cases heard in full hearings, and the rate at which the caseload increases, started to rise around 2000, a trend that can be put down to the increase in the number of schemes operating.

The above tables though do also provide some evidence that in the last two years the rates of public law litigation involving the ombudsman has decreased. A plausible explanation may be that this decrease is in part due to an increase in the fees surrounding judicial review claims in July 2016 (see this [paper](#)).



Although several public sector ombudsman schemes were in operation before 2000, from 2000 a number of additional schemes came into operation to cover much of the private and hybrid public/private sector. The detail of this growth in schemes is charted in the following table which excludes a number of schemes which we do not believe could be subject to judicial review.

## History of the ombudsman sector in the UK

| SCHEME  | LEGISLATION  | YEAR OF ESTABLISHMENT | YEAR OF ABOLITION |
|---|--|-----------------------|-------------------|
| Parliamentary Commissioner for Administration (since 2006 commonly referred to as the Parliamentary and Health Service Ombudsman) | Parliamentary Commissioner Act 1967  | 1967                  |                   |
| Northern Ireland Parliamentary Commissioner for Administration (later Assembly Ombudsman)   | Northern Ireland Parliamentary Commissioner Act 1969   | 1969                  | 2016              |
| Northern Ireland Parliamentary Commissioner for Administration  | Northern Ireland Parliamentary Commissioner Act 1969   | 1969                  | 2016              |
| Health Service Commissioner   | Health Service Commissioners Act 1993 (formerly National Health Service Reorganisation Act 1973) | 1973                  |                   |
| Commissioner for Local Administration (Local Government Ombudsman, and since 2017, Local Government and Social Care Ombudsman)    | Local Government Act 1974  | 1974                  |                   |
| <i>Pensions Ombudsman</i> <sup>19</sup>   | <i>Pension Schemes Act 1993</i>  | 1993                  |                   |
| Prisons (and Probation Ombudsman) <sup>20</sup>   | Non-statutory body <sup>21</sup>   | 1994                  |                   |
| Housing Ombudsman Service <sup>22</sup>   | Housing Act 1996, section 51 and Schedule 2)   | 1996                  |                   |
| <i>Police Ombudsman for Northern Ireland</i> <sup>23</sup>  | Police (Northern Ireland) Act 1998, 2000, 2003   | 2000                  |                   |
| Financial Ombudsman Service <sup>24</sup>   | Financial Services and Markets Act 2000  | 2001                  |                   |
| Scottish Public Services Ombudsman <sup>25</sup>  | Scottish Public Services Ombudsman Act 2002  | 2002                  |                   |
| Ombudsman Services <sup>26</sup>  | Non-statutory body   | 2003                  |                   |
| Independent Police Complaints Commission (renamed Independent Office for Police Conduct (2018))                                   | Police Reform Act 2002   | 2004                  |                   |
| Office of the Independent Adjudicator for Higher Education  | Higher Education Act 2004  | 2004                  |                   |
| Public Services Ombudsman for Wales <sup>27</sup>   | Public Services Ombudsman (Wales) Act 2005   | 2005                  |                   |
| Scottish Legal Complaints Commission  | Legal Profession and Legal Aid (Scotland) Act 2007   | 2008                  |                   |
| Legal Ombudsman   | Legal Services Act 2007  | 2010                  |                   |
| Northern Ireland Ombudsman  | Public Services Ombudsman Act (Northern Ireland) 2016  | 2016                  |                   |
| Service Complaints Ombudsman  | Armed Forces Service Complaints and Financial Assistance Act 2015                                | 2017                  |                   |

<sup>19</sup> Not included in this study. Pension Fund Protection was added in 2005.

<sup>20</sup> Probation Ombudsman remit extended from 2001. Remains a non-statutory ombudsman scheme and no direct judicial review has been generated around this scheme.

<sup>21</sup> The PPO operates under the direction of the Secretary of State for Justice. Despite at least two proposals to found the institution in statute, it currently remains a Departmental public body situated in the Ministry of Justice. For the PPO's terms of reference see <https://s3-eu-west-2.amazonaws.com/ppo-prod-storage-1g9rkhjhkmgw/uploads/2017/04/PPO-Terms-of-reference-2017.pdf>

<sup>22</sup> There were no judicial review cases found for the Housing Ombudsman.

<sup>23</sup> Not included in this study.

