Independent Review of Administrative Law

Response of Garden Court Chambers to the 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?

1. Public law challenges arise in nearly all of Chambers' specialist areas. Our core strength is the multi-disciplinary expertise we can offer at all levels of seniority. We pursue bold and innovative points of law to secure the best possible outcome for our clients.

2. Our public law barristers write leading texts on judicial review and regularly train others on how to pursue judicial reviews.

3. Garden Court Chambers won the Chambers & Partners Human Rights and Public Law Set of the Year 2016. We were shortlisted for Public Law Set of the Year by the Legal 500 Awards 2017. Stephanie Harrison QC was shortlisted for Public Law Silk of the Year 2017 by the Legal 500 Awards and shortlisted for Human Rights and Public Law Silk of the Year at the Chambers Bar Awards 2019.

4. The Independent Review of Administrative Law (IRAL) panel has invited the submission of evidence on how well or effectively judicial review balances the legitimate interest in citizens being able to challenge the lawfulness of executive action with the role of the executive in carrying on the business of government, both locally and centrally.

5. We note that the panel is particularly interested in any notable trends in judicial review over the last thirty to forty years and in understanding whether the balance struck is the same now as it

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was before, and whether it should be struck differently going forward. The panel has also stated that it is interested in receiving evidence around how judicial review works in practice and the impact and effectiveness of judicial rulings in resolving the issues raised by judicial review.

6. Garden Court Chambers has a long-standing reputation for taking on public law challenges against all public authorities including government departments, local councils, courts, the police, the Home Office and prisons. Our areas of expertise include: challenges to government policy and secondary legislation; constitutional challenges to all the key departments of state; challenging cuts to public services; access to justice; deaths for which the state could be responsible; public inquiries; human rights and international humanitarian law; false imprisonment, administrative detention and prisoners' rights; national security and counter-terror measures; social welfare and health; criminal justice and discrimination.

7. As a set that almost exclusively represents claimants and interveners who are either individuals or non-governmental organisations, our public law barristers take the lead on bringing significant and important legal issues to the attention of the Court for their scrutiny arising from new primary or secondary legislation and/or the implementation of national or local government policy. As can be seen from the challenges brought by the Garden Court public law team, we not only represent the rights of individual claimants, but also have a wider lasting and beneficial impact across the categories of often marginalised groups.

8. It is important for the Panel to be aware of the breadth of cases which properly come within the scope of judicial review which, as a remedy of last resort, can only properly arise where there is no alternative remedy available. In certain spheres of law, this arises where statutory rights of appeal do not exist, or have been removed where they previously existed; for example for lawful migrants refused extensions of their leave to remain or whose leave has been curtailed.[1]

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[1] For example, see *R (Ahsan) v SSHD* [2017] EWCA Civ 2009, [2018] HRLR 5 https://www.bailii.org/ew/cases/EWCA/Civ/2017/2009.html a landmark judgment on the requirements of procedural fairness and the need for an in-country appeal in "TOEIC" cases, both under Article 8 and at common law. *Ahsan* related to pre-Immigration Act 2014 cases, where a decision to remove a lawful migrant from the UK under section 10 of the Immigration and Asylum Act 1999 was appealable, but if no human rights claim had been made the appeal could not be brought in-country. Today there is no right of appeal against such decisions at all unless a human rights claim has been made and refused. See also *R (Balajigari) v SSHD* [2019] EWCA Civ 673, [2019] 1 WLR 4647 https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Civ/2019/673.html a landmark judgment about decisions to refuse Indefinite Leave to Remain based on discrepancies between income figures declared to HMRC and to the Home Office. Its wider importance lies in what it says about the

9. Moreover where primary legislation is implemented through policy there is clear and proper scope for that to be interpreted by the Courts, to scrutinise the exercise of discretion that necessarily exists within policy frameworks to avoid inconsistent decision-making and to ensure that the policy is consistent and compatible with the intention of Parliament and with constitutional rights. A principle of good administration is to have less extra-statutory concession and policy and more legal certainty by those who make and apply the law.

