INDEPENDENT REVIEW OF ADMINISTRATIVE LAW

CALL FOR EVIDENCE

'Does judicial review strike the right balance between enabling citizens to challenge the lawfulness of government action and allowing the executive and local authorities to carry on the business of government?'

RESPONSE FROM FRESHFIELDS BRUCKHAUS DERINGER LLP

STATEMENT OF PRINCIPLES AND INTRODUCTORY COMMENTS

As an international law firm that was founded in London, we are committed to upholding the rule of law in the United Kingdom and throughout the world.

Further, as a responsible business and engaged member of our community we consider a robust standard of judicial review as essential to uphold the rule of law and ensure that businesses and individuals are able to effectively enforce their rights. This is particularly the case in light of the continued expansion in executive power, as demonstrated by the substantial growth in the volume and scope of secondary legislation. We acknowledge that apparently "political" cases may have caused much debate as to the proper ambit of judicial review, but we are concerned to ensure that such debate – which is entirely legitimate – does not erode safeguards that benefit us all and which work well, leading to unintended consequences.

We observe in this regard that judicial review promotes commercial certainty by providing an effective remedy where Government fails properly to engage with stakeholders, follow rigorous decision making processes and abide by good administration. In our experience, it is one of the mechanisms that gives international businesses the confidence to invest in the UK. It would be inappropriate to restrict the scope of such review, particularly in the regulatory context.

To achieve these objectives, it is important that judges are able to apply remedies flexibly, to ensure fair and just outcomes in the diverse range of scenarios where judicial review is sometimes appropriate. Judges are well versed in using the tools available through judicial review prudently and are best placed to determine what type of remedy is most efficient and effective.

Freshfields participated in the Law Society's expert roundtable in advance of the publication on 6 October 2020 of its statement of fundamental principles to guide the Independent Review (available at: https://www.lawsociety.org.uk/en/topics/human-rights/independent-review-of-administrative-law). We fully endorse these fundamental principles and urge the Independent Review to reflect upon them in this exercise.

In preparing tis response to this call for evidence, Freshfields has drawn upon its experience as a leading international law firm, with substantial experience of commercial and regulatory judicial review before the High Court of England and Wales and in specialist tribunals such as the UK Competition Appeal Tribunal in preparing its response to this call for evidence. It also has the most active public interest intervention practice of any City law firm and is therefore able to provide practical insights from this perspective. However, and for the avoidance of doubt, the views provided herein – while informed by our deep experience and expertise – remain entirely those of Freshfields, and not of any of its clients.

SECTION 1

We have no comments on Section 1 of the call for evidence

SECTION 2 – CODIFICATION AND CLARITY

Question 3: Is there a case for statutory intervention in the judicial review process? If so, would statute add certainty and clarity to judicial reviews? To what other ends could statute be used?

We acknowledge that codification can be a helpful way to promote legal certainty, and welcome – for example - the clear elucidation of the procedure for judicial review that is set out in CPR Part 54. However, codification must not arbitrarily limit the scope or powers of judicial review.

Judicial review involves a series of common law concepts, such as '*natural justice*' and '*irrationality*' and, in such circumstances, there is a risk that codification would unintentionally create uncertainty, leading to satellite litigation in relation to the meaning and effect of such terms.

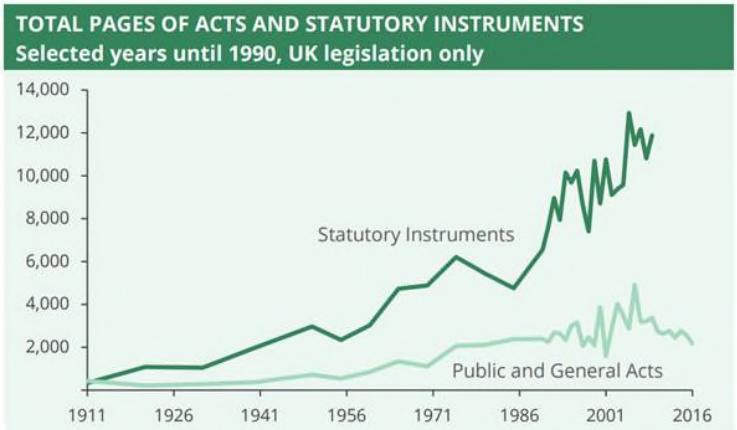
As a more general point, there is an appreciable difference between the way judicial review cases are handled in different courts and tribunals (such as the Competition Appeal Tribunal), applying judicial review principles. It is therefore potentially misleading to refer to the '*judicial review process*' as a unitary concept.

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

To the extent the Panel is concerned that the present ambit of judicial review is overbroad, or unclear, our experience does not bear this out. Rather, we consider that the scope of commercial judicial review (particularly of administrative action) is well-understood by City practitioners. We are comfortable advising our clients on matters concerning the appropriate targets of judicial review action, ripeness and prematurity. Both the publicity that potentially attaches to judicial review challenges and the costs risk of being denied permission militate in favour of careful analysis of the basis on which any claim should be brought.

