Independent Review of Administrative Law

Sent by email to: IRAL@justice.gov.uk

26 October 2020

Dear IRAL Panel,

GC100 Response to the Independent Review of Administrative Law: Call for Evidence

I am writing on behalf of the GC100.

The GC100 is the association for the general counsel and company secretaries of companies in the UK FTSE 100. There are currently over 125 general counsel and company secretary members of the group, including representatives from over 80 of the UK FTSE 100 companies. Please note that, as a matter of formality, the views expressed in this response do not necessarily reflect those of each and every individual member of the GC100 or their employing companies.

The GC100 welcomes the opportunity to respond to this call for evidence and we set out below our comments on it. This response begins with the GC100's concerns regarding the timescales around the Independent Review of Administrative Law (the 'IRAL'), then proceeds to make a number of general observations about the scope and remit of the IRAL, before responding to certain specific questions raised in the Call for Evidence, on which GC100 members wish to contribute.

Concerns regarding the timescales around the IRAL

At the outset, the GC100 notes the IRAL's extremely broad scope and remit, covering both the substance and procedure of judicial review in this jurisdiction. Note G to the Terms of Reference describes the IRAL as a *"comprehensive assessment of judicial review"* and its machinery generally. Such an assessment is a highly ambitious outcome to achieve, given the timescale of the review and its apparently limited resources. Previous similar exercises have taken many years. We are doubtful that the review will be able to produce outcomes that will command general confidence unless it can demonstrate that it has allowed sufficient time both for a comprehensive body of evidence to be assembled and for that evidence fully to be considered. In particular, we do not agree that the primarily anecdotal responses invited by the Call for Evidence will generate a sufficiently robust foundation of hard evidence on which to base recommendations for change.

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Any comprehensive review should be grounded on verifiable empirical data together with analysis of identifiable judicial review cases, all of which should be non-selective, and should take account of the full spectrum of judicial review jurisprudence. Administrative law has developed through numerous cases, considering different facts, and through legislation (e.g. the Human Rights Act 1998), and sufficient time and resources are needed for the field to be reflected upon carefully as a whole. In the limited time available the GC100 has nevertheless produced the response set out below. It is unfortunate that until now there has been no direct engagement with the business community, given the importance of commercial judicial review. Every year, many commercial entities engage in judicial review applications to protect valuable business interests, whether through challenging adverse decisions, stepping in to support one side or the other, or themselves being amenable to review if they exercise public functions.

The attraction of the UK as a jurisdiction in which to invest and do business is rooted firmly in the UK's longstanding commitment to the rule of law, which in turn brings legal certainty, clarity and stability. The existence of judicial review, supported by a high quality and independent judiciary, ensures that public bodies are accountable for their decisions and helps to maintain the quality, predictability and fairness of governmental decision-making and official action. With this in mind, fairness requires stakeholders like the GC100 to be given a proper opportunity to comment on any specific recommendations the IRAL Panel intends to make in its report to the Lord Chancellor, and we request that opportunity. The GC100 also wishes to engage with the government's eventual response to that report before future policy positions on these matters are confirmed.

A. General comments on the Terms of Reference and Call for Evidence

Will reforms to judicial review damage the UK as a legal centre?

International participants are attracted to the UK both by its legal framework and the way in which the courts execute business. At the outset, the GC100 expresses concern that competing legal systems in the EU 27, the United States and Asia will exploit any visible weakening of the ability of the judiciary in this jurisdiction to review Executive action as evidence of a diminution of what the UK has to offer. Competitors will allege that this shows the UK is no longer a reliable partner because of increased 'change in law' and 'political' risk. In the circumstances, trust in the system will be eroded and the UK law brand will almost certainly be damaged. This will ultimately have material repercussions for the UK economy's growth, competitiveness, and overall wellbeing in the medium to long term.

The UK is currently working through the consequences of leaving the European Union, and experiencing the economic and social uncertainty of a global pandemic. This is a time of unprecedented disruption and legislative change, during which pillars of stability like judicial review, are especially important. Indeed, the system of oversight currently provided by judicial review, which comprises a balanced set of rules fine-tuned over many years, is likely to be especially necessary in the near future to resolve disputes over the nature and impact of secondary legislation (in particular Brexit-related statutory instruments), many of which were necessarily drafted against demanding timescales, are open to the criticism of being relatively opaque, and have benefited from less refinement than usual due to a lower degree of Parliamentary scrutiny and consultation. The business community, including FTSE 100 companies, has real concerns that this surge in statutory instruments may result in erroneous changes and the introduction of uncertainty into previously well-established areas of law, unlawfully subject companies to new or different obligations, or impermissibly alter the regulatory landscape in certain sectors.

