



THE FRAUD
LAWYERS ASSOCIATION

MINISTRY OF JUSTICE IRAL SECRETARIAT

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?

Call for evidence

RESPONSE OF THE FRAUD LAWYERS ASSOCIATION

Introduction

1. The Fraud Lawyers Association (“**FLA**”) was founded in 2012 to educate and train its members in all matters relating to their practice as fraud lawyers. Its membership consists of several hundred solicitors and barristers who practice mainly in the area of criminal and/or civil fraud.
2. This response reflects the wide range of experience accumulated by our members, from both branches of the legal profession; including public prosecutors (past and present) and defence lawyers as well as advocates who both prosecute and defend. Some of our members act both for claimants and defendants in judicial review proceedings relating to financial crime investigations.
3. A recent exercise by Professor Richard Ekins and Professor Graham Gee of the Judicial Power Project purported to identify 50 “problematic” UK cases, although by their own admission the

authors of that study did not define what they meant by “problematic”¹. This list may therefore have included identification of “problematic” social issues or correct legal decisions which were “problematic” for the Government. Those calling for unnecessary reform to judicial review will nevertheless rely on tendentious articles such as this to support their agenda.

4. At the outset of its response, the FLA notes that the Conservative Party’s 2019 manifesto stated:

After Brexit we also need to look at the broader aspects of our constitution: the relationship between the Government, Parliament and the courts; the functioning of the Royal Prerogative; the role of the House of Lords; and access to justice for ordinary people. The ability of our security services to defend us against terrorism and organised crime is critical. We will update the Human Rights Act and administrative law to ensure that there is a proper balance between the rights of individuals, our vital national security and effective government. We will ensure that judicial review is available to protect the rights of the individuals against an overbearing state, while ensuring that it is not abused to conduct politics by another means or to create needless delays.

5. This manifesto pledge to “update” administrative law followed the government’s defeat in the Supreme Court case of *R (Miller) v Secretary of State for Exiting the European Union* [2018] AC 61 and the Prime Minister’s personal defeat in *R (Miller) v Prime Minister* [2020] AC 373. Following the latter loss, the Prime Minister was subsequently reported as wanting to review the scope of judicial review². This background does not form a sound springboard for revision of the UK’s constitution. As Jonathan Sumption, former JSC, said³:

¹ www.judicialpowerproject.org.uk/judicial-power-50-problematic-cases/

² E.g. “Boris Johnson told to keep ‘populist hands’ off judiciary after reports he wants overhaul of how government is challenged in court”, The Independent, 25 July 2020. <https://www.independent.co.uk/news/uk/politics/boris-johnson-judicial-reviews-supreme-court-uk-governemt-a9637601.html>

³ “How the UK Supreme Court’s rebuke to Boris Johnson remakes British Law”, New York Times, 24 September 2019.

“If the government takes an axe to the political convention and there are no rules, then there is a complete void in which the executive can act however it likes.”

6. The current call for evidence is plainly related to that political manifesto agenda and the Prime Minister’s desire to reduce judicial scrutiny of government decisions. The FLA simply does not understand the manifesto’s reference to ensuring that judicial review “is not abused to conduct politics by another means” and is concerned that the populist use of such language may be appealing to those who do not really understand the vital constitutional function the courts play in our democracy. The prosaic truth is that judges refuse to venture into examining political decisions unless they have been taken unlawfully. Even the government must act in accordance with the law. For reasons that are set out in this response, the FLA is concerned by the apparent attempt to categorise judicial review challenges to the unlawful acts of the government and its agencies as “conducting politics by another means”.
7. The law - whether derived from international principles, legislation or the common-law of our country - must be respected by the government and its various departments. For centuries, it has been an essential aspect of the United Kingdom’s democracy that the government is held accountable for its unlawful conduct. Scrutiny of government activity through the courts is an integral part of our democratic process and any proposed curtailment of that accountability merits very careful and mature consideration. There is a real risk that any removal or restriction on the right to bring judicial review proceedings is perceived as, or is in fact, an attempt to muzzle judges from examining the limits within which the government and its agencies are able to lawfully operate. This has constitutional implications. As Baroness Hale PSC and Lord Reed DPSC recently explained in *R (Miller) v Prime Minister* [2020] AC 373 at paragraph [33]:

... [T]he courts have a duty to give effect to the law, irrespective of the minister's political accountability to Parliament. The fact that the minister is politically accountable to Parliament does not mean that he is therefore

immune from legal accountability to the courts. As Lord Lloyd of Berwick stated in *R v Secretary of State for the Home Department, Ex p Fire Brigades Union* [1995] 2 AC 513, 572–573:

“No court would ever depreciate or call in question ministerial responsibility to Parliament. But as Professor Sir William Wade points out in *Wade & Forsyth, Administrative Law*, 7th ed (1994), p 34, ministerial responsibility is no substitute for judicial review. In *R v Inland Revenue Comrs, Ex p National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, 644 Lord Diplock said: ‘It is not, in my view, a sufficient answer to say that judicial review of the actions of officers or departments of central government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge.’

