

## **Judicial Review in Wales**

### **Submission by the Public Law Project and Dr Sarah Nason**

#### **Summary Conclusions**

In this submission we note the following key conclusions about judicial review in Wales:

- The ordinary civil (non-asylum and immigration) judicial review caseload has declined across the England and Wales Administrative Court in recent years;
- Wales generates fewer such ordinary civil claims per-head of population than England;
- The proportion of claims issued by unrepresented litigants (LIPs) is increasing across the Administrative Court, including in the Cardiff Administrative Court;
- The impacts of legal aid reforms, and to judicial review procedures and costs, may have had a disproportionate impact outside London, including in Wales;
- Barristers based at chambers in Wales are instructed in only a very small proportion of the total number of claims handled by the Administrative Court in Cardiff; and
- The judicial review caseload pertaining to Wales is diverse, often involving a complex mixture of devolved and non-devolved law and policy, EU law (and to a lesser extent international law) relevant to the particular claim in a variety of different ways. This complexity presents challenges and opportunities for legal education, legal practice and justice in Wales.

#### **The Public Law Project**

1. This evidence is provided to the Commission by the Public Law Project and Dr Sarah Nason. The Public Law Project is an independent national legal charity. Our mission is to improve public decision making and facilitate access to justice. We work through a combination of research and policy work, training and conferences, and providing second-tier support and legal casework including public interest litigation. Our strategic objectives are to:
  - Uphold the Rule of Law;
  - Ensure fair systems; and
  - Improve access to justice.

#### **Introduction and Methods**

2. Judicial review is a form of court proceeding, usually in the Administrative Court, in which the judge reviews the lawfulness of a decision or action, or a failure to act, by a public body exercising a public function. It is only available where there is no other effective means of challenge. Whilst judicial review claims are only a small proportion of public law litigation and practice, they are an important barometer of broader compliance with the rule of law and standards of public administration.
3. This Submission is based primarily on an analysis of applications for judicial review received by the Administrative Court across 11 years, from 1 May 2007 to 30 April 2018, corresponding to two years before and nine years after the so-called 'Regionalisation' of

the Administrative Court.<sup>1</sup> Regionalisation refers to the opening of Administrative Court Centres (now more often called Regional Administrative Courts) in Cardiff, Birmingham, Leeds and Manchester.

4. Although Administrative Court claims could previously be issued in Cardiff, this arrangement had been described as in practice providing little more than a 'Post box' facility, existing until April 2009 when a fully operational Administrative Court Centre was opened.<sup>2</sup> Claims issued and administered at the Administrative Court Office (ACO) in Cardiff can be determined at any appropriate venue in Wales. The general case for regionalising the Administrative Court was stressed to be improving access to justice by ensuring that public law claims are issued and heard at the most appropriate location. Regionalisation established new access points to the High Court's supervisory jurisdiction, it was in this sense a largely administrative reform and did not mirror, for example, the creation of local small claims courts in civil cases. There are of course also constitutional and devolution reasons why claims against Welsh public bodies ought generally to be issued and determined in Wales.
5. From a data collection perspective identifying Welsh claims is not straightforward; first we have to determine what is meant by a 'Welsh' judicial review application. There is no easy means of defining such claims in a manner that would allow us to give a precise figure of the number of Welsh claims. Instead there are several available measures which combine to present a picture of judicial review litigation that is connected to Wales in various ways, including:

*For Issued Claims:*

- That the claim was issued in the Cardiff Administrative Court
- That the claimant's given address (where available) is in Wales
- That the solicitor and/or barrister instructed by the claimant in the case are/is based in Wales
- That the defendant's solicitor and/or barrister are/is based in Wales

*For Claims Reaching Substantive Reported Judgment:*

- The above plus the legal issues in the claim, including whether the claim concerns law made by the National Assembly for Wales and Welsh Ministers, law made by Westminster applying to the UK, or to England and Wales (or Westminster law applying just to Wales)
6. The data in this Report is mainly extracted from the Administrative Court IT system (the Crown Office Information Network (COINs)), other data is taken from published Ministry of Justice Statistics.<sup>3</sup> The fields extracted from COINs include the Topic of the

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<sup>1</sup> For more detail on the background to Regionalisation and the general research project methods see respectively; Judicial Working Group, *Justice Outside London* (2010) - online at: <https://www.judiciary.uk/publications/administrative-court/> and S. Nason and M. Sunkin, 'The Regionalisation of Judicial Review: Constitutional Authority, Access to Justice and Specialisation of Legal Services in Public Law' (2013) 76(2) *Modern Law Review* 223-253.

<sup>2</sup> For background see D. Gardner, *Administrative Law and the Administrative Court in Wales* (University of Wales Press 2016).

<sup>3</sup> Civil Justice Statistics Quarterly; <https://www.gov.uk/government/collections/civil-justice-statistics-quarterly#2018>

claim, the claimant's address, claimant solicitor and barrister addresses, the defendant solicitors address and the defendant barristers address (we do not have at this time a specific field recording the precise identity of the defendant from COINs). The majority of this Report focuses on ordinary (non-asylum and immigration) civil judicial review claims, particularly given that the number of asylum and immigration claims issued in Wales is comparatively small. Different considerations also apply to asylum and immigration claims as a substantial proportion of claimants are detained, impacting on the location of issue. This Report also does not examine criminal judicial review and other Administrative Court claims (such as statutory appeals and appeals by way of case stated). It is worth stressing at the outset that whilst constitutionally important, judicial review constitutes only a very small part of the broader compass of public law practice in Wales and England.

