RESPONSE of THE PUBLIC and ADMINISTRATIVE LAW GROUP of ST. JOHN'S CHAMBERS, BRISTOL[1] to THE IRAL Secretariat Call for Evidence

Preliminary

1. We should start by saying that the Consultation period for this response is lamentably short. It is approximately 6 weeks which, for a subject apparently as far reaching as this consultation, is unacceptable. This remains the case after the recent one week extension.[2] The Panel invites:

> "*the submission of evidence on how well or effectively judicial review balances the legitimate interest in citizens being able to challenge the lawfulness of executive action with the role of the executive in carrying on the business of government, both locally and centrally."*

This is a topic of fundamental importance to every UK citizen and business, and it seems to us that much longer should have been given. Almost as a throwaway line the document adds:

> *"The panel is particularly interested in any notable trends in judicial review over the last thirty to forty years. Specifically, the panel is interested in understanding whether the balance struck is the same now as it was before, and whether it should be struck differently going forward."*

2. Unless the panel is simply going to rely on the commentary from, e.g., *de Smith's* classic work on *Judicial Review* we consider that much longer is required for any considered responses.[3] We also note that no specific complaints are made about the way judicial review operates either in substance or procedurally.

3. The lack of time and the breadth of the consultation gives no confidence in the panel's approach to their task and strongly suggests that conclusions are pre-determined. The reality, with apologies to Lord Simonds in *Magor and St. Mellons*

[1] A sub-group of 10 practitioners in the field of public and administrative law at St John's Chambers, Bristol. . The views expressed in this Response do not necessarily reflect the views of individual members of St John's Chambers.

[2] See the Cabinet Office Guide on Consultation Principles 2018, para. E.

[3] Even the Planning White Paper consultation, which is supposedly a fundamental review of planning law and practice, allowed 12 weeks.

RDC v Newport Corporation,[4] appears to be that this an attempt at a naked usurpation of the judicial function under the thin disguise of reasonable enquiry.

Responses

4. We doubt whether [p. 5] it is fruitful to enquire whether there is a principle of 'non-justiciability' which can be applied to applications for JR. It strikes us that this was a debate which, in reality, was concluded in the 17th century in cases like the *Case of Proclamations*[5] in which Coke CJ observed that "*the King hath no prerogative but that which the law of the land allows him*". This might be regarded as one side of the coin whereas the other side is represented by *Godden v. Hales*,[6] in which Herbert CJ said that "*There is no law whatsoever but may be dispensed with by the supreme law-giver [the King] ….*".[7] The latter view did not survive 1689 and there has never been any serious attempt to revive it or to suggest that any similar approach is an appropriate one under English law (see on this the recent Supreme Court decision in *Miller (No. 2)* [2019] UKSC 41).

5. If one substitutes for 'the King' a modern government using prerogative powers one can see immediately the difficulty in suggesting that a particular common law or statutory power, absent the clearest words in an Act of Parliament, should be non-justiciable. We refer to the history because, in our view, it is impossible to treat this subject properly without reference to it. This is one, but only one, reason why the short consultation period is so unsatisfactory. In a nutshell the history of the courts' approach to governmental power has been one (with occasional blips, as in *Godden*, above) of sensible control to ensure legality. It should continue as at present and does not require legislative intervention.

7. There have been no serious attempts in the modern era (outside wartime) to do this, apart perhaps from the abortive attempt in the Asylum and Immigration (Treatment of Claimants) Bill of 2003 to insert an unprecedented ouster clause to all but outlaw any scrutiny by the courts. This is dealt with in detail in *de Smith*

[4] [1952] 1 AC 189, at 191 (speaking of Denning LJ's interpretation of the relevant statute) – "It appears to me to be a naked usurpation of the legislative function under the thin disguise of interpretation ……".
[5] 12 Co. Rep. 76.
[6] Howell's State Trials vol. 11 at 1196 and 1199.
[7] This was the dispensing powers case which was overruled by the Bill of Rights 1689.

at 1-060 and repays study.[8] We note, with considerable concern, that the government intends, in clause 48 of the United Kingdom Internal Market Bill to oust the jurisdiction of the courts to review the lawfulness of regulations made under clauses 44 and 45 (which concern the Northern Ireland Protocol) notwithstanding any potential incompatibility or inconsistency with international or domestic law.

