Independent Review of Administrative Law Secretariat

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? (the "Consultation").

26 October 2020

Response from CMS Cameron McKenna Nabarro Olswang LLP ("CMS")

Response

Consultation Questions 1 and 2:

We have no comment on questions 1-2.

Consultation 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?"

Answer:

We think there is a case for statutory intervention in relation to the substantive law concerning judicial review. Currently across the field, there remains enormous uncertainty in relation to both even the essential principles of judicial review and the application of those principles in specific cases. For example, in terms of substantive challenge at common law the position broadly remains that the basis for challenge is *Wednesbury* unreasonableness, but this is explicitly stated to be a flexible test. The introduction of the proportionality test from European Convention and Union law offered some prospect of a somewhat clearer picture but in due course, this test has been applied with great variability (the elision of the test with "manifest error" when that occurs essentially resets it to *Wednesbury*). Equally, it appears difficult to discern clear and consistent authority in relation to the award of damages for Convention breaches on the basis of "just satisfaction".

This flexibility may suit judges trying to bring justice to specific cases, but it comes at the cost of great uncertainty to litigants and with uncertainty comes cost. And the feeling can arise, that the outcome of a case can depend overly on the disposition of the individual judge or judges hearing it.

We do not doubt the Herculean task in trying to codify the principles of judicial review and it may ultimately be that there are as many disadvantages as advantages in doing so. But what we do not think can be sensibly said it that the current regime for judicial review is incapable of material improvement. We are also doubtful that meaningful improvement, at least in terms of the clarity and consistency of the law can be achieved by the courts alone.

Consultation 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?"

Answer: In many cases it will be clear whether a specific decision or exercise of power is subject to judicial review. However, there are several contexts where the position is much greyer, and where greater clarity would assist. There are also instances where dual routes of challenge exist, creating uncertainty,

inefficiencies and increased costs. A clearer single route of challenge, or at least extension to the timetable for any judicial review, would be welcome. We address some specific examples below.

It is trite law that in order for a decision to be subject to judicial review, the function being exercised (leading to the decision) must be a public function. In many cases, the distinction between the exercise of public and private law functions is straightforward. However, this is not always the case. The issue has been debated and tested in numerous cases, with the applicable principles to be derived from case law not always easily identified. Understandably, parties in receipt of an unfavourable decision will be looking to test the boundaries of the scope of decisions amenable to challenge, which can lead to great cost, time delay and uncertainty prior to any decision on permission. The ambiguity in this area has also led, in our experience, to challenges being brought in circumstances where it is patently clear that the decision is not amenable to judicial review, but the applicant has sought to bring the challenge to exert pressure in a wider commercial context. As a result, greater clarity on the precise scope of public law (as opposed to private law) functions would be welcome.

It is also trite law that judicial review is only potentially available where there is no adequate alternative remedy. Ordinarily, this requires potential applicants to have exhausted all applicable routes of appeal. Again, in most cases this will not give rise to any real issue. However, there are a number of contexts where the appropriate routes of challenge are less clear, where dual routes exist and where, in light of the strict time limits for judicial review, applicants are effectively required to pursue alternative routes simultaneously in order to protect their positions. Whilst good for the lawyers, this is far from satisfactory for applicants, forced to incur significant costs which may ultimately be entirely wasted, as well as taking up court resource and causing delay.

One example of this challenge faced by potential applicants is where the decision is governed by the Public Contracts Regulations 2015 ("**PCRs**"). Applicants can find themselves having to go through a convoluted process of filing dual claims under the PCRs and for judicial review, with both claims potentially (but not necessarily) being heard and case managed together. Having a single route of challenge that would allow for arguments under the PCRs and public law grounds to be considered together would be a welcome improvement.