## Judicial Review Caseloads

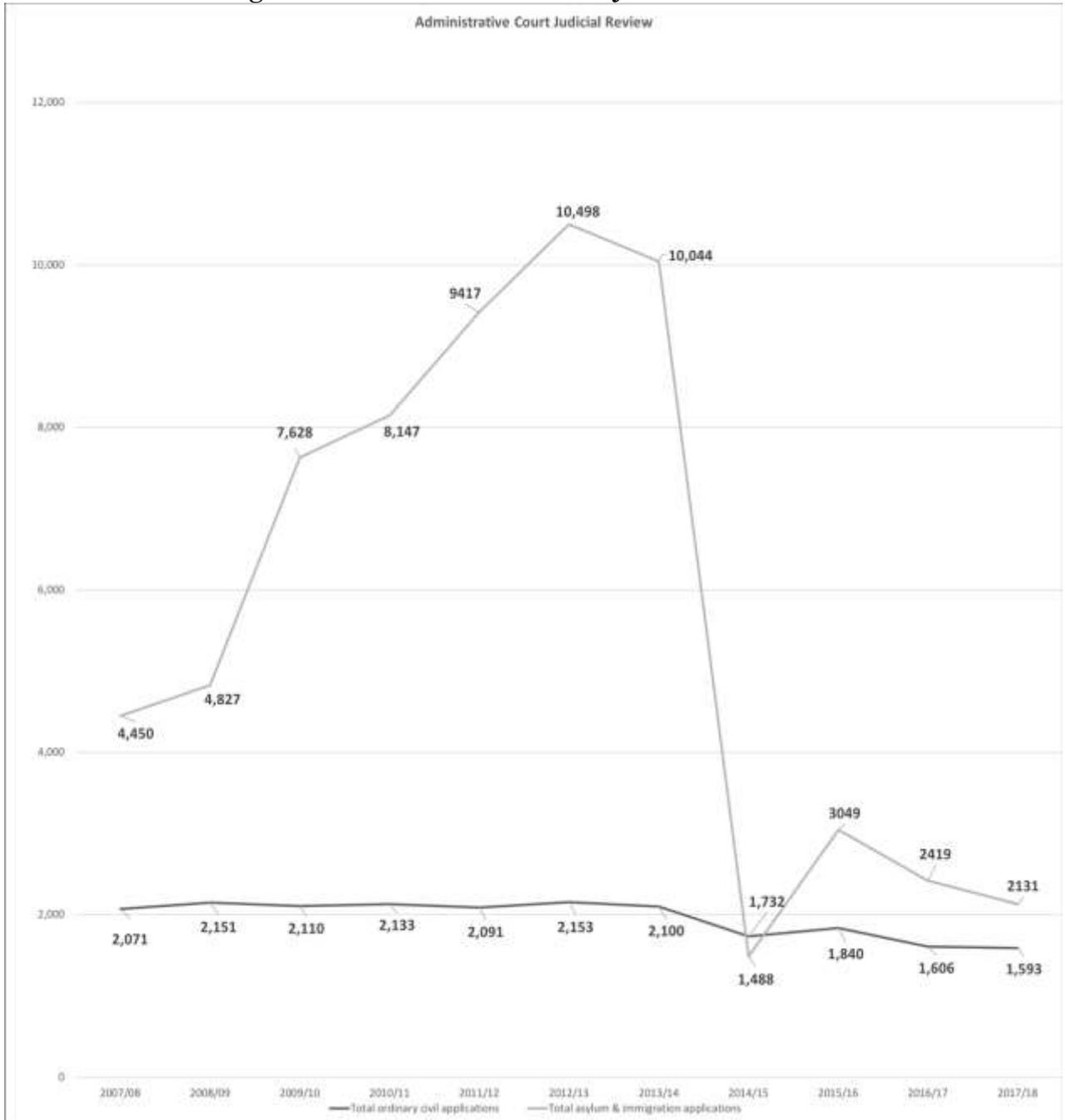
7. **Figure One** shows the total Administrative Court judicial review caseload over the 11 years of data analysis. The reduction in the number of ordinary civil judicial review claims issued per-annum in the years post 2013/14 is noteworthy, particularly given historical data showing that the number of such claims issued per-annum has been approx. 2,000 since at least 1996.<sup>4</sup> This recent reduction coincides with reforms to legal aid introduced by the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO), and with reforms to judicial review procedures and costs.<sup>5</sup>
8. The drop in asylum and immigration judicial review between 2013/14 and 2014/15 is due to the majority of such claims being transferred to the jurisdiction of the Upper Tribunal Immigration and Asylum Chamber (UTIAC); it should be noted that UTIAC also sits in Wales with cases administered from Cardiff.

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<sup>4</sup> See e.g., V. Bondy and M. Sunkins, *The Dynamics of Judicial Review Litigation* (Public Law Project 2009); and data extracted by R. Dixon and C. Hood of The Department of Politics and International Relations, University of Oxford – available online at: <https://docs.google.com/spreadsheets/d/1Kcm2Buf8ykb9otUleY5gQCW1DKaaYSpWoNzabR7AmAs/edit#gid=0>

<sup>5</sup> Ministry of Justice, *Judicial Review: Proposals for Reform* (Consultation Paper CP25/2012) and *Judicial Review: Proposals for Further Reform* (Cm8703, 2013).

