Shelter Evidence to the Independent Review of Administrative Law: Call for Evidence

October 2020

Independent Review of Administrative Law: Call for Evidence

Introduction

Shelter welcomes the opportunity to respond to the Inquiry.

Shelter's legal services employ 46 solicitors, 25 advisers and 30 support staff in 16 offices around England and Scotland to give advice and provide legal representation to the public. Our evidence is concentrated in the areas of housing and homelessness casework and associated matters, in which we have wide-ranging experience. Housing law is complex, and successive governments have continued to add to or amend existing legislation. Consequently, it can be challenging at the best of times for our specialist advisers to advise people on their rights. It is often impossible for individual residents to understand the law and prepare their own case when trying to preserve their home or on finding themselves homeless. Rights mean nothing if people are unable to enforce them.

The Covid-19 crisis has revealed just how vulnerable so many members of society are: vulnerably housed, precariously employed and inadequately remunerated. As we teeter on the edge of a global recession, it is more important than ever that we have a robust legal system to underpin our safety net, ensuring that people can access and enforce their rights when they need them most.

Our experience of judicial review proceedings takes different forms. The most frequent instances in which we use (or issue warnings of) judicial review is on behalf of individual clients who are challenging local authority decisions. Such decisions are in the context of:

- Homelessness applications under Part VII of the Housing Act 1996. These include challenges to local authority `gatekeeping' practices, where an authority unlawfully turns a homeless person away rather than provide the services to which they are entitled; a refusal to provide temporary accommodation; or the failure to make a decision or to provide accommodation under homelessness duties.

- Applications for assistance to social services by homeless families under section 17 Children Act 1989 (provision of services to children in need)

- Applications for accommodation under a local authority's allocation scheme (housing register), including issues of eligibility and prioritisation. Challenges may be to the lawfulness of the allocation scheme itself in some general aspect, or to the fairness or rationality of a decision made in a particular case.

In addition, we are sometimes party to challenges to central government policy or decision-making in matters which affect people's ability to find or keep a safe home. We do not usually initiate such challenges, but we occasionally seek permission to act as interveners,

in cases where we have research evidence or other material which we believe will assist the court. Examples of cases in which we have intervened are:

- ***R (TG) v LB Lambeth*** [2011] EWCA Civ 526: a case in which we drew attention to the persistent failures of and lack of co-ordination between housing and social services authorities in dealing with homeless young people. In this case, Wilson LJ commented that Shelter's submissions were "*conspicuously helpful*".

- ***R (MA and others) v SSWP*** [2013] EWHC 2213 (Admin): a challenge to the housing benefit social sector size criteria rules.

- ***R (SG & others) v SSWP*** [2015] UKSC 16: a challenge to the benefit cap in relation to whether it had a discriminatory effect against single parents and victims of domestic violence.

- ***R (DA & DS) v SSWP [2019] USC 21:*** challenges to the legality of the revised benefit cap as it applied to lone parent families with children under 2 and 5.

In other cases, we have submitted witness statements in a number of judicial review proceedings, as in the recent case of ***R (on the application of Right: Community: Action Ltd) v Secretary of State for Housing, Communities and Local Government*** CO/3024/2020 (relating to permitted development rights that could result in the creation of new dwellings); in ***R (A) v Secretary of State for Work and Pensions*** CO/6391/2013 (relating to the application of the social sector size criteria for housing benefit purposes to a 'panic room' specially converted to protect a victim of domestic abuse); in ***R (Ward and Gullu) v London Borough of Hillingdon*** (2019) EWCA Civ 692 (in respect of the lawfulness of the Council's allocation scheme, and particularly its ten year residence condition in its application to Irish travellers and refugees) and in ***R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department*** **[2020] EWCA Civ 542** (in respect of the lawfulness of the right to rent policy under the Immigration Act 2014 in certain circumstances). Again, in all cases, we were able to offer particular research evidence or insights relating to the subject matter of the proceedings.

We have been the joint applicants for judicial review in the following cases:

- ***R v Secretary of State for the Environment ex parte Shelter and the Refugee Council*** (1996) CO/2765/96: establishing the principle that a public body must give reasonable notice before evicting a person from temporary accommodation. Carnwath J. said: "[Local authorities] are under a public law duty to act reasonably, which is of particular importance when one is dealing with a need as basic as the need for a roof over one's head."

