Equality and Human Rights Commission

Response to call for evidence

Judicial review

Call for evidence details

Title of 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

Source: Independent Review of Administrative Law

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About the EHRC

1. The Equality and Human Rights Commission (the Commission) is a statutory body established under the Equality Act 2006. We operate independently to encourage equality and diversity, eliminate unlawful discrimination, and protect and promote human rights. The Commission enforces equality legislation on age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

2. The Commission has been given powers by Parliament to advise government on the equality and human rights implications of laws and proposed laws and to publish information or provide advice on any matter related to equality, diversity and human rights.

3. The Commission is accredited at UN level as an ‘A status’ National Human Rights Institution in recognition of our independence, powers and performance. The Commission is also Great Britain’s Equality Body with responsibility for enforcement of the Equality Act 2010.

The Commission's interest in this call for evidence

4. We believe that judicial review is an essential tool in holding public bodies, including government, to account, and for ensuring effective and transparent governance.

5. The Commission has enforcement powers under section 30 of the Equality Act 2006 to bring own-name judicial review proceedings or to act as an intervenor; and under section 28 to fund judicial review proceedings brought by others, where they relate wholly or partly to the Equality Act 2010. Our interventions in a range of judicial review cases have provided a significant form of assistance to the court both as the regulator of the Equality Act 2010, and as a National Human Rights Institution. In line with the Regulators' Code, we use our full range of enforcement and other powers proportionately; where it is appropriate to use our judicial review powers they have a significant value in addressing potential breaches of equality and human rights.

6. The use of our judicial review powers has helped ensure that equality and human rights laws are respected, and has prompted positive changes in policies and practices to the benefit of broad sections of society and across a range of public bodies. This is as true for cases that did not reach court, being settled at the pre-action stage or earlier (preliminary pre-action) stage, as for those which progressed to a substantive hearing.

7. Our overriding concern is that changes to judicial review might threaten to undermine access to justice, as well as the accountability of the executive and the constitutional role of the independent judiciary. These concerns sit within the wider social and political context, in which the UK's departure from the EU creates uncertainty for many individual rights; as do proposals to reform the Human Rights Act 1998.

8. We also respond to this call for evidence as we are concerned that any changes that might narrow the accessibility or effectiveness of judicial review would restrict our enforcement powers in respect of equality and human rights. Any changes could also have negative implications for the ability of individuals to enforce their rights.

9. We are not unique among public authorities as an organisation that both brings and defends judicial review claims. At times, proceedings are brought against the Commission's own decisions made in its capacity as a public body. Nevertheless, the prospect of judicial review does not hinder our decision-making, but rather ensures that compliance with the law and good practice is at the forefront of these decisions. No changes should be made to the judicial review process that would make this remedy any less accessible or effective, since this would undermine the possibility of holding public authorities to account and diminish the quality of decisions.

10. Our response, which draws on wide experience of judicial review proceedings, is confined to England and Wales issues. We note that the panel intends to consider UK wide policy making and may include change to court procedure in Scotland. The panel will of course be aware that the UK Government cannot legislate in relation to the Scottish justice system without the agreement of the Scottish Government, both in terms of the Scotland Act 1998 and the Act of Union 1707.

Overarching themes

Access to justice

11. Judicial review is a mechanism to challenge the lawfulness of decisions, acts or omissions by public authorities, or bodies exercising public functions. Everyone should have effective access to the justice system in order to seek redress against decisions that affect them. Judicial review provides a vital opportunity for challenge where there is no alternative remedy available to an aggrieved party. Rather than inappropriately hindering the business of government and other public bodies, it is an important mechanism to ensure lawful, rigorous decision-making, that rights are respected and that effective remedies are available.

12. Amongst other things, judicial review is the principal means of testing the compatibility of administrative decisions with rights under the European Convention on Human Rights (ECHR). In relation to civil rights and obligations, where an internal complaints procedure does not qualify as an 'independent and impartial tribunal' under Article 6(1) of the ECHR, judicial review provides the independent scrutiny that is required by the Convention.

