Duncan Lewis

Duncan Lewis Solicitors' response to the Independent Review of Administrative Law call for evidence

October 2020

Duncan Lewis

A. INTRODUCTION

1. Duncan Lewis is the largest legal aid firm in the country. Our public law department is responsible for a significant number of judicial review proceedings brought on behalf of largely vulnerable applicants, including refugees and victims of trafficking. Our work is centred around immigration law and the judicial review claims brought by the department primarily concern decisions made by public authorities in pursuit of immigration instruments. Considering the volume of our work, we believe we can provide the Panel insight into the current practicalities of judicial review.

2. We note the Government's aim to make changes to the current system "to ensure the judicial review process is not open to abuse and delay."[1] We are deeply concerned that such changes would enable the Government to cut costs, reduce accessibility to meaningful relief, and curtail the ability of the courts to hold the Executive to account. Considering our area of practice, we are particularly concerned that marginalised groups like asylum-seekers will lose meaningful avenues of representation, and become subjected to majoritarian policies which undermine individual rights.

3. We view the judiciary as an essential institution for the protection of the UK's constitutional principles. It is no surprise that the Government regards the courts as a thorn in its side. However, in Professor Mark Elliot's words, this "is precisely as it ought to be in a constitutional democracy that respects the rule of law and the separation of powers." Indeed, "holding the Executive to account by reference to legal standards that are enforceable via judicial review is a bedrock, and non-negotiable, function of an independent judiciary."[2]

4. Aware that constitutional theorists will provide the Panel insight into the constitutional ramifications of the proposed changes, we seek to limit our submission to providing practical examples of the day-to-day mechanisms of judicial review by the courts. By doing so, we hope to illuminate that the tools available to the courts today offer effective, efficient and tailored solutions to failures by the Executive. Moreover, as demonstrated by cases lost by Duncan Lewis (also discussed below), the current system does not unduly burden the Executive; the courts deploy both procedural and substantive mechanism of

[1] 'Government launches independent panel to look at judicial review'. 31 July 2020.
[2] Elliot, Mark. 'The Judicial Review Review I: The Reform Agenda and Its Potential Scope'. Public Law for Everyone. 3 August 2020.

judicial review with due deference to Executive expertise to ensure the courts do not overstep their constitutional boundaries.

5. Responding to the Terms of Reference of the Independent Review ("**TOR"**), Part B of our submission sets out a summary of our position. Our response does not seek to be a comprehensive response to the TOR. Rather, we have identified areas within the TOR which are of particular relevance to our practice area. In Part C we discuss a series of judicial review proceedings commenced by our department. With these case studies, we seek to offer the Panel insight into the practicalities of judicial review proceedings and consideration of the tools utilised by the courts.

B. SUMMARY OF KEY POINTS

(i) Codification

6. The TOR question whether substantive public law should be placed on a statutory footing to promote clarity and accessibility of the law.[3] We note that the powers of the courts are already codified in part (e.g. Senior Courts Act 1981) and argue that the remainder should continue to be guided by common law precedent to ensure it remains responsive to judge made developments. An all-encompassing codification of judicial review would not only have to be excessively lengthy (rendering the aim of promoting clarity and accessibility futile), it would by its very nature have to be so technical that it would disable the courts from tailoring their review to the individual circumstances of each case. By contrast, the flexibility of the common law ensures that judges have the ability to be responsive to individual circumstances when holding the executive to account. Case study (i) discussed in Part C below demonstrates that this flexibility enables courts to tailor their review of executive powers through statutory interpretation. In this way the courts can be sensitive to the nature and subject area of the case, and the individual circumstances of the applicant.

(ii) Curtailment

7. The TOR further seek to bring back the distinction between justiciable and non-justiciable areas of law so as to shield particular areas of law from review by the courts. We consider this development to be deeply troubling for its implications on the rule of law. We note

[3] Terms of Reference - Independent Review of Administrative Law [2020]: 1

that the courts already deploy varying degrees of scrutiny depending on the nature and subject area of the case. Particularly in our area of practice where national security issues regularly arise, the courts deploy deference to executive expertise. We note that such deference protects the institutional competence of the executive. By contrast, the constitutional principle of the separation of powers would be greatly undermined were the government to oust the courts by introducing non-justiciable subject areas.

