

Does judicial review strike the right balance between enabling citizens to challenge the lawfulness of government action and allowing the executive and local authorities to carry on the business of government?

Response to the Independent Review of Administrative Law Panel's

Call for Evidence

Leigh Day is a leading claimant-focussed law firm specialising in International & Group Claims, Clinical Negligence, Personal Injury, Employment Discrimination and Human Rights & Public Law.

Leigh Day's Human Rights & Public Law Department is one of the UK's largest specialist practices in this field. It is recognised by its peers and the Legal Directories as one of the top ranked practices in the country. It is one of only three firms named in Band 1 of both Chambers & Partners and the Legal 500 in the areas of Administrative & Public Law and Civil Liberties. Eight of the department's lawyers, plus one Consultant, are ranked as leaders in these fields in Chambers & Partners.

The firm holds a contract with the Legal Aid Agency to provide specialist services in Public Law and has done so since specialist franchises were first awarded.

Leigh Day are instructed in dozens of judicial reviews at any one time. The firm have been involved in some of the most important judicial review and public law cases over the last two decades including:

- R (oao Corner House Research)-v-DTI [2005] EWCA Civ 192
- R (oao Corner House Research & CAAT)-v-Director of the SFO [2008] UKHL 60
- R (Wright & Ors)-v-SSH [2009] UKHL 3
- R (oao Binyam Mohamed)-v-SSFCA [2010] EWCA Civ 65
- Yunus Rahmatullah-v-SSD & SSFCA [2012] UKSC 48
- R (oao CAAT) v Secretary of State for International Trade & others [2019] EWCA Civ 1020

- R (Friends of the Earth Ltd) v Secretary of State for Transport [2020] EWCA Civ 214
- R (TP, AR & SXC) v Secretary of State for Work and Pensions [2020] EWCA Civ 37
- Help Refugees Ltd, R (on the application of) v Secretary of State for the Home Secretary [2018] EWCA Civ 2098

Drawing on this vast experience and knowledge, Leigh Day are thus well placed to respond to the IRAL Call for Evidence Ministry.

A. Introduction

We make the opening observation that the IRAL's remit as set by the Government appears to be based on a number of false premises or assertions which the evidence does not support:

1. The last 40 years has not seen unprecedented changes to the fundamental scope and parameters of judicial review. There has been development and evolution. There has been modernisation of practice and procedure. However, aside from an unusual lull and retrenchment for a 30 or 40 year period between the wars, there has been a steady development of judicial review over the centuries, a development which has gone hand in hand with the development of the constitution¹. The Anisminic case which is so often cited as a watershed was really no more than another stage of the common law development and only shone so starkly because of the few decades of retrenchment which proceeded it. Anisminic itself was heard now more than half a century ago.
2. All the evidence points to a trend of decreasing, rather than increasing, numbers of judicial reviews over recent years, unsurprising given the barriers to accessing judicial review for any person or body not eligible for legal aid and the attempts during the years of the Coalition government to decrease the accessibility of judicial review.²
3. There is no evidence that judicial review is 'abused' or that the current filters preventing abuse (merits criteria to secure legal aid³, the permission filter, the totally without merit procedures and costs sanctions) are not working as intended by the government. To the extent that wholly misguided judicial

¹ See: *Lions under the Throne*, Sedley (2014) for a good overview.

² Judicial Review: Proposals for Reform (2014) and Judicial Review: Proposals for Further Reform (2014) leading to, amongst other changes, the Part XX of the Criminal Justice and Courts Act.

³ Sometimes unfairly applied at a higher threshold than the court's permission test, leading to a double injustice for some claimants

reviews are brought, these are largely confined to unrepresented litigants and would be better addressed by broadening access to, and funding for, early legal advice and representation and by public education.

4. It is not right to treat judicial reviews brought by public spirited individuals, civil society groups and other organisations as though it is a trouble making campaigning tool. It is entirely democratically appropriate (indeed essential for a fair democracy to function) for the legality of executive action to be tested by such individuals and groups. Further, it is vitally important these judicial reviews are brought by such claimants where individuals may be unable to access judicial review or there is no particular defined group of persons beyond the public at large. Finally, such judicial reviews constitute a very small number in proportion of the overall numbers of judicial review.