8. Judicial review proceedings in the area of financial crime have historically involved sensitive and complex international issues of legal importance. Judicial review proceedings have resulted in the quashing of decisions taken by the government and/or government departments such as the Serious Fraud Office and the National Crime Agency, or more frequently in important clarification of the limits of those powers:
 - a. examination of significant principles of international comity and international law as regards the requirement for co-operation between international prosecuting authorities: e.g. *R (KBR, Inc.) v Director of Serious Fraud Office* [2019] QB 675 (the Supreme Court heard an appeal on 13th October 2020), which considered whether the SFO can unilaterally and coercively require a foreign company to produce documents held abroad, and *R (JP Morgan and ors) v Serious Fraud Office* [2012] EWHC 1674 in

which the High Court quashed the SFO's decision to act upon an unlawful Italian request for assistance;

- b. compliance with the rule of law: e.g. *R (Corner House Research) v Serious Fraud Office* [2009] 1 AC 756, in which the House of Lords considered a decision by the SFO to abandon a bribery investigation into Saudi arms deals as a result of a threat from a Saudi Arabian official that it would withdraw its counter-terrorism co-operation, and *R (Chatwani) v National Crime Agency* [2015] EWHC 1284 in which the High Court quashed search warrants and precluded the NCA from retaining material obtained during the execution of those warrants owing to the NCA's "egregious disregard" for the provisions of PACE 1984 and its concealment of its desire to install covert listening devices when applying for a search warrant);
- c. right to a fair trial: e.g. *R (AL) v Serious Fraud Office* [2018] 1 WLR 4557 in which the SFO's failure to seek relevant disclosure from the corporate subject of a Deferred Prosecution Agreement was criticised by the High Court;
- d. legal professional privilege: e.g. *R (McKenzie) v Serious Fraud Office* [2016] 1 WLR 1308 in which the High Court provided guidance regarding how the SFO should approach the collation, sifting and retention of privileged communications between a lawyer and their client;
- e. presence of a solicitor in an interview: e.g. *(R (Lord) v Serious Fraud Office* [2015] EWHC 865 in which the High Court examined whether the SFO acted lawfully in precluding a solicitor from remaining in an interview conducted pursuant to s.2 of the *Criminal Justice Act 1987*.

9. Judicial review has therefore provided both an essential safeguard against the unlawful conduct of prosecuting agencies and ensured the accountability of such agencies. It is impossible to identify which cases are viewed by the government as "considering the actions of an overbearing state", "involving the conduct of politics by another means", or "creating needless delays", and thus fall within the scope of the current call for evidence.

10. The introductory comments to the Terms of Reference do not sufficiently clarify the purpose of the call for evidence. The Terms of Reference state that the review is intended to examine trends in judicial review of executive action whilst balancing the role of the executive to govern effectively under the law, with a request for evidence on the development of JR and judicial decision-making and what reforms might be justified.

11. In 2013, the coalition government introduced a package of reforms with the stated aim of reducing the alleged rise in judicial review claims and the burden on public authorities. From 1 July 2013, CPR r.54.12(7) introduced a power for the single judge considering whether to grant permission to apply for judicial review to certify that the claim was “Totally Without Merit”. A similar provision was inserted into the Upper Tribunal Rules 2008 as a result of the transfer of jurisdiction to hear immigration claims. The effect of a judge certifying that the claim is totally without merit is that the claim fails and the claimant may not orally apply to renew his application for permission.

12. The purpose behind introducing the new rule was explained in *R (Grace) v Secretary of State for the Home Department* [2014] 1 W.L.R. 3432 at [13]:

[13] I return to the purpose of CPR 54.12.7. It is not simply the prevention of repetitive applications or the control of abusive or vexatious litigants. It is to confront the fact, for such it is, that the exponential growth in judicial review applications in recent years has given rise to a significant number of hopeless applications which cause trouble to public authorities, who have to acknowledge service and file written grounds of resistance prior to the first judicial consideration of the application, and place an unjustified burden on the resources of the Administrative Court and the Upper Tribunal. Hopeless cases are not always, or even usually, the playthings of the serially vexatious. In my judgment, it would defeat the purpose of CPR 54.12.7 if TWM were to be given the limited reach for which Mr Malik contends. It would not produce the benefits

to public authorities, the Administrative Court or its other users which it was intended to produce. I have no doubt that in this context TWM means no more and no less than 'bound to fail'.