8. Rather than curtailing the court's powers according to subject area the courts should continue to individually assess each case before them to determine the degree of scrutiny appropriate. Where the court determines that the question before it is justiciable, existing grounds of judicial review (illegality, procedural unfairness and irrationality) should be deployed consistently, regardless of the subject matter of the case. The standards expected of public authorities should not depend on the (politically) sensitive nature of the subject matter. It is particularly important that public authorities are held to the same standards when dealing with society's most vulnerable. In our experience representing vulnerable refugees, asylum seekers and victims of trafficking, it is essential that the courts deploy the same grounds of review when reviewing Home Office decisions and policies as they would when reviewing less politically sensitive matters; this protects the principle of equality and ensures legal certainty.

9. Case studies (i) and (iv) below demonstrate the courts' review of executive action on grounds of procedural unfairness and irrationality. These examples evidence that the tools allotted to the courts when reviewing the executive is both sensitive to the nature and circumstances of each case (see case study (i)) as well as sensitive to the institutional competence of the executive (see case study (iv)).

(iii) *Disclosure*

10. The TOR suggests that the duty of candour unduly burdens the executive. We note that the disclosure of policies and policy decisions is essential to the principles of legal certainty and the rule of law. It not only reveals how the law applies to individuals, it reveals the extent to which the executive, by way of secondary legislation, carries out the intention of Parliament. Disclosure thus serves a non-disposable democratic function and is essential to the preservation of the rule of law. Case studies (ii) and (iv) demonstrate the democratic importance of policy review by the courts. Furthermore, case study (ii) demonstrates the value of judicial review to the executive; where the executive deploys

contractors, judicial review can illuminate the failure of contractors to act in accordance with the executive's policies.

(iv) Time limits

11. The TOR suggests that the current law on time limits in bringing judicial review claims is insufficiently streamlined and should be further curtailed. We note that the Civil Procedure Rules and the Senior Courts Act 1981 establish clear and strict limitations. Case study (iii) demonstrates that the current three-month limitation period for judicial review proceedings is indeed strict. Furthermore, the case evidences that the courts' discretionary power to displace the three-month limitation period in exceptional circumstances ensures the good administration of justice. The current law should therefore be maintained.

(v) Costs

12. The TOR further proposes to make it financially more difficult for judicial review proceedings to be brought against the Government. As a starting point we note the importance of access to judicial review for the protection of access to justice and the rule of law. Accordingly, judicial review should not be merely accessible to the wealthy. Recent changes to legal aid have made it increasingly difficult for lawyers to continue to represent vulnerable individuals by way of public funding.

13. LASPO and the Civil Legal Aid (Remuneration) Regulations 2013 introduced a semi payment-by-results regime, whereby legal aid providers are not paid for any work done in judicial review proceedings if permission is refused. Under the Regulations, solicitors and barristers therefore work at risk of not getting paid at all until receipt of a permissions decision by the administrative court. This means that lawyers are less likely to pursue judicial review proceedings which ultimately means that important cases of principle may never reach the courts. Considering the draconian measures of the current legal aid regime, we argue that no further financial hurdles should be introduced to bringing judicial review proceedings.

C. CASE STUDIES

(i) *R (FB (Afghanistan) and Medical Justice) v Secretary of State for the Home Department* [2020]

Background

14. In *R (FB (Afghanistan) and Medical Justice) v Secretary of State for the Home Department*[4], Duncan Lewis represented FB in judicial review proceedings challenging the lawfulness of the Secretary of State for the Home Department ("**SSHD"**) providing a notice of removal window to an individual due to be removed, without notice directions. Duncan Lewis argued that the common law and statutory scheme required notice of directions specifying the date and time of removal to be provided to the individual due to be removed.

Judgment

15. In its decision, the Court of Appeal interpreted the common law principle of the duty to give notice within the relevant statutory framework. The Court found that there was "no statutory requirement for notice of removal directions to be given to a person whom it is proposed to remove."[5] Indeed, the Court found that "Section 10(7) concerns giving directions for removing a person, but it imposes *no duty*: it only gives the Secretary of State or an immigration officer the *power to give directions*, and then not to the person it is proposed to be removed but only to the captain, owner or agent of the aircraft etc." [6] The Court therefore considered the Parliamentary intention to give the SSHD a *discretionary power* to issue removal directions *without requiring* her to do so.