13. Under Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR), the UK must ensure that any person whose civil and political rights have been violated has an effective remedy, even where the violation has been committed by a person acting in an official capacity. This right must be ensured without discrimination, including on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (Article 26 ICCPR). Other key international law principles[1] are that States' obligations with respect to international human rights law include the duty to provide equal and effective access to justice and effective remedies for those who claim to be victims of a human rights violation.

14. We would therefore have serious concerns about any changes to the procedure or scope of judicial review which would restrict the fundamental right of access to justice. The human rights and equality implications of any prospective amendments to judicial review procedure, or scope, as developed by the review panel must be seriously considered, in a way that is compliant with the Public Sector Equality Duty[2]. Given the potential scope of reform, we would expect any proposals made by the Panel to be subject to full consultation.

[1] UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (adopted by the UN General Assembly in 2005 – Res 60/147)

[2] See s149, Equality Act 2010. Those subject to the general duty must have due regard to the need to:

- Eliminate unlawful discrimination, harassment and victimisation
- Advance equality of opportunity between different groups
- Foster good relations between different groups

15. The Commission considers that over recent years there have been increasing barriers to accessing judicial review, with a shift away from enabling people to challenge the lawfulness of action by public bodies and those exercising public functions, and too far in favour of allowing the executive to carry on the business of government and public administration without scrutiny. The Commission considers that the proper balance between these two objectives needs to be restored. Recent examples of the increasing limitations on access to justice in this area include:

- Increased fees (with oral renewal now costing £385)[3]
- The 'no permission no payment rules' introduced to legally-aided cases[4] which means that if permission is refused, a legal aid provider will not be paid notwithstanding that an individual has been granted a legal aid certificate. Legal aid providers are therefore now obliged to carry out significant pre-permission work on judicial reviews at the risk of no payment. In turn, this is likely to have a chilling effect, with providers applying a higher threshold to which cases they will agree to take instructions in.
- The power for the court to review whether the outcome of the case would have been substantially different had the conduct complained of not occurred, and the ability to refuse permission[5], or to grant relief[6], on this basis unless reasons of exceptional public interest apply. This provision has the potential to undermine enforcement of the PSED in terms of the intention of the duty to ensure that decisions are properly made, giving appropriate weight to the equality implications and possible mitigations.[7]

[3] Ministry of Justice, EX50A: August 2020
[4] Civil Legal Aid (Remuneration) Regulations 2013/422, Regulation 5A
[5] Senior Courts Act s31(3C); amended by the Criminal Justice and Courts Act 2015
[6] Senior Courts Act s31(2A); amended by the Criminal Justice and Courts Act 2015
[7] For example, see the recent case of Gathercole v Suffolk County Council [2020] EWCA Civ 1179

- Costs capping orders which do not provide sufficient costs protection for Claimants. Costs capping orders available in non-environmental casesare not available until after the permission stage meaning that a Claimant has to take a costs risk of several thousands of pounds before even being in a position to apply for protection.[8]
- Provisions brought in under section 87 of the Criminal Justice and Courts Act 2015 (subsections 5-6) requiring Judges to order interveners to pay the costs of another party in certain circumstances. There is a risk that this has a deterrent effect on the organisations who are willing to make interventions.

16. The full impact of these recent limitations is still to be seen, but the trend following the introduction of reforms has been a decrease in permission applications.[9]

17. The Commission's particular concern is that equality and human rights laws must continue to be upheld. Judicial review is an important means of enforcing these laws, including the PSED, which is a statutory obligation on bodies exercising public functions. The Commission has specific powers (s31 Equality Act 2006) to assess compliance with the PSED, but it would not be appropriate - given that our powers are of a strategic nature - to conduct assessments in every decision where there is cause for concern.

