Response to the IRAL call for evidence

1 Introduction

I am a retired solicitor. I practised law until 2014 mainly in the field of town and country planning. Since then I have, amongst other things, lectured on planning law. During my career as a planning lawyer I acted for developers, landowners, local authorities, objectors and trade bodies on projects large (such as Canary Wharf, Channel Tunnel Rail Link, Cambourne New Settlement) and small. I was a member of the Law Society's Planning and Environmental Law Committee for many years and its chair from 2007 -2011. This submission is made in my personal capacity.

Governments generally dislike being restrained in what they do and in having their actions scrutinised by the Courts. However, we expect them to act within the law, and usually governments want to act lawfully. Apart from anything, if the government does not show a good example, it becomes difficult to require compliance by subjects. The principle that the executive arm of government and the prerogative powers of the Crown are subject to the law of the land, whether made by Parliament or declared by the judges as Common Law, was established definitively in the 17th Century in the reigns of James I and Charles I at considerable personal cost to Members of Parliament, and the bloodshed of the English Civil War.

Additionally, England is a freedom loving country which is proud to be subject to the rule of law and which within the past five years has celebrated the 800th anniversary of Magna Carta, a foundational document of that tradition, which restricted the exercise of arbitrary power by the executive.

A government which governs lawfully has nothing to fear from judicial review. Of course, mistakes about the law will be made, but it is better to have a way of correcting those. Of course, there will be new factual situations where there may be differing views on what the law requires. It is the job of the Courts to decide. Where the answer is clear, litigation is unlikely. In civil matters the Courts are there to resolve disputes and so avoid resort to self-help and violence. If there is no forum for the resolution of such disputes with the government, or if jurisdiction is denied, then the perception of unfairness will grow, people will feel they are powerless and there will be a sense of injustice. In addition, if government is insulated from having its decisions scrutinised and, where they are unlawful, quashed, government will tend towards disregard of the law.

2 Section 1 – Questionnaire to Government Departments

My submission on this is made in my private capacity but draws on my personal professional experience.

Question 1 The question asked is: "do any of the following aspects of judicial review seriously impede the proper or effective discharge of central or local governmental functions?"

The proper and effective discharge of central and local government functions includes the function of justifying the legality of the discharge of those functions. So this question is proceeding on a misunderstanding. It is really, does being judicially reviewed cause you inconvenience? Undoubtedly, judicial review and other forms of being held to account are inconvenient and divert time and energy away from other aspects of the job. They are stressful. But they are necessary in a democracy and in a rule of law nation. They also improve decision making and clarify what is required.

If a responding Government department answers "yes" to any of the examples (a) – (g) that suggests very serious deficiencies in their decision making. The Home Office is perceived to be the subject of many judicial review applications because of immigration and asylum decisions. But these are very important life changing decisions and it is crucial that the law is followed.

Question 1(h) asks whether the remedies are a serious impediment. A "yes" might be expected to this question 1(h). But in reality, it is not the remedy which is the problem. The true impediment to the discharge of the function is the decision under challenge, which is being quashed, or in relation to which an injunction is issued preventing the unlawful action. The remedies are: quash, remit for redetermination, injunction, declaration, damages. It is difficult to see how anything other than these would be appropriate. But it should be remembered that the remedy has always been discretionary and is not always issued despite the illegality. In addition since April 13th 2015 we have had s.31 (2A) of the Senior Courts Act 1981 which says:

"(2A) The High Court—
(a) must refuse to grant relief on an application for judicial review, and
(b) may not make an award under subsection (4) on such an application,
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."

This totally removes a remedy where the outcome would have been the same had the law been followed. It also considerably relaxes the requirement to follow the law where it is inconvenient, which is not supportive of the rule of law but gives relief where the decision would be the same.

Question 1(i) asks about standing. My field is planning law field and there the rules on standing to bring claims are very wide. In for example R v. Somerset County Council and ARC Southern, ex p Dixon [1997] JPL 1030 a case in which I acted for ARC Southern, the claimant, Mr Dixon, a local resident, challenged the grant of planning permission by the County. He had taken no part in the application process, not made any representations and nor had he participated in an earlier planning inquiry into identical proposals. Nonetheless he was given standing. Was this too wide? Mr Dixon's case was dismissed. ARC were unable to claim their costs from him owing to the rule in Bolton MDC v Secretary of State for the Environment [1995] 1 W.L.R. 1176 which normally denies the intervening applicant its costs. However, the costs involved were relatively modest compared with the cost of promoting the planning application. More recent case law (Crawford Brunt v Secretary of State [2015] EWHC 3580) has limited standing in statutory review challenges to Secretary of State planning appeal

decisions, and Mr Dixon's lack of participation would be likely to deny him standing in such cases. ARC, like most developers, factored the possibility if judicial review into their commercial planning so far as I am aware.

