CAJ
Committee on the Administration of Justice

Response to Independent Review of Administrative Law Call for Evidence

October 2020

Introduction

The Committee on the Administration of Justice (CAJ) is an independent human rights non-governmental organisation with cross community membership in Northern Ireland and beyond. It was established in 1981, campaigns on a broad range of human rights issues and is a member of the International Federation of Human Rights (FIDH). CAJ seeks to secure the highest standards in the administration of justice in Northern Ireland by ensuring that the government complies with its international human rights obligations.

Following a commitment in the Conservative Party 2019 Manifesto the Independent Review of Administrative Law (IRAL) was set up by the British Government "to consider options for reform to the process of Judicial Review". This submission is a response to the IRAL call for evidence.[1] Justice is largely a devolved matter in Northern Ireland.

In our response to this call for evidence we endorse the recent comments of retired Supreme Court Justice Lord Kerr, which are particularly relevant to the Terms of Reference[2] for this review and the landscape from which it has emerged:

> '*I can understand the government is less than pleased when challenges are made to decisions they have taken frequently after very considerable deliberations … But it doesn't seem to me that attacking lawyers who provide the services that allow those challenges to be made … is particularly profitable.'*

While he noted that ministers might be:

[1] https://www.gov.uk/government/groups/independent-review-of-administrative-law

[2] The Terms of Reference (https://www.gov.uk/government/groups/independent-review-of-administrative-law#terms-of-reference) state "The review should consider in particular:
1. 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.
2. 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.
3. 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.
4. 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."

> '*irritated by legal challenges which may appear to them to be frivolous or misconceived' he stated that 'if we are operating a healthy democracy what the judiciary provides is a vouching or checking mechanism for the validity [of] laws that parliament has enacted or the appropriate international treaties to which we have subscribed … The last thing we want is for government to have access to unbridled power*'.[3]

Lord Kerr's speech is a reminder that judicial review is about making sure no government, of whatever political hue, has access to unbridled power. Whilst it might be understandable that a party in government regards limits on its power as undesirable, it should remember that at some stage it will be a party in opposition and may seek to hold a new government accountable. Weakening judicial review may therefore backfire when there is a change of government.

Judicial review also ensures that the devolved Executives and Legislatures act within their powers. In the case of Northern Ireland this is central to governance structures further to the Belfast or Good Friday Agreement (GFA).

It would be remiss not to note that the IRAL is being taken forward against the backdrop of attacks on lawyers from the most senior levels of Government, namely the Prime Minister and Home Secretary. This has been articulated in terms that both explicitly encompass political discrimination ('leftist' lawyers) but also create a climate of hostility towards the legal profession that has had lethal consequences in Northern Ireland in the past. This, together with attacks on the 'vexatious' prosecutions of historic offences in Northern Ireland, fundamentally undermines the constitutional principles of the rule of law and the separation of powers: key cornerstones of a democratic society.

The IRAL also takes place against the background context of other measures undermining the rule of law by the present government. In March 2020 the Secretary of State for Northern Ireland announced that government would unilaterally renege on its commitment to legislate for the UK-Ireland Stormont House Agreement, to set up institutions to deal with the legacy of the Northern Ireland conflict, including an Historical Investigations Unit to ensure discharge of procedural duties under ECHR Article 2 (right to life). This statement was expressly linked to the Overseas Operations (Service Personnel and Veterans) Bill, which seeks to prevent prosecutions for past war crimes, including torture and killings, by the UK military. The bill would also diminish the incorporation of the ECHR in Northern Ireland law in conflict with the GFA, itself a legally binding international treaty.[4] Government also recently introduced, and rushed through the House of Commons (in 10 days) the Covert

[3] https://www.theguardian.com/law/2020/oct/19/uk-needs-judges-to-limit-government-power-says-lord-kerr
[4] The Rights, Safeguards and Equality of Opportunity section of the GFA provides an unqualified commitment that *"2. The British Government will complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency." There is no qualification to events in Northern Ireland nor an arbitrary cut of date as to when this commitment will apply.*

Human Intelligence Sources (Criminal Conduct) bill, which would make 'lawful for all purposes' crimes committed by informants (CHIS) which have been authorised by handlers, with no express limits preventing the authorisation of crimes that would constitute human rights violations.

