

THE **LAW SOCIETY**
OF NORTHERN IRELAND



Independent Review of Administrative Law

Call for Evidence

**“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 of the Law Society of
Northern Ireland**

October 2020

*96 Victoria Street
Belfast BT1 3GN
Tel: 02890 23 1614
Fax: 02890 232606
Email: enquiry@lawsoc-ni.org
Website: www.lawsoc-ni.org*

The Law Society of Northern Ireland (the Society) is a professional body established by Royal Charter and invested with statutory functions primarily under the Solicitors (Northern Ireland) Order 1976 as amended. The functions of the Society are to regulate responsibly and in the public interest the solicitor's profession in Northern Ireland and to represent solicitors' interests.

The Society represents over 2,800 solicitors working in approximately 480 firms, based in 65 geographical locations throughout Northern Ireland and practitioners working in the public sector and in business. Members of the Society thus represent private clients, Government and third sector organisations. This makes the Society well placed to comment on policy and law reform proposals across a range of topics.

Since its establishment, the Society has played a positive and proactive role in helping to shape the legal system in Northern Ireland. In a devolved context, in which responsibility for the development of justice policy and law reform takes place at a local level, this role is as important as ever.

The solicitors' profession, which operates as the interface between the justice system and the general public, is uniquely placed to comment on the particular circumstances of the Northern Irish justice system and to assess the practical workings of policy proposals.

RESPONSE

Introduction

The Law Society of Northern Ireland welcomes the opportunity to provide a response to this Call for Evidence by the Independent Review of Administrative Law Panel. A Society Working Group chaired by a Council Member of the Society and Committee Chair, and a Workshop chaired by a Lord Justice of Appeal, considered the issues raised and feedback from both sources were used to inform this response.

The Society's membership agreed that judicial review is an essential feature of the justice system across the United Kingdom and is a fundamental mechanism for individuals, organisations, NGOs, businesses and others to challenge decisions and actions of public bodies to ensure that they have acted in accordance with their procedures, policies and powers. It also provides the ability to enable citizens to assert their fundamental individual rights and to seek remedies when powers have been unlawfully applied or abused.

At the outset, it must be noted that the Society was concerned that the response period allowed for the Call for Evidence was not compliant with Government Consultation Principles. In particular the time period initially suggested for evidence to be submitted was neither sufficient nor proportionate, particularly given the subject matter of the review and its importance. Concerns were raised that this would limit the ability to provide a comprehensive and well-informed response. The one-week extension was therefore welcomed.

Some members of the Society raised concerns regarding the intentions behind the review, particularly in the context of recent comments by the Government on the rule of law and legal practitioners, most notably in the areas of immigration and human rights law. Various members have questioned the motivation behind the review and believe that it is an attempt by the Government to curtail judicial review in response to recent court decisions where the judiciary have been at the centre of matters of public concerns, most notably in the case of *Miller and Cherry* [2019] UKSC 41.

The terms of reference for the review are very broad, which leads the Society to the conclusion that the Government's agenda might well be to limit the powers of the court to review administrative decisions in order to shield it from scrutiny. There is only one reference (on page 6 of the Call for Evidence) to the principle of the rule of law, which may be the principle judges will need to rely on if they are asked to rule on the legality of any new statutory reforms. This is strange as any departure from the current judicial review process and protections on either a substantive or procedural basis, would be far-reaching, and have wider constitutional implications. It is also notable that there is no reference to the Human Rights Act within the terms of reference, which is surprising, as it is difficult to consider grounds for judicial review and issues of justiciability without references to human rights.

Lord Kerr of Tonaghmore, a former Lord Chief Justice of Northern Ireland was recently quoted as saying "Ministers might be irritated by legal challenges which may appear to them to be frivolous or misconceived, but, if we are operating a healthy democracy what the judiciary provides is a vouching or checking mechanism for the validity [of] laws that parliament has enacted or the appropriate international treaties to which we have subscribed ... The last thing we want is for Government to have access to unbridled power." The Society approves of those sentiments.

Our members queried why the Call for Evidence related only to Government Departments, yet the distribution of this review paper was to wider recipients. It is felt that this in turn reflected an intention to narrow judicial review, without consideration of the wider consequences.

Furthermore, the review appears to apply to UK wide England and Wales powers, with the welcoming of evidence in relation to reserved matters. It is not technically accurate to speak of the law of the United Kingdom. There have for many decades been three separate legal jurisdictions in the UK meaning that we should speak of the law of England and Wales, the law of Scotland and the law of Northern Ireland. Yet, it is apparent that wider implications may follow for devolved administrations. It must be noted that justice and administrative law are devolved matters for Northern Ireland. Therefore any UK-wide reforms in this context would be problematic.

