INDEPENDENT REVIEW OF ADMINISTRATIVE LAW: CALL FOR EVIDENCE

Humanists UK

Response from Humanists UK, 25 October 2020

ABOUT HUMANISTS UK

At Humanists UK, we want a tolerant world where rational thinking and kindness prevail. We work to support lasting change for a better society, championing ideas for the one life we have. Our work helps people be happier and more fulfilled, and by bringing non-religious people together we help them develop their own views and an understanding of the world around them. Founded in 1896, we are trusted to promote humanism by over 85,000 members and supporters and over 100 members of the All Party Parliamentary Humanist Group. Through our ceremonies, pastoral support, education services, and campaigning work, we advance free thinking and freedom of choice so everyone can live in a fair and equal society.

We have extensive experience supporting individuals in bringing forth judicial review claims, and intervening in the cases of others. Our success rate in such claims is very high, with notable successes including a series of reproductive rights cases in Northern Ireland and a challenge against DfE guidance implying that religious education could exclude humanism.

SUMMARY OF OUR RESPONSE

We welcome the opportunity to respond to the Independent Review of Administrative Law (IRAL) panel on the effectiveness of judicial review (JR) in England and Wales. Since at least the era of Magna Carta, a defining principle of the United Kingdom's constitution has been the rule of law: the notion that no-one, not even the Crown, is above the law, and that the law extends its protection to all. Indeed, the Government has adopted the rule of law as one of the key 'British values' to be promoted in schools[1] and upheld through the Prevent policy.[2]

Judicial review therefore represents a fundamental mechanism of justice in our country. It is through JR that our courts adjudicate on whether the executive has exceeded its lawful authority, thereby defending our fundamental freedoms. Any proposals the Panel may make must therefore be based squarely on defending the rule of law.

In brief our views are as follows:

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[1] 'Schools should promote the fundamental British values of democracy, the rule of law, individual liberty, and mutual respect and tolerance of those with different faiths and beliefs' – 'Promoting fundamental British values as part of SMSC in schools', Department for Education (2014), accessible at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/380595/SMSC_Guidance_Maintained_Schools.pdf

[2] 'By extremism here we mean the active opposition to fundamental British values, including democracy, the rule of law, individual liberty and the mutual respect and tolerance of different faiths and beliefs' – 'Prevent Strategy', HM Government (2011), accessible at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/97976/prevent-strategy-review.pdf

- Given the constitutional importance of JR we believe that the costs of JR should be seen as a necessary public expense, akin to that of other forms of public accountability such as Ombudsman investigations, public inquiries, and public inquests.
- JR does not hamper effective decision-making. JR is solely focused upon ensuring that public authorities act in a lawful manner and it is not only a protection from arbitrary government but in the long run promotes a system of effective governance.
- The risks of stifling legal development outweigh the benefits of attempting to consolidate or codify the existing grounds of JR.
- Proposals to expand the scope of non-justiciability should be viewed with extreme caution and skepticism.
- In the case of JRs related to human rights more time should be allowed for claimants to lodge a claim.
- The existing rules on costs for unsuccessful parties are neither too lenient, nor charitable in application; rather they act as a punitive deterrent against those with modest means from challenging potentially unlawful conduct.
- The existing costs regime of JR is not proportionate and risks undermining access to justice.
- The present means of enforcing JR rulings are insufficiently flexible.
- With regards to settlement prior to trial, it is rarely in the interests of public authorities nor individual citizens to pursue a JR and settle at the last moment. Thus, more should be done to encourage earlier settlement from public authorities and the executive.
- The existing rules on standing provide an appropriate and practical basis for public interest standing and therefore do not require amendment.

RESPONSE TO CONSULTATION QUESTIONS

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

First and foremost, we strongly disagree with the implicit view articulated in the questionnaire for Government departments, especially in regard to question 2, that JR hampers decision-making. (Similarly question 7 presumes that the costs regime is always too lenient). It is important to recognise that JR is premised upon the notion of *ultra vires* in England and Wales. Unlike some jurisdictions, this means that JR is not concerned with the merits of a public authority's conduct. It is solely concerned with whether the conduct was performed in a lawful manner. This is worth nothing for two reasons. Firstly, it means that the best way a public authority can avoid a JR is to act in a lawful manner when making a decision or taking a specific action. Secondly, it means that the costs of JR (in both the sense of financial and convenience to public authorities) should be seen as a necessary expense of good governance. Or put another way, just as we accept the costs of Ombudsman investigations, public inquiries, and public inquests as appropriate expenditure, so too should we view the costs associated with JR. This is particularly true given that JR is limited to questions of an important nature, since all cases must pass the threshold of 'permission' before they are able to proceed to substantive arguments.

Beyond this, whilst JR is typically framed as a benefit solely to individual citizens, it is our experience that JR can also benefit public authorities. For example, following our proposed challenge against the exclusion of humanist representatives on a local statutory body responsible for overseeing religious education in the Vale of Glamorgan, it was visible that other local authorities sought to learn from the Vale of Glamorgan's mistake by correcting their own policies.[3] Thus, we believe it is important to recognise that whilst JR plays a critical role in the protection of individual rights and resolution of public wrongs, it can also serve an important mechanism in upholding good decision-making.