...

[15] The adoption of this approach does contain within it two important safeguards. First, no judge will certify an application as TWM unless he is confident after careful consideration that the case truly is bound to fail. He or she will no doubt have in mind the seriousness of the issue and the consequences of his decision in the particular case. Secondly, the claimant still has access to a judge of the Court of Appeal who, with even greater experience and seniority, will approach the application independently and with the same care. To my mind, these safeguards are sufficient. CPR 54.12.7 so applied does not detract from the vital constitutional importance of the judicial review jurisdiction. Moreover, it is consistent with the overriding objective of the CPR."

13. The Court of Appeal also examined the government's 2013 consultation paper that led to the introduction of the new rule, in *Wasif and anor v Secretary of State for the Home Department* [2016] EWCA Civ 82:

[14] ... The proposal originated in a Consultation Paper entitled *Judicial Review: proposals for reform* issued by the Ministry of Justice in December 2012. It was put forward on the basis that it would shorten the process of weeding out "weak or hopeless cases" (or, elsewhere, "unfounded or misconceived cases"). The senior judiciary in their response welcomed the proposal, saying that it would be "effective in filtering out weak cases early while minimising the risk of injustice". The Government in its response to the consultation again referred to "weak or hopeless cases", though there was also a reference to the procedure having an impact "only on the weakest cases".

14. The Court of Appeal went on to examine how cases are filtered out at the permission stage by judges exercising their practical experience:

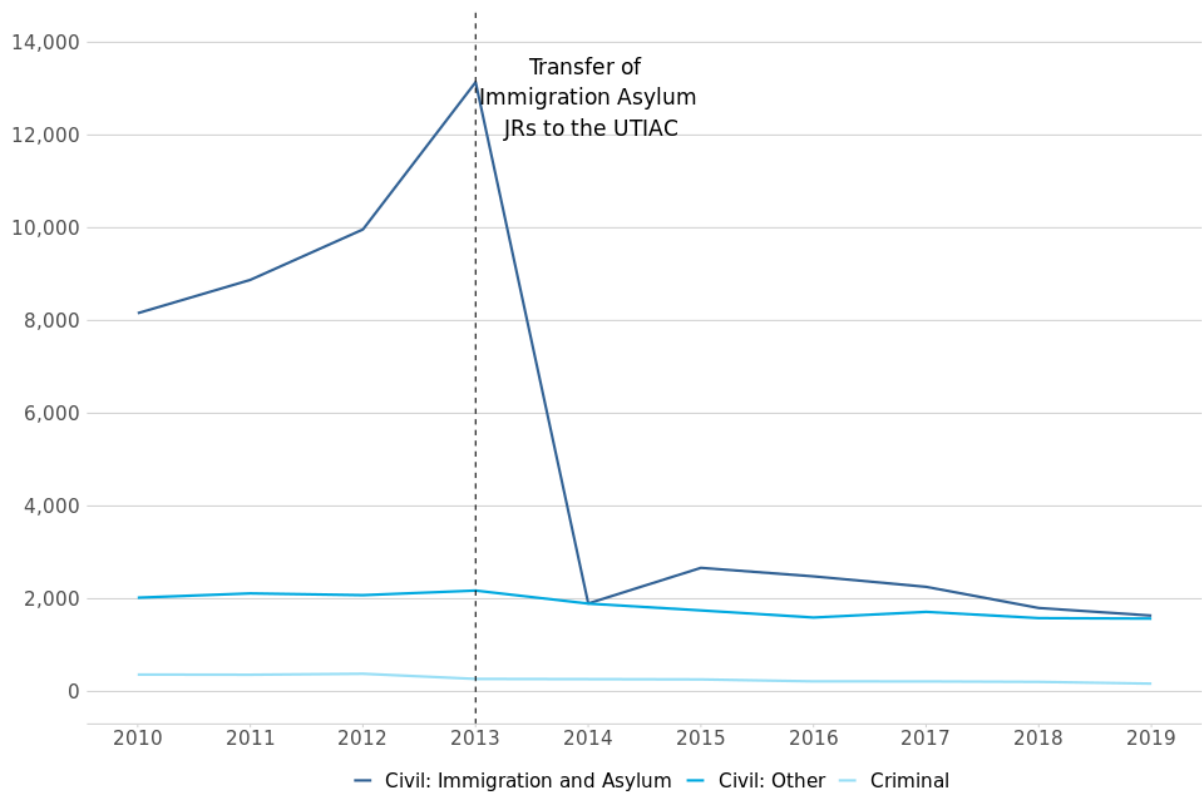
[15] In our view the key to the conundrum is to recognise that the conventional criterion for the grant of permission does not always in practice set quite as low a threshold as the language of "arguability" or "realistic prospect of success" might suggest. There are indeed cases in which the judge considering an application for permission to apply for judicial review can see no rational basis on which the claim could succeed: these are in our view the cases referred to in *Grace* as "bound to fail" (or "hopeless"). In such cases permission is of course refused. But there are also cases in which the claimant or applicant (we will henceforth say "claimant" for short) has identified a rational argument in support of his claim but where the judge is confident that, even taking the case at its highest, it is wrong. In such a case also it is in our view right to refuse permission; and in our experience this is the approach that most judges take. On this approach, even though the claim might be said to be "arguable" in one sense of the word, it ceases to be so, and the prospect of it succeeding ceases to be "realistic", if the judge feels able confidently to reject the claimant's arguments. The distinction between such cases and those which are "bound to fail" is not black-and-white, but we believe that it is nevertheless real; and it avoids the apparent anomaly identified at para. 13 above.

