Independent Review of Administrative Law:

A submission from the Law Centres Network

ABOUT US

The Law Centres Network is the national membership body for Law Centres. A Law Centre is a not-for-profit law practice that specialises in social welfare law and aims its services at the most disadvantaged people in its community, largely for free. The first Law Centres in the UK opened fifty years ago, in 1970, and there are currently local 41 Law Centres in our Network, helping some 250,000 people a year. Law Centres have always provided a mix of legal services, some funded by legal aid and others by other sources, and routinely use Judicial Review

WHAT IS AT STAKE

Judicial Review lets people assert their rights, seek remedies when those rights are breached, and ask the court to test the lawfulness of actions by public bodies. As such, Judicial Review lets people hold those public bodies to account and is a crucial, if sometimes inconvenient, check on executive power. It does so despite a structural power imbalance between individuals and public bodies. In order to fulfil is role, the *availability* and *accessibility* of Judicial Review are critical considerations, and this submission will focus on them.

To preserve the availability of Judicial Review would mean that the procedure itself is maintained; that the judges reviewing are able to do so without fear or favour; that they can offer effective remedies to claimants, giving substantive justice; and that all affected by public bodies have recourse to Judicial Review either in personal capacity or in the public interest through the work of charities and other organisations.

To preserve the accessibility of Judicial Review would mean that people are given sufficient opportunity to bring a claim; that the procedure is affordable and does not put them in undue risk of costs awards; that bringing claims is not fraught with procedural and other obstacles; and that there remain other vehicles for people to assert their rights, so that Judicial Review may remain a remedy of last resort as intended.

Some matters, such as political decisions, are beyond the scope of Judicial Review, and judges routinely show no hesitation in declaring them as such, confining themselves to legal, justiciable questions. We believe that, despite the heat emanated from sometimes close brushes with political matters, the courts ably distinguish between them and matters which are within the remit of the court's review. Their scope definition remains whether decisions were made within a public body's powers, following the law and correct procedure. We believe that these definitions and their interpretation by judges need no new external restrictions.

Views critical of the terms of Judicial Review tend to return to two common themes, which are relevant to the current Review. The first sees Judicial Review as widely abused in order for organisations to conduct *'politics by another means'*. The court itself refers to this paraphrase on Clausewitz repeatedly in its regular dismissals of cases that try to do just that, if they are not refused permission in the first place: "Judicial Review is not, and should not be regarded as, politics by other means."[1] The allegation that the court is incapable of ensuring that Judicial Review is not abused has yet to be proven.

The second theme, which is apparent from the current Review's terms of reference and its call for evidence, suggests that Judicial Review somehow *impedes effective government* by being burdensome and disruptive, causing delays and damaging public trust. This argument was rehearsed in the last time that Judicial Review rules were changed, in part 4 of the Criminal Justice and Courts Act 2015. Then as now, these grave and bold assertions by the government of the day were just that and presented no evidence to support them. In the current context, such assertions and assumptions risk prejudicing the work of this Review.

JUDICIAL REVIEW AND ACCESS TO JUSTICE

The limits to what decisions can be challenged through Judicial Review exist to maintain a balance between the democratic rights of individuals and the need for effective and efficient government. However, that balance is weighted against individuals: Judicial Review is a slow, legalistic procedure that can be expensive to many and carries the further risk of costs liability. Many individuals find it inaccessible without legal assistance. Therefore, it is important to maintain the accessibility of Judicial Review for lawyers and organisations that 'hold the door open' for those individuals, such as Law Centres.

Law Centres' routine work in their communities is to widen access to justice for disadvantaged, often vulnerable people primarily in social welfare law. Each Law Centre is a small or medium local law practice that is a charity and employs solicitors to provide legal services. This means that Law Centres do not bring Judicial Review frivolously; rather, they use Judicial Review as a last resort and often in the course of their legal aid work, which means that at case has already been assessed as meritorious for attracting public funding.

Often, though, the threat of Judicial Review is just as important as the procedure itself. A letter before action signals that the Law Centre and its client are serious about challenging a decision, primarily of local authorities. Many a Law Centre client were housed, or given more appropriate housing, or finally accessed social care provisions because the council was encouraged to reconsider its previous decision in order to avoid costly and protracted legal proceedings. The efficacy of this path of action depends entirely on the council knowing that, despite its minuscule budget, the Law Centre has recourse to Judicial Review – whereas its client alone did not – and is intending to act on it. Successfully using this path of action to achieve an agreed solution is a treble gain: the problem resolved for a disadvantaged person; an objectionable decision is revised; and a dispute is resolved without needlessly disturbing

[1] See recently by Hickinbottom LJ and Haddon-Cave LJ in [2019] EWCA Civ 304; and by Singh LJ and Carr J in [2019] EWHC 221 (Admin) at [326].

the court. This virtuous recourse of Law Centres and other organisations to Judicial Review must be preserved in the interests of justice.

