Independent Review of Administrative Law call for evidence: judicial review

Coram Children's Legal Centre response – October 2020

Coram Children's Legal Centre (CCLC), part of the Coram group of charities, is an independent charity working in the UK and around the world to protect and promote the rights of children, through the provision of direct legal services; the publication of free legal information online and in guides; research and policy work; law reform; training; and international consultancy on child rights. The Migrant Children's Project at CCLC provides specialist advice and legal representation to migrant and refugee children and young people on a wider variety of issues related to immigration, asylum, care and services. CCLC has undertaken amicus curiae interventions in a number of significant cases, including in the European Court of Human Rights, the Supreme Court and the Court of Appeal, providing assistance to the court on matters of children's rights and best interests.

Introduction

Judicial review is often the only available remedy to uphold children's legal rights. It is a vital protection only used when there is no other remedy, or all other alternative remedies have been exhausted. While alternative remedies may be appropriate in addition to this process in some situations, it is currently the case that government bodies are not meeting all their obligations to children and young people. It is wholly essential that judicial review remain available as a safeguard of last resort. If children, young people, or those caring for them, cannot take steps to ensure the law is upheld, they can be left without a home, without status, excluded from education, and separated from their family.

We recognise that the Panel has been given a very short time in which to review a legal process that touches upon every area of law; not just a few high profile cases, but also those that affect the daily lives of children and families across the country. We are concerned that should the Panel keep to its stated timetable of issuing a report before Christmas, it has insufficient time to consider all the ramifications of any proposed reform, and avoid unintended consequences that would harm children and young people. Our response is specifically focused on the exercise of judicial review in relation to the rights of children and young people in the areas of community care, immigration, and education law, as this is where CCLC has expertise. For a wider response beyond these areas, we would refer the Panel to the Public Law Project's comprehensive submission[1], and to the submission of the Immigration Law Practitioners' Association for a broader overview of immigration issues.

Section 1

Question 1: Are there any comments you would like to make, in response to the questions asked in the questionnaire for government departments and other public bodies?

Judicial review provides a safety net for children and young people on a daily basis, across a huge range of issues where there is no other form of redress available. Without the availability of judicial

[1] https://publiclawproject.org.uk/wp-content/uploads/2020/10/201020-PLP-Submission-to-IRAL-FINAL.pdf

review, children and young people can face major breaches of their legal rights by government bodies, with serious consequences including homelessness, deteriorating mental health, an inability to access education, and in some cases (such as cases involving immigration removal) death.

We appreciate that judicial review is used in a variety of ways across a wide range of legal arenas. We would like to draw the Panel's attention to the issues that generally attract little publicity, but have huge effects on the vulnerable individuals concerned. We have provided examples of some (but by no means all) of the key areas where judicial review is essential to safeguard children and young people, split across our areas of expertise.

Immigration, asylum and trafficking

- Judicial review has been key in ensuring victims of trafficking can still access legal aid for immigration advice[2], after the Legal Aid Agency stated in 2017 that they could not. A judicial review on this point was settled the day before the hearing, when the government agreed to amend its position.

- It took a judicial review challenge to restore legal aid for immigration matters for unaccompanied and separated children[3], after legal aid for this cohort was removed by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO'). Prior to this challenge, children in care had to hope the local authority responsible for them would pay their legal costs, which meant in reality that many were left without advice or representation.

- If a child or young person who has sought asylum is given an unlawful condition on their immigration bail (such as a 'no study' condition[4]), and the Home Office refuses to vary the condition, then judicial review is the only route by which this can be challenged.

  For example, when the new immigration bail conditions were first brought out in 2018, CCLC's outreach advice team saw a large number of enquiries from care leavers (including separated asylum seeking young people waiting on a decision) who had suddenly been given a 'no study' condition, meaning they must immediately stop attending college. This put some at risk of homelessness, as local authorities need only continue to support care leavers aged 21 to 25 if they are in education or training. Judicial review was an essential safety net for those young people to ensure the Home Office applied its policies lawfully. The Home Office guidance was subsequently updated to clarify that no study conditions should not be applied to care leavers receiving leaving care support, as it had never intended to affect this cohort.

- Where an asylum seeker has been provided with unsuitable or unsafe asylum support accommodation, and the Home Office refuses to change their accommodation offer, the

[2] https://atleu.org.uk/news/legalaidimmigrationadvice

[3] https://questions-statements.parliament.uk/written-statements/detail/2018-07-12/HCWS853

[4] https://www.childrenslegalcentre.com/resources/no-study-immigration-bail/

only mode of redress is judicial review. Situations such as this tend to involve very vulnerable individuals, and it is vital that a route is available to challenge unsuitable asylum support accommodation.