16. To determine whether the Court should nevertheless impose a duty to give notice on the SSHD in the circumstances, the Court considered the common law principle of the duty to give notice. The Court noted that "it is well-established that there is generally a public law duty to give an individual notice of any decision which has a direct adverse impact on his or her rights or interests; but that duty is neither absolute nor stand-alone. It is a duty associated with the obligations of procedural fairness." [7]

[4] [2020] EWCA Civ 1338
[5] *Ibid.* [80]
[6] *Ibid.*
[7] *Ibid.*

17. Citing Lord Steyn in *R v Secretary of State for the Home Department ex parte Anufrijeva* [2003] HL 26, the Court of Appeal agreed that the duty to give notice "is not a technical rule, it is simply an application of the right of access to justice…".[8] The Court considered notice to be of particular importance to individuals seeking to challenge a relevant determination. Accordingly, the Court distinguished the facts before it from those in *Anufrijeva*. In that case, the relevant determination disentitled the claimant to income support. The House of Lords held that the determination could have no effect until the claimant was notified, because it was only then that the determination could be legally challenged.

18. By contrast, in *FB* the Court of Appeal noted that "the decision to remove is not, in itself, appealable."[9] Accordingly, the duty to give notice, while considered to be a general principle of procedural fairness at common law, was not necessary to protect the right of access to justice. Duncan Lewis' argument that the failure to provide removal directions was unlawful was therefore unsuccessful.

Significance

19. The above case demonstrates that courts already apply common law principles of judicial review differently depending on the subject matter and nature of the case. Even within the area of immigration law, the courts, by way of statutory interpretation, tailor the principles of judicial review according to the specific statutory framework and the fundamental rights at stake. In this example the Court of Appeal gives due deference to Parliamentary intent by recognising that the legislation did not impose a duty of the SSHD to notify individuals.

20. Furthermore, this case demonstrates the value of a flexible set of principles guiding the court's review. As discussed above, the duty to give notice is recognised as a general principle of procedural fairness in judicial review. Nevertheless, in the words of Lord Steyn, "it is not a technical rule, it is simply an application of the right of access to justice." In determining whether to find a duty on the facts, the courts consider whether the right of access to justice is impeded by the failure to notify. On the facts, the Court of Appeal in *FB* was not restricted by the existence of a general duty to give notice. Rather, the

[8] *Ibid.* [81]
[9] *Ibid.* [85]

flexibility (and uncodified nature) of the principles of judicial review enabled the court to consider the higher principles underlying the general duty to give notice, namely the right of access to justice. Where this right was not at stake, the Court of Appeal found that there was no duty to give notice.

21. While Duncan Lewis was unsuccessful in establishing a duty of to give notice in this case, the case helpfully demonstrates that the courts' approach to judicial review is already tailored to the subject matter and nature of the case. As demonstrated above, this can be to the benefit of the Executive. Inevitably, there are also circumstances where the court's approach to judicial review is instead utilised to impose a duty on the Executive.

*(ii) R (AQS) v The Secretary of State for the Home Departmen*t [2020]

Background

22. In *R (AQS) v The Secretary of State for the Home Departmen*t[10] Duncan Lewis represented an asylum seeker entitled to SSHD accommodation. AQS, who had previously been attacked by another resident in asylum accommodation was fearful of sharing accommodation but was required to share a room with another individual who started to display symptoms of Covid-19. AQS raised concerns with the accommodation provider who moved the other person elsewhere but within a day AQS also became unwell with symptoms of Covid-19. He expressed his distress that he had been exposed to harm to the accommodation provider, the argument escalated and property was damaged. The police were called and evicted AQS from the property.

23. There followed a period of several days in which AQS's support worker and legal representatives attempted to obtain alternative accommodation for AQS but were told that AQS must self-isolate and could not be provided with SSHD accommodation as he was symptomatic and should instead contact NHS 111.

24. Duncan Lewis issued urgent judicial review proceedings on the understanding that the SSHD had an unpublished policy refusing accommodation to Covid-19 Symptoms. On the same day, the Administrative Court issued an Interim Order that the Secretary of State must "provide AQS with single person accommodation until further order."

