IRAL

Call for Evidence

A response from DAC Beachcroft

March 2021

DAC BEACHCROFT

Introduction

1. This document is the DAC Beachcroft LLP response to the call for evidence from the Independent review of Administrative Law. This submission is made on behalf of the public law practitioners at DAC Beachcroft LLP only, and not of our clients. The submission relates to the law of England and Wales only.

2. DAC Beachcroft LLP is an international law firm headquartered and with the bulk of its practice in the UK, and specifically England and Wales. We are recognised as a leading public law practice in the UK and our senior public lawyers are recognised as leading practitioners in their own right.

3. As relevant to this call for evidence, we have a substantial public sector practice, primarily in healthcare (the NHS) but also in education and local government. We act for NDPBs, service providers and other public sector bodies. Hence our experience of judicial review is very largely but not exclusively on the defendant side. We regularly act defending judicial reviews for the public sector both against high profile strategic system wide decisions, and against more individual "business as usual" decisions.

4. It is worth opening with some general remarks. First, this review may be in danger of focusing on the exceptional, and overlooking the far more common. No public body welcomes being subject to a judicial review, any more than any defendant welcomes any legal action. However the vast majority of the actions of public bodies are not challenged. Of the tiny minority of decisions that are challenged, most challenges do not get beyond pre-action stage. Of those that do a majority are filtered out at permission, and of those few that proceed to trial our experience is that most fail.

5. The claim, if it is made, that the number or scope of judicial review has expanded beyond reasonable grounds does not accord with our experience, which is that for a typical public body judicial review continues to be a rare event. To focus, as it seems some may do, on the vanishingly small proportion of judicial reviews where a claimant is granted a remedy as evidence that judicial review or administrative law may in some way be impeding public administration is to focus on a tiny percentage of the available data. Our experience is that individual public bodies are not frequently subject to judicial review and we do not believe they operate in fear of it.

6. Second, administrative law does not trespass into policy. It embodies general procedural expectations in the form of the law around natural justice, consultation or legitimate expectation, for example . It requires minimal standards of rationality and enquiry, which are not hard to satisfy. But beyond that it does not go. In our experience judges are scrupulous not to substitute their view on a policy question for that of the decision maker, and this deference is repeated again and again in the case law. We do not recognise a concern that administrative law is a real obstacle to the implementation of policy for reasons that relate to the content of the policy. Media reporting of judicial review is almost invariably inaccurate and often seriously inaccurate in this regard.

7. Third, administrative law plays an important constitutional role which is too obvious to need lengthy elaboration. As the UK has an uncodified constitution that relies at least in part on convention and culture it is more than usually dangerous to embark on any significant revision of administrative law in isolation (certainly if that revision is in the hands of the executive or the legislature). The very existence of this review, with respect, begs a wider question that would inevitably be asked in a broader constitutional review, namely that if it was the case that public bodies regularly find their decisions being questioned in the courts, does it follow that this is a problem at all, or if it is that the problem lies with the courts.

8. Our final opening comment is that administrative law as a whole, and judicial review in particular, offers important benefits to public bodies and the public at large. These are at least threefold. First, it must be remembered that public bodies take decisions of great significance to the public both as individuals and collectively. Some of our clients have to take decisions that will inevitably disappoint if not upset parts of the public. It is not enough that such decisions have legal authority in the sense of bare legal power. They must additionally be seen as legitimate, i.e. as a proper and acceptable way for the far reaching powers of the state to be used in a democratic and civilised society. It is an important part of that legitimacy that the decisions can in principle be tested against certain minimal standards of procedural propriety and rationality in front of an independent judiciary. In our experience defendants take seriously the concept that judicial review is not like normal adversarial litigation, but is a collaborative exercise with the Court to establish the legality and thus legitimacy of their actions. This can be preferable to having no independent forum for a would-be claimant to challenge and a defendant (it would hope) to vindicate the exercise of public power.

