Submission by Irwin Mitchell to the Independent Review of Administrative Law

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This is a response by Irwin Mitchell to the Call for Evidence[1] produced by the Independent Review of Administrative Law ('IRAL') Panel, which opened on 7 September 2020 and closes at 12pm on 19 October 2020.

About Irwin Mitchell

Irwin Mitchell[2] is a full-service law firm founded in 1912, with over 2,500 employees in 15 offices around the UK. We provide expert legal advice and representation to individuals, charities and businesses across a wide range of practice areas.

Our Public Law and Human Rights team specialises in administrative law, health and social care, mental capacity, education, civil liberties, and planning and environmental law. The majority of our team's work is in advising and representing claimants, including individuals, campaign groups, charities and businesses, in cases against public bodies, including government departments, local authorities, NHS bodies and police forces.

We have Legal Aid Agency contracts for Public Law, Community Care and Actions Against Public Authorities. We act for individuals who are financially eligible for legal aid, as well as for private-paying clients and in cases which are 'crowdfunded'.

Introduction

Prior to answering the specific questions set out in the IRAL Call for Evidence, we wish to make some introductory comments about the background and context to the IRAL which will inform our responses to the specific questions.

Concerns about the Independent Review of Administrative Law

We have had the benefit of considering the detailed response to the IRAL Panel by the Constitutional and Administrative Law Bar Association (ALBA)[3]. We agree with the principled and practical concerns expressed in that response about the IRAL, its Terms of Reference and Call for Evidence.

In very brief summary of those concerns, as ALBA submits, any proposal to codify, limit or otherwise alter the scope of judicial review by legislation inevitably enters deep constitutional waters, and it is not clear that the IRAL Panel has the time, resources, clarity in scope and aims, independence from government, or breadth of experience and expertise necessary to undertake the comprehensive inquiry required by this task. With the greatest respect to the IRAL Panel, it should be mindful of these limitations when considering what, if any, recommendations to make following this Review.

Striking the 'right balance'

The title of the IRAL Panel's Call for Evidence asks the following question:

> *"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?"*

We submit that the answer to this question is 'no': it is currently too difficult for ordinary citizens to access judicial review in order to challenge potentially unlawful conduct by the government and other public bodies. We therefore submit that any recommendations made by the IRAL Panel should seek to address this imbalance by increasing, rather than further restricting, the ability of citizens to bring judicial review challenges against public bodies. The IRAL Panel will be aware that judicial review is a remedy of last resort, and that if an alternative means of challenging the decision in issue exists, that alternative means should be exhausted before an application for judicial review is made.

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[1] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/915905/IRAL-call-for-evidence.pdf (accessed 9 October 2020)
[2] https://www.irwinmitchell.com/
[3] https://adminlaw.org.uk/wp-content/uploads/ALBA-Response-to-Call-for-Evidence-FINAL-19.10.20.pdf (accessed 19 October 2020)

The reason we argue that the right balance is not currently being struck in judicial review is that for the ordinary citizen, who is not financially eligible for civil legal aid, it is very difficult – even practically impossible – to access judicial review. We acknowledge, of course, that public bodies are likely to find it inconvenient and burdensome to defend prospective judicial review challenges due to the time and cost involved in doing so. However, this administrative burden must be compared to and balanced against the practical impossibility faced by the majority of citizens in accessing judicial review and public law remedies when subjected to potentially unlawful state conduct.

It has been estimated that the proportion of people in the UK who are financially eligible for legal aid is now as low as 20 per cent[4]. This proportion has decreased significantly in recent decades: from 80 per cent in 1980, to 53 per cent in 1998, and to 29 per cent in 2007[5]. Of the estimated 80 per cent of people in the UK who are not financially eligible for civil legal aid, it is very likely that the vast majority would not have the means to fund judicial review proceedings. In an application for judicial review which is privately funded and contested to a substantive hearing in the Administrative Court, in our experience a claimant would need tens of thousands of pounds – probably at least £40,000 – in order to instruct their own legal representatives and meet any adverse costs liability if the case was unsuccessful.

