The Independent Review of Administrative Law (IRAL)

Call for Evidence

We're the UK's HIV rights charity. We work to stop HIV from standing in the way of health, dignity and equality, and to end new HIV transmissions. Our expertise, research and advocacy secure lasting change to the lives of people living with and at risk of HIV.

National AIDS Trust successfully used judicial review to establish that NHS England has the legal ability to commission PrEP (pre-exposure prophylaxis) in England. PrEP is a medication which is highly effective at preventing people without HIV from acquiring the virus. It has the power to drive progress towards the goal to end new HIV transmissions by 2030. In 2014, NHS England set up a working group, including National AIDS Trust, tasked with examining the cost effectiveness of the drug and developing a commissioning proposal. After 18 months, NHS England abandoned the process declaring it didn't have the legal power to pay for PrEP as responsibility for commissioning HIV prevention lay only with Local Authorities. National AIDS Trust disagreed and we decided to challenge their decision at judicial review and won (August 2016).

NHS England decided to appeal. We defended the judgement in the Court of Appeal and in November 2016 the court ruled in our favour, confirming the initial ruling. In December 2016, as a direct outcome of losing the case, NHS England announced that it would fund a major new clinical trial of PrEP. The trial had 26,000 places across the UK (initially 10,000, followed by an expansion to 13,000 and then 26,000 places). In March 2020, the Secretary of State for Health Matt Hancock announced that PrEP would be routinely commissioned in England from April 2020.

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

The questionnaire for government departments and other public bodies asks respondents whether judicial review seriously impedes the proper or effective discharge of central or local governmental functions. Judicial review can only be successful if the government is proven to have acted unlawfully, therefore the idea that judicial review impedes government function cannot be sustained. Judicial review exists to ensure that central and local governments can function effectively and lawfully.

Tools of accountability, such as judicial review, need resources in order to work. This cost is to ensure that government departments and other public bodies act lawfully. It is essential to ensure good governance and access to justice.

With regards to the second question in the questionnaire, the phrasing of this question implies that judicial review is opposed to more efficient, higher quality decision-making. In fact, judicial review seeks to hold the government accountable for their actions and improve standard of governance. We acknowledge that judicial review may be seen as burdensome by the government, however many judicial review cases help clarify the law, helping government bodies function effectively and lawfully.

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)?

An issue which has not been covered in our response to question one is the duty of candour which requires both parties to disclose certain information which is relevant to the case.

Whilst we recognise that it might be disruptive for the government to deal with a judicial review, it is a mistake to think that bringing a judicial review is a decision taken lightly by claimants. In our experience of judicial review, there was a great deal of risk involved and we were only able to consider bringing a judicial review when we felt there was a clear injustice and the law was not being followed. Anyone affected by state decisions should be able to know which factors were involved. Both parties must be as transparent as possible to allow claimants to make decision whether or not to proceed to judicial review.

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?

We acknowledge that statute could add certainty and clarity to judicial reviews. However, statutory intervention in the judicial review process at the level of detailed required to provide clarification would most likely make it less accessible, knowable and certain. Furthermore, codification would require the investment of more resources into the judicial review process.

The scope of statutory intervention is unclear, however if the Panel and Government do choose to follow the route of codification, they must take the necessary steps to ensure that it does not make it harder for citizens to challenge unlawful actions by Government. Statute should only be used to improve not restrict access to justice and the rule of law.

4. Is it clear what decisions/powers are subject to Judicial Review and which are not? Should certain decision not be subject to judicial review? If so, which?

All government power must be subject to control by the courts and judicial review is an essential tool in allowing this to happen. We believe that all government decisions should be subject to judicial review, however if certain decisions are to be excluded there must be another mechanism which is accessible to citizens that would ensure the government is not acting unlawfully.

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 procedural rules and appeal mechanisms are fairly clear to lawyers. Since we had legal representation when we brought a judicial review, our lawyers were able to clarify the procedure for us. Had we not had legal representation, the process would have been unclear and this presents a barrier to accessing judicial review for individuals who cannot afford legal representation.