On the contrary, it is our experience that the central problem with judicial review in its current form is its inaccessibility to the larger part of the public. This is a deep problem when judicial review is one of the key constitutional components regulating the relationship between the state and the individual. Its importance in a liberal democracy must not be underplayed, and its inaccessibility is a serious problem.

That inaccessibility, in our view, is brought about through three main barriers:

1. Knowledge and education: in our experience the majority of clients and potential clients who approach us have very little understanding of the role and limits of judicial review. Those who have heard of it tend to come after deadlines have already passed or with misunderstandings about the process.
2. Representation: legal representation in judicial review is of vital importance both for the claimant, in identifying public law wrongs and putting their case on the correct legal basis, and for the public body defendants and the Court in ensuring that the case is run economically.

A recurring theme with our clients, even those who might be deemed to be sophisticated, is the difficulty they have in distinguishing the *merits* of the relevant act or decision, from the public law issues which are raised. It is not easy to detach and view these matters objectively when one is enwrapped in the substance of the complaint. It is only by accessing specialist public law advice that those clients are able to properly understand their rights.

We are sure that most Defendant lawyers would agree that their job is harder when they are faced by a litigant in person. Litigants in person tend to make the Judge's job more difficult, as they have to spend court time on trying to focus the claimant's submission, including where there seems to be a good legal point

at its heart, but the claimant is simply unable to distil it without legal representation.⁴

This is another reason why public education is such a crucial factor and the lack of it acts as a barrier to judicial review.

The problem is the scarcity of providers of specialist claimant public law advice. The majority of the public are simply unable to afford to bring a full judicial review. Those who can are either businesses and conspicuously wealthy individuals (who tend to use the large City Firms for representation) or the ever decreasing pool of those without means, who are eligible for Legal Aid (without crippling 'contributions').

Even where legal aid is available, the rates of remuneration have only changed once in the last 25 years and that was a 10% reduction in the rates of payment. The changes in recent years whereby providers are not paid at all if they bring a case which is refused permission⁵ has further undermined the sustainability of a judicial review practice.

Acting for those who are ineligible for legal aid is, by and large, 'on a no win, no fee' basis or on extremely low fees, which are only uprated in the claim is successful. Where even a strong judicial review claim can rarely be assessed as having greater than a 60% prospect of succeeding (and there is no success fee to balance out the large risks involved), it can quickly be appreciated that running a sustainable business is extremely difficult.

The lack of providers reflects the fact that a claimant public law practice is barely financially viable. Leigh Day (and possibly others) would not be able to offer the public law services it does without the work being cross-subsidised by the other work of the firm. This is a financial decision taken in the best interests of our clients and access to justice, in spite of the systemic problems that exist.

The lack of specialist lawyers, particularly outside London, is undoubtedly a major barrier to accessing judicial review. It also worryingly undermines the principle of equality of arms, as claimants struggle to access the best legal advice, whilst public bodies have the resources to do so.

3. Cost: the final and most significant barrier is the cost of the process. The reality is that only a small proportion of the adult population can seriously contemplate bringing a judicial review with all the inherent costs risks.

⁴ Sitting and observing a typical Administrative Court permission list being dealt with can be illuminating in this regard.

⁵ Subject to limited exceptions, such as where the claimant settles the claim in their favour prior to a permission decision, or where a rolled-up/oral hearing is ordered by the court to consider the question of permission.

We have already touched on this in the section above and our experience of taking on new clients and cases backs up the fact that, unless a potential claimant is eligible for legal aid (and can afford any financial contributions to the legal aid) it is generally only larger groups (and even then only those groups who have the social capital to tap into sources of private funding) who can afford to raise the funds necessary to bring a judicial review. As a result, huge sections of society are disenfranchised from accessing the courts.

Individual private paying claimants are extremely rare and that is not surprising when one considers that the costs risks involved if one loses the case (and hence has to pay both sides costs) are generally in the region of £50-100,000 if one loses the case, sometimes even higher. All but the wealthiest clients cannot afford this.

In broad terms, almost anyone who has a job or owns their own home is not going to be eligible for legal aid and most would face a serious risk of losing their home if they brought a judicial review.

