Independent Review of Administrative Law
Response to Call for Evidence
26 October 2020

1. The following is from the individuals listed at the end of this response. We are all in individual practice at Landmark Chambers and have acted both for and against Respondents in many complex and sensitive judicial review claims, as well as those which might be described as more straightforward. Many of us either are or have been on the Attorney General's Panels of Approved Counsel. We respond below to the terms of reference as identified.

2. Underlying the Review is a latent concern that judicial review may have taken a wrong turning over the past fifty years since at least *Anisminic Ltd v FCC* [1969] 2 AC 147. That is a fundamental proposition and in our view the timetable for examination of this question has been too short. We are also concerned as to the method for considering these issues: for example, there appears to be no consideration as to whether (as many believe) judicial review has improved public decision-making or strengthened the rule of law, or how it could continue to do so.

3. There also appears to be no process for considering whether there will or may be unintended consequences of any restriction on the ability of claimants to challenge administrative decisions by way of judicial review. There appears to be no evidence to support the hypothesis that a reduction in the level of scrutiny of the lawfulness of decisions of public officials will produce better decision making which is in the wider public interest. Less scrutiny from the courts may assist those making decisions but it may lead to a reduction in compliance with legal obligations and thus result in a culture where public officials are less accountable and thus make decisions which are not in the overall public interest.

4. Turning then to the questions asked:

1. Whether the amenability of public law decisions to judicial review by the courts and the grounds of public law should be codified in statute?

3. Whether, where the exercise of a public law power should be justiciable: (i) on which grounds the courts should be able to find a decision to be unlawful; (ii) whether those grounds should depend on the nature and subject matter of the power and (iii) the remedies available in respect of the various grounds on which a decision may be declared unlawful.

5. In short, attempting to codify grounds for judicial review is unlikely to clarify precisely what needs to be established to show a set of circumstances is either lawful or unlawful. Sometimes the grounds are grouped as illegality, irrationality and procedural

impropriety per Lord Diplock in *CCSU v Minister for the Civil Service* [1985] AC 374. Question 1 of the Call of Evidence attempts to define six groups, plus "any other"[1]. While codification has been useful in establishing a system of administrative law in some jurisdictions, at this stage in the maturation of the UK's administrative law, it is difficult to see how it could "clarify" the law for the benefit of both public bodies and those seeking to challenge them.

2. Whether the legal principle of non-justiciability requires clarification and, if so, the identity of subjects/areas where the issue of the justiciability/non-justiciability of the exercise of a public law power and/or function could be considered by the Government.

6. This raises issues of some considerable legal complexity and controversy. Article 9 of the Bill of Rights provides:

> *"That the Freedome of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament."*

The decision as to what constitutes a '*proceeding in Parliament*', and therefore what decisions can or cannot be challenged in the courts is ultimately a matter for the court, not for definition by Parliament: *R v Chaytor & Ors (Rev 2)* [2010] UKSC 52. Were it otherwise, Parliament would be judge in its own cause. We don't see a case to change this approach.

7. In relation to the prerogative powers identified in paragraph 3.34 of the Cabinet Manual, there is a well-developed jurisprudence that recognises the constitutional limits of the courts in certain subject matters in which the executive has a particular expertise or constitutional mandate. The prerogative powers are the clearest examples of such subject matters. Sometimes, in rare cases, the question of non-justiciability will require the court to assess competing rights and obligations under statute or the constitutional relations between the executive and Parliament. In our view, it is important that a distorted picture of the court's willingness to adjudicate on matters falling within the particular province of the executive not be extracted from these particular, unusual cases. We consider that it would be both practically difficult and constitutionally inappropriate to seek to supplant the court's well-developed approach.

[1] The call for evidence suggests a. judicial review for mistake of law b. judicial review for mistake of fact c. judicial review for some kind of procedural impropriety (such as bias, a failure to consult, or failure to give someone a hearing) d. judicial review for disappointing someone's legitimate expectations e. judicial review for Wednesbury unreasonableness f. judicial review on the ground that irrelevant considerations have been taken into account or that relevant considerations have not been taken into account g. any other ground of judicial review

8. The terms of reference suggest there may previously have been a dichotomy between the "scope" of powers and the "exercise" of powers. If a public body acts outside the scope of its powers, it acts unlawfully because it does not have the power to do what it does. As a matter of principle, we suggest that that approach must be correct.

9. However, the Terms of Reference float the suggestion that, until the last 50 years, any exercise of a power within scope would not have been struck down by the Courts. An examination of a series of cases from the C19th onwards shows that this broad hypothesis is incorrect. The Courts have struck down administrative decisions taken by public bodies in England which are within the scope of the power of the public body on a variety of grounds. The hypothesis that, since the 1980s, the courts have struck down decisions of public bodies by way of judicial review on grounds that could not have been formulated prior to the 1980s is simply incorrect.