- ***R (on the application of Ben Hoare Bell and others) v The Lord Chancellor and the Director of Legal Aid Casework*** [2015] EWHC 523 (Admin); a successful challenge to the legal aid regulations, which required providers to work at risk in applications for judicial review pending the grant of permission by the Court.

In addition, we regularly bring appeals in the county court against local authority homelessness decision under s.204 Housing Act 1996. Such statutory appeals are based on a point of law, and the county court is exercising a jurisdiction which is in the nature of judicial review.

Most of our judicial review work is therefore concerned with decisions made in respect of individual clients by public authorities. Those decisions concern issues which are fundamental to a person's wellbeing: the need for a home; for welfare benefits to assist with accommodation costs; and for subsistence in cases where a person or family find themselves destitute. If the authority misunderstands the law, or adopts a procedure which is unfair, such that a person is deprived of such basic needs, it is unquestionable that the individual must have a means of challenging that decision. That means of challenge is by way of judicial review, as Parliament has framed the law in such a way that only judicial review can offer a remedy.

In some cases, particularly in the allocation of social housing, the decision in question will derive from a policy which is considered unlawful, so that the challenge is in effect to the policy itself. The rationale in bringing the challenge is the same, namely, that the authority has misinterpreted or exceeded the powers which Parliament has given to it: but a successful challenge to a policy is likely to benefit a wider group of people than just the individual applicant.

Likewise, in the rare cases where Shelter has made an application for judicial review in its own name or has requested permission to intervene in judicial review proceedings, the basis for the challenge is invariably a legal one: that the defendant – whether a local authority or the Secretary of State – has acted beyond its powers or otherwise in such a way as to frustrate the will of Parliament. A good example is the ***Ben Hoare Bell*** case referred to above, which was a judicial review of the remuneration regulations introduced under the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO) to restrict the circumstances in which legal aid would be available for judicial review cases. The Lord Chancellor has a duty under s1 of LASPO to ensure that legal aid is made available in accordance with Part 1 of the Act. The regulations, however, created a `no permission, no fee' condition of payment, so that legal service providers would not be entitled to payment where permission for judicial review was neither granted nor refused. We argued that Parliament did not intend to permit the Lord Chancellor to make an entitlement to payment conditional on the outcome of a case, as LASPO did not contemplate that legal services would be provided without payment. The Administrative Court found that the regulations put providers of legal services at risk in situations which could not be said to be linked to the stated objectives of the Regulations and this was incompatible with the statutory purpose.

Section 1 – Questionnaire to Government Departments

Based on the Terms of Reference as set out in the Introduction, the IRAL has created the following questionnaire to be sent to Government Departments. The questions are as follows:

1. In your experience, and making full allowance for the importance of maintaining the rule of law, do any of the following aspects of judicial review seriously impede the proper or effective discharge of central or local governmental functions? If so, could you explain why, providing as much evidence as you can in support?

a. judicial review for mistake of law

b. judicial review for mistake of fact

c. judicial review for some kind of procedural impropriety (such as bias, a failure to consult, or failure to give someone a hearing)

d. judicial review for disappointing someone's legitimate expectations

e. judicial review for Wednesbury unreasonableness

f. judicial review on the ground that irrelevant considerations have been taken into account or that relevant considerations have not been taken into account

g. any other ground of judicial review

h. the remedies that are available when an application for judicial review is successful

i. rules on who may make an application for judicial review

j. rules on the time limits within which an application for judicial review must be made

k. the time it takes to mount defences to applications for judicial review

2. In relation to your decision making, does the prospect of being judicially reviewed improve your ability to make decisions? If it does not, does it result in compromises which reduce the effectiveness of decisions? How do the costs (actual or potential) of judicial review impact decisions?

3. Are there any other concerns about the impact of the law on judicial review on the functioning of government (both local and central) that are not covered in your answer to the previous question, and that you would like to bring to the Panel's attention?

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?**

The main focus of the Review is on whether judicial review strikes the right balance between enabling citizens to challenge the lawfulness of executive action and allowing the executive and local authorities to carry on the business of government. It is disappointing that the first question in the call for evidence proceeds from an assumption that judicial review "seriously impedes" government functions. We do not consider that the existence or exercise of judicial review impedes the proper or effective discharge of central or local governmental functions. Contrary to the pejorative terms of question 1, many public bodies welcome the existence of judicial review as a check on their practices, and by extension as a mechanism for assisting them to carry out their duties lawfully. There are many examples of authorities that change their policies and/or offer an improved service following judicial review proceedings.

