



Response by UKELA (UK Environmental Law Association) to the call for evidence by the Independent Review of Administrative Law Panel on the effectiveness of judicial review

The Independent Review of Administrative Law (IRAL) panel has invited the submission of evidence on how well or effectively judicial review balances the legitimate interest in citizens being able to challenge the lawfulness of executive action with the role of the executive in carrying on the business of government, both locally and centrally.

UKELA (UK Environmental Law Association) comprises approximately 1,400 academics, barristers, solicitors and consultants, in both the public and private sectors, involved in the practice, study and formulation of environmental law. Its primary purpose is to make better law for the environment.

UKELA prepares advice to government with the help of its specialist working parties, covering a range of environmental law topics. This response has been prepared primarily by the Environmental Litigation Working Party but with input from UKELA's Governance and Devolution Group (GDG) which includes representatives from all its working parties. In essence, these submissions do not necessarily and are not intended to represent the views and opinions of all UKELA members but have been drawn together from a range of its members.

UKELA is grateful for the opportunity to submit evidence to the Independent Review of Administrative Law Panel.

Section 1 – Questionnaire to Government Departments

1. UKELA has not responded directly to three questions addressed to government departments.

Q1. Are there any comments you would like to make, in response to the questions asked in the ... questionnaire for government departments and other public bodies?

2. UKELA is firmly of the view that the existence of judicial review should not impede (or be seen to impede) the proper functioning of government (whether central or local) and does not agree that judicial review in its present form is an impediment to effective administration. UKELA recognises that judicial review claims may delay the implementation of decisions and divert resources, but those concerns should not be given undue priority.
3. The experience of UKELA members, many of whom advise public bodies on the risks of legal challenges to decision on a day-to-day basis, is that the availability of judicial review as a means of challenging decisions assists public bodies in making better-quality decisions.

Q2. 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)?

4. In specialist areas, UKELA considers that having specialist judges (including non-legal experts) to determine claims can be important. Where legal issues relate to industrial processes, chemicals and waste, for example, it can sometimes be difficult for a non-expert judge to grapple with the relevant issues. Accordingly, UKELA considers that there should be a facility for judges to sit with experts in determining claims. One way of achieving this would be for claims to be transferred to the Upper Tribunal, where cases are frequently determined by a combination of legal and non-legal judges (e.g. in the Lands Chamber).

Section 2 – Codification and Clarity

Q3. 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?

5. UKELA considers that judicial review is central to environmental law and policy. It helps provide an important constitutional mechanism and facilitates the separation of powers between the legislature, executive and the judiciary. Moreover, much of the

clarification, development and improvement of the law in this field has resulted from judgments in judicial review proceedings see e.g. the judgment in *R (Champion) v North Norfolk District Council* [2015] 1WLR 3710, UKSC 52 in which the Supreme Court clarified some distinctions between environmental impact assessment (EIA) and the Habitats Directive assessment provisions while affirming other areas of practice in this specialist field; and also the recent judgment of the Court of Appeal in *R (on the application of Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214, which clarified that the Airports National Policy Statement regarding the expansion of Heathrow Airport was not produced in compliance with the United Kingdom's obligations under the Paris Agreement. These are just two examples of the important role of the courts in clarifying and developing environmental law as a result of claims brought by judicial review, whether the outcome was favourable to the claimant or defendant in that particular case.

6. Judicial review allows individuals and organisations to assert their environmental law rights and to help ensure that the exercise of executive and administrative decisions, acts or omissions are in accordance with the law. The limitation of the scope of what may be challenged by way of judicial review to the legality, as opposed to the merits, of decisions ensures that there is an appropriate balance between citizen and state.
7. Whilst the existing system of judicial review is not perfect (with particular reference to the remedies available to the court and the current costs regime, each discussed further below), UKELA considers that the overall framework and scope of judicial review is broadly satisfactory in its current form with the provisions contained in statute, the Civil Procedure Rules and in Practice Directions. Accordingly, UKELA is not persuaded that the benefits of statutory intervention or codifying the law of judicial review are compelling. The very nature of judicial review (i.e. that it is the judiciary reviewing public functions *on the application of a claimant*) underlines its common law basis. UKELA believes that many of the key issues subject to review are not well suited to being codified such that putting judicial review on a statutory footing would not resolve existing uncertainties and may have the unintended consequence of creating further uncertainty.
8. Further, in the light of the proposals within the Environment Bill 2020-21 (currently before Parliament), UKELA considers that the proposed powers and functions of the proposed Office for Environmental Protection (OEP), Environmental Standards Scotland and any other comparable governance provisions across the UK, including

their proposed ability to secure binding settlements without the need for formal litigation, may be regarded as complementary to judicial review in relevant environmental cases.

Q4. 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?