The Office for National Statistics reports that the median household disposable income in the UK was £29,600 in 2019.[6] It has been reported that 48 per cent of households have either no savings or less than £1,500 in savings, while 70 per cent of households have less than £10,000 in savings[7]. It is therefore clear that, at present, the vast majority of people in the UK are not financially eligible for civil legal aid in order to bring an application for judicial review and, importantly, to obtain protection from the adverse costs risk if their case is unsuccessful. For the estimated 80 per cent of people in the UK who are not financially eligible for civil legal aid, it is likely to be practically impossible for all but the most wealthy to fund an application for judicial review.

Whilst we note from the IRAL Terms of Reference[8] that the financial eligibility criteria for civil legal aid do not fall within the scope of the Review, the inaccessibility of judicial review is, in our submission, vital context for the IRAL Panel to consider before making any recommendations to reform administrative law, particularly given the question which forms the title of the Panel's Call for Evidence.

The inaccessibility of judicial review to ordinary citizens, due primarily to the combination of restrictions on legal aid and the adverse costs risk, is in our submission the most important issue in administrative law, and creates a significant imbalance between citizens and public bodies which ought to be rectified. This argument is advanced in more detail in two articles by Tom Hickman QC for the UK Constitutional Law Association in February 2017[9] and October 2017[10]. He summarises the problem as follows in the first of these two articles:

> "*The vast majority of the population have no access to judicial review in any meaningful sense. This is because of the rule, derived from private law, that if a claim is lost the claimant must pay the costs of the defendant and, potentially, also of any interested party. Even if an individual acts as a litigant in person or negotiates a no-win-no-fee (or reduced fee) arrangement with lawyers, they have no control and no visibility over the level of potential adverse costs. Many individuals would be bankrupted by an adverse costs order. Even those who would not be bankrupted could not rationally be expected to risk their savings, or the equity in their house, in bringing a judicial review claim to protect themselves and their family from arbitrary action by a public body*."

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[4] *The Right to Justice*, final report of the Bach Commission on Access to Justice in September 2017, page 23: http://www.fabians.org.uk/wp-content/uploads/2017/09/Bach-Commission_Right-to-Justice-Report-WEB.pdf (accessed 9 October 2020)

[5] Ibid

[6] https://www.ons.gov.uk/peoplepopulationandcommunity/personalandhouseholdfinances/incomeandwealth/bulletins/householddisposableincomeandinequality/financialyearending2019 (accessed 19 October 2020)

[7] *The Money Statistics*, report by The Money Charity, February 2019: https://themoneycharity.org.uk/media/Feb-2019-Money-Statistics.pdf (accessed 19 October 2020)

[8] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/915624/independent-review-admin-law-terms-of-reference.pdf (accessed 9 October 2020)

[9] *Public Law's Disgrace*, Tom Hickman, 9 February 2017: https://ukconstitutionallaw.org/2017/02/09/tom-hickman-public-laws-disgrace/ (accessed 9 October 2020)

[10] *Public Law's Disgrace: Part 2*, Tom Hickman, 26 October 2017 https://ukconstitutionallaw.org/2017/10/26/tom-hickman-public-laws-disgrace-part-2/ (accessed 9 October 2020)

Access to judicial review for the majority of ordinary citizens is therefore, at present, hypothetical. Tom Hickman QC argues that the solution to this access to justice problem is a system of qualified one-way costs shifting (QOCS), as was introduced for personal injury cases following the Jackson Report[11] and recommended for judicial review cases by Lord Justice Jackson[12]. Tom Hickman QC explains how the QOCS regime operates as follows:

> *"The default rule is that defendants cannot recover their cost against unsuccessful claimants. This rule is 'qualified' by allowing a sum to be recovered that represents a reasonable amount for a claimant to pay having regard to their ability to pay (it also allows recovery for abusive claims and unreasonable conduct). Jackson LJ recommended that such a regime be applied to judicial review but this was never carried out…*
>
> *For my own part, I would like to see a regime of qualified one-way costs shifting which requires a defendant to apply at an early stage for any qualification to the default rule. Such an application would have to be made and determined at the permission stage so that claimants would know prospectively what their costs exposure would be and could make submissions on the appropriate level. In case brought by a private individual or SME it would be exceptional for any significant amount to be ordered to be payable in the event that a claim, found to be properly arguable, ultimately fails. No doubt principles governing what is reasonable for claimants to pay would quickly emerge. And to ensure that claims are not deterred by permission stage costs, if a claim is rejected at the permission stage costs would only be awarded against a claimant if the claim was identified as being totally without merit (it is not impossible to countenance a variation of such a rule to address heavy commercial judicial reviews). There is no ideal solution. But a regime such as that sketched here would meet the central problem in public law and would be fair overall."*