On top of this, the government has pushed through the United Kingdom Internal Market Bill through the House of Commons openly conceding that its purpose and effect was to breach international law in ways specific to Northern Ireland. Whilst the bill as introduced sought to set aside domestic and international law (including implicitly the ECHR and GFA) in relation to aspects of the NI Protocol. Government Amendments *explicitly* diminished incorporation of the EHCR in NI law, through limitations on the application of the Human Rights Act (HRA). This includes disapplying section 6(1) of the HRA, which requires acts of public authorities to be compatible with ECHR rights with reference to Regulations under the bill, limiting remedies before the courts and removing the usual ability of the courts to strike down secondary legislation by virtue of ECHR incompatibility.

In addition to this provision conflicting with the GFA it also makes an early mockery of the government's much extolled commitment to comply with a specific provision in Article 2(1) of the NI Protocol in the Withdrawal Agreement, in which the UK has committed that there will be no diminution in certain GFA rights as a result of Brexit. Specifically Article 2(1) of the NI Protocol in the Withdrawal Agreement provides "The United Kingdom shall ensure that no diminution of rights, safeguards and equality of opportunity as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union… and shall implement this paragraph through dedicated mechanisms." Section 23 and Schedule 3 European Union (Withdrawal Agreement) Act 2020 accordingly provide new powers to the Equality and Human Rights Commissions in relation to the non-diminution commitment. The offending clauses in the Internal Market bill however would already set these commitments aside in relation to specific Northern Ireland provisions. In his condemnation of the Internal Market Bill Lord Neuberger provided an unequivocal warning:

> 'Once you deprive people of the right to go to court to challenge the government, you are in a dictatorship, you are in a tyranny,' … 'The right of litigants to go to court to protect their rights and ensure that the government complies with its legal obligation is fundamental to any system … You could be going down a very slippery slope.'[5]

In the light of this context, CAJ is particularly concerned at any proposal that may further weaken the rule of law.

[5] https://www.theguardian.com/law/2020/oct/07/brexit-strategy-puts-uk-on-slippery-slope-to-tyranny-lawyers-told

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Consultation period

CAJ is concerned that seven weeks is an insufficient period of consultation for this review given that the matters under consideration are of significant constitutional importance, namely: the rule of law; separation of powers; independence of the judiciary and access to justice. We submit that this time frame is not a proportionate one to obtain informed responses from a wide range of stakeholders and does not comply with conventional best practice or indeed the current Cabinet Office Consultation Principles.[6]

Independence of review

The independence of this review is called into question given the tone of the Terms of Reference and the nature of the questionnaire, which appears to be balanced in favour of receiving complaints about, and proposed restrictions of, the current remit of the courts in judicial review. The comments of the Chair also undermine confidence in the independence of his review. Of particular note is a February 2020 piece in response to the *Miller (2)* judgment, criticising the Supreme Court for interfering in the 'stuff of politics not law' and having set aside 'principled limits on the justiciability of the prerogative power to prorogue'[7] as well as his previous comments in a 2019 Policy Exchange paper[8]:

> 'Parliament might want to legislate to protect other, related prerogative powers. Legislation of this kind may be the only way to limit the courts' incursion into political territory.'

The *Miller (2)* case demonstrates that the executive is legally accountable to the courts but also politically accountable to Parliament. Judicial review is essential not just to ensuring the rule of law but also ensuring the accountability of the executives to the relevant legislatures. Judicial review provides redress where the executive is acting outside of its authority under statute. It also ensures than when acting under non-statutory and prerogative powers, the executive is not unlimited. In this way, judicial review protects the principle of political accountability and the authority of the democratically legitimated legislatures.

Particular Circumstances of Northern Ireland

Justice, including administrative law, is a devolved matter in Northern Ireland. As a post conflict society since the 1998 GFA, judicial review has played a vital role in providing a measure of accountability of government actions and any attempt to restrict the role of

[6] Consultation Principles 2018
https://www.gov.uk/government/publications/consultation-principles-guidance

[7] https://www.conservativehome.com/thinktankcentral/2020/02/edward-faulks-the-supreme-courts-prorogation-judgement-unbalanced-our-constitution-the-commons-needs-to-make-a-correction.html

[8] 'The Law of the Constitution before the Court, Supplementary Notes on the unconstitutionality of the Supreme Court's prorogation judgment'
https://policyexchange.org.uk/wp-content/uploads/The-Law-of-the-Constitution-before-the-Court.pdf

administrative law in Northern Ireland would not be in the public interest. A detailed review of civil justice in Northern Ireland, including judicial review has already taken place; commissioned by the Lord Chief Justice and published in 2017.[9]

The Review's Terms of Reference state that it 'should consider public law control of all UK wide and England & Wales powers that are currently subject to it whether they be statutory, non-statutory, or prerogative powers'. The Call for Evidence notes that 'the Panel may also recommend certain minor and technical changes to court procedure in the Devolved Administrations which may be needed as part of implementing changes to UK policies' but no practical details have been provided on how that would develop. We suggest that there would have to be very strong reasons for any interference in devolved justice, especially in the highly sensitive, post-conflict society of Northern Ireland.