Another example comes from the tax arena, where a party who wishes to challenge a decision of HMRC on the basis of both substantive and public law grounds may be faced with the prospect of appealing a decision to the First-tier Tribunal, and at the same time having to file an application for judicial review. Given that parties are unable to agree to extend the time limit for issuing any application for judicial review, the only risk-free option is to file the application for judicial review "*promptly and in any event not later than 3 months after the ground to make the claim first arose*". Convention is then either to proceed with the judicial review claim in parallel to the tribunal proceedings or for the court to stay the judicial review proceedings (either before or after the permission stage) pending the outcome of the tribunal proceedings. At the very least, this is a waste of time, effort and resources on the part of the parties and the court, particularly given that the applicant has to do most of the work (and incur most of its costs) in preparing an application for judicial review to be issued. There are a number of ways of potentially addressing this, including providing one route of challenge for both substantive and public law grounds, or introducing a process for potentially extending the deadline to issue an application for judicial review or, at least, to allow a judicial review claim form to be lodged to protect against any limitation period for bringing the judicial review claim, without having to undertake the full scope of work (including filing witness evidence, grounds, exhibits etc) to commence such a claim. So long as the full judicial review claim is then commenced within a certain timeframe after any other route for redress has been exhausted, the right to commence judicial review is preserved.

One further example arises in the context of consultation or other longer-term decision-making processes which, at their conclusion, give rise to a right of appeal. Often such processes involve multiple interim decisions which might ordinarily be amenable to judicial review and the relevant strict time limits. However, where any final decision would be subject to statutory (or other) appeal, it is not always clear whether interim decisions are amenable to judicial review in these circumstances, nor is it practical or attractive to commence judicial review proceedings during these incomplete stages of a wider consultation process. Potential applicants are therefore faced with the prospect of having to file claims for judicial review at interim stages for fear of such claims being time-barred in the future, without understanding the ultimate impact of any interim decision on the final decision that might be taken by the decision maker. This often leads to increased costs, wasted time and court resources, and a delay in the ultimate decision-making process. Yet complex decision-making by public bodies, particularly in regulated sectors, is increasingly conducted on this basis and consulting bodies may even – on occasion – use this process to frustrate the potential for judicial review challenges at the final conclusion of the process.

This could be addressed in a number of ways, including a single route of challenge allowing both substantive and public law grounds to be considered together, or introducing a process for potentially extending the deadline to issue an application for judicial review or allowing all decisions forming part of a final decision-making process to benefit from a time-limit for challenge that runs only from the date of the final decision at the end of the whole consultation process.

Consultation 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?

Answer: The general process of making or responding to a Judicial Review claim, or appealing a Judicial Review decision, is reasonably clear as set out in CPR 54 and the Administrative Court Judicial Review Guide (the "**Admin Court Guide**"). However, there is unhelpful uncertainty and inconsistency in the interpretation of the time limit for commencing challenges, due to the "promptly" requirement. This is inherently uncertain and unhelpful (and can lead to unnecessary satellite litigation), but also inconsistent because it does not apply where issues of EU law are in question. It is also inconsistent with the approach in other parts of the United Kingdom, such as Northern Ireland, where all cases are "in time" if brought within the required 3-month period.

To provide further detail, neither CPR 54 nor the Admin Court Guide reflect the position following *Case C-406/08 - Uniplex (UK) Ltd v NHS Business Services Authority,* which is that where a claim involves a point of EU law the claimant does not have to overcome the hurdle for promptness.

Secondly, following the decision in *Uniplex*, the time limit for bringing a judicial review claim in Northern Ireland was amended to remove the requirement for promptness in order to remove the disparity between EU and non-EU based applications (see The Rules of the Court of Judicature (Northern Ireland) (Amendment) 2017).

Thirdly, despite the departure of the UK from the EU, the uncertain nature of "promptly" means that often (a) the merits of a case have to be assessed by claimant lawyers in an overly contracted time period, and (b) there are time-consuming arguments at the permission stage regarding whether or not a case has been brought "promptly".

The removal of the requirement of promptness except in cases of exceptional urgency would solve these issues and create certainty for both decision makers and claimants. As to when a case is one of "exceptional urgency", this could be assessed with reference to the timing of the effect of a particular decision, and

possibly be subject to a certificate of urgency issued by the administrative court, although detailed consideration would have to be given to how this would work efficiently and fairly in practice without imposing a further administrative burden on the court.