We agree that QOCS should form part of the solution to addressing the significant imbalance in judicial review between claimants and respondents. Although outside of the scope of the IRAL Terms of Reference, we submit that the financial eligibility criteria for civil legal aid should also be reformed in order to increase individual citizens' access to justice. In addition, restrictions on legal aid payments for those representing claimants in judicial review cases should be repealed[13].

An alternative to the introduction of QOCS for judicial review cases is the extension of the Aarhus costs regime which applies in environmental cases. The effect of the Aarhus regime is to limit the costs recoverable from claimants to £5,000 for individuals and £10,000 for companies, with a reciprocal cap on the costs that claimants can recover if successful of £35,000. In our submission, the introduction of QOCS for judicial review cases is a preferable solution to the extension of the Aarhus regime, as the Aarhus regime still carries a significant adverse costs risk which would deter many claimants with meritorious cases.

We note that the Conservative Party manifesto for the General Election in 2019 spoke of the "*need to look at the broader aspects of our constitution… [including] access to justice for ordinary people*", as well as pledging to "*ensure that judicial review is available to protect the rights of individuals against an overbearing state, while ensuring that it is not abused to conduct politics by another means or to create needless delays*"[14].

At present, as set out above, judicial review is only accessible to the minority of individuals who are either financially eligible for legal aid (estimated at 20 per cent of people) or have sufficient financial resources to fund their own legal representation and the risk of having to pay the legal costs of the defendant if their case is unsuccessful. In order to address this imbalance so that ordinary people have effective and meaningful access to justice, we submit that any proposed reform of administrative law made by the IRAL Panel must be aimed at increasing, rather than restricting, access to judicial review.

The IRAL Panel must also accept, in our submission, that the effect of any further restrictions on judicial review will be to:

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[11] *Review of Civil Litigation Costs: Final Report*, Lord Justice Jackson, December 2009: https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf (accessed 14 October 2020)
[12] Ibid, page 310-313
[13] See Regulation 5A, Civil Legal Aid (Remuneration) Regulations 2013, and Clarification by the Ministry of Justice:https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777609/Clarification_on_Payment_for_Civil_Legal_Services_under_Regulation_5A_FINAL.pdf (accessed 9 October 2020)
[14] Conservative and Unionist Party Manifesto 2019, page 48: https://assets-global.website-files.com/5da42e2cae7ebd3f8bde353c/5dda924905da587992a064ba_Conservative%202019%20Manifesto.pdf (accessed 9 October 2020)

- Reduce the ability of ordinary citizens to challenge potentially unlawful decisions and conduct by public bodies; and
- Allow unlawful decisions and conduct by public bodies to proceed uncorrected.

If the IRAL Panel nevertheless recommends further restrictions on judicial review, it must acknowledge that this will be the effect of its recommendations.

Response to IRAL Questionnaire

Section 1 – Questionnaire to Government Departments

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 have any comments to make in response to the questions asked of government departments and other public bodies, save to note that the questions appear aimed primarily at drawing responses concerning the negative effects of judicial review for public bodies. It is vital that the IRAL Panel gives proper consideration to the experience of both claimants and defendants in judicial review cases and, in particular, the practical impossibility faced by most ordinary citizens in accessing judicial review as claimants (as set out above in our Introduction). The IRAL Panel must also consider the potential deleterious effects on accountability and the quality of public body decision-making of any proposed restrictions on judicial review.

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)?

Please see our Introduction above, concerning reform of the adverse costs rules in judicial review. In summary, we submit: (a) that qualified one-way costs shifting should be introduced in judicial review cases in order to increase access to justice and address the present imbalance between claimants and defendants; and (b) the duty of candour for disclosure of information and documents in the pre-action (pre-issue of court proceedings) protocol stage should be strengthened to ensure that there is proper disclosure to assist in resolving disputes at a much earlier stage avoiding court proceedings; and (c) enhanced flexibility by two modest reforms to the time limit for judicial review, which are set out on page 6 of this document. These are allowing the parties to agree an extension to the time limit in appropriate cases, and establish a presumption that delay in legal aid is a good reason for an extension of time, where the application has been made promptly.