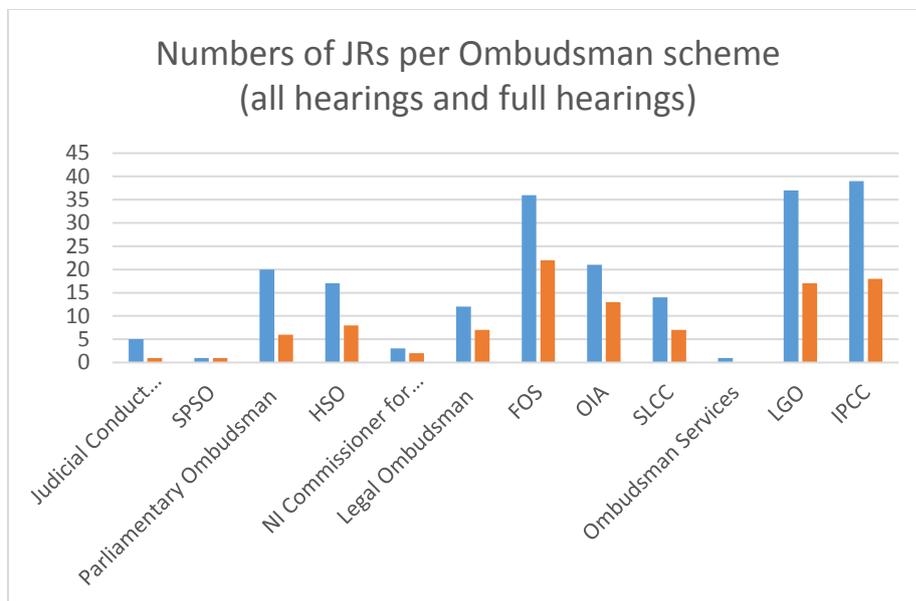
<sup>24</sup> Previous to the FOS, a number of private sector ombudsman schemes operated and this did generate some judicial review claims. The cases involving these defunct schemes have not been included in this study.

<sup>25</sup> Predecessor organisation was run under the Parliamentary, Health and Local Government Ombudsman legislation respectively.

<sup>26</sup> First for Communication (2003) and then later Energy (2006) and Property (2007), with more functions following in later years, see <https://www.ombudsman-services.org/>

<sup>27</sup> A separate scheme had operated before then under the devolution legislation, but 2006 represents the date of the bespoke legislation.

The rate of judicial review/appeal cases varies between the schemes.



These variances might be due to a variety of factors and it is difficult to read too much into the results. Some schemes (eg LGO) have been in operation longer than others, whilst other schemes (eg FOS) process considerably more complaints than others. The issues involved for some schemes might in practice be more significant to the individual than others (either due to financial impact and/or personal impact).

We did find though some interesting patterns when comparing turnover of complaints with the number of JR/appeal cases, which we will pursue in a later paper.

## B5. Claimant success rate in full hearings at JR/appeal

To gauge claimant success rate in JR hearings we relied upon the Ministry of Justice court statistics. Following a request for information in 2016, we obtained statistics for a 10-year period. These data recorded ‘successful’ (including partial judgments in favour) claims at 41%. We do not have the split between courts.

The results of our study can be traced back to the [Data File](#). To obtain the relevant statistic for outcome we coded each case for:

- Court in which case was last heard
- Whether or not permission had been obtained
- Outcome

Analysing this data gave us the following results.

| <i>Courts in which case was heard</i> | <i>Hearings</i> | <i>Claims found at least in part for claimant</i> | <i>Percentage of claims found at least in part for claimant</i> |
|---------------------------------------|-----------------|---|---|
| <b>Total</b>                          | <b>103</b>      | <b>35</b>   | <b>34</b>   |
| Administrative Court                  | 77              | 24  | 31  |
| Court of Appeal                       | 18              | 7   | 39  |
| Supreme Court                         | 1               | 1   | 100   |
| Inner House of Court of Sessions      | 7               | 3   | 43  |
| <i>All Appeal Courts</i>              | <i>25</i>       | <i>8</i>  | <i>42</i>   |

One area that would be worth exploring more in future research is the higher success rate in the appeal courts than the Administrative Court. There might be several reasons for this difference, eg a filtering effect might mean that virtually all weak cases are weeded out by the time that the case arrives in the Appeal courts, or the Appeal Court judges might be more willing to expand the law to allow the claimants claim to succeed.

There were variances in the success rates against different schemes. However, it is difficult to discern a clear pattern and the numbers of cases per scheme are too low to read much into the results. One scheme that does appear anomalous is the Local Government Ombudsman which has been reviewed more than most other schemes by virtue of its relative longevity. However, more than the other schemes cases date back prior to 2000 and the period when it became the practice to report cases online as a matter of course. Plausibly, therefore, the Administrative Court cases that were reported in the pre-2000 period were more likely to be selected for interest by the reporters and our sample misses a number of cases found in favour of the LGO.