Question 1(j) asks whether the time limits for commencing judicial review cause difficulty in the proper and effective discharge of government functions. The time limits for judicial review are very short. As the Review will know, a challenge must be commenced "promptly and in any event within three months". In planning cases the time limit is six weeks. It is shorter in procurement cases.

Question 1(h) asks whether the remedies are a serious impediment. A "yes" might be expected to this question 1(h). But in reality, it is not the remedy which is the problem. The true impediment to the discharge of the function is the decision under challenge, which is being quashed, or in relation to which an injunction is issued preventing the unlawful action. The remedies are: quash, determine, remit for redetermination, injunction, declaration, damages. It is difficult to see how anything other than these would be appropriate. But it should be remembered that the remedy has always been discretionary and is not always issued despite the illegality. In addition since April 13th 2015 we have had s.31 (2A) of the Senior Courts Act 1981 which says:

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Defending a decision which is being challenged will take some time, as question 1(k) acknowledges. But judicial review is a relatively swift legal proceeding. Days and days of argument are unusual. If the defence is successful, it will have been worthwhile and is a necessary part of government life. If the defence fails, then the reasoned judgment of the court will be worth learning from and the future discharge of government functions will be improved. In short, legal accountability will always mean that defences have to be prepared from time to time. The time spent can be an investment.

Question 2

The question asked has three parts. I have separated them with letters.

2a In relation to your decision making, does the prospect of being judicially reviewed improve your ability to make decisions?
2b If it does not, does it result in compromises which reduce the effectiveness of decisions?

2c How do the costs (actual or potential) of judicial review impact decisions?

Answers

2a The potential for judicial review improves decision making. The decision maker is aware that decisions may be subject to judicial scrutiny. Therefore they try to ensure that they take into account all relevant matters, ignore the irrelevant matters, get the law right, not make Wednesbury unreasonable decisions and behave fairly. When preparing or advising on material being submitted to a decision maker, the potential for judicial review of the eventual decision has always been borne in mind and it has been important only to put before the decision maker matters which can properly be taken into account, and to put all of them into the process.

2b Not applicable in view of my answer to 2a.

2c Minimally. The potential for judicial review is a beneficial encouragement to good decision making.

This is another surprising question. Every government decision has the potential to be examined by the Courts. So every decision should be made with the possibility that it will be examined in Court in mind.

In the planning field in which I have worked for most of my career, wise developers work on that assumption. They are well aware that the range of people who can try to challenge a planning permission is huge. They instruct their professional teams to prepare applications for permission which put all the relevant matters before the planning authority, which do not mention irrelevant matters, which get the procedure and the law right and which do not lead to Wednesbury unreasonable decisions. An instruction to the developer's lawyers to review the application material so as to reduce (or eliminate) the risk of successful judicial review is not uncommon.

But it is surprising that any Government department, Civil Servant or Minister could contemplate making a decision which failed to take into account all relevant matters, which took into account anything irrelevant, which ignored or misinterpreted the law, which was so unreasonable that no reasonable decision maker could have taken it, or which failed to observe the rules of procedural fairness. Question 2b suggests that following the law results in "compromises". Between what would that compromise be? It must be between something which is lawful and something which is unlawful. This is not a compromise, because the unlawful thing is simply not available, it is not on the table. Therefore it cannot come into the decision maker's contemplation. If it does, the decision maker clearly wants to break the law. That is an unacceptable position. The decision maker should confine him or herself to options which are lawful. If those are insufficient, it is not acceptable to speculate whether the decision will be the subject of a claim for judicial review and take the risk. The proper course is to behave lawfully on the decision in hand and for the Government to seek to change the law through Parliament.

Question 3

The question is: "Are there any other concerns about the impact of the law on judicial review on the functioning of government (both local and central) that are not covered in your answer to the previous question, and that you would like to bring to the Panel's attention?"

The impact of judicial review on the functioning of government is actually beneficial. It is a good thing to ensure that government complies with the law.

The questionnaire then asks:

1. Are there any comments you would like to make, in response to the questions asked in the above questionnaire for government departments and other public bodies?
2. In light of the IRAL's terms of reference, are there any improvements to the law on judicial review that you can suggest making that are not covered in your response to question (1)?

There are no additional comments I would like to make from the point of view of a government department.