9. All of the vast number of decisions that are never challenged benefit from the public knowing that, if they were sufficiently flawed, they could be set aside (ignoring for now the serious concerns there must be about practical access to justice in the UK at present). This accountability to law gives all public bodies legitimacy, just as accountability to the electorate gives elected bodies legitimacy. These two forms of legitimacy are different but not in conflict. Indeed they should be seen as mutually supporting, and great care should be taken with any view that democratic legitimacy does not need the support of legal legitimacy, not least for fear of the rise of the "tyranny of the majority". When Parliament creates a public body or confers a power we argue it is not sufficient that the body or power is created by a body with democratic legitimacy, the created body or power must also have and be seen to have legal legitimacy if its decisions are to be assented to, rather than merely endured.

10. Second, public bodies interact between themselves. While it is rare indeed for those interactions to lead to a threat of legal proceedings, the behavioural norms and expectations embodied in administrative law make the day to day conduct of public administration between public bodies that much smoother.

11. Finally, it happens from time to time that the scope of a power or how it must be exercised is genuinely uncertain. Some mechanism must exist to resolve these uncertainties. Past case law and the (rare) possibility of a challenge to clarify any new ambiguity enable public bodies to understand where the limits of their powers are and thus to operate confidently within them.

12. Moving on to the review's 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?

13. The questionnaire asks whether: 1) the substantive grounds for judicial review, 2) the remedies available when an application for judicial review is successful, and 3) the rules on standing, time limits and time to mount defences to claims, "impede the proper or effective discharge of central or local government functions". (We note the limit of the question to bodies with democratic accountability. If the implication is that democratic accountability can justify a lower level of legal accountability we disagree: as we noted above the two are not the same.)

14. These aspects do not in our experience impede proper and effective decision making and the discharge of central or local government functions. In fact, we consider these elements to be useful to ensuring that the appropriate decisions are made, within the ambit of the law, and considering the relevant evidence, including the relevant groups and individual(s) who are or may be affected by a decision.

15. When advising public authorities on decisions they intend to make, reference to the well-known grounds of judicial review to ensure an appropriate decision making procedure has been adopted is invaluable in ensuring advice is consistent and proportionate.

16. Decision makers who make decisions which: have considered and complied with the relevant law – including the scope of any discretion, have been correct in fact, have not been affected by bias, have considered all mandatory considerations, having heard from all relevant individuals or groups who are or may be impacted by the decision, have not – without good reason – disappointed previously built up legitimate expectations, and which are on the whole reasonable, are making good decisions. Nothing in this list of considerations goes to the substantive outcome of the decision made. Instead it is about the process leading to that decision.

17. We elaborate on the points listed in section 1 of the questionnaire below.

Permission

18. Few claims pass the permission stage. As such, most claims are dealt with either at the pre-action stage or at the permission stage when permission is denied. Filing summary grounds of defence to an application for permission is usually a relatively time and cost effective way of dealing with those less meritorious claims.

19. Permission in judicial review cases is not mirrored in other forms of litigation between private parties or in private actions against public authorities. In this sense permission provides public authorities with a special status where unmeritorious cases can be denied permission at an early stage.

20. Permission is an important stage that is not directly considered in the list of aspects to be considered in relation to the substantive grounds of judicial review in question 1. Notably, of the judicial review claims brought in 2018, only about 20% of those cases were granted permission. Of those cases, only about 5% proceeded to a full a hearing. This corresponds with our own experience.

The substantive grounds for judicial review (1 a) – f))

21. The substantive grounds for judicial review are listed in sub paragraphs a – f, with sub paragraph g offering a catch all of "any other ground of judicial review". These grounds of review are very much focused on the procedure of how a decision has been made and not on the substance of the decision itself. As such our view is that these grounds for review do not impede the proper or effective discharge of central or local government functions. In fact, we encourage our clients to have regard to these grounds of review to support a structure for good decision making procedures.

