Leicestershire County Council

By e-mail
IRAL secretariat
Ministry of Justice
IRAL@justice.gov.uk

Date: 14th October 2020
My ref: LH
Your ref:
Contact: Lauren Haslam
Phone: [redacted]
Email:

Dear Sirs

RE: Independent Review of Administrative Law – Call for Evidence

1. We refer to your email dated 10 September 2020 inviting interested parties to comment on possible options for the reform of judicial review. Set out below is Leicestershire County Council's response to this consultation.

2. Firstly, Leicestershire County Council ("LCC") recognises the important role played by judicial review in holding public bodies to account for the proper exercise of power. The Council further recognises such accountability helps to promote higher standards of governance and decision making.

Terms of Reference

3. We acknowledge that much of the Inquiry's focus *(per points 2 & 3 of the terms of reference[1])* will be on issues of justiciability, including the extent to which executive power may be challenged through the Courts.

4. We appreciate that the panel will wish to ensure that judicial review operates in a manner which strikes the proper balance between democratic accountability and governmental effectiveness.

5. For its part, LCC does not advocate in favour of a "hollowing out" of judicial review. Moreover, seismic changes to the legal framework create the potential for uncertainty and challenge whilst any new framework becomes settled law. As a general principle, it is desirable to have a settled and predictable body of law.

---

[1] https://assets.publishing.service.gov.uk/media/5f27d3128fa8f57ac14f693e/independent-review-of-administrative-law-tor.pdf

Chief Executive's Department
Leicestershire County Council, County Hall, Glenfield, Leicestershire LE3 8RA
Telephone: 0116 232 3232 Fax: 0116 305 6161 Minicom: 0116 305 6870

John Sinnott CBE, MVO, MA, Dipl. PA, Chief Executive
Lauren Haslam, LLB(Hons), Dip.L.G. Director of Law & Governance

www.leicestershire.gov.uk

6. Moreover, a significant rebalancing of the scales of justice in favour of public bodies is perhaps unwarranted given how few judicial reviews are actually decided in favour of claimants. In the case of local authorities just 23 out of 652 challenges (or 3.5%) were decided in favour of Claimants[2].

7. Moreover, LCC would question whether fundamental reforms in this area are necessary given that there have been successive reviews of judicial review in 2012[3], 2014[4] and 2015[5].

8. Nevertheless, LCC would welcome certain procedural changes to the judicial review process. Those reforms would affect the pace of proceedings as well as the liability for adverse costs.

Protections for public bodies.

9. Before identifying perceived shortcomings with the existing Judicial Review process, LCC acknowledges that Public bodies already benefit from a number of protections which prevent them from being inundated with public law challenges:-

   i. Firstly, not everybody who wishes to challenge the actions of a public body is entitled to bring a judicial review. Prospective claimants must demonstrate a sufficient interest. [6]

   ii. Secondly, LCC accepts that the "arguability" threshold at the permission stage, provides an important filter on those cases which should not be allowed to proceed. This has been strengthened by the effect of Section 84 of the Criminal Justice and Courts Act 2015 *(by introducing a high likelihood test[7]).*

   iii. Thirdly, LCC also recognises that if there is another route by which the decision in issue can be challenged, which provides an adequate remedy for the claimant, that alternative remedy should generally be exhausted before applying for judicial review.[8]

10. Despite these protections, judicial reviews do adversely impact on local authorities. Perhaps the most significant impact arises from the time it takes a judicial review to conclude.

11. Even without interim injunctive relief being granted to a claimant, policy implementation is typically put on hold during the period of a legal challenge. Judicial reviews create deep uncertainty about whether a policy can lawfully be implemented. That uncertainty generally has a paralysing effect.

12. If, during a legal challenge, a local authority is unable to implement a policy designed to achieve financial savings or alternatively generate income *(e.g. by proceeding with a*

---

[2] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/806896/civil-justice-statistics-quarterly-Jan-Mar-2019.pdf
[3] Which led to the Civil Procedure (Amendment No 4) Rules 2013
[4] Which led to the Criminal Justice and Courts Act 2015
[5] Which led to proposals for the provision and use of financial information.
[6] *for the purposes of Section 31 of the Senior Courts Act 1981*
[7] The High Court must refuse to grant relief on an application for judicial review if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.
[8] see R (Archer) v Commissioners for Her Majesty's Revenue and Customs [2019] EWCA Civ 1021 at [87] – [95]).

development) the anticipated financial returns lost from the delay are typically unrecoverable.

13. As detailed below, local authorities which successfully defend a judicial review are frequently unable to recover their costs. Local authorities can also have little or no expectation of recouping anticipated savings or earnings which would have been achieved if an unmeritorious judicial review had not been brought. In a time when local authority budgets are already under strain it can be unhelpful to lose planned for savings.