10. Many of the important public law cases in which Garden Court has been involved concern foreign nationals and have an immigration or asylum context but they are important public law cases. See for example *R v SSHD ex parte Khawaja* [1984] AC 74 (Court's precedent fact jurisdiction in judicial review of the detention of illegal entrants); *Bugdaycay* HL [1987] AC 514 (removal of asylum seekers and Court obligation to apply 'anxious scrutiny' in such human rights cases); *A v SSHD* [2004] UKHL 56, [2005] 2 AC 68 (compatibility with article 5 ECHR of indefinite detention of foreign nationals); *A (No 2) v SSHD* [2005] UKHL 71, [2006] 2 AC 221: (use of torture evidence in SIAC proceeding); *B (Algeria) v SSHD* [2018] UKSC 5, [2018] AC 41 (the power to impose bail when no lawful power to detain); *DN (Rwanda)* [2020] UKSC 7, (effect of an ultra vires order on legality of detention), *Hemmati* [2019] UKSC 56, [2019] 3 WLR 1156 (in which the Supreme Court found that Dublin returnees had been detained in breach of EU law). In that context it is important to bear in mind the comments of Lord Bingham (then the senior Law Lord) in the seminal case of *Huang* v SSHD in 2007 [§17] as to the evolution of law and policy in that context, discrete from other contexts:

"Domestic housing policy has been a continuing subject of discussion and debate in Parliament over very many years, with the competing interests of landlords and tenants fully represented, as also the public interest in securing accommodation for the indigent, averting homelessness and making the best use of finite public resources. The outcome, changed from time to time, may truly be said to represent a considered democratic compromise. This cannot be said in the same way of the Immigration Rules and supplementary instructions, which are not the product

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requirements of procedural fairness and the need for a "minded to refuse" procedure and the impact on this cohort and their dependents otherwise lawfully present in the UK. See now also the judgment of the Supreme Court in *Pathan v SSHD* [2020] UKSC 41 on the importance of procedural fairness and the Court's concern not to overstep the territory of substantive unfairness.

of active debate in Parliament, where non-nationals seeking leave to enter or remain are not in any event represented".

8. However, the work undertaken in these chambers demonstrates the importance and value of the remedy on the current test and the law and procedure as it stands: A number of other cases, across different practice areas, demonstrate the value of judicial review as a safeguard for the vulnerable. In *R (EG) v Parole Board for England and Wales* [2020] EWHC 1457 (Admin[2]) May J concluded that a vulnerable prisoner with learning difficulties, who lacked litigation capacity, had not had a speedy review of his detention as required by Article 5 ECHR, and that - contrary to the previous understanding of the Parole Board and practitioners - the Parole Board's rules did allow for the appointment of a litigation friend for a prisoner where one was required. This was an important advance in the protection of incapacitous prisoners, who are by definition vulnerable and less able to advocate for themselves than other prisoners. *In R (M) v London Borough of Newham* [2020] EWHC 327 (Admin) Linden J granted a mandatory order to the father of a seriously disabled child requiring the local authority to provide suitable accommodation[3].

9. Judicial review continues to be a vital safeguard for procedural fairness for people from all walks of life - from EG above, to *R (Sargeant) v First Minister of Wale*s [2019] EWHC 739 (Admin)[4] where, on a challenge brought by the widow of the deceased Welsh politician Carl Sargeant, four aspects of the protocol governing the non-statutory public inquiry into Mr Sargeant's death were quashed because they had frustrated a legitimate expectation that the inquiry would be wholly independent from the then First Minister, Carwyn Jones AM. Judicial review also safeguards fundamental liberties such as religious freedom, as it did in *R (Hussein) v Secretary of State for the Home Department* [2020] EWHC 1457 (Admin) where Holman J found a breach of Article 9 in relation to the night state lock-in at Brook House immigration removal centre, due to the conditions in which Muslim detainees had to pray[5].

10. The Supreme Court has endorsed the approach that individual's fundamental rights are engaged, the standard of review is more flexible than the traditional *Wednesbury* standard. What is required is a careful

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[2] R (EG) v Parole Board for England and Wales https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Admin/2020/1457.html
[3] R (M) v London Borough of Newham https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Admin/2020/327.html
[4] R (Sargeant) v First Minister of Wales https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Admin/2019/739.html