22. We apply the substantive grounds of review in two scenarios: 1) at the advisory stage where we are asked to advise on decisions or actions public authorities plan or intend to take, and 2) at the point where a judicial review claim is threatened or filed. At the first stage, and as noted above, the substantive grounds of review, and the case law that has developed from each of them, set an invaluable structure for how good decisions are to be made by,

23. At the second stage, when a claim is brought or threatened, the grounds of review are simply a way of framing a claim. Provided the public authority has followed the process of decision making correctly/appropriately and has documented or is able to provide clear reasons for the decision, a judicial review claim is not something with which a public sector body need to be overly concerned. In our experience, courts are unwilling to engage in the merits of a policy decision or the substantive outcome

24. In terms of the grounds of review themselves little needs to be said about the appropriateness of mistake of law or mistake of fact as a basis for bringing a claim in judicial review. It is obvious that when making a decision central and local governments and other public authorities should have regard to their appropriate legal limits (mistake of law) and be properly informed about the relevant facts to be considered in their decision and which drive/support an outcome..

25. Procedural impropriety is similarly appropriately framed as it stands. It may seem odd that ensuring a decision is procedurally proper/fair could be suggested as impeding the <u>proper</u> (or

effective) discharge of public functions. We hope no one would support the taking of procedurally flawed or unfair decisions as proper, and it is unlikely to be effective not least because it will lack legal legitimacy. The questions can only be what are the necessary standards of procedural propriety and fairness, and have they been met in a particular case. The answer to both of those questions cannot sit with public sector bodies themselves, whether elected or not. They would be "marking their own homework". They can only sit with the courts.

26. As to the very limited scope for merits review, Wednesbury unreasonableness, again, requires little in the way of an explanation as to the important role it plays. Decisions should not be unreasonable. The test for an unreasonable decision is set high, requiring no other (hypothetical) decision maker to come to the same decision. (Outside limited cases proportionality has made little headway into administrative law, which remains largely "hands off" on merits.) As a standalone ground Wednesbury unreasonableness is rarely successful, and on the few occasions we are aware of it being successful, we are supportive of the courts' conclusions and note that generally it shows there to have been a fundamental failure of decision making and governance in reaching the decision, not that the review itself impeded proper and effective decision making.

Remedies

27. Remedies in judicial review are discretionary and, much like the substantive grounds of judicial review, focused predominantly on the process of decision making and not the conclusion of the decision itself.

28. There are typically three types of orders that can result from a successful judicial review: Mandatory orders requiring the body under review to do something; Prohibitory orders restraining or preventing the body from doing something; and Quashing orders setting aside a decision on the basis that it is invalid.

29. Where a judicial review is successful, more often than not all the court will award as a remedy is a quashing order and direction that the decision be retaken by the defendant. This is not a direction that the substantive conclusion is invalid, and it is not uncommon for the same conclusion to be reached after following the appropriate decision making process and ensuring that the decision reached fits within the legal boundaries of that body's discretion or vires. (It may be thought when this happens that that makes that particular judicial review pointless. It does not. Upholding correct procedures is an end in itself. The rule of law requires it.) It is extremely uncommon for a court to issue direction as to the conclusion that should have been reached, and requires the court to be persuaded that no other outcome would be lawful.

30. Damages are uncommon, and there is no right to damages for loss caused by unlawful administrative action. This might be said to favour public authorities but is essential to ensure that decisions are not taken defensively, influenced by fear of financial penalties or compensation.

Standing, time limits, and defences

Standing

31. The current standing test is set out in s 31(3) of the Senior Courts Act 1981. The test in that section is that a claimant must have a sufficient interest in the matter to which the claim relates. This test is a relatively low threshold. Our view is that there is no reason for principled objection to the current threshold. As judicial review is concerned with decision making by government, public bodies and regulators, it must be available to all who are affected by those decisions. This includes citizens and non-citizens, when relevant, such as immigration cases or when a company has business interests in the UK. Organisations such as charities or trade unions should also be able to act, within reasonable limits, in the interests of the people, bodies or issues they represent by initiating or intervening in judicial review claims. Further the difficulty in obtaining funding for a judicial review argues against too narrow a test of standing: those with the closest connection to a decision may in fact be unable to challenge it for reasons unrelated to the merits of the claim. (But see our comment below on multiple claimants.)