Judicial review will be relied upon to resolve the uncertainty created by new rules, so that businesses and investors can return to operating with confidence.

Is judicial review broken?

The premise upon which the IRAL is based appears to be that the system of judicial review is broken. For example, the Call for Evidence invites government departments to provide examples of how core aspects of judicial review *"seriously impede the proper and effective discharge of central or local governmental functions"*. The GC100 does not share this view. Administrative law and judicial review help to secure good public administration. Their existence provides a powerful check on Executive action which helps to improve decision-making, secures accountability within public bodies, and prevents the improper exercise of public power. Although commercial judicial review challenges to government and regulatory decisions (including statutory appeals on judicial review principles) are relatively rare, their availability exerts a constant refining influence on government and regulators, thereby upholding high standards of public administration.

Many FTSE 100 companies operate in highly regulated sectors of the economy and are significantly influenced by what policymakers decide. Merits review may be preferable for certain categories of regulatory decisions. Where this is not available, however, FTSE 100 companies see the judicial review process described above in action and believe that judges generally strike the right balance between exercising an appropriate degree of restraint and deference to the decision maker and providing appropriate oversight and scrutiny in reviewing commercial matters. While FTSE 100 companies necessarily balance a multiplicity of cost, reputational and other factors when considering whether to challenge decisions that affect them, the small proportion of decisions challenged indicates a belief that decisions are generally made properly with public law principles in mind. When FTSE 100 companies do feel compelled to bring a judicial review they are often successful because they have identified an important substantive or procedural flaw that requires correction. The availability of judicial review in its current form also helps to ensure that government and regulators continue to act within their proper bounds as they make their decisions and policies. In the GC100's experience, the risk of challenge incentivises on-going institutional improvement internally within public bodies and assists in creating and maintaining a culture of accountability and transparency (e.g. by ensuring there are systems for training decision-making staff, and that processes are transparent and up-to-date). Similarly, when FTSE 100 companies stand alongside government in defence of decisions whose commercial consequences they support, they do so secure in the knowledge that many judicial review applications will fail because the decision-making has been robust. The GC100 invites the IRAL Panel to give appropriate weight to this experience. The IRAL Panel should conclude that, far from being broken, the current system of judicial review is working well, at least in the commercial context and the regulated sectors.

Is judicial review 'politics by another means'?

The GC100 is aware that the 2019 Conservative Party manifesto committed the party to ensuring that judicial review is *"not abused to conduct politics by another means or to create needless delays"*. The GC100's experience of judicial review does not support this proposition in relation to areas in which it has been necessary for its members to litigate.

Many if not most judicial review applications are challenges to Executive decisions which are argued to be flawed due to errors that have been made in the decision-making process. Inevitably, however, a number are politically inflected because they are disputes about the lawfulness of decisions by public bodies which effect major policy changes. There will of course be instances where, when FTSE 100 companies bring judicial review challenges, the future of major policy initiatives and the expenditure of significant sums of money turns on the outcome. Such applications are not, however, 'politicised', tactical, speculative or a form of *"politics by another means"*. Far from bringing applications to exert political pressure, FTSE 100 companies are inherently reluctant to go to court for fear of damaging their ongoing relationships with government and their regulators. Judicial review is rightly a remedy of last resort, and FTSE 100 companies much prefer to resolve disagreements with government and regulators through dialogue. When they do bring judicial review applications, they believe, based on professional advice, that particular government or regulatory actions are unlawful. Going to court also means that attempts to resolve disagreements with government or regulators have not been successful through the means of stakeholder engagement or pre-action correspondence. There is nothing inappropriate about FTSE 100 companies (or anyone else with the necessary interest) subjecting public law decisions to scrutiny in such circumstances. This does not impede the proper and effective discharge of governmental functions. Instead it helps to improve standards in public administration and uphold the rule of law. FTSE 100 companies are simply trying to ensure that public decision-makers comply with the law. Most judicial review applications attract neither media attention nor political controversy, and a small minority of exceptions should not drive changes applicable to all.