| <i>Scheme</i>  | <i>Cases heard at<br/>JR/ Appeal</i> | <i>Claimant<br/>successful</i> | <i>Percentage of<br/>claims found at<br/>least in part for<br/>claimant</i> |
|--|--------------------------------------|--------------------------------|---|
| Financial Ombudsman<br>Service                                   | 22                                   | 6                              | 27  |
| Health Service Ombudsman   | 9                                    | 3                              | 33  |
| Independent Police<br>Complaints Commission                      | 21                                   | 6                              | 29  |
| Parliamentary Ombudsman  | 3                                    | 3                              | 50  |
| Local Government<br>Ombudsman                                    | 17                                   | 9                              | 47  |
| Scottish Public Services<br>Ombudsman                            | 1                                    | 1                              | 100   |
| Northern Ireland<br>Ombudsman                                    | 2                                    | 1                              | 50  |
| Legal Ombudsman  | 7                                    | 3                              | 43  |
| Scottish Legal Complaints<br>Commission                          | 7                                    | 3                              | 43  |
| Office of the Independent<br>Adjudicator for Higher<br>Education | 14                                   | 4                              | 21  |

# Conclusions on Judicial Review and Individual Rights/Interests

## B6. Reasons for oral permissions being refused

We coded the permission hearings for the stated reason why permission was refused. On most occasions this reason was provided expressly. The results of our study can be traced back to the [Data File](#).

The following table charts the results. (NB for some cases more than one reason was provided)

| Ground applied                             | Number of occasions cited | %  |
|--|---------------------------|----|
| 1. Totally without merit <sup>28</sup>     | 17                        | 15 |
| 2. Lack of arguable case                   | 68                        | 60 |
| 3. Time limit                              | 23                        | 20 |
| 4. Alternative remedy                      | 2                         | 2  |
| 5. 'No difference' principle <sup>29</sup> | 0                         | 0  |
| 6. Standing                                | 0                         | 0  |
| 7. Abuse of process <sup>30</sup>          | 4                         | 4  |

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<sup>28</sup> The difference between 'totally without merit' and 'lack of arguable case' is very obfuscated: 'There are indeed cases in which the judge considering an application for permission to apply for judicial review can see no rational basis on which the claim could succeed: these are in our view the cases referred to in Grace as "bound to fail" (or "hopeless"). In such cases permission is of course refused. But there are also cases in which the claimant or applicant (we will henceforth say "claimant" for short) has identified a rational argument in support of his claim but where the judge is confident that, even taking the case at its highest, it is wrong. In such a case also it is in our view right to refuse permission; and in our experience this is the approach that most judges take. On this approach, even though the claim might be said to be "arguable" in one sense of the word, it ceases to be so, and the prospect of it succeeding ceases to be "realistic", if the judge feels able confidently to reject the claimant's arguments. The distinction between such cases and those which are "bound to fail" is not black-and-white, but we believe that it is nevertheless real' (*Samia Wasif v SSHD* [2016] EWCA Civ 82, ¶15).

Therefore, in practice, we will simply recorded these as found in the cases.

<sup>29</sup> Pursuant to s84 of the Criminal Justice and Courts Act 2015, the Senior Courts Act 1981 now reads at s31(3C): 'When considering whether to grant leave to make an application for judicial review, the High Court – (a) may of its own motion consider whether the outcome for the applicant would have been substantially different if the conduct complained of had not occurred, and (b) must consider that question if the defendant asks it to do so. (3D) If, on considering that question, it appears to the High Court to be highly likely that the outcome for the applicant would not have been substantially different, the court must refuse to grant leave'.

<sup>30</sup> For example, where a litigant has initiated a fresh application for judicial review of matters that have already been determined [see e.g. *Mcdonald v Judicial Appointments & Conduct Ombudsman & Ors* [2013] EWHC 1755 (Admin)].

## **B7. Remedies made available in cases where the claim of the claimant was upheld in part or full**

For each of the 35 cases where the claimant was successful in full or in part, the remedy awarded by the court was coded. It was not always easy to discern the nature of the judicial ruling made, but the following decisions could be discerned.

The key finding here is that in 28 cases the original decision was quashed in whole or in part, and in a further case the relevant ombudsman agreed to reopen the complaint.

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| <b>Remedies</b>                    |    |
|------------------------------------|----|
| 1. Quashing order                  | 26 |
| 2. Prohibiting order               | 0  |
| 3. Mandatory order                 | 0  |
| 4. Declaration                     | 1  |
| 5. Damages (ECHR violation)        | 0  |
| 6. Quashed and not remitted        | 2  |
| 7. Award decided subsequently      | 1  |
| 8. No award made                   | 4  |
| 9. Ombud agreed to reopen decision | 1  |
|                                    | 34 |

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# UPHOLDING THE RULE OF LAW

## Employs Non-Literal Approaches to Legislative Interpretation

### B8 Interpretative strategy applied to legislation

We coded for four forms of interpretation. Where there was more than one interpretive technique applied we coded for that which suggested the ‘thicker’ interpretation and analysed subsequently its implication. For a full defence of our method, see our *A1 above*.

The results of the study were:

|                                    |            |
|------------------------------------|------------|
| No interpretation approach applied | 22         |
| Literal                            | 64         |
| Textual                            | 12         |
| Contextual                         | 5          |
| <b>Total</b>                       | <b>103</b> |

The results of our study can be traced back to the [Data File](#).