[16] Once that is recognised, there is a sensible basis for distinguishing between the two kinds of case as regards the right to an oral renewal hearing. The provision for such a right, in the rules as currently structured, recognises that oral argument may on occasion persuade a court that a claim for which the judge has refused permission on the papers does in fact have a realistic chance of success. To allow for that possibility is reasonable where the judge has recognised a rational case but has felt able to reject it on the papers; and it reflects the value which the common law tradition attaches to oral argument. But where the judge has found that the claim is bound to fail, in the sense identified above, it necessarily follows that there is no such chance; and to allow a hearing would be pointless and would merely – contrary to the policy behind the 2013 rule-changes – waste the resources of the Court and unjustifiably prolong an apparent uncertainty about the lawfulness of the challenged decision.

15. Thus, permission to apply for judicial review is refused in cases where the single judge takes the view that, taking the claimant's case at its highest, it is wrong. The claimant may renew his application orally before the court should he choose to do so and the statistics show that a small number of cases are then granted permission. A case will be certified as totally without merit where there is no rational basis upon which the claim could succeed, i.e. the case is "hopeless" or "bound to fail". Permission will be granted in all other cases. The FLA thinks that this is a practical and workable approach to judicial supervision of the executive's conduct and does not require any amendment.
16. The review panel should take care not to overstate the demands on government from judicial review proceedings. All litigation is time-consuming. It could be argued that public authorities that repeatedly act in a contentious manner are likely to be repeatedly the subject of litigation. That is a circular argument and no basis to restrict the right of citizens to challenge executive decisions. It is the "hopeless" cases that require filtering and the coalition government has already adequately addressed this problem.
17. Although the Court in *Grace* referred to the "exponential" number of judicial review applications, in fact, by way of update, the figures have fallen substantially since then. Figure 10 is taken from the Ministry of Justice's own recent statistics⁴:

⁴ <https://www.gov.uk/government/publications/civil-justice-statistics-quarterly-april-to-june-2020/civil-justice-statistics-quarterly-april-to-june-2020>

**Figure 10: Annual Judicial Review Applications, by type;
calendar year 2010-2019 (Source: table 2.1)**



18. Further statistics supplied by the MOJ for the period October – December 2019 do not portray any concerning increase in judicial review applications, indicating there is undue burden on the government or the Administrative Court⁵. In fact, the opposite is true. The most recent statistics demonstrate a downward trend in all judicial review applications since 2017:

- a. There were 1,400 judicial review applications received so far in 2020, down 17% on the same period in 2019;
- b. In 2019, there were 3,400 applications received in total, down 6% on 2018 (from 3,600);

⁵https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/870184/civil-justice-statistics-quarterly-Oct-Dec.pdf

- c. Of the 1,400 applications received in the first half of 2020, 550 were civil immigration and asylum applications, 820 were civil (other), and 82 were criminal, down 38%, up 4% and up 14% respectively on the same period of 2019. 16 of the civil immigration and asylum cases have since been transferred to the UTIAC;
- d. Of the applications that were made in the first half of 2020, 38% are now closed. Of the total applications, 650 reached the permission stage within the first half of 2020, and of these:
 - i. 170 cases were granted permission to proceed;
 - ii. 470 were refused at the permission stage including 13% (88) that were found to be totally without merit (TWM). However, 12 cases refused at permission stage went on to be granted permission at the renewal stage;
 - iii. 180 of the 2020 cases have been assessed to be eligible for a final hearing and of these, 13 have since been heard.
- e. For the 2020 cases, the mean time from a case being lodged to the permission decision was 63 days, up from 60 days across the same period of 2019. The mean time from a case being lodged to final hearing decision was 99 days, similar to the same period of 2019.