Key principles

In light of the above concerns and the apparent intentions behind the review, it is important to outline and emphasise some of the many long-standing key legal principles and doctrines surrounding judicial review to reassert their importance.

Judicial review is a fundamental part of democracy, a key cornerstone to our society. It helps to promote and improve democracy by providing a means for the individual citizen to enforce the legal duties that are imposed on public authorities by Acts of Parliament, and to ensure that public bodies are acting appropriately within their powers and obligations. Judicial review promotes accountability and transparency of public authorities, and plays a significant role in promoting the rule of law by preventing the exercise of State power in an oppressive, abusive or arbitrary fashion.

The separation of powers is also a fundamental aspect of constitutional democracy. The principle of the independence of the judiciary is at the heart of the common law. Judges must be free from political interference to enable them to exercise impartial judgments. Through judicial review, the judiciary exercise a supervisory jurisdiction, which can be seen in the established grounds of judicial review and the discretionary nature of public law remedies.

In summary, judicial review provides an important function in facilitating checks on Executive powers by allowing individuals to assert their rights. It ensures accountability and transparency. It is a fundamental aspect of democracy, and ultimately contributes to upholding the rule of law. In this context, the reform agenda is troubling and concerning, and any attempt to reduce or erode the rights of citizens to avail of judicial review and its remedies, or to curtail the capacity of judges to uphold the rule of law, would be unacceptable and troubling.

Unique circumstances in Northern Ireland

It is also important to re-emphasise the unique circumstances in Northern Ireland which should be considered when looking at any suggested reforms as a result of this Call for Evidence.

Northern Ireland is undoubtedly still a society in transition from conflict, with unique constitutional and power-sharing arrangements. Respect for the rule of law in Northern Ireland is central to ensuring public confidence in the Government.

In the years following the Belfast/Good Friday Agreement of 1998, the people of Northern Ireland have been let down by the Executive on many occasions, most notably with the collapse of power sharing arrangements on different occasions. It is arguable that the less effective and reliable that administrations are, the more important it is that judicial review remains undisturbed. The instability of these arrangements reinforces the need to provide adequate protections for citizens to seek remedies and to ensure that judicial review is preserved in all its current forms.

With the most recent collapse of the Northern Ireland Assembly in January 2017, this jurisdiction experienced a long period in which there was no functioning Government. During this time, citizens turned to the courts to put a focus on policy and procedure. Courts in Northern Ireland have often found themselves at the centre of matters relating to public concern, and have played a vital role in this respect. For example, had there not have been the ability to turn to the courts in recent years, there would not be progress on matters of vital importance to citizens in Northern Ireland, most notably in relation to Compensation for Victims of Historical Institutional Abuse and the Pension Scheme for Victims of the Troubles.

In addition, inconsistent decision making is prevalent in Northern Ireland and judicial review has acted as an important mechanism in this context to rectify or correct flaws in public decision making. Ensuring consistency of decision making is vital, therefore judicial review and its associated principles should not be eroded.

Without judicial review there would be a lack of accountability, and a lack of redress, subsequently impacting on wider access to justice matters. However, in Northern Ireland, an erosion of judicial review would have particularly stark impacts for our citizens given the unique circumstances and arrangements in this jurisdiction. In operating a healthy democracy, the judiciary provides a vouching or checking mechanism for the validity of laws that Parliament has enacted, as Lord Kerr has indicated. Without this judicial check it is conceivable that the Government might have access to unbridled power.

Codification and Clarity

It is important to note that there has already been some statutory intervention in the area of judicial review in Northern Ireland under the Judicature (Northern Ireland) Act 1978 and the Senior Courts Act 1981, which is confined to procedural matters.

Codification of judicial review has been attempted in other common law jurisdictions such as Australia and Canada. In Canada, there is a list of grounds for judicial review but it should be noted that the Canadian model was introduced in the context of a very specific constitutional framework which does not exist in the UK. Creating a similar list in the UK would be difficult, particularly due to the existence of excepted, reserved, and transferred matters, and the attendant risks of interfering with justice – a devolved matter in Northern Ireland. If there was to be codification of any kind, it is difficult to understand how this would operate in devolved jurisdictions. It would likely add unnecessary complexities given constitutional arrangements, which could ultimately be unworkable.

Whilst in some areas of the law codification brings clarity, the codification of the law on judicial review would likely present significant difficulties. Judicial review law is quite a broad area, relating to many sectors of society. It is an area of continuing evolution and expansion. Therefore, any attempt to summarise a particular part of it would present enormous challenges. An exhaustive list would be challenging to draw up given the scope and evolving nature of judicial review. In addition, the task of interpreting and applying any such codification would ultimately fall to the independent judiciary, and this task would be performed by giving effect to long-standing legal principles.