Section 1: Questionnaire to Government Departments

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)?

It is of concern that the detailed questionnaire in Section 1 is only addressed to government Departments and excludes others engaged in judicial review, including non-governmental organisations, from setting out their valuable experiences. This imbalanced approach raises concerns about the ability of the IRAL to obtain evidence from all sectors engaged in judicial review in a fair and representative manner.

It appears that questions in this section have been framed to prompt criticism rather than approval of the current jurisdiction of the courts in judicial review with a view to narrowing accountability of government action to the courts. This is demonstrated in question 1 in this section, which invites evidence to support the view that judicial review can 'seriously impede the proper or effective discharge of central or local governmental functions' on 11 separate grounds.

It is the function of judicial review to ensure that government acts in accordance with the law and it provides for greater accountability, which should result in more effective governance. It is our experience that many public bodies we engage with in Northern Ireland remain alive to the potential of judicial review of their decision-making and regard this positively as it ensures constant reflection on the lawfulness of their processes and decisions.

[9] Review of Civil and Family Justice in Northern Ireland Review Group's Report on Civil Justice September 2017

It is clear that the Review's Terms of Reference, such as the suggested reforms to the duties of candour and disclosure, have the potential to result in far-reaching changes to judicial review, significantly reducing the practical capacity of courts to uphold the rule of law.

We also note the absence of any reference to the Human Rights Act 1998 in the terms of this review. This provides for an unnaturally narrow approach to judicial review given the embedding of human rights in judicial review grounds and on the issue of justiciability:

> 'After all, sections 6 and 7 of the Human Rights Act 1998 create an express statutory obligation on public bodies not to violate the human rights in Schedule 1 and provide victims of a violation the right to pursue legal proceedings against a public body. Moreover, the approach of the courts to such matters as rationality, procedural fairness, and proportionality is fundamentally affected by issues concerning human rights.'[10]

Judicial review has played a vital role in providing accountability in Northern Ireland as it has emerged a post-conflict society and during the absence of a functioning devolved government. Challenges have been taken to ensure compliance with the government commitment under the GFA to 'complete incorporation into Northern Ireland law of the European Convention on Human Rights, with direct access to the courts, and remedies for breach of the convention, including power for the courts to overrule assembly legislation on the grounds of inconsistency'[11]. CAJ represented one of the applicants, Jamie Waring, in a challenge against the Prime Minister and the Brexit Secretary arguing that the decision of the UK government not to seek an extension of the exit date from the EU, among other grounds, did not protect the GFA in all its parts. [12] While ultimately unsuccessful, these judicial review proceedings provided an essential measure of accountability of government decision making, on behalf of wider society directly affected in Northern Ireland.

It is of particular significance that the UK states that its approach to withdrawal from the European Union: '…has been underpinned by our steadfast commitment to upholding the Belfast ('Good Friday') Agreement. We acknowledge the importance of the rights and equality protections set out in the Agreement, which recognise the unique circumstances of Northern Ireland's history and the need to put rights and equality central to creating a peaceful and shared future in Northern Ireland. The UK is committed to ensuring that rights and equality protections continue to be upheld in Northern Ireland.'[13]

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[10] Reviewing Judicial Review: The constitutional importance of the Independent Review of Administrative Law 2020, Theodore Konstadinides, Lee Marsons and Maurice Sunkin (University of Essex) https://ukaji.org/2020/09/24/reviewing-judicial-review-the-constitutional-importance-of-the-independent-review-of-administrative-law-2020/

[11] Rights, Safeguards and Equality of Opportunity, Belfast Agreement, https://www.gov.uk/government/publications/the-belfast-agreement

[12] In the matter of an application by Raymond McCord, JR83 and Jamie Waring for judicial review https://www.judiciaryni.uk/judicial-decisions/2019-nica-49

[13] UK Government commitment to "no diminution of rights, safeguards and equality of opportunity" in Northern Ireland: What does it mean and how will it be implemented?