[10] [2020] EWHC 843

25. The SSHD provided accommodation within two days of the interim order. In their summary grounds of defence, the SSHD responded to AQS's claim by stating that "there had been a bit of confusion last week about whether persons with symptoms should ring 111 for accommodation (instead of seeking asylum accommodation); but that this has since been clarified, and all staff have been reminded of the correct position … which is that the Secretary of State is continuing to accept applications for accommodation and support and provide the same for those who are eligible. It is obviously unfortunate that the wrong information was given, but this has been (and remains) a fast moving situation, and that error has been identified and corrected."[11]

Significance

26. This case demonstrates the importance of the court's power to grant interim relief. Without this power, AQS would have been forced to spend more days without accommodation in conditions rendering him highly vulnerable. Furthermore, this case demonstrates the importance of the duty on Government to disclose its policies for the principles of transparency and legal certainty. On the facts, a contractor acted in violation of the SSHD's policy by determining that AQS was not eligible for SSHD accommodation. Duncan Lewis' claim brought this failure by the contractor to the SSHD's attention, who could subsequently reveal that there was no policy behind the failure to provide AQS accommodation.

27. The Judge in the case clarified that as it is "…the Secretary of State who is the accommodation provider, acting through others… when MHL (the contractor) conveys information it is the Secretary of State who is conveying information, through that channel."[12] While the SSHD bears final responsibility for all decisions made on her behalf, it is nevertheless common knowledge that the SSHD can practically not review every decision made on her behalf. Judicial review is an essential tool to correct determinations which are otherwise outside the purview of the SSHD.

[11] *Ibid.* [23]
[12] *Ibid.* [22]

(iii) Badmus & Ors, R (On the Application Of) v The Secretary of State for the Home Department [2020]

Background

28. In *Badmus & Ors, R (On the Application Of) v The Secretary of State for the Home Department*[13] Duncan Lewis challenged the SSHD's policy of paying immigration detainees a fixed pay rate of £1 an hour in order to work in detention. While the substantive aspects of the appeal were unsuccessful, the case demonstrates the importance of a flexible approach to time limits, notwithstanding the strict rules under the Civil Procedure Rules (**CPR**) and the Senior Courts Act 1981 (**SCA**).

29. CPR 54.5(1) provides that a claim for judicial review must be made "promptly and … in any event not later than *3 months after the grounds to make the claim first arose*". Section 31(6) SCA provides that, where there has been "undue delay" in making an application for judicial review, the court may refuse to grant permission or relief "if it considers that the grant of the relief sought would be likely to cause *substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration*".

30. In *Badmus*, the policies under challenge were the Detention Service Orders of 2013 which established the £1 hourly rate, and the 2018 Review Decision where the SSHD decided to maintain the £1 hourly rate. Duncan Lewis issued judicial review proceedings more than 3 months after the 2018 Review Decision was published. The Court of Appeal had to consider whether permission should be granted notwithstanding the fact that the grounds under challenge (the 2013 Order and the 2018 Decision) arose more than three months before the claim was issued.

Judgment

31. The Court of Appeal considered Singh LJ in *TN (Vietnam) & Anor, R. (On the Application of) v Secretary of State for the Home Department & Anor*[14]*.* Considering the CPR and the SCA (above) Singh LJ noted that, "… a very strict view might be taken: that time begins to run from the date when secondary legislation is made or at least when it comes into force. However, that would be contrary to both principle and authority."[15] Indeed, rather than

[13] [2020] EWCA Civ 657
[14] [2018] EWCA Civ 2838
[15] *Ibid.* [94]

deploying a strict approach to time limits, the Court of Appeal concluded that the relevant date was not the date that the policy came into force, but rather the date when the policy first applied to the individual.

32. In *Badmus*, the applicants were not in detention at the time of 2013 Order, nor at the time of 2018 Review Decision. Accordingly, the Court of Appeal found that the Order only applied to the applicants once they were taken into detention and earning a £1 hourly rate. On the facts, only one of the three applicants issued proceedings within three months of arriving in detention. Accordingly, the Court of Appeal found that only one of the three applicants was within three-month time limit.

Significance

33. The Court of Appeal's approach to time limits demonstrates that the current legislation guiding time limits is sufficiently strict whilst simultaneously responsive to individual circumstances. Indeed, as demonstrated by *Badmus*, the courts generally adopt a strict approach to the 3-month time limit. Indeed, in the Administrative Court, the Judge found that the applicants were out of time because both the 2013 Order and the 2018 Review Decision were issued more than 3 months before the applicants issued their judicial review proceedings. Nevertheless, the Court of Appeal adopted a more flexible approach, considering the fact that the applicants could not have brought the proceedings within the time limit because they simply were not in detention at the time.