The law on when the time limit starts running is also unclear. Although the general position is that time starts running from the date when grounds for making the application first arose, and that any later knowledge is relevant to an application for extension of time, in the interests of certainty and to save the costs of an application to extend, we would suggest that it should be the case that time does not start running in respect of a particular claimant's claim until the date the relevant decision was communicated to them, or they were otherwise made aware of it. That would also incentivise clear and transparent decision-making and reporting of decision-making by public decision-makers.

One other area of process that is somewhat unclear relates to interested parties. The current procedure requires the prospective claimant and defendant to identify interested parties during pre-action correspondence and then to include those so identified as interested parties in any subsequent claim. However, it is not always the case that the parties wish to include all persons who are properly interested in a claim as "interested parties". Where both parties are content not to do so, those who should have been so identified may be prejudiced by the failure to include them as interested parties. There is no mechanism to apply to become an interested party, only an intervener. But the status of an intervener is not the same as an interested party. It would be helpful for the process to provide a mechanism by which persons who are properly interested in a claim, but who have not been so identified, are able to ensure they are treated as interested parties at an early stage and gain all the benefits attributable to an interested party.

Consultation 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?"*

Answer: Given the range and size of potential claims it is impossible to strike the perfect balance in every case. The general position requiring the application to be made promptly and, in any event, within three months undoubtedly puts pressure on applicants and their legal advisers to move quickly. For planning and procurement cases tighter time limits apply. This will, on occasions, compromise the quality of the application and the prospects of securing leave to proceed. That said experienced practitioners well understand the need to move promptly and the consequences of not doing so. Whilst not perfect, the current framework factoring in the degree of discretion afforded to the court strikes the right balance between enabling time for a claimant to lodge a claim, and ensuring effective government and good administration. However, see also our response to question 5 above.

Consultation Question 7:

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

Answer: In general, we consider that the rules as set out in the Admin Court Guide are clear and are applied appropriately in the Courts. However, while the rules set out when interveners can be liable for adverse costs, they should be clearer with regard to interested parties and costs. While the rules specify when a Claimant can be liable for an interested parties' costs, they appear silent on the situations when interested parties can be liable for the adverse costs, which may on occasion be appropriate if the involvement of an interested party has not significantly assisted the court or has not been necessary in order to resolve the

issues in dispute, or if the interested party has acted unreasonably (that is, similar to the circumstances in which interveners can be liable for adverse costs).

Consultation 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?"*

Answer: The application of the proportionality principle to costs in judicial review proceedings is particularly vexed since it is rare for any specific monetary sum to be at stake, more usually it is simply a point of principle. Accordingly, it can be difficult to have any benchmark to assess the proportionality of the costs incurred. For that reason, we wonder if there is any utility in the proportionality test applying at all in public law. We can also see some merit in the position as regards the costs of interested parties or interveners being put on a clear statutory footing so that, for example, an interested party which was a commercial entity in competition with the claimant and was quite properly in the proceedings to protect its own position, should be able to recover its costs according to clear statutory rules. Those rules could also clearly provide in such cases for the provision of costs budgets akin to those in private law proceedings.

Consultation 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?"*

Answer: The answer to this question in part depends on whether one considers that it should be part of the role of the Court in reviewing the exercise of a public function to replace a successfully challenged decision (on whatever grounds) with a decision that the Court considers would be more appropriate. Given that judicial review is not concerned with the merits of decisions, this would be a fundamental shift in the nature and purpose of judicial review. It would also undermine the principal that judicial review is a remedy of last resort.

If the remedies available were altered to allow the Courts to impose a different decision, this would have certain advantages, including:

- Time would be saved in having to await the decision-maker re-taking the decision (if necessary) in light of the Court's judgment, thus leading to certainty of outcome and impact of public decision-making more quickly;
- That certainty would also avoid the potential for further challenge or threat of challenge of the re-made decision (other than through the court system by way of appeal);
- The provision of a more consistent approach to challenging public law decisions, so that the Courts may make determinations similar to those that can be imposed by bodies (such as the CMA) who may hear challenges of certain types of public decisions, where a review mechanism other than judicial review has been provided for by statute.