The fundamental purpose of judicial review is to ensure that people are treated fairly and in accordance with law. It gives effect to parliamentary sovereignty, by ensuring that the executive is accountable to basic principles of good governance. It has the effect of enhancing the quality of decision-making at all levels of government, since public bodies are concerned to ensure that their decisions, policies and procedures are lawful and could withstand a challenge by judicial review.

We stress that the purpose of judicial review is to determine whether public authorities are acting in accordance with the law. Lord Justice Singh has referred to "the underlying principle … that public authorities are not engaged in ordinary litigation, trying to defend their own private interests. Rather, they are engaged in a common enterprise with the court to fulfil the public interest in upholding the rule of law."[1]

We see no evidence that judicial review is unduly hampering government decision-making. The number of judicial review cases has been declining by the year. There are actually very few judicial reviews, and of those that exist, the great majority are brought by individuals who have been adversely affected by a particular decision or policy. The requirement to obtain permission ensures that unmeritorious cases are filtered out at an early stage. Moreover, the threat of judicial review proceedings in itself is often sufficient to cause public authorities to examine their own procedures critically and to withdraw their unlawful decisions or otherwise offer a compromise which is favourable to the complainant.

Case study one:

Jane and her 5 year old son Tom were homeless after Jane fled from the family home following repeated acts of domestic abuse by her husband. She was able to stay with a friend for a couple of weeks, but had to leave that accommodation in the week before Christmas. She made a homeless application to the Council, but they refused to assist, on the basis that she was "not homeless" because she had matrimonial home rights to her husband's property. [This was an unlawful decision, but Jane did not know how to challenge it.]

By the evening of 22nd December Jane had run out of options and had nowhere to go. She had no money and was destitute. She telephoned the social services out-of-hours line on 22nd December and was provided with emergency accommodation for one night. She was advised to go to the Council's offices the next day, on Friday 23rd December. As advised, she went early to the Council on Friday, only to find that the offices were closed for Christmas with no provision for emergency contact.

Jane spoke to a Shelter adviser, and as she and her son were street homeless, Shelter paid for hotel accommodation from 23rd to 28th December out of our hardship fund. On the morning of 28th December we sent a letter to the Council under the judicial review pre-action protocol requiring the Council to carry out a `child in need' assessment in respect of Tom and to provide suitable accommodation and subsistence pending the assessment. Unless

[1] R (Hoareau) v Secretary of State for Foreign and Commonwealth Affairs [2018] EWHC 1508 (Admin), para 20.

we received their assurance by 4.00 pm that afternoon that accommodation would be provided for the family, we would apply for judicial review without further notice.

The Council contacted Shelter at 3.00 the same day and agreed to provide accommodation. They would not have done so if we had not been able to carry out our warning of judicial review. Subsequently, we successfully challenged the Housing Department's decision of "not homeless", and the Council accepted a rehousing duty to Jane.

Judicial review is of course concerned with decision-making not only by central government, but also by local authorities and other public bodies and regulators. It is already a highly restrictive remedy: the court are reluctant to intervene in executive decisions. The greater the discretion given by Parliament to the public authority, as in the homelessness legislation under the Housing Act 1996, the less likely the courts are to find fault with the authority's exercise of that discretion. If the availability of judicial review were to be further curtailed, there can be no doubt that this would undermine public confidence in the rule of law.

In so many cases, the decisions which we and other legal representatives are challenging are clearly wrong in law. In the homelessness context, such cases usually stem from a basic failure of good decision-making. The most frequent breaches of the law are to be found in `gatekeeping' cases, where an authority wrongfully refuses to take a homeless application or to provide emergency accommodation when the legislation quite clearly requires them to do so: this may be as a result of a failure to consider the particular facts of the case or to have regard to the Homelessness Code of Guidance, or because of applying blanket policies instead of exercising discretion. Whatever the reason, it is no exaggeration to say that judicial review, or the warning of it, is what stands between the client and street homelessness.

A successful outcome in such cases does not only benefit the most disadvantaged people in society, but ensures that what Parliament has laid down is actually observed and carried out on a day-to-day basis. As has rightly been said, judicial review is about getting it right when it matters, where decisions that affect fundamental aspects of people's lives are concerned. If the law requires that a homeless person should be accommodated, it would be a violation of the will of Parliament if there were no means of enforcing that duty.