[5] R (Hussein) v SSHD https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Admin/2018/213.html

and 'anxious' scrutiny of the foundations of the decision under challenge in the light of its fundamental importance and impact on A. In *Pham v Secretary of State for the Home Department* [2015] UKSC 19; [2015] WLR 1591. Lord Mance, summarizing the Court's approach in *Kennedy v Charity Commission* [2014] UKSC 20, noted the court's conclusion in that case that: *'The common law no longer insists on the uniform application of the rigid test of irrationality once thought applicable under the so-called Wednesbury principle … The nature of judicial review in every case depends on the context. [94]* He went on to emphasise (at [95] to [97]), the contextual nature of rationality-based review as a flexible tool rather than a rigid principle. Lord Sumption effectively endorsed that view, but, importantly, (reviewing at [107] the difference between EU and common law approaches to proportionality), pointed out that it was '*for the court to assess how broad the range of rational decisions is in the circumstances of any given case* depending on the context of the decision. He concluded, reviewing approaches taken in pre- and post Human Rights Act cases, and quoting *Kennedy* that *'the common law no longer insists on a single, uniform standard of rationality review based on the virtually unattainable test stated in* Wednesbury*'* (at [108]). Lord Reed (at [112] to [119]) took a similar view, pointing out that in a deprivation case (such as *Pham)* it may even be correct to say that the exercise of deprivation powers should be justified as necessary to achieve the legitimate aim pursued [120].

11. Whilst some of these cases arise out of our Human Rights Act 1998 obligations, the Court has emphasised common law procedural fairness in *Pathan v SSHD* [2020] UKSC 41 and the common law constitutional right of access to justice in *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409 concerned with the imposition of fees for bringing employment tribunal claims. See also the very recent decision in *Medical Justice v SSHD* [2020] EWCA Civ 1338. The Court in *UNISON* observed in interpreting the law that "[r]elationships between employers and employees are generally characterised by an imbalance of economic power. Recognising the vulnerability of employees to exploitation, discrimination, and other undesirable practices, and the social problems which can result, Parliament has long intervened in those relationships so as to confer statutory rights on employees, rather than leaving their rights to be determined by freedom of contract… In order for the rights conferred on employees to be effective, and to achieve the social benefits which Parliament intended, they must be enforceable in practice."

12. It is of vital importance that these powers are not further curtailed, to ensure that the rights of those most vulnerable are protected. Our constitution depends on the courts' scrutiny of Parliamentary provisions in both primary and secondary legislation and whether the implementation is consistent with the intentions of Parliament.

13. Finally to avoid repetition we agree with the submissions of the Public Law Project ("PLP") and the Administrative Law Bar Association ("ALBA") and gratefully adopt their submissions

and recommendations. We also commend the submissions of Liberty and JUSTICE to the Panel.

Concerns about the Scope and Nature of the Review Process

12. We are concerned that the task of the Review Panel is ill-defined and that the time given to the panel for completion of the review is wholly inadequate. The Terms of Reference are wide-ranging and include an extraordinarily broad range of both procedural and substantive matters and the panel have been given just 6 months to produce a report. We are also concerned that in a review of Judicial Review that necessarily will affect potential Claimants and their representatives as well as Defendant public bodies, a questionnaire has been sent solely to the latter. The nature of some of the questions can also be seen as 'leading' and inviting negative comments on the current operation of Judicial Review, whereas when properly considered Judicial Review can be seen as increasing the quality of administrative decision making.

13. We are also concerned that what is arguably the primary function of Judicial Review, the constitutional protection of Parliamentary sovereignty, is not mentioned in the terms of reference, nor is there any mention of the relationship between judicial review and human rights and in particular the intersection of judicial review with the Human Rights Act 1998.

14. We also note and draw attention to the fact that there is no acknowledgment in the questionnaire that Judicial Review encourages and hones good decision making and improves the standard of administration by ensuring that decision makers are both procedurally and substantively accountable. For example, a good decision is one where all relevant factors are taken into account and irrelevant factors are left out of account and where there are no material errors of fact and law. The concept of the 'Judge over the shoulder' of a decision maker is a boon to good administration.

15. The premise of the review seems to be that there is a tension between on the one hand an individual's ability to challenge government decisions and 'effective and efficient' government. We consider this to be a false dichotomy. The existence and operation of judicial review in its current form promotes good governance and administration.

Question 1

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

16. The principles of judicial review are a product of the common law and have been developed over centuries. The Terms of Reference refer to an arguable 'blurring' of the distinction between the scope of a power and the manner in which that power is exercised within that permitted scope 'over the course of the last 40 years…'[6]. As a product of the common law Judicial Review has proved flexible and responsive enough to adapt to changes in both the legal landscape and to the economy and society generally. The principles of Judicial Review are sufficiently well-established that there cannot be any real doubt as to their content but are adaptable enough to respond to a rapidly changing landscape.

17. The changing scope of judicial review over time has to been seen in the context of the change in the role of government generally, the increase in the use of secondary legislation and other developments in governance but it is important to remember that the development is not solely a modern phenomenon[7].

