# ADVOCATES FOR ANIMALS

***Making full use of the law to help animals***

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**October 2020**

## Response to the Call for Evidence by the Independent Review of Administrative Law Panel

## Introduction

1. Advocates for Animals (AfA) is the UK's first law firm dedicated to ensuring that animals are given the protection intended by the legislature.

2. This Response is written on behalf of animal protection organisations and concerned individuals named in the Annex.

3. The Response focuses on those parts of the terms of reference of most relevance to the signatories.

4. The review follows that conducted by the Ministry of Justice in 2013 (the 2013 consultation). That led to some legislative changes, in the Criminal Justice and Courts Act 2015 (the 2015 Act) – for example, with regard to unmeritorious cases, protective costs orders (PCOs) and interventions. Some have expressed surprise

that the Government is conducting another root-and-branch review of judicial review so soon.

## General remarks

5. Judicial reviews are brought in the High Court. [1] Their purpose is to enable one arm of our tripartite Constitution arrangements – the judiciary – to ensure that another arm, the Executive, acts lawfully. Contrary to the impression sometimes given by critics, its function is to ensure that the will of Parliament, the third arm, is *respected*, not thwarted. It is self-evident that judges cannot perform their constitutional duty – and the rule of law cannot be vindicated – if in practice appropriate cases are not brought before them. Without the right to petition given by many countries with a written constitution, judicial review provides a vital safeguard for citizens.

6. Judicial review is therefore the means by which decisions of public bodies, including Ministers, can be challenged. 'Decision' is interpreted broadly, such that (for example) a failure to make a decision may be challenged, as may guidance and secondary legislation if falling outside the ambit of an Act of Parliament. Judicial review essentially looks at the process by which a decision has been arrived at, including proper application of legislation and caselaw and procedural fairness. Judges do not substitute their own views on the substantive merits of a matter for those reached by decision-makers entrusted with the task by Parliament.

### *Is inappropriate use made of judicial review for political or campaigning purposes?*

7. Many assume that the review is driven by a belief that judges sometimes trespass onto political territory. [2] If this is the belief, it does not represent our experience.

[1] Or sometimes in the Upper Tribunal
[2] See, for example, this article in the *Independent* on 15 January 2020: https://www.independent.co.uk/news/uk/politics/boris-johnson-judicial-review-supreme-court-challenge-downing-street-a9285276.html

8. Judicial review deals with the relationship between citizen and State. Even before Covid-19, the State had a say in huge swathes of our lives. It is inevitable, therefore, that judges will be asked to adjudicate in sensitive and politically controversial areas. There will almost inevitably be policy context to disputes.

9. But that does not mean that judges are being political if they rule against a public body. A claimant has to identify an error of law in the decision in question and will get short shrift from the judge if they fail to do so. The permission stage provides more than adequate means for judges to screen out any political cases masquerading as legal cases.

10. Similarly, some have suggested that judicial review is sometimes inappropriately used for campaigning purposes, and even that campaigning organisations should not be allowed to bring cases. In our view, the premise is wrong. Certainly, as far as we are aware the charge has not been made about animal protection judicial reviews. The process is too slow, too expensive and too all-consuming to be considered an effective campaign tool.

11. Care needs to be taken with the word 'campaigning'. Campaigning for NGOs means seeking to promote the interests of their constituencies, including by ensuring that the law is properly applied. Seeking to address unlawful action by public bodies via judicial review is a legitimate role for NGOs, as the Charity Commission accepts. But as already noted it is the *sine qua non* of any judicial review that a claimant must establish unlawfulness. A claimant would not be allowed to use the proceedings simply as a way of generating publicity for a cause, and nor should they. Judges are well able to deal robustly with any attempt to dress up what is in truth a vehicle for publicity as a legal complaint. They would not give permission for the case to proceed .

12. Where there is a genuine legal complaint, suitable to be aired through judicial review, there can be no objection to an NGO claimant drawing public attention to the case, particularly if it is successful. Indeed, it is the function of the media

more generally to shine a light on challenges to abuse of power. But that is very different from claimants misusing the court process simply to gain publicity. There are, in fact, much cheaper ways of gaining publicity.