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?

The answer to this question depends on the purpose of codifying the grounds and/or process of judicial review. If the purpose is simply to improve public understanding and accessibility of the law by codifying the core principles and grounds of judicial review in clear terms, whilst not restricting the ability of the courts to interpret and apply the law in individual cases, then there may be benefits to codification.

However, if the purpose of codification is instead to effect changes in how the courts interpret and apply the principles of judicial review, and therefore potentially to limit citizens' access to judicial review, then such potential codification cannot be judged in the abstract and would require consideration of the draft legislation prior to reaching a view on its merits. In our submission, codification of the principles and grounds of judicial review should not be used to restrict the ability of the courts to interpret and apply the law in individual cases.

We therefore agree with Professor Mark Elliott that codifying the grounds of judicial review is likely to fail, "*either because the legislation would proceed at such a high level of abstraction as to be largely vacuous or because it would need to set out the grounds of review in so much detail as to thwart the achievement of the (claimed) accessibility objective*"[15].

[15] *The Judicial Review Review II: Codifying Judicial Review – Clarification or Evisceration?*, Professor Mark Elliott, Public Law For Everyone: https://publiclawforeveryone.com/2020/08/10/the-judicial-review-review-ii-codifying-judicial-review-clarification-or-evisceration/ (accessed 9 October 2020)

If the IRAL Panel considers what Professor Elliott terms a 'restrictive' model of codification, which "*deliberately sets out to narrow the grounds on which judicial review can occur*", then we would oppose such a proposal because it would have the effect of reducing the ability of ordinary citizens to challenge potentially unlawful decisions and conduct by public bodies, and of allowing unlawful decisions and conduct by public bodies to proceed uncorrected. This would reduce the accountability of public body decision-making and undermine the rule of law.

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?

In almost all cases, it is clear to lawyers specialising in public law which decisions are amenable to judicial review and which are not. However, it is likely to be considerably more difficult for non-lawyers, including unrepresented litigants in court proceedings, to understand which decisions are amenable to judicial review. For this reason, access to specialist publicly funded legal advice and representation is vital to ensure that citizens have effective access to justice.

There will be a small minority of cases where the question of whether a particular decision or power is amenable to judicial review is unclear, even to specialist public lawyers, and where the courts will therefore have to determine the answer. Given that the role of the courts is to interpret and apply the law, it is right that the courts decide on the ambit of their jurisdiction.

In our view, all decisions and powers exercised by public bodies (or exercised by individuals or organisations exercising public functions) should be accountable and subject to judicial review and the jurisdiction of the courts. The alternative is for certain powers to be capable of being exercised unlawfully by public bodies without any possibility of legal recourse. This would also be likely to see an increase in certain types of decision being made in the knowledge that a challenge could not be brought. The role of judicial review as a deterrent to public bodies cannot be underestimated.

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 responding to judicial review claims is clearly and helpfully set out in the Administrative Court Judicial Review Guide[16]. The length of the Judicial Review Guide (currently 153 pages) is an indication of the complexity of judicial review, and underlines the need for ordinary citizens to have access to publicly funded legal advice and representation in order to bring judicial review cases.

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?

We agree that the current judicial review procedure, which in most public law cases (with specific exceptions) requires claimants to make an application for judicial review promptly and in any event within three months of the decision they seek to challenge, broadly strikes a fair balance. There does however need to be a degree of discretion with this (see below) and the recognition of the existence of rolling limitation deadlines where the nature of the act is ongoing.

For legally aided claimants, it can be difficult to obtain legal aid funding from the Legal Aid Agency in a timely manner in order to enable us to file applications for judicial review promptly and within three months of a decision being taken. In some cases, it can also be difficult to ascertain the date of a decision, and therefore the date from which the time limit for bringing an application for judicial review starts to run. In our submission, it is therefore right that the court has the power under Civil Procedure Rule 3.1(2)(a) to extend or shorten the time limit in appropriate cases.