On the issue of justiciability, the word ‘clarifying’ used in the terms of reference could be interpreted as an attempt to narrow, limit or perhaps oust certain subjects or areas from the scope of judicial review. The Society believe that there should not be any further restrictions placed upon types of decisions that can be reviewed as it would be difficult to ascertain or justify certain issues or categories to be precluded. An attempt to legislate in relation to the principle of justiciability would present wider questions surrounding legitimacy, and would reduce the powers of courts to make determinations, which is unjustifiable in relation to both the separation of powers and

the rule of law. It is important that individuals have meaningful ways to bring challenges against decisions which have a significant impact on their lives, particularly given the imbalances of powers which exist between individuals and the State. Consequently, it is the Society's view that any attempt to remove areas or categories, or to reduce the scope of judicial review through codification, would result in inconsistencies, and would contribute towards a reduction of rights for individuals.

Grounds of judicial review

As outlined above, there are many fundamental constitutional principles associated with judicial review, many of which relate to the grounds of judicial review. Judicial review permits judicial scrutiny where parliamentary accountability has been inadequate or insufficient. It is important to emphasise that judicial review is not an appeal, but rather a review of the decision, and the court is not being asked to go directly into the shoes of the decision maker.

Under the common law the traditional grounds for judicial review are illegality (acting ultra vires), procedural impropriety (or unfairness) and irrationality (Wednesbury unreasonableness). These have been further developed by the courts over the years, including by their reliance on concepts such as legitimate expectations and proportionality (which are sometimes categorised as aspects of procedural impropriety). Moreover, in *Lumba v Secretary of State for the Home Department* [2011] UKSC 12 a majority in the Supreme Court ruled that a public authority cannot take action under a power conferred by statute if it does so in a manner which conflicts with a published policy on the matter. It should be noted that there have been various cases in Northern Ireland where individuals have had to turn to the courts to ensure that Ministers disclose and follow their own guidelines and policies.

The grounds of judicial review ensure that public bodies act in accordance with the law and their obligations. In the jurisdiction of Northern Ireland, the courts have also had to intervene on many occasions when Ministers have acted in an inconsistent manner by taking political factors rather than legal considerations into account during their decision-making process. Therefore, given the complex background and history of this jurisdiction, judicial review plays a significant role in Northern Ireland in holding

Ministers and the Government to account for their actions. The Society supports the view that judicial review is a fundamentally democratic legal process promoting accountability and transparency on the part of public authorities.

Process and procedure

Some Society members working in the public sector represent Government bodies and public authorities in the judicial review process. A number of our members in this sector expressed reservations regarding streamlining of the judicial review process and highlighted that the judicial review process is equally as important for public bodies as it is for individual citizens. As many decisions taken by public bodies are subject to judicial review, it acts as a checking mechanism to ensure adherence to rules and consistency due to the potential threat of judicial review, subsequently contributing to more effective decision making. Therefore, the existence of judicial review in its current form encourages public bodies to act fairly and to impose their own checks and balances. This is not simply done as a result of a challenge. Therefore anything that would curb this process would be unwelcome.

Through involvement in the judicial review process, public bodies can avail of important advice and guidance from the judiciary which can be of vital assistance when adopting future decision-making processes. Judicial guidance on new legislation is often crucial for public bodies and authorities when developing their own internal processes. Information contained within judgments can also act as a helpful tool when developing considerations on how to approach or take matters forward. The Society believes that judicial review provides an essential contribution to guiding and educating public authorities. Subsequently, the outcomes of the judicial review process and the associated guidance provides useful and welcome help for many of these bodies to review their processes and develop more effective systems, which ultimately in turn benefits citizens. This demonstrates the vitality of the judicial review process for both claimants and respondents.

The Society is not aware of any readily available evidence to suggest that there is anything wrong with the current process of judicial review procedure in Northern Ireland. There do not appear to be any significant flaws within the current procedure. It would not be acceptable to place any hurdles or barriers within the procedural

processes which have an impact on preventing claims being brought, as this would have wider implications on access to justice matters.

In contrast to the suggestion within the Call for Evidence document of streamlining the process, the Society would wish to see a broadening of the judicial review process, making it easier for individuals to avail of.

Standing

The test for standing is already codified under the Judicature (NI) Act 1978 and Order 53 of the Rules of the Court of Judicature (Northern Ireland) 1980, whereby an applicant or a group must have sufficient interest in the cause or matter coming before the court to be granted leave and to be granted any relief. The other aspect of standing relating to the term “sufficient interest” has been subject to considerable case law. The only buffer against this is the “busy body” test.