In addition to providing a remedy in individual cases, it is clear that judicial review has a positive systemic benefit, in holding public authorities accountable for their decisions and in improving the quality of those decisions in the future. In the absence of judicial review, there is no doubt that many homeless applicants, both single persons and families, would be turned away by local authorities and would become street homeless or be condemned to return to violent or abusive situations. As a fundamental principle of access to justice, judicial review must continue to be available to all who are affected by the decisions of public bodies.

Effectiveness of judicial review

As others have said, it is a measure of the effective of judicial review as a remedy that so few cases are actually issued, and of those that are started, only a small proportion are ever determined by the court at a hearing. Initially, this is because of the effectiveness of the judicial review pre-action protocol in resolving cases before they need to go anywhere near the court. This accounts for a high proportion of our urgent homelessness cases. A well argued pre-action letter will very frequently cause the local authority to reconsider and provide temporary accommodation for a homeless household whom it had earlier turned away.

Of course, as judicial review is a remedy of last resort, matters would not reach this stage if there were some other effective means of dealing with the issue. In some non-urgent cases, it may be necessary to exhaust the authority's internal complaints procedure before judicial review is considered. However, most homelessness cases are too urgent to await the outcome of a complaint, which at the various levels of the complaints system could last many months. Ultimately a pre-action letter is far more effective than other forms of dispute resolution, precisely because it carries the prospect of litigation.

Where it does become necessary to issue proceedings, the majority of our cases require urgent consideration, and when the papers are put before the duty judge, an interim injunction will often be granted, ordering the authority to provide immediate temporary accommodation for the applicant and his/her household. When an interim order is made in these circumstances, that is usually enough to resolve the entire case, as it is rare that an authority will seek to contest the basis for the injunction at a full hearing. Accordingly, the claim is usually conceded and the proceedings are settled by consent.

Judicial review and test cases

A minority of judicial reviews will have a `test case' significance, in that the court's decision will clarify the interpretation of the law itself or how it is applied in particular contexts. This use of judicial review, we would suggest, is wholly beneficial and in the public good, since the outcome will often affect many more people in addition to the applicant, who would otherwise need to bring challenges themselves where possible or continue to be treated unlawfully.

We acknowledge that an even smaller minority of judicial review cases may have political implications, but that must not detract from the fact that what is being challenged are legal decisions and/or policies. The checks and balances which are necessary to the separation of powers will inevitably give rise to cases that are sensitive in political terms and attract public attention. However, it is beyond dispute that the courts are astute to ensure that cases do not cross the line into political debate.

Clearly, claims for judicial review may be brought by campaigning organisations, and it is essential that this should continue without financial or other obstacles being placed in the way, especially since judicial review is largely inaccessible to individual citizens without legal representation. The court does not allow itself to be influenced by the policy considerations

in such cases, except where they are relevant to the legal grounds of challenge. Thus, in the challenge to the social sector size criteria (`bedroom tax') in ***R (MA and others) v SSWP*** [2013] EWHC 2213 (Admin), in which we intervened, despite the widespread evidence of the hardship that is caused by this particular measure, the challenge was rejected on the basis that the claimants were unable to show that the regulations in question were "manifestly without reasonable foundation": the very high threshold which the courts apply when considering whether regulations which cause discrimination are deemed to be proportionate and in pursuance of a legitimate aim.

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)?

The cost of judicial review proceedings is a significant barrier to access to justice for those whose financial means are above legal aid eligibility levels, but for whom the prospect of paying privately to bring an application for judicial review is out of the question. Likewise, for those who would be eligible, but are unable to find a solicitor with a relevant legal aid contract in their area.

As stated in our response to question 6, we consider that the time limit of three months for bringing a claim is too short and should be extended or made more flexible. There should be provision enabling an extension to be agreed between the parties to allow the public body more time to respond to a protocol letter or to provide pre-action disclosure or to reflect on the merits of the challenge. The extension of time would also allow the proposed claimant to review their case in light of the authority's response or disclosure, or for the parties to engage in negotiations or ADR.

We would also propose that there should be a general duty on public bodies to give reasons for any decision which affects an individual citizen. The existing scope of that duty and the extent to which authorities are required to give reasons for their actions are not well defined in law. There will often be an express statutory duty to give reasons, as there is in relation to homelessness decisions, but in other contexts it is not clear whether such a duty exists. We would suggest that a general duty to give reasons for a decision, whether in the ordinary course of decision-making or when called upon to do so, may well obviate the need for judicial review in some cases.