[16] The Administrative Court Judicial Review Guide 2020 is available here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/913526/HMCTS_Admin_Court_JRG_2020_Final_Web.pdf (accessed 9 October 2020)

The courts should continue to have the flexibility to extend or shorten the time limit for bringing judicial review proceedings in order ensure a just outcome in individual cases. In our view, this flexibility would be enhanced by two modest reforms to the time limit for judicial review[17]:

1. Allowing the parties to agree an extension of the time limit in appropriate cases, particularly where this would allow the public body defendant adequate time to respond to a letter before action or to provide pre-action disclosure, or allow the parties to engage in negotiations, which might mean that the case does not proceed;

2. Establishing a presumption that delay in obtaining legal aid is a good reason for an extension of time, at least where the application has been made promptly.

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

Please see our Introduction above, concerning reform of the adverse costs rules in judicial review. In summary, we submit that qualified one-way costs shifting should be introduced in judicial review cases in order to increase access to justice and address the present imbalance between claimants and defendants.

Qualified one-way costs shifting would include a discretion for the court to allow successful public body defendants to recover a reasonable amount from a claimant, having regard to the claimant's ability to pay, whilst also increasing access to justice for claimants.

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?

Please see our Introduction above, concerning reform of the adverse costs rules in judicial review. In summary, we submit that qualified one-way costs shifting should be introduced in judicial review cases in order to increase access to justice and address the present imbalance between claimants and defendants.

The permission stage in judicial review proceedings exists for the purpose of filtering out unmeritorious cases before a substantive hearing. The threshold for granting permission to apply for judicial review – that the court will refuse permission unless it is satisfied that there is an arguable ground for judicial review – is sufficient to enable the court to filter out unmeritorious cases and focus its resources on arguable cases.

We note that Lord Jackson described the permission requirement in judicial review as "an effective filter to weed out unmeritorious cases"[18]. We agree that the permission stage is an appropriate and effective means of dealing with unmeritorious applications for judicial review. We have, however, had experience of applications for judicial review which were refused permission 'on the papers' by a judge, but which were subsequently granted permission at an oral renewal hearing, and which then ultimately succeeded at a substantive hearing. In our view, it is therefore important that claimants continue to have the right to apply for oral renewal when permission is refused on the papers. Statistics show that over the last few years, almost one in three renewal claims see permission granted.[19]

In respect of standing, the current rules are sufficient.

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?

In our view, the courts generally have the flexibility to grant appropriate remedies in judicial review cases. This flexibility is limited by the 'no substantial difference' test in section 84 of the Criminal Justice and Courts Act 2015. This requires the court to refuse to grant relief on an application for judicial review "if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred". Prior to this, the position was that the court would grant relief in respect of an unlawful decision

[17] As suggested by Public Law Project in their submission to the IRAL: https://publiclawproject.org.uk/wp-content/uploads/2020/10/201020-PLP-Submission-to-IRAL-FINAL.pdf (accessed 21 October 2020)
[18] Page 310, *Review of Civil Litigation Costs: Final Report*, Lord Justice Jackson, December 2009: https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf (accessed 14 October 2020)
[19] https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-april-to-june-2020 (accessed 19 October 2020)

unless it was shown that the decision would necessarily, or inevitably, have been the same (*Simplex GE (Holdings) Ltd v Secretary of State for the Environment* [1988] 3 PLR 25 at paragraph 42).

The 'no substantial difference' test enables defendants to argue that relief should be refused, notwithstanding their unlawful conduct, because it is highly likely they would have reached the same decision or taken the same action if they had complied with the law. In our view, this is an inappropriate restriction on the court's flexibility to grant appropriate remedies in judicial review proceedings, and provides an incentive for defendants to argue that there would have been 'no substantial difference' in the outcome if they had not acted unlawfully. It therefore allows – and indeed requires the courts to allow – unlawful conduct by public bodies to pass uncorrected.

Given that there are remedies available to the courts in judicial review short of making a quashing order, such as declarations of unlawfulness, in our view the 'no substantial difference' test imposes an unnecessary and undesirable restriction on the discretion of the courts to grant an appropriate remedy in individual cases.

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

Public body decision-makers should seek to minimise unlawful decisions by following the guidance set out in *'The judge over your shoulder – a guide to good decision making'* by the Government Legal Department[20]. Public bodies can also minimise the need for claimants to proceed with judicial review by ensuring they take a realistic position on the merits of the case in pre-action correspondence, rather than requiring a claimant to file an application for judicial review before agreeing to reconsider or reverse an unlawful decision.