Even in public interest litigation, where Costs Capping Order (“CCOs”) come into play and lawyers are more likely to offer CFA funding, the costs risks involved are generally far too high for most individuals (hence the importance of groups and organisations, who are generally able to fund-raise more easily, having standing). A combination of the removal of CCOs from the permission stage, when the jurisdiction was codified in the CCJA 2015, and the rapid inflation of Defendant's costs claimed at the permission stage⁶, means that even starting a claim in the hope that funds might be raised is extremely risky.

In short, the current costs regime debar the majority of the population from accessing this fundamental constitutional safeguard.

Unless or until Lord Justice Jackson's original recommendation of qualified one-way costs shifting in judicial review is adopted, this is likely to remain the case. That said, the situation would be somewhat ameliorated if his later recommendation of the universal adoption of the Aarhus costs rules in judicial review were adopted. There are many reasons, which we will not go into here, why that later recommendation (made in the face of the government's intransigence in the face of his first recommendation) will not solve the issue but it would at least be a step in the right direction.

⁶ Five years ago, we could safely advise clients to budget between £1500-£4000 for the Defendant's costs of the acknowledgement of service and that only rarely in complex cases or where the public body was instructing private practice solicitors would costs exceed this broad band. Over recent years, we have seen claims filed with the AoS rising considerably. This fact, coupled with recent changes of interpretation of the law regarding interested parties being able to claim their costs *in addition* (see CPRE - Kent Branch v SSCLG [2019] EWCA Civ 1230), mean that we have to advise clients that the costs risk may well rise well into five figures.

It is unsurprising then that, in the mind of the public, judicial review is seen as something which only assists maligned elements of society (asylum seekers, welfare recipients, criminals) or "campaigning" organisations and big business. Until these barriers to accessibility are brought down that is likely to remain the case

The present situation is unsustainable in the long run, causing problems for society's cohesion and leading to the political attacks on lawyers and the courts that we have seen increasingly over recent years and months. Naturally, the executive will also seek to take advantage of this to consolidate its power and unbalance the separation of powers.

B. Objection to interference in the substance of judicial review in the manner apparently envisaged by the government

In our view, any fundamental reforms to the substance and the principles of judicial review (grounds, targets, remedy, standing etc), or any attempts to seek to change the common law as carefully developed by the Courts over the centuries, are objectionable in the current circumstances for two crucial reasons: one of principle, and one practical.

1. Objection in principle: we consider it wrong in principle to separate out judicial review (a core constitutional check and balance in our system) and seek to reform it in isolation from the rest of the constitution within it sits. Indeed, we would go so far as to say that it is constitutionally improper for such interference to be driven by the executive (who are the subject of this key check and balance). There is at least a case to be made that the full codification of judicial review should only be carried out alongside the codification of our constitution as a whole. But whether or not codification is the right way to go, it is vitally important that reform of the constitution is considered in full and with an even hand, given the delicate balances in play.

This is not an objection to the review, reform or even codification of judicial review in principle. Rather it is to the manner (and the context within which) it appears to be occurring.

2. Practical Objection: Even taking judicial review in isolation, the task of reviewing its operation against the evidence is a massive one. Judicial review has been the subject of a number of very significant studies, investigations and inquiries over the last 50 years. These are referred to extensively in other submissions we have seen, and we don't intend here to repeat references. However, the lesson from those processes is clear. This subject requires enormous time and resources to be properly and fairly examined. Given its constitutional importance this is really a matter for a full Royal Commission with the ability to set its own timetable and procedures.

C. Proposals for procedural reforms which would improve the operation of judicial review

Notwithstanding the above, there are practical and procedural areas where changes and reforms could be introduced now without disturbing the constitutional balance.

1. Reform of the permission stage: The permission stage was originally intended to be a low costs filter to ensure that unmeritorious claims did not take up unnecessary time on the part of the Court and Defendants. Unfortunately, as elaborated on below, in practice (and the current civil procedure rules are in part to blame for this)⁷ the permission stage has become almost the main battle ground in judicial review. It often entails Defendant's pouring significant resources into stopping a claim at that stage and, not infrequently, the claim is then compromised once permission is granted. If the claim is not conceded, then the filing of detailed grounds etc amounts to needless duplication of the already extensive summary grounds and evidence filed at the permission stage.