19. The FLA makes the following observations:

- a. Even allowing for Covid-19 impacts in the first half of 2020, the long-term trend of judicial review applications has been downwards since 2015;
- b. The introduction in 2013 of the “Totally Without Merit” criteria in CPR r.54.12(7) had a meaningful impact on sifting out hopeless applications;
- c. In order to assist the single judge in determining such hopeless applications, the defendant will often file summary grounds of resistance identifying the weaknesses in the application. The introduction of any filtering criteria as a result of the review panel’s call for evidence would probably still require summary grounds of resistance to be filed by a defendant in order to assist the single judge determine the merits

and/or justiciability of the claim. This would not substantially reduce the administrative burden of responding to judicial review applications;

- d. There is no evidence to support the subjective contention that the business of government is being “improperly hampered” by the issuance of judicial review claims.

Terms of reference and the FLA’s response

20. The terms of reference reveal the justification for the IRAL’s Call for Evidence:

- Q1. 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.
- Q2. 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.
- Q3. 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.
- Q4. 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.

Q1. 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.

21. In *Council of the Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410 Lord Diplock stated:

‘By ‘illegality’ as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.’

22. The FLA does not think that there should be any form of codification whatsoever of the category of decision that is amenable to judicial review on the grounds of “illegality”. To remove or restrict the grounds of review in any case involving allegedly illegal conduct of the executive would represent a gross and unjustified interference with the separation of powers, which has formed the cornerstone of the UK’s unwritten constitution for the last 400 years.

Q2. 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.

23. Justiciability is an evolving concept. The FLA believes that a flexible approach allows judges to review the executive’s conduct in appropriate cases that involve a sufficient public-law element. Whilst recognising that the courts have traditionally treated matters of national defence, operational policing and international relations as non-justiciable, the FLA would not support rigid lines of justiciability by reference to certain types of decision, or government department or minister.

24. The courts are well-able to assess justiciability on the facts of a given case. In *R (David Ames) v Lord Chancellor* [2018] EWHC 2250, the court had to consider whether the challenged

decision was merely incidental to the public law function of providing legal aid or a necessary core element of discharging that function such that the decision was justiciable. Having reviewed the authorities, Holdroyde L.J., at paragraph 55 of the judgment, summarised the common-law approach when considering whether a decision is justiciable:

- a. there is no universal test for when a decision will have a sufficient public law element to make it amenable to judicial review. It is a question of degree;
- b. in determining whether a particular decision is amenable to judicial review, the court must have regard to not only the nature, context and consequences of the decision but also the grounds upon which the decision is challenged. The nature of the challenge, such as alleged 'illegality', may shed light on whether the decision is amenable to judicial review (the Court acknowledged the circularity of this test);
- c. the fact that the decision is made by a public body exercising its statutory powers will not necessarily be a conclusive indication that there is a sufficient public law element;
- d. conversely, the fact that the challenged decision relates to a public authority's performance of a contract will not be a conclusive indication that there is no sufficient public law element;
- e. it will be necessary to consider whether the challenged decision is one which is merely incidental to a public function or is one which is necessarily involved in the performance of a public function;
- f. if there is no sufficient public law element, the fact that there is no other avenue of appeal will not result in the court treating the decision as if it were a public law decision.

25. The FLA also notes that the Supreme Court unanimously rejected the Prime Minister's argument that his decision to prorogue Parliament was non-justiciable, referring to the significant constitutional impact that such a decision had on the separation of powers. If the use of prerogative powers is, in exceptional cases, reviewable by the courts it is difficult to conceive of any executive acts that should never be reviewable under any circumstances. Any criteria

formulated by the review panel would necessarily have to remain flexible, in which case the relevant considerations would only reflect the common-law's current approach.

26. Specifically in the area of financial crime, the Divisional Court examined the justiciability of the SFO's decision to investigate a suspect in *R (Corner House Research) v Serious Fraud Office* and, more recently, in *R (Soma Oil) v Serious Fraud Office* [2016] EWHC 2471. In both cases, the courts concluded that the claims were justiciable but to intervene would blur the constitutional difference between the judiciary and the SFO. However, key to these decisions was the fact that if the SFO had acted in bad faith (or there were other exceptional circumstances equally grave), the courts would be willing to intervene.

27. The common-law has already carefully balanced the role of judges with that of the executive and the legislature to determine whether a claim will be justiciable. In *R (Miller) v Prime Minister* [2020] AC 373 the Supreme Court carefully balanced the arguments that the Prime Minister's exercise of his prerogative power to prorogue Parliament was non-justiciable with the arguments that the courts should exceptionally intervene to prevent the government obstructing its accountability to Parliament given the significant change to the UK's constitution by the UK leaving the EU. On the evidence available the Supreme Court concluded that the claim was justiciable and quashed the Order in Council that had prorogued Parliament.