**Figure One: Administrative Court Judicial Review**



**Figure Two** below shows the number of ordinary civil judicial review cases issued per-annum in each regional Administrative Court. **Figure Three** below shows the number of asylum and immigration judicial review cases issued per-annum in each regional Administrative Court.

Figure Two: Ordinary Civil Judicial Review by Regional Court of Issue

Court Centre	2009/10		2010/11		2011/12		2012/13		2013/14		2014/15		2015/16		2016/17		2017/18	
	No	%																
Birmingham	137	6.5	178	8.4	162	7.8	176	8.2	118	5.6	148	8.5	133	7.2	108	6.7	124	7.8
Cardiff	61	2.9	80	3.8	68	3.3	86	4	101	4.8	71	4.1	69	3.8	76	4.7	75	4.7
Leeds	221	10.5	238	11.2	199	9.5	198	9.2	214	10.2	130	7.5	110	6	77	4.8	74	4.6
Manchester	215	10.2	212	9.9	231	11.1	281	13.1	213	10.1	148	8.5	142	7.7	99	6.2	134	8.4
<b>Sub-total outside London</b>	<b>634</b>	<b>30.1</b>	<b>708</b>	<b>33.2</b>	<b>660</b>	<b>31.6</b>	<b>741</b>	<b>34.4</b>	<b>646</b>	<b>30.8</b>	<b>497</b>	<b>28.7</b>	<b>454</b>	<b>24.7</b>	<b>360</b>	<b>22.4</b>	<b>407</b>	<b>25.5</b>
London	1,476	70	1,425	66.8	1,431	68.4	1,412	65.6	1,454	69.2	1,235	71.3	1,386	75.3	1,246	77.6	1,186	74.5
<b>Total</b>	<b>2,110</b>		<b>2,133</b>		<b>2,091</b>		<b>2,153</b>		<b>2,100</b>		<b>1,732</b>		<b>1,840</b>		<b>1,606</b>		<b>1,593</b>	

Figure Three: Asylum and Immigration Judicial Review by Regional Court of Issue

Court Centre	2009/10		2010/11		2011/12		2012/13		2013/14		2014/15		2015/16		2016/17		2017/18	
	No	%	No	%	No	%	No	%	No	%	No	%	No	%	No	%	No	%
Birmingham	334	4.4	517	6.3	547	5.9	538	5.2	518	5.2	77	5.2	182	6	145	6	169	7.9
Cardiff	59	0.8	69	0.8	64	0.7	88	0.9	78	0.8	17	1.1	66	2.2	13	0.5	26	1.2
Leeds	154	2.0	244	3.0	238	2.5	264	2.6	188	1.9	31	2.1	55	1.8	27	1.1	37	1.7
Manchester	186	2.4	284	3.5	288	3.1	419	4	422	4.2	74	4	124	4.1	91	3.8	82	3.8
<b>Sub-total outside London</b>	<b>733</b>	<b>9.6</b>	<b>1,114</b>	<b>13.7</b>	<b>1,137</b>	<b>12.2</b>	<b>1,309</b>	<b>13.9</b>	<b>1,206</b>	<b>12.1</b>	<b>199</b>	<b>13.4</b>	<b>427</b>	<b>14</b>	<b>276</b>	<b>11.4</b>	<b>314</b>	<b>14.7</b>
London	6,895	90.4	7,033	86.3	8,209	87.8	9,039	87.4	8,762	87.9	1,287	86.6	2,622	86	2,143	88.6	1,817	85.3
<b>Total</b>	<b>7,628</b>		<b>8,147</b>		<b>9,346</b>		<b>10,348</b>		<b>9,968</b>		<b>1,486</b>		<b>3,049</b>		<b>2,419</b>		<b>2,131</b>	

9. Prior to regionalisation it was estimated that a maximum of one-third of ordinary civil judicial review claims were likely to originate outside London and Southern England.<sup>6</sup> **Figure Two** shows that the number of ordinary civil judicial review claims issued outside London peaked in 2012/13 at 741 claims and 34.4% of the total ordinary judicial review caseload. In 2016/17, by contrast, there were only 360 claims issued outside London representing 22.4% of the total ordinary civil judicial review caseload.
10. It is important to be clear that not all claims issued in Cardiff relate to public law issues arising in Wales. The relevant Practice Direction (Administrative Court (Venue) 54 (D)) provides the ‘general expectation’ that ‘proceedings will be administered and determined in the region with which the claimant has the closest connection’, but this is subject to ten other considerations,<sup>7</sup> including the location of the defendant, the location of the parties legal advisers, costs, media interest, and the workload of the respective courts. There are also excepted classes of claim that cannot be determined outside London; if such claims are issued in a Regional Court they will be transferred to London for administration and determination.<sup>8</sup> Since 2013 the Cardiff ACO has had formal responsibility for administering claims relating to the geographical area of the Western Circuit (South West England), and even before this formal transfer of responsibility it is likely that some 40%-50% of claims issued in Cardiff related to public law issues arising from outside Wales (primarily from the South West of England).<sup>9</sup>
11. The highest number of ordinary civil judicial review claims issued in Cardiff over the research period was 101. Notably this was in 2013/14 when the Cardiff ACO gained formal responsibility for administering claims originating from the Western Circuit, though other data shows that a large number of cases in this particular year originated in Wales.
12. Although the proportion of all Administrative Court ordinary civil claims issued in Cardiff has risen from 2.9% of applications in 2009/10 to 4.7% of applications in 2017/18, this needs to be considered alongside other data which shows that issuing in Cardiff is only part of the story of Welsh judicial review.

