JOINT CHARITIES AND CIVIL SOCIETY RESPONSE

RESPONSE TO THE MINISTRY OF JUSTICE'S CALL FOR EVIDENCE IN THE INDEPENDENT REVIEW OF ADMINISTRATIVE LAW

OCTOBER 2020

INTRODUCTION

On Thursday 8 October 2020, a group of charities and Civil Society Organisations (CSOs) came together in a roundtable organised by the National Council for Voluntary Organisations (a leading representative body for civil society organisations) and Bates Wells (a law firm specialising in work with such organisations). The aim of the roundtable was to discuss the use of judicial review by those in the sector, and views on the government's proposals for reform. The joint response below documents the discussion that took place at that roundtable and is submitted to the IRAL as evidence of the views of charities and CSOs in relation to these matters.

Invites were sent to a small group of selected organisations. Those in attendance at the meeting or who contributed by email included Anti-Slavery International, Friends of the Earth EWNI, Compassion in World Farming, Quakers in Britain, The Ramblers, Reprieve, Shelter, The Sheila McKechnie Foundation, Unlock Democracy and Weald Action group. A further small number of other organisations attended the roundtable.

The organisations in attendance represent a wide range of interests in society, from the protection of public rights of way across land to the interests of animals. They are unified in their support for the role that public law and judicial review play. They also share concern about any proposal to reduce the availability of judicial review, and they are particularly concerned about the implication (from the question asked) that public interest standing is currently treated too leniently by the courts. Public interest standing for charities and CSOs is vital to the proper functioning of the UK as a constitutional democracy. It is a democratic requirement that the public be able to hold the government to account for actions taken in their name, and sadly individual claimants do not always have the time, funds or knowledge required to play this important role alone.

Those attending the roundtable were of the view that charities, CSOs and other representative organisations are not treated too leniently by the courts. They are usually only granted "public interest standing" where no individual victim or more appropriate claimant can be identified. They cannot challenge the merits of political decisions and they must have a legal argument, just like any other claimant. If the rules on standing were tightened, there would be decisions that could not be challenged at all, which would prevent the courts from performing the supervisory function so crucial to democracy. The identity of the claimant is not the point in public law. Judicial review is about the duties owed by government to the public and not about rights enjoyed by a particular individual. It should not matter whether claims are brought by representative organisations or individuals, provided there is a real public law issue to address.

Furthermore, charities and CSOs help ensure a more efficient use of judicial review: they have an unrivalled ability to organise claimants and bring together alliances and interest groups – this being something which should be valued and seen as a public good. This can decrease work for government by ensuring one well-organised claim (with a broad evidence base) is brought in relation

to the same set of issues, rather than multiple scatter-gun claims, which require extra work to be dispensed with one by one.

These organisations can also greatly assist the courts when they intervene in judicial review cases. Many charities and CSOs have research departments and are able to offer valuable evidence to the court that simply could not be offered by the other parties. Intervenors do not increase costs – the law already operates so that the intervenor can be asked to pay any additional costs it has caused. For this reason, charities and CSOs only intervene in cases if they have a real point to make and are able to assist the court.

RESPONSE TO CONSULTATION QUESTIONS

SECTION 1 – QUESTIONNAIRE TO GOVERNMENT DEPARTMENTS

1. ***In your experience, and making full allowance for the importance of maintaining the rule of law, do any of the following aspects of judicial review seriously impede the proper or effective discharge of central or local governmental functions? If so, could you explain why, providing as much evidence as you can in support?***

    a. ***judicial review for mistake of law***

    b. ***judicial review for mistake of fact***

    c. ***judicial review for some kind of procedural impropriety (such as bias, a failure to consult, or failure to give someone a hearing)***

    d. ***judicial review for disappointing someone's legitimate expectations***

    e. ***judicial review for Wednesbury unreasonableness***

    f. ***judicial review on the ground that irrelevant considerations have been taken into account or that relevant considerations have not been taken into account***

    g. ***any other ground of judicial review***

    h. ***the remedies that are available when an application for judicial review is successful***

    i. ***rules on who may make an application for judicial review***

    j. ***rules on the time limits within which an application for judicial review must be made***

    k. ***the time it takes to mount defences to applications for judicial review***

2. ***In relation to your decision making, does the prospect of being judicially reviewed improve your ability to make decisions? If it does not, does it result in compromises which reduce the effectiveness of decisions? How do the costs (actual or potential) of judicial review impact decisions?***