Judicial review has evolved in tandem with the rapid increase in the use of delegated legislation to make significant legal changes to our society, and in the absence of adequate parliamentary scrutiny of that delegated legislation. In support of this, see Image 1 below demonstrating the growth in the total number of pages of Statutory Instruments. From this perspective, the development of judicial review can be seen not as indicating a growth of judicial power, but rather as a reaction or counterbalance to a growth in executive power.

Image 1: Total Pages of Acts and Statutory Instruments[1]



Source: Annual volumes of Acts and SIs published by The Stationary Office.

The beneficial consequences of the UK's robust standard and broad scope of judicial review are felt more widely than in just the cases which come before the courts, and which may therefore appear in the public eye. The growing amount of legislation has led to an increase in the number of and extent to which commercial activities are in some way regulated by government or government functions. Where regulators continue to seek to stretch their jurisdiction in order to develop and enforce policy through regulation, the availability of judicial review is extremely valuable to a regulated business. The threat of judicial review actively encourages government functions to engage effectively with stakeholders, follow rigorous decision making processes and abide by good administration – all of which in turn promotes commercial certainty and drives investment in the UK.

It is crucial that secondary legislation remains subject to judicial review in full. The need for judicial review is heightened by the role that statutory instruments, promulgated through the use of broad discretionary powers, play in the UK's exit from the European Union. To put this into context, the government estimated that between 800 and 1,000 statutory instruments would be needed to correct domestic law as we leave the EU. The government itself has acknowledged that this will 'be a substantial challenge for both Government and Parliament in complexity and planning'.[2] Given the ambit of the forthcoming legal challenges, which will affect every area of Government policy, and every sector of the UK economy, we consider that it is appropriate that adequate safeguards remain in the form of judicial review.

Limiting the scope of judicial review could lead to a significant reduction in the number of remedies available to businesses and individuals to enforce their rights. For example, we

[1] Acts and Statutory Instruments: the volume of UK legislation 1850 to 2019, 17 June 2019, page 19. See: https://commonslibrary.parliament.uk/research-briefings/cbp-7438/. Accessed: 2 October 2020.

[2] Legislating for the United Kingdom's withdrawal from the European Union, presented to Parliament by the Secretary of State for Exiting the European Union, paragraph 3.19, March 2017. See: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604516/Great_repeal_bill_white_paper_accessible.pdf. Accessed: 2 October 2020.

are aware of discussion in relation to removing judicial review from procurement bid challenges as well as removing the right to damages for breach of procurement law – this would significantly water down the available remedies as well as potentially prejudice transparency in holding the bodies exercising public power and spending the public's money to account.

Question 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?

We consider that the process of making judicial review claims and appeals (if necessary) is well-understood by practitioners. The now long-established CPR Part 54 reforms provided welcome modernisation of the previous RSC Order 53 process and, in our view, remain fit for purpose.

SECTION 3 – PROCESS AND PROCEDURE

Question 6: Do you think the current Judicial Review procedure strikes the right balance between enabling time for a claimant to lodge a claim, and ensuring effective government and good administration without too many delays?

In our experience, the current time limits strike an appropriate balance. Applications for judicial review are subject to strict time limits and the courts have wide powers for dealing with unmeritorious claims. There is scope for arguing that a fixed time limit of three months in those cases where it is currently '*promptly; and in any event not later than 3 months*' would bring greater clarity for claimants, particularly those who are not legally represented. This is especially so given the requirement for a claimant to 'front-load' a claim for judicial review by providing their full case and supporting evidence at the outset. Further, we think that there are arguments – consistent with the overriding objective – in favour of allowing claimants to have more time to initiate their claim where genuine efforts have been made to resolve matters with the relevant decision-maker before commencing proceedings, Nevertheless, overall we do not consider the current position on timing has been problematic.

Question 7: Are the rules regarding costs in judicial reviews too lenient on unsuccessful parties or applied too leniently in the courts?

We are not aware of any evidence showing that the rules regarding costs in judicial review are too lenient, or are applied too leniently by the courts in respect of unsuccessful parties. Indeed, we note in the regulatory context, that the Court of Appeal has now indicated that public authorities may to some extent be insulated from the application of the usual costs rules (see *BT v Ofcom* [2018] EWCA Civ 2542 and *CMA v Flynn Pharma Ltd* [2020] EWCA Civ 617). Accordingly, we consider it would be unjust to further tip the balance in favour of public authorities and against private claimants. We consider that it is incumbent upon public authorities to carefully consider whether it is appropriate to spend public money on contesting proceedings that might be resolved through other means, and that the costs regime can be used to support this objective. For example, the greater use of

interlocutory costs orders (eg where a public authority has contested permission at a hearing) may incentivise more prompt resolution of matters.

