Small Charities Coalition

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?

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Introduction to the Small Charities Coalition

The Small Charities Coalition is a membership body representing 91% of charities in the UK. Founded in 2008, we now have a membership of over 15,000. As the name suggests we specialise in providing practical support, advice, and advocacy to small charities with an income of under £1 million. Most charities providing legal advice and support are small charities. Our response to this consultation is based on our experience supporting, researching and amplifying the voice of small charities, including small charities which provide legal services and advice.

Small charities have had a critical role in facilitating access to justice, whether working on a specific legal area, such as the rights of children in care, or providing legal support in various areas of the law. In the case of fault in decision-making or failure to act on the part of a public decision-maker, judicial review has served as a primary mechanism to ensure that compliance happens in practice.

Executive Summary

Judicial review is an important process that serves to uphold the principles of the government, not work against it. Unlawful actions by the government undercut its main function to best serve the public interest, and it is beneficial to ensure those unlawful actions are found and addressed with proper diligence.

Restricting access to avenues that allow citizens to address government misconduct is not a fruitful direction the citizenry nor the government. Focus would be better spent on making sure judicial reviews are a more thorough and efficient process instead of bureaucratic burden to be avoided.

Judicial review often leads to satisfaction for all parties involved when laws and principles have been breached, and it continues to serve as a crucial platform for people who would otherwise be unheeded and unheard.

Questionnaire to Government Departments

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?

1a. The Call for Evidence asks government departments whether judicial review "seriously impedes" the function of their work and, additionally, whether particular grounds of challenge are particularly burdensome.

Judicial review can only succeed if the government has acted unlawfully. Therefore, judicial review cannot "seriously impede" government functions. We consider judicial reviews a tool for both service improvement and redress, as opposed to a hindrance or obstacle. Mechanisms of accountability of course require resources to be effective; this is the cost of ensuring that

Government acts lawfully. This is not a fault of the mechanism. Any challenge has the potential to be burdensome, however, judicial review has significantly greater potential for improvement in the public interest.

1b. The Call for Evidence also asks government departments: "In relation to your decision making, does the prospect of being judicially reviewed improve your ability to make decisions? If it does not, does it result in compromises which reduce the effectiveness of decisions?"

Judicial review cases can lead to an improved quality of service and help to clarify the law, helping authorities carry out their duties effectively and lawfully. One case study is that of Just for Kids Law and Kesia Leatherbarrow. Kesia Leatherbarrow died in 2013, shortly after being released from police custody, where she was held for three days with no adult representation. Just for Kids Law, working closely with Kesia's bereaved family, issued a judicial review challenge to the Home Office's policy on detention.

As a result of this judicial review, a small charity successfully challenged the policy of treating 17-year-olds in police custody as adults. The law was subsequently clarified, and all under 18s are now defined as arrested juveniles. This legal challenge was to the benefit of the government, as well; the UK is now in alignment with the United Nations Convention on the Right of the Child. This may not have been possible without 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)?

This call for evidence places a lot of emphasis on the government, in addition to legal and organisational actors in the judicial review process. However, there is less consultation with claimants in judicial review proceedings and what their views are. We would like to know what the panel have done to ensure claimant's voices are heard and considered in the reform process.

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?

We do not hold the position that the grounds, rules and remedies of judicial review are 'uncertain' as is suggested. Whilst it is important for judicial review to be accessible, codification may reduce this in practice. However, if codification is the decided avenue, it is imperative that the codification does not make it harder for the public to challenge unlawful actions by Government or otherwise undermine access to justice or 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?

It is clear that judicial review is a process by which the courts review the lawfulness of a decision or action undertaken by a public body or government authority. We do not recommend that this is narrowed or varied. It is important that no one is above the law, and accordingly government decisions should not be excluded from judicial review. Judicial review is an effective method for ensuring that the government does not act 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?

There are barriers to accessing judicial review, especially for individuals who cannot afford legal representation. Costs are a leading barrier, particularly in the backdrop of legal aid cuts, and the funding constraints of small charities. However, the procedural rules and appeal mechanisms in the in the Civil Procedure Rules are reasonably clear.

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?

In our view, the current time limit for Judicial Review is too short. Permission can be refused if a claim is not brought 'promptly' even when it is brought within 3 months. Any further reduction risks excluding meritorious claims from the ambit of the courts. "Effective" government must mean government which acts in a proper and lawful manner, which judicial review helps ensure. The time limit of below three months is shorter than that in other areas, i.e. an action in tort can be brought up to six years after the relevant act takes place. Any shortening of the time limit will create disproportionate barriers for small charities, due to fewer (if any) staff and resources.

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

The rules regarding costs in judicial review are arguably too harsh on unsuccessful parties, not too lenient. This is against the principle of access to justice, which should not rely on financial power. The risk of having to pay their opponent's costs – as well as their own - is already a major barrier to claimants seeking to pursue judicial review.

Costs operate as a particularly unfair barrier, being formally unrelated to the merits of validity of a claim. Without free and affordable legal services, often provided through small charities, many individuals would not have access to justice. Civil court is not amenable to litigants in person in large part due to the risk of paying one's opponent's costs.