10. An analysis of the decisions of the Courts over many decades shows that the courts have been prepared to review the exercise of administrative powers by public bodies on a variety of grounds including bad faith, unreasonableness or improper purpose for at least 150 years.

11. Contrary to the implication in the Terms of Reference, control by the Courts over the exercise of the powers which a public body has been given by Parliament is not a recent development. *Cooper v Wandsworth Board of Works* (1863) 14 Common Bench Reports (New Series) 180 143 E.R. 414 concerned whether a duty to fairly hear a person's objection to demolition of their house was implied into the exercise of the power to demolish. *Kruse v Johnson* [1898] looked at test by which the question as to whether certain by-laws were unreasonable or not. *Associated Provincial Picture Houses, Limited v Wednesbury Corporation* [1948] 1 KB 223 established the reasonableness test, but not as a new doctrine but based on a series of cases going back over 100 years. The improper purpose doctrine may have been expanded by *Padfield*, but that built on C19th foundations.

12. The one area where the law may have been clarified arises from the *Padfield* line of cases, namely whether a power which is given by Parliament to a public authority for one purpose can lawfully be used for another purpose. We do not see how it can said that an exercise of the conferred power is properly used if it is used for a wholly different purpose. Retaining the *Padfield* doctrine is needed to ensure that Parliament's purposes are maintained.

4. Whether procedural reforms to judicial review are necessary, in general to "streamline the process", and, in particular: (a) on the burden and effect of disclosure in particular in relation to "policy decisions" in Government; (b) in relation to the duty of candour, particularly as it affects Government

13. The duty of candour has existed for a long time. Pre-2000 caselaw established "the duty of the respondent to make full and fair disclosure" e.g. *Ex p Huddleston* [1986] 2 All ER 941, 945. The duty does not refer to disclosure in the modern sense of disclosure of documents. Questions of disclosure were usually post-permission – prior to the JR reforms this was because judicial review was, until permission was granted, an almost entirely ex-parte procedure.

14. From a public body perspective, one can see how the duty of candour may, in some cases, be seen as a demanding obligation: it may be administratively onerous and may be seen as particularly so before a case has been issued, and so before a claim has even been recognised as arguable.

15. However, this needs to be seen in context. The primary reasons why the ordinary rules about disclosure of documents do not apply to judicial review proceedings are (a) that there is a different and very important duty which is imposed on public authorities: the duty of candour and co-operation with the court and (b) unlike other litigation judicial review has a permission stage.

16. As has been repeatedly stated by the Courts in recent years, the special rules that apply in judicial review are framed the way they are "because the underlying principle is that public authorities are not engaged in ordinary litigation, trying to defend their own private interests. Rather, they are engaged in a common enterprise with the court to fulfil the public interest in upholding the rule of law."[2]

17. The duty of candour applying at an early stage avoids litigants being left in a "catch 22" situation where they cannot get permission at an early stage without proving the arguability of their case because they have not yet had disclosure of the public body's documents but cannot prove the arguability of their case without disclosure.

18. The significance of a lack of candour can be seen in the litigation concerning contaminated blood in the years 1990s to 2000, the government resisted disclosure of documents showing the extent to which ministers knew that NHS blood carried fatal viruses such as HIV and Hepatitis C, but stuck to the official line that there was no knowledge of the risk and that transmission through blood was "not conclusively

[2] See e.g. *R (Hoareau) v FCO* [2018] EWHC 1508 (Admin) (Singh LJ & Carr J), *R (Citizens UK) v SSHD* [2018] EWCA Civ 1812

proved". The Claimants had to go to the Court of Appeal to secure some disclosure, and disclosure problems caused the litigation to be settled. Now that additional documents have been disclosed in the public inquiry, it can be seen that, for example, the government was repeatedly warned that using blood and blood products from the United States carried a high risk of fatal viruses such as HIV and Hepatitis C and that it had been shown that the most likely route of transmission was blood and blood products. The absence of a duty of candour can thus lead to government withholding information that would undermine the factual or legal case advanced by the government. Removing the duty of candour would be a licence to mislead.

19. Further, usually the burden on local authorities to disclose matters in judicial review is less onerous than that which applies in civil proceedings. Altering that relationship of cooperation and partnership with the courts might have unforeseen consequences or embolden the Courts to resort to deploying more coercive powers.

4(c)- 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?

20. It is noted that the possibility that standing tests are too narrow is not contemplated. We consider that an open-minded review of judicial review would have at least considered that possibility.