It is axiomatic that all persons in the UK, including the state itself, are bound by laws of general application that are enforceable by the courts. This includes requirements that the state must follow fixed and publicised rules, Executive discretion must be limited, and public power must be exercised fairly. All of the aspects of judicial review listed in Section 1 of the Call for Evidence contribute to achieving this. All are interdependent: abridging the duty to consult, for example, may lead to an increase in decisions with reviewable errors, translating into an overall increase in the number of judicial review challenges brought, albeit on different grounds. Accordingly, none of the grounds in Section 1 of the Call for Evidence are superfluous, and all may arise in commercial contexts affecting FTSE 100 companies. The UK's strong commitment to the rule of law delivers stability, which encourages inward investment into the UK by making it a reliable partner. Curtailing the grounds of review, excluding areas of decision-making from scrutiny, or reducing the courts' current sensitive and contextual application of the grounds could easily undermine the UK's reputation in this area. It would be very unfortunate if changes with widespread consequences were to be proposed to deal with a relatively small number of instances in which it is considered that judicial review has been abused.

Is judicial review tainted by judicial activism or the expansion of judicial power?

Further relevant context for the IRAL appears to be a concern that judicial review has facilitated judicial activism and the expansion of judicial power. This has not been the experience of GC100 members. We have had no instances cited to us by our members in which FTSE 100 companies have experienced judicial activism. In cases involving sectoral regulators, especially, our experience has shown that courts generally apply the correct level of scrutiny to regulatory decisions, and display a significant degree of deference to expert regulators. It is right that decisions which impact on fundamental rights should receive more scrutiny, as they do.

The high calibre, independence and rigorous impartiality of this country's judiciary contribute significantly to making the law of England and Wales, alongside New York law, the law of choice for international business. Those qualities suffuse judicial review judgments just as much as private commercial rulings. They are especially apparent in the High Court and appellate courts. Placing limitations on the ability of the judiciary to scrutinise public law decisions would dismantle their authority and cast doubt on the quality, predictability and fairness of future government decision-making and official action. This could put pressure on the UK's leading position as an attractive jurisdiction for doing business.

Do the legal principles of justiciability/non-justiciability of the exercise of public law powers/functions require amendment or clarification?

Finally, regarding paragraphs 2 and 3 of the Terms of Reference, GC100 members do not consider any changes or clarifications to the legal principles of justiciability/non-justiciability to be required, insofar as they pertain to commercial judicial review and regulatory decision-making.

In light of the matters outlined above, the GC100 considers that significant reform of judicial review carries with it significant risks to the business community.

B. Responses to specific questions in the Call for Evidence

Section 2 – Codification and Clarity

The GC100 does not consider that there is any particular lack of certainty and clarity in either the grounds for judicial review or judicial review process/procedure. The Administrative Court Guide and the Civil Procedure Rules provide a good clear statement of the judicial review process. Because judicial review applies to all decisions with a sufficient public law flavour or character, there are inevitably arguments about its application at the margins. This cannot be cured by codification or statutory intervention because the structure of the administrative state and the range of public and private bodies exercising public power will always be evolving. FTSE 100 companies operate across a diverse range of sectors and industries, overseen by different regulatory regimes. This wide array of commercial contexts (and the ever-changing nature of risk management, contingency planning and business need within them) illustrates why codification is impractical and of limited value. The strength of the current system of judicial review comes, in part, from the ability of judges to tailor the application of established principles to constantly changing circumstances. This is a role for which they are especially well qualified, and which it would be unrealistic to expect Parliament to perform through legislative interventions.

As the oversight mechanism of last resort for government action, judicial review is potentially applicable to many and various exercises of public power. Statutory intervention in the judicial review process might clarify particular points but it would almost certainly have undesirable consequences. From the GC100's perspective, codification in all but the most minimal sense would bring an unacceptable risk of the deliberate or inadvertent narrowing of the grounds of review, or of reducing the courts' ability to apply the grounds in a sensitive and contextual manner. It would, in all probability, imperil the flexibility of judicial review and the ability of the courts to continue to adapt the application of judicial review to changing circumstances. Moreover, codification of these complex and nuanced administrative law principles risks transforming judicial review into an exercise in statutory interpretation. This shift in emphasis would undermine the holistic approach required to give effect to the fundamental purpose of judicial review, namely to ensure the fair and just exercise of public power.