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)?

No response.

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?

JR is no recent innovation but the modern form of such ancient procedures as mandamus and certiorari and as with all common law it creates a living body of slowly evolving law reacting to new events and new ideas, and so 'capable of providing the citizens of this country with a system of practical justice relevant to the times in which they live'.[4] In our view this process of adaptation could only be hindered and complicated by statutory codification, if indeed any such codification were possible, which we doubt, since it is arguably beyond the power of Parliament to stop or place boundaries on the courts exercising their ancient function of reviewing the lawfulness of the decisions of the executive.

It is not clear, based on the terms of reference, how a codification of the common law grounds for JR would take place. One option would involve consolidating the existing case law on JR into a single statutory document, much like the Administrative Procedure Act 1946 which governs JR in the United States of America, or the Administrative Decisions (Judicial Review) Act 1977 which governs JR in Australia. The strongest argument in favour of this proposal would most likely be that it would consolidate and make more easily accessible the law and procedures on JR which at present exist in a body of case law that is not always clear to individuals, public authorities, and even in some cases the judiciary. As such, it might be argued that by transposing the law into a single authoritative source the law would become more certain and thus accessible for those who wish to understand it. However, this argument is flawed.

Firstly, a simple consolidating statute would have no meaningful impact on the ability of the courts or public authorities to understand the law. This is because if confusion does exist, it does not lie within the *available* grounds of JR but rather the *applicable* grounds. Put another way, if the effect

[3] A fuller discussion of this proposed challenge can be found in our response to question 11.
[4] Lord Goff, *Kleinwort Benson Ltd v Lincoln City Council* [1992] 2 AC 349, para 377.

of consolidation merely moved the starting point of JR from the oft-quoted judgment of Lord Diplock in *GCHQ*[5] to a Judicial Review Act, this would in itself do nothing to clarify the meaning of the more indeterminate JR standards e.g. the requirements of fairness. Indeed, the experience of America and Australia attests to this problem, as in both countries case law has remained vital post-codification. For example, in the USA, section (10)(e) of the Administrative Procedure Act 1946 was designed to improve accessibility by setting down in one place that a ground of JR is when an action is '*unsupported by substantial evidence*…'. Yet, besides clarifying that such a ground existed, the statute did nothing to resolve longstanding questions over how much 'substantial evidence' was required to support a JR claim, and at what threshold evidence became 'substantial'. In short, despite codification the USA has continued to rely on case law and precedents to resolve these questions, as the case law became necessary to interpret the statute.[6] Ultimately, codification therefore did not bring about greater certainty as the 'correct' interpretation of the law remained disputed and reliant upon case law. Similarly in England and Wales consolidation would only achieve a change of form rather than substance.

In the alternative, if the Government intended to codify JR in an exhaustive way, ousting uncodified precedents, then the drafting exercise required would be far more extensive. Put simply, legislation would have to specify the grounds of judicial review, their various iterations, and in some cases provide conclusive (or presumptively applicable) interpretations. For example, instead of merely stating that illegality, rationality, procedural impropriety (or more broadly fairness), legitimate expectations, and proportionality are the basis for judicial review, legislation would have to state that that illegality encompasses: when the executive makes an error of law; when someone acts for an improper purpose; when someone takes account of irrelevant considerations or fails to take account of relevant considerations when exercising a discretionary power; when an individual unlawfully delegates their discretion to another; and when an individual unlawfully fetters their discretion – in addition to explaining the meaning behind these various concepts; and repeating the exercise for the other grounds.[7] Quite evidently, this would be an enormous undertaking and would pose a serious risk of legislation inadvertently restricting JR. Indeed, it is for this reason that America and Australia deliberately chose not to take such a path and instead adopted the lesser consolidating approach.

However, even if these problems could be overcome, codifying JR would remain inadvisable due to the inevitable inflexibility it would create. As stated above, a significant advantage of JR's existing nature has been the ability of the law to develop over time. For example, in the 19th century the notion of 'natural justice' was a largely anodyne concept, limited to property or private rights. Had the law been codified at this stage, the seminal twentieth century judgment of *Ridge v Baldwin* (which recognised natural justice as a public law right) might simply have been impossible.[8] Consequently, many of the most important principles of good governance developed from the

[5] Lord Diplock, *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, para 410
[6] T Jones, 'Judicial review and codification' (2006) *Legal Studies* 20(4) : 517 – 537
[7] See for example the continuing common law dispute on the boundaries of proportionality and enhanced forms of rationality (or as it is sometimes called the anxious scrutiny).
[8] *Ridge v Baldwin* [1964] AC 40

principles of *Ridge,* namely legitimate expectations, the duty to give reasons, and the requirements of consultation, could now be in doubt today.