From the perspective of our pro bono practice, we note that adverse costs risk already plays a significant role in discouraging:

- meritorious claims, despite the potential availability of cost-capping orders; and
- (following the introduction of section 87 of the Criminal Justice and Courts Act 2015) potential third party interventions which could otherwise have provided important assistance to the court.

Question 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?

In respect of costs, please see our response to question 7, above.

The test for standing in judicial review should not be further restricted. Courts are already able to exercise control over standing to minimise the duplication of hearings and to manage vexatious claims.

Question 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 view, it is appropriate for judges to maintain access to the remedies currently available under judicial review. Judicial review remedies are discretionary, so the court already has considerable flexibility to ensure remedies are appropriate to the circumstances of the case.

We often find that mandatory orders are a useful remedy. Where a judge finds that the court has sufficient information before it to make a mandatory order, this is often more efficient – and achieves finality and legal certainty more promptly – than returning the decision to a tribunal to re-consider the same information and repeat the primary decision-making process.

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

The need for judicial review can be minimised by public bodies taking decisions with adequate consultation, effectively engaging with stakeholders and using and publishing robust cost / benefit analyses.

For many of our pro bono clients, adequate funding for the resources intended to support and advise individuals of their rights in relation to decisions by government bodies would reduce the need to rely on remedies available through judicial review.

Question 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 do have experience of settlement shortly before, and during, trial. In judicial reviews brought by our commercial clients, there is often no particular reason why it should not be capable of settlement in the ordinary way and with similar frequency as in commercial cases: this follows from the fact that our commercial clients will likely be seeking the reversal of, or amendment to, a particular decision which, if agreed with the relevant public authority, will obviate the need for proceedings (and their attendant cost). This is particularly the case where judicial review proceedings have been brought in conjunction with other claims. The basis on which a settlement is reached in a given case is confidential, however it is evident in our experience that two factors will tend to lead to settlement dialogue: (a) the elucidation of the legal position as a result of the process of the preparation of pleadings; and (b) evidence-gathering and analysis conducted pursuant to the Government's duty of candour.

As to the former, our experience suggests that the adversarial process of judicial review can effectively support settlements being reached, provided that Government entertains dialogue in parallel to the judicial review process. As to the latter, this underlines the importance of the duty of candour, which we consider must be fully retained and the importance of which we emphasise.

For our pro bono clients, settlement generally offers a speedy and effective resolution of their case and usually represents a good outcome for both the claimant and the public body.

That said, there are of course some cases in which a public hearing and judgment are important, for the parties and for society more broadly.

Question 12: Do you think that there should be more of a role for Alternative Dispute Resolution (ADR) in Judicial Review proceedings? If so, what type of ADR would be best to be used?

ADR already plays an important role in judicial review: judicial review is a remedy of last resort, so potential claimants have to first pursue complaints, internal reviews and statutory appeal. The pre-action protocol for judicial review requires early dialogue between the parties, and requires parties to set out and respond to proposals for ADR (with potential cost consequences if they unreasonably refuse).

There may be scope for further encouragement of ADR in judicial review proceedings. In particular, where this achieves an outcome desired by the claimant such as reconsideration of a decision. We consider that – given the non-pecuniary nature of the relief that is usually sought in judicial review and the public policy/interest factors that Government will necessarily be weighing up – that mediation would likely be the most appropriate form of ADR, by providing an opportunity for structured dialogue between the parties. We consider that where such an option is pursued, the court should be encouraged to exercise its discretion to extend time for a claim to be brought so that a claimant is not unduly prejudiced by seeking to explore a consensual solution. Further, the interests of unrepresented claimants, and their ability to access representation for mediation – or any other form of ADR – would have to be addressed.

Question 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?

We would not support stricter rules on standing being introduced. The courts have adequate powers to manage standing, and we are not aware of any evidence that the existing rules are being applied unduly leniently by the courts.

In the vast majority of cases, standing is straightforwardly established, particularly in the context of regulatory decisions, where the addressee(s) of such decisions will self-evidently have standing. Further, it is important that trade associations and member organisations continue to be able to bring judicial review proceedings on a representative basis in respect of challenges to measures of general application, where an individual directly affected claimant may for legitimate commercial reasons (costs, concerns about the potential impact on government relations) be unable or unwilling to initiate proceedings on its own account.

To the extent that the Panel has any concerns regarding the court's approach to admitting third-party interveners, we observe that this is strictly not a matter of standing. The court has the discretion under CPR 54.17 to permit any person to file evidence or make representations: our experience (particularly in the pro bono context) is that the court carefully assesses such applications in determining whether it would be assisted by such interventions, and deploys appropriate methods (for example imposing limitations on the length of written and/oral submissions) to regulate them. We noted in response to question 7 above that costs risk now also plays a substantial role in discouraging third party interventions.

26 October 2020

Freshfields Bruckhaus Deringer LLP