8. We do not deal with Section 1 of the document because it seems to be addressed exclusively to central and local government. However we observe in relation to local government, of which we have had extensive appearance in dealing with JR and statutory appeals (invoking grounds similar to JR), that we have seen nothing – even when the challenge has been from well-funded environmental and other interest groups - to suggest that the grounds for judicial review "*seriously impede the proper or effective discharge of ……. local governmental functions.*" Indeed, there have been situations where JR intervention has been welcomed, particularly by officers, since it has justified a stance or advice taken or given by them.

9. The form of question 3 ("*Are there any other concerns about the impact of the law on judicial review on the functioning of government (both local and central) …….*") seems to assume that, as well as JR hampering the proper functioning of government (which we do not share), any such 'concerns' relating to the functioning of government have some priority over legality. This assumption is misplaced and strikes at the heart of our modern constitution and the separation of powers. This may seem harsh, and we have noted the opening to question 1, but the opening words of the first paragraph of the Introduction - whether judicial review "*balances the legitimate interest in citizens being able to challenge the lawfulness of executive action with the role of the executive in carrying on the business of government,*" - makes our point. As a matter of political expediency, there may be situations, perhaps the majority of the time, where the executive considers that the business of government should trump legality. However, this would be a dangerous position to take: in any democracy, it should be a fundamental principle that governmental decisions must be lawful and subject to the supervisory jurisdiction of the courts. There cannot be a 'balance' to be struck between executive

[8] See the Supplement at 1-060A for another example.

convenience and legality; such a balance would infringe individual rights and undermine our democratic order. We add it is plain, and has been for decades, that the courts are concerned only with the legality of a decision and not its merits and, in assessing legality, afford the decision-making a considerable degree of latitude: the courts will not substitute their own view for that of the decision-maker. Thereafter, the crucial question is what remedy, if any, the court grants to deal with an illegality.

10. Moving to section 2, we deal with the individual questions:

> 3. *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?*

11. The short answer is 'no'. The substantive principles of JR are well-established and well-known. They are set out in a number of textbooks, the principal ones being *de Smith* and *Wade and Forsyth*. The judges have developed the principles on the customary, common law incremental basis. They are well understood and applied by public bodies, applicants and the courts. The principles have been adapted to suit modern government, although many of them were obvious in the 19th century as is clear, for example, from the Supreme Court's judgment in *Miller (No. 2)*. The judges have been, in our view, rightly cautious and have concentrated on legality so as to leave the merits of the decision to the decision maker. We have been involved in many cases where challenges have been dismissed or permission to proceed has been refused because it has been clear that the challenge was not based on legal grounds but was one which sought to contest the merits of the decision. The procedural aspects of JR are also well-established, in the Civil Procedure Rules, in particular CPR rule 52 (on appeals) and rule 54 (on Judicial Review and Statutory Review), and related Practice Directions. The rules applicable to statutory appeals to specialised tribunals are already set out in the relevant statute and in the relevant tribunal's procedural rules.

12. It is impossible to assess whether a statute would add clarity and certainty to JR without seeing precisely what the statute would say. That apart, it would probably curtail the proper development of the law which, as we have said, has

been dealt with by the courts incrementally as law and society have developed. There is a major benefit in flexibility.

> *4. Is it clear what decisions/powers are subject to Judicial Review and which are not? Should certain decision not be subject to judicial review? If so, which?*

13. Again, the answer by reference to the textbooks, is 'yes'. In any system of law there are inevitably grey or borderline areas and JR is no exception. But that does not make the case for statutory intervention that would in some way limit a right to judicial review that would otherwise exist. Such areas can be left to the judges to sort out as they have in the development of administrative law and judicial review since the 1950s.