13. The erection of higher or even insuperable obstacles for campaigning organisations to bring a case would be both unnecessary and dangerous. It would be unnecessary because campaigning organisations, like any other claimants, have to identify an error of law. It would be dangerous because it would inevitably mean that some unlawful decisions would go uncorrected. This is particularly so with animal protection where, by definition, human agency in the form of a concerned third party is needed to ensure that the law is being applied properly.

14. We say more about the importance of animal protection NGOs having access to judicial review under *Standing*.

15. More generally, any suggestion that Administrative Court judges have a predisposition to find against Ministers and other public bodies is in our view wide of the mark. Indeed, our experience is that, in animal protection cases, if anything the opposite is the case: judges often show considerable deference and latitude to public bodies.

***Use made by animal protection organisations of judicial review***

16. The role of animal protection organisations is to give voice to their constituencies, which might otherwise have no means of challenging unlawfulness by public bodies. Their constituencies are the many members of the public concerned about animal welfare and, of course, the animals themselves.

17. Animal protection organisations have, in fact, used judicial review sparingly. Indeed, that is true of NGOs more generally. The 2013 Ministry of Justice consultation paper noted [3] that judicial reviews brought by NGOs and similar

[3] Para 78

organisations have a higher success rate than other judicial reviews, indicating that cases are carefully chosen.

18. A judicial review can only be brought as a last resort. Other avenues have first to be explored. We believe that that is appropriate. Our clients use a range of other legal techniques – including obtaining information under the Freedom of Information Act 2000 (FOIA) and using bodies such as Ombudsmen – before considering judicial review.

19. Examples of judicial reviews brought by animal protection NGOs in the public interest include in the areas of animal experiments (by Cruelty Free International (CFI)), intensive farming (the RSPCA and Compassion in World Farming (CIWF)), the badger cull (by the Badgers Trust), the exotic pet trade (Animal Protection Agency) and the protection of other wildlife. Numerous categories of animals can be the victims of unlawful regulatory action by public bodies – for example, farmed animals, circus animals, zoo animals, wild animals, companion animals, marine animals, animals used in experiments, exotic animals traded to and from the UK, fur-bearing animals and so forth. There is a plethora of law and therefore legal duty on public bodies. Various international treaties and conventions, and governmental guidance and codes of practice, are often in play.

20. Indeed, the welfare of over a billion animals every year in this country is regulated by various public bodies. There is a consensus that there is a real public interest in ensuring that the regulation is lawful and that animals receive the protection intended by Parliament.

21. It is also important to appreciate that success is often achieved in judicial reviews by concession by the public body in the course of a case, followed by a change of practice. Just two examples: CFI [4] brought a judicial review against the Home Office based on its routine failure to assess, before a particular type of safety testing on animals took place for particular substances, whether there was a non-

[4] Then *sub.nom.* the BUAV

animal alternative which could be used. The Home Office changed its practice without the need for a final hearing. Very recently, the Scottish Government has put a halt to live animal exports in the context of a judicial review brought by CIWF.

22. Equally, a warning, explicit or implicit, that a judicial review may follow is often enough to achieve a change to unlawful practice, such as the prohibition of the notorious Lethal Dose 50 poisoning test. Needless to say, these successes are not reflected in the statistics. Were judicial review not an option, systemic unlawfulness would have gone unchecked.

23. It is well recognised that even the possibility of a judicial review challenge – 'the judge over your shoulder' [5] – acts as a real incentive for officials to make sure they stay within the law. Clearly, that incentive is removed if appropriate challenges cannot be brought.

## Substantive issues

### *Should the amenability of public law decisions to judicial review by codified in statute?*

24. Judicial review has a legislative basis: section 31 Senior Courts Act 1981 (the 1981 Act). There are detailed rules of court and practice directions. Rules about protective costs orders and interventions are set out in the 2015 Act.

25. We see no advantage in further codification. The great merit of judicial review, as with other parts of the common law, is its flexibility. It evolves to meet changing societal needs. Any further codification is liable to constrain that flexibility.

[5] The title of the guide by the Government Legal Department to decision-makers https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/746170/JOYS-OCT-2018.pdf

*Grounds and remedies*

26. Again, flexibility is the key. We see no warrant for narrowing either the grounds on which judicial review may be sought or the remedies available. Any narrowing is likely to lead to an increase in unchecked unlawfulness by public bodies.

## Procedural matters

27. The review asks whether various specified procedural reforms are necessary 'to streamline the process'.

28. Having appropriate procedural rules is key to ensuring that appropriate cases can be brought and prosecuted, and the rule of law therefore vindicated. Procedural rules should ensure fairness to all concerned but not act as a barrier.