Indeed, such is the importance of the ability for the law to develop, that despite its Administrative Decisions (Judicial Review) Act 1977 having no reference to legitimate expectation, proportionality, and fundamental human rights, Australia still chose to incorporate all of these concepts into JR via the common law, ironically creating a situation whereby legislation intended to clarify the law, itself became inaccurate and misleading. Whilst we recognise that it would be possible for legislation to be drafted in such a manner as to allow the continued development of the law, such a prospect would be harder within the UK's constitutional arrangements without also expanding the scope of the judiciary's power, or inevitably encountering the problems identified above – e.g. creating a statute reliant upon case law for interpretation.

In light of this, we caution against any effort to codify JR. Although we recognise that legal certainty is a desirable aim, we believe that the risks codification would pose are too high a price to pay.

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

In principle, any decision of a public official, or private body exercising a public power[9], can be judicially reviewed unless it would require the courts to adjudicate upon a 'non-justiciable' matter. These excluded matters are those where there is no applicable domestic law (e.g, claims which rely on international public law) and historically also issues such as the application of the royal prerogative. Assuming that a decision or power is justiciable, a judicial review will then be possible if either the decision/power either originates from a clear legal source e.g. a statute, subordinate legislation, the royal prerogative or the common law, or if the nature of the power is of a sufficiently public character to justify judicial oversight.[10]

In line with the Panel's terms of reference, our response on whether certain decisions should be non-justiciable will primarily focus on the royal prerogative. However, we urge the Panel to view any attempt to expand the scope of non-justiciability with caution and the utmost skepticism. Non-justiciability is an extreme proposition in public law and a blunt instrument; in the words of Lord Wilberforce it refers to a judicial 'no-man's land'.[11] If an issue is deemed to be non-justiciable, then it is considered to be so far outside the scope of our law that it is simply impossible – note, not improper, but impossible – for our courts to judge the executive's conduct against any legal standard. Such a notion of non-justiciability has the potential to insulate abuses of power from any legal scrutiny. Moreover, given that our courts now regularly demonstrate a high degree of deference, the case for widening the application of non-justiciability is unconvincing. Indeed, both

[9] *R v Panel on Take-Overs and Mergers, ex parte Datafin* [1987] QB 815. In this case, the Court of Appeal established that a private body performing a public duty or exercising a power which has a public character can be amenable to judicial review.
[10] *R (Holmcroft Properties) v KPMG LLP* [2016] EWHC 323
[11] Lord Wilberforce, *Buttes Gas v Hammer and Occidental Oil (No.2 and 3)* [1982] AC 88, para 938

non-justiciability and deference enable our courts to apply a lesser standard of scrutiny to political or 'high policy' matters. However, whereas non-justiciability achieves this outcome by circumscribing the possibility of scrutiny, deference accomplishes the same outcome by encouraging our courts to show restraint but importantly does not do this at the expense of oversight. For example, the cases of *R (Abbasi)*[12] and *R (Al Rawi)*[13] are instructive: in both cases whilst the Court of Appeal felt that foreign affairs should not be seen as off-limits from judicial oversight, they decided to show a considerable degree of caution when determining the legality of the executive's conduct. Put simply, since the courts are already reluctant to pass judgment in cases of policy that they know are outside their constitutional expertise, it would be highly inappropriate to expand the notion of non-justiciability to resolve such an ill-defined and contentious alleged problem.

With regards specifically to the royal prerogative, it has long been recognised that while JR of the *existence* and *extent or scope* of prerogative powers is possible, a far more limited form of review exists in relation to the *manner* in which the power has been exercised.[14] Indeed, since the case of *GCHQ* the orthodox view in English law has been that certain 'subject matters' within the royal prerogative are amenable to the ordinary standards of JR, whereas other topics such as the making of treaties, defence of the realm, appointment of ministers, and dissolution of Parliament are not. This orthodoxy has not been formally changed by the judgment in *Miller/Cherry.*[15] In that case, the Supreme Court focused solely on the first issue of determining the *scope* of the prerogative power to prorogue Parliament, and did so by reference to the fundamental constitutional principles of parliamentary sovereignty and parliamentary accountability.[16] For the avoidance of doubt, this means that it did not engage with whether the *manner* in which the royal prerogative was exercised was unlawful and thus did not apply the ordinary standards of JR.

It is unclear from the terms of reference how the Panel might seek to increase the range of decisions not subject to JR. However, if the Panel were minded to do so, they would reasonably have two options. First, they could expand the number of categories or subject matters which are non-justiciable. Alternatively, they could take the revolutionary step of removing the ability of our courts to determine the *existence* and *scope* of the royal prerogative. In our view, neither approach would be appropriate.