14. A good example of that is the most recent decision of the Supreme Court in *Miller (No. 2)* [2019] UKSC 41 dealing with the lengthy prorogation of Parliament – an exercise of the Crown's prerogative power. The Supreme Court reasserted traditional doctrine in making it clear that the extent of prerogative powers were for the courts to determine and that, in this instance, the government had exceeded those powers (see at [50]-[52] and [55]-[61]). There is nothing surprising about the principles of this decision and further light is shed on the courts' approach by the judgment of the Inner House of the Court of Session in *Cherry v Advocate General for Scotland* [2019] CSIH 49.

15. The Scottish judges took an even more traditional approach than the Supreme Court (see at [54]-[60], [90]-[91] and [123]-[124]).[9] They held that there was an improper motive or improper purpose for the use of prerogative power[10] namely, stopping Parliament sitting to transact business and to scrutinise governmental actions for a lengthy period. It will be noted that the government had the opportunity to explain itself and give lawful reasons for its actions but completely failed to do so. If this common law power was non-justiciable we would be in the situation where there was Parliamentary sovereignty,[11] provided Parliament was not prorogued at the whim of the executive for an indefinite period; such sovereignty would thus be illusory. That prospect alone suggests

[9] [2019] CSIH 49.

[10] Another way of putting this might have been to say that the decision maker had failed to take into account a material consideration.

[11] And the ability of Parliament to hold the executive to account on a regular basis.

there should be a legal limit on this power, which necessarily will be for the courts to determine.[12]

16. It is nothing to the point that there were political overtones in this decision. Both the Supreme Court and the Scottish Inner House were able to cite many decisions where the courts had applied the law in that situation.[13] The courts are used to dealing with cases where politics are to the fore and they are perfectly able to stick to the legalities, apply the law and reach a just decision. The courts are able to deal with sensitive issues where necessary by excluding evidence or holding that the issues, e.g., national security, are beyond their remit.

> *5. 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?*

17. Yes. The procedures are set out in the CPR, rule 54 and related practice directions and, for appeals, CPR, rule 52. This sets out clearly the modern procedure on JR. Furthermore, the Claim Form and the response form (both available on line) are easy to complete – although of course dealing with the grounds for JR in a given case may be complex and challenging. That is why legal advice may well be necessary, although many successful claims for JR are brought without professional legal assistance.

18. The Administrative Court Guide is available on line and provides an easy to read guide to procedures and issues together with references to further reading, e.g., the CPR.

> *6. 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?*

19. This is a very general question but the straightforward answer is 'Yes'. The time limits are deliberately short – 'promptly' and in any event within 3 months.[14] And there are only 6 weeks for Planning Court claims (that might be regarded as

[12] See the article by Professor Paul Craig on this topic (written before the Supreme Court gave judgment) In *Counsel* (Oct. 2019) at pp. 26-28.

[13] The *Case of Proclamations*, which has stood the test of time, strikes one as a case with very obvious political overtones.

[14] It cannot be extended by agreement; only at the discretion of the court.

too short). In some statutory appeals that are determined on the basis of judicial review principles, the time limit is even shorter (for example, 28 days to bring a claim for review of a decision of the Competition and Markets Authority under s.120 of the Enterprise Act 2002). It should be noted that 3 months is not a period during which the claimant can do nothing. He should be moving 'promptly' and cannot delay until the last day of the period. The courts treat the issue of delay strictly and against the claimant.[15]

20. In any event, the provision in the CPR for the use of Pre-Action Protocol letters (or an explanation of why they are not used) provides an early warning for defendants and, with a timely response, will sometimes stop a claim dead in its tracks, either because it is manifestly unmeritorious (and discontinued) or because the defendant accepts that its decision was in some way unlawful.

7. Are the rules regarding costs in judicial reviews too lenient on unsuccessful parties or applied too leniently in the Courts?