Time limits

32. The time limits for bringing a judicial review claim require the claim to be brought promptly, and in any event within three months (and certain decisions (e.g. planning decisions) have a shorter turnaround time). This is a relatively quick turnaround time for judicial review claims to be brought. The time limits put pressure on claimants to formulate and bring their claim quickly. Sometimes, in our experience, this can result in poorly formulated claims. However, it is not clear that extending the time limits would result in better formulated claims. Equally, it seems unlikely, in our experience, that reducing the time limits would deter what may otherwise be less than likely or unmeritorious claims from being brought. In addition to our public law practice, we also regularly act for public authorities facing public procurement claims. The time limit for bringing claims in that jurisdiction is 30 days. This short timeframe does not deter poor claims. In fact, in our experience it incentivise claims to be filed to protect one's position, even if the claim is weak and ultimately is withdrawn. Reducing time frames in judicial review would, in our view likely result in the same incentive structure.

Defences

33. In our experience, although defences can be time intensive to construct, defending a judicial review claim is not an impediment to the proper or efficient discharge of central or local government functions. In fact, as judicial review is an important public law check on public power, defending judicial review claims that are correctly filed and receive permission is appropriate and the time expended on such defences is valuable both for public confidence in decisions taken by public authorities and for clarifying and sharpening decision making in the future.

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)?

34. No. Our view is that judicial review as it currently operates is, and should remain, an appropriate check mechanism on the exercise of executive and other public power.

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?

35. We believe that a major statutory intervention would raise extremely difficult constitutional issues, a minor statutory intervention would achieve little, and in any event there are no weaknesses in the current arrangements that call for either step.

36. Any major intervention would raise serious questions about the separation of powers, in that the legislature (and it might realistically be feared in fact the executive) would be seeking to control the powers of the judiciary to hold the executive to account, which is an essential element of the rule of law.

37. The legislature is not an apt body to define what administrative law requires. The rule of law should not be dependent on a decision of the legislature for the simple reason that what has been given can be taken away. An attempt to intervene by statute in this field will raise the question of whether Parliament in fact has the power to so or to do so effectively, a question which, if it must be asked at all, should only be asked as part of a much wider consideration of the whole UK constitution.

38. Further, intervention by the legislature would be likely to raise devolution issues. At present administrative law is essentially the same in England and Wales and so far as we are aware not materially different between the UK's three jurisdictions. It is not obvious that the Westminster Parliament could intervene in the content or enforcement of administrative law as it relates to devolved matters, with the possible result, that different expectations would apply in England as opposed to Wales, Scotland and Northern Ireland.

39. Finally administrative law evolves to reflect not only legislative intent (which is given substantial

weight) but also the standards and expectations of good public administration generally, and of society more broadly. If statutory intervention cuts off the ability of the law to evolve we consider that could be a retrograde step likely to undermine confidence in the legal system.

40. In any event we do not think that an intervention is necessary, as clarity and certainty are not currently lacking. The grounds of judicial review are well known and understood with only a few areas of uncertainty (one example being proportionality, although the Supreme Court has recently clarified the law in this area, an example of present arrangements working well). Of course in any system there will be finely balanced decisions at the edges. We cannot see how a statutory list or codification could possibly change this.

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?

41. We understand that this question relates to points 1 and 2 of the Terms of Reference, namely:

    1. Whether the amenability of public law decisions to judicial review by the courts…should be codified in statute.
    2. Whether the legal principle of non-justiciability requires clarification and, if so, the identity of subjects/areas where the issue of the justiciability/non-justiciability of the exercise of a public law power and/or function could be considered by the Government.

42. "Amenability" refers to the broad question of what type of decision or action can be judicially reviewed, i.e. decisions related to the exercise of a power derived from statute or the Royal Prerogative[1] or made by a body exercising functions of a public nature.[2]

43. As to justiciability if something is non-justiciable it is not capable of its nature of being determined by a court of law, i.e. it requires the resolution of issues which cannot be or are not suitable to be resolved by the application of legal principles or processes (such as the intrinsic merits of a particular government policy, or an aesthetic, religious or scientific judgement). Non justiciability therefore arises from the nature of the decision in question and needs to be established case by case. It is not a label that can be applied at will.

