# Response of Bhatt Murphy Solicitors to the call for evidence in relation to judicial review

# "Does judicial review strike the right balance between enabling citizens to challenge the lawfulness of government action and allowing the executive and local authorities to carry on the business of government?"

**General Introduction**

1. Bhatt Murphy was established in 1998 and acts in civil cases concerning the detaining authorities – primarily in relation to the police, prisons and immigration detention. We have substantial experience of judicial review including in the appellate courts and the Supreme Court.

2. We participated in an oral session with the Committee that was organised by the Law Society and so will endeavour not to repeat information that has already been received or that others are better placed to provide. Bhatt Murphy has seen the response lodged by the Public Law Project and endorses that response.

3. As an introductory observation, the purpose of this review is unclear and fails to explain the manner in which judicial review could be said to have inhibited the proper functioning of the executive and local authorities. As has been noted in the figures provided by the Public Law Project in their written evidence, judicial review applications have in fact been declining in recent years.

4. The nature of this review is also unbalanced in that it is impossible to look at the

role of judicial review without a wider examination of the current constitutional settlement and the principle of the separation of powers. A review of one constitutional branch requires it be contextualised within the use of legislative and executive powers that are subject to this remedy.

5. For example, the increasing use of secondary legislation will inevitably raise concerns about the proper use of delegated powers and the absence of Parliamentary scrutiny and the extent to which those powers are properly authorised by the enabling statute. This is a longstanding principle – see for example, *Leech (No 2)* [1993] 3 WLR 1125 – that has not previously been seen as either controversial or a fetter to good governance. To the contrary, in the absence of any written constitution this has always been the key mechanism for the protection of fundamental common law rights.

6. It should also be noted that any 'expansion' of judicial review is inextricably linked to the role that the State plays in modern life:

> *"The expansion of the modern state has seemed to make administrative review inevitable. The reach of government, for good or ill, now extends into every nook and cranny of life. As a result, individuals, groups and businesses all have more reason than ever before to challenge the legality of government decisions or the interpretation of laws. Such challenges naturally end up before the courts."* (The Gavel and the robe, The Economist, 7 August 1999)

7. The question of whether judicial review is so fundamental to the rule of law that it is either improper or unlawful to exclude it requires careful consideration. Although some judicial views were expressed on this issue in the recent *Privacy International* case [2019] UKSC 22 where we acted for the Claimants, longstanding views on the constitutional propriety of ousting the jurisdiction of the High Court have been very trenchant. Indeed, when considering an ouster clause

in the context of the Asylum and Immigration (Treatment of Claimants etc) Bill in 2004, the Joint Committee on Human Rights stated commented that:

> *"Ousting the review jurisdiction of the High Court over the executive is a direct challenge to a central element of the rule of law, which includes a principle that people should have access to the ordinary courts to test the legality of decisions of inferior tribunals. Clause 11 of the Bill seeks to make the immigration and asylum process operate outside normal principles of administrative law and legal accountability. This sets a dangerous precedent: governments may be encouraged to take a similar approach to other areas of public administration."*[1]

8. This review will also wish to consider the work of previous inquiries into the scope of judicial review to avoid duplicating previous work. The House of Commons Research Paper 06/44 (28 September 2006) provides a neutral and informative starting point that dispels many of the concerns raised in this consultation.

9. The last detailed review of the judicial review process was conducted as recently as 2013[2] and identified the key area of concern as resting with planning decisions. Importantly, there were very few concerns raised in relation to issues such as scope, standing and costs.

[1] Joint Committee on Human Rights, Asylum and Immigration (Treatment of Claimants) Bill, 2 February 2004, HC 304 2003-4, para 57

[2] https://consult.justice.gov.uk/digital-communications/judicial-review/results/judicial-review---proposals-for-further-reform-government-response---annex-a.pdf

## Section 1 – Specific Questions

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?*

   Response

   The questionnaire is unbalanced and appears to be premised on an assumption that government departments are likely to consider that judicial review has the capability to "seriously impede" the functioning of government. The broad point to make is that judicial review is a crucial part of the current constitutional settlement whereby unlawful decisions or policies made by public bodies can be set aside by the Court: on limited grounds; only after unarguable cases have been screened out at the permission stage; within a tight timeframe; and where there is no alternative remedy. That the executive might be unhappy with some decisions of the Court is a measure of the necessity for the current scope of JR – not an indication that any reform is necessary.

   As long ago as 1991 Lord Bridge in *Hague* ([1992] 1 AC 58 stated, in the context of whether decisions made pursuant to the Prison Rules should be amenable to judicial review, "I believe this [the Home Office's concession on the point] confirms the view that the availability of judicial review as a means of questioning the legality of action purportedly taken in pursuance of the prison rules is a beneficial and necessary jurisdiction which cannot properly be circumscribed by considerations of policy or expediency in relation to prison administration". The position before Hague was the courts had been persuaded JR should not generally lie in respect of decisions affecting prisoners – the case's outcome is a reminder of the dangers of demarcating "no-go" areas for the law.

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)?*

Response

As noted in the introductory comments, consideration of this question cannot be addressed in a vacuum and would need to be considered in the context of a wider consultation. However, there are significant concerns in relation to the accessibility of judicial review outside of the very limited groups of people who qualify for legal aid and the very rich. The Jackson proposals on costs shifting have not been taken further and should be considered as a sensible and proportionate way of ensuring that judicial review is a meaningful remedy.