In our view, reforms should be made so that the permission stage operates as it was originally intended. While a return to a fully *ex parte* application process is neither necessary nor desirable, the judicial review process would run much more efficiently if the following reforms were adopted:

- 1.1 Change the procedure rules so that a Defendant is only obliged to submit Summary Grounds of Resistance where: (a) the Claimant is unrepresented; (b) the Pre-action Protocol was not followed; or (c) the Claimant has raised (without sufficient notice) new grounds not foreshadowed in the Pre-action Protocol correspondence.
- 1.2 Change the costs rules so that Defendant may only expect to recover his cost of the Acknowledgement of Service where permission is refused and (a)-(c) above apply.
- 1.3 Change the costs rules so that, if the Defendant contests arguability, they will expect to pay the Claimant's costs of the permission application *in any event* where permission is granted on any of the grounds (save where (b)-(c) above apply). The current default position, namely that of 'costs in the case', places the Claimant at a huge disadvantage, despite having been successful in resisting the Defendant's attempt to have the claim struck out at the permission stage. Elsewhere in civil litigation, parties who successfully resist any application by the other side are entitled to their costs.

⁷ r. 54.8(1) of the CPR

- 1.4 Discouraging the Defendant's attendance at Court on renewed permission hearings by strictly limiting the time available for such hearings⁸ and providing that Defendants will only be permitted to make oral submissions at the Court's specific invitation.

These changes (together with recommendation 2 below) will place more emphasis on settlement and the pre-action protocol (hopefully leading to fewer claims being issued) while also speeding up the permission stage and reducing the overall costs of a judicial review (by, for instance, removing the duplication between Summary Grounds and Detailed Grounds etc).

2. Amend the CPR so that the parties (including interested parties) may agree between themselves that a judicial review will have been issued promptly and without delay if agreed within the three month period (removing the monopoly on this from the Court) in order to facilitate pre-action settlement.
3. Finally, adoption of Lord Justice Jacksons recommendations for reform of costs following his exhaustive review. This is the only way to make judicial review a truly universal constitutional safeguard.

These changes, which are procedural and ancillary to the substance of judicial review, could be adopted easily and quickly (without negative constitutional consequences) and would, we believe, make a significant difference to the current burden on the Court and public authorities.

D. Questions

Section 1

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

As above, we consider that these questions are leading and proceed on a false premise. They suggest that judicial intervention in order to ensure decisions by government are lawfully made is somehow an impediment to governmental functions. On the contrary, government cannot function properly if it is acting unlawfully and the

⁸ If it is not clear whether or not a claim is arguable, after an hour of submissions, then it should be.

evidence suggests that scrutiny through judicial review promotes the quality and ultimately the efficiency of decision making by public bodies⁹.

It is a trite point that all government decision-making should be done lawfully. Judicial review is simply a means by which to scrutinise and, where appropriate, correct matters when it is not. If government views judicial review as a hindrance to lawful decision-making, then there is a fundamental mistrust by government of the rule of law. It cannot be consistent with the principle of the separation of powers, if the executive chooses the rules by which the lawfulness of its own actions is scrutinised by the judiciary.

We reiterate the point made above that if the function of judicial review is to be reviewed and reforms considered, this can only properly done in the context of a fundamental review of the operation of our constitution, carried out on a fair basis and not politically motivated.

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)?

We believe that the current principles and functions of judicial review are capable of operating to ensure an appropriate degree of scrutiny over executive action that the constitution is properly balanced. They have been carefully developed by the Courts over a period of centuries alongside the development of our constitution. There is no need for fundamental reform in the manner that the government appears to be pushing for.

That is not to say that there are not procedural reforms which might improve the operation and efficiency of judicial review and which we cover elsewhere in our response.