### Transfer of Claims

13. The data in **Figures Two and Three** is based on the number of claims issued in the particular Regional Courts, whereas the Regional Courts also determine claims issued in another Regional Court and subsequently transferred. The majority of claimants with given addresses in Wales issue their claims in the Administrative Court in Cardiff, however, as the discussion below about claimant location concludes, claimant addresses are more likely to be available where the claimant is an unrepresented litigant. For cases

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<sup>6</sup> S. Nason, ‘Regionalisation of the Administrative Court and the Tribunalisation of Judicial Review’ [2009] *Public Law* 440.

<sup>7</sup> [https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part54/pd\\_part54d](https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part54/pd_part54d)

<sup>8</sup> CPR PD 54(D) Para 3.1, including proceedings in which a special advocate is instructed, proceedings under the Extradition Act 2003 and Proceeds of Crime Act 2002. The requirement to issue Administrative Court proceedings which must be heard by a Divisional Court at the RCJ in London, has begun to prove controversial as Divisional Courts have heard other types of case in Cardiff.

<sup>9</sup> See e.g., Nason and Sunkin (n 1), S. Nason, ‘Justice Outside London: Five Years of “Regional” Administrative Courts’ (2014) *Judicial Review* 188 and S. Nason, M. Sunkin and D. Hardy, ‘Regionalisation of the Administrative Court and Access to Justice’ *Judicial Review*, 15(3) (2010) 220.

where solicitors and/or barristers are instructed, there is a higher chance of claims being issued in another location and transferred to Cardiff than there is for unrepresented claimants. The rate of transfers seems to be increasing. For example, in 2009/10 there were 10 ordinary civil claims issued in another location and transferred to Cardiff, for each year between 2012/13 and 2017/18 the figure was between 16-18 claims per-annum issued in another Region and transferred, but in 2017/18 the figure had increased to 29 claims. It is likely that many of these transfers result from cases where the claimant and/or defendant is based in Wales, but one or both parties legal advisers are based in London, and the case has initially been issued in London as more convenient for the legal team. Whilst the data demonstrates that the Administrative Court is identifying these cases and transferring them to Cardiff as appropriate, it raises questions around why lawyers based in Wales are not handling a higher proportion of work originating in Wales and South West England.

### **Claimant Location**

14. A more accurate estimate of Welsh claims can potentially be provided by looking at claimant addresses; this measure takes Welsh claims to include applications against the decisions of both devolved and non-devolved public bodies affecting people with given addresses in Wales. At the outset we must add the caveat that a claimant's given correspondence address may not necessarily be their home address (it could for example be a work address or the address of a family member).
15. Claimant addresses were available for 9,309 ordinary civil judicial review applications across the England and Wales Administrative Court, that is in 43% of such applications, over the 11 years of research (this excludes addresses given as HMP, HMYOI, or as 'Care of a firm of solicitors or other advice organisation). Over the 11 years, 413 applications were issued by claimants with addresses in Wales, this represents 4.4% of all applications in which a claimant address is available. Given that Wales accounts for approximately 5.5% of the total England and Wales population it can be said that in most years Wales has produced fewer judicial review claims than might be expected purely on the basis of population statistics. This figure also does not include all those cases where the claimant's address is not available, and here the proportion of work handled by lawyers based in Wales is very small, providing even further evidence that Wales produces fewer judicial reviews per-head of population than England.
16. The reason why claimant addresses are not recorded in all ordinary civil claims is that claimant addresses are not necessarily provided when the claimant has legal representation, here it is often only their legal adviser's address that is recorded. Claimant addresses are, on the other hand, always recorded where the claimant issues the application as an unrepresented litigant (a Litigant in Person – LIP). It is therefore not surprising that a rise in availability of claimant addresses across all Administrative Court ordinary civil judicial review claims (from a low of 30% of claimant addresses being recorded in 2007/08, to a high of 61% of claimant addresses recorded in 2017/18) correlates with a rise in the proportion of ordinary civil claims issued by LIPs (from lows of 20% in 2008/09 and 2009/2010, to a high of 36.5% in 2017/2018).
17. When we examine claimant addresses as a method of identifying Welsh claims, we are really looking at a specific category of claims; those that are more likely to have been (though may not necessarily have been) issued by LIPs. The LIP category itself needs some further examination, as whilst the vast majority of claims recorded as 'In Person'

on the COINS system are issued by individual litigants, a small percentage (approx. 5%) involve organisations (in particular local authorities and occasionally charities) acting ‘In Person’ through their own in-house legal advisers. The figures in this Report are based on the total undifferentiated number of LIPs.

18. **Figure Four** shows the number of claims issued by claimants with addresses in Wales over the years, this data should be treated with some caution as the number of claims is small and the reasons contributing to an increase/decrease in judicial review at any period in time are many and varied. For example, in the year with the highest number of claims (2013/14 with 57 claims) there were a significant number of applications seeking to review the decisions of county court judges, but in other years with a comparatively high number of claims such as 2010/11 (42 cases) and 2014/15 (52 cases), the Topics of claim are too varied to suggest any obvious reason for a higher number of applications in those years.