[8] ss88-90 Criminal Justice and Courts Act 2015

[9] There have been 798 judicial review applications received in 2020 so far, down 14% when compared to the same period in 2019 (from 930). In 2019, there were 3,400 applications received in total, down 6% on 2018. See Ministry of Justice, Civil Justice Statistics Quarterly, England and Wales, January to March 2020

18. Judicial review is the only way for other individuals or organisations to challenge decisions that do not comply with the PSED. Judicial review ensures the law can be better enforced, with better equality outcomes for disadvantaged groups, respect for individual rights, and better lives for people affected by the decisions of public authorities as a result.

Rule of law

19. According to Lord Justice Jackson in his 2017 report on civil litigation costs, judicial review has a "special role [..] in the constitution"[10], enabling individuals to hold the executive to account via the courts. It is "central to the rule of law"[11] that we have an effective judicial review system. Access to justice and the ability to access judicial review as a means of redress is directly related to the accountability of public bodies, the executive and the rule of law. Judicial review is a key mechanism in our broader constitutional framework both in ensuring that those public bodies and the executive properly carries out – and does not overstep – the intention of Parliament, as well as ensuring that laws set by Parliament are not contrary to human rights.

[10] LJ Jackson, July 2017, p126, Review of civil litigation costs: supplemental report. Fixed recoverable costs
[11] ibid

20. It is concerning that the title of the call for evidence juxtaposes the ability to contest the lawfulness of decisions with the ability to carry on the work of the executive: where Government decisions are unlawful, they are not the proper business of Government. A robust means of testing lawfulness must be maintained to ensure that all public authorities act in accordance with the law, as determined through the democratic process. Challenges to unlawful acts should not be framed as antagonistic or antithetical to the efficient business of government. The availability of judicial review is often helpful to that business and should be seen in a positive rather than a negative light. Even the theoretical possibility that a decision may be subject to judicial review is an important driver of lawful decision-making.[12]

21. The coronavirus pandemic and resulting emergency legislation have highlighted the profound importance of the rule of law and judicial review. The Commission has called on the Government to ensure that any changes that restrict our rights must be flexible, with appropriate review and end points, and remain open to challenge.

22. The ongoing circumstances of the pandemic pose an enormous challenge in balancing the need to save lives, promote economic recovery, and protect the enjoyment of rights. Decisions are being made at pace and with reduced levels of parliamentary scrutiny. Changes to judicial review that reduce the legitimate opportunity for challenge and scrutiny by an independent judiciary would, particularly at the current time, put fundamental democratic norms further at risk.

[12] Government Legal Department, 2018, The Judge Over Your Shoulder: a guide to good decision-making

23. Judicial review has already been used effectively (at the pre-action stage) to secure important changes to guidance on access to critical care during the pandemic so as to prevent discrimination in relation to individuals with autism, learning difficulties and mental health impairments.[13] In another case, the judicial review pre-action protocol resulted in the Government amending its guidance to make clear that people with specific health conditions could exercise more than once a day and travel beyond their local area to do so.[14] These should be considered positive outcomes for the public.

Case study

In the case of X and Y v National Police Chiefs' Council (NPCC), the Commission provided s28 legal assistance to challenge a national police digital data extraction policy under which victims of rape could be asked to consent to a complete download of sensitive personal data from their mobile phones as a condition of investigating the alleged crime. This deterred rape victims from pursuing their cases through the criminal justice system and had a disproportionate effect on women. Following the issue of judicial review proceedings, the NPCC announced it would withdraw its guidance and issued new interim guidance reflecting a more proportionate and targeted disclosure request from victims. This case exemplifies the importance of judicial review as a means of challenging the policies of public bodies, and highlights its successful use in influencing positive social change; in this instance enabling access to justice for rape victims, thus ultimately creating a safer society.

[13] Reported in Hodge Jones and Allen news, 31 March 2020
[14] Reported by Bindmans LLP, 8 April 2020

Comments on specific questions

Call for evidence and framing of the questions

24. The prospect of reforming judicial review has significant constitutional implications, and so the questions asked in the call for evidence and the framing of this review exercise are important.