*Standing*

29. Standing – or *locus standi* – refers to who may bring a judicial review.

30. Under section 31(3) Senior Courts Act 1981, a claimant must have 'sufficient interest in the matter to which the application relates'. Over the past three decades, judges have applied a liberal test, such that NGOs and other bodies may be granted standing where they have a legitimate claim to relevant expertise and to represent the constituency affected by the alleged unlawfulness. Individuals have on occasion been granted standing in public interest cases, too. [6]

31. The MoJ 2013 consultation document recognised:

> '*Judicial review is a critical check on the power of the State, providing an effective mechanism for challenging the decisions, acts or omissions of public bodies to ensure they are lawful*'. [7]

[6] See *R v Secretary of State for the Foreign and Commonwealth Office ex parte Lord Rees Mogg* [1993] EWHC Admin 4 (30 July 1993) (the claimant sought a declaration that the United Kingdom could may not lawfully ratify the Treaty on European Union signed at Maastricht)
[7] Para 1

32. As already noted, it goes without saying that judicial review cannot fulfil this crucial role unless it is, in practice, possible to challenge decisions of public bodies which may be unlawful. Standing is the most important aspect of access, certainly with animal protection.

33. Put simply: the rule of law cannot be vindicated unless there is someone who can facilitate the vindication. The Aarhus Convention recognises that, with many environmental challenges, it is unrealistic to expect that any individual will bring a case and standing has therefore to be accorded to NGOs. The principle is all the more important with animal protection because no human being concerned about animals being protected as Parliament intended will be directly affected by a decision. Caselaw has identified the likely absence of any other responsible challenger as a factor pointing towards the grant of standing. [8] Only an NGO with relevant expertise can facilitate the upholding of animal protection law.

34. Users of animals in various settings are hardly likely to complain that animal protection standards are not being complied with. They would, however, as directly affected persons be able to bring a judicial review in relation to regulation of their activities. There is a recent example of this with the challenge by manufacturers of so-called 'shock collars' to the Government's proposal to bring in a ban. [9] Similarly, the NFU and a licence applicant recently challenged DEFRA's decision not to grant a badger cull licence in Derbyshire. [10] If NGOs could not bring cases on behalf of animals there would be a fundamental imbalance of access to the courts.

35. The rules for standing before the EU courts are far more restrictive: it is all but impossible for NGOs to bring challenges there, save where a decision is directed

[8] See, for example, *R (Grierson) v OFGOM and Atlantic Broadcasting* [2005] EWHC 1899

[9] *The Electronic Collar Manufacturers Association and another v Secretary of State for the Environment, Food and Rural Affairs* [2019] EWHC 2813 (Admin) (24 October 2019) http://www.landmarkchambers.co.uk/wp-content/uploads/2019/10/Electronic-Collar-Manufacturers-v-SS-for-Environment-24-Oct-2019.pdf

[10] *R (National Farmers Union and another) v Secretary of State for the Environment, Food and Rural Affairs* [2020] EWHC 1192 (Admin) (13 May 2020) https://www.bailii.org/ew/cases/EWHC/Admin/2020/1192.html

to them (as with a refusal of a request for information). The result is that unlawful decisions taken by the European Commission and other EU bodies often go unchecked. That is inimical to the rule of law. [11] The UK should not make the same mistake.

36. In short: the legal basis for standing should not change. Judges are well able to assess whether an organisation has a legitimate claim to bring a case.

***Protective costs orders***

37. PCOs give NGOs bringing a judicial review in the public interest some protection against costs should they eventually lose the case. The 2015 Act now sets out the criteria. [12] It uses the term 'costs capping order' and defines it as 'an order limiting or removing the liability of a party to judicial review proceedings to pay another party's costs in connection with any stage of the proceedings'. [13]

38. In our view, PCOs are a vital mechanism for ensuring that appropriate animal protection cases can be brought, and the rule of law therefore vindicated. They are more or less obligatory in environmental cases (under the Aarhus Convention), to which animal protection cases can be closely analogous. Their importance is highlighted by an important CFI judicial review [14] about the Home Office's approach to assessment of suffering when deciding whether to grant licences for animal experiments. The department was projecting costs of £150,000 and, but for the PCO, CFI would have had to abandon the case.