28. Consistently with the United Kingdom's flexible constitution and the common-law, there should be a flexible, rather than a hard-edged, approach to issues of justiciability. Otherwise the review panel risks disrupting the constitutional balance in the United Kingdom.

29. Should the UK's departure from the EU be relevant in any way to the review panel's call for evidence, the FLA observes that "Brexit" was said to be about giving power back to the people of the UK, not about shielding the executive from scrutiny.

Q3. 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.

30. For the reasons already provided in relation to Q1. and Q2., the FLA does not think that any areas of executive decision-making (particularly in the area of financial investigations) should be *de facto* non-justiciable, nor that there should be any operative presumption of non-justiciability. There are a great many ways in which the state can unlawfully impact on the rights of its citizens, including by acting in bad faith or with ulterior purpose. The executive is rightly given a wide margin of discretion by judges in many areas of its business, depending on the nature of the issue.

31. Turning to the specific questions:

- i. There should not be a closed list of grounds upon which the courts should be able to find a decision to be unlawful. The grounds upon which a decision may be challenged as “illegal” are flexible, and successful challenges include:
 1. procedural failings, such as a breach of the duty to act fairly (which includes an effective opportunity to make representations and notification of the issues to be considered);
 2. irrational or unreasonable decisions;
 3. taking irrelevant considerations into account or failing to take relevant considerations into account;
 4. non-compliance with policy or guidance (or failing to have any policy or guidance) or the over-rigid application of such guidance;
 5. improper purposes behind decisions;
 6. a duty to consult appropriately;
 7. a duty to provide reasons;

8. bias (actual or presumed), predetermination and lack of independence in the decision-maker;
 9. acting outside the scope of powers or duties, or failing to comply with duties or powers;
 10. a duty to act within a reasonable time;
 11. within some limits, compliance with statutory obligations (such as a duty not to act contrary to the *Human Rights Act 1998* or the Public Sector Equality Duty);
 12. failure to comply with legitimate expectations; and
 13. errors of fact in the decision-making process.
- ii. Given the answer to i. above, this question is not strictly relevant. The unlawful quality of the conduct cannot depend on the nature and subject-matter of the power.
 - iii. The discretionary remedies available to a court following a finding of unlawfulness (i.e. quashing order, mandatory order and/or damages) should remain. The discretionary aspect enables the court in appropriate cases to make no order, despite having found there to have been unlawful conduct.

Q4. 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.

32. This Question raises interesting issues. Putting aside the unquantifiable impact upon the process caused by the restrictions on funding for claimants⁶, the Call for Evidence appears to be premised on the suggestion that compliance with disclosure and the duty of candour by the Government is an irritant that should be streamlined out of the process as far as possible. With one exception recognised by the courts (i.e. relating to international requests for mutual legal assistance⁷), why wouldn't the executive wish to comply with a duty of candour in litigation? In the FLA's combined experience, compliance with the duty of candour has resulted in defendants properly conceding claims, resulting in saving costs and the court time. The only issue that merits consideration is the absence of a statutory threshold test for disclosure by defendants in judicial review proceedings, meaning that defendants would sometimes prefer to face the argument that they have failed to comply with the duty of candour than to voluntarily disclose borderline material that potentially undermines its case.

33. Those members of the FLA who defend judicial review proceedings are acutely aware how cumbersome compliance with disclosure and the duty of candour can be in complex cases, but they are nevertheless sensitive to the importance of these requirements to the credibility of the process and the furtherance of high standards in public administration. In 1986, Sir John Donaldson MR explained the rationale for the requirement⁸:

With very few exceptions, all public authorities conscientiously seek to discharge their duties strictly in accordance with public law and in general they succeed. But it must be recognised that complete success by all authorities at all times is a quite unattainable goal. Errors will occur despite the best of endeavours. The courts, for their part, must and do respect the fact that it is not for them to intervene in the administrative field, unless there is reason to inquire whether a particular authority has been successful in its endeavours. The courts must and do recognise that, where errors

⁶ See regulation 5A of the Civil Legal Aid (Remuneration) Regulations 2013 and the House of Commons Justice Committee report: *Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012*, 4 March 2015

⁷ *R (Unaenergy) v Serious Fraud Office* [2017] 1 WLR 3302

⁸ *R v Lancashire County Council, ex p Huddleston* [1986] 2 All ER 941, 945

have, or are alleged to have, occurred, it by no means follows that the authority is to be criticised. In proceedings for judicial review, the applicant no doubt has an axe to grind. This should not be true of the authority.