Judicial Review can offer small organisations with limited resources, like Law Centres, the opportunity to play their part in **improving the law**. They can do so by bringing cases before the court in order to clarify points of law or asking for it to be updated – especially in the interest of disadvantaged or vulnerable people, whose voices would not otherwise be heard in the discourse. Here are but some examples from Law Centres' casework just over the past two years:

- Clarifying the scope of the Covid-19 'eviction ban': Hackney Community Law Centre helped Kevin Okoro challenge his council's decision to try to evict him. The Court of Appeal clarified that the stay on possession proceedings applied not just to them proper but also to appeals of County Court possession decisions – serving the overall aim of protecting people in their homes during the first wave of the pandemic
- Updating rules on end-of-life support: Law Centre NI helped Lorraine Cox, who suffers with Motor Neurone Disease, seek the court's review. She was denied expedited benefits through the terminal diagnoses rule because she could not prove that she would die within six months. The rule had been introduced 30 years ago for compassionate reasons, but the court found the six-month requirement discriminatory, requiring it to be updated
- Improving fairness in Universal Credit: Central England Law Centre and another law firm represented three severely disabled claimants who had been encouraged to migrate from legacy benefits to Universal Credit, not knowing that they would lose their Severe Disability Premium. Finding the rules governing this discriminatory, the court required DWP to replace them by better arrangements that would not disadvantage over 13,000 severely disabled people

Just as importantly, Judicial Review can also help **bolster access to justice**, a foundational right, by removing obstacles in its way. This right has in effect been eroded over the past 12 years due to austerity cuts to public funding.[2] Some recent examples of this include:

- Preventing a mooted residence test for accessing legal aid: following the legal aid cuts of 2013, the Ministry of Justice wanted to introduce a third test for accessing legal aid, beyond means and merits, that would have denied legal aid to people who were not in the UK legally for a minimal period beforehand. Ultimately, the Supreme Court ruled that this change was *ultra vires*, thereby also defending parliamentary sovereignty
- Removing prohibitively high Employment Tribunal fees: these fees had a clearly adverse impact on employees' access to justice, with new ET claims dropping precipitously by about 70% within a year. Ultimately, the Supreme Court judged that this was unlawful, the fees were scrapped, and employee claims have increased.

[2] The World Justice Project's Rule of Law Index, an annual comparative exercise, charts a slow decline in UK's performance on the rule of law in recent years. Our worst performing aspects were the affordability and accessibility of civil justice and the prevention of discrimination. https://worldjusticeproject.org/rule-of-law-index/country/2020/United%20Kingdom/.

Importantly, the judgment established affordability as a quantifiable indicator for gauging actual access to justice

- Strengthening local provisions to prevent home loss: we have brought a judicial review against the Ministry of Justice, challenging a consolidation of legal aid contracts for the Housing Possession Court Duty Scheme. This was successful, and the retention of more duty desks and more local providers is coming into its own as the pandemic-driven 'eviction ban' ends, putting hundreds of thousands of rented homes at risk

Judicial Review, then, plays a dual role in strengthening access to justice and thereby the rule of law, one that is often overlooked in the increasingly febrile public discourse on it.

MAINTAINING AVAILABILITY AND ACCESSIBILITY

We have noted above that the availability and accessibility of Judicial Review should be preserved not just for individuals but for lawyers and organisations working on their behalf or in the public interest. There are multiple aspects to maintaining accessibility. This should be addressed in multiple aspects: in terms of costs and risk, standing and overall recourse to Judicial Review (rather than lower grade mechanisms such as ADR or ombuds schemes).