As alluded to above government has already departed from this commitment in relation to the UK Internal Market bill.

Section 2 – Codification and Clarity

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?

It is our view that the case has not been made for statutory intervention in the judicial review process and is unnecessary. As administrative law is a devolved matter for Northern Ireland, any proposed UK wide reform will be problematic given that Parliament will be in breach of the Sewel Convention if it legislates on devolved matters without the [prior] consent of the devolved jurisdiction. Under the terms of the GFA, the only express reason for the UK Parliament to legislate on a devolved matter is in order to comply with the UK's International Obligations.[14] The devolution settlement on Justice matters was painstakingly separately negotiated and set out in the Hillsborough Castle Agreement, which staved off a further collapse of the devolved institutions.[15]

We note that the Review's broad Terms of Reference asks '*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*' and whether such codification would '*promote clarity and accessibility in the law and increase public trust and confidence'* in judicial review.

This implies there is some problem with 'public trust and confidence' in judicial review and we are not aware of any evidence to support this. As Dr Ronan Cormaicain observes, it appears from this Review's call for evidence that the preferred approach would be 'UK-wide Westminster legislation on non-devolved matters plus England and Wales legislation on all matters' which:

> 'Could create anomalous and artificial divisions. Northern Ireland Ministers would be reviewed under one set of criteria, English and Welsh Ministers under a different set of criteria. There would be two different streams of judicial review law, the uncodified old law with its procedures and safeguards, and a new codified law with potentially different procedures and safeguards. Depending upon which jurisdiction they are in, Ministers would be held to different standards.'[16]

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https://www.gov.uk/government/publications/protocol-on-irelandnorthern-ireland-article-2

[14] Paragraph 33 of Strand 1 of the GFA which sets out the role of Westminster, stating that (in addition to legislating for non-devolved matters and the scrutiny role of select committees) the UK Parliament 'will': "legislate as necessary to ensure the United Kingdom's international obligations are met in respect of Northern Ireland; (33(b))"

[15] https://www.gov.uk/government/publications/hillsborough-castle-agreement

[16] *Ronan Cormancain: 'Legislative Competence in Northern Ireland and the Independent Review of Administrative Law'*, UK Constitutional Law Association https://ukconstitutionallaw.org/

We see no reason for such anomalies to arise as our view is that the current process of judicial review does not require significant amendment. However, if the review panel concludes otherwise, it should not seek to impose it in Northern Ireland. This is a region in which trust in the rule of law and in democratic institutions still needs to be worked for on a daily basis; any further demonstration of government seeking to avoid legal oversight would be disastrous, and as alluded to above, conflict with the agreements of the peace settlement.

Mark Elliot observes that in the debate on codification there are two broad consensus. Firstly that the grounds of judicial review 'amount to an expression of fundamental constitutional principles, including the rule of law and separation of powers'. Secondly, regardless of differing views 'it is undeniable that at least some, and arguably a great deal, of the law of judicial review emanates from or sits in relationship with the process of statutory interpretation.[17]

In his analysis, Timothy H. Jones notes that even in civil law states supposedly more used to codification, judicial review/administrative law tends to remains the responsibility of the judges to develop and he could not see any benefit to codification from existing examples. He observes that certainty; clarity; democratic legitimacy and rationality are the four principal legal values associated with codification and when considering the issue of separation of powers that arise he cautions that:

> '…one must be wary of any simple equation between a concern with this issue and a regressive, Diceyan approach to public law. Even Thomas Jefferson, for all his fear of Federal judicial power, declared: 'The dignity and stability of government in all its branches . . . depend so much upon an upright and skilful administration of justice, that the judicial power ought to be distinct from both the legislature and executive and independent upon both, that so it may be a check upon both, as both should be checks upon that'[18].'[19]

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?

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] The Judicial Review Review II: Codifying Judicial Review – Clarification or Evisceration? https://publiclawforeveryone.com/2020/08/10/the-judicial-review-review-ii-codifying-judicial-review-clarification-or-evisceration/

[18] T. Jefferson 'Notes on Virginia Q.XIII' (1782) in Jefferson, above n 99, vol2, p 162.

[19] Timothy H. Jones, 'Judicial review and codification' (2000) 20 (4) Legal Studies 517-537, published online by Cambridge University Press, 2 January 2018

It appears from the Terms of Reference that the focus of the Review is on narrowing the circumstances in which areas are justiciable, and to exclude some matters, even beyond the scope of judicial review:

> '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.'