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[12] *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002) EWCA Civ 1598
[13] *R(Al Rawi) v Secretary of State for Foreign and Commonwealth Affairs* [2006] EWCA Civ 1279
[14] *Case of Proclamations* [1610] EWHC KB J22. This seminal judgment from the 17th century is one of the earliest authorities for the ability of courts to review the existence and extent of the royal prerogative. In the oft quoted passage it was held that '*the King Hath no Prerogative, but that which the law of the land allows him*'.
[15] *R (on the application of Miller) v The Prime Minister* [2019] UKSC 41
[16] Mark Elliott, 'The Judicial Review Review III: Limiting judicial review by 'clarifying' non-justiciability – or putting lipstick on the proverbial pig', Public Law for Everyone (2020) accessible at: https://publiclawforeveryone.com/2020/08/20/the-judicial-review-review-iii-limiting-judicial-review-by-clarifying-non-justiciability-or-putting-lipstick-on-the-proverbial-pig/

Regarding the first option, namely the expansion of non-reviewable 'subject matters', we advise against changing the existing law. As Professor Mark Elliot has persuasively argued, the 'subject matter' approach to justiciability relies upon a basic fallacy: it assumes that, since certain subject matters rarely raise justiciable questions, it follows that they will never raise such questions. This is incorrect. Take for example, the subject matter of 'mercy'. Whilst it is true that the prerogative power to pardon someone is unlikely to raise justiciable questions, not least because it is governed by the executive's sense of morality, this does not mean that justiciable questions never arise. Indeed, in *Lewis v Attorney General of Jamaica,*[17] the Privy Council was capable of carving out the legal and moral questions, by recognising that a prisoner sentenced to death remained entitled to a fair decision-making process and thus by denying someone such a right natural justice questions arose. Instead of certain prerogative *subjects* never raising justiciable questions, we therefore believe a more accurate description of the law is that certain prerogative *issues* can arise which our courts are unsuitable to adjudicate upon.[18] However, our answer to question 3 has demonstrated that a codified list of *issues* would be unlikely to ever fully represent the range of necessary topics upon which a court may be unsuitable to adjudicate, thus we believe deference is a more appropriate mechanism to deal with these issues than non-justiciability.

With regards to the second option, namely the radical step of removing the ability of our courts to determine the *existence* and *scope* of the prerogative, we strongly advise against changing the law. First and foremost, it is worth recognising that identifying the *existence and scope* of the prerogative is a very limited form of JR. Indeed, our courts only identify the *scope* of a prerogative power by using our constitution's fundamental principles. Thus, in the words of Professor Elliot, 'if legislation concerning justiciability were to make any difference, it would by definition, need to preclude courts from examining matters that are presently regarded – in light of relevant constitutional principles – as suitable for judicial resolution.'[19] But, more fundamentally than this, there is nothing intrinsically different about prerogative powers and other forms of executive power. Indeed, if it is accepted that our courts should be the final arbiter when a minister is alleged to have acted unlawfully and exceeded the scope of a statutory power, it is hard to see any principled basis for depriving our courts of the same responsibility simply because a minister derives their authority from the prerogative. Such a view would hark back to a bygone age of English law and fundamentally call into question our adherence to the rule of law.

In sum, we advise the Panel not to expand the number of issues deemed unsuitable for adjudication, and specially urge caution with regards to the non-justiciability of the royal prerogative.

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?

[17] *Lewis v Attorney General of Jamaica* [2001] 2 AC 50
[18] M Elliott and R Thomas, 'Public Law', Oxford University Press, Edn 2 (2014), pages 511 – 514
[19] *Ibid* no. 10

In our view, the Civil Procedural Rules sufficiently define the above processes and therefore do not requirement amendment or review.

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 general, judicial review requires that a claim form is submitted 'promptly' and in any event 'no later than 3 months' after the grounds for making a claim first arise.[20] This is the case regardless of whether a claim relates to a human rights violation or a violation of the common law e.g. an irrational, illegal, or procedurally unfair decision. In our view, the existing timeframe for JR should be expanded when claims relate to human rights violations.

The case in favour of providing a more lenient timeframe for human rights JR is underpinned by the fact that human rights violations can continue for much longer periods than a few months. Unlike common law rights (those based on rationality, illegality, and procedural fairness) it is important to recognise that human rights are universal. This is significant because it means that human rights apply to everyone equally throughout their lives, and as such must mean at the very least that they continue to apply when an individual's circumstances change. This has an important consequence in regard to time limits, as it is easy to conceive of a situation when a public authorities' decision/ action might not impact upon the human rights of an individual at the time of the decision, but will at a later stage. For example, if the Director of Public Prosecutions (DPP) changed his guidance on assisted dying this would be unlikely to impact upon someone who is able to end their life without assistance. However, it is easy to imagine a circumstance in which someone becomes severely disabled after the DPP issues new guidance. In this situation, if someone was required to lodge a case 'promptly' and within three months of the DPP's decision, then it is probable that they would not be able to bring a case since they would not be a 'victim' at the time of the decision.
Yet, if they were given a longer period to lodge a claim, it is more likely they would be able to vindicate a potential rights violation.

Indeed, it is for this precise reason that the European Court of Human Rights does not impose a three month time-limit to lodge a human rights case, and why many people who fall outside the domestic three-month window find themselves forced to pursue a case at the European level. Equally, it is likely that this problem was at the forefront of Parliament's mind when it drafted the Human Rights Act 1998, and as such explains why a more generous one year time-frame exists when individuals seek a 'civil' claim based on past abuses or breaches of their rights.