As an example, CCLC represented an extremely vulnerable asylum seeking child. He was age disputed so was not accommodated by the local authority but placed in asylum support accommodation with adults. The young person had significant mental health including a history of attempted suicide. Despite considering supporting evidence including medical reports to confirm that he needed self-contained accommodation within close proximity of his support network, the SSHD refused to move him. A judicial review was issued and interim relief was granted by way of an order for the SSHD to move him to sole occupancy accommodation close to his support network. The SSHD failed to comply and a further application had to be made. He was eventually moved to self-contained accommodation but it was too far from his support network. The young person was forced to start further judicial review proceedings, which the SSHD settled by granting him refugee status, which meant that his support from the SSHD would come to an end as he is entitled to apply for mainstream housing and support. All attempts to resolve these issues before issuing judicial review proceedings were unsuccessful. Unfortunately, it is the experience of our legal practice unit that cases like this are not uncommon.

- Where a child or young person has been waiting for much longer than 6 months for a decision on their asylum claim, judicial review is the only available method to prompt a decision, or indeed usually to get any response from the Home Office at all. CCLC's legal practice experience is that a pre-action letter can prompt an agreement to make a decision within three months. It is not unusual for a decision not to be made in the agreed timeframe, requiring a further pre-action letter. CCLC's two immigration solicitors have sent around 25 pre-action letters so far this year on behalf of vulnerable children and young people whose asylum decision has been unreasonably delayed. These cases rarely go to a full judicial review, since the pre-action process does trigger decision making. It is also our experience that the Home Office does not respond to letters regarding delay that are not formal pre-action letters, making judicial review an essential tool.

  We would emphasise that delay in asylum decision making for children is a regrettably common problem. Between July 2017 and November 2019 the Migrant Children's Project advised 143 children and young people who were under 18 when they claimed asylum, of whom almost a third (45) had been waiting over six months for an initial asylum decision at the date that they sought our advice. The longest wait we recorded for a child asylum seeker was 48 months (with no substantive asylum interview), and many young people had been waiting for over two years for a decision. This delay can have serious detrimental affects on children's mental and physical health, education, relationships with professionals and access to services. Without judicial review, these children and young people would have no independent mechanism to challenge the delay.

- If a young person's application for asylum or leave on human rights grounds is refused and certified as 'clearly unfounded', that person has no right of appeal. Certification can only be

challenged by judicial review. Given the scarcity of legal aid providers with immigration specialisms, very vulnerable applicants may have received only limited legal advice (if any) before making an application, meaning that key issues would not be put forward to the Home Office. It is essential that judicial review is retained to challenge certification.

For example, CCLC encountered a 17 year old whose human rights application had been refused and certified as clearly unfounded. We supported her in a successful judicial review to challenge the certification and obtain a right of appeal. Over the course of working with her, it became apparent that she had been trafficked to the UK as a young child for domestic servitude, was still under the control of her trafficker, and had major depressive disorder. She was granted discretionary leave as a victim of trafficking and eventually asylum based on her risk of being re-trafficked and poor mental health. She now has access to the support she needs and is studying at university. Had she not had the right to judicially review her certification, she would likely have been removed from the UK in breach of the UK's international obligations to victims of trafficking. Multiple psychiatric reports concluded that removal would likely result in her suicide.

- Where a child's application to register as a British citizen is refused, there is no right of appeal; they can only submit a request for reconsideration for internal review by the Home Office. Judicial review is a crucial backstop for this process. Circumstances where this occurs include applications by children that have been refused on the grounds: that they are not of good character (which considers behaviour from the age of 10); that they have been unable to provide evidence of residence to the Home Office's standards (it can be difficult for families with a background of homelessness or domestic abuse to provide specific evidence); or discretionary applications (e.g. for a child in care where the local authority considers their future lies wholly in the UK) where a reconsideration request has been unsuccessful.

- Where an application for leave has been made with a fee waiver request, there is no mechanism to challenge a fee waiver refusal other than by judicial review. This is an essential safety net, ensuring that the most vulnerable are not permanently locked out of the immigration system by the high cost of an application.