39. Indeed, there is a good argument that the criteria for granting PCOs are now too strict. For example, section 88(6)(b) and (c) provide that a PCO *cannot* be granted unless (*inter alia*) the court is satisfied that the applicant would withdraw the case, and be acting reasonably in doing so, if the application was rejected. No

[11] References via domestic courts are not always possible and can in any event be expensive and take a long time. Even that avenue will shortly be closed for UK citizens and NGOs
[12] Sections 88 and 89
[13] Section 88(2)
[14] Again, *sub.nom.* the BUAV

doubt this should be a factor going to the exercise of discretion but it is unnecessarily restrictive to make it a precondition which has to be satisfied in every case. The overriding test for a PCO should be one of reasonableness: is it reasonable to expect an NGO, which is motivated by concern for the public interest, to be exposed to a full adverse costs order, in light of its financial position, the relative financial position of its public body opponent, the public importance of the interests at stake and the apparent strength of the legal arguments? If the issue is of great importance to the NGO's constituency and to the rule of law, it may feel obliged to struggle on even if does not obtain a PCO. That should not be a bar to its being granted a PCO. The potential legal costs associated with seeking a PCO are themselves a deterrent to frivolous applications.

40. In short: for the rule of law to be vindicated, judicial review must not be so expensive as to be out of reach of those who need to access it and PCOs are a vital tool in ensuring this in public interest cases. In addition, we believe that, where PCOs are not applied for or granted, judges should exercise more freely the discretion they have at the end of a case not to award costs against an unsuccessful NGO bringing a case in the public interest. The test should be whether clarification of the issue was reasonably called for.

***Interventions***

41. The courts have often welcomed interventions by third parties such as NGOs to help them understand the policy and factual context in which the decision under challenge was made. [15] They are designed to lead to more informed judgments by the court: intervention is not there for the benefit of the intervener but for the court. In fact, the Government and other public bodies often apply to intervene in judicial reviews.

[15] NGOs have often been closely involved in lobbying for the laws in question

42. A judge may decide that an intervention should only be permitted by written statement, thereby keeping costs down for all parties.

43. Nevertheless, under section 87(5)-(7) of the 2015 Act the court *must*, on application, order an intervener to pay the additional costs incurred by the applicant where (*inter alia*) (i) the intervener's evidence and representations, taken as a whole, have not been of significant assistance to the court; or (ii) a significant part of the intervener's evidence and representations relate to matters that it is not necessary for the court to consider in order to resolve the issues. There is an exceptional circumstances get-out but the provision nevertheless unfairly and unnecessarily trammels the court's discretion. The intervener may have acted perfectly reasonably and will probably have been acting on advice in deciding on its contribution to the proceedings. By definition, in granting permission to intervene the judge must consider that an intervener would add value and it is not fair that interveners should bear the risk that a case should then take a different course from that anticipated.

***Time limit for bringing claims***

44. Under CPR Part 54.5(1), planning cases aside judicial reviews must be brought promptly and in any event 'no later than 3 months after the grounds to make the claim first arose'. The court can extend or shorten the time limit. Section 31(6) of the Senior Courts Act 1981 then provides that, where there has been 'undue delay' in making an application for judicial review, the court may refuse to grant permission or relief '… if it considers that the grant of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration' – in other words, even if the claim would otherwise have been successful.

45. The need for alacrity is reasonable, given the uncertainty which the bringing of a case may represent for good administration or for third parties.

46. However, the critical words in CPR Part 54.5(1) are 'after the grounds to make the claim first arose'. It may not be obvious when this is. A claimant, including an NGO, may not know that grounds have arisen for some time. This is particularly so with animal protection, where secrecy of both activity and regulatory practice is pervasive. It is not reasonable to expect the claimant to bring a claim until they know, or should have known, about the 'decision' in question.

47. Similarly, where what is being attacked is the validity (the *vires*) of secondary legislation or the lawfulness of either guidance, a policy adopted by a public body or a code of practice, it is not reasonable to expect a claimant to bring a case until the legislation etc affects them or those they represent. These are often termed continuing illegality cases. Until that point, the claimant does not have standing to bring a case. The courts have not always been consistent in the way they have approached continuing illegality cases and clarity would be welcome.