[20] *R v Department of Transport, ex parte Presvac Engineering Ltd* [1992] 4 Admin LR 121. This case established the general position that a three month period refers to when the grounds of complaint arose rather than when the claimant first learnt about said grounds. Granted we recognise that there is a developing case law which recognises a time limit distinction between abstract claims and circumstances where the ground to bring the claim first arose when the individual with standing was affected by it. However, this remains a developing body of law and is limited to secondary legislation.

Therefore we believe that the existing timeframe for individuals to lodge a human rights JR does not strike an appropriate balance between enabling time for a claimant to lodge a claim and effective governance. Instead, we urge the Panel to explore expanding the period of time available.

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

The basic rule governing costs for JR, as with most private litigation, is that the unsuccessful party will incur the costs of the other side's representation. In practical terms, this means that anyone hoping to challenge the conduct of a public authority must now be in a position to afford both their own representation – in many cases a challenge in itself – and an additional £40,000+ for the other side's fees. Although we acknowledge that this rule has always been the abiding basis of costs in JR, we believe that its operation has now taken on a new significance following recent changes to legal aid and costs capping orders (previously known as protective costs orders). Indeed in an environment where JR has become increasingly inaccessible for most people, our experience suggests that the 'loser pays' principle, far from being lenient on unsuccessful parties, actually places a prohibitive financial barrier in the way of justice.

In theory, despite the principle of '*loser pays*', JR should remain affordable through three mechanisms: conditional fee agreements, costs capping orders, and legal aid. Regrettably, it is our experience that they are not adequate to guarantee access to JR.

<u>Conditional fee agreements</u>

A conditional fee agreement is a private deal whereby a lawyer will agree to work on a limited costs basis, such as 'no win, low fee'. As a result, conditional fee agreements represent a lifeline for many people by enabling cases to begin, but are wholly inadequate for mitigating the potential costs of losing a case. Put simply, whilst a conditional fee agreement may protect someone against the costs of their own lawyer, it does not protect against the costs of someone else's. Thus, if someone loses a case at permission or after a substantive hearing, the *'loser pays'* principle will still result in a potentially punitive financial burden. An illustrative example of this has been our involvement in assisted dying litigation. In the last two years, we have supported three people in attempting to overturn the UK's ban on assisted dying. In all three cases, the lawyers representing Omid T, Paul Lamb, and Phil Newby agreed to work either on a *pro bono* or on a 'no win, no fee basis'. Nevertheless all three cases were delayed while the would-be litigants struggled to acquire (by a mixture of crowdfunding and support from us) the finances necessary in case they were required to pay the Government's costs. As a result, despite the support of conditional fee agreements, the prospect of paying the Government's costs prevented any litigation on assisted dying between 2015-2017. Thus, several people were forced to wait whilst their health rapidly deteriorated in order to raise sufficient funds to bring a case.

<u>Costs capping orders</u>

The successor to 'protective costs orders' (PCOs), costs capping orders (CCO) are a judicial device that limits or removes the potential liability of a party to JR proceedings to pay the other party's costs. They achieve this by setting a maximum sum that can be awarded in costs against a party. The sums involved are either agreed between the parties, or, failing that, are set by the judge. The criteria upon which judges must now determine whether to grant a CCO are set out in Section 88-90 of the Criminal Justice and Courts Act 2015 (although as an example of codification in action, this statute remains informed by the still-developing case law of PCOs and CCOs). Although CCOs are therefore designed to specifically limit adverse costs, two factors undermine their general ability to protect access to justice for JR.

Firstly, in both common law and statute the abiding principle of CCOs has always been to protect only 'public interest proceedings'. In determining whether a case fits such criteria, courts must now have particular regard to the number of people directly affected if a remedy is provided.[21] Yet, it is unclear why CCOs should be limited in this manner, since it is easy to imagine a situation where only one person is impacted by a decision/action but the impact is severe. Take for example the case of Sarah Ewart, a woman in Northern Ireland who faced the prospect of carrying a foetus to term even though it would not survive outside her womb. Granted, this example relates to the then law of abortion in Northern Ireland, but nevertheless demonstrates how a decision or action which impacts on few people can still have a momentous impact and thus deserve financial support. Secondly, unlike PCOs, CCOs can now be provided only after permission has been granted. This means that claimants must be able to accept the risk of being ordered to pay the defendant's costs up to the permission stage if it is not granted. In our experience, this risk can be a serious deterrent for individuals from low to moderate income backgrounds, and thus cases that may qualify for CCO protection can fail to get off the ground.