In our experience, the process was risky, intimidating and expensive and there was a lot of legal jargon that made it difficult for us to understand what we needed to prepare for each stage of the process.

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?

The time limit for making application for judicial review is currently very short. We support the concept of a time limit to ensure that cases can move forward efficiently and that the Government can make and implement good policy without undue delay. However, three months is not enough time to understand the process, the decision that has been made, consider other options to rectify the decision, secure legal representation and comply with pre-action protocol. It also significantly limits the time available to try to negotiate an alternative outcome to litigation. Moreover, since judicial review claims are 'front-loaded', it is difficult to gather all the evidence and materials relevant to the claim before making the application.

It is not the default response of many individuals and organisations to proceed to judicial review when a decision is perceived unlawful, however due to the three month limit this decision can be rushed. We support a small extension of the current three month time limit.

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

The risk of having to pay our opponent's costs in addition to our own was the largest barrier in our decision to bring a judicial review. The costs are prohibitively high such that had we not been able to come to an arrangement that meant that our legal team represented us at very reduced rates, and had we not been able to come to a cost agreement with the other party, we could not have afforded to take the financial risk as a small charity. We have a duty to manage our income and expenditure and act in line with our charitable aims and objectives. Even when something is as important as the issue of PrEP (which is fundamental to what we do as an organisation), still the potential financial impact could have been so high that we would not have been able to take action.

We resorted to extraordinary measures in order to secure the money to proceed to judicial review, including crowdfunding and the aforementioned fee agreement with NHS England. Our legal team had to agree a very low-cost cap, which in turn meant they did significant work for free. They are not a wealthy firm and it is unlikely that they would be able to do such a thing again. For this reason, it is hard to imagine a scenario in which we could launch another judicial review.

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?

See answer to question 7 for our answer on costs of judicial review and question 13 for our answer on standing.

We do not have experience of bringing a claim that was deemed unmeritorious, however we believe that there is already a fairly meticulous procedure to ensure that unmeritorious claims are removed from the system. A good legal team would be able to advise an individual or organisation of the likelihood that their claim will proceed to judicial review. Widening access to good legal services would reduce the number of unmeritorious claims that reach the courts.

If someone is considering applying for judicial review they must be able to access legal advice to help them decide whether to apply. Legal aid may be required in some of these cases, which is increasingly difficult to access.

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?

We have not found the remedies granted as a result of a successful judicial review too inflexible. The flexibility helps ensure that different solutions are found for different situations.

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

If there was more of a culture of openness to challenge among statutory services, there may be less need for judicial review. In our experience, it is as though the decision maker is unwilling to deviate from its initial decision and chooses to defend it over an approach of listening or hearing.

As previously mentioned, the short time limit for applying for judicial review makes it difficult to exhaust all other options to minimise the need to proceed with judicial review.

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?

We have no experience of settlement before trial.

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?

In order for ADR to be effective, both parties must be willing to engage meaningfully in an attempt to reach a compromise. This is not always the case. Furthermore, in our experience, disputes of the application of the law can only be resolved by a court, and therefore ADR is of limited use.

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?

As a charity representing people living with HIV, we were the most appropriate claimant to apply for judicial review. It is vital that we should be able to challenge the decisions and actions of public bodies and public interest standing is granted in order to ensure that this is the case. Public interest claims can be more efficient and require fewer resources as it can reduce the need for multiple individual claims on the same grounds.

Whether the most appropriate person to bring a judicial review is an individual affected or a representative organisation will depend on the circumstances, however there are already sufficient rules on public interest standing to reject frivolous claims. Stricter rules on standing may result in decisions going unchallenged if there is no affected individual who is able to apply.

In our experience the Local Government Associated instructed their own barrister. It is in the overwhelming interest in the application of justice for the widest possible hearing of any relevant evidence in order to ensure that the outcome of the case is as robust as possible. This in turn will reduce the need or likelihood for appeal.

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National AIDS Trust

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