However, if there is one fundamental flaw with our system of judicial review it is its accessibility to the public at large. This is in part through lack of education and understanding of the principles and availability of judicial review and its place in our constitution. This is something which really ought to be remedied through the education system, and much more care and attention ought to go into that. However, the biggest single barrier is undoubtedly the costs regime. We consider that, in the light of Lord Justice Jackson's exhaustive review, it would be appropriate to adopt his recommendations. Barriers to access to justice and costs regime are ancillary to the substantial function of judicial review and changes here, provided they improved the

⁹ <https://publiclawproject.org.uk/wp-content/uploads/2020/10/201020-PLP-Submission-to-IRAL-FINAL.pdf> (p. 7) & <https://adminlaw.org.uk/wp-content/uploads/ALBA-Response-to-Call-for-Evidence-FINAL-19.10.20.pdf> (p. 13 para 35)

access to justice position, would be an exception to principle that judicial review ought not to be reformed in isolation from a full and fair review of the constitution at large.

Section 2

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, or at least not in the sense of full codification absent the introduction of a full written constitution. We would prefer to maintain the common law approach and an unwritten constitution as these provide the flexibility for evolution. Flexibility within the common law to allow judicial review to evolve incrementally, without wholesale statutory interference, is a cornerstone of the rule of law in this country. If there is to be statutory intervention and codification of the fundamentals of the judicial review process then this should only take place after the most careful review of the entire constitution. ¹⁰

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

Yes, it is clear. In our view, it is and should remain a matter for the Courts which decisions taken by public bodies (or by other bodies exercising a public function) are amenable to judicial review.

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 – see above. It is clear to members of the legal profession. However, we would like to note that it is often very difficult for litigants in person to navigate the judicial review process. As a firm, we receive many enquiries from members of the public to assist when it is often too late, because the time limits for bringing a challenge were not clear to them. If anything, the government should be investing in education and outreach projects to ensure members of the public are better educated about the judicial review process.

¹⁰ For completeness, there are already some aspects of the judicial review process that are on a statutory footing e.g. costs capping order. Procedural requirements (e.g. time limits) are clear from the CPR. There is no need for further statutory intervention, given the rules are clear.

Section 3

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 current time limit rules just about strike the right balance between ensuring effective decision making and permitting time for scrutiny by the public and for lawyers to prepare a claim. The inherent flexibility of the time limit is important in this regard. A hard-edged limitation would not be appropriate as it would lose this flexibility.

Please bear in mind that, as the decision-maker, the government can (if it chooses to) take as long as it wants to make a decision, which may be done over several years. In most judicial reviews, the claimant then has only three months to bring a claim. That time limit should not be shortened.

Any stricter time-limit for claimants would be manifestly unfair. If anything, the rules are too generous to defendants in that the “promptly” limb of the time-limit is often interpreted too harshly against the claimant, particularly when simply finding the funds to cover the costs of a claim can take months, not to mention becoming aware of the seeking legal advice, investigating the merits of a case, engaging in pre-action correspondence and finally issuing the claim.

By way of example, in R (Packham) v Secretary of State for Transport [2020] EWHC 829 (Admin) the Divisional Court ruled that the claimant (represented by Leigh Day) had not brought the claim promptly, because it had been brought within six weeks and one day. That was overturned by the Court of Appeal, yet is an indication of the rules being applied too far in the Defendant’s favour.

The three months often provides vital time to allow the sides to a dispute to settle the claim, which reduces the burden on the system (such as a claim recently threatened by one of the firm’s clients in relation to the government’s proposals for A-level testing). There are certainly other claims that have not been brought as a result of the information provided by the defendant in pre-action correspondence, which has enabled advice to be given that merits no longer justify a claim being issued. If the time limit were shorter, many claims would be deprived of this opportunity, forcing claimants to issue protectively without being fully appraised of the defendant’s position, which would be a waste of time and resources for both sides.

Any reduction of the limit would be counter-productive, because it would lead to more claims being issued where they might otherwise not (either because agreement is reached between the parties or because pre-action correspondence elucidates the situation and a claimant decides not to proceed). An additional burden would be placed on the Courts dealing with the claims issued 'just in case'.

On the other hand, if the Panel is to give serious consideration to a greater role for ADR in the judicial review process (see further below) then there should be a change

to the time limit to enable (unlike the current rules) the parties to agree to extend time between themselves to facilitate an agreement without having to instigate the proceedings in court. Without such a change, it is difficult to see what benefit ADR will add beyond increasing costs and duplication of work

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

Generally-speaking, no. At the end of the case, costs typically follow the event in accordance with the normal civil rules.

