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Welsh Government

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Lord Faulks QC
Chair of the Independent Review of Administrative Law

By e-mail to: IRAL@justice.gov.uk

26 October 2020

Dear Lord Faulks

Independent Review of Administrative Law

I am writing to set out the Welsh Government's position on the matters you have been asked to consider in your Review.

We are prepared to engage with this UK Government initiated Review insofar as it relates to matters which are reserved. But we do so on the basis that we have not seen any case for any diminution in the availability and scope of judicial review, and would have profound concerns about such diminution being applied to the actions of public authorities in Wales without the support of the democratic institutions of Wales.

Principles

Our starting point is that access to the supervisory jurisdiction of the courts is a fundamental principle of administrative justice that has developed as part of the common law in England and Wales. It is in the interests of good government, access to justice and the Rule of Law for citizens to be able to seek redress against the state and to hold public bodies to account for any decision-making they may take which is legally defective.

Judicial review is the principal means by which individuals and others can challenge the lawfulness of administrative decisions and actions by government departments and other public bodies, to ensure that they do not exceed the limits of their legal powers. It is a vital check and balance on executive overreach and one that I as a Law Officer actively welcome.

Public bodies have it in their gift to ensure that judicial review proceedings do not find against them. The most straightforward method is for them to operate within the law. It is only right that they can be held to account for any decision-making on their part which is legally defective.

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It is important to note that it is not the case that the courts are full of spurious judicial review cases. Cases that are without merit do not proceed. Cases that have merit are heard. This is how it should be and it cannot be said that the odds are stacked against public authorities.

The courts have always been able to weed out cases where they cannot see any arguable error of law at the permission stage of a judicial review challenge and ensure that any such cases are not given permission to proceed to a full hearing. In addition the “totally without merit” and “no substantial difference” tests provide additional protections against claims which are unlikely to result in substantive outcomes.

Access to justice

We also recognise the need to 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. But the current arrangements do not achieve this balance, in particular due to cuts in legal aid in England and Wales under the reforms introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012. These have severely limited access to specialist legal advice and there are ‘advice deserts’ across Wales and England in public law generally and in particular fields such as social care. In Wales the Welsh Government has stepped into the breach in an effort to mitigate this through our Single Advice Fund, but we cannot replace what has been lost in an area where the UK Government currently has responsibility for policy and delivery.

There is therefore a clear barrier to people legitimately accessing judicial review through lack of means. Any further limitation on the availability of judicial review would serve only to exacerbate this obstacle to redress.

Devolution

I am of the view that there is a clear public interest in favour of challenges to the decisions of public bodies being held in locations where those affected by the decision under challenge are far more likely to engage in the process and where there can be more local scrutiny and accountability. The Commission on Justice in Wales has carried out the most thorough review we have ever seen of the justice system in Wales. I commend its report and recommendations to you.

The Commission recommended that cases against Welsh public authorities which challenge the lawfulness of their decisions should be issued and heard in Wales. This is being acted on by the Civil Procedure Rules Committee. It has agreed to change the Civil Procedure Rules to give effect to this recommendation. It is right in principle and I look forward to the change becoming effective.

I note from the Review terms of reference that you are cognisant of the devolution issues that may arise and have taken particular care to ensure your panel has appropriate understanding of the position as it relates to Scotland.

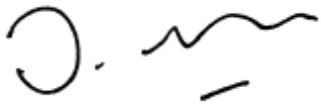
As the England and Wales jurisdiction serves two legislatures and two Governments, it should not be presumed that it is a uniform whole. There is growing divergence between the laws of Wales and the laws of England. In Wales, the Welsh Government and the Senedd have used devolved competence to develop innovative policies and legislation to seek to improve decision-making by public bodies in Wales. This must, in our view, be underpinned by effective judicial oversight and the supervisory jurisdiction of the courts.

Statutory intervention

I believe that codifying judicial review principles in legislation is unnecessary. The principles of judicial review have been developed judicially over hundreds of years. Those principles are already established, clear and certain. They are well understood by practitioners and those who teach in our law schools.

If the aim is to ensure clarity and remove any opaqueness about when a judicial review can be brought I believe that the answer to that lies in education and explanation rather than legislative reform. There is a strong case for providing information that would assist people who cannot access appropriate legal representation but there are better ways to address this. The reinstatement of adequate legal aid ensuring professional legal advice is available to all is the obvious solution. In the absence though of that sensible move, the production of clear procedural guidance for litigants in person would provide clarity and could help to ensure that access to redress is maintained and limit the significant additional challenges that litigants in person can present to the courts.

Yours sincerely,



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