Ordinarily, but not exclusively, the relevant statute being interpreted was the founding statute of the ombudscheme being challenged. Inevitably, the interpretative strategy allows for an element of disagreement (including between the authors of the study). As well as being transparent about the choices being made, our defence of this technique lies in the nuanced nature of the analysis that follows the finding. In other words, although there will occasionally be some level of unresolvable disagreement in the coding applied, not only will these examples be rare as occurring on the boundary lines of the categories, the implications were tested when the results were analysed.

For instance, the case of *R v Parliamentary Commissioner for Administration Ex parte Dyer* [1994] WLR 621 could plausibly be recorded as one in which ‘No interpretation approach was applied’ because although the relevant statute was considered, the court largely found it unhelpful for resolving the matter before them. However, we chose to consider it an example of ‘literal interpretation’ because the statute was considered and the literal meaning given to the provisions in the Act did inform how the decision was made. They found, in part, that judicial review in the case could not be assumed not to apply to an ombudsman because statute did not bar it expressly.

The important point for our purposes here, however, is that whether recorded as ‘no interpretation’ or ‘literal interpretation’, in terms of statutory interpretation this case is recorded as an example of ‘Thin’ rule of law decision-making. By contrast, separately under another test, we have recorded (under judicial strategy) the rule of law expanding nature of this case, in that through expanding the common law to allow for judicial review of the Parliamentary ombudsman the ruling in this case facilitated a ‘thick’ rule of law approach – so the different dimensions of this case are captured under different tests.

The distinction between literal and contextual interpretation is also contentious, but we address this in the paper through a deeper analysis of those cases which we coded as ‘textual’ but found to

be instances of ‘thin’ rule of law interpretation given the nature of the interpretative work being performed by the judge.

Finally, because we treat both textual and contextual interpretation techniques as evidence of a potentially thick rule of law strategy, for the purposes of this study the difference between the two interpretative methods is inconsequential (ie it is sometimes difficult to tell from the written word alone whether the driver behind establishing ‘Parliamentary intention’ is driven only by the words of the statute or by recourse to an analysis of the practice of the law or other sources of information).

## B9. Proportion in use of interpretative techniques

The following table details what interpretative approach the court took when a case fell to be resolved on a specific legislative provision, either through direct application or interpretation.

|            |    |     |
|------------|----|-----|
| Literal    | 64 | 79% |
| Textual    | 12 | 15% |
| Contextual | 5  | 6%  |

The purpose of this test was in part to establish the degree to which potentially ‘thick’ rule of law strategies were being applied in ombudsman judicial review. The assumption with literal interpretations is that judges might be imposing interpretations on a case, but they are doing it within a tight framework that requires justification in the reasoning. With textual and contextual techniques, the room for expanding the law becomes wider.

However, a further aim was to highlight potentially thick interpretation cases and interrogate them in more depth to understand why the judge had taken this approach. The following cases were those in our sample where we found the judge to have moved beyond a straightforward literal approach.

1. *R (Mencap) v PHSO & EHRC* [2011] EWHC 3351 (Admin);
2. *R (Heather Moor & Edgecomb Ltd) v Financial Ombudsman Service* [2008] EWCA Civ 642;
3. *R (Kerman & Co Llp) v Legal Ombudsman* [2014] EWHC 3726 (Admin);
4. *Anderson Strathern Llp & Anor v A Decision of The Scottish Legal Complaints Commission* [2016] ScotCS CSIH\_71.
5. *Armagh City Council, Re Judicial Review* [2014] NICA 44
6. *R (AC) v OLAHE (2017)* (Claim Non.CO/5366/2016) available on the website of the Office of the Independent Adjudicator for Higher Education;
7. *R (Brinsons (A Firm)) v Financial Ombudsman Service* [2007] EWHC 2534 (Admin);
8. *R (Siborurema) v OLAHE* [2007] EWCA Civ 1365;
9. *R (Hession) v Health Service Commissioner for Wales* [2001] EWHC 619 (Admin)
10. *R (IFG Financial Services Ltd) v Financial Ombudsman Services Ltd* [2005] EWHC 1153 (Admin)
11. *R v Local Commissioner for Administration ex parte Bradford MBC*;
12. *R v PCA, ex parte Balchin* [1996] EWHC Admin 152;
13. *R v PCA, ex parte Balchin (No 2)* (2000) 79 P. & C.R. 157;
14. *JR55, Re Application for Judicial Review (Northern Ireland)* [2016] UKSC 22;
15. *R (Cavanagh) v Health Service Commissioner* [2005] EWCA Civ 1578.
16. *Council of The Law Society of Scotland v The Scottish Legal Complaints Commission (SLCC)* [2017] ScotCS CSIH\_36
17. *Tenetconnect Services Ltd v Financial Services Lts & Anor* [2018] EWHC 459 (Admin)

## B10. Explanations for ‘thick’ interpretative techniques

Our challenge was to find the *best* viable explanation for why on occasion the judiciary adopted ‘thick’ interpretative techniques in the sample we were looking at.