<b>Figure Four: Ordinary Civil Judicial Review - Claimant Address in Wales</b>		
	<b>Number of claimants with given address in Wales</b>	<b>% of all cases where claimant address known</b>
<b>2007/08</b>	25	4
<b>2008/09</b>	28	3.3
<b>2009/10</b>	31	4.2
<b>2010/11</b>	42	4.8
<b>2011/12</b>	29	3.2
<b>2012/13</b>	42	5.7
<b>2013/14</b>	57	6.5
<b>2014/15</b>	52	5.4
<b>2015/16</b>	39	4.5
<b>2016/17</b>	34	3.8
<b>2017/18</b>	34	3.5
<b>Total</b>	<b>413</b>	

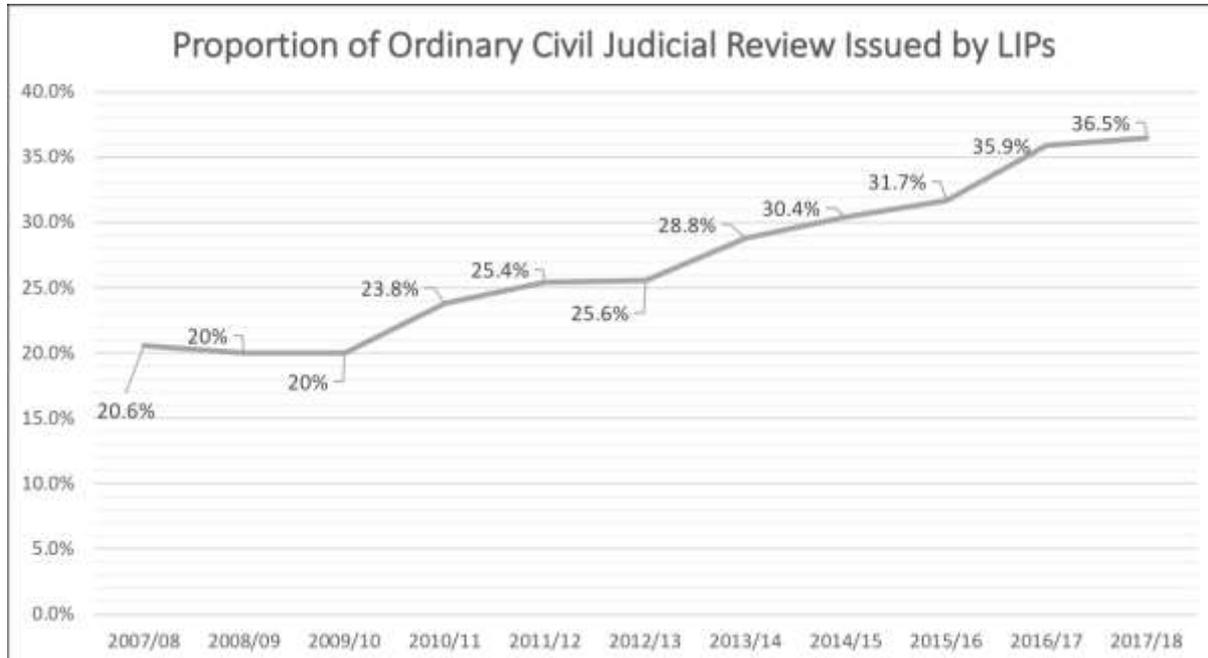
19. Of the 413 claims issued by claimants with addresses in Wales, 208 were issued by LIPs who remained unrepresented throughout. Of the 205 claims in which the claimant and the claimant solicitors address is recorded, 113 claimants in Wales (55%) instructed solicitors in Wales. Of the 171 claimants with addresses in Wales who were represented by barristers, only 28 (16%) were represented by barristers based at chambers in Wales.

### **Litigants in Person**

20. **Figure Five** shows the proportion of ordinary civil judicial review claims issued by LIPs (who remained as LIPs throughout). Given the limitations of the data it is not possible to give an accurate account of the proportion of all Welsh claims that were issued by LIPs. In terms of overall numbers, the proportion of ordinary civil claims issued in Cardiff by LIPs has generally been higher than the Administrative Court average, and in most years a higher proportion of LIP claims issued in Cardiff originated from claimants with addresses in Wales than from claimants with addresses in England. For example, in 2017/18 the proportion of Cardiff issued ordinary civil judicial review claims that were

issued by LIPs was 48% (cf an Administrative Court average of 36.5%) and 63% of these LIP claimants had given addresses in Wales.

**Figure Five: LIPs in Ordinary Civil Judicial Review Claims**



### Solicitor Location

21. Another method of identifying Welsh claims is to examine the addresses of claimant legal advisers (both solicitors and barristers) where instructed. Aside from local convenience, there are many other considerations featuring in the decision to instruct a legal adviser (e.g., pre-existing relationship, costs, expertise and specialisation (and perceptions of such)). It would therefore be wrong to conclude that all cases handled by Welsh lawyers relate to legal issues arising in Wales; England-based claimants may choose Welsh lawyers (for reasons of pre-existing relationship, costs or reputation). On the other hand, there are occasions where a solicitor based in England is more conveniently located for a claimant based in Wales (North Wales claimants instructing lawyers in North West England for example), and there are occasions when an England-based solicitor may have more actual or perceived expertise appropriate to the claim.<sup>10</sup> The data on solicitors then does not necessarily tell us a great deal about the scale of judicial review originating from people in Wales, but it does tell us something about the activities of Welsh solicitors as part of the broader market for public law legal services.

22. Across the 11 years of this research, where both claimant and solicitor addresses are available (noting the above limitations to this data), 55% of claimants (amounting to 113 claims) with addresses in Wales instructed solicitors based in Wales. Whilst this means that some 45% of known Welsh claimants who were represented instructed solicitors in

<sup>10</sup> For example, Manchester based solicitors do considerable work relating to the General Medical Council as it has offices based there, and solicitors based in the North East of England have tended to develop expertise relating to prisons claims given the large prison population in the Region.