However, it would also have some significant disadvantages and risks, including:

- The potential politicisation of court judgments;
- Lengthier proceedings, which may be costlier and, depending on the issues in question, requiring complex, technical, expert evidence, to enable the Court to consider what more appropriate decision

should be imposed instead of the challenged one, in circumstances where the Court may not be best-placed to do so;

- Greater incentive for challenge, in the knowledge that if a new decision needs to be taken, it may be taken by a different decision maker (the judge or judges hearing the claim).

On balance, we consider the time and cost advantages would be outweighed by the disadvantages and, indeed, in reality the potential time-savings may be illusory where lengthier proceedings with heavier evidence requirements may be needed to allow the Court to impose a wider set of potential remedies. That would undermine some of the procedural benefits of the current judicial review process that allows for a final determination on the challenged decision to be made far more quickly than traditional civil litigation, in part because the Court does not have to concern itself with reaching a just final determination of the underlying matter – but only to consider whether the existing decision should stand or fall.

Therefore, we consider that, in general, the currently available remedies (i.e. quashing orders, mandatory and prohibitory orders, together with declarations and injunctions in appropriate cases, or dismissal of the challenge) are appropriate for the judicial review mechanism and also help to limit the use of judicial review. We note that a damages remedy is also available in some circumstances, but only where some underlying cause of action exists independent from any bases for judicial review; we consider this another appropriate safeguard and limitation on the misuse of the mechanism. Given the limited nature of the available remedies, it is also important that those remedies remain discretionary so that the Court has latitude not to provide a remedy where it is not considered appropriate to do so, even if the challenge is otherwise successful. Recent changes (i.e. section 31(2A) Senior Courts Act 1981) to require the Court not to grant a remedy where it is highly likely that the outcome would not have been substantially different if the conduct complained of had not occurred, help further to limit the use of the mechanism (along with the permission stage) to those challenges which properly deserve Court time, notwithstanding the delay to certainty of the outcome of decision-making with public ramifications.

Consultation Question 10:

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

Answer: Proper use of the pre-action protocol procedure to seek the settlement of claims prior to judicial review. Earlier reliance and engagement of the duty of candour to ensure the early sharing of relevant information regarding the decision-making process. Forcing a potential claimant to seek disclosure through Freedom of Information Act (FOIA) requests (which has a lengthy time-frame within which public bodies may respond – and thus may frustrate a claimant seeking to bring a claim promptly where key information can only be obtained through such requests) is unhelpful. Consideration should be given to requiring any information which may be disclosable under a FOIA request to be disclosed in a curtailed timeframe where the information is requested in respect of a matter which has been notified as a potential judicial review claim.

Consultation 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?"*

Answer: We have experience of settlement before issue (following the use of the pre-action protocol) and post issue (albeit not as late as at the door of court) although in our experience this is rare. Our experience of settlement of judicial review claims tends to be where either the merits of the claim are very strong (and

therefore any well advised respondent agrees to some or all of the remedy sought) or where there is genuine legal uncertainty which the respondent does not wish to be finally determined by a court.

Consultation 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?"*

Answer: No.

Given that one of the main remedies in judicial review proceedings is the quashing of the public authority's decision, this should be something that can be conceded by a public authority at an early stage, such as following the permission stage, in order to avoid the cost of a full hearing. While parties are already encouraged to consider settlement as part of the pre-action protocol (the "**PAP**"), and there is a general duty in the Admin Court Guide to consider ADR, there could be a requirement to have a pre-action meeting, which could take place as a mediation, at which ADR is discussed and specifically whether any issues can be narrowed down pre-action. However, from experience of general litigation, it is also unfortunately the case that ADR requirements and cost consequences can be used strategically by both parties as leverage. This would be unhelpful in the judicial review context, particularly where a claimant must bring any claim within 3 months or "promptly".

To the extent there is appetite for requiring ADR to be attempted, given the tight timescales of judicial review and significant costs that claimants must incur up front to commence such a claim, there could be a requirement for a meeting to take place if and when permission is granted, instead of before issuing proceedings.

The best form of ADR is likely to be mediation, especially for cases where there are interested parties and interveners.

Consultation 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?"

Answer: We have no comment on question 13.