Some claims lodged find **resolution at Pre-Action Protocol stage**, as we have suggested above. Law Centres' experience of this is quite mixed, dependent on the public body and type of action or decision challenged. In general, local authorities tend to be more amenable than central government to reconsider their decisions before permission or before hearing. However, **settlements** at early stages of the Judicial Review process or indeed any time before substantive hearing do not happen on their own. The power imbalance, especially between larger public bodies and the claimant creates no incentive to settle, except when the public body is keen to avoid an adverse judgment, especially one with wider implications for similar cases. For this reason, the odds are stacked even higher against settlement in strategic litigation. This suggests that more restricted or less potent mechanism of redress (such as ombuds schemes) or dispute resolution (such as ADR) would not have nearly the same compelling effect on the willingness of sides to settle. Unfortunately, this is another aspect of Judicial Review that is lean on quantitative evidence. Official figures simply tell us that typically only 1 in 5 claims is granted permission, but not what happened to most claims, including the 27% that do not make it to permission stage – how many were settled or resolved or how many were simply withdrawn.[3]

Changes to rules governing **costs and cost protection** in Judicial Review in part 4 of the Criminal Justice and Courts Act 2015 have adversely affected the ability of charities, especially smaller ones, to bring cases for Judicial Review, or to bring their expertise to bear as interveners. UK charities are already discouraged from taking legal action by Charity Commission guidance to trustees on taking legal action (CC38). Especially to charities with no previous experience of legal action, the document's tone and orientation suggest that

[3] Lewis Graham, Lee Marsons, Maurice Sunkin and Joe Tomlinson, "A Guide to Reading the Official Statistics on Judicial Review in the Administrative Court – October 2020", https://administrativejusticeblog.files.wordpress.com/2020/10/a-guide-to-reading-the-official-statistics-on-judicial-review-in-the-administrative-court-october-2020.pdf, p.4.

litigation in general should be regarded, and is regarded in most cases, as a last resort. The 2015 changes have added further deterrents: they exposed interveners to risk of costs and have confined parties' cost capping orders to work done after permission, leaving them exposed to costs for the pre-permission stage, which can be long and laborious. These changes have a clear chilling effect. Just earlier this year, the Law Centres Network decided to decline an invitation to intervene in a Judicial Review case because of the costs risk, preferring instead to share information that informed submissions by another intervener. If a charity does overcome the chilling effect and bring a Judicial Review, as we did in 2016, the cost liability of losing an otherwise meritorious case, that the court acknowledges to be in the public interest, can nevertheless be so considerable as to strongly discourage thoughts of subsequent litigation.

The **duty of candour** and **disclosure** in its light are essential components of Judicial Review. Casting disclosure as a supposed 'burden' is a claim that needs to be substantiated and quantified. If the problem is that document or data retrieval are onerous or time-consuming, these are operational challenges that call for technical solutions, such as better software to enable and speed up searching and scanning through documents. If the problem concerns revealing sensitive details publicly, or ones that might embarrass the government, then surely, to quote Brandeis, "sunlight is said to be the best of disinfectants." The public interest and good public administration necessitate a duty of candour on public bodies, in particular government departments, and this is a higher standard of conduct because the government is unlike any other party to litigation. Ultimately, watering down the duty of candour and associated measures, like disclosure or statements of truth, can only be regarded as suspect and an attempt to obscure questionable conduct.

For charities, such as Law Centres, that serve disadvantaged people, **standing** is an issue of importance. Due to their circumstances, Law Centre clients are more reliant on public support than better off people. They are therefore more affected by decisions and actions of public bodies, at national and local level. However, they are also more likely to not feel empowered enough to take legal action, mostly because they lack legal capability but also because they may fear adverse implications for them. In such cases, when Law Centres are not able to act for specific individuals impacted, it is nonetheless important that they have standing to bring the matter for the court's review in the public interest.

IMPROVEMENTS?

We remain unconvinced of the case for making changes to Judicial Review and how it is conducted, especially given the dearth of evidence to support it. The matters under consideration are **constitutional** by nature and by importance, and they concern such foundational principles as the rule of law and the separation and balance of powers. We strongly urge the government to consider any proposals for change with extreme caution. Whatever proposals for changes are made should be publicly consulted on over several months, so they may receive the most thorough scrutiny.

Still, Judicial Review should be more accessible to people who need recourse to it. To improve on this, individuals could be helped to be more practically capable of challenging decisions affecting them. This could be enabled through widening the scope for legal assistance with Judicial Review, for example, by widening the scope of legal aid for this while still being subject to a merits test. Another welcome measure would be to reverse the costs risks added in the

Criminal Justice and Courts Act 2015, to better enable charities to perform their role in the public benefit. This would also increase access to Judicial Review for disadvantaged individuals and groups.

Whatever changes are proposed should reflect several fundamental principles: that Judicial Review continues to be a primary device for ensuring the compliance of public bodies with the rule of law; that this translates into practical holding of government to account, in the interest of better decision making and public trust; and that effective, universal access to the justice system and to Judicial Review is maintained, so people remain able to challenge decisions affecting them.

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Law Centres Network, 19 October 2020