BIRMINGHAM LAW SOCIETY

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Response to Ministry of Justice Independent Review of Administrative Law Call for Evidence

October 2020

Response of the Dispute Resolution Committee of the Birmingham Law Society to the Ministry of Justice Independent Review of Administrative Law Call for Evidence

This response has been prepared by the dispute Resolution Committee of the Birmingham Law Society. The Society is the largest local law society with some 5,000 members. The response represents the collective view of the Dispute Resolution Committee whose members are specialist lawyers practising in all aspects of administrative law and are from all branches of the legal profession.

Section 1 – Questionnaire to Government Departments

1. Are there any comments you would like to make, in response to the questions asked in the questionnaire for government departments and other public bodies?

We consider Judicial Review to have an important role to play in ensuring appropriate scrutiny of decision-making processes and procedures and to ensure that due procedure is followed.

2. In light of the IRAL's terms of reference, are there any improvements to the law on judicial review that you can suggest making that are not covered in your response to question (1)?

Please see response to question 4.

Section 2 – Codification and Clarity

3. Is there a case for statutory intervention in the judicial review process? If so, would statute add certainty and clarity to judicial reviews? To what other ends could statute be used?

No - There is a clear procedure as set out in the Civil Procedure Rules and Administrative Court guide to govern the judicial review process along with much case law precedent and therefore in our opinion intervention is not required.

As a remedy of last resort, Claimants are required to show the necessity and suitability of the judicial review they are seeking – the process is not undertaken lightly and the Administrative Court gives due consideration as to whether the prospective judicial review is appropriate or has merit at the initial permission stage. Due to the nature and importance of the remedy of Judicial Review, a high degree of discretion of the Court is necessary and appropriate.

4. Is it clear what decisions/powers are subject to Judicial Review and which are not? Should certain decision not be subject to judicial review? If so, which?

Not always, however this is often swiftly determined at the point of a claimant's initial Application for Permission for Judicial Review.

Whether a decision or act can legally be subject to Judicial Review is subject to consideration of a number of factors rather than a clear test or pre-determined list of acts/decisions that can be challenged in this way. Nonetheless, given the range and extent of the decisions/powers of central and local government as well as other bodies exercising public law functions, it may be difficult to resolve this.

5. Is the process of i) making a Judicial Review claim, ii) responding to a Judicial Review claim and/or iii) appealing a Judicial Review decision to the Court of Appeal/ Supreme Court clear?

Yes.

Please see response to question 3 – there is a clear procedure in the CPR and Administrative Court guide which outlines the process in an appropriate format. However, the general public may not be aware of the Administrative Court Guide despite it being readily accessible online.

Section 3 - Process and Procedure

6. Do you think the current Judicial Review procedure strikes the right balance between enabling time for a claimant to lodge a claim, and ensuring effective government and good administration without too many delays?

Yes.

The limitation period is sufficient to allow a claimant to seek legal advice and then to issue a claim. It is also not so long as to have a detrimental impact on the public law functions in question.

7. Are the rules regarding costs in judicial reviews too lenient on unsuccessful parties or applied too leniently in the Courts?

Some members' experience is that the Courts tend to be more lenient towards unsuccessful claimants at trial, however this is not surprising due to the nature and importance of the remedy. The Court has a balance to strike and a higher level of fact-specific considerations to contemplate when determining the issue of costs.

8. Are the costs of Judicial Review claims proportionate? If not, how would proportionality best be achieved? Should standing be a consideration for the panel? How are unmeritorious claims currently treated? Should they be treated differently?

Judicial Review often involves lower costs than Part 7 claims due to the relatively streamlined and quick process, and due to the disapplication of the usual disclosure rules and oral examination of witnesses. In this sense, the costs are often proportionate.

Unmeritorious claims are identified as such in the decision at permission stage and are not able to be subject to a renewed oral hearing, they may also result in an order departing from the usual principle that the decision-maker may only recover costs of its Acknowledgment of Service.

9. Are remedies granted as a result of a successful judicial review too inflexible? If so, does this inflexibility have additional undesirable consequences? Would alternative remedies be beneficial?

The remedies available are appropriate in addressing the underlying flaws in a decision-making process, particularly given that Judicial Review is a remedy of last resort and not designed to be in pursuit of damages. The discretionary nature of the remedies allow flexibility when faced with applications that are rendered academic by the time of trial.

10. What more can be done by the decision maker or the claimant to minimise the need to proceed with judicial review?

It is not uncommon for a claimant to issue an Application for Permission for Judicial Review very close to the end of the limitation period, in some cases without following the Pre-Action Protocol.

This can result in Applications being issued and costs incurred that could otherwise have been avoided had the parties been able to fully engage in pre-action correspondence. It is therefore important that the Pre-Action Protocol to facilitate constructive correspondence about the decision/act and ensure the decision-maker is put on notice of the potential challenge.

11. Do you have any experience of settlement prior to trial? Do you have experience of settlement 'at the door of court'? If so, how often does this occur? If this happens often, why do you think this is so?

It is understood that this is experience is less common in Judicial Review than in other proceedings, possibly due to the streamlined process and consequential shorter trial time estimates and associated reduced costs. In addition, following exchange of the Claimant's grounds and decision maker's detailed grounds of resistance, there is usually little development or change in the parties' positions ahead of trial.

12. Do you think that there should be more of a role for Alternative Dispute Resolution (ADR) in Judicial Review proceedings? If so, what type of ADR would be best to be used?

As the nature of Judicial Review is to challenge the decision making process rather than the decision made, ADR has less of a prominent role as there is not always room for a 'middle ground' or partial concessions. Nonetheless, some decisions e.g. to issue an Enforcement Notice in relation to a breach of planning permission, may be suitable to ADR.

13. Do you have experience of litigation where issues of standing have arisen? If so, do you think the rules of public interest standing are treated too leniently by the courts?

No response.

26 October 2020

Birmingham Law Society