Commercial entities require certainty and stability to order their affairs and engage in future planning. Business and investor confidence are maximised in an environment where the conduct of market actors and their stakeholder relationships are governed by known and established rules. Given the complexity and diversity inherent in commercial life, however, flexibility and discretion are still required to ensure that reasonableness, fair dealing and just results are achieved in each case. The codification of principles in legislation and the mechanical application of codified rules are not synonymous with clarity and legal certainty. The fact that the current state of judicial review is not codified neither makes it uncertain nor incapable of being applied in a principled manner. It is the judicial discretion inherent in the current approach that allows successful navigation of these competing considerations of certainty and fairness in a business context.

Section 3 – Process and Procedure

This response deals only with those aspects of 'Section 3: Process and Procedure' in relation to which the GC100 has specific points to make. The GC100 is comfortable with the status quo in other areas not addressed below. For example, the permission stage and the legislative changes made to judicial review in Part 4 of the Criminal Justice and Court Act 2015 (notably the *"outcome for the applicant would not have been substantially different"* test in section 84) already appear effective at screening out cases which do not deserve further consideration.

Regarding paragraph 6 of the Call for Evidence, any large organisation considering challenging public authorities must be alive to limitation periods and be prepared to deploy the resources necessary to meet them. The GC100's typical experience is that there will usually be sufficient prior engagement with relevant public bodies in areas affecting FTSE 100 companies that the timing of challengeable decisions can be anticipated in advance and preparations made to react quickly. Where another organisation, such as a competitor, brings a challenge relevant to one or more FTSE 100 company, or where a FTSE 100 company stands alongside government in defence of a decision whose commercial consequences it supports, a swift judgment is desirable so as to resolve legal uncertainty as soon as possible. The GC100 considers that the current tight time limits for lodging judicial review applications work well in balancing the need to prepare a proper challenge with allowing government administration to continue, especially given that there is a valuable element of tailoring through judicial application of the *"promptness"* requirement. Accordingly, any change to this would be very ill advised. Moreover, given that regulatory decisions are generally very lengthy and involve complex economic analyses, reducing the current limitation period will likely result in more judicial review challenges being filed on a pre-emptive and protective basis in an attempt to allow commercial parties the opportunity to consider the relevant decision in full. The current general time limits also give valuable space for resolving or narrowing disputes through pre-action correspondence and alternative dispute resolution, any reduction of which would be undesirable. In the event that a really urgent judicial review application is lodged, the GC100 has confidence that the court will consider and resolve it as rapidly as reasonably practicable.

Regarding paragraphs 7 and 8 of the Call for Evidence, the general rule on costs in judicial review is the same as in private law litigation – the losing party pays the winning party's reasonable costs. It is always important when businesses succeed in litigation that they are able to recover their legal costs at the highest available rate. However, FTSE 100 companies bring judicial reviews in order to highlight and correct important substantive or procedural flaws in public decision-making that significantly affect their activity.

The cost of doing so is a by-product of this vital process, and adjusting the applicant's ability to recover costs would seldom, if ever, affect GC100 members' decisions to bring such challenges. Nor, given this context, are FTSE 100 companies necessarily deterred by the risk of adverse costs, although these may be difficult to predict. When FTSE 100 companies join proceedings as interested parties, they do not generally expect to recover their costs at all if successful, and accept that they may be ordered to contribute if unsuccessful.

Regarding paragraph 9 of the Call for Evidence, the GC100 is satisfied with the remedies available in judicial review, including that these are sufficiently flexible to be tailored to particular circumstances.

The GC100 considers it essential that the duty of candour and cooperation remains robust, so that judicial review remains effective in holding government to account, promoting transparency and improving standards of administration within public bodies. Members' broad experience is that the duty is currently a proportionate means of identifying the essence of the decision-making process whilst avoiding disclosure of, and therefore the need to review, extensive primary documentation of marginal value.

Conclusion

The government often speaks of its desire to produce a dynamic economy, freeing up business to deliver by reducing undesirable constraints so companies can invest and innovate. The GC100 is supportive of that ambition. It would be wrong, however, to characterise judicial review as one such undesirable constraint, or any kind of impediment. The GC100 is concerned that the premise behind this review appears to be that comprehensive change, in relation both to the substance and the procedure around judicial review, is required. For the reasons given in this response, the GC100 is opposed to change of that nature and is concerned that codification of existing rules will have the undesirable consequence of hampering the business community's ability appropriately to hold the Executive to account through the courts for unlawful actions.

Yours sincerely,

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