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?

As the Review panel will be aware, there is already substantial statutory and procedural regulation of judicial review, particularly under the Senior Courts Act 1981, the Criminal Justice and Courts Act 2015 and Part 54 of the Civil Procedure Rules.

We believe that there is no case for statutory intervention in judicial review. It is not clear to us that such an undertaking is even feasible, much less desirable. It is doubtful whether an attempt to define the nature and scope of judicial review in statute would produce greater clarity and certainty than is given in the set of grounds set out in the narrative to question 1.

It is conceivable that the principles of illegality, irrationality and impropriety could be formulated in statutory form, but any codification of the grounds for judicial review is likely to produce a set of grounds very similar to those which have already been developed by the courts and which are set out in Question 1. It would be impossible to understand the application of various grounds without assistance from the case law from which they have derived. Conversely, any attempt to set out a detailed, technical exposition of judicial review in a statute would render the material complex and inaccessible to the average person. This would be a recipe for satellite litigation, as lawyers and the courts agonise over the meaning and scope of the powers defined in the statute.

The scope of judicial review, notably in relation to the correct interpretation of primary and secondary legislation, needs to evolve through the organic process of argument and judgments in case law. If anything, the present grounds are too narrow, notably the threshold of *Wednesbury* unreasonableness. However, any attempt to regulate the use of judicial review by statute is likely to be more restrictive, and we consider that this would be detrimental to the culture of lawful decision-making.

As others have said, the best way to make the law of judicial review more accessible would be by public legal education and by providing sources of independent legal advice on public law issues at modest cost. Making the eligibility limits for legal aid is also essential, if this remedy of constitutional importance is to be available to more than a relatively small, albeit the most vulnerable, part of the population.

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?

In our view, it is generally quite clear what decisions or powers are subject to judicial review.

We do not agree that certain decisions should not be subject to judicial review. The courts already show significant deference to the government in general, and particularly in relation to politically sensitive matters.

Most decisions by government or public authorities are, and should remain, potentially open to challenge on public law grounds. The role of the courts in supervising the exercise of their powers by public bodies and in reviewing their decision-making processes is fundamental to the rule of law. At risk here is the principle that no-one is above the law, including government, and the importance to democratic life of governmental activities being subject to control by the courts.

It is axiomatic that the courts have developed rigorous limits on the scope of judicial review. As a starting point, judges are reluctant to intervene in the decision-making functions of public bodies. The court will need to be satisfied of the claimant's standing to apply for judicial review. Even in homelessness cases where the gulf in power between the applicant and the authority is so great, it is always difficult to convince the court that a particular decision is unlawful and requires its intervention. Even then, the court may decide in its discretion not to make the order sought by the claimant.

The bar is therefore set extremely high: there is no warrant for putting some decisions beyond the pale of judicial review. We consider that it would be an extremely dangerous precedent to place any executive decisions beyond the scope of such scrutiny by narrowing the justiciability of public powers. To give the executive immunity from legal scrutiny and to deprive citizens of the ability to hold the executive accountable strikes at the very meaning of the rule of law.

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?

Yes: we consider that the process of making an application for judicial review and responding to a claim is reasonably clear. The specific procedure is prescribed by Part 54 of the Civil Procedure Rules. We also have the benefit of the Administrative Court Judicial Review Guide, which provides helpful advice and assistance on the process, including practical questions such as how to prepare a claim form, where to file it, responding with an Acknowledgment of Service, what happens at permission stage, and so on.

There are barriers to accessing judicial review, especially for individuals who cannot afford legal representation. As stated in our response to question 3, there is a need for public legal education and for access to legal advice to enable citizens to understand the nature of judicial review and its processes.

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?

The time limits imposed in judicial review claims are already very short. Permission can be refused by the court if a claim is not brought 'promptly', or at any rate within three months.

There is certainly no basis for reducing these already restrictive time limits. A shorter time limit has no conceivable justification. It would have the perverse effects of reducing the time available for a settlement to be negotiated or for the public body to respond to a pre-action or provide pre-action disclosure, and of increasing the pressure on potential claimants to file their claims earlier than they would wish to.