Case Progression at a pre-action stage.

14. LCC accepts that there is broadly suitable provision for case progression at the pre-action stage.

15. The time limits set out in CPR 54.5 *(i.e. that the claim form must be filed promptly and not later than 3 months after the grounds first arose)* are already sufficiently tight.

16. Likewise, a person seeking permission to bring judicial review proceedings before the Upper Tribunal[9] must apply promptly and within three months *(per Rule 28 of the Tribunal Procedure (Upper Tribunal) Rules 2008/2698).*

17. The time limits for a challenge under the Public Contracts Regulations 2015 are shorter still. Regulation 92 of the 2015 regulations requires challenges to be brought forward within 30 days.

18. LCC considers that the necessity for challenges to be brought promptly is entirely justified. Indeed, as Keene LJ explained in R (Finn-Kelcey) v Milton Keynes BC [2008][10]:

> *"The need for a claimant seeking judicial review to act promptly arises in part from the fact that a public law decision by a public body normally affects the rights of parties other than just the claimant and the decision-maker."*

19. Part 3.1(2)(a) of the CPR permits courts to "*extend or shorten the time for compliance with any rule, practice direction or court order*". Nevertheless, LCC accepts that the Courts have demonstrated a willingness to give effect to the strict time limits.

20. Indeed, in Kigen -v- SSHD [2015] EWCA Civ 1286 it was confirmed that awaiting the outcome of decision of the Legal Aid Agency was no longer considered to constitute a good reason for delay.

Scope for Reform

21. In 2010 the European Courts identified that the notion of bringing a claim "promptly" contravenes the requirement for legal certainty. In Uniplex (UK) Ltd v NHS Business Services Authority it was stated as follows: -

> *"A national provision under which proceedings must not be brought 'unless ... those proceedings are brought promptly and in any event within three*

---

[9] section 16 of the Tribunals, Courts and Enforcement Act 2007
[10] EWHC 1650 [2009] Env LR 4 (at [21-[22])

months', gives rise to uncertainty. The possibility cannot be ruled out that such a provision empowers national courts to dismiss an action as being out of time even before the expiry of the three-month period if those courts take the view that the application was not made 'promptly' within the terms of that provision. A limitation period, the duration of which is placed at the discretion of the competent court, is not predictable in its effects. Consequently, a national provision providing for such a period does not ensure effective transposition of Directive 89/665."[11]

22. CPR 54.5 has not been amended notwithstanding that the term "promptly" has been judicially determined to lack certainty. There may be scope for the panel to make recommendations on this aspect.

Case Progression during litigation.

23. In our experience, the main delays arising from litigation relate to the time it takes to get a final hearing. Even in straightforward judicial review cases it can take between six and eighteen months before a final decision is reached.

24. We accept that the Administrative Court seeks to cater for such cases by enabling a request for urgent consideration with applications being made on form N463. We also acknowledge that a two-tier system is warranted since not all cases carry the same urgency. However, it is reasonable in our view to question whether a delay of up to 18 months in standard cases should be regarded as acceptable.

25. There were 3,400 Judicial Reviews in 2019.[12] Of these, 520 of the 2019 cases were assessed to be eligible to proceed to a final hearing. Although these cases are legally complex, the main facts of the case are not generally in issue. Accordingly, if additional judicial resources were deployed then the delays encountered by participants could be reduced.

26. We acknowledge that section 13 of the Administration of Justice act 1969 (as amended by section 63 of the Criminal Justice and Courts Act 2015) made greater provision for appeals which leapfrog the Court of Appeal. Whilst this mechanism is obviously expedient in the cases of national significance, it obviously cannot alleviate delay in the great majority of cases.

27. During the Coronavirus pandemic, Courts and Tribunals Service (HMCTS) has relied extensively on remote hearings, generating a significant experiment in digital justice as a consequence. It can be expected the issue of delay will remain one of the main issues facing participants in judicial reviews for some time to come.

Costs

28. Where a local authority successfully defends a judicial review, it will typically face difficulties in recovering costs from the claimant and / or the interest groups which organised the litigation. This issue is discussed below.

---

[11] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62008CJ04

[12] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/870184/civil-justice-statistics-quarterly-Oct-Dec.pdf

29. In the experience of LCC, judicial reviews against local authorities are frequently instigated by local interest groups. An individual is then identified on behalf of the interest group as having a "sufficient interest" to act as Claimant and bring the claim.

30. In our experience, the nominated Claimant tends to be an individual who fulfils the criteria to obtain a legal aid certificate and thereby benefits from statutory costs protection *(as to which please see below)*.