Legal aid

The final mechanism by which claimants can hope to mitigate the worst effects of the '*loser pays*' principle is by obtaining state funding to either partially or wholly fund a case through legal aid. In our view, legal aid is an indispensable requirement of genuine access to justice, since it underpins the right of everyone to enjoy the benefit of law regardless of their financial means. This being said, since the introduction of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, the availability of legal aid has been curtailed for large sections of society. Under the Act's new financial eligibility tests, which require someone to have a monthly income below £2,675 and less than £8,000 in savings to be considered for support, legal aid has become entirely inaccessible for those with relatively modest means.[22] With regards to JR, this has meant that between 2013 and 2018 there was a 58% fall in the number of legal aid grants for JR but, importantly, this did not translate into a significant reduction in the total number of cases classified as 'totally without

[21] Section 88(8).
[22] Neasa MacErlean, 'Legal aid: Who qualifies and how much help can you get?', *The Guardian* (2010) accessible at: https://www.theguardian.com/money/2010/sep/25/legal-aid-reforms-public-sector-job-cuts

merit' (which fell during the same period by only 2%).[23] Thus, rather than cutting out weak applications, the impact of reducing legal aid appears to have been to significantly cut the number of cases brought that would be with merit. In other words, the impact has been to price citizens out of our justice system. Compounded with the fact that legal aid is often refused to cases seen as being on the borderline of success, the overall impact of legal aid cuts is likely to have been to insulate the state from legitimate challenges and to enable unlawful exercises of power to go unremedied.[24]

In sum, it is therefore our view that the existing rules on the operation of costs for unsuccessful parties, so far from being too lenient, are actually a punitive deterrent to those with modest means from challenging potential unlawful conduct.

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?

The existing costs of JR can often stretch into six figure sums and create unfair barriers to justice for those with modest means, regardless of the validity of their claim. The principal arguments in support of the existing costs regime are: that unmeritorious JRs are discouraged, earlier settlements are promoted, and ultimately it is fairer for the successful parties to recover the majority of their costs. In our view these arguments are misguided as they conflate the impact of costs with other more effective mechanisms and overlook the critical importance of JR.

With regard to unmeritorious claims, the case in support of the existing costs regime is dubious. Thus, between 2015 and 2019, Government reforms reduced the number of cases lodged for non-criminal and asylum JRs by 10%. Yet as noted above, this did not result in a reduction in cases classified as 'totally without merit' (which fell during the same period by only 2%).[25] This is unsurprising given that the main mechanism designed to filter meritorious and unmeritorious claims for JR is not 'costs' but the process of permission. Indeed, the requirement to obtain permission before a claim can proceed has proven itself to be a sensible and capable sifting procedure, since the fall in cases classified as 'totally without merit' can be directly attributed to the 3% fall in cases failing to gain permission over the same period. Another factor which casts doubt upon the impact of costs on deterring unmeritorious claims, is the provision of legal advice. According to a report from the charity the Legal Action Group, a third of the population will experience a justiciable civil law problem in their life and 46% of those who take legal action will choose to handle their case without any access to legal help. Notably, the most commonly cited

[23] Electronic Immigration Network 'Ministry of Justice publishes long-awaited review into legal aid, proposes no significant changes for immigration', Electronic Immigration Network (2019) accessible at: https://www.ein.org.uk/news/ministry-justice-publishes-long-awaited-review-legal-aid-proposes-no-significant-changes
[24] 'Enforcing human rights', Joint Committee on Human Rights (2018), accessible at: https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/669/66906.htm
[25] 'Civil justice statistics quarterly: January to March 2020', Ministry of Justice (2020) accessible at: https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-january-to-march-2020

reason for not seeking formal advice is its cost and affordability.[26] Yet, in our experience legal advice is often the most effective route through which unmeritorious claims can be prevented. Indeed, it is in both a lawyer's and client's interest not to pursue claims which are without merit, since both carry a reputational risk and financial consequence if permission is refused. Rather than seeking to reduce unmeritorious claims through a system of adverse costs, a more effective and workable solution would be for the Government to expand access to legal advice through mechanisms such as legal aid.

Secondly, regarding incentives, it is our experience that the existing costs regime does not promote early compromise. If anything, it has the opposite effect. Indeed, considering that the overall effect of the Government's financial law reforms has been to raise the significance of losing a case, it is our experience that people are now more willing to appeal an unfavorable judgment, as the risk of adding to the already devastating costs of losing is marginal in comparison to the chance of reversing the original judgment. Put another way, our experience of the costs regime has been to promote an 'in for a penny, in for a pound' mentality.

Finally, whilst it may be true that in a private law context it is fairer for the winning party to recover the majority of their costs, such a mindset in the context of public law is misplaced. Indeed, in stark contrast to private law where a single veritable 'loser' can exist (in the sense that one person's private interest fails to prevail), public law is not a zero sum game. The core notion of *ultra vires* is that JR does not pick a winner or loser (in the sense of reviewing the merits of each case), but instead our courts merely apply the law. Public authorities are only compelled to explain and defend their actions in court when they have arguably exceeded their lawful power. Put another way, even in cases where a public authority is the *prima facie* 'loser', JR is still a net benefit to the State, as it has held a public authority to account, corrected a public wrong, and upheld the rule of law. Viewed from this perspective, the provision of JR is not a drain on the state's expenses, but a legitimate public good.