On the question of improvements, in the planning field there is an unfortunate dilemma for claimants over the time for commencing judicial review. In planning cases judicial review must be begun within six weeks after the grounds upon which the claim is based first arose. In planning it may be clear that the decision-making local authority has made a procedural error from early stage in the application process. Similarly, any illegality in relation to taking into account only matters which are relevant will be apparent at the date of the committee decision which can be some weeks before the permission is issued. When should the claim be commenced, or put another way, when does the time for claiming expire? For some years it has been clear that the claim need not be commenced unless and until the permission has been granted, so that the six weeks commences on the actual date of the permission. This is the effect of R (Burkett) v Hammersmith and Fulham London Borough Council [2002] 1 W.L.R. 1593 (HL). However, in R (Champion) v North Norfolk DC [2015] UKSC 52 the Supreme Court reserved its position on Burkett saying that it might want at the permission stage and at the discretion stage (the point at which having found illegality the court exercises its discretion whether or not to quash) to consider whether the challenge should have been commenced within six weeks of when the illegality was first apparent rather than six weeks from the date of the permission. This is an unnecessary hazard and now recreates the gamble for claimants. It suggests that the claimant, often a private individual, should advise the planning authority – a public governmental body – on the law. The planning authority has – or should have – the resources to do this. The private individual will rarely have such resources. I suggest that it should be made clear that whilst judicial review can be commenced at the earlier stage it is not necessary to commence judicial review in such cases unless and until the planning permission has been given, and that the six weeks begins from the actual date of the planning permission.

3 Section 2 – codification and clarity

Question 3[1]

[1] The numbering has two questions 3. This is the second question 3.

The question asks "Is there a case for statutory intervention in the judicial review process? If so, would statute add certainty and clarity to judicial reviews? To what other ends could statute be used?"

Apart from my suggestions in relation to R (Burkett) v Hammersmith and Fulham London Borough Council [2002] 1 W.L.R. 1593 (HL) and R (Champion) v North Norfolk DC [2015] UKSC, I do not have any suggestions for statutory intervention.

I imagine that this is the point at which some others may suggest that the decision of the Supreme Court in R. (on the application of Miller) v Prime Minister [2019] UKSC 41 (the prorogation case, often known as Miller 2) was improper and that judicial review should be limited so as to prevent similar cases. That was a momentous decision at a momentous time for the United Kingdom. But the illegality was simple and straightforward. The reason given for the five week prorogation was to enable the Queen's Speech to be written. But the evidence showed that it typically takes only four to six days to write it. No evidence was given why five weeks was necessary. The reasons did not support the action. So the advice to the Queen was unlawful. See paragraphs 58-61 of the judgment. Whilst the Supreme Court did not use the language of Wednesbury, the advice to the Queen was irrational on its face.

The advice to have such a long prorogation would have deprived Parliament of its ability to perform its constitutional function to hold the government to account. If that could lawfully be done, then the executive could govern for very long periods without Parliament, and would only need to recall Parliament to raise money and to continue to maintain an army. Power such as that was done away with in the 17th Century.

It is also worth observing on Miller 2 that the decision was unanimous, by all eleven Justices of the Supreme Court. This also means that it included those Justices who dissented in Miller 1[2]. So it is not a case of a decision by judges prejudiced against Government or against Brexit.

Question 4

The question asks "Is it clear what decisions/powers are subject to Judicial Review and which are not? Should certain decisions not be subject to judicial review? If so, which?

It is clear that there is a vast range of decisions taken by Government, both central and local, which are amenable to judicial review. The judgment in Miller 1 reminds us why it is normal for prerogative powers to be subject to judicial review. We are a rule of law nation. Government should regard all its decisions as ones which it should be proud to take in accordance with all the laws of the land and not seek to hide from justice, or to behave unlawfully. I have not seen a case made for the exclusion of any decisions from the need to follow the law and so would not change the current position.

Question 5

[2] (R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5

The question asks "Is the process of i) making a Judicial Review claim, ii) responding to a Judicial Review claim and/or iii) appealing a Judicial Review decision to the Court of Appeal/ Supreme Court clear?"

In my time in legal practice as a planning lawyer, I never encountered any lack of clarity.

4 Section 3 – process and procedure

Question 6

The question asks "Do you think the current Judicial Review procedure strikes the right balance between enabling time for a claimant to lodge a claim, and ensuring effective government and good administration without too many delays?"

Please see my comment above on Burkett and Champion.

Question 7

The question asks whether the rules regarding costs in judicial reviews are too lenient on unsuccessful parties or applied too leniently in the Courts?

Not in my view and experience. The protective costs orders available on Aarhus cases are there for environmental reasons. There may have been studies on whether that has encouraged litigation, but that is after all the aim of the Aarhus convention's provisions on access to environmental justice. The Aarhus convention was ratified by the UK in February 2005, in addition to it binding the UK as a result of its ratification by the EU[3].

Question 8

There are actually five questions. I have given each a letter:

8a Are the costs of Judicial Review claims proportionate?
8b If not, how would proportionality best be achieved?
8c Should standing be a consideration for the panel?
8d How are unmeritorious claims currently treated?
8e Should they be treated differently?

8a The legal costs of the successful party are always subject to assessment. In comparison to commercial litigation, judicial review is a very streamlined process, with most evidence being given in writing and unchallenged. This keeps legal costs down.