(iv) Medical Justice & Ors v Secretary of State for the Home Department & Anor [2017]

Background

34. In *Medical Justice & Ors v Secretary of State for the Home Department & Anor*[16], Duncan Lewis challenged the lawfulness of the SSHD's Adults at Risk in Immigration Detention Statutory Guidance (AARSG). Section 59 of the Immigration Act 2016 states that the SSHD "must issue guidance specifying matters to be taken into account by a person to whom the guidance is addressed in determining…whether a person ("P") would be particularly vulnerable to harm if P were to be detained or to remain in detention." Pursuant Section 59, the SSHD issued the AARSG. The SSHD's guidance advised medical practitioners,

[16] [2017] EWHC 2461

charged with preparing a report to document whether a detainee is a victim of torture, which will inform the Home Office in assessing an individual's particular vulnerability to harm in detention, that torture inflicted by non-state actors must not be considered torture for the purposes of their examinations. The SSHD relied on a definition of torture found in the United Nations Convention Against Torture (UNCAT), a political document drafted to prevent the perpetration of torture worldwide, and sought to apply it to a purely medical assessment.

35. The AARSG's use of the UNCAT definition left many individuals who had been victims of torture unprotected. For example, one of the applicants was a young man who had been kidnapped and beaten with knives, sticks and a gun by the Taliban because he refused to be groomed into joining them. The applicant was told by the SSHD that his case did not meet the new definition of torture. He was therefore not deemed particularly vulnerable to harm in detention.

Judgment

36. The High Court found that the distinction between state and non-state torture when assessing particular vulnerability to harm in detention "has no rational or evidence base." Indeed, Ouseley J argued that "there is no evidence that such a distinction relates to the relevant vulnerability. The evidence rather is that it does not."[17]

37. The court therefore accepted the argument that the use of the restrictive UNCAT definition of torture in the AARSG was contrary to the statutory purpose of section 59, which was to focus on those who were unsuitable for detention because they were particularly vulnerable to harm in detention. Such use was also irrational and had no rational or evidence base. It was further irrational for political issues as to who inflicted the harm to be left to a medical practitioner to address.

Significance

38. This case highlights the constitutional role exercised by the courts when judicially reviewing the exercise of executive powers. The High Court considered Parliament's intention when drafting Section 59 of the Immigration Act 2016. From the wording, it is clear that Parliament was concerned by the continued detention of vulnerable individuals

[17] *Ibid.* [153]

with detrimental effect. The restrictive definition of torture that was subsequently introduced by the SSHD failed to carry out the express will of Parliament. Accordingly, the AARSG undermined the sovereignty of Parliament. The High Court, in reviewing the guidance by way of statutory interpretation, restored the sovereignty of Parliament.

39. Furthermore, the case demonstrates how courts consider irrationality in judicial review. While the judgment of whether someone is particularly vulnerable to harm in detention as a result of the infliction of severe pain and suffering is likely to be made by a medical practitioner, the Court concluded that whether an individual is a victim of torture under the UNCAT definition, requires judgements to be made about political issues which a medical expert is unlikely to have the necessary knowledge and expertise to make. Accordingly, the Court found it "irrational for the issue and its investigation to be left to the medical practitioner, if the definition is to be used, without further provision in the AARSG dealing with how the non-medical issues raised by the UNCAT definition of "torture" are to be covered."[18]

40. In its analysis the Court considers that the political issue may be determined by a caseworker with the relevant expertise, and posits that there could be two investigations to establish (a) whether an individual was particularly vulnerable to harm in detention as a result of the infliction of severe pain and suffering, and (b) whether this pain and suffering amounts to torture. However, as the guidance did not suggest that two investigations should take place, the Court found it irrational for a medical professional to make a determination in relation to a matter outside their expertise.

41. It is significant that the court does not seek to rewrite the statutory guidance. Indeed, the Court does not overstep its constitutional boundaries; the Court does not step into the decision-maker's shoes. Rather, the Court recognises that it will be for the Executive to introduce new guidance that is rational and carries out the express will of Parliament.

[18] *Ibid.* [162]

D. CONCLUSION

42. In this submission we have sought to provide practical insight into the mechanisms of judicial review. We have provided a few short case studies to illuminate how the flexible tools available to the courts today enable effective proceedings and tailored determinations. We reiterate our deep concern that the codification and curtailment of administrative law will have detrimental effects on the separation of powers, the rule of law, and the sovereignty of Parliament.