There is a good argument that, contrary to the current approach, Defendants should face the presumption of bearing the costs of a judicial review where they have been found to have acted unlawfully, but where relief is not granted either in exercise of the courts general discretion or under section 31 of the SCA. In those cases, where the Claimant has been vindicated, but the public authority evades sanction, there are good public interest reasons why the matter ought to have been examined by the Court (particularly where declaratory relief has been obtained) and the Claimant generally fails in securing relief through no fault of their own (such as Defendants taking post-decision steps that are deliberately designed to make the granting of relief an academic exercise and to avoid costs). That presumption could of course be rebutted in appropriate cases under the Court's normal discretion (where for instance the public body had conceded unlawfulness, but simply resists relief).

However, where we do think the costs rules are too lenient is on Defendants at the permission stage. One way of speeding up and reducing the costs of judicial review would be to make Defendants bear the cost ("in any event") of unsuccessfully resisting permission in a case (see above).

It is incredibly rare for Defendants to concede permission. In our experience, the permission stage is not treated (as it should be) by Defendants as a filter to weed out cases which are unarguable (the formal test) but rather a 'nothing to lose' opportunity to block a case at an early stage. This leads to the all too frequent and ridiculous state of affairs where highly competent counsel on both sides spend considerable court time (very rarely the standard allotment of 30 minutes and sometimes even full days) arguing the merits of a case at an oral renewal hearing.

If permission is then refused this makes a mockery of the arguability threshold (although it clearly makes no sense to go through the whole thing again 6 months later if the judge has reached the clear view that the claim should fail). But the bigger flaw is that, if permission is granted, the case proceeds to go through almost the same process again several months later with costs having been almost doubled.

There is an argument for revisiting the whole permission stage (as we propose elsewhere). However, a simple interim solution would be to make Defendant's liable in costs (in any event) where they unsuccessfully resist permission, just as claimants are liable in costs where they fail to obtain permission. This would likely have an immediate effect in reducing court time at the permission stage and moving cases more quickly through to trial and final determination, because Defendants would be encouraged to concede permission where a claim is clearly arguable, while significantly reducing the costs of the process.

The other point to re-iterate is that, as Lord Justice Jackson found, the costs rules are actually not lenient enough for Claimants. Judicial review will remain a theoretical and largely unattainable constitutional protection for most citizens (and the role of civil society organisations and other groups will remain paramount to fill this gap) for as long as it is too risky and expensive for the majority of the population.

The government should be considering introducing qualified one-way costs shifting ("QOCS") in JRs or standard costs capping, as recommended by Lord Justice Jackson.

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

The costs of judicial review are proportionate, although there is a powerful case that QOCS, or at least the default costs caps in environmental JRs, should be introduced for all JRs.

If anything, the costs rules place the claimant at a disadvantage. For example, why is it the case that if a claim is successful in its application for permission to apply for judicial review, and that application is resisted by the Defendant or Interested Party, then the resulting costs order is costs in the case? Why should the Claimant not be entitled to its costs on making that successful application? If it were, then that is likely to encourage Defendants to concede permission pre-issue for those claims that are clearly arguable (even though very rarely conceded by Defendants) which would reduce the burden on the system and the costs to all parties.

By way of further example, it is extremely unfair for Claimants to be potentially faced with unlimited costs exposure if permission is refused and there is no legal aid or costs capping order in place, given such an order is contingent on permission being granted in non-environmental JRs. If anything, the caselaw on this point should be placed on a statutory footing to give certainty to Claimants. For example, there is no reason why

it should not be the case that the maximum both a Defendant and Interested Party combined can recover for the costs of the acknowledgment of service is £2,500.

The law on standing is well established and there are no reasonable grounds for it to be changed at the current time. Where some sort of limitation on standing might become arguable is if all citizens could access judicial review without fear of crippling costs. For example, if QOCS was introduced (and there is no good reason why public bodies, funded by the tax-payer and exercising public functions, should be placed in a more advantageous position than private bodies and insurance companies facing negligence claims) then there might be a decent case that standing should be limited to individuals, save in exceptional circumstances where affected individuals are unable by some constraint from bring a claim themselves

In the above proposal, any incorrect use of the advantages of costs protection would be self-regulating, because most citizens would also not be able to meet their own lawyers' costs and therefore would only find legal representation where the lawyers assessed the chances of succeeding as being sufficient to meet the financial risk of taking the case. Unrepresented claimants should largely be dealt with without significant burden (or any burden if they deemed the claim hopeless) at a properly functioning permission stage filter.