18. Judicial Review principles are sufficiently recognisable to have been used as a term of art by Parliament in statutory provisions; e.g. section 194(2) of the Digital Economy Act 2017: 'The Tribunal must decide the appeal…by applying the same principles as would be applied by a court on an application for judicial review…' and section 179(4) of the Enterprise Act 2002; '… the Competition Appeal Tribunal shall apply the same principles as would be applied by a court on an application for judicial review.'

19. Any codification necessarily risks reducing that flexibility and would be likely to generate litigation about the precise meaning of the statutory definitions employed. It would fall to the Courts to interpret those definition and would be likely to lead to significant new litigation. If an attempt was made to codify all generally applicable judicial review principles the statute would become wholly unwieldy and all but incomprehensible. On the other hand, if an attempt is made to produce a simplified code of judicial review principles, it is inescapable that there would be gaps that would have to be filled by interpretation by the courts. It is difficult to see what would be achieved in those circumstances.

20. There would be no benefit in codification of the kind envisaged.

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[6] Seemingly a reference to *Anisminic Ltd. V Foreign Compensation Commission* [1969] 2 AC 147 where a 'single category of error of law' was established.

[7] See for example *R v Speyer* [1916] 1 KB 595 (DC) concerning the justiciability of the royal prerogative.

Questions 2 and 3

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.

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.

21. As the principles of Judicial Review have evolved the courts have developed effective rules that establish what types of decision can be challenged, in respect of when a decision making body is susceptible to judicial review (i.e. when it can be said to that the decision has a sufficient public element to be amenable to judicial review) and if so, what decisions of that body are justiciable.

22. The Courts already tread carefully in this area and it is a matter of high principle that certain matters are simply not justiciable, e.g. the appointment of ministers, the making of treaties, the 'defence of the realm', the grant of honours etc. If, as seems likely, the interest in reform in this area has been solidified by the outcome of *R (Miller) v The Prime Minister* [2019] UKSC 31 [2020] AC 373, in that case the Supreme Court simply clarified that questions of the legal limits of the exercise of the prerogative were justiciable. It is difficult to see how any sensible reform in a mature democracy would interfere with this principle.

23. The principles are clear but the application of those principles in an individual case requires careful analysis, a function that the Courts have exercised carefully as the principles have developed. The courts have been anxious not to overstep their constitutional role. As a general matter the Courts will not review Parliamentary proceedings (see Miller [§70]) and will not consider matters that are properly within the province of foreign policy and diplomacy (e.g. *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598.

24. As mentioned above, the principles of judicial review have evolved as part of the common law and questions of justiciability often turn on a careful analysis of the source of a particular power and how that power is being exercised. Context is everything. An attempt to codify or place statutory limitations on justiciability are likely (i) not to achieve the stated purpose and (ii) to result in the Courts having to interpret those provisions in line with the common law principles in any event.

Question 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;

(c) on possible amendments to the law of standing;

(d) on time limits for bringing claims,

(e) on the principles on which relief is granted in claims for judicial review,

(f) on rights of appeal, including on the issue of permission to bring JR proceedings and;

(g) on costs and interveners.

25. There are sufficient safeguards already built into the Judicial Review process that militate against delay and excessive cost. Compared to other forms of litigation Judicial Review is speedy (the claim must be brought within 3 months), there is a filter at the permission stage which reduces the work that public bodies have to spend on unmeritorious claims and there are various mechanisms open to the Courts, for example costs capping, that can ensure that disproportionate costs are not incurred. In addition, disclosure obligations are not regimented and in practice a public body is left to consider what the duty of candour requires it to disclose to the claimant. Compared to disclosure obligations in civil litigation, the duty is modest.

26. It may not be what the framers of these questions had in mind, but it is clear that the restrictions on legal aid brought in by the Civil Legal Aid (Remuneration) (Amendment)

Regulations 2017 that provide that lawyers undertaking publicly funded judicial review work will not be paid unless the court gives permission to bring the claim (or in certain other, limited circumstances) have had a disproportionate effect on the access to justice of vulnerable claimants.

27. Assessing whether a particular claim will be granted permission is a difficult task, particularly when disclosure or other developments can materially affect that assessment after a claim has been lodged. In a Judicial Review claim, a significant amount of the work is front-loaded because the grounds for review and the statement of facts relied upon have to be sufficiently compelling to persuade a Judge to grant permission and sufficiently comprehensive to obviate the need for a future application to amend the grounds. The current payment regime puts legal aid lawyers who conduct this type of work and who are already operating on tight margins in an invidious position

28. A further barrier is the fact that the Courts do not generally consider a delay in obtaining public funding as a good reason for any delay in bringing a claim for judicial review[8] and impecunious claimants often have to find a lawyer who is willing to work, at least initially, for free to get their claim off the ground.