31. In practice, the Claimant becomes a figurehead for the litigation, in the sense that they do not appear to be the individual(s) giving instructions to Solicitors or gathering evidence in support of the claim.

32. Rather the parties appearing to control the conduct of the litigation on the Claimant's behalf, remains the local interest group *(albeit the Claimant acquiesces to that situation)*. In that sense the interest group, may actually be regarded as the *"real claimant"*.

33. The experience of LCC is not unique in that respect, in the case of R (on the application of Edwards and another v Environment Agency and others (No 2) [2013] UKSC 78 the judge stated that the claimant had been:-

> *"put up as a claimant in order to secure public funding of the claim by the Legal Services Commission... when those who are the moving force behind the claim believe that public funding for the claim would not otherwise have been available"*.

34. Unless the Court is prepared to make a third-party costs order, the relevant Interest Group, is in practice, insulated from an adverse costs order.

35. A legitimate question then arises as to whether the public interest in *(meritorious)* public law challenges means that, those who seek to challenge public bodies should be immune from the normal risks associated with civil litigation.

Statutory Costs Protection for Legally aided Claimants.

36. Section 26(1) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 sets out the general principle that costs ordered against a legally aided individual in civil proceedings must be reasonable, having regard to all the circumstances, including the financial resources and conduct of the parties to the proceedings. This is known as "cost protection".

37. For the sake of good order, the Council does not seek to advocate in favour of the removal or reduction of the statutory costs protection or the modification of The Civil Legal Aid (Costs) Regulations 2013.

38. The Council accepts that the intention of cost protection is to ensure that claimants are not deterred from resolving their issues through legal action for fear of being personally liable for unaffordably high costs.

39. Moreover the "Aarhus Convention"[13] requires that the procedures to which it refers should be "fair, equitable, timely and not prohibitively expensive" (article 9.4).

---

[13] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters

Third Party Costs Orders

40. The jurisdiction to award costs against a non-party is found in Section 51(1) & 51(3) of the Senior Courts Act 1981. However, the granting of a non-party costs orders is exceptional *(see the decision of the Privy Council in Dymocks Franchise Systems (NSW) Pty Ltd v Todd & Ors (No. 2) (New Zealand) [2004] UKPC 39 (21 July 2004)).*

41. Moreover, Courts will not typically grant costs orders against non-parties if there is also a legally aided litigant *(see the decision in Symphony Group Plc v Hodgson).*

42. In the view of LCC, it would be reasonable for the Panel to consider recommending legal changes to make it easier for public bodies to seek non-party costs orders against parties who may be described as the *"real claimants".*

43. As indicated above, non-parties are in practice insulated from adverse costs orders (particularly where the claimant is legally aided). It is questionable whether, real claimants should be able to avoid the ordinary cost rules. This is particularly so given that great majority of challenges are unsuccessful *(and therefore arguably unmeritorious).*

44. It may reasonably be argued that interest groups choosing to instigate litigation via a proxy claimant should not be entirely relieved of the risks associated with litigation.

45. The law already recognises that certain individuals lack the standing to instigate judicial reviews. In the case of Inland Revenue Commissioners Appellants v National Federation of Self-Employed and Small Businesses Ltd. it was stated that: -

> *"There is also general agreement that a mere busybody does not have a sufficient interest. The difficulty is, in between those extremes, to distinguish between the desire of the busybody to interfere in other people's affairs and the interest of the person affected by or having a reasonable concern with the matter to which the application relates. In the present case that matter is an alleged failure by the appellants to perform the duty imposed upon them by statute."*

46. The Panel may wish to consider whether individuals who promote litigation by nominating proxies and or by giving instructions to solicitors should ordinarily expect to carry some cost risks.

47. Admittedly, on 17 January 2018, Mr Justice Coulson made a costs order against a non-party in the case of *Bombardier Transportation UK Limited v Merseytravel v Stadler Bussnang Ag.* In that case it was accepted that it was important to ascertain who was the "*the real party*" to the litigation. However, in our experience such orders are rare.

48. It is open to Claimants to seek a protective costs order (PCO) under Section 88 of the Criminal Justice and Courts Act 2015 to limit or completely remove the costs risk to a claimant in bringing a judicial review claim.

49. If the non-party costs orders were made in conjunction with protective costs orders then the real claimants could carry a limited cost risk. If those instigating judicial reviews were required to carry a modest cost risk (but not a prohibitive cost risk) then

this may prompt more careful consideration about whether a particular challenge has merit. This may limit the number of unmeritorious judicial claims brought.

We would be pleased to address any questions arising out of this note as needed.

Yours faithfully

Lauren Haslam
Director of Law and Governance

c.c. LGALegal@local.gov.uk