44. We believe there is no practical uncertainty in either area, nor do we think that the approach taken by the courts needs revision. We do not think otherwise justiciable decisions should be taken outside the scope of judicial review (save perhaps where an alternative and adequate equivalent independent mechanism for ensuring legality exists, such as in national security cases). Where the executive claims special powers or applies public money it must be subject to review appropriate to keep its actions within their proper limits. It is constitutionally doubtful for the consent of the executive or legislature to be needed for that review, which is what codification of amenability or justiciability would amount to.

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?

45. It is both clear and straightforward.

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?

46. The current flexible time limit for most judicial review claims (which must be filed "promptly and in any event not later than 3 months after the grounds to make the claim first arose") enables the court to ensure that the appropriate balance of the above factors is struck in each individual

[1] Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 (HL)

[2] R v Panel on Take-overs and Mergers, ex parte Datafin plc [1987] QB 815

case. The courts do apply a shorter time limit where the impact of a claim on public administration would be particularly far reaching.

47. As it is not possible for parties to extend the limitation period by agreement and given the front loaded nature of a judicial review claim, claimants need a reasonable period of time to understand and consider the act or decision that they may wish to challenge, to seek advice as necessary and to make investigations regarding funding. We rarely act for claimants so cannot assist the panel with how many potential claimants miss out on bringing an otherwise arguable claim owing to the 3 month rule, but we would be concerned to see this time period reduced for the reasons above. We also anticipate that a reduction in the limitation period would be likely to result in more and more ill-thought through claims being issued, as this would compress the opportunity for pre-action correspondence (through which issues can often be resolved) and for potential claimants to consider carefully – preferably with legal advice – whether to bring a claim.

48. We act for a range of defendants and in our experience the existing limitation rules either do not or do not unduly disrupt the effective execution of their work. Most if not all of our clients understand that it is appropriate for potential claimants to be given a time limited opportunity to seek review of their decisions and are able to build this limited uncertainty into their timetables. (What can disrupt the effective execution of a defendant's work is the time taken to resolve a judicial review case. This is not a function of the court rules; judicial review is in principle a swift and relatively informal process. The problem is court resource and further resources being made available to the Administrative Court would be highly welcome.)

49. While it is not possible to extend limitation by agreement, the claimant may apply to the court to extend time. The JR Guide explains the Court will only extend time if an adequate explanation is given for the delay, and if the court is satisfied that an extension of time will not cause substantial hardship or prejudice to the defendant or any other party, and that an extension of time will not be detrimental to good administration. Similarly these factors may result in a claim being struck out for failure to file "promptly". In this way the current rules enable the court to ensure the appropriate balance of the factors referred to in this question 6 as well as other relevant factors.[3]

.

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

50. There are two areas where JR costs rules may result in unnecessarily lenient outcomes for unsuccessful parties:

    a. Costs of renewal applications;
    b. Protective costs orders (particularly in crowdfunded cases).

Costs of renewal applications

51. Practice Direction 54A, para 8.6 provides that where a defendant or any party attends a permission hearing, the court will not generally make an order for costs against the claimant.

52. Applications for reconsideration at an oral hearing of the court's decision to refuse permission to proceed with a JR application on the papers tend to be granted as a matter of course, irrespective of the merits (or lack thereof) of the JR application, or the substance (if any) of the renewal application.

53. Given the procedural and substantive significance (and long term costs consequences) of a successful renewal application, we would usually advise the defendant to attend for the purpose of making oral submissions at the renewal hearing. The cost of doing so may be not insignificant.

54. In the light of the above, we consider the court's practice of granting no order as to costs in

[3] For a recent example see R (on the application of Stuart-Turner) v Headteacher & School Governors (2020) QBD (Admin); [2020] 10 WLUK 46 in which the Court considered the wider public interest and found that the application had not been made promptly and within three months and it was not in the interests of justice to extend time.

respect of unsuccessful oral renewal applications (where, after all, a claimant is on notice their claim lacks merit but has chosen to persist anyway) is lacking in rationale, unfair towards defendants and, ultimately, difficult to justify to the taxpayer.

55. As a failed oral renewal application is, in essence, a second determination by the court that the JR application is unarguable, it is unclear why the successful party (i.e. the defendant/