It is our view that the procedural rules surrounding claims for judicial reviews and appeal are clear and not in need of amendment.

Given the particular circumstances of Northern Ireland, as a post conflict society, respect for the rule of law is central to ensuring public confidence in government. Judicial review has played a key role in ensuring that public authorities act lawfully and provides vital accountability and transparency of their actions and it is clear what decisions/powers are subject to judicial review and this should not be any way restricted.

Victims and survivors of the conflict in Northern Ireland have been required to take judicial review proceedings, following unlawful acts by the government. These decisions have developed jurisprudence on matters of profound public importance and fundamental rights such as the right to life as protected under Article 2 ECHR[20]and the right to be free from torture as protected under Article 3 ECHR[21] and remain the benchmark for both domestic litigation and under the review of international treaty bodies such as the Council of Europe and UN human rights committees.

During the collapse of our devolved government and arising from concerns about our complex constitutional power sharing arrangements a number of successful judicial reviews of particular public interest have been taken in this jurisdiction providing vital accountability and remedies in the absence of an Executive. In 2018 in *Buick*[22], in which the subject matter of the challenge was the Department for Infrastructure decision to approve an energy waste project in North Belfast, the majority judgment of the Court of Appeal held that cross cutting decisions cannot be dealt with by Departments in the absence of Northern Ireland Ministers. In 2019, the Northern Ireland Court of Appeal case of '*JR80*' noted that the absence of an Executive, Assembly and Ministers in Northern Ireland since 2017 meant that there was no capacity for any devolved legislation. Despite a recommendation to establish a redress scheme for victims of Historical Institutional abuse receiving universal support by political parties, it was not implemented and no compensation had been paid. The Court of Appeal held that the Executive Office could exercise the prerogative power to set up an ex gratia redress scheme for these victims and survivors.

[20] *In the matter of an application by Hugh Jordan for Judicial Review (Northern Ireland*), [2019] UKSC 9
[21] *In the matter of an application by Francis McGuigan and Mary McKenna for Judicial Review* [2019] NICA 46
[22] *In an application by Colin Buick for Judicial Review* [2018] NICA 26.

CAJ
Committee on the Administration of Justice

Section 3 – Process and Procedure

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?

Yes. In Northern Ireland, an application for judicial review must be made no later than 3 months after the grounds to make the application first arose, unless the court considers that there is good reason to extend this time period in accordance with Order 53 of the Rules of the Court of Judicature (Northern Ireland) Order 1980.[23] Following a Department of Justice consultation, the time limit was amended in 2017 to remove the requirement of promptitude[24].

During this period a putative applicant must usually also issue a letter before application in accordance with the Pre-Action Protocol as set out in Judicial Review Practice Note 1/2008[25] and await a response. In this time applications for legal aid, if appropriate, are also made.

The two staged approach to applications for judicial review; namely seeking the leave of the court to proceed, having demonstrated an arguable case, and the subsequent granting of leave filters unmeritorious claims and can identify weak respondents' arguments which may result in early resolution of the matter under challenge.

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

No, there is no evidence to support that costs in judicial reviews are too lenient on unsuccessful parties or applied too leniently in the Courts in Northern Ireland. The need to apply for leave of the court to apply for judicial review, in which an arguable case must be demonstrated, ensures that cases without merit do not proceed. The courts have a wide discretion on the issue of costs as set out in the Rules of the Court of Judicature 1980[26]:

Order 62(4):

> The powers and discretion of the Court under section 59 of the Act (which provides that the costs of and incidental to proceedings in the Court of Judicature shall be in the discretion of the Court and that the Court shall have full power to determine by whom and to what extent the costs are to be paid) and under the enactments relating to the costs of criminal proceedings to which this Order applies shall be exercised subject to and in accordance with this Order.

[23] Order 53 of the Rules of the Court of Judicature (Northern Ireland) Order 1980 https://www.justice-ni.gov.uk/sites/default/files/publications/justice/COJ_Rules.pdf
[24] The Rules of the Court of Judicature (Northern Ireland) (Amendment) 2017
[25] Judicial Review Practice Note 1/2008 (revised 10 October 2013) https://www.judiciaryni.uk/judicial-decisions/practice-note-1-2008
[26] Rules of the Court of Judicature 1980 https://www.justice-ni.gov.uk/sites/default/files/publications/justice/COJ_Rules.pdf

Order 62 rule 3(3):

> (3) If the court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the Court shall order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.