In most of the judicial review cases that we deal with, the three-month time limit is not an issue, since the decision will be a failure to accommodate the client, and the client will be in need of urgent assistance. However, in other cases, especially those involving allocation of social housing from the local authority's housing register, the actual decision complained of may have been some time ago, but the applicant will not have been able to get advice from a legal aid provider (if any) if the area. Often, they will not even be aware that there is a legal issue, for example, in the decision as to what banding or priority group they are placed in.

As a result, they may come to us several weeks, if not longer, after the decision was made. We then have to take full details of the background and examine the allocation scheme in order to assess whether the council have made a lawful decision. A pre-action letter will then have to be written, setting out the relevant facts and law, and the remedy sought. If the matter is not resolved at the pre-action stage, there may well be difficulties in obtaining legal aid to cover the judicial review. Finally, because of the front-loaded nature of a judicial review claim, we will need to prepare a bundle of documents with supporting evidence in order to issue the application.

We consider that judges should have discretion to extend time where reasonable rather than that an applicant with a strong case should be denied justice because of the operation of a rigid three-month time limit, where the injustice is ongoing. The possible exercise of a discretion would strike the right balance between the need of claimants for redress and the general public interest in achieving certainty. Such a discretion should, however, pay particular attention to the difficulties faced by the applicant in obtaining specialist advice and in securing legal aid, either of which could take substantially more than three months, with no fault or delay on the claimant's part.

We would also agree with the proposal that the parties should be able to agree an extension of the time limit, in the interests of allowing more time and scope for negotiation which may result in a settlement and obviate the need to issue proceedings.

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

In our experience, costs on a judicial review follow the event in accordance with the general rule. An unsuccessful party who is legally aided will normally be protected from the enforcement of costs, which is the standard rule in all legal aid matters: if it were otherwise, no vulnerable individual or person of modest means would be able to come before the courts in civil matters.

Lord Justice Jackson considered the question of costs in judicial review proceedings in his review of civil litigation costs (2009/2010) and in his Supplemental Report (2016/2017). As he recognised, "many … claimants are of modest means and are deterred from pursuing claims because of the adverse costs risk" (Supplemental Report, para 1.5).

We see no basis whatsoever for considering the rules regarding costs to be applied too leniently in the courts. On the contrary, we would identify a much greater concern, which is

that, for those who are financially ineligible for legal aid (which will include many persons of modest means who are just above the legal aid threshold), the risk of having to pay the other side's costs is a barrier to access to the court. Orders for costs against an unsuccessful party are likely to run into many thousands of pounds. Thus, many people are denied a remedy for an unjust decision.

We note that the consultation paper expresses the view that access to justice is provided by the availability of legal aid and costs capping orders. However, as Lord Justice Jackson has stated, costs capping orders are of little practical value, because the procedure for obtaining them is too cumbersome and expensive. The criteria for granting such orders are too wide and the outcome of any application will not be known until too late in the day. They are only available in public interest cases and once permission is granted, and the financial risks are still unaffordable for many claimants. Costs capping orders have a marginal effect and certainly do not facilitate access to justice.

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?

The question of proportionality is double-edged. For our clients, who are among the most vulnerable and disadvantaged, what is at stake is a roof over their heads, and it is difficult to say that any amount of costs is disproportionate when that fundamental need is in issue. On the other hand, they could not possibly afford the costs of bringing a judicial review if it were not for the availability of legal aid. Looked at from yet another perspective, costs are not disproportionate where they are incurred in redressing an unlawful decision or a failure to act which concerns the need for a home. It is also evident that in so many cases where an authority has defended a claim which has been successful, it could have housed the client for a fraction of the costs it has incurred in contesting the proceedings.

The primary objective of most judicial reviews – certainly those which Shelter undertakes in the homelessness context – has no financial value, but is directed at requiring the local authority to provide suitable accommodation.

However, for people who are ineligible for legal aid, or those who are eligible but cannot find a legal aid solicitor in their area with capacity to act for them, there is no doubt that the costs of judicial review, coupled with the risk of an adverse costs order if unsuccessful, put any prospect of judicial review out of their reach. For those persons, the costs of judicial review are indeed disproportionate in the sense that they are completely unaffordable. We encounter many cases, including homeless families, where the parent is working and earning just enough to put them over the legal aid threshold. For them, there is no access to justice.