21. Like a number of these questions framed in general terms it is impossible to do more than give a general answer which is: 'no'. The general rule is that costs follow the event and the losing party should pay the successful party's reasonable and proportionate costs, as in other litigation.

22. If the reference is intended to be to the Aarhus Convention rules in relation to environmental claims (as defined there, they include a large number of planning matters) the answer is still 'no'. The CPR requires the claimant to identify its supporters and their financial support for the claim. It is possible for the defendant to seek to 'disapply' the Aarhus limits and there is space on the various forms for these purposes.

23. With regard to the courts' attitude to costs, our experience is that, on a summary assessment, the successful party is likely to recover what it claims. There are relatively few arguments before a judge on summary assessment. We cannot say how many detailed assessment claims proceed to the Costs Judge and, without knowing more about any perceived problems, we cannot say any more.

[15] The fact that the PAP letter procedure has been used or there are other negotiations is not an answer to a claim of delay; see *Trim v. North Dorset DC* [2010] EWCA Civ 1446 at [38].

If there is a presumption underlying the question that the courts fail to award defendants their costs, whether at all or in the amount claimed, that is a matter of case management and the court's discretion.

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

24. It is not clear how the different parts of this omnibus, and again general, question hang together. The short answer to the first sentence is 'yes'. But if there are grounds for thinking a winning party's costs are disproportionate the paying party's remedy is to challenge the summary assessment and/or seek a detailed assessment before the Costs Judge.

25. Standing need not be a consideration for the panel. There is a good deal of case law on the topic and an aggrieved defendant has ample opportunity to raise the matter when defending.

26. Unmeritorious claims are deal with under the CPR. If a defendant sees a claim as totally without merit, it may invite the court to so certify on an application for permission and, if done, there can be no application for renewal, albeit there can be an appeal to the Court of Appeal (with permission). There are further provisions for dealing with vexatious litigants and for civil restraint orders where a claim is found to be totally without merit. A direct answer to the question is that there is no case for dealing with them differently, whether from other applications for JR or civil claims generally.

> *9. 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?*

27. No – since the court as a matter of discretion may refuse to quash a decision, which is the normal remedy for an unlawful decision. Where it exercises its discretion it may do so by granting a declaration instead of a quashing order. However, it *must* refuse to grant relief where s. 31 of the Senior Courts Act 1981 applies, on the basis that the decision would not have been substantially different.

28. Alternative Dispute Resolution (such as mediation) could be made available but, if so, it would be necessary to extend the periods for applying to the court under CPR 54, since ADR might take some time and might fail.

10. What more can be done by the decision maker or the claimant to minimise the need to proceed with judicial review?

29. This assumes more needs to be done. Without evidence, it is not a valid assumption. That said, the Pre-Action Protocol letter procedure is very useful because it can weed out unmeritorious claims as well as showing that a defence to a claim will not succeed. See also para. 28.

11. 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?

30. Since the introduction of the Pre-Action Protocol procedure, settlement may take place as a result of the exchange of letters and so may result in the abandonment or compromise of a claim or the quashing of a decision by consent. On the assumption that the parties have been properly advised at that stage, any further settlement is unlikely since battle lines will have been drawn. It may happen if further material becomes available but in our experience is rare. Settlement at the door of the court is also rare but may happen because one party has misunderstood the strength of the opposing case.

12. 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?

31. There may be situations in which it could be useful, but see para. 28 above. Mediation would seem to be the most suitable form of ADR. If used, mediators will normally need to have a clear grasp of the legal principles involved both generally and in the area of dispute, in order to assist the parties either to reach settlement, narrow the issues or at least understand each others' cases better.

13. 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?

32. No.

33. Finally, we have to repeat that the time for consultation is far too short. When questions are framed in general terms this exacerbates the problem and we do not see why, on such important issues, more time has not been given. As a result, we feel prejudiced in responding.

26th October 2020

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