The Judicial Review Practice Note 1/2008 is also clear on the role of judicial review as a remedy of last resort and the costs implications for those that fail to comply with the protocol:

> 'The Courts take the view that litigation should be a last resort, and that applications should not be issued prematurely when a settlement is still actively being explored. Parties are warned that if the protocol is not followed (including this paragraph) then the Court must have regard to such conduct when determining costs.'[27]

The risk of costs remains a significant barrier to potential claimants taking meritorious judicial review proceedings. While legal aid is available to some and provides a measure of protection against the risk of costs, it is of concern that due to their financial means many potential applicants are unable to obtain legal aid and therefore proceed with their claim, which encroach on their access to justice. There may also be delays in the granting of legal aid, requiring potential applicants to seek leave to apply for judicial review, and file the requisite court fee, without legal aid in place to ensure that the appropriate time limits are complied with – exposing them to unnecessary costs.

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?

(a) Are costs in JR proportionate?

(b) Should standing be considered by the panel?

(c) Should unmeritorious claims be treated differently?

Yes, we are not aware of evidence to suggest that costs of judicial review claims are not proportionate. We note the importance of the use of Protective Costs Orders to ensure that public interest claims are able to proceed where an applicant does not have sufficient funding and the risk of costs is a barrier to proceedings. They provide an important means of access to justice, particularly for non-governmental or charitable organisations, as well as individuals, wishing to engage in public interest litigation addressing human rights or constitutional matters.

When granted by the court, a Protective Costs Order will usually limit liability for costs for both parties benefitting applicants and relevant government departments.

[27] Appendix1, Pre-action Protocol for Judicial Review, ibid

The criteria for Protective Costs Orders was set in the *Corner House Research, R (on the application of) v Secretary of State for Trade & Industry* [2005] EWCA Civ 192, which held that they may be made at any stage of the proceedings, and on such conditions as the court thinks fit, as long as the court is satisfied that:

> '(i) the issues raised are of general public importance;
>
> (ii) the public interest requires that those issues should be resolved;
>
> (iii) the applicant has no private interest in the outcome of the case;
>
> (iv) having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved, it is fair and just to make the order;
>
> (v) if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.
>
> (2) If those acting for the applicant are doing so pro bono this will be likely to enhance the merits of the application for a PCO.
>
> (3) It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above.'[28]

In Northern Ireland, third party interveners 'may apply for a protective costs order' and this should be made 'as soon as practicable after leave is granted'. This helps mitigate against the risk of adverse costs, which has a chilling effect for non-governmental organisations and others, wishing to make an intervention, which would be in the interests of justice.[29]

It is also of note that the Aarhus Convention[30] requires that access to justice in environmental matters should be 'fair, equitable, timely and not prohibitively expensive' and this is addressed in Practice Note 1/2008. It requires applicants to state whether the application is an 'Aarhus Convention case' for the purposes of the Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013 ('the 2013 Regulations') and, where the applicant does not wish the 2013 Regulations to apply to the application, this should be stated also. Where the applicant states that these Costs Protection Regulations apply respondents are required to state if this is disputed and on what grounds. [31]

[28] Paragraph 74
[29] Northern Ireland Practice Direction 1/2013
https://www.judiciaryni.uk/judicial-decisions/practice-direction-012013-third-party-interveners
[30] UN Economic Commission for Europe's Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental matters
https://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf
[31] Annex A Letter before application and Annex B Response to a letter before application

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?

No. Judicial review remedies in Northern Ireland are discretionary and the court has a wide degree of flexibility in how they granted or not. They are set out in Order 53 of The Rules of the Court of Judicature (NI) 1980:

> 'Procedure for application for judicial review
>
> 1. There shall be a procedure, to be known as an application for judicial review, under which application may be made to the Court for one or more of the following forms of relief: that is to say, relief by way of-
>
> (a) an order of mandamus;
>
> (b) an order of certiorari;
>
> (c) an order of prohibition;
>
> (d) a declaration;
>
> (e) an injunction.

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

The answer to this question is fairly straightforward, in essence government and other public authorities need to ensure that they are not taking and seeking to stand over decisions that are unlawful.

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?