25. We are concerned by the tendentious tone of the questions in the call for evidence. Here, the starting point for the questions for Government departments is whether aspects of judicial review 'seriously impede' Government, rather than, for example, whether it strikes the 'right balance' as asked by the title of the call for evidence. Consultees are asked whether they agree that remedies are 'too inflexible' and whether standing is treated 'too leniently'. These questions might be characterised as leading.

26. The call for evidence is framed with the presumption that judicial review is a tool used exclusively by individuals and pressure groups. However it is also a tool that public bodies themselves use in relation to other public bodies: the Commission has specific statutory powers in this regard, for example. It appears that the call for evidence places undue weight on the perspective of government and public bodies who are the subject of judicial review proceedings and insufficient weight on the perspective of those individuals affected by poor public policy and decision making, whose remedy is judicial review. We have already expressed concern that the call for evidence appears to portray judicial review in opposition to the efficient business of government rather than as a tool for ensuring effective governance. This highlights the importance of a future consultation on any proposals for reform.

27. We are also concerned by the speed of the current review exercise, in light of the panel's terms of reference which effectively require it to undertake a wholesale consideration of judicial review. All of this could undermine confidence in the rigour and impartiality with which the responses to the call for evidence will be considered.

Q2. Improvements to judicial review

28. Based on our experience of engaging in judicial review and our work with stakeholders, we consider that the process could be improved to promote more effective access to justice. We detail our suggestions for improvements in response to questions 6, 7 and 10 below, and summarise them here:

- In relation to costs capping, the regime applied to Aarhus claims should apply more generally to judicial review and not exclusively to environmental cases.
- It should be possible to agree limited extensions of time between parties if need be – to the limitation date for issuing judicial review proceedings – so as to avoid proceedings having to be issued, and court time being taken up, unnecessarily.
- The civil procedure rules should be amended to allow for extensions of time where delays are owing primarily to delays in a grant of legal aid.
- There should be stronger obligations in relation to the duty of candour, so that more information is provided by the parties at the pre-action stage, and at the outset of proceedings. It would streamline the process of judicial review, and lead to fewer claims, if claimants had better information about decision-making available to them.

Q3. Statutory intervention in the judicial review process

29. The Commission's view is that further codification is unnecessary: the law is well established and clear as to which grounds are available. Codification may create more uncertainty, especially since judges would in any event be required to interpret statutory provisions. Codification that aims to limit the efficacy of judicial review would clearly erode access to justice and be potentially detrimental to appropriate accountability.

Q6. Timeframes

30. We have direct experience of the timeframes for bringing judicial review proceedings, in terms of the use of our Equality Act 2006 powers, and we would not support any reduction of that timeframe (either from the perspective of acting as a claimant or as a defendant).

31. It is important to note that the time limit for issuing judicial review proceedings is 'promptly; and in any event not later than 3 months after the grounds to make the claim first arose. The courts have been willing to refuse permission in judicial review claims where proceedings are not considered to be prompt.[15] This sets an appropriately high bar against issuing untimely claims.

[15] See for e.g. R. v Somerset CC Ex p. Dixon [1998] Env. L.R. 111 at 115; Hardy v Pembrokeshire CC (Permission to Appeal) [2006] E.W.C.A. Civ 240; [2006] Env. L.R. 28 at [10]

32. It should be noted that accessing legal aid can take time but the current position[16] means this barrier is no justification for delay. The Court of Appeal in that case held that the delay in legal aid was not a satisfactory reason for missing the judicial review deadline (whereas it had previously been found to be an acceptable reason), and that the excuse of a delay in legal aid could result in an application for an extension of time being refused. The current position means added pressures for legal aid claimant lawyers. If anything, the balance in that respect could be improved: the civil procedure rules should be amended to allow for extensions of time where delays are owing primarily to delays in a grant of legal aid.