Rules on standing ensure that appropriate organisations are granted leave to take judicial review proceedings and this should not be subject to any restrictions. Various organisations in Northern Ireland have been given standing to take judicial review proceedings which have resulted in successful litigation, benefiting the wider Northern Ireland society. It is essential that NGOs and other organisations are able to continue to challenge unlawful decisions where individual victims or claimants cannot be identified.

Costs

The Society is aware that the judicial review court has wide discretion when it comes to costs and the general rule is that the unsuccessful party shall cover the costs of the successful party. However, different orders can be made to take into account other relevant factors, such as conduct or whether there has been partial success.

Some of our members articulated practical problems surrounding legal aid provision for judicial review cases in Northern Ireland and expressed concern that it is becoming increasingly difficult for applicants to obtain legal aid to bring a judicial review application. Some members suggested that it is rare to be granted a legal aid certificate for judicial review in the first instance, and that a high proportion of cases are turned down despite submitting Counsel's opinion on the merits. The lack of legal aid provision for judicial review therefore is a major hurdle, and acts as a mechanism which filters cases from advancement through the courts.

The Society would submit that it is unusual to omit reference to legal aid within the document, yet include the consideration of whether costs are being applied too leniently. Many of our experienced practitioners have asserted that unless an individual is legally aided, the opportunity for them to appear before the court is very limited, unless they are can self-fund. It must be noted that Legal Expenses Insurance, which is available for numerous forms of litigation, is excluded under many policies for judicial review claims. In essence this means that the very poor or very wealthy are the only two broad categories who are capable of bringing forward judicial review cases.

This results in a major issue in relation to access to justice, and also has wider human rights implications. The Society would submit that issues relating to costs go right to the core of equality of arms between the State and an individual.

Whilst there is the possibility of seeking cost protection orders, this still leaves the applicant having to fund themselves in the first instance. Other ways which have been utilised to cover costs of commencing judicial review claims include crowdfunding by a group of people, or through public interest litigation.

The Society believe that judicial review must be an accessible mechanism for all citizens, and therefore, must be affordable to ensure that those who are adversely affected by decisions of Government and public bodies are in a position to challenge them. Costs should therefore not be punitive as against the applicant as they often act as a deterrent for bringing cases and a barrier to seeking a remedy.

Remedies

The Society believes that it is necessary that Judges have a wide range of remedies available for use, and they must be able to exercise their discretion freely in relation to granting remedies.

It is difficult to measure the success of judicial review, mainly due to its diversity and the wide-ranging circumstances it relates to. The Society suggests that what is fair or viewed as successful in one outcome will not necessarily be interpreted in the same way in another case. There have been many cases which have technically been unsuccessful, but which nevertheless prompted reforms. Consequently, remedies granted cannot be viewed as a simple stark failure or success on the part of either party, and it is necessary that a broad perspective is adopted in this regard.

Settlement/Alternative Dispute Resolution

Judicial review statistics do not reveal the whole picture of success or failure rates. For example, some disputes will resolve at the pre-action letter stage without proceedings being initiated. Others succeed at the leave stage without any judicial intervention, by consensual agreement. What happens outside the actual judicial review procedure is also not often documented, for example, an agreement may have been reached through informal resolution via legal representatives.

In all areas of contentious business there has been an increasing appetite to reach consensual resolution. The judiciary are proactive in encouraging parties and professionals to consider alternative dispute resolution. However, whilst alternative dispute resolution is an effective, less expensive and informal method of achieving a result, the Society suggests that there are some cases which are not amenable due to complexity or other difficulties. Certain cases require a court to examine the facts of a case and make a determination.

CONCLUSION

As previously suggested the intent behind this review has raised concerns for members of the Society. The Society considers that limiting judicial review through making it difficult to access legal aid, and other attempts to frustrate the use of judicial review, are unacceptable and worrying. The Society believes that there should be no concerns that frivolous or vexatious cases are allowed to progress through the court system and accumulate costs, as there is a natural filter at the 'Leave' stage in a judicial review application which effectively identifies such cases.

Available statistics provided by Northern Ireland Courts and Tribunals Service do not show that there has been an abuse of judicial review in this jurisdiction. Furthermore, there is no available evidence to suggest any fundamental difficulties or shortcomings in the current judicial review process. Rather than eroding or curtailing the powers of individuals to gain access to fundamental rights or attempting to limit the role of the independent judiciary in exercising their scrutiny functions, the Society believes that the current judicial review system should be protected, strengthened and made more accessible.

The Society welcomes this opportunity to submit a response in respect of the Call for Evidence by the Independent Review of Administrative Law Panel.

We trust our contribution is constructive and we are happy to meet with officials to discuss any of the issues raised in our response.

The Society would like to be kept informed of any subsequent proposals formed as a result of this Call for Evidence and also any changes to the overall policy direction of the topic under discussion.