  For example, CCLC supported an undocumented woman with three children under 12. The younger two were British by birth, but without documentation. The eldest was eligible to register as British. The family had just escaped serious, long term domestic violence from the children's British father and were homeless. We applied to register the eldest as British, and an application with fee waiver for leave to remain under the Immigration Rules for the mother and eldest child. The fee waiver was rejected, despite supporting evidence from the police, the local authority (detailing the financial support provided) and a DV support organisation. After pre-action proceedings commenced the SSHD agreed to review the fee waiver application, but subsequently refused to do so. Following further pre-action proceedings, the fee waiver application was reviewed and granted. The mother has now been granted leave to remain with her three British children, and the family can access the support they need to begin to recover from their experiences. Without judicial review to challenge the fee waiver refusal, this would not be the case.

Community Care

- Where a family has made an application for immigration status but is waiting for a decision from the Home Office, and the family is destitute or facing destitution, local authorities have a duty to assess whether the family needs support under section 17 Children Act 1989. Where local authorities refuse to carry out an assessment, the only recourse is judicial review.

  CCLC represented a vulnerable single parent of two children who were born in the UK. She had no recourse to public funds with a pending immigration application for leave to remain. She had been living with a friend for years in accommodation in disrepair and had suffered sexual harassment there. She was then thrown out by her friend and went to stay temporarily elsewhere. The local authorities in both the area that they had lived and the children went to school, and the area they were temporarily staying, refused to assess them and it was only when CCLC sent pre-action correspondence to both that the first local authority agreed to carry out an assessment of the children and eventually agreed to provide the family with accommodation and sufficient support. The mother was later granted leave to remain with her children.

- Where a local authority carries out an age assessment of a young person, and the young person disagrees with the assessed age, there is no method to challenge the decision other than by judicial review. An age assessment can have significant impacts both on the housing, support and education available to a child, but also on the outcome of any asylum claim made. An age assessment that significantly differs from a child's claimed age can lead the Home Office to make a negative credibility assessment, and extrapolate from this that other parts of their asylum claim are also not credible. It is essential that children and young people have an independent mechanism to challenge these decisions.

  For example, CCLC represented an unaccompanied asylum seeking child who arrived in the UK when he was 15. An age assessment by social services did not comply with legal requirements and he was not informed of their decision that he was two years older than claimed until many months later. The child was extremely traumatised by his experiences in his country of origin, with a history of suicide attempts. We referred him to a child trafficking specialist therapist. His ID card from his country of origin was authenticated by an independent expert and sent to social services with his medical records and a detailed letter of representations. Social services accepted his vulnerability and agreed to continue his foster placement under a 'Staying Put Arrangement', but despite the evidence put forward refused to accept his age. It was only when judicial review pre-action protocol correspondence was issued that the local authority agreed to reassess his age and he was finally accepted as being 16 years old (having turned 16 during the process).

Education

- Where a child is diagnosed with Special Education Needs ('SEN'), they will be issued with an Education Health and Care Plan (EHCP) to set out the additional support needed from the local authority to meet their needs. Should a local authority fail to comply with the terms of the EHCP, the only recourse is judicial review. In our experience it is rare for such cases to need to progress to a full hearing, as local authorities tend to recognise their error at pre-action stage and settle. However without the option of judicial review, it is likely that many local authorities would not change their position.

  As one example of many, CCLC represented a teenager with a diagnosis of Autistic Spectrum Condition in a mainstream secondary school. The SEN Tribunal had previously issued a decision on this child's Special Educational Needs ('SEN') which led to an amendment of his previous Education Health and Care Plan ('EHCP'). A further EHCP was issued but the Local Authority failed to provide the support the Tribunal directed. The child complained to the Local Authority, and only when this had no effect was a judicial review pre-action letter sent outlining the failure. The Local Authority responded defending its position and arguing the provision was being delivered. The child disputed this. A further pre-action letter threatening the Local Authority with a claim for Judicial Review had to be sent and third letter sent before the Local Authority conceded and finally ensured that the child received the support they needed.

Question 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)?

We would refer the Panel to the Public Law Project's comprehensive answer to this point, and in particular with regards to the importance of disclosure duties and the duty of candour. We agree that there is a case for reinforcing the importance of the duty of candour, perhaps by putting it on a statutory footing. Full compliance with the duty of candour by public bodies is essential to avoiding cases progressing unnecessarily; as can be seen from the examples given in response to question 1, it is often the case that when a public body reviews its decision making and documents at pre-action stage, they realise that their actions were unlawful and settle. It will also be the case that public authority defendants disclose details of their decision making that persuade applicants not to pursue the matter.