We identified the following viable explanations:

### 10.1 To add rigour to a literal interpretation

Often the best meaning of a legal provision is indeterminate and it makes good sense to read around the Act to compile a best understanding of the legislative intention. Consistencies and inconsistencies can be identified this way. With such cases, it may even be moot whether the interpretation is ‘literal’ or ‘textual’. We found the following cases where the work of the judge was best described as an enterprise in trying to identify a literal interpretation through a broader reading of the legislation.

**NB The cases in bold indicate those cases found against the ombudsman.**

1. *R (Mencap) v PHSO & EHRC* [2011] EWHC 3351 (Admin);
2. *R (Heather Moor & Edgecomb Ltd) v Financial Ombudsman Service* [2008] EWCA Civ 642;
3. *R (Kerman & Co Llp) v Legal Ombudsman* [2014] EWHC 3726 (Admin);
4. ***Anderson Strathern Llp & Anor v A Decision of The Scottish Legal Complaints Commission* [2016] ScotCS CSIH\_71.**
5. *Tenetconnect Services Ltd v Financial Services Lts & Anor* [2018] EWHC 459 (Admin)

### 10.2 To resolve conflicting positions

We found a series of cases in which the court had to come to a decision as to which ‘conflicting’ provision of law to give priority – or at least where the best reading of one legislative provision could be rejected primarily because another legislative provision logically alluded to a different interpretation. Consistency in law, therefore, was provided for through reference to more than one legislative provision.

1. *Armagh City Council, Re Judicial Review* [2014] NICA 44
2. ***R (AC) v OIAHE (2017) (Claim Non.CO/5366/2016)* available on the website of the Office of the Independent Adjudicator for Higher Education;**
3. *R (Brinsons (A Firm)) v Financial Ombudsman Service* [2007] EWHC 2534 (Admin);
4. *R (Siborurema) v OLAHE* [2007] EWCA Civ 1365;
5. ***Council of The Law Society of Scotland v The Scottish Legal Complaints Commission (SLCC)* [2017] ScotCS CSIH\_36**
6. *R (Hession) v Health Service Commissioner for Wales* [2001] EWHC 619 (Admin)
7. *R (IFG Financial Services Ltd) v Financial Ombudsman Services Ltd* [2005] EWHC 1153 (Admin)

### 10.3 To read extra meaning into the legislation

There were five cases in which the judge took the opportunity to read extra meaning into the legislation where there was no clear interpretative need to do so given the clarity of the legislation. In other words, whereas for the previous two categories a literal interpretation would have been weakly justified or led to potential inconsistency in the law, with these five categories there was a

logical option available which would have not led to inconsistency and would have been clear: namely, the statute could have been interpreted to confer wide discretion on the ombudsman to make the decision being challenged without offending any other part of the Act. In such cases, the use of discretionary power could have been left to the ombudsman to decide, subject to common law grounds of administrative law.

For three of these cases we found that the interpretative endeavour had no impact on the decision in the case. These were:

1. *R v Local Commissioner for Administration ex parte Bradford MBC*;
2. *R v PCA, ex parte Balchin* [1996] EWHC Admin 152;
3. *R v PCA, ex parte Balchin (No 2)* (2000) 79 P. & C.R. 157;

For the other two, the interpretation adopted went to the heart of the decision.

4. *JR55, Re Application for Judicial Review (Northern Ireland)* [2016] UKSC 22;
5. *R (Cavanagh) v Health Service Commissioner* [2005] EWCA Civ 1578.

# Departures From Judicial Precedent

## B11 Use of precedent

Mostly we found that the courts placed a lot of emphasis on precedent.

However, there were cases where a point was made of distinguishing certain cases put before the court.

1. *R (Chancery UK LLP) v Financial Ombudsman Service* [2015] EWHC 407 (Admin);
2. *Scholarastica Umo v LGO* [2003] EWHC 3202 (Admin);
3. *R (Liverpool City Council,) v Local Commissioner For Local Government For North And North East England* [2000] EWCA Civ 54;
4. ***R (AC) v OIAHE (2017) (Claim Non.CO/5366/2016)* available on the website of the Office of the Independent Adjudicator for Higher Education**
5. *R (Budd) v OIAHE* [2010] EWHC 1056 (Admin);
6. ***R v PCA, ex parte Balchin (No 2) (2000) 79 P. & C.R. 157***
7. *Tenetconnect Services Ltd v Financial Services Lts & Anor* [2018] EWHC 459 (Admin)

In three cases the court made a point of rejecting or disregarding an earlier ruling, albeit not expressly overruling the case.