21. There are other developed jurisdictions where wider standing arrangements than the UK are enjoyed, particularly in relation to claims concerning fundamental rights or the environment. Section 38 of the Constitution of the Republic of South Africa provides that any of the following may allege a breach of the Bill of Rights:

> *"The persons who may approach a court are –*
> *a. Anyone acting in their own interest*
> *b. Anyone acting on behalf of another person who cannot act in their own name*
> *c. Anyone acting as a member of, or in the interest of, a group or class of persons.*
> *d. Anyone acting in the public interest; and*
> *e. An association acting in the interest of its members."*

22. In our system standing plays a role both in filtering out "busybodies" from bringing claims, but it can also be relevant to whether relief is granted at the substantive stage.

23. An issue with narrowing standing provisions is that JR is not about private rights; it is about public wrongs, as Sedley LJ said in *R v Somerset ex parte Dixon* [1998] Env L.R. 111. Its purpose is to vindicate the rule of law. Our greatest judges have thought that function to be more important than rules of *locus standi*. Indeed, the champion of the

modern evolution of administrative law said as much in the classic formulation that laid the groundwork for the development of administrative law. Lord Diplock in *R v IRC ex parte National Federation for the Self Employed* 1982 AC 617.

> "*It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped.*"

24. We have collectively engaged with many cases in which issues of standing arise and do not consider the rules of standing developed by the courts are too wide. The Courts are adept at, and have developed numerous and sophisticated methods for controlling access to the courts.

In relation to paras 4(d)-(g):

25. In our view it is unnecessary to 'streamline' the judicial review process any further, bearing in mind the impact that has already been brought to bear by the 2015 Act- Criminal Justice and Courts Services Act.

26. The terms of reference ask whether the current procedure strikes the right balance between enabling enough time for a claimant to lodge a claim, and ensuring effective government and good administration without too many delays. Those of us practising in the planning and environmental field have been dealing for some time with the significantly truncated period of 6 weeks from the date of the decision, and with no possibility of a time extension for "good reason" as in the case of other judicial reviews. This was no doubt considered acceptable on the basis that it did bring judicial reviews in line with statutory appeals in planning cases, in which there was already a 6-week time limit.

27. However, that does leave very little margin for error. In an *ideal world* in which the claimant has anticipated the decision and approaches their lawyers fairly instantly afterwards, then bearing in mind the need to use the pre-action protocol and to offer the defendant- ideally- a full 2 weeks to respond, then the time roughly breaks down into 2 weeks for initial consideration of the claim and preparation of a pre-action letter, 2 weeks then for the defendant to get back by way of its pre-action response, and then 2 weeks before the last day for filing. There is no doubt that it is sometimes a rush, so that it is hard to imagine a shortening of the timetable still further.

28. In a meritorious challenge in the immigration field, the consequences of a tightening of the timetable would be even tougher, given the need in the first place to gather together information such as detention reviews.

29. One important thing which should not be forgotten is the importance of the ability to challenge in the case of an 'ongoing breach or failure'. It was seen recently, as one example in the challenge to the handling arrangements in place for the eventual decision-making in the Holocaust memorial case.

Principles on which relief is granted

30. The questions asked are: Are the remedies granted in a successful JR too inflexible? Does that have undesirable consequences? Would alternative remedies be beneficial? Should there be more of a role for ADR? If so what type?

31. There is already a role for ADR if the parties want. But it is not appropriate to every case - it will often mean simply submitting to judgment. For example, a planning permission once granted can't simply be reviewed or withdrawn. But it can be very useful and effective in other areas, particularly where no firm decision has yet been made but a challenge has been *threatened*.

32. If remedies were tinkered with so that a decision declared unlawful was nonetheless protected from being a nullity, that would be a seismic change in the world of administrative law, the importance of which can't really be overstated.

33. There is already s84 of the 2015 Act, which *requires* the court to *refuse* to grant relief if it's highly likely that the outcome would not have been substantially different absent the unlawful conduct established. That already applies to both stages of the process- permission and substantive and has proved to have a substantial impact. Going much further could effectively turn the outcome of a successful judicial review claim into the equivalent of an award of nominal damages; a Pyrrhic victory.

34. The existing powers are already entirely adequate to deal with a case where, for example, there is a sham consultation on an NHS or educational reorganisation but where there is only one outcome that the public body could realistically have followed, even if a proper consultation process had been followed. The proceedings rightly examine if the public body has followed its statutory consultation duty (since the absence of any review mechanism would mean that it may be ignored) but equally ensure that a procedural error does not result automatically in a delay in implementation of changes to public services. The present balance appears to be about right.

Rights of appeal including for permission

35. The permission stage can be relatively lengthy, given the paper stage and then the right of renewal- unless the claim is declared totally without merit, even with the court being less flexible about accommodating chosen Counsel's dates to avoid. But there are still cases which have needed to get to the Court of Appeal in order to get off the ground, sometimes important ones. They are relatively few in number, and there does not appear to be any justification for limiting the right of appeal at permission stage.