We agree with the Public Law Project that if and to the extent that public authorities find compliance with the duty of candour unduly burdensome, the best approach would be to consider how they can adopt better systems for keeping records about their decision making.

<u>Section 2 – Codification and Clarity</u>

Question 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?

Question 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?

Question 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?

It is our view that the judicial review process as a whole is already clear, including what decisions and powers are subject to judicial review. The process is set out in the Civil Procedure Rules and the Senior Courts Act which are clear and comprehensive. Whilst members of the public may not be aware of the judicial review process, powers and limits, this can be addressed by ensuring access to good legal advice and public legal education.

We cannot see any benefit to statutory intervention in the process. We would be strongly opposed to statutory limitation of which decisions by public authorities may be subject to judicial review. As demonstrated in our answers to question 1, the law in areas such as immigration and community care can change quickly, and judicial review must remain flexible to prevent serious unintended consequences to these changes (such as the introduction of immigration bail 'no study' conditions leaving care leavers at risk of homelessness).

Section 3 - Process and Procedure

Question 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?

All judicial reviews are required to be brought promptly, and in any event within three months of the event complained of. The following are not usually accepted as excuses for late applications:

- ignorance of the law, even if you have been badly advised;
- unjustified delay in seeking proper advice; or,
- delay by the public body if the claimant adds to this by their own delay.

This can often be a very tight timeframe for vulnerable individuals to realise that their issue will not progress further without legal advice, seek and obtain appropriate legal advice (particularly given the legal aid deserts in many parts of the country for education, housing, community care[5], immigration and asylum law[6]), seek and obtain legal aid, and prepare and lodge a claim. We strongly believe that any reduction of this timeframe would seriously inhibit access to justice in areas of law that have an immediate impact on the health, safety and wellbeing of families and children.

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

Question 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?

[5] https://www.lawsociety.org.uk/en/campaigns/legal-aid-deserts

[6] https://righttoremain.org.uk/legal-aid-droughts-and-deserts-new-report-by-dr-jo-wilding/

The current costs rules are appropriate. Unmeritorious claims do not progress past permission stage. Wholly without merit claims do not have an oral renewal right. A claim that is ultimately unsuccessful at hearing is not necessarily unmeritorious, and should not be penalised. It is worth observing that a large number of meritorious claims also do not progress past permission stage as the public authority chooses to settle (see our response to question 1).

The judicial review process ensures that the public authority is given multiple opportunities to reconsider and concede before a claim progresses to a full hearing and any award of inter partes costs against them. Judicial review is a process of last resort, following a system of internal review and pre-action proceedings. Conversely, legal aid practitioners do all work up to permission stage at risk, and can generally only expect to be paid if permission is granted. This in itself reduces the likelihood of unmeritorious claims being brought.

Moreover, we strongly believe that costs should not be made any harsher for litigants in person where cases are deemed unmeritorious at permission stage or beyond. Given the legal advice deserts in many parts of the country for housing, community care, education, immigration and asylum law (both for private and legal aid advice), an increase in litigants in person may be expected. It would not be just to punish what will often be vulnerable individuals for an inability to obtain legal advice on merits when legal advice is often simply no longer available in many parts of the UK.

Question 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?

In general we consider that the current remedies available as a result of a successful judicial review are sufficiently flexible.

We would suggest that in some areas of law would benefit from giving the court more powers to make and enforce timescales in which the public body must remake decisions found to be unlawful. It is common for public bodies to agree or be ordered to remake a decision, but then delay the process to such an extent that a further judicial review must be brought regarding the delay. This has a circular effect, wasting time, increasing costs, and often causing significant detriment to the claimant.

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

Early and substantive engagement by the decision maker is key. It is our experience that there is considerable variety between public bodies in the level and quality of their engagement to pre-action letters. A meaningful response to all pre-action letters could in many cases avoid the need to proceed further.

As an example, CCLC represented an exceptionally vulnerable young person who following a serious childhood illness has lasting physical disabilities and learning difficulties. He lives in a residential placement provided by adult social services. He lacks capacity to instruct and CCLC was authorised by the Court of Protection to act. Following a successful appeals process (which concluded in the Court of Appeal), the young person was granted 30 months'

leave to remain in the UK on the grounds of his private life. Given his vulnerabilities, we requested a grant of indefinite leave to remain outside the rules. This was rejected. We challenged the Home Office's failure to grant indefinite leave to remain outside the rules by way of judicial review. Despite providing full representations at pre-action stage, it was only when the judicial review application was lodged that the Home Office settled and paid costs. He was subsequently granted indefinite leave to remain. Had the Home Office engaged meaningfully with our pre-action correspondence, the additional time and costs could have been avoided.