The analogy is not exact, but just as the judges of the inferior courts when challenged on the exercise of their jurisdiction traditionally explain fully what they have done and why they have done it, but are not partisan in their own defence, so should be the public authority. It is not discreditable to get it wrong. What is discreditable is a reluctance to explain fully what has occurred and why.

...

... Certainly it is for the applicant to satisfy the court of his entitlement to judicial review and it is for the respondent to resist his application, if it considers it to be unjustified. But it is a process which falls to be conducted with all the cards face upwards on the table and the vast majority of the cards will start in the authority's hands.

34. A further warning against reducing the requirement for compliance with the duty of candour is that trust in UK politicians and government ministers is at a low amongst the public⁹. The Ipsos MORI Veracity Index 2019 placed “politicians generally” at the bottom of those trusted to tell the truth (14%). “Government ministers” fared only marginally better at 17%. In comparison, judges were trusted by 81% of participants. Any incursion into the duty of candour, or curtailment of a defendant’s disclosure obligations, enables a public authority to present a misleading picture and prevents judges from fairly dealing with cases. This state of affairs can only serve to undermine public confidence in the process and in administrative decision-making, and fuel suggestions that difficult cases have been “whitewashed”.

35. Judicial review of decisions by prosecutors can be particularly sensitive. In appropriate cases, there is a process by which PII material can be considered by a court as part of a closed material

⁹ <https://www.ipsos.com/ipsos-mori/en-uk/trust-politicians-falls-sending-them-spiralling-back-bottom-ipsos-mori-veracity-index>

procedure, limiting the requirement to disclose sensitive documents to the claimant¹⁰. However, the courts will intervene when prosecutors get it wrong. In the very recent case of *R (L) v DPP [2020] EWHC 1815*, the Divisional Court quashed a CPS decision not to prosecute exploitation charges contrary to s.4 of the *Asylum and Immigration (Treatment of Claimants, etc.) Act 2004*. By s.31(2A) of the Senior Courts Act 1981, the court “must” refuse relief if it appears to the court to be highly likely that the outcome for the applicant would not be substantially different if the conduct complained of had not occurred. This provision is designed to prevent any remedy in unmeritorious cases. The CPS sought to rely on this provision, but the Divisional Court observed:

[39] In considering whether a substantially different outcome would have been “highly likely”, it is particularly important to have in mind the different constitutional roles of the executive and the courts. As recently observed by the Court of Appeal (Lindblom, Singh and Haddon-Cave LJ) in *R (Plan B Earth) v Secretary of State for Transport [2020] EWCA Civ 214* at [273], of the provisions of which section 31(2A) forms part:

“It would not be appropriate to give any exhaustive guidance on how these provisions should be applied. Much will depend on the particular facts of the case before the court. Nevertheless, it seems to us that the court should still bear in mind that Parliament has not altered the fundamental relationship between the courts and the executive. In particular, courts should still be cautious about straying, even subconsciously, into the forbidden territory of assessing the merits of a public decision under challenge by way of judicial review. If there has been an error of law, for example in the approach the executive has taken to its decision-making process, it will often be difficult or impossible for a court to conclude that it is ‘highly likely’ that the outcome would not have been ‘substantially different’ if the executive had gone about the decision-making process in accordance with the law. Courts should also not lose sight of their fundamental function, which is to maintain the rule of law...”.

¹⁰ *R (Jordan) v Chief Constable of Merseyside Police and anor [2020] EWHC 2274*

With that, I respectfully agree.

36. This respectful balance should be maintained. The court, not the executive, should decide on all available information whether there has been unlawful conduct. The court can only discharge its constitutional function if the executive can be trusted to comply with its duty of candour and disclosure obligations. However, it is plain that the courts accord the executive a wide margin of appreciation in decision-making where appropriate to do so.

37. The common-law requires claimants to have a “sufficient interest” in the matter in order to have standing to bring the claim. A flexible approach enables interest groups to bring judicial review proceedings in appropriate cases even if they have some private interest in the outcome of the claim: *R v Leicestershire County Council and ors, ex. p. Blackfordby & Boothorpe Action Group Ltd* (2001) *Env LR 2* at [38] – [C/1/20]:

“... the increasingly liberal approach of the courts towards the standing of interest groups since the Rose Theatre decision (see e.g. the survey in *R v. Secretary of State for Foreign and Commonwealth Affairs* [1995] 1 WLR 386) tells against the adoption of a restrictive approach in the present context even if it is right that the applicant represents the private interests of local residents rather than the wider community interest.”