With respect, this is another slightly odd question. To what are the costs compared in the assessment of proportionality? In cases of human health, life, death and liberty, high costs are eminently justifiable. (In passing I note that the claimant's costs of judicial review in

[3] https://www.parliament.uk/globalassets/documents/post/postpn256.pdf

immigration cases are normally paid by the legal aid authorities. Legal aid rates are incredibly low.) In cases of high constitutional principle, high costs will be justified.

8b In the light of my answer to 8a I am unable to answer 8b.

8c I am not dissatisfied with the current position on standing. There might be a case for aligning standing on planning judicial review cases with standing on planning statutory review cases – see my comments at 1(i) above.

8d and 8e I have no experience of costs in unmeritorious claims. It should be remembered that there is already a filter in judicial review; claims only proceed to trial if they pass the permission stage, except in the case of rolled-up hearings.

Question 9.

The question is: "Are remedies granted as a result of a successful judicial review too inflexible? If so, does this inflexibility have additional undesirable consequences? Would alternative remedies be beneficial?"

The remedies seem appropriate to me. When coupled with the Court's discretion whether or not to issue a remedy and with s.31(2A) on which I have commented above it seems to me that government is not unjustly held to its legal obligations.

Injunctions in cases of personal liberty and deportation are the only way to prevent the harm which would flow from breach of the law, often irreparable harm.

Question 10.

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

For the decision maker it is straightforward – take into account what is relevant, exclude the irrelevant, do not be irrational, get the procedure right, behave in accordance with the rules of fairness. Specifically in planning, it would help if planning officers considered third party representations on a planning application when those representations are actually made (usually there is a 21 day period for such representations) rather than filing them and leaving them until the end of the process.

The claimant should engage with the decision making so that the substance of their case can be fully addressed. judicial review is about unlawful process not the merits of the case.

Question 11.

The question is "Do you have any experience of settlement prior to trial? Do you have experience of settlement 'at the door of court'? If so, how often does this occur? If this happens often, why do you think this is so?"

In planning, settlement is usually impossible as it would involve revoking the planning permission or amending it. This leads to compensation claims from the landowner as the value of the land is highly likely to be affected. That is the proper position and I do not suggest it is changed.

Question 12.

The question is "Do you think that there should be more of a role for Alternative Dispute Resolution (ADR) in Judicial Review proceedings? If so, what type of ADR would be best to be used?"

I would simply comment that judicial review is about illegality. It is not about damages. It is not always about financial loss. Another point to bear in mind is that many people are affected by the illegality. In a planning case, hundreds or thousands of people are affected by the illegality. If a planning judicial review could be settled by ADR, some of those who have stood back but morally supported the claimant might have a different view of an acceptable compromise. So if there were ADR in judicial review, we may see many more claimants in each case, there to protect their own view and possibly suspicious of a deal reached in the privacy of ADR. In contrast, I suggest they are likely to accept the view of a Court.

Question 13.

The question is: "Do you have experience of litigation where issues of standing have arisen? If so, do you think the rules of public interest standing are treated too leniently by the courts?"

Yes, I have such experience. See my comments above on R v. Somerset County Council and ARC Southern ex parte Dixon.

5 **Closing remarks**

Judicial review enables the citizen, the subject to ensure that government, both local and central, behave lawfully, especially in decisions which affect that person. The idea that a government would want to behave unlawfully or would think that its view on what is lawful is the only view is very strange. Yet that is what would happen if we limit judicial review. Government respect for the rule of law would decline. As it became inconvenient to comply with the law, civil servants and ministers would cut corners, secure in the knowledge that legal challenge had been limited. The business of government is to carry out the lawful business of government, lawfully. If it does not do that, the youth on the receiving end of the ASBO will thumb their nose at the authorities with some justification. The benefit fraudster will be aggrieved. Government will not command respect.

The actions of the current administration are relevant. For example Clause 45 of the Internal Market Bill states "regulations under section 42(1) or 43(1) are not to be regarded as unlawful on the grounds of any incompatibility or inconsistency with relevant international or domestic

law"[4]. So if a purported regulation under s.42 (Power to disapply or modify export declarations and other exit procedures) had not followed Parliamentary procedure or exceeds the ambit of the power and confiscated property that would apparently be lawful. Can that be right? Only judicial review will enable that to be settled. The government also advocates breaking international law. The government has been slow to comply with procurement law in relation to coronavirus contracts. It is also reported that it did not respond on the substance of the pre-action protocol letters issued by the Good Law Project on those contracts. Just this morning, this has been subject to comment in The Times[5]. Judicial review is a vital safeguard for the subject, citizen, business and public.

David Brock
19th October 2020

[4] The definition in the Bill of relevant international or domestic law includes all UK law.
[5] Clare Foges, "Time to stop the coronavirus gravy train".