England, we must be careful not to draw too many negative conclusions from this about Welsh legal practice. For example, some of these applications will have been in excepted classes of claims that have to be issued in London, others will have involved a Welsh applicant from close to the border with England instructing an England-based solicitor to handle a claim against a UK Central Government department, here there are reasons to argue that London is a more appropriate venue.

23. In total over the 11 years there were 308 claims in which solicitors based in Wales were instructed to act for claimants; in addition to the 113 of these claims involving claimants with addresses in Wales, 44 involved claimants with addresses in England, 8 involved claimants detained at HMP/HYOI (in England or Wales), and in 143 claims no claimant address was recorded.

<b>Figure Five: Ordinary Civil Judicial review – Claimant Solicitor Address in Wales</b>		
	<b>Number of claimants instructing solicitors in Wales</b>	<b>% of all cases where claimant solicitor address known</b>
<b>2007/08</b>	30	2
<b>2008/09</b>	32	2
<b>2009/10</b>	38	2.4
<b>2010/11</b>	32	2.1
<b>2011/12</b>	27	1.8
<b>2012/13</b>	22	1.4
<b>2013/14</b>	23	1.6
<b>2014/15</b>	32	2.8
<b>2015/16</b>	21	1.7
<b>2016/17</b>	29	2.8
<b>2017/18</b>	22	2.2
<b>Total</b>	<b>308</b>	

24. The data shows that Welsh solicitors are instructed to act for claimants in only a small proportion of all Administrative Court ordinary civil judicial review applications. It also demonstrates that perhaps little has changed over the longer-term. The highest number of recorded applications involving Welsh solicitors (38 claims) was in the first year after the Cardiff Court was opened, with Nason and Sunkin previously noting that there were 20% more claims issued by solicitors based in Wales in the first two years after regionalisation than the two years prior.<sup>11</sup> However, since then the number of cases issued in which Welsh solicitors have been instructed to act for claimants has been variable and generally declined.

25. There were 99 different solicitor organisations (primarily private firms of solicitors with some charitable organisations) acting for claimants among the 308 claims involving Welsh solicitors over the 11 years. Of these 99 organisations, 63% were instructed in just one claim over the 11 years. One organisation was instructed in 24% of the 308 claims over the 11 years, and in total the busiest six Welsh organisations were instructed in close to half (49%) of the claims in which a Welsh solicitor was recorded as acting for the

<sup>11</sup> Nason and Sunkin (n 1).

claimant. This data aligns with previous findings concerning England and Wales, that whilst issuing a judicial review claim is a rare occurrence for most solicitors, there are firms/charitable organisations with specific expertise acting in a larger number of applications, usually related to a specialist subject matter (education and community care are prominent specialisms among Welsh firms/organisations).

### Claimant Barrister

26. Over 11 years, claimants with given addresses in Wales were represented by barristers based at chambers in Wales in only 16% of ordinary civil judicial review applications (to put this another way - 84% of Welsh claimants who instructed barristers, instructed barristers based in England). In total, across all England and Wales Administrative Court ordinary civil judicial review claims, barristers based at chambers in Wales acted for claimants in 57 ordinary civil judicial review claims over the 11 years (an average of just five claims per-annum). This was at its highest in 2010/11 with 11 Wales based barristers acting for claimants, and lowest in 2013/14 with just two.

### Defendant Solicitor

27. The COINs data extracted for the current research does not provide detailed information about the identity of defendants themselves, but it does, however, give the identity of the defendants legal advisers in the majority of claims. Based on this data, over 11 years, 265 defendant solicitors were recorded specifically as public bodies based in Wales, five of these were UK bodies based in Wales, and 10 cases involved either the Welsh Assembly Government or Welsh Ministers. The majority of these public bodies were Welsh local authorities, with other prominent bodies being courts, NHS authorities and police forces. The total number of defendant solicitors recorded as Welsh public bodies per-annum is shown in **Figure Six**.

Year	Number of Public Bodies
2007/08	15
2008/09	13
2009/10	18
2010/11	34
2011/12	23
2012/13	30
2013/14	39
2014/15	30
2015/16	23
2016/17	21
2017/18	19
<b>Total</b>	<b>265</b>

### Defendant Counsel

28. Barristers based at chambers in Wales acted for defendants in 55 ordinary civil judicial review cases across the England and Wales Administrative Court over 11 years, an average of five cases per-annum; a maximum of nine barristers based at chambers in

Wales instructed to act for defendants in 2013/14, and lows of three in 2008/09, 2014/15 and 2017/18.

## Topics of Claim

29. There are some 90 different Topics of judicial review claim recorded in the COINs data, and the judicial review caseload (including in Cardiff) has become increasingly diverse over the years. Some Topics are notably more prevalent in Cardiff than in other Administrative Courts, these include, in general education, town and country planning, and community care, and in some years housing and homelessness.<sup>12</sup>

## Progression of Claims

30. From Ministry of Justice data, of the 605 ordinary civil judicial review applications handled by Cardiff between 2009 to 2015 inclusive,<sup>13</sup> 103 resulted in a final substantive hearing.<sup>14</sup> Some 20% were withdrawn before a permission decision (compared to 26% across the Administrative Court as a whole), 68% were refused permission either at first instance or on renewal (compared 67% across the Administrative Court as a whole), 34% were withdrawn after permission and prior to a substantive hearing (compared to 50% across the Administrative Court as a whole) and 33% of claimants were granted a remedy (compared to 37% across the Administrative Court as a whole). Therefore, whilst claims issued in Cardiff are just as likely to be granted permission as claims across the Administrative Court as a whole, Cardiff issued claims are less likely to be withdrawn, and slightly less likely to result in success for the claimant (it should be noted of course that there are no separate statistics for ‘Welsh’ claims and these figures include ‘English’ claims).