36. The use of the 'totally without merit' marker should not be too extensive and should be saved for genuinely frivolous or abusive cases- perhaps along the lines of the former permission test before it evolved into the test of 'arguability'. It is questionable whether it is appropriate for this to be applied to a professionally-advised claim. In itself it adds to the time and expense involved.

37. As for rights of appeal generally, given the points of public importance which are regularly raised, there cannot be any justification for limiting a right of appeal from, say, the high court to the Court of Appeal or beyond.

Costs and interveners

38. The terms of reference ask whether the costs of judicial review are proportionate, or how should proportionality be best achieved? Should standing be a consideration?

39. The attempt to link standing to costs is interesting given that it is a separate requirement in its own right, and is relevant in public interest claims in which the costs capping regime already applies. It would therefore appear already to be well covered in the existing rules.

40. To face a costs bill of several thousand pounds if unsuccessful at the permission stage, plus needing to pay one's own lawyers, already strikes the balance at the outer limit of what is reasonable.

41. Given the codification of the rules for costs capping orders, which mean that a CCO cannot now be granted until *after* the permission stage, it is particularly harsh for a claimant to have to face two sets of costs at the permission stage. If the whole point of having a permission stage is to have a filter for unmeritorious claims, then hand in hand with that should go a relatively light costs regime.

42. Quite apart from that, the change to preclude the award of a CCO until after permission is granted is already a significant incursion, given the inescapable need to front-load the claim, and it is hard to imagine a raising of the costs barrier still further without severely

restricting access to court to challenge potentially unlawfully decisions. Even in an Aarhus claim, the costs cap of £5,000 is obviously still a lot more than a lot of people can realistically afford to risk. Costs are already a significant inhibiting factor that precludes many claimants.

43. It is not considered that there is any good argument for restricting the ability to intervene in a judicial review where the intervener can bring deep knowledge and day-to-day practical experience to bear, for the court's benefit. It is akin to the role of an *amicus* for the court. Given the costs rules which currently apply, there is even less justification for any consideration of limiting this role.

Wider Issues

44. The substantive law governing judicial review (*e.g.* grounds, relief) is not limited to claims by citizens against central government.

(a) A significant number of judicial review claims involve one public authority challenging the decision of another public authority. This is particularly so in social welfare law. For example:

(i) duties usually fall on the local authority for the area where the person is "ordinarily resident" (*e.g.* Care Act 2014). Two local authorities can legitimately dispute which of them is responsible for a particular individual where that individual moves between their areas and, often, the only way to resolve that dispute is by judicial review of a decision made by the Secretary of State;

(ii) some legislative schemes provide for the decision of one local authority to bind another authority (*e.g.* homelessness duties under the Housing Act 1996, where authority A determines what duty is owed, but that the duty should be discharged by authority B, because B is the authority with whom the applicant has the "local connection"). If the second authority is dissatisfied with the decision of the first authority as to what duty is owed, then its only remedy is to seek to quash the decision of the first authority by judicial review (*e.g. R (Ealing LBC) v RBKC* [2017] EWHC 24 (Admin)).

(b) Not all public law decisions taken by a local authority are capable of being withdrawn or remade, even where the authority considers that it has made an error of law in the original decision. In such cases, the only remedy is the authority to seek judicial review against itself (in practice, the Leader of the Council would usually bring the claim, see *e.g. R v Bassetlaw DC, ex p. Oxby* [1998] PCLR 283 (CA)).

(c) There are various statutory schemes which provide a citizen with a right of appeal "on a point of law" against a public law decision of a public body. The best known is s.204, Housing Act 1996, which provides for a homeless person to appeal a decision of the local authority as to what (if any) duty is owed under the homelessness

legislation. The appeal is to the county court "on a point of law". It has been held that this means that appeals are limited to the grounds which could be raised by way of judicial review: *Runa Begum v Tower Hamlets LBC* [2003] UKHL 5. A change to the grounds of judicial review would, therefore, appear to also change the rights of the homeless to challenge decisions in the county court.

(d) Finally, where a public authority brings residential possession proceedings against an occupier (whether a tenant, licensee or even someone with no contractual or statutory security of tenure), that person is entitled as of right to defend the claim for possession on the basis of any domestic public law ground: *Lambeth LBC v Kay* [2006] UKHL 10; *Wandsworth LBC v. Winder* [1985] A.C. 461. This is of marginal importance for most tenants with statutory security of tenure but is of central importance for those who have no security of tenure. One striking example is canal boat occupiers. A canal boat occupier has no security of tenure and cannot ordinarily resist an attempt by the Canal and River Trust to remove the boat from the canal; the only kinds of defence that are likely to succeed are those based on public law grounds (see, by analogy, *Jones v Canal & River Trust* [2017] EWCA Civ 135).

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