Unmeritorious claims are already well dealt with under the current processes. They will not obtain legal aid, because the merits test required to be met for eligibility. Where they are brought, the permission filter provides a means for dealing with them quickly and cheaply. The Court can already mark a claim as totally without merit as part of this process, limiting the onward options of the claimant. Where such a claim is brought by legal representatives, they can be referred to their regulator under the Hamid principles. Finally, costs will be awarded against the claimant. That is an incredibly draconian set of tools available to limit unmeritorious cases. Even cases which are not wholly unmeritorious, but which fail to obtain permission (and we have already discussed how the permission threshold in practice is set much higher than basic arguability), then legal representatives are unable to obtain payment for their work from the Legal Aid Agency.

To sum up, in answer to whether unmeritorious claims should be treated differently, no. But serious consideration should be given to amending the limitation on payment for the permission stage under legal aid, so that it aligns and only applies where a claim is marked as wholly without merit.

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?

Remedies are discretionary, so there is already the requisite flexibility built into the system. The test under s. 31 of the Senior Courts Act 1981 is another tool at the court's disposal to avoid disruption to good administration. However, this question again is asked on a false premise. The question of relief only arises if the court considers that the government (or other public body) has acted unlawfully. The question assumes that relief granted to the Claimant, such as a quashing order resulting in an unlawful decision having to be retaken by a public body, is in some way undesirable. As stated above, government can only function efficiently and effectively if its decisions are made lawfully, and the purpose of judicial review is to ensure that happens. Treating the consequences of that as "undesirable" is completely missing the constitutional role that judicial review plays. If anything, Defendants ought to be encouraged (see above re: costs at permission stage) to concede permission in clearly arguable cases more often than they do. If they were effectively encouraged to do so, then that would reduce the burden on the system.

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

Alternatives to litigation are already built into the system, such as at the pre-action protocol stage. If the decision-maker were more transparent and effected disclosure of relevant documents at as early stage in the proceedings (especially at pre-action stage) as practicable then that would assist claimants in being able to properly weigh up the merits of proceeding with a claim. Rules should be built into the system to incentivise public bodies to more frequently: (a) concede permission on the papers when it is clear that a claim is arguable; and (b) consent to judgment when it is clear that a decision has been made unlawfully. This would speed up the process and ultimately lead to savings to the public purse. Essentially, public bodies should be assisted to make lawful decisions the first time round, and they should be encouraged to properly engage with the pre-action protocol and their duty of candour, in order to either resolve the issue or so that the claimant knows that their claim lacks merit and doesn't proceed to issue.

A key change which could be introduced to facilitate settlement pre-action would be to allow the parties to agree between themselves that the time limit can be extended. The strict rules on limitation in judicial review are to ensure good administration and certainty by preventing delayed challenges to public decisions. However, there is no good reason that we can see that the Court should be sole arbiter of whether a claim is brought promptly or within time if the parties (including any directly affected

interested parties) are content to agree otherwise between themselves. Otherwise, claimants are often forced to issue protectively and seek a stay of proceedings, which adds an avoidable stage to the court process.

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?

Settlement prior to trial generally is the most common outcome in cases we do. A significant proportion of potential claims are settled pre-action, either through a concession on the part of the Defendant, change of circumstances or as a consequence of assessment of the merits following the pre-action protocol correspondence. Of those claims that do issue, we would estimate just under half will settle at some stage before trial - most commonly during the course of the permission stage (typically it seems because this may be the first time that the Defendant has taken external legal advice) but also, not infrequently, immediately when permission is granted (an example of the permission stage being inappropriately used as a tool to try and smother good claims at birth).

For example, it is our experience that the vast majority of judicial reviews issued by our firm challenging detention authorised by the Home Secretary under immigration powers settle before a substantive hearing, in some cases very close to trial.