1. *Maxhuni v LGO* [2002] EWCA Civ 973
2. *R (Walker) v Financial Ombudsman Service* [2013] NIQB 12;
3. *R (Jeremiah) v Parliamentary and Health Service Ombudsman* [2013] EWHC 1085 (Admin)

# Preference for Substantive Over Procedural Judicial Reasoning

## B.12 Nature of legal ground used successfully against ombudsman decisions

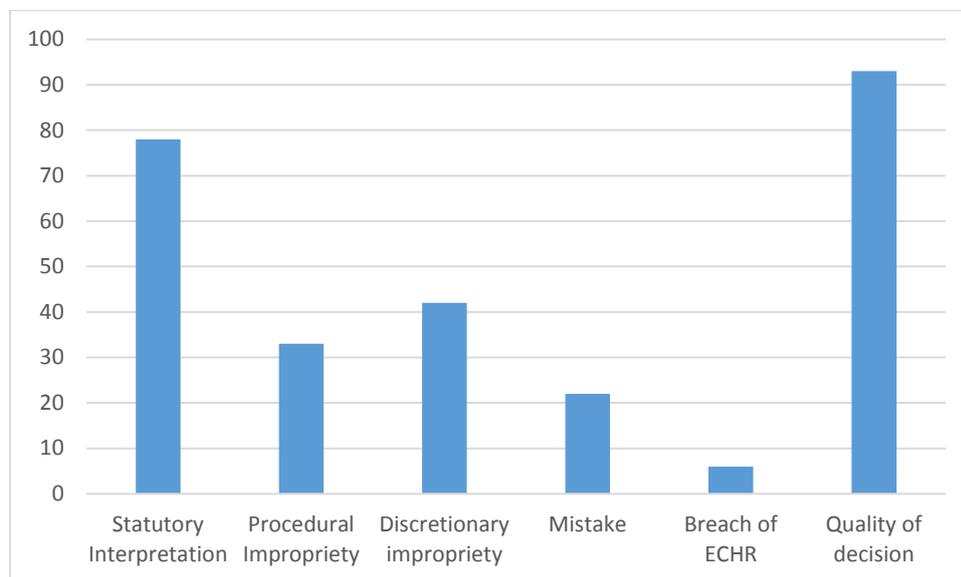
We borrowed, with some small adaptations, a typology from the work of Sarah Nason<sup>31</sup> in categorising the legal grounds used to resolve cases against an ombudsman according to six forms. See A1 above for further detail.

Within this approach, although we tested for specific grounds of administrative law, we also collated those tests within six broad umbrella categories which indicate the nature of the work being undertaken by the courts. These categories were:

1. Ordinary common law statutory interpretation<sup>32</sup>
2. Procedural impropriety
3. Discretionary impropriety
4. Mistake<sup>33</sup>
5. Breach of ECHR
6. Quality of decision

We also tested for a seventh category, ‘Significant claims based on common law constitutional values, rights, or allocation of powers’ which was identified by Sarah Nason in her work as a developing area of judicial activity, but in our work found no cases that obviously fell into this category as opposed to the other categories adopted.

Applying these categories, for all cases we identified the following distribution of grounds being used to challenge an ombudsman decision.



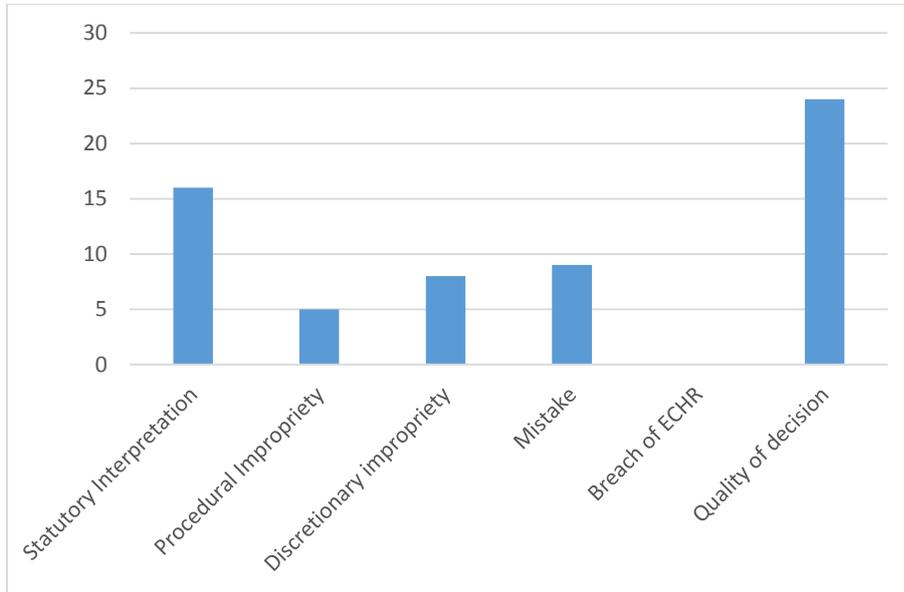
<sup>31</sup> Sarah Nason, *Reconstructing Judicial Review* (Hart 2016) 25, 146.

<sup>32</sup> Nason justifies this as an entire category on the basis that challenges to decision-makers’ interpretation of statute were the largest proportion of claims in her sample (p. 157).