38. However, the common-law recognises that mere “busybodies” do not have standing, as Lord Wilberforce recognised in *R v IRC, ex. p. National Federation of Self-Employed and Small Businesses* [1982] AC 617, HL:

“There may be simple cases in which it can be seen at the earliest stage that the person applying for judicial review has no interest at all, or no sufficient interest to support the application: then it would be quite correct at the threshold to refuse him leave to apply. The right to do so is an important safeguard against the courts being flooded and public bodies harassed by irresponsible applications. But in other cases this will not be so. In those it will be necessary to consider the powers or the duties in law of those against whom the relief is asked, the position of the applicant in relation to those powers or

duties, and to the breach of those said to have been committed. In other words, the question of sufficient interest can not, in such cases, be considered in the abstract, or as an isolated point: it must be taken together with the legal and factual context. The rule requires sufficient interest in the matter to which the application relates. This, in the present case, necessarily involves the whole question of the duties of the Inland Revenue and the breaches or failure of those duties of which the respondents complain.”

39. The current test for standing already prevents public bodies being “harassed by irresponsible applications”. As Lord Wilberforce explained, standing is a subject that cannot be considered in the abstract and must be viewed within the legal and factual context of the claim.

40. The FLA strongly believes that the common-law approach to “standing” does not require any review by the panel. There are occasions when it may be important for issues affecting the wider public to be challenged by representative bodies such as the FLA. Individuals may not have the financial means to bring such challenges, nor may they have the inclination to do so through fear that such challenge will be counter-productive to a favourable outcome of their investigation.

41. Time-limits do not require amendment. The 3-month limit is tight but subject to extension in appropriate cases. This period generally allows sufficient time for clients to secure evidence, clarify issues by way of correspondence and obtain legal advice before the lawyers for each party exchange letters before action and issue proceedings. Government departments often delay responding to correspondence, sometimes making it necessary for a claimant to issue proceedings simply in order to ensure the claim is filed within time. Any extension of the 3-month period may result in uncertainty over administrative activity, whereas any reduction of the time-limit may result in an increase in the number of judicial review claims filed simply in order to comply with the reduced time-limit. That would increase costs and the burden on administrators having to respond to filed applications. The current system strikes the right balance.

42. One area that does require codification of some sort is the avenue of appeal in a “criminal cause or matter”¹¹. The route of appeal in judicial review proceedings relating to a “criminal cause or matter” is to the Supreme Court, but that requires the High Court to certify a point of law of general public importance: *Administration of Justice Act 1967, s.1(1)*. Otherwise, appeal from the High Court is to the Court of Appeal and does not require certification of a point of law of general public importance.

43. As the Supreme Court recently observed in *Re McGuiness [2020] 2 WLR 510*, this has significant impact upon criminal appeals in judicial review matters, involving special procedural hurdles. The Supreme Court acknowledged that there would be many cases in which an appellant had a meritorious complaint about a High Court decision which was not corrected because the case did not raise a point of law of general public importance. Anticipating the wrong route of appeal is fatal to the appeal court’s jurisdiction to hear the claim¹², resulting in wasted time and costs for all parties. Indeed, a single judge’s refusal of permission and certification of a judicial review application in a criminal cause or matter as totally without merit can neither be overturned as a result of an oral renewed application for permission, nor can it be appealed to the Court of Appeal or Supreme Court: *R (Kearney) v Chief Constable of Hampshire [2019] EWCA Civ 1841*. Certainty on this issue would save costs, time and resources.

44. The FLA has neither evidence that the costs regime (which includes costs-capping) nor the current process for granting applications to allow interventions require amendment by the review panel.

¹¹ Senior Courts Act 1981, s.18(1)(a).

¹² E.g. *R (Panesar) v Central Criminal Court [2015] 1 WLR 2577* and *R (Kearney) v Chief Constable of Hampshire [2019] EWCA Civ 1841*

Conclusions

45. The common-law is currently functioning well in the UK. The introduction of totally without merit certification and the transfer of jurisdiction for immigration appeals to the UTIAC in 2013 has achieved a dramatic reduction in the Administrative Court's case-load, which currently remains on a downward trend. Legislation has been introduced to render the executive immune from challenge or sanction when the outcome would not have been substantially different if the unlawful act had not occurred. The impact of the civil costs regime has also played its part in reducing claimant's ability to challenge the actions of the executive. Judges already approach the question of permission in a robust fashion such that only meritorious cases are considered at a final hearing. A sensible balance in practice and procedure therefore currently operates in judicial review proceedings. The FLA is against any further measures which serve to protect the executive from judicial scrutiny in public courts.

46. Several contentions in the IRAL's call for evidence are without any foundation, show a lack of understanding regarding the practical operation of judicial review and are contrary to the common-law. This call for evidence will act as a dog-whistle to any executive body seeking to reduce scrutiny of its conduct by the courts. Any further reform proposed by the review panel would have a deeply concerning impact on the UK's constitution and the separation of powers.