Settlement between the days immediately after permission is less common. However, not infrequently, the Defendant will seek to retake a decision under challenge with a view either to making the claim academic or as a fall back should the case go against them (and thus as a tactic to avoid the granting of relief and costs). To militate against the latter misuse of the system, the rules on costs should be reformed so that the rule in *M v Croydon Borough of London* [2012] EWCA Civ 595 is changed to a classic 'but for' test, namely but for the claim would the Defendant had retaken the decision under challenge. If the answer is no, then the Claimant should be entitled to their costs.

Settlement at the doors of court is, in our experience, extremely uncommon, though it does on occasion happen. That is probably because having spent the money to get that far the Defendant may as well have a go at winning the case. That in itself is no bad thing. Only a small proportion of judicial reviews ever make it to a final hearing, and where they do there is often a principle of wider applicability to be tested, so there is a wider public interest in the Court determining the issue.

Another issue which perhaps causes claims to proceed to trial, where they might otherwise be resolved by settlement, is a Defendant's reluctance to pay costs when offering a compromise or retaking a decision under challenge. As we have outlined above, most clients cannot afford to make more than a token gesture to their own

lawyers' costs and they become liable for those costs where the claim concludes favourably. It is therefore sometimes necessary to pursue a case to final determination (even where there might be an accommodation which could be reached) in order to recover those costs. The financial viability of judicial review practitioners is also dependent upon securing inter partes costs recovery because they cannot generally expect to receive sufficient payment from their clients (even legal aid funding is generally too low to make any profit)¹¹ so there are no incentives on lawyers to settle either (where settlement wouldn't be in their client's best interests), unless their costs come as part of the settlement package.

In one of the firm's recent cases (*K/JL v SSWP*) the Defendant in fact: conceded permission; negotiated not to provide summary grounds of resistance, but to file their detailed ground on a date sometime in the future; and then conceded the claim on that date. The claim was issued on 4 March and the defendant conceded on 31 July. It seems very likely that this was a pre-planned strategy from the outset and that the defendant knew that it would concede the claim far in advance of the date that it actually did. We assume it was helpful to the Defendant to delay having to remake the policy decision (and unhelpful to our clients) and it therefore used the judicial review process to its own end. Given that the Defendant must have known it was going to concede the claim far in advance of when it did, evidenced by the fact that it brought in new regulations five days after it conceded the claim (which were clearly a reaction to the claim and must have taken time to draft), the defendant's actions plainly wasted costs and resources in delaying its decision. The defendant even allowed a second claimant to be added to the claim a month before she conceded, again adding unnecessary costs if the claim was going to be conceded in any event.

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?

See above. ADR is already encouraged under the present system. However, ADR is rarely offered or taken up by Defendants. The firm has had a recent case against HM Treasury, where we offered ADR roundtable meeting on our client's behalf, but that was rejected by the Defendant. That said, we cannot see how ADR would be useful in immigration related cases (where the Defendant's approach is generally to pass the buck to the Court) or planning cases (and other cases where the decision maker is *functus officio*).

¹¹ *R (E) v Governing Body of JFS & Another* [2009] UKSC 1

As explained above, one necessary change, if ADR is to be encouraged during the pre-action stage, is to change the rules on timing/delay so that the parties can agree as of right that a claim is brought promptly in the event that issuing has been delayed for the purposes of pursuing 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?

We cannot recall an example of a public body challenging the standing of one of our clients, outside of claims under the Human Rights Act. That said, we have experience of a quite worrying trend by which certain government departments are raising the issue of standing in their pre-action correspondence and summary grounds of resistance as a matter of course. The firm's case of Turner (re Errol Graham) is a good example. Alison Turner was the daughter in law of Errol and had been close to Errol (albeit there had been a period before his death in which she had not seen him). Errol's son, Alison's partner, is in prison. The Secretary of State for Work and Pensions argued strongly that Alison didn't have standing, yet the Court disagreed in its permission decision.

The rules on public interest standing are not treated too leniently by the courts, who are well placed to make that judgment. If the government was allowed to define who is or isn't allowed to bring a claim against it, then that would ride roughshod through the fundamental principles of the rule of law. It is worth noting that there are special requirements, in relation to standing in environmental cases as a result of the UK's ratification of the Aarhus Convention, which the Panel's recommendations should not seek to undermine.

Leigh Day

26 October 2020