29. The majority of claims for Judicial Review arise in the immigration context. This is due, at least in part, to the removal from the scope of the statutory appeal scheme of a large number of immigration decisions, thus removing an alternative remedy and forcing Applicants to seek judicial review of decisions that they consider to be unlawful.

30. In the field of immigration most cases that are granted permission by the Administrative Court or the Immigration and Asylum Chamber of the First-tier Tribunal are subsequently settled by the Secretary of State for the Home Department, seemingly because at that stage a full review of the claim is made. Were the decision making process of a better quality and more robust from the outset, many of those ultimately successful claims might be avoided, particularly with proper engagement at the pre-action protocol letter stage. That would go a long way to streamline the process.

31. Judicial Review is an inherently flexible process, particularly when set in the context of other mechanisms for challenging the legality of decisions. The fact that a Claimant has to obtain

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[8] See in an analogous context *R (Kigen) v SSHD* [2017] EWCA Civ 1286, [2016] 1 WLR 723 https://www.bailii.org/ew/cases/EWCA/Civ/2015/1286.html

the permission of the Court before bringing a claim for Judicial Review and a Defendant has an opportunity to make submissions prior to that permission being granted are important safeguards that act as a 'gatekeeper' and prevents unmeritorious or otherwise inappropriate claims from proceeding.

32. The fact that a claim has to be brought 'promptly' and in any event no later than 3 months[9] after the decision that is challenged (compared to 6 years in most civil litigation) also protects decision makers. There is statutory protection for decision makers in the form of section 31(2A) of the Senior Courts Act 1981 which provides that even where a Claimant can show that a decision is unlawful, if it is likely that the outcome would not have been substantially different if the conduct complained of had not taken place, the claim must be refused. Further, Judicial Review is a remedy of last resort; where a Claimant has the option of an alternative remedy, they will not normally be permitted to bring a claim for judicial review.

Interveners and Standing

33. The current test for whether a person or organisation has standing to bring a judicial review claim is set out within section 31 of the Senior Courts Act 1981 and requires a 'sufficient interest in the matter to which the application relates'. We consider that this test is appropriate and has been interpreted appropriately by the Courts. If those who can show that they have 'sufficient interest' are prevented from bringing a claim it is axiomatic that unlawful decisions would go unchallenged.

34. Equally, the Courts take a sensible view of who has sufficient interest and standing to intervene in judicial review claims and such interventions are overwhelmingly made where there is a point of general importance at stake in the claim. Our experience is that interveners assist the Court by bringing expertise and often additional evidence to the proceedings in cases where there is a public interest in all issues being ventilated.

Time Limits

[9] Even shorter timescales apply to some claims for Judicial Review; see for example claims under the Planning Acts and in 'Cart' judicial reviews.

35. As we set out above, compared to all other forms of civil litigation, the time limits for bringing a claim in judicial review are very short indeed, so we can see no warrant for reducing them further. Indeed, there is a strong case for reform that extends time in certain cases.

Principles of Relief

36. There is a large degree of flexibility in the types of relief that can be granted following a successful claim for Judicial Review and all remedies are inherently discretionary. As we mention above, the court must decline to grant relief if the outcome would not have been substantially different had the decision challenged not been made[10] and the Court has a wide discretion to decline to grant relief in a host of other circumstances. It is difficult to see any need for reform in those circumstances.

Appeals

37. The ability to seek the permission of the Court of Appeal to appeal decisions to refuse claims for judicial review both after a substantive hearing of the claim and if permission is refused is an important safeguard. The time limit for appealing a decision to refuse permission is only 7 days in most cases and given the constitutional importance of judicial review cases and that permission to appeal has to be sought and granted in all cases, any removal of appeal rights would be impossible to justify.

CONCLUSION

38. Judicial review is a vital constitutional safeguard providing a mechanism for redress for those affected by poor decision-making and is a check on the exercise of executive power. Its operation is fundamental to the rule of law. Executive decisions must be open to review by the courts to ensure those in power have acted lawfully, rationally and proportionately. There is nothing within the concept of judicial review that properly prevents the executive and local authorities to carry on the business of government.

[10] Senior Courts Act 1981 s31(2A).