It is not clear what is meant by the question as to how unmeritorious claims are currently treated. The grant or refusal of permission is the basic test of determining whether a case has merit or not. However, a refusal of permission does not necessarily mean that there is no merit whatever to the claim: there may indeed be quite substantial merit, but where the test is *Wednesbury* unreasonableness, that is a high bar to overcome. We would not favour

complicating the process further with any other measures or hurdles designed to exclude supposedly unmeritorious claims.

With regard to the costs of intervenors, in our experience, interventions are usually treated as costs neutral. The rules on interveners' costs are set out in s 87 of the Criminal Justice and Courts Act 2015 (CJCA). They are a deterrent to many organisations that could provide valuable evidence to assist the Court. Any measure which further increased the cost risk for interveners would rule out the possibility of interventions from bodies which have evidence to offer that would assist the Court.

Interveners of course always need the court's permission, and permission will only be granted if the evidence which the intervener proposes to give would be within the scope of the claim and would assist the court. When permission is granted, the court will usually stipulate the scope for the intervention. The order will also usually set out whether the intervener is limited to written submissions only or whether it will be allowed to make oral submissions

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We do not intervene in cases unless we have particular experience or research which we believe will assist the court. When we are considering an intervention, we do a great deal of front-loaded work in order to reduce any costs risk. We would never expect any other party to pay our costs, and we are very careful to obtain prior consent from other parties that we intervene on a costs neutral basis before we go ahead. We are careful to set out a full application outlining the content of our proposed intervention, and we stick to that scope if we get permission. The rules provide that if an intervenor does increase costs, it may be asked to pay the additional costs it has caused.

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 most cases, the standard remedy of quashing the decision challenge and sending the case back to the public authority for a fresh determination is sufficient, especially when accompanied by a steer from the court as to what different decision it would expect the authority to reach on reconsideration. In many cases, the remedy we are seeking is the urgent one of an interim injunction ordering the authority to accommodate the claimant pending a decision on their homeless application. That indeed is the primary purpose of the proceedings, and once achieved, with the client safely accommodated and their homeless application being considered there is no need for a further hearing. The matter can then be settled and a consent order submitted to the court.

We would, however, welcome greater discretion being vested in the court to take it upon itself to make an order re-making the decision where it is clear that this is what ought to happen on a re-determination. We accept that this is only likely to happen in a small minority of cases, where the court considers that on the evidence there can only be one lawful outcome.

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

In terms of local authority decision-making on homelessness and allocations matters, the obvious answer is a willingness to engage with representations made in individual cases, to review policies and practice in the light of challenges and to provide better training to their staff. There should be systems in place to ensure that after settling an individual case, lessons are learned and steps taken to prevent the same issue arising in relation to other applicants for housing.

Case study two:

Helen was a widow aged 65 who had the care of her grandson, Robert, aged 13, because of Robert's mother's mental health problems. They lived in a mobile home park. Helen and her late husband had purchased the mobile home several years previously, on the assurance by the park owner that they were entitled to live there all year round.

In fact, that turned out to be untrue. The park only had a licence as a holiday park, and residents were required to vacate their caravans between November and February every winter season.

Helen and her grandson had nowhere to go, but were faced with vacating their home when the park closed at the end of November. Shelter assisted them to apply as homeless to the local housing authority. The authority initially refused to accept that they were homeless within the meaning of the legislation, and maintained their refusal even when we warned them that we would need to apply for judicial review.

We therefore issued our application for judicial review with an urgent application for an injunction ordering the Council to provide emergency accommodation. Upon being served with the judicial review application and grounds, the Council reviewed their position and conceded a duty to assist Helen, without the need for a court order. Subsequently, they offered Helen a permanent tenancy, so that she and Robert did not have to return to the mobile home after the winter season.

Where the matter has reached the stage of pre-action correspondence, again authorities should be prepared genuinely to reconsider their decisions in the light of arguments made by the claimant or their legal representatives, rather than seek ways of maintaining a flawed decision or policy. In relation to central government departments, there will obviously be a reluctance to accept challenges to national policies, but it may be possible to mitigate the effects of a policy in individual cases. A more open and transparent approach to decision-making and a positive approach to pre-action correspondence with a view to finding a solution are clearly the best ways of avoiding the need to proceed with judicial review. For example, where a local authority adopts an allocation scheme which gives preference to certain classes of applicant, it should be ready to disclose its Impact Assessment and policy documents, when seeking to justify any discriminatory effects of the scheme. In relation to homelessness, some authorities expect people to make a homeless application through an

online portal, which may offer no transparency about when personal contact will be made to discuss the circumstances and consider offering emergency accommodation. On a more mundane but sadly familiar level, our advisers often find it difficult to get authorities to engage with them when they make contact about a client's situation: telephone calls are not returned and emails not responded to. Only when the formal pre-action letter is sent and reaches the authority's Legal department is a meaningful response received. A less defensive and more constructive ethos would make for early resolution of these issues and avoid the need for judicial review.

