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Government launches independent review of administrative law led by Lord Edward Faulks QC

We have been invited to submit evidence to assist the panel in considering options for reform of judicial review principles and procedures - contribute to the development of our response.

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Background

Judicial review provides a powerful mechanism for ensuring that the rule of law is upheld in the United Kingdom. It allows individuals and organisations to challenge decisions taken by public bodies, ministers, officials and other bodies performing public functions, and acts as a means of ensuring that such decisions are taken in accordance with the law. It effectively operates to regulate the relationship between the citizen and the state.

In **R (Alconbury Developments Ltd and Others) v Secretary of State for the Environment, Transport and the Regions** [2003] 2 AC 295, Lord Hoffman said that:

> "*The principles of judicial review give effect to the rule of law. They ensure that administrative decisions will be taken rationally, in accordance with a fair procedure and within the powers conferred by Parliament.*"

However, judicial review is not without criticism. Many legal practitioners, academics and commentators have expressed concern about the development of judicial review principles over the last half century or so. Critics argue that the expansion of judicial review through decided cases has resulted in a situation in which the courts are increasingly expected to intervene in matters of public policy that should rightly be reserved to democratically elected parliamentarians and ministers. The administrative burden that defending judicial review proceedings imposes on public bodies, including in respect of costs, is increasingly well understood.

Balancing individual rights and effective government

On 12 December 2019 the Government was elected on a manifesto in which they pledged:

> *"After Brexit we also need to look at the broader aspects of our constitution: the relationship between the Government, Parliament and the courts; the functioning of the Royal Prerogative; the role of the House of Lords; and access to justice for ordinary people. The ability of our security services to defend us against terrorism and organised crime is critical. We will update the Human Rights Act and administrative law to ensure that there is a proper balance between the rights of individuals, our vital national security and effective government. We will ensure that judicial review is available to protect the rights of the individuals against an overbearing state, while ensuring that it is not abused to conduct politics by another means or to create needless delays. In our first year we will set up a Constitution, Democracy & Rights Commission that will examine these issues in depth, and come up with proposals to restore trust in our institutions and in how our democracy operates."*

The Independent Review of Administrative Law (IRAL), which was launched on 31 July 2020, is intended to implement this manifesto commitment.

The Terms of Reference for the Independent Review of Administrative Law explain that the Panel should "*bear in mind how the legitimate interest in the citizen being able to challenge the lawfulness of executive action through the courts can be properly balanced with the role of the executive to govern effectively under the law*". It appears that the government are looking to redraw this balance.

The panel are specifically instructed to consider:

1. Whether the amenability of public law decision to judicial review by the courts and the grounds of public law illegality should be codified in statute.
2. Whether the legal principle of non-justiciability requires clarification and, if so, to identify areas where this should be considered by government.
3. On which grounds justiciable claims should be brought, including whether this should depend upon the nature and subject matter of the power exercised, and whether the remedies available to a claimant should depend upon the grounds on which a claim is brought.
4. Whether procedural reforms to judicial review are necessary to 'streamline the process', including to:
    - the disclosure burden;
    - the duty of candour;
    - the law of standing;
    - time limits for bringing claims;
    - the principles on which relief is granted;
    - rights of appeal, including at permission stage;
    - the rights of interveners; and
    - costs.

Call for evidence

On 7 September the Independent Review of Administrative Law secretariat published a call for evidence in the form of a questionnaire to government departments and a survey of people who have direct experience in judicial review cases, including those who provide services to claimants and defendants involved in such cases, from professionals who practice in this area of law; as well as from observers of, and commentators on, the process.

Government departments are invited to submit their views on:

1. whether the grounds for bringing judicial review claims, the remedies available and the rules on standing and time limits seriously impede the proper and effective discharge of central and local government functions;
2. whether the prospect of being judicially improved improves their ability to make decisions, or results in compromises which reduce the effectiveness of judicial review;
3. how the costs (actual or potential) of judicial review impact decisions; and
4. any other concerns about the impact of the law on judicial review on the functioning of government.

Section 2 of the call for evidence is headed 'codification and clarity', but the questions posed suggest that there is scope for wider ranging reform of judicial review principles. Respondents are asked whether there is case for codifying judicial review in statute, to improve certainty and clarity or 'for other ends', and whether certain decisions and powers should be put beyond the scope of judicial review.

Section 3 addresses the processes and procedures that govern judicial review challenges. Respondents are asked to submit evidence on the timescales in which judicial review claims may be brought, and whether there needs to be greater flexibility in, or statutory control over, the remedies available to successful claimants.

Of particular interest to public authorities is likely to be the issue of costs. The call for evidence invites interested parties to submit their views on whether the costs in judicial review proceedings are proportionate, and whether the rules regarding costs are too lenient, or too leniently applied by the courts.

There can be no doubt that the availability of cost capping orders, the removal of legal aid for judicial review proceedings, and the ability of claimants to bring proceedings whether or not they have the means to pay a defendant's costs, mean that defendants invariably bear the majority of the costs of judicial review proceedings, even when they are successful at permission stage or at substantive hearing. The panel will therefore consider the extent to which the burden of bearing the costs of judicial review proceedings should be more evenly shared between claimants and defendants.

Unintended consequences

Footnote F to the Terms of Reference acknowledges that modifications to the substantive law on judicial review would affect all cases involving public law decision making. However, it is unclear at this stage how any proposals for reform arising from the review may seek to address unintended consequences in non-judicial review proceedings.

Judicial review grounds are raised in a variety of statutory appeals and non-public law proceedings, including:

1. Statutory appeals brought on judicial review grounds (e.g. appeals brought under s.204 of the Housing Act 1996 challenging the suitability of accommodation provided to a person who is homeless);
2. Intra-authority disputes (e.g. ordinary residences disputes in social care cases, homelessness referrals from one local housing authority to another under s.198 of the Housing Act 1996 and parish council challenges to grants of planning permission made by their parent District Council);
3. Cases where a local authority needs to judicially review itself
4. Public law grounds raised as a defence in criminal proceedings (**Boddington v British Transport Police** [1998] 2 All ER 203);
5. Public law grounds raised as a defence in civil actions (**Wandsworth LBC v Winder** [1984] UKHL 2);

These examples illustrate the wide ranging ways in which public authorities use public law to protect themselves and to regulate the rights of citizens. It is unclear how the government intends to mitigate the risk of unintended consequences in the wider public sector.

Next steps

We have been invited to submit evidence to assist the panel in considering options for reform of judicial review principles and procedures. We are currently reflecting on the questions posed by the panel and we will be drawing on our broad public law expertise and our specific experience in both bringing and defending judicial review claims to inform our response.

We understand that public bodies in central and local government and in devolved administrations will be invited to respond directly to the call for evidence by the Independent Review of Administrative Law secretariat. However, if you would like to contribute to the development of our response then please share your thoughts and experiences with us by emailing Sam Trevorrow. We will publish our response in due course.

The call for evidence closes on 19 October 2020. The panel expects to review the evidence and issue its report to the Lord Chancellor before the end of the year. It is therefore likely that proposals for reform may well be announced by the Government early in 2021.

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