33. In 2019 the Commission reviewed the effectiveness of using its powers under section 30 Equality Act 2006 to issue judicial review proceedings in its own name, and noted that the existing deadline of acting promptly but no later than three months was already extremely tight, especially once the pre-action process was factored in to that time-frame. Therefore any shortening of the timeframe is likely to have an adverse impact on how we are able to use this important statutory power. In particular, a shorter period could hinder effective pre-action engagement, which can often influence resolution and collective change at an early stage.

34. It should be noted that while early engagement with the possibility of judicial review in sight may by itself often be sufficient to prompt public bodies to make lawful decisions, it is difficult to quantify this influence (we are not aware that any relevant statistics are collected). Examples of where the Commission has used the pre-action stage to secure a significant change in practice without proceeding to judicial review include:

[16] R(Kigen) v SSHD [2015] EWCA Civ 1286

- A number of Clinical Commissioning Groups (CCGs) had NHS Continuing Healthcare (NHSCHC) policies which were likely to breach ECHR Article 8 rights, UNCRPD Article 19 rights and the Public Sector Equality Duty. We initially worked towards reaching an agreement without formal legal action. Having exhausted all avenues, we sent pre action letters challenging the policies and threatening judicial review proceedings. This led to all CCGs either using the National Framework which is lawful, otherwise revising their policies, or committing to take our concerns into account when conducting a review of the policies.
- We corresponded with a local authority and CCG regarding their inadequate assessment of mental health needs over the course of six months with the prospect of judicial review clearly in view. It was ultimately not necessary to bring judicial review proceedings in light of the defendants' early engagement with us, and following our scrutiny, their assessment processes had reached a broadly satisfactory position.

35. Without the time for this informal resolution, litigation would have been required to effect these positive changes for individuals.

36. We would suggest that, based on our experience, there is a strong case for the need for flexibility to extend the judicial review limitation date where it is proportionate and in the interests of justice to do so. Indeed it should be possible to agree extensions of time between parties if need be, to avoid proceedings having to be issued protectively.[17] In our experience, defendants often do not engage until late in the process and then ask for extra time which either has to be refused, or which means that proceedings must be issued protectively.

[17] Civil procedure rule 54.5.2 says: (2) The time limits in this rule may not be extended by agreement between the parties.

37. In a recent case we supported proceedings had to be issued protectively in order to give a defendant an extension of time to reply to the pre-action letter. This incurred a court fee, time drafting an application, and the use of court time to seek a stay of proceedings. It would encourage constructive and focused negotiation if parties were able to agree limited extensions of time between themselves, as parties can in effect do in private law proceedings.).

Q7. Costs

38. We do not consider that the rules on costs in judicial reviews are too lenient on unsuccessful parties. As the Master of the Rolls summarised in the seminal case on costs in judicial review proceedings:

> 'the position should be no different for litigation in the Administrative Court from what it is in general civil litigation'[18]

39. To the contrary, we are aware that the risk of an adverse costs order is prohibitive for many people who may have a meritorious judicial review claim. Compounding this, it is not generally possible to obtain "After The Event" legal insurance for judicial review, or, where it is available, the premium is often prohibitively high.

40. Equally, the rules on costs in judicial reviews are rooted in the same provisions of the Civil Procedure Rules as for private law claims. The Commission is not aware of any widespread evidence that the courts in judicial review claims are departing from the accepted principle that the loser pays costs.

[18] Para 58, R(M) v London Borough of Croydon [2012] EWCA Civ 595

41. In relation to the availability of costs capping orders (CCOs), we consider that the costs-capping regime which applies in Aarhus Convention claims[19] (where the default position is that costs are capped at £5,000 for individuals, to reflect the Aarhus Convention requirement that judicial review is not prohibitively expensive) should apply more generally to judicial review claims and not be limited solely to environmental cases.