Yes, we do have experience of this. CAJ was one of a number of groups that challenged a district Council in Northern Ireland for introducing a policy of banning bilingual street signs (to prevent signage going up in Irish and English.) We had repeatedly engaged with the Council on this matter being a clear breach of domestic law as well as treaty based obligations. In the end, the policy was rescinded in the mouth of judicial review proceedings.[32] It is a matter for the public authority in this instance to clarify precisely why it acted in this way. However, in general we would like to offer the observation that a public authority (including those acting in a political context, such as a Council or Ministerial department), will be conscious that it can 'get away' with acting unlawfully if prompt legal challenges are not brought. Any reforms brought in that make judicial review more difficult

[32] See https://krw-law.ie/street-signs/

or impossible to obtain or enforce, are likely only to embolden such practices with serious consequences for the rule of law.

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?

Alternative Dispute Resolution already plays a role in judicial review proceedings, where appropriate, given that judicial review is a remedy of last resort. The Northern Ireland Judicial Review Practice Note 1/2008 makes it clear that:

> '6. The Courts take the view that litigation should be a last resort, and that applications should not be issued prematurely when a settlement is still actively being explored. Parties are warned that if the protocol is not followed (including this paragraph) then the Court must have regard to such conduct when determining costs.'

The use of Alternative Dispute Resolution in Northern Ireland was addressed in the review of civil justice, including judicial review, led by Lord Justice Gillen and he noted that:

> 'Generally, the question in judicial review proceedings will be whether a public law decision was lawful or not. Arguably, that is generally not something that can be resolved by mediation or ADR.
>
> Having said that, the group accepted there may be particular cases or types of case that could benefit from mediation/ADR. Some special educational needs cases could, for example, fall into this category'. [33]
>
> 'Moreover, some practitioners consider there to be a tension between the constitutional and supervisory role of judicial review, on the one hand, and the private and confidential nature of mediation on the other. The principle that judicial review is an important constitutional check on the power of government does not, for some, sit easily with the idea that disputes could be settled in a confidential mediation.'[34]

The use of Alternative Dispute Resolution is set out in Practice Note 1/2008, which provides a code of good practice and the steps that should be taken before making an application for leave to bring judicial review[35]:

> '7. It is not practicable in this protocol to address in detail how the parties might decide which method to adopt to resolve their particular dispute. However, summarised below are some of the options for resolving disputes without litigation:

[33] Paragraph 20.41-20.42
[34] Paragraph 20.45, Ibid
[35] Appendix I Pre-Action Protocol for Judicial Review

(1) Discussion and negotiation.

(2) Ombudsmen – the Parliamentary and Health Service, Police and Prison Services for Northern Ireland. Ombudsmen have discretion to deal with complaints relating to maladministration. The British and Irish Ombudsman Association provide information about Ombudsman schemes and other complaint handling bodies and this is available from their website at www.bioa.org.uk. Parties may wish to note that the Ombudsmen are not able to look into a complaint once court action has been commenced.

(3) Early neutral evaluation by an independent third party, (for example, a lawyer experienced in the field of administrative law or an individual experienced in the subject matter of the claim).

(4) Mediation – a form of facilitated negotiation assisted by an independent neutral party.

However it is expressly recognised that no party can or should be force to mediate or enter into any form of ADR.'

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?

CAJ has been granted standing to take judicial review proceedings in its own name as a 'human rights watchdog' and this has resulted in successful strategic litigation, which has benefitted wider society in NI as a whole. It is our view that the rules of public interest standing are not treated too leniently and we would reject any attempt to restrict the scope of standing given the detrimental impact this could have on putative challenges raising matters of wider public interest. The Rules of the Court of Judicature (NI) on standing are clear:

Order 53(3)

(5) The Court shall not, having regard to section 18(4) of the Act, grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates.

(6) Such leave shall not be granted if, having regard to the nature of the persons and bodies against whom relief may be granted by way of an order of mandamus, prohibition or certiorari, the Court is satisfied that the case is one in respect of which relief could not be granted by way of any such order.

….

(8) If the Court grants leave, it may impose such terms as to costs and as to giving security as it thinks fit.

It is vital that NGOs or other organisations such as the United Nations 'A status' accredited Northern Ireland Human Rights Commission[36] are able to continue to challenge unlawful decisions, in which they have sufficient interest, where an individual victim or claimant cannot be identified. Public interest challenges must be able to proceed to ensure access to justice in practice for all in our society. As alluded to above it is of particular importance and a vital protection that the Equality Commission for Northern Ireland and the Northern Ireland Human Rights Commission have been given standing to bring cases in their own name under the new Dedicated Mechanism to ensure non-diminution of equality and human rights post Brexit.