On the other hand, if a public authority does not properly engage with a pre-action letter, it is possible that they will seek to uphold an unlawful decision by default, and a judicial review claim will then need to proceed which should not have been necessary. However, such unnecessary claims are readily avoided where the public body's lawyers are able fully to consider the merits of the proposed claim.

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?

We have plenty of experience of cases settling both pre- and post- issue of proceedings. Most of our cases settle following the pre-action protocol letter, but where proceedings have started, the majority settle soon after issue, usually following the grant of an interim injunction ordering the authority to accommodate, since the purpose of the judicial review has been achieved. A small minority of cases proceed to a full hearing. It is rare for those cases to settle at the door of the court, where the opportunities to settle at an earlier stage have not been taken.

Very many judicial review cases settle, usually in a manner favourable to the claimant. Where a case is settled, this should be seen as a positive outcome and a vindication of the purposes of judicial review. Settlement provides an effective and timely means of resolving issues, to the benefit of both claimants and public bodies. But negotiation and settlement are only possible because of the availability of judicial review as a last resort.

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?

Judicial review is always a last resort, and where a claimant has a suitable alternative remedy, such as an effective complaints system, the court may refuse permission or relief. Most clients welcome the prospect of being spared the additional stress of being involved in litigation. In our pre-action letters, we invariably offer to engage in ADR, but defendants rarely take up these offers.

We would welcome a role for ADR in seeking a resolution that avoids the need for judicial review, where the subject matter of the dispute is suitable for mediation or other form of dispute resolution. In the nature of our work, however, ADR will not generally be appropriate, since there is usually an urgency to the proceedings and a need for an interim injunction to

secure temporary accommodation for the homeless person. In other cases, where the challenge is to an interpretation of, for example, the relief duty under the Homelessness Reduction Act 2017, or is to part of the council's allocation scheme, the court is required to decide an uncertain point of law, and again ADR is not appropriate.

It should not be forgotten, however, that pre-action correspondence, and particularly the pre-action protocol letter, is a form of ADR. Claimants' representatives are almost always willing and anxious to engage with the authority if they respond positively to these early communications. In addition, the permission stage itself has been described as a form of early neutral evaluation.

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?

As the Review panel will be aware, a person can only bring an application for judicial review if they have a 'sufficient interest' in the matter to which the application relates. Whether a person or organisation has a sufficient interest is a question of judgment to be determined in the particular circumstances of the case.

The judicial review cases in which Shelter is involved are generally brought in the name of the person affected, ie the individual client, so that the question of standing does not arise. In fact, the great majority of judicial review cases are brought by the individual directly affected by the decision in question, rather than by an organisation. There are relatively few public interest judicial reviews. In any case, the courts' position is clear. Campaigning activities and public support alone will not be enough to secure standing to bring an application for judicial review.[2]

In the few cases which we have brought in our own name, or in which we have intervened, we have not encountered any difficulty in relation to our having standing to become a party to the case. However, we believe that it is essential that public interest standing should be granted to smaller organisations, charities and community groups in bringing issues of public importance to the attention of government and the courts. Where no more appropriate claimant can be identified, such representative groups should be able to challenge the decisions of public bodies in which they have an interest. Where an authority has behaved unfairly, the fact that someone is able to call that authority to account is more important than the identity of that person. It is more important that unlawful decisions and actions are investigated than that strict rules about standing are upheld. Existing safeguards are more than adequate to ensure that unrepresentative groups and claims that have no chance of success do not get past the permission stage.

[2] R (McCourt) v Parole Board for England and Wales [2020] EWHC 2320, para 50.

There is in any event a strong public interest in the courts hearing meritorious challenges to the decisions of public authorities. We stress that no challenge will get past the permission stage if it is not based on firm legal grounds.

In summary, there is no evidence to suggest that the courts are unduly lenient in relation to public interest standing. Nor is there evidence that the judicial review process is in some way being exploited for political ends.

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