42. The Commission's view is that at present non-Aarhus costs capping does not go far enough. The current costs capping regime[20] is not adequate to ensure that individuals with meritorious claims are able to challenge the lawfulness of government action. We would echo the words of the Right Hon Lord Justice Jackson who, in 2017, said:

> "CCOs are of little practical value, because the procedure for obtaining such orders is too cumbersome and too expensive. The criteria for granting CCOs are unacceptably wide and the outcome of any application must be uncertain. Also, that outcome will not be known until too late in the day." [21]

43. The current position for non-Arhaus claims means that a Claimant has to have been granted permission in order to secure a costs capping order; this is often too late and too expensive for many claimants. Further, the requirement that a CCO be granted only in cases which are 'public interest proceedings' has been defined narrowly.[22]

[19] Part 45.41 CPR and onwards
[20] As per s88 Criminal Justice and Courts act 2015
[21] Right Hon Lord Justice Jackson, 2017, Review of Civil Litigation Costs: Supplemental Report, Fixed Recoverable Costs
[22] R(We Love Hackney) v LB Hackney [2019] EWHC 1007 (Admin) paras 32-48

Q8. Unmeritorious claims

44. We consider costs and standing under other headings and address only the questions regarding unmeritorious claims here.

45. We consider that unmeritorious claims are treated appropriately at present. We do not consider that any additional mechanisms are required for this purpose.

46. First, and as noted above, the “loser pays" principle applies in judicial reviews as it does in private law proceedings, and the court has the discretion to make indemnity and wasted costs orders against unsuccessful parties in judicial review proceedings, should that be considered necessary. This is an entirely appropriate way of dealing with unmeritorious claims and is consistent with the wider civil litigation landscape.

47. The existing permission filter, that is the need for a claim to be arguable, together with the denial of an oral renewal hearing for those cases considered to be totally without merit, are other appropriate ways in which unmeritorious judicial review claims are currently dealt with.

48. Given that a significant proportion of judicial reviews which are refused permission on the papers are subsequently granted permission at an oral renewal hearing, we would be concerned by any further changes to the availability of oral renewal hearings.[23]

[23] Ministry of Justice statistics show that in 2018, almost 30% of cases that went through the oral renewal stage were granted permission: Ministry of Justice, Figure 4, Guide to Civil Justice Statistics Quarterly

49. Furthermore, in the case of legally aided judicial reviews, the Civil Legal Aid (Merits) Regulations 2013 impose their own merits criteria, which include criteria that do not apply to non-judicial review claims. In legally aided cases therefore, there is an additional barrier to unmeritorious claims progressing through the courts.

50. For these reasons, in our analysis the existing procedures are sufficient to enable access to judicial review without interfering unnecessarily with the business of government.

Q10. Minimising the need for judicial review

Transparency and candour

51. Transparent decision-making, including providing reasons for decisions, would reduce the need for judicial review. We know, for example, through contact with prospective claimants, that a lack of transparency in respect of evidence of compliance with the Public Sector Equality Duty can be a particular problem in terms of identifying the reasons for a decision. At a minimum, this evidence should be disclosed at an early stage of proceedings.

52. As noted above, the Commission will often send out preliminary pre-action letters and have found that in many cases, where defendants engaged with those, it helped draw out the issues and narrow the area of dispute. In various instances where we have explored the use of our judicial review powers, we have not ultimately needed to issue proceedings because our engagement with the relevant public body has prompted constructive dialogue and ultimately compliance with equality and human rights law.

53. The very possibility of judicial review itself is therefore, in our experience, a helpful mechanism for securing agreement at an early stage without need for recourse to the courts. Successful resolution at an early stage depends on constructive engagement by the defendant; greater engagement would therefore reduce the need for judicial review proceedings.

54. We consider that stronger obligations in relation to the duty of candour would reduce the need for judicial reviews to proceed to trial, or at all; and enable greater equality of arms.[24] This could entail a practical requirement akin to disclosure in civil proceedings where parties must sign disclosure lists to confirm that they have complied with the duty. This would focus defendants' minds on the duty of candour at an early stage.