***Disclosure and the duty of candour***

48. The review refers to (a) the burden and effect of disclosure in particular in relation to policy decisions in government; and (b) the duty of candour, particularly as it affects Government.

49. These are closely related. The duty of candour comes first chronologically. On receipt of a pre-action letter under the judicial review protocol, public bodies must consider whether there are documents or other information which they should disclose to the putative claimant. This is explained in guidance issued by the Treasury Solicitor. [16] Sadly, in our experience the duty is often not honoured, but it is vitally important. Claimants are at an obvious disadvantage because public bodies have access to information which they do not. It is therefore difficult to be confident whether unlawfulness has taken place. As importantly, judges cannot perform their role unless they have the full picture. In our view,

16 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/285368/Tsol_discharging_1_.pdf (2010)

there should be no watering down of the duty of candour. Of course, if there is strong reason to suspect that someone is misusing the judicial review protocol to obtain information (to which perhaps they would not be entitled under FOIA), without any real intention of bringing a judicial review, the duty should not apply.

50. Orders for disclosure are rare in judicial review, even where the duty of candour has not been honoured. The legal test is whether disclosure appears necessary in order to resolve the matter fairly and justly. [17] In our view, whilst disclosure should not be routine (as it is in litigation between private parties), the court should not hesitate to order it where appropriate. In *R (National Association of Health Stores and another) v Department of Health*, [18] Lord Justice Sedley said that the Court should not simply rely on summaries of documents provided by officials: [19]

> '*… The best evidence rule is not simply a handy tool in the litigator's kit. It is a means by which the court tries to ensure that it is working on authentic materials. What a witness perfectly honestly makes of a document is frequently not what the court makes of it. In the absence of any public interest in non-disclosure, a policy of non-production becomes untenable if the state is allowed to waive it at will by tendering its own précis instead*'.

We respectfully agree.

## Conclusion

51. Judicial review is a precious safeguard against the abuse of power (however inadvertent) by Ministers and other public bodies. Anything which limits the rights of individuals or organisations to bring judicial reviews, or makes it more difficult for them in practice, would be a seriously retrograde step in a democracy such as ours.

[17] See *Tweed v Parades Commission for Northern Ireland* [2007] 1 AC 950 (House of Lords)
[18] [2005] EWCA Civ 154 (22 February 2005)
[19] Para 49

52. Because judicial review is a discretionary remedy, judges have the flexibility they need to ensure that an appropriate balance is struck between vindication of the rights of the claimant (or those they represent), on the one hand, and the interests of third parties and good administration, on the other. There is no warrant for legislative intervention limiting that flexibility. Unmeritorious cases can be, and are routinely, weeded out at an early stage.

53. Responsible public bodies often welcome the clarification of the law which judicial review can facilitate. Judicial review improves decision-making, to everyone's benefit.

54. Judicial review is particularly important with animal protection, where animals used by human beings in various settings are dependent on NGOs to bring cases to ensure that they are indeed accorded the protection intended by Parliament.

# Annex

Marc Abraham, veterinary surgeon and broadcaster

Karl Ammann, wildlife photographer and campaigner

Animal Aid

Animal Defenders International

Animal Equality

Animal Free Research UK

Animal Interfaith Alliance, an umbrella organisation for:

- The Anglican Society for the Welfare of Animals
- Animals in Islam
- Bhagvatinandji Education and Health Trust
- Catholic Concern for Animals
- Christian Vegetarians and Vegans UK
- The Christian Vegetarian Association US
- Dharma Voices for Animals
- The Institute of Jainology
- The International Ahimsa Organisation
- The Jewish Vegetarian Society
- The Mahavir Trust
- The Oshwal Association of the UK
- Pan-Orthodox Concern for Animals
- Quaker Concern for Animals
- The Romeera Foundation

The Sadhu Vaswani Centre

The Young Jains

Animal Justice Project

Animal Protection Services

Animals Save UK ltd

Born Free Foundation

Caged Nationwide/Sighthound Welfare UK

Compassion in World Farming

Cruelty Free International

Four Paws UK

Freedom for Animals

Greyt Exploitation

Humane Being

League Against Cruel Sports

Leicester Animal Rights

Leicestershire Animal Save

One Kind

Open Cages

Respect for Animals

RSPCA

Save the Asian Elephant

The Donkey Sanctuary

The Humane League

The Vegan Society

Tracks Investigations

Wild Welfare

World Animal Protection

Viva!