3. ***Are there any other concerns about the impact of the law on judicial review on the functioning of government (both local and central) that are not covered in your answer to the previous question, and that you would like to bring to the Panel's attention?***

From this, we would appreciate your response to the following questions:

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?***

We do not consider that any of the above aspects of judicial review impede the proper or effective discharge of central or local governmental functions, and we are concerned about the leading nature of this questionnaire, which assumes that judicial review does impede the business of government. We are alarmed that the IRAL did not directly pose the same questionnaire to charities, CSOs and other claimant organisations (whilst we understand certain organisations were directly addressed, these were few in number and civil society is not mentioned anywhere in the questionnaire). This approach lacks balance, since no counterpoint has been directly and systematically sought to the government's perspective.

In our opinion, judicial review improves public decision-making. Civil society plays an important role in this regard, by ensuring that decisions with adverse consequences for the wider population are

brought to light early. It is in everyone's best interests for adverse unintended consequences of public decisions to be highlighted early. The alternative is often for the decision-maker to implement a flawed decision and have to deal with consequential issues arising (including, potentially, compensation) for years.

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 consider the law of judicial review could be improved by:

- Allowing longer deadlines to bring claims, or at least allowing parties to agree an extension to the current three month time limit.
- Creating a stand-alone ground of judicial review for breach of the equal treatment principle.
- Pinning down the extent and scope of the duty of public bodies to give reasons.

Whilst not definitely supporting codification (see below), the group took the view that the Panel or Government could usefully approve the above. This would improve the efficiency of the judicial review process. Longer deadlines and the possibility of agreeing extensions could lead to fewer claims because parties would have longer to resolve their issues at the pre-action stage. A stand-alone ground of judicial review for breach of the equal treatment principle would clarify the law because this ground is confusingly hidden within rationality review at the moment. Pinning down the extent and scope of the duty to give reasons would lead to better and more transparent decision-making, since decision-makers would be encouraged to think fully about their decisions at the earliest possible stage. If errors were identified, they could be corrected at that stage, long before the possibility of a judicial review claim arose.

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?***

We are in two minds about whether codification to set out and clarify the existing grounds of judicial review would be of assistance to claimants and claimant organisations. We are completely opposed to any codification to reduce the grounds of judicial review or the availability of judicial review generally.

Some organisations present at the roundtable noted that the grounds of judicial review are fairly complicated and inaccessible for non-lawyers, and setting them out simply in legislation might assist claimants.

Other organisations could see considerable difficulties with codifying the grounds of judicial review. One issue cited was that the grounds of judicial review are complicated (by necessity), and it might be impossible to include the level of detail required to make the legislation useful, whilst still making it accessible. Judges would likely still interpret the grounds of judicial review in case law, and needing to refer to both case law and legislation could actually make the law less accessible for claimants.

There was wider support for codifying the procedure (as opposed to the substantive grounds) for bringing a judicial review claim in one place in legislation (specific to judicial review). Judicial review procedure can currently be quite hard for claimants and claimant organisations to understand and claimants are required to refer to multiple sources. It was argued by some that being able to get a sense of the process from one legislative procedural code might assist. It was acknowledged that claimants would still need expert advice even if the procedure for bringing a judicial review claim were

set out in legislation. Nonetheless, it was felt that legislation could still be useful to claimants in the early stages.

An alternative to codifying the judicial review procedure would be to produce a clear gov.uk webpage setting out the process of bringing a judicial review claim and linking to existing user-friendly guides, such as the Administrative Court guide, which is considered to be more user-friendly than the Civil Procedure Rules and Practice Directions.

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?***

The organisations at the roundtable were wholly opposed to narrowing the justiciability of public powers. Justiciability of public powers is a crucial check and balance on the government, and it would pose access to justice issues if justiciability were narrowed, since certain decisions would then not be subject to scrutiny by the courts. Access to justice is a fundamental constitutional right, and any attempt to undermine it by restricting the availability of judicial review is unacceptable.

The decisions and powers subject to judicial review were clear to the legal practitioners at the roundtable, including those employed by charities and CSOs. As previously discussed, non-legal experts usually require expert advice to understand the availability of judicial review in relation to a particular decision or power. This is unremarkable and would be the same in any area of the law.

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?***

The process of making and appealing a judicial review claim was clear to the legal practitioners at the roundtable, including those employed by charities and CSOs. Again, non-legal experts would usually require expert advice, which is unremarkable.