55. Candour at an early stage – and prior to that, transparency in decision-making and the provision of reasons for decisions - would enable public authorities to better assure the public and the Commission of their legal compliance and in turn should lead to fewer judicial review cases being issued.

Other factors

56. The ability for parties to agree extensions of time, as referred to above, would appear likely to reduce the necessity for judicial review proceedings being issued.

[24] as put by Lord Donaldson MR in R v Lancashire CC ex p Huddleston [1986] 2 All ER 94: judicial jeview is a process 'which falls to be conducted with all the cards face upwards on the table and the vast majority of the cards will start in the authority's hands'

57. The accessibility, powers and sufficient resourcing of alternative mechanisms for dispute resolution, such as ombudsman schemes, could also be improved. However such dispute resolution must take place 'in the shadow of the law': judicial review must be available where needed, in order to preserve access to justice.

Q13. Standing

Sufficient interest

58. The Commission does not consider that any change to the test of standing is required – the current test of "sufficient interest"[25] strikes the right balance. The existing rules have been set out clearly by the courts[26] and these rules already exclude judicial reviews by people with little or no interest in the claim.

59. The courts have interpreted standing in a broad manner, including on the basis of public interest, and this is justified given the importance of administrative law; and the need for the possibility of effective challenge to executive power to maintain the rule of law. Lord Diplock said:

> 'It would, in my view, be a grave lacuna in our system of public law if a pressure group … or even a single public-spirited taxpayer … were prevented by outdated technical rules of [standing] from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped.'[27]

[25] Section 31(3) senior Courts Act 1981
[26] Per Sedley J in R v Somerset City Council ex p Dixon [1998] Env LR 111.
[27] R v Inland Revenue Commissioners, ex parte National Federation of Self-employed and Small Businesses Ltd [1982] AC 617

60. Rose LJ, in an environmental case brought by a pressure group where there was no other obvious candidate to question the decision, cited the "importance of vindicating the rule of law" as a key argument in favour of acknowledging standing in such circumstances.'[28]

61. The administrative court guide also acknowledges the relevance of public interest to standing:

> 'Claimants may be considered to have sufficient standing if the claim is brought in the public interest'[29]

62. The Commission regularly monitors judicial review claims involving equality and/or human rights issues and has extensive experience of intervening in such claims. We are not aware of claims being allowed to proceed where the claimant has had little or no interest in the matter or where judicial review is being used as a mere campaigning tool, beyond what is reasonably the concern of an interested party.

63. In our assessment, the current standing test is fit for purpose, and a narrower test may have a negative impact on pre-hearing costs and on court time.

[28] R v Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement Ltd [1995] 1 WLR 386
[29] para 5.3.2., Administrative Court Guide

Existence of an individual Claimant

64. As acknowledged by the Right Hon Lady Justice Hale,[30] public law is concerned with public wrongs, rather than individual rights. A broad test for standing allows alleged abuses of executive power to be challenged when those affected by a policy or decision cannot bring a case themselves – for logistical or financial reasons (given the costs issues outlined above), because they are not aware of the issue, or because they lack access to lawyers. The Commission's analysis suggests that many public interest challenges could not otherwise be brought by a claimant with a direct personal interest in the matter, which poses risks to both access to justice and the effective rule of law.