9. Whilst the idea of enacting a list of specified matters which are beyond the scope of judicial review may seem attractive from the perspective of ensuring legal certainty, given the evolving nature of the exercise of executive and administrative power (as most recently borne out by the legislative response to the Covid-19 pandemic), UKELA does not consider that it would be practicable to exclude, by statute, certain decisions of public bodies from the scope of judicial review on the basis that, other than in a few extreme cases, it will not be possible to create an appropriate list of matters which should legitimately be regarded as being immune from challenge.
10. UKELA recognises that some decisions are less amenable to judicial review and that the courts will approach such cases by adopting a different standard of review, as was the case, for example, in the recent Court of Appeal judgment in *R (Packham) v Secretary of State for Transport & others* [2020] EWCA Civ 1004 which concerned a decision by the government to proceed with the HS2 high speed railway project in the light of the recommendation of a government-sponsored and non-statutory review. In those sorts of cases claimants should be more conscious of the light touch nature of the review applied by the courts before bringing challenges as courts are ready to refuse permission for challenges against, for example, high level policy decisions that are not based in or derived from statute as in the *Packham* case.
11. Similarly, the Supreme Court's judgment in the *R (Miller and another) v Secretary of State for Exiting the European Union* [2018] AC 61 [2017] UKSC 5r litigation, which concerned the legality of the government's decision to notify the European Commission of the United Kingdom's intention to withdraw from the European Union, illustrates that the courts are used to and capable of dealing with decisions in extremely sensitive areas of high politics and foreign affairs and recognise the appropriate limits of judicial review.

12. In view of the above, UKELA is not persuaded that there is a compelling case to establish a statutory list of matters that are excluded from the scope of judicial review.

Q5. 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?

13. From the perspective of lawyers the process and procedures for judicial review sufficiently clear. However, UKELA's experience (e.g. when engaging with litigants in person) is that the perception of judicial review, is that it has a wider scope of intervention than it has. Improved guidance for potential claimants would assist, in particular that the court will not re-take any decision under review but address any material legal error relating to a decision.

Section 3 - Process and Procedure

Q6. 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?

14. UKELA recognises that the time limits for judicial review are comparatively short but that there is need for this to ensure effective government and good administration. However, there is scope for exploring how an effective pre-action stage may be accommodated when a six-week limit applies, as it does for many planning decisions. Without changing any time limit, there may be some scope for claims to be brought but then stayed to allow correspondence between the parties (including possibly the use of alternative dispute resolution) to avoid the need for full pleadings and claim bundle to be filed and served. This may reduce the overall costs of bringing and responding to judicial review claims. Any revision to the system would need to be subject to the court's management of any claim.
15. Moreover, the recently enacted provisions of section 31(2A) of the Senior Courts Act 1981 provide a means for public bodies whose decisions are challenged by judicial review to resist, in appropriate cases, the grant of a remedy following a successful

claim, on the basis that it is highly likely that the outcome for the claimant would not have been substantially different if the legal error identified by the court had not occurred. While there are some concerns about the operation of this provision, UKELA accepts that this helps to minimise delays by ensuring that decisions do not need to be re-taken simply to rectify a technical legal flaw with the same substantive outcome as the original decision subject to judicial review.

Q7. Are the rules regarding costs in judicial reviews too lenient on unsuccessful parties or applied too leniently in the Courts?

16. UKELA considers that the framework for costs in respect of unsuccessful parties in judicial review claims is not too lenient or applied too leniently in the courts. This is considered further in the response to Question 8 below.

Q8. 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?

17. UKELA would like to emphasise that the experience of its members in advising potential environmental judicial review claimants is that costs remain a significant disincentive and in some cases a barrier to access to justice. And while the adverse costs protection rules derived from the Aarhus Convention and contained in Part 45.41-44 of the Civil Procedure Rules offer some assistance, the costs cap for many claimants still represents a significant sum (coupled with the expenses and own legal costs), particularly (in the case of individuals or organisations with greater means) the possibility of an upwards variation of the costs cap. Moreover, in UKELA's view the rules remain unnecessarily complex with amendments in 2017 making the procedure overly-complicated (notwithstanding the High Court clarification of certain aspects of those amendments in *R (RSPB) v Secretary of State for Transport* [2017] Env LR 13, EWHC 2309).
18. The Ministry of Justice will recall that the overriding purpose of the Aarhus Convention costs provisions is to ensure that proceedings in environmental matters are fair, equitable, timely and not prohibitively expensive. The rationale for them is that often a claimant in environmental claims is concerned about an error of law in the

public interest and for the benefit of the environment at large and should therefore not be precluded from accessing justice on account of concerns about costs.

Q9. 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?