Moreover, it is essential that decision makers adhere to any commitments made in their pre-action response. As shown in several of the examples provided in our response to questions 1, it is not uncommon for public bodies to commit to taking action within a certain timeframe, and then fail to do so. This then precipitates the need for further pre-action procedures and potentially a further judicial review, again wasting time, increasing costs, and often causing significant detriment to the claimant.

This question must also be viewed within the context of the current legal aid system. The introduction of LASPO has meant that since April 2013, legal aid is no longer available for employment, many education issues, non-asylum immigration, private family law, many debt and housing cases, and most welfare benefits cases. Early legal advice and representation to properly prepare and evidence cases and draw out the relevant issues can avoid cases reaching the judicial review stage. The example provided at question 1 (p.3) of a young person whose immigration application was certified as 'clearly unfounded' illustrates this issue. She had to borrow money to pay privately for immigration advice and could afford only a very basic service. As a result, the adviser did not spend enough time with her to realise that she was a victim of trafficking, and this information was not provided to the Home Office. Had the young person been able to access a legal aid immigration adviser from the start without being worried about putting herself into debt, the right information could have been provided from the start, and judicial review and all the subsequent costs avoided.

Question 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?

In the experience of CCLC's solicitors, it is unusual for settlement to occur 'at the door of the court' in judicial review proceedings (conversely, this is common in appeals). However, as per our response to question 1 we have found it is very common for public bodies to settle judicial reviews at pre-action stage, issuing stage, or following a grant of permission. For example, we issue an average of two pre-action letters per month regarding local authorities failure to implement Education Health and Care Plans for children pending a hearing at the Special Educational Needs and Disability Tribunal (which can leave a child without any educational provision for three months or more). These are almost always settled straight away.

It is our experience that, once a public body is faced with the possibility of independent external scrutiny and possible cost consequences, they are motivated to examine their own decision making process with greater attention (and usually this internal examination is

carried out by someone other than the original decision maker). Often, this internal examination concludes that their process was inadequate or unlawful, and they agree to settle the matter. The possibility of full judicial review is essential to ensure this internal examination takes place; in our experience a letter of complaint often receives little response, whereas a pre-action letter to the same public body setting out the same facts often resolves the issue.

Question 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 (ADR) could only be effective in judicial review proceedings if public bodies are committed to engaging with them in a meaningful way. Without this, they would simply be a method to further draw out the proceedings.

The pre-action stage already provides an opportunity for the respondent to fully engage in the issues in dispute. However, it is our experience that the response is often merely cursory or a re-stating of the original decision. We would be very concerned by the proposition of any blanket requirement for ADR as part of the judicial review process, where public bodies are already routinely failing to engage in the existing pre-action process.

Mediation could play a role in helping to resolve some disputes between individuals and public bodies. Once action has commenced there is sometimes a hardening of positions by all parties, which can delay reaching a resolution. Where children are involved (for example in age disputes), any delay can cause active harm due to the prolonged uncertainty of their situation. However, it is essential that if mediation is made a requirement for cases such as these, legal aid must be provided for the potential claimant to provide equality of arms and increase the prospect of a real and lasting resolution. And as above, mediation will only be effective if public bodies fully engage in the process, to a greater degree than they currently engage in pre-action proceedings.

We would also particularly direct the Panel to the Public Law Project's response to this question, which sets out five areas (urgency, time limits, expense, nature of the dispute and need to resolve a point of legal principle) which must be carefully considered before devising any proposal to expand the use of ADR in judicial review proceedings.

Question 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?

Public interest standing is of vital importance in allowing organisations to bring proceedings on issues of wider importance for the vulnerable, children, and those less able to issue. We have seen no evidence to suggest that the rules of public interest standing are treated too

leniently by the courts. Rather, there is a strong public interest in allowing government decisions to be held to account through the courts where there is a meritorious case, even where there is no particular individual able to bring the case or whose circumstances represent the whole impact of the decision in question.

The court has proven mechanisms to prevent abuse of public interest standing, and we have yet to see any evidence that reform of the standing rules is necessary. Were any reform to be contemplated, we would expect the protection of children and other vulnerable people to be made a primary consideration in the process.

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