65. For example, there is sometimes no victim who could, in practice, bring a claim. This is illustrated by the judicial review in which Medical Justice, a non-governmental organisation (NGO), challenged an aspect of deportation policy which made it practically very difficult for certain individuals to properly challenge removal.[31] Although unsuccessful at first instance, that decision has recently been reversed by the Court of Appeal.[32]

[30] The Right Hon Lady Justice Hale, Deputy President of the Supreme Court, speaking at the Judicial Review Trends and Forecasts conference, London 14 October 2013

[31] R(Medical Justice) v SSHD; [2019] EWHC 2391 (Admin)

[32] Medical Justice V Secretary of State for Home Department [2020] EWCA Civ 1338 in which the Commission intervened

66. It may also sometimes be appropriate for a judicial review application to be made before new legislation takes effect. In these circumstances, an organisation is more likely to bring the claim, because the legislation has not yet had a direct impact on any individuals. For example, the Public Law Project applied for a declaration that a draft order prepared by the Government, which would introduce a residence test for legal aid, would be unlawful. The UK Supreme Court held, prior to the order's introduction, that it would be ultra vires and therefore unlawful.[33]

67. These examples illustrate the important role of NGOs in relation to issues where there is no appropriate individual who can bring the claim, despite the volume of cases that they bring being relatively small. NGOs are often well placed to represent the interests of an affected group, can support their claim with specialist evidence, and their presence lends an institutional overview to the issue. Considering a claim on a question of policy or legal principle brought by an NGO is a more efficient use of court time than dealing with a group claim brought by many different individuals. In these circumstances, it is also more appropriate and helpful for the court not to be limited to considering the facts of individual cases.

68. Similarly, the courts have been willing to accept the standing of professional representative groups, when the interests of their members are affected, rather than the interests of the group itself.[34] In a few cases, the courts have recognised the standing of a concerned individual bringing a public interest challenge.[35]

[33] R(PLP) v Secretary of State for Justice [2016] UKSC 39
[34] Examples include R (BAPIO Action Ltd) v SSHD [2007] EWCA Civ 1139; R (Law Society) v the Lord Chancellor [2012] EWHC 794
[35] For example, R v Secretary of State for Foreign and Commonwealth Affairs ex parte Rees-Mogg [1994] QB 552

The importance of interventions

69. We wish to draw the panel's attention to the relevance of interventions to judicial review proceedings. The Commission has intervened in some 50 concluded judicial review cases over the last five years under its s30 EA06 powers. We have offered our expertise in equality and human rights to assist the deliberations of the courts; the value of our interventions has been acknowledged in a number of judgments.

70. We are not unique among public bodies in intervening in judicial review cases. In the recent Court of Appeal case of *Bridges*[36], which involved the novel and developing field of facial recognition technology, a number of public bodies intervened, namely the Information Commissioner, the Surveillance Camera Commissioner and the Police and Crime Commissioner for South Wales. Examples of government departments themselves intervening in judicial review cases include Halabi v Southwark Crown Court [2020] EWHC 1053 (Admin).[37]

71. Intervening in judicial review proceedings is an important tool for public bodies themselves seeking to clarify the law and is not one which should be restricted. The following illustrates how the Commission's ability to intervene in judicial review has benefitted the Court - in this planning case the Court set out the role of the Commission, its statutory duty and its s30 power to intervene and made reference to our reports:

[36] R (on the application of Edward BRIDGES) v Chief Constable of South Wales Police [2020] EWCA CIV 1058
[37] Halabi v Southwark Crown Court [2020] EWHC 1053 (Admin)

> 'I am indebted to Mr Buttler for the EHRC for his succinct summary of the case law on s 149, which was not challenged. I have adopted his skeleton on the issue.'[38]

72. The significance of the Commission's role as intervenor was demonstrated in the recent case of MS(Pakistan)[39]. In that case, the Appellant applied to withdraw his appeal. The Supreme Court held that in circumstances where an important question of law may have been wrongly decided by the Court of Appeal, and where the Appellant no longer wished to pursue the appeal, the Commission should be allowed to intervene and in effect take over the main conduct of the appeal.

[38] Para 108, Moore & Coates v Secretary of State for Communities and Local Government v London Borough of Bromley, Dartford Borough Council, Equality and Human Rights Commission [2015] EWHC 44 (Admin), Judgment 21 January 2015

[39] MS(Pakistan) v SSHD [2020] UKSC 9, paras 9-10