One aspect of the judicial review process mentioned in the IRAL terms of reference but not the call for evidence is access to government information relevant to the case (the duty of candour). On this point, the organisations present at the roundtable were clear that the availability of information about public decision-making – which is usually in the hands of public bodies – is indispensable for access to justice. The duty of candour must not be narrowed.

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?***

The organisations at the roundtable were not in favour of shortening the current three month time limit (alongside the requirement for promptness) for bringing a judicial review claim. Indeed, they could see a case for increasing the time limit, to increase access to justice and ensure adequate time for claimants to complete pre-action engagement with government and public bodies. Alternatively, the parties should in certain circumstances be allowed to agree an extension to the current three month time limit.

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

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?***

The organisations present at the roundtable did not agree, in terms of the cases the group were aware of, that costs in judicial review are disproportionate, nor that they are too lenient on unsuccessful parties. If this question is aimed at asking whether claimants should face a bigger costs penalty at the permission stage, then they were opposed to this proposal. Judicial review claims are often brought by members of the public, and raise points in the public interest. It is not appropriate for large public bodies to go after a member of the public for costs at this very early stage. If a real issue has been raised by the claimant it will be obvious to both the defendant and the court very quickly, and settlement should be possible to allow the issue to be resolved without incurring high costs.

Disproportionate costs risks for claimants at the permission stage would also pose real access to justice issues, since claimants would be deterred from bringing meritorious claims. The onus should be on defendants to keep down costs at the permission stage.

Some organisations see a case for changing normal practice so that each side bears its own costs if the claim is deemed by a court to have been reasonable, irrespective of the outcome. The normal practice that challenges not pressed to a successful conclusion result in huge costs for the claimant make claims impossible for some. Whilst we entirely understand that frivolous judicial reviews should be discouraged and dismissed at an early stage, it is important to ensure meritorious claims go ahead without disproportionate costs risks for claimants. It is also important to ensure that defendants do not push up costs in order to deter claimants with fewer financial resources. We note that protective costs orders in judicial review – set at a reasonable level - can be important to allow impecunious claimants to bring litigation in the public interest. That said, the cost of seeking a PCO can be a significant deterrent. The cost is recovered if the claimant succeeds, but can add significantly to the burden if the claimant fails. Therefore, PCOs are not always sought. Greater clarity about the circumstances which normally justify a PCO would be helpful.

It is unclear what is meant by “should standing be a consideration for the panel” in the context of costs. There should be no costs penalty for a party not granted standing, since that party will often have brought valuable information to the attention of the court or the public. Costs penalties used in this way would also have a chilling effect on access to justice, since claimants would be deterred from bringing meritorious claims.

On intervenors and costs - in our experience of intervening in judicial review claims, claimants and defendants are rarely asked to pay an intervenor’s costs. If the intervenor does increase costs, it may be asked to pay the additional costs it has caused. For this reason, most charities and CSOs only intervene in cases if they have a real point to make and are able to assist the court. Many CSOs have research departments and are able to offer valuable evidence to the court that simply could not be offered by the other parties.

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?***

We do not consider the remedies in judicial review to be inflexible. The most common remedy (the quashing order) does what is needed, by undoing the unlawful decision and requiring it to be retaken.

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

We consider proper public consultation and engagement, open decision-making and good pre-action correspondence help to minimise the need to proceed with a judicial review. We would also suggest greater use of ADR in appropriate cases.

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?***

Some of the organisations present at the roundtable noted that the government may try to make financial settlements with individual claimants to make claims of public importance go away. This is because a modest sum for a government department may be hard to refuse for an individual claimant. This highlights the importance of having charities and CSOs involved in cases of notable public interest. It is not in the best interests of the public for the government to be able to dismiss claims with a wider relevance without considering the merits and implications of the issues raised, simply by offering an individual a modest sum of money. On the contrary, a proper review of a decision that is likely to have wider implications will often ensure longer term benefits for government itself. In particular, one organisation stated that where judicial reviews are brought to challenge human rights breaches which are systemic in nature (such as torture and rendition), confidential settlements can be damaging to the public interest as the conduct in question will remain shielded from public scrutiny, and broader policy change is unlikely to occur to ensure such abuses do not take place in the future. Other organisations present at the roundtable noted positive examples of settlement following good use of pre-action correspondence that highlighted the issues at stake. This underlines the importance of allowing adequate time in the judicial review procedure to facilitate good pre-action engagement. In the experience of the group, where a good legal argument has been made in pre-action correspondence, the public authorities concerned are overwhelmingly likely to agree to a quashing order or just agree to remake the decision – this being squarely in the public interest as it promotes good lawful decision making. These are often however decisions that the public bodies would not have agreed to reconsider/retake without the actual threat of litigation.