In view of this, we do not believe that the existing costs of JR are proportionate. In particular, we dispute any suggestion that the existing rules of JR have a soft-touch approach to unmeritorious claims, and would urge the Panel to consider expanding access to legal advice if it wishes to reduce the number of JRs lacking merit. With regards to whether standing should play an important role in the determination of costs, we refer to our answer in question 13, but would add that given the importance of standing as a mechanism of ensuring access to justice, it would be wholly inappropriate to link standing and costs.

Finally, considering that JR has in effect become only a hypothetical remedy for those from modest or low-income backgrounds, as a result of the current costs system, we strongly endorse the recommendations of Sir Rupert Jackson.[27] In particular, we believe a system of qualified one-way

[26] Lucy Logan Green and James Sandbach, 'Justice in free fall: a report on the decline of civil legal aid in England and Wales', Legal Action Group (2016), accessible at: https://www.lag.org.uk/?id=201911
[27] R Jackson, 'Review of Civil Litigation Costs: Final Report' (2009), accessible at: https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf

costs shifting (QOCS) is underpinned by a compelling logic and would substantially reverse the trend of declining access to justice.

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?

In our experience, the existing remedies of JR are unduly restrictive upon the ability to enforce compliance when a public authority or the executive loses a JR. The case of *Fox v Secretary of State for Education* is an instructive example.[28] The central issue of *Fox* was whether the Government had made an error of law by issuing guidance which asserted that teaching the GCSE religious studies (RS) curriculum, which excluded humanism, would meet the statutory requirement for all religious education teaching at key stage 4. In a judgment from Mr Justice Warby, it was held that this assertion was wrong in law, since in schools without a religious character RE must under human rights law be 'objective, critical and pluralistic', and if a syllabus did not cover non-religious worldviews such as humanism it would not meet this requirement.[29] Consequently, the High Court ordered that the Government must withdraw its assertion. Yet critically, when the Government withdrew the assertion in question, it also issued new guidance in which it claimed that the ruling was only on a 'a narrow, technical point' that 'does not affect how schools are teaching religious education'. Specifically it claimed – in direct contradiction of the *Fox* ruling[30] – that 'There is no obligation on any school to cover the teaching of non-religious world views (or any other particular aspect of the RE curriculum) in key stage 4 specifically'.[31] Put simply, this meant that even though the Government blatantly ignored the finding as to the law on RE on which they lost the JR, the narrow remedy provided meant it had theoretically complied with the ruling merely by withdrawing its assertion. Thus, short of bringing an entirely new JR and incurring the associated costs of such an action, the remedy against the Government had proved unable to cure an error of law.

In response to this dilemma, we believe that successful JR litigants should be entitled to challenge the adequacy of the decision maker's compliance with the ruling as a continuation of the existing legal process and to obtain further orders for specific compliance without incurring the financial or administrative burdens of beginning a claim afresh.

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

No response.

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[28] *R (on the application of Fox) v Secretary of State for Education* [2015] EWHC 3404
[29] *Ibid* para 31(2)
[30] *Ibid* para 78; S Juss, 'Commentary on the Department for Education's *Guidance for schools and awarding organisations about the Religious Studies GCSE'* (2016), accessible at: https://humanism.org.uk/wp-content/uploads/2016-05-31-FINAL-Commentary-on-DfE-RE-guidance.pdf
[31] 'Guidance for schools and awarding organisations about the Religious Studies GCSE', Department for Education (2015), accessible at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/488477/RS_guidance.pdf

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 experienced two notable occasions when the respondents to a JR have settled prior to trial and 'at the door'. The first occasion concerned the decision of the Vale of Glamorgan Council to deny the application of a humanist parent to become a full member of the statutory local body responsible for overseeing religious education (the Standing Advisory Council for Religious Education or SACRE), on the basis that humanism is not a religion, and education law referred to religious representatives being appointed as full members. In that case, we and the local parent were granted permission to challenge the Vale of Glamorgan's exclusion of a humanist representative as unlawful discrimination against humanists and failure to treat non-religious beliefs equally to religions in a way that contravened the Human Rights Act 1998 and European Convention on Human Rights. However, prior to substantive arguments, the local council withdrew its challenge, and agreed to review its policy on humanist membership of the SACRE. (Eventually it changed its policy and admitted a humanist representative, but only two years later.[32]) In the second case, the Oxford Diocesan Schools Trust similarly chose to settle a case involving two humanist parents, after permission was obtained to challenge the human rights compatibility of a school's decision to provide no meaningful alternative to collective worship.[33] In this case, Lee and Lizanne Harris withdrew their children from daily acts of Christian worship at Burford Primary School. They then asked the school to provide an alternative assembly of equal educational worth, but were refused and instead saw their children left in a separate room under supervision.

In both these instances, the respondent's decision to wait until the last possible moment before settling was an unnecessary waste of time, energy, and resources. Moreover, since the respondents arguably abandoned proceedings only after it became financially unviable for them to proceed, it is likely that they had hoped we would either fail to obtain permission or a favourable CCO. Indeed, this would align with our wider experiences of public authorities – typically Local Authorities or NHS Trusts – as they often decide to settle once they have recognised that their limited financial funds prevent them from litigating a weak case to a final hearing. This contrasts with our experience of JR against central Government, where the lack of an obvious financial barrier seemingly motivates the Government to continue litigating weak cases in the hope that a claimant will withdraw their claim.