<sup>33</sup> Nason is inspired by Rebecca Williams, who argues that a decision ‘can only be an error if it falls short of an objective truth’: ‘When is an Error not an Error? Reform of Jurisdictional Review of Error of Law and Fact’ [2007] PL 793. Therefore, it seems Nason’s ‘mistake’ category is more concerned with error of fact, and objective mistakes.

This result suggests that litigators adopt a strong focus on arguing that either (a) the ombudsman has misinterpreted the law or that (b) the decision itself is flawed in some respect. Noticeably, the ECHR is barely relevant in ombudsman case law.

Focusing on only the grounds that have proved successful against an ombudsman scheme in those 35 cases in which the court found at least in part against the ombudsman the following distribution is evident.



### B13 Cases decided by category of law.

#### *Statutory interpretation cases*

We tested for all grounds argued against an ombudsman in court, with in some cases the same legal ground being applied more than once in a case. For instance, in *JR55*<sup>34</sup> there were three separate interpretations of the statute found against the Ombudsman. Likewise, in *Anderson Strathern*,<sup>35</sup> two separate interpretations can be discerned. Removing this potential double counting, we found that out of the 35 cases found against the Ombudsman, in 13 the source had been a finding of statutory interpretation upon which the relevant ombudsman had erred. These included:

*Anderson Strathern Llp & Anor v A Decision of The Scottish Legal Complaints Commission* [2016] ScotCS CSIH\_71

*JR55, Re Application for Judicial Review (Northern Ireland)* [2016] UKSC 22

*R (AC) v OIAHE* (2017) (Claim Non.CO/5366/2016)

*Stenhouse v The Legal Ombudsman & Anor* [2016] EWHC 612 (Admin)

*Cavanagh & Ors v Health Service Commissioner* [2005] EWCA Civ 1578

<sup>34</sup> *JR55, Re Application for Judicial Review (Northern Ireland)* [2016] UKSC 22

<sup>35</sup> *Anderson Strathern Llp & Anor v A Decision of The Scottish Legal Complaints Commission* [2016] ScotCS CSIH\_71

Miller & Anor v The Health Service Commissioner for England [2018] EWCA Civ 144  
Kerr Stirling LLP v Scottish Legal Complaints Commission [2012] ScotCS CSIH\_98  
Miah v IPCC [2017] EWCA Civ 2108  
Argyll & Bute Council, Re Judicial Review [2007] ScotCS CSOH\_168  
Akanho v Local Government Ombudsman [2014] EWHC 766 (Admin)  
Atwood v The Health Service Commissioner [2008] EWHC 2315  
Bluefin Insurance Services Ltd v Financial Ombudsman Service Ltd [2014] EWHC 3413

### *Procedural Impropriety cases*

The following three cases identified five grounds of law found against ombudschemes.

Miller & Anor v The Health Service Commissioner for England [2018] EWCA Civ 144 (x3)  
Stenhouse v The Legal Ombudsman & Anor [2016] EWHC 612 (Admin)  
R (Siborurema) v OIAHE [2007] EWCA Civ 1365

### *Discretionary impropriety cases*

There are seven cases in which a discretionary impropriety ground succeeded.

Miller & Anor v The Health Service Commissioner for England [2018] EWCA Civ 144  
Newman v The Parliamentary and Health Service Commissioner [2017] EWHC 3336 (TCC)  
R v PCA, ex parte Balchin [1996] EWHC Admin 152  
R (Herd) v Independent Police Complaints Commission [2009] EWHC 3134 (Admin)  
R (Gopikrishna) v OIAHE [2015] EWHC 207 (Admin)  
R v Commissioner for Local Administration ex parte Croydon LBC [1989] 1 All ER 1033  
R (Hafiz & Haque Solicitors) v Legal Ombudsman [2014] EWHC 1539 (Admin)

In an additional case, R (Norwich and Peterborough Building Society) v Financial Ombudsman Service Ltd [2002] EWHC 2379 (Admin), the court found that the FOS had failed to have regard to a relevant consideration, but the decision was upheld nevertheless because it was defensible on other grounds.

### *Mistake cases*

We identified nine cases in which a form of mistake argument was successful.

Miah v IPCC [2017] EWCA Civ 2108  
Gopikrishna v The Office of the Independent Adjudicator for Higher Education & Ors [2015] EWHC 207  
R. v Commissioner for Local Administration Ex p. S [1998] EWHC Admin 1062  
Kelly v Financial Ombudsman Service Ltd [2017] EWHC 3581 (Admin)  
Campbell v IPCC [2015] EWHC 3424  
Kerr Stirling LLP v Scottish Legal Complaints Commission [2012] ScotCS CSIH\_98  
Bartos v A Decision of The Scottish Legal Complaints Commission [2015] ScotCS CSIH\_50  
Rosemarine v The Office for Legal Complaints [2014] EWHC 601 (Admin)

R (Balchin) v Parliamentary Commissioner for Administration (No 3) [2002] EWHC 1876 (Admin)

### *Quality of decision*

#### Deficiency in reasons provided

We identified twelve cases in which the reasoning of an ombudsman was found to be flawed (with in two cases a double finding along these lines made).