## Reported Substantive Determinations

31. For this submission we examined 82 substantive judgments delivered between 2010 and 2017 inclusive in civil judicial review cases (asylum and immigration and other) administered by the Administrative Court in Cardiff.<sup>15</sup> The majority of these claims were heard in Cardiff (occasionally in other locations in Wales), with some heard in Bristol. We were concerned to determine how many of these cases were connected to Wales in various ways, and found that:

- 49 cases involved at least one claimant based in Wales
- 40 cases involved at least one devolved Welsh public body defendant (including the Welsh Ministers) – with many involving multiple such defendants
- 33 cases involved at least one claimant based in England
- 30 cases involved at least one English public body defendant
- 9 cases involved a UK Government Department or Government Minister as a defendant

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<sup>12</sup> See further Nason and Sunkin (n 1)

<sup>13</sup> This includes claims issued in Cardiff and claims later transferred to Cardiff.

<sup>14</sup> We do not examine the progression of claims issued in 2016 onwards as a significant proportion have not yet reached final resolution, the analysis here includes only ‘closed’ claims.

<sup>15</sup> These were judgments reported in full on Westlaw, and we anticipate that this sample includes 90% of all judgments during delivered during the time period.

Other defendants included magistrates and county courts in England and Wales, the Crown Prosecution Service, National Probation Service, the Legal Services Commission and the First-tier and Upper Tribunals.

32. We discovered from this examination that any attempt to categorise claims precisely as turning on matters of Welsh law and/or devolved Welsh policy, was fraught with difficulties. This is significantly due to the nature of public administrative law, where the general principles - that public body decisions must be lawful, procedurally fair, and reasonable - stem from the common law of England and Wales. Whilst these common law principles have often been described as generalised principles of statutory interpretation, the precise significance of the relevant statutory provisions to the case at hand varies greatly. Judicial review claims rarely ever include just one ground, more often than not multiple common law grounds are argued (including illegality, procedural impropriety and irrationality), regularly accompanied by particular forms of statutory illegality – breach of the UK wide Human Rights Act 1998 or Equality Act 2010, or of a particular piece of EU law.
33. The majority of judicial review challenges issued in Cardiff relate to specific public body decisions, but others have concerned the validity of legislation, or the lawfulness of a particular policy adopted by a public body.
34. At the outset we define ‘Devolved Welsh law’ in this context to include the body of law (primary, secondary, and soft-law e.g., ‘Guidance’) made by the National Assembly for Wales and Welsh Ministers. We acknowledge that ‘Welsh law’ also includes law made by the Westminster Parliament that applies only to Wales. Welsh law can feature in a judicial review application in a number of different ways. Most obviously the lawfulness of a piece of legislation itself can be challenged, usually this is secondary legislation, but in the case of Wales, Devolved Welsh primary legislation can also be challenged as potentially beyond legislative competence. A public body’s compliance with relevant Welsh law can be challenged – has the public body correctly interpreted and applied the law. Particular aspects of Welsh law (primary, secondary, and soft-law) can also be raised as relevant considerations that arguably should have been taken into account by the public body in reaching its decision; sometimes these considerations go to the lawfulness of a public body’s decision, but equally the relevant statutory and policy context is also important in determining whether the public body’s decision was reasonable.
35. The upshot from the substantive judgments is that cases regularly involve multiple grounds, with multiple sources of law relied on in a number of different ways. For example, the central issue in a case may concern whether a Welsh public body has breached the claimant’s ECHR rights or Equality rights under UK law, but factors going to determining whether a *prima facie* breach is proportionate can include provisions of Devolved Welsh law and policy. In many cases aspects of the law applicable to the UK, the law applicable to England and Wales, and the law applicable to Wales or England only<sup>16</sup> (as well as related policy/guidance), might all be considerations relevant to the lawfulness and/or reasonableness of a range of public body decisions challenged in just one case. In some areas, most notably environmental law, the relevant legal regimes are primarily of EU law and Devolved Welsh law, with the law applicable to England and Wales sometimes also being examined if certain provisions apply. In cases concerning human rights, international legal regimes (including those beyond the ECHR) have also

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<sup>16</sup> Depending on the nature of the defendant.

been examined as considerations (for example, as going to the reasonableness or proportionality of decisions or policies).