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?***

We consider that ADR could play a greater role, provided it is used to ensure that matters of public importance are considered in detail.

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?***

The organisations present at the roundtable have significant experience of litigation where issues of standing have arisen. Indeed, we wish to highlight the positive impact public interest standing can have in bringing issues of public importance to the attention of government and the courts.

In order to assist the IRAL panel, we have gathered some examples of judicial review claims brought or supported by charities and CSOs, including those represented at the roundtable. As may be seen, many of these claims were of huge public importance and would not have been brought without the support of the sector. It is quite clear that public interest standing is vital to the proper functioning of the UK as a constitutional democracy. It is a democratic requirement that the public be able to hold the government to account for actions taken in their name, and sadly individual claimants do not always have the time, funds or knowledge required to play this important role alone.

One point to make at the outset is that charities and CSOs have an unrivalled ability to organise claimants and bring together alliances and interest groups. This can decrease work for government by ensuring one well-organised claim is brought in relation to the same set of issues, rather than multiple scatter-gun claims, which require extra work to be dispensed with one by one. There is also a broader evidence base, improving the quality and robustness of court decisions taken.

An excellent example of this is the pre-action engagement undertaken by various organisations acting together in relation to the Transparency of Lobbying etc. Act 2014. The Act required third party campaigners to register with the Electoral Commission if spending over a certain amount on

campaigning in the run up to an election. However, many of the rules proposed by the Act posed problems for a variety of organisations due to their lack of clarity and the considerable administrative burden they created. In response to this problem, the affected organisations came together and drafted one focused pre-action letter, with proper legal input. This was quickly understood by government, which agreed to clarify the legislation and change some of the rules. Because of the skill of the third sector in mobilising joint action with proper advice, an important issue of public importance was resolved easily, cheaply, and without the need to go to court. Furthermore, the legislation was much improved as a result of this action. This is a sector that is uniquely placed to mobilise a wealth of knowledge and experience to quickly identify and address issues of public importance. Action by the sector is often much more efficient than when multiple claimants act alone.

Representative organisations are also uniquely placed to spot and highlight how government action in one area may impact a different, unforeseen area. For example, Quakers in Britain were involved as an intervenor in a judicial review brought by the Palestine Solidarity Campaign (*R (Palestine Solidarity Campaign Ltd and another) v Secretary of State for Housing, Communities and Local Government* [2020] UKSC 16). Here, the Quakers' intervention was made in order to highlight how guidance to local authorities about pension fund investment based on ethical pressure would potentially have an impact on ethical investment in a range of fields, including fossil fuel divestment. Quakers in Britain were uniquely placed to see how a change to the rules in one area could have huge unintended consequences elsewhere. It is unlikely the government would have been able to cut across the siloed nature of its own work to perceive these issues on its own. This case highlights the benefits of allowing representative organisations to intervene in judicial reviews – or if no more suitable individual claimant can be found – to bring judicial review claims in their own right.

There has been regrettable reporting in the tabloid press to the effect that judicial reviews are mostly used by charities and CSOs to pursue political ends through the courts. This is simply not the case. Many judicial reviews are brought about issues of nationwide, cross-political public interest. For example, in *R (Godmanchester Town Council) v. Secretary of State for the Environment, Food and Rural Affairs; R (Drain) v. Secretary of State for the Environment, Food and Rural Affairs* [2007] UKHL 28, the Ramblers were involved to protect public rights of way that had been in use for a long time under the Highways Act 1980 s.31(1). An adverse precedent had been set in the High Court that effectively rendered the statutory provision a dead letter. A judicial review was brought against two specimen decisions, and the Supreme Court ultimately found in the claimants' favour. The impact of that decision is that rights of way continue to be successfully established by the public as a result of long use. Without the involvement of the Ramblers, it is unlikely the challenge would have been brought, and the legislation would still be being misapplied, to the detriment of the public. This case reinforced the original will of Parliament, by highlighting how an inappropriate precedent had been developed by the courts and local planning inspectors, contrary to the intention of the original legislation.