Adams v The Commission for Local Administration In England & Ors [2011] EWHC 2972 (Admin)

Bartos v A Decision of The Scottish Legal Complaints Commission [2015] ScotCS CSIH\_50

R (Balchin) v Parliamentary Commissioner for Administration (No 3) [2002] EWHC 1876 (Admin);

R v PCA, ex parte Balchin (No 2) (2000) 79 P. & C.R. 157 (x2)

R (Cardao-Pito) v OIAHE [2012] EWHC 203 (Admin) (x2)

R (Turpin) v Commissioner for Local Administration [2002] JPL 326

R. (Hughes) v Local Government Ombudsman [2001] EWHC Admin 349

R (Aviva Life & Pensions UK Ltd) v Financial Ombudsman Service [2017] EWHC 352 (Admin)

R v Commissioner for Local Administration ex p Eastleigh BC [1988] QB 855

R (Crawford) v The Legal Ombudsman & Anor [2014] EWHC 182 (Admin)

R (Hafiz & Haque Solicitors) v Legal Ombudsman [2014] EWHC 1539 (Admin)

JR55, Re Application for Judicial Review (Northern Ireland) [2016] UKSC 22

#### Irrational

We identified ten cases in which the reasoning of an ombudsman was found to be irrational.

JR55, Re Application for Judicial Review (Northern Ireland) [2016] UKSC 22

R. (Hughes) v Local Government Ombudsman [2001] EWHC Admin 349

R (Crawford) v The Legal Ombudsman & Anor [2014] EWHC 182 (Admin)

R (Dennis) v Independent Police Complaints Commission [2008] EWHC 1158 (Admin)

R (Hafiz & Haque Solicitors) v Legal Ombudsman [2014] EWHC 1539 (Admin)

Stenhouse v The Legal Ombudsman & Anor [2016] EWHC 612 (Admin)

R (Garrison Investment Analysis) v Financial Ombudsman Service [2006] EWHC 2466 (Admin)

Miller & Anor v The Health Service Commissioner for England [2018] EWCA Civ 144.

Kelly v Financial Ombudsman Service Ltd [2017] EWHC 3581 (Admin)

Newman v The Parliamentary and Health Service Commissioner [2017] EWHC 3336 (TCC)

## STANDARD SETTING

### **B.14 Tendency to provide some form of guidance or legal instruction**

We coded all those cases in which some form of legal or guidance statement was made about the ombudsman's powers or its operations. This test excluded those cases in which the judgment only discussed in detail 'generic principles' of law and/or were fact-specific.

Our results can be traced back to the *Data File* under the column 'Judicial Strategy'.

We found judicial guidance of long-term use to the ombudsman sector in 24 cases in which the decision of the ombudsman was successfully challenged, and equivalent guidance in 53 cases in which the decision was upheld.

TO DOUBLE CHECK

## FORMS OF STANDARD SETTING

### **B.15 Judicial statements as to the wide discretionary remit of the ombudsman**

We recorded instances where the ruling of the court placed emphasis on recognising the wide discretion of the ombudsman office – and either explicitly or implicitly suggested that the court would show deference to that wide discretion. These cases were:

*Crosby v IPCC* [2009] EWHC 2515 (Admin);

*Muldoon v Independent Police Complaints Commission (Administrative Court)* [2009] EWHC 3633 (Admin);

*North Yorkshire Police Authority v The Independent Police Complaints Commission* [2010] EWHC 1690 (Admin);

*Ramsden v IPCC* [2013] EWHC 3969 (Admin);

*Rapp v Parliamentary and Health Service Ombudsman* [2015] EWHC 1344 (Admin);

*Sneddon & Anor v Scottish Legal Complaints Commission* [2015] ScotCS CSIH\_62;

*R v PCA, ex parte Balchin* [1996] EWHC Admin 152

*Siborema v OIAHE* [2007] EWCA Civ 1365;

*Maxwell v OIAHE* [2011] EWCA Civ 1236;

*R v Local Commissioner for Administration ex parte Bradford MBC* [1979] 1 QB 287;

*R v Commissioner for Local Administration ex p Eastleigh BC* [1988] QB 855;

*R (Norwich and Peterborough Building Society) v Financial Ombudsman Service Ltd* [2002] EWHC 2379 (Admin);

*Atwood v The Health Service Commissioner* [2008] EWHC 2315

*R (Thilakawardhana) v OIA* [2018] EWCA Civ 13

*Miller & Anor v The Health Service Commissioner for England* [2018] EWCA Civ 144.

*Newman v The Parliamentary and Health Service Commissioner* [2017] EWHC 3336 (TCC)