36. We also note that many cases involve more than one claimant and/or more than one defendant and that the parties can be based in multiple locations. For example, some cases have included as first claimant an individual based in Wales, and as second claimant an England and Wales representative organisation based in England, challenging decisions turning on both devolved and non-devolved law and policy. Other cases have included as defendants both a UK Secretary of State and the Welsh Ministers.
37. Given the complexities of the legal issues addressed in many of the cases, we merely highlight here how many judgments involved an examination of law made by the National Assembly for Wales and Welsh Ministers (we do not purport to determine precisely how this law was relevant to the case).<sup>17</sup> There were 26 cases in which provisions of such Devolved Welsh law were examined. There were also a small number of obvious cases in which Westminster legislation clearly applying *only* to Wales was examined, but we do not purport to provide a detailed analysis of such examples here. Our main reflection is that whilst there were 1,167 civil judicial review claims (both asylum and immigration and others) issued in Cardiff over the 11 years of this research, only a small proportion resulted in a reported substantive judgment turning in whole or in part on matters of Devolved Welsh law.<sup>18</sup> Nevertheless, previous research demonstrates that even a single judgment can have major reverberations across a broad range of public body activity, and ‘that practical impact is not necessarily associated with legal notoriety’.<sup>19</sup>
38. The data is interesting in its own right, but it also highlights how little we know about the general practice of public law in Wales, for example how many issues of Welsh law were raised with lawyers and other advice providers but were resolved or in some way or abandoned before a potential judicial review was issued, and how many issued claims that were withdrawn ultimately ended in some form of settlement or alternative dispute resolution process, and in which party’s favour were these disputes resolved? Previous research shows that a high proportion of claims that are withdrawn at various stages of the judicial review process are resolved by way of settlement in the claimant’s favour.<sup>20</sup>

## Conclusions

39. The number of claimants and legal advisers located in Wales issuing judicial review claims represents a small proportion of the total Administrative Court caseload; a proportion that suggests Wales generates fewer ordinary civil judicial review claims per head of population than England. Whilst Nason and Sunkin previously found that

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<sup>17</sup> For example, whether the law’s validity was challenged, whether a public body’s interpretation and/or application of provisions of such law was challenged, or whether the provisions were treated as relevant considerations going to lawfulness or reasonableness of a public body decision.

<sup>18</sup> Even if, as we expect, the figure of 26 is slightly shy of the total, the complete figure is unlikely to be significantly higher.

<sup>19</sup> See e.g., most recently, V. Bondy, L. Platt and M. Sunkin, *The Value and Effects of Judicial Review: The Nature of Claims, Their Outcomes and Consequences* (PLP, London School of Economics, University of Essex 2016)

<sup>20</sup> See V. Bondy and M. Sunkin, *The Dynamics of Judicial Review Litigation: The Resolution of Public Law Challenges Before Final Hearing* (Public Law Project 2009).

‘Welsh’ claims<sup>21</sup> had increased between the two years prior to regionalisation and the two years immediately after, this increase has not resolved into a longer-term trend.

40. Our current analysis also shows the importance of viewing Welsh claims in the context of broader issues affecting Administrative Court litigation. The total number of ordinary civil judicial review applications issued in the Administrative Court per-annum has decreased significantly from 2013/14 onwards, whilst the proportion of claims issued by LIPs has continued to increase. It is hard not to draw the conclusion that these trends relate, at least in part, to legal aid reforms introduced by LASPO 2012, and reforms to judicial review procedures and costs (from 2013 onwards). That the proportion of ordinary civil judicial review claims issued outside London also begins to decline from 2013/14 might suggest that the reforms are having a disproportionate impact beyond London and the South East of England.
41. In previous research Nason and Sunkin concluded that in Birmingham, Manchester and Leeds, it may have been mainly the activities of local specialist lawyers driving regionally issued judicial review claims. On the contrary in Cardiff, the number of claims involving solicitors based in Wales has generally been comparatively small and the caseload more varied. Nason and Sunkin’s prediction that the presence of a Regional Administrative Court might spark the development of a local market for public law legal services, with providers ‘clustering’ around the new locations, does not appear to have been borne out in relation to Cardiff, especially as far as the activities of barristers are concerned. On the other hand, the regional markets that did seem to have been catalysed – notably around Leeds and Manchester – appear to have contracted significantly following legal aid and other reforms, resulting in a notable reduction in the number of judicial review claims issued in these two locations. Across the Administrative Court as a whole there has been a rise in unrepresented litigation (LIP claims) with the proportion of Cardiff issued ordinary civil claims issued by LIPs higher than the Administrative Court average in at least some years.
42. When it comes to the substance of claims issued in Cardiff, we find further evidence that a large proportion of such cases concern the South West of England. But most notably we see the full patchwork of legal issues; claims involving multiple parties from numerous locations, and turning on variously applicable law made the Assembly and Welsh Ministers, by Westminster, the EU, and international regimes. We also see that whilst statutes and guidance are often central to the judicial review landscape, in a good deal of cases the reasonableness or procedural fairness of the defendant’s decision turns more on careful application of the precedents of English and Welsh common law than it does on statutory context.
43. Overall, the ordinary civil (non-asylum and immigration) judicial review caseload has declined across the England and Wales Administrative Court in recent years; Wales generates fewer such claims per-head of population than England and the proportion of claims issued by unrepresented litigants (LIPs) is increasing; the impacts of legal aid and other related judicial review reforms may have been disproportionately felt outside London, including in Wales. The vast majority of claimants and defendants in the Cardiff Administrative Court who are represented by counsel are represented by barristers based at chambers in London, and often (and apparently increasingly) cases are issued in

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<sup>21</sup> Based on the location of claimants and solicitors, and the number of claims where the defendant was recorded as a Welsh local authority or other Welsh devolved public body.

London for the convenience of counsel and subsequently transferred to Cardiff. Whilst further research is to follow, we suggest the data and analysis demonstrates that the diverse nature of public administrative law as it applies to Wales presents challenges (and opportunities) for legal education, legal practice and justice in Wales, and that there is clearly untapped potential in the market for public law legal services (especially representation in court) to be provided by lawyers based in Wales.