Legal aid can act as an essential lifeline for many claimants. It is important that individuals should be able to access judicial review regardless of their financial means. Current legal aid eligibility rules have had the unfortunate consequence of large numbers of people who simultaneously cannot qualify for legal aid and cannot afford their opponents legal costs.

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?

There is considerable danger in separating "meritorious" from "unmeritorious" cases at the outset. Any filtering mechanism separating "meritorious" from "unmeritorious" cases risks being applied in an arbitrary, or perhaps even discriminatory, manner. In any case, a number of claims may only emerge as lacking on merits following the disclosure of certain information by the government, due to the 'duty of candour'. Seeking to filter such cases through additional measures and from the outset runs a probable risk of restricting access to justice.

It is vital that those considering whether to apply for judicial review should be able to consult a lawyer, who can advise as to the merits of the claim. Legal aid will be required in many of these cases. Many small charities provide free legal advice through helplines or pro-bono case work, although their reach can often be limited by funding and staffing restrictions.

The numerous procedural filter mechanisms built into the judicial review system offer a more effective way to separate those cases with merit from those that do not. For example, only around 20% of cases which reach the permission stage are approved to move to a full hearing.

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?

The majority of remedies imposed by the courts are designed to ensure that the decision-maker complies with the rules set out by Parliament, while leaving primary responsibility for making decisions with the public authority decision-maker. However, this may not always benefit the claimants who are initiating judicial review and may therefore be too inflexible. If a claimant has demonstrably sustained a loss or injury due to fault with the public authority decision-maker, remedies such as compensation could be explored in judicial review proceedings.

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

Lengthening the time limits for judicial review would make it easier for claimants and decision-makers to sort out their problems out of court. Pre-action protocol is often successful in terms of preventing claims from needing to progress to judicial review. For example, SOS!SEN is a small charity which has achieved settlements for their beneficiaries following pre-action letters.

Judicial review offers a route for dissatisfied claimants to bring their dissatisfaction to the attention of relevant public bodies. If public bodies pay more attention to grievances being aired, this will reduce the need for judicial review. Failing this, settlement in judicial review is common, is usually made in favour of the claimant, and both parties report high levels of satisfaction with the process.

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?

Many small charities working in education, for example, will frequently achieve settlement prior to trial. As stated above, the pre-action successes of SOS!SEN, a charity for the education rights of children with special educational needs, is one example. However, in cases involving special educational needs and disagreements over school place, settlement 'at the door of court' is not uncommon, as local authorities often concede in the final moments before trial.

In response to why this occurs, offers to settle are most often made because the public body involved recognises the merits of the case, rather than for reasons such as to save time or resources. In the case of settlements 'at the door of the court', the bulk of legal costs may already have been incurred, indicating that time and resource considerations are not the catalyst.

Late-stage reversal of decision-making is also not uncommon. One case study is the Southall Black Sisters ruling surrounding the funding of specialist domestic violence services for BME women.In 2007, Ealing Council decided to stop funding the Southall Black Sisters and instead fund a generic domestic violence service. There was evidence that the local authority had not considered evidence presented by the Southall Black Sisters, demonstrating underreporting of domestic violence among BME groups and unique needs which require specialist services.

In July 2008, two service-users of Southall Black Sisters, represented by the Public Law Project, took Ealing Council to the High Court. The legal challenge sought to clarify local authority duties under the Race Relations Act, and specifically the provision of specialist services. On the second day of the hearing in the High Court in 2008 Ealing Council withdrew from the case, agreeing to a reversal on the funding decision and confirming that it would start the process again, including with equality impact assessments of any new proposals. The judge gave a ruling which provided guidance and clarified the law. Not only was the disputed decision reversed, Ealing Council agreed to cover the legal costs of both the Southall Black Sisters and the Equality Human Rights Commission.

Ultimately, settlement should be viewed as part of the judicial review mechanism rather than a failing of it. After all, it is often only through the judicial review mechanism itself that details of grievances come to the attention of public bodies and settlement offers can be made. Settlement offers as part of the judicial review process can have public benefit and result in re-evaluation of practice on the part of the decision-maker.

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?

ADR will only be successful if backed up by the realistic prospect of court proceedings if ADR does not work. Although often beneficial for both sides, settlements reached through ADR often only relate to the individual case and may be confidential. Additionally, ADR will not always be suitable for judicial review proceedings. For instance, disputes about questions of law can only ultimately be resolved by the court.

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?

Most judicial review cases involve individual victims, and the courts are careful to limit the standing of inappropriate parties. We emphasise that it is vital that someone ought to be able to challenge the decisions and actions of public bodies. Whilst "public interest standing" can be granted to organisations, companies and charities, this is usually only done where no individual victim or more appropriate claimant can be identified.

Therefore, the rules on standing already operate to ensure that the most appropriate body to challenge a decision will be granted standing to do so. More strict rules on standing may mean that decisions cannot be challenged. This would risk closing an important avenue by which the decisions of public bodies can be scrutinised, which is against the important aim of ensuring access to justice in practice.

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