## 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?*

Response

It is difficult to understand the full premise of this question. Judicial review is already extensively governed by statute – the Senior Courts Act 1981 as amended and the Civil Procedure Rules for example. The principles and processes that underpin judicial review are sufficiently certain and clear.

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?*

Response

It is generally clear as to which decisions are subject to judicial review. If in asking whether "certain decision [sic] not be subject to judicial review" the question is suggesting that categories currently amenable to JR should not be then the answer is no. The Court is already highly sensitive to the subject matter of claims in applying the principles of JR – for example in the prison context taking into account the sensitivities of prison management. It is also important to remember that remedies in JR are discretionary.

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?*

Response

See answer to question 3 – the current procedures are sufficiently clear as set out in the Civil Procedure Rules and Practice Directions, and in the Supreme Court in the Supreme Court Rules and Practice Directions. The Administrative Court in addition publishes a very clear user's guide to judicial review. However, as noted in the section dealing with ADR below, the very nature of the remedy is one where legal representation is usually critical and it is not a remedy that can be comfortably utilised by litigants in person.

## 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?*

Response

The three month time limit is a short period for Claimants' to prepare full detailed grounds for judicial review, particularly where public funding is needed. In practical terms, it is virtually impossible for a publicly funded claimant to complete the pre-action protocol and obtain legal aid in a shorter period of time.

It is accepted that this relatively tight time limit is appropriate given the need for finality in public and/or judicial decision making. However, it is suggested that it would be appropriate for the parties to have the ability to agree an extension of time where there is no prejudice to good administration.

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

Response

No. The Courts apply the usual rules in civil cases that costs follow the event CPR 44(2)(a). Problems can arise in identifying the successful party where, for example, cases settle before permission. However such problems have been mitigated by the Court developing particular rules on determining

responsibility for costs in such cases - see *M v Croydon Borough of London* [2012] EWCA Civ 595 for example. There is of course a serious costs penalty for legally aided Claimants whose solicitors will not even be paid under the legal aid scheme where permission is refused.

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?*

Response

Costs are generally proportionate. They are subject to assessment by the Court in the same way as in other cases of civil litigation. The issue of standing is not a problem for the Courts. Clearly the primary purpose of JR is to allow the Courts to correct unlawful decision-making. The Courts already have adequate means to deal with unmeritorious claims (they can be certified as totally without merit under CPR 54(7) for example, which prevents an application for permission being renewed at an oral hearing; there is also the wasted costs jurisdiction)

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?*

Response

The remedies in JR are inherently flexible. Crucially they are discretionary and allow for relief to be refused or a claim rejected if, on reconsideration, there is no prospect that a different decision would be reached. The mischief that this question is aimed at is unclear.

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

Response

Claimants are required to comply with the pre-action protocol. This can result in decision makers reviewing decisions. However too often in our experience even in very clear cases decision makers do not properly respond to pre-action correspondence having properly reconsidered their decisions in light of the grounds set out in that correspondence. In addition Claimants are expected to have used appropriate alternative remedies before resorting to judicial review. However again the quality of review provided by complaints procedures is highly variable. However in principle positive engagement with these two requirements: to use alternative remedies and to use the pre action protocol, are capable of minimising the need to proceed with judicial review.

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?*

Response

Our firm has experience of late settlement. Often this is due to the Defendant failing to properly review the merits of a case. For example in one case that was a complex case relating to unlawful detention (CO/2010/2018) under immigration powers that was listed for a three day hearing on 3 December 2019 the Defendant finally conceded the claim days before the listing. This appeared to be a belated recognition of the Claim's merits, but resulted in a large amount of costs being incurred which would not have been necessary had the Claim been conceded at an early stage. This was a case where the Defendant aggressively defended the Claim at every stage despite evident merits and, for example, failed to take a realistic view once permission was granted.

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?*

Response

ADR is conceptually difficult in judicial review and there is of course the need for proceedings to be brought promptly. If the pre-action protocol does not resolve the issue then it is difficult in many cases to envisage a procedure which would be suitable across the many types of subject matter that judicial review deals with which might provide an appropriate means of ADR short of litigation itself. ADR is also an impractical solution for unrepresented litigants and is likely to be especially exclusionary for vulnerable groups and those with protected characteristics if they are not represented.

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?*

Response

We have significant experience of cases where standing is an issue. As was noted in the Government response in 2013 (above), the current rules on

standing are not perceived to be problematic and the suggestion that there needs to be a direct (individual) interest in the outcome can often lead to greater administrative burden. One example is the case where we acted for the Howard League for Penal Reform and the Prisoners' Advice Service in respect of a challenge to legal aid changes for prisoners.[3] These organisations were able to bring together a range of issues and professional experience in one challenge that allowed the Respondent and the courts to address the entire range of issues affecting a prison population numbering over 80,000 people. All individual cases were stayed pending the outcome of this one case ensuring that the Ministry of Justice did not have to defend a large number of individual claims that would have rested on complex and changing individual circumstances.

The word "leniently" again appears loaded – presumably on the assumption that standing in judicial review is too widely applied. As stated above the role of JR is to correct unlawful decision-making. The courts do not allow "busybodies" to litigate at will – but it is correct that the rules of standing should not be too prescriptive – it is not in the public interest for unlawful decisions to remain uncorrected.

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[3] *R (Howard League and PAS) v The Lord Chancellor* [2015] EWCA Civ 819