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?

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[32] Humanists UK, 'Humanist representatives will be included on schools' RE body – Welsh council rules' (2018) accessible at: https://humanism.org.uk/2018/11/08/humanist-representatives-will-be-included-on-schools-re-body-welsh-council-rules/

[33] Humanists UK, 'School concedes in collective worship legal case – will provide alternative assemblies' (2019) accessible at: https://humanism.org.uk/2019/11/20/school-concedes-in-collective-worship-legal-case-will-provide-alternative-assemblies/

Given our experience as related in answer to the previous question and although we have no experience of ADR, we should welcome any measure that promoted earlier settlements so as to avoid public authorities tactically delaying a decision to settle until it becomes financially univable for them to continue.

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?

The basic rule of standing for JR is that a claimant must have a 'sufficient interest' in order to bring a case. Typically, this means that cases are generated by individuals directly impacted by the actions or decisions of a public authority. However, it is possible in some cases for standing to be granted to organisations; this is known as public interest standing or associate standing. In our experience, the existing case law on public interest standing provides a practical and limited basis for these rare instances and as such we do not believe that the rules are applied too leniently.

The leading authority on associate or 'public interest' standing is the case of *R v Secretary of State for Foreign and Commonwealth Affairs ex parte World Development Movement*.[34] Importantly, this judgment established that whilst a relatively low bar may exist for individuals to satisfy the 'sufficient interest' requirements of standing, the ability of organisations to do the same is significantly limited and will depend on: the importance of the issue raised by the JR, the likely absence of any other claimant, the nature of the breach of duty (or law), and the expertise of the organisation, such as in giving advice, guidance, or assistance on the specific subject matter. Putting this in context, the case of *Fox v the Secretary of State for Education*[35] is illustrative of how difficult this test is to satisfy in practice. This is because *Fox* concerned our field of expertise and, as such, could have been seen as an archetypical case in which we might have been granted standing to challenge the Government's guidance. Yet, such are the narrow circumstances in which the courts will countenance 'public interest' standing, we were refused permission – meaning that only the individual co-claimants were able to proceed.

At its core, public interest standing exists because our law recognises it is possible for a decision or action to irrationally, illegally, or unfairly impact upon an individual's rights, and that this can happen even if an individual claimant is unavailable to challenge the law. An illustrative example of this is cases related to children's rights, where a young person may not have the maturity or awareness to realise their rights are being breached, much less challenge that breach. For example, Children's Rights Alliance for England (CRAE), of whom we are a member, brought a case seeking guidance on whether the Secretary of State for Justice had an obligation to inform young people who had been subjected to unlawful restraint techniques while detained that they might be entitled to legal redress. Evidently, the children with a sufficient interest in this case would not have been in a position to litigate, as the point of the case was that they did not know they might have a claim. Thus, public interest standing existed to enable CRAE to take the claim on the

[34] *R v Secretary of State for Foreign and Commonwealth Affairs ex parte World Development Movement Ltd* [1995] 1 WLR 386
[35] *Ibid* no. 26

children's behalf.[36] The importance of this point is worth reiterating, especially in relation to the rule of law. This is because, unless an individual or organisation brings a JR, public wrongs are effectively immune from challenge. Courts cannot instigate proceedings against a public authority without a claimant. Thus, if technical rules on standing prevented a case from ever appearing before our courts, actions which were potentially unlawful would become effectively immune from scrutiny. Put another way, in the absence of individual claimants the opportunity for the courts to hold our public authorities to account is seriously restricted; were the test of 'public interest' standing made more demanding, the opportunity would quickly disappear. Indeed, it is for this reason that Sir Stephen Sedley has rightly hailed the 'preparedness of the High Court to consider whether the state has abused its powers at the instance of an applicant who has nothing personally to gain [as] one of the modern cornerstones of the rules of law'.[37]

Overall, in our experience the existing rules on standing are both strenuously enforced and sufficiently crafted to limit cases to appropriate circumstances. Given the supreme importance of unlawful acts and decisions not becoming immune from challenge in all but name, we urge the Panel not to recommend amendment of the existing law on standing, so risking irreparable damage to the rule of law.

For more details, information and evidence, contact Humanists UK:

Richy Thompson
Director of Public Affairs and Policy
[redacted]
humanists.uk

[36] *R (on the application of The Children's Rights Alliance for England) v Secretary of State for Justice and ors* [2013] EWCA Civ 34

[37] Sir Stephen Sed*ley,* 'Sir Stephen Sedley on the Purpose of JudicialReview: Not in the Public Interest', Constitutional Law Association (2014) accessible at: https://ukconstitutionallaw.org/2014/03/03/sir-stephen-sedley-on-the-purpose-of-judicial-review-not-in-the-public-interest/