The introduction of qualified one-way costs shifting, and an increase in access to judicial review for claimants as a result, would further incentivise public bodies to take lawful decisions. Strengthening the duty of candour for disclosure of information and documents in the pre-action (pre-issue of court proceedings) protocol stage would help to ensure that there is proper disclosure to assist in resolving disputes at a much earlier stage avoiding court proceedings.

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?

In our experience, the vast majority – over 95 per cent – of prospective judicial review cases on which we advise claimants are resolved prior to trial. Indeed, the vast majority of those settle prior to issuing proceedings. This can be for a number of reasons, including:

- The dispute is resolved following pre-action correspondence with the prospective defendant;
- The prospective claimant is advised not to make an application for judicial review, or to seek to resolve the dispute by another means (e.g. via a complaints process or Ombudsman);
- The dispute is resolved after an application for judicial review is filed but before permission is considered;
- The dispute is resolved after the court grants permission for an application for judicial review to proceed to a substantive hearing.

Settlement 'at the door of the court' does happen, although not that frequently. In our experience it most commonly occurs where defendants have not turned their mind to the issues before the court and it is only upon instructing counsel, or spending time preparing for the hearing that they acknowledge the strength of the claim. It is more common for a defendant to reverse its decision, or agree to provide the remedy the claimant seeks, either in pre-action correspondence, shortly after an application for judicial review is filed, or shortly after the court grants permission for an application for judicial review to proceed to a substantive hearing. In our view, this is likely to be because defendants recognise that their prospects of successfully defending an application for judicial review are low, and it is therefore appropriate and in their interests to settle the case before a substantive hearing.

[20] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/746170/JOYS-OCT-2018.pdf (accessed 9 October 2020)

Our experience appears to be supported by the statistics for judicial review applications. Joe Tomlinson, Research Director at Public Law Project, analysed the 2019 caseload for the Administrative Court[21] and found that of the 3,384 applications for judicial review which were lodged with the court:

- 949 applications for judicial review were withdrawn prior to permission being considered for the first time;
- 638 applications for judicial review were granted permission to proceed (522 granted first time, 116 granted at the second stage / on oral renewal);
- Of the 638 applications which were granted permission, 482 were withdrawn prior to a final hearing;
- Of the 156 final hearings which took place, the claimant was successful in 68 cases and the defendant was successful in 79 cases.

These statistics do not include prospective judicial review cases in which an application was not lodged with the Administrative Court, but nevertheless indicate that the vast majority of applications which are lodged are resolved or settled prior to a final hearing. As indicated above, in our experience the vast majority of prospective judicial review cases settle prior to proceedings being lodged with the court.

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 have experience of using Alternative Dispute Resolution in appropriate cases, and pre-action correspondence in effect provides a means of resolving many cases. However, as the question at issue in judicial review cases is whether a public body has acted lawfully or unlawfully, in our view the appropriate form of resolution in most cases will be by the court. That is not to say that ADR should not be considered in each case and used, where appropriate. A round table format, with legal representatives present, is, in our view, often the most productive way of narrowing down the issues and seeking to reach agreement.

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 do not believe that the rules are treated too leniently. We have some experience of issues of standing arising in cases where we have represented campaign groups or charities in judicial review cases which may not affect them directly, but which affect individuals connected to the aims of the organisation. In our view, the rules on standing should permit individuals and organisations to bring applications for judicial review unless they have absolutely no interest in the issues within the case or are acting veraciously. This is because unlawful decisions or conduct by public bodies should not be allowed to persist simply because no directly affected individual is able to bring the case. Often these groups represent vulnerable individuals who are affected by the decisions made and give them a crucial voice where otherwise they would have none. They have specific knowledge and experience which helps to identify unlawful acts and decisions.

Irwin Mitchell LLP
19 October 2020

[21] *A guide to reading the Official Statistics on judicial review in the Administrative Court*, by Lewis Graham, Lee Marsons, Professor Maurice Sunkin, and Dr Joe Tomlinson, October 2020, page 12: https://drive.google.com/file/d/1jO0e5_z4tqB35QdU_b-14bwFkYa7En3s/view (accessed 19 October 2020)