In another challenge, the Ramblers questioned the government's exclusion of the Isle of Wight from plans for an English Coastal Path. The Marine and Coastal Access Act 2009 allowed for exemptions for islands. This made sense for small uninhabited islands, but it did not make sense for the public in relation to the sizeable Isle of Wight. A pre-action letter and communication with local MPs brought this issue to the attention of the Secretary of State, who quickly addressed the concerns of the public by reversing the original decision. The result is that everyone can enjoy the Isle of Wight's stunning coastal scenery in future.

Another area in which public interest claimants can have a huge impact is climate change. The natural world cannot bring a challenge on its own behalf, and yet it is hugely important that the government and other public bodies recognise the environmental impact of their decisions, for present and future generations. These cases simply must be brought. The standing rules already act to ensure that a judge considers who is best-placed to bring environmental claims. If the only possible claimant is a public interest organisation then there is no question that the claim should go ahead with a public interest claimant, rather than let important environmental aspects of the decision go unnoticed.

For example, in *RSPB, Friends of the Earth Ltd and ClientEarth v Secretary of State for Justice and Lord Chancellor* [2017] EWHC 2309 – a case about cost caps in judicial review under the Aarhus Convention – the public interest claimants were able to make important clarifications to the Civil

Procedure Rules, allowing for proper access to justice in environmental cases. Without this clarification, there would have been a deterrent effect on well-founded environmental claims because there would have been no certainty at the outset about the claimant's potential costs liabilities when bringing a case on behalf of the natural world. In another example, Weald Action group is currently supporting a claim which seeks to bring UK planning policy into line with climate change strategy, by questioning whether the defendant should have considered indirect or downstream emissions in respect of the use of oil and gas produced at a UK facility. This claim is clearly of huge public interest and importance, since it seeks to protect the environment for future generations.

Similarly, judicial review can help protect the interests of charities. In *Independent Schools Council v Charity Commission for England and Wales* [2011] UKUT 421 (TCC) the claimant organisation challenged Charity Commission guidance that called into question the charitable status of some independent schools. This guidance was found to be unlawful – the Upper Tribunal said that as long as independent schools made *de minimis* provision for families from deprived backgrounds, the public benefit could be met and charitable status retained.

Judicial review has also protected the interests of animals – in a recent judicial review sought by Compassion in World Farming the Scottish Government was challenged on its policy of approving long-distance international transport of live unweaned calves without nourishment. Ultimately, the Scottish Government agreed to halt such live exports (albeit on other grounds), and the parties settled. Other examples of judicial review, or threatened judicial review, with involvement by the sector relate to:

- Protection of the rights of children (particularly the fundamental right of access to justice);
- Protection of the victims of human trafficking;
- Challenging extreme breaches of the Human Rights Act 1998;
- Challenging local authority decisions contrary to the interests of homeless people (particularly important in this context, since judicial review is the only available remedy); and
- Challenging erroneous exclusions from the housing register at the local level.

Many of these cases re-affirm the importance of the Parliamentary Sovereignty by ensuring primary legislation is applied correctly at the local level. With an increase in the use of secondary legislation in recent years it is more important than ever that judicial reviews can be brought to reassert the intentions of Parliament, as expressed in primary legislation.

Many of the challenges above did not go all the way to Court, but were settled at the pre-action stage. The charitable and CSO sector achieves a huge amount through the use of pre-action letters. They often are able to secure better legal advice at this stage than individuals (particularly given the restrictions on legal aid) and ensure matters can be resolved without going to court, thus avoiding the drain on public resources full litigation can cause.

Many of the challenges above were brought by individuals, with charities and CSOs simply asked to contribute evidence, support, background context or other assistance to claimants and the courts. The assistance of the sector in these challenges made for better claims overall, which were easier for defendants and the courts to deal with. They have also improved government policy and decision-making.

To conclude, we wish to reiterate that public interest standing is vital to the proper functioning of the UK as a constitutional democracy. It is a democratic requirement that the public be able to hold the government to account for actions taken in their name, and sadly individual claimants do not always have the time, funds or knowledge required to play this important role alone.

In addition, we wish to remind the IRAL panel that this sector has an unrivalled ability to organise claimants and bring together alliances and interest groups, which can decrease work for government and the courts overall, by organising one unified claim in relation to the same set of issues and one

with the best possible evidence base, thereby avoiding multiple claims and improving the robustness of public sector and court decision making.

Those attending the roundtable were committed to engaging with the IRAL by way of this submission and stand ready to provide more evidence and views if required. In particular, we would call for a consultation on any Governmental proposals at a formative stage and would urge the Panel to make this a key recommendation.