The importance and effectiveness of public interest judicial review challenges taken by NGOs can be demonstrated through a number of cases taken by CAJ such as the following:

In the Matter of an Application by the Committee on the Administration of Justice and In the Matter of a Decision of the Parole Commissioners for Northern Ireland communicated on 28 February 2013 and 9 April 2013. **[2014] NIQB 67[37]:**

The Northern Ireland High Court held that a decision by the Parole Commissioners of Northern Ireland to refuse access to a representative of the Committee on the Administration of Justice (CAJ) to observe a parole hearing was unlawful.

This judicial review followed the refusal of our request to monitor the parole hearing of a prisoner by the Parole Commissioners of Northern Ireland (PCNI), under Rule 22(4) of the Parole Commissioners' Rules (NI) 2009, to monitor a parole hearing of a prisoner. The High Court in Northern Ireland held that the PCNI had misdirected itself in law and the decision to refuse access to CAJ was unlawful. This judgment upheld our claim that there is a public interest in proceedings being as transparent and accountable as possible in support of the principle of open justice.

In the matter of an Application for Leave to Apply for Judicial Review by Steven Agnew and Others **[2016] NIQB 85 and [2017] UKSC 5[38];**

This judicial review challenged the government claim that it could use the Royal Prerogative, to begin the removal of the UK from the EU under Article 50 of the Treaty of the European Union, without the consent of Parliament, following the UK referendum vote in 2016 to leave the European Union. In 2017 by a majority of eight to three, the Supreme Court held that an Act of Parliament is required to authorise ministers to give Notice of the decision of the UK to withdraw from the European Union and rejected arguments that the Scottish Parliament, Welsh Assembly and Northern Irish Assembly should vote on whether Article 50 could be triggered. The judgment ensured that Parliament passed legislation authorising the government to give notice to the EU that it intends to withdraw from it, in accordance with Article 50.

[36] https://www.nihrc.org/about-us
[37] https://www.judiciaryni.uk/judicial-decisions/2014-niqb-67
[38] https://www.judiciaryni.uk/judicial-decisions/2016-niqb-85

In the Matter of an Application by the Committee on the Administration of Justice (CAJ) and Brian Gormally for Judicial Review [2015] NIQB 59[39].

This challenge addressed the NI Executive's legal duty in relation to tackling poverty, social exclusion and deprivation under section 28E of the Northern Ireland Act 1998. This duty was introduced as a cornerstone of the peace settlement and is of even greater importance at a time when increasing austerity is being imposed on Northern Ireland. The High Court in Northern Ireland held that the Executive had acted unlawfully. The devolved administration must therefore now introduce an anti-poverty strategy, and base it on objective need. This strategic litigation challenged for the first time the government's failure to implement a rights-based policy as required by one of the Agreements forming part of the peace settlement.

Unfortunately, a period of lack of devolved government in Northern Ireland followed this judgment and there was no progress on enforcement of it. However, the recent restoration of devolution has led to the establishment of a process to ensure this commitment to an anti-poverty strategy will now be met.[40]

Conclusion

We reaffirm our position that it is not necessary or appropriate to seek to restrict judicial review in Northern Ireland based on our above submissions. Access to justice remains a key tenet of a democratic society and the rule of law is paramount. It is vital that we recall that no one is above the law and judicial review plays a vital role in holding government unlawful decisions to account.

The comments of Lady Hale are of even greater significance now than when they were expressed in 2015:

> 'It has always been the role of a constitutional court to protect fundamental rights, within the framework of the law and the Constitution, and that is what an independent judiciary will continue to do to the best of its ability. The rules of statutory interpretation play an important part in this. The rule of law is something more than the mere servant of Parliament. The quid pro quo is that we must stay true to our judicial oath, 'to do right by all manner of people after the laws and usages of this realm, without fear or favour, affection or ill-will'. We are not making it up as we go along, but building upon the centuries of law and jurisprudence which make up our national narrative...'[41]

CAJ, October 2020

[39] https://www.judiciaryni.uk/judicial-decisions/2015-niqb-59
[40] https://www.northernireland.gov.uk/node/46534
[41] The UK Supreme Court in the United Kingdom Constitution Inaugural lecture at the Institute for Legal and Constitutional Research, University of St Andrews Lady Hale, Deputy President of the Supreme Court* 8 October 2015, https://www.supremecourt.uk/docs/speech-151008.pdf