19. UKELA considers that this is an area where reform of the current operation of judicial review would be beneficial. Modern-day judicial review is derived from the historic writs of mandamus and certiorari, with the effect that quashing orders are the norm in successful cases. This often has the effect that there is limited scope for the court to quash part of a decision, to rectify mistakes or make directions as to how matters should be addressed going forward, each of which may (depending on the circumstances of the case) be a more proportionate or appropriate remedy than simply to quash the decision of a public authority wholesale.
20. In the planning context, a helpful example exists in the amendments to section 113 of the Planning and Compulsory Purchase Act 2004 which include a more expansive range of remedies where a statutory planning document is successfully challenged. These include giving the court power to give directions when remitting a decision to a public body for re-determination (whether whole or in part) such as requiring specified steps leading to the making of the decision to be re-taken. This helps to ensure that a court is able to match the remedy to the error of law that has been identified.
21. The availability of a wider pool of potential remedies also helps claimants to formulate and tailor claims more effectively, leading to better outcomes for both parties in the event of a successful challenge. The case of *JJ Gallagher Ltd v Cherwell District Council* [2016] 1 WLR 5126 EWCA Civ 1007 is a useful illustration of the operation of these powers and where the Court of Appeal held that the section 113 powers were widely drawn and gave the court the flexibility to order remedies that would avoid uncertainty, expense and delay.
22. UKELA considers that judicial review could usefully be improved by expanding the potential remedies to make them more responsive to the particular context and forward looking.

Q10. What more can be done by the decision maker or the claimant to minimise the need to proceed with judicial review?

23. UKELA considers that this is at the crux of current concerns about the operation of judicial review and, in order to minimise the need for judicial review claims to be issued, the government should focus primarily on improving the quality of administrative decisions which give rise to them. In particular, UKELA considers:-

- 1) That public bodies should be striving towards “getting it right first time” in making of decisions. To do so, the quality of administrative decisions and the creation of internal procedures and checks must be given attention, rather than merely a focus on the speed and cost cutting of administrative procedures. Public bodies need time, expertise, funding and the willingness to explain themselves and take seriously the views of those affected if they are to make good decisions which will be accepted by those who may be adversely affected by decisions. Consideration of a simplification of rules and procedures and rationalising the many statutory duties on authorities which often pull in different directions would also help.
- 2) That there should be suitable means of redress for those unhappy with decisions: whether this is by way of effective internal review, appeals, appropriate tribunal or related routes; each supported by readily available advice. This could avoid the need to go to court at all. UKELA recognises that some progress is being made in this respect with tribunal reform, but more could be achieved.
- 3) Finally, it is important to rebuild confidence in the ability, impartiality and fairness of government processes (both central and local). In the experience of some UKELA members there are instances whereby public bodies are perceived (perhaps incorrectly) to be pursuing their own narrow prerogatives and agendas, without having regard to the views of the local community or other affected stakeholders. It is possible that the establishment of the OEP, Environmental Standards Scotland and similar governance bodies across the UK will facilitate improved confidence in administrative decisions affecting the environment.

24. In summary, UKELA's view is that the key to improving the operation of judicial review lies predominantly in improving the quality of administrative decision-making, rather than seeking to intervene in the existing framework of judicial review in order to redress a perceived imbalance in favour of claimants and to shift the balance towards public authorities.

Q11. 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?

25. The experience of UKELA members is that settlement in judicial review cases only usually occurs where either: (i) the claim relates to an issue that is capable of being resolved in another way, and the claim becomes academic as a result; or (ii) that the parties have concerns about costs and the substantive merits of their arguments and want to reach a compromise position. This rarely occurs 'at the door of court' as the nature of judicial review is that the parties' respective legal positions will be well-understood by the other well before the date of a hearing.

Q12. 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?

26. UKELA recognises that in some cases ADR may be appropriate, but in many cases it should be borne in mind that the underlying decisions subject to judicial review do not always simply involve two parties as with much conventional litigation. In many cases, the substance of the decision being challenged very often engages and affects the wider public interest. For example, the use of ADR to resolve a planning case may provide a satisfactory outcome to the direct parties (being the planning authority and the developer or third party challenger) but risks excluding completely others who are also affected, including, for example those who are satisfied with the decision by the planning authority on the basis that it has acted appropriately to protect their interests, whether that is to approve or refuse development.

27. To the extent that there may be legal flaws in decision-making by public bodies which warrant litigation, such cases should in the main be determined by the courts and not through a private ADR process.

Q13. 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?

28. UKELA considers that the rules in relation to standing (as clarified by case law) provide an appropriate balance between the ability of affected persons to challenge the decisions of public authorities which affect them and the desirability of ensuring that effective administration is not impeded by unmeritorious claims made by individuals or organisations who are not sufficiently affected by a decision. In this regard it should be emphasised that the nature of judicial review is that cases are often brought on behalf of a wider public interest. This is particularly true of environmental law, as illustrated by Lord Hope's 'osprey' analogy at paragraph 152 of the Supreme Court's judgment in *Walton v Scottish Ministers* [2012] UKSC 44, namely that environmental law proceeds on the basis that the quality of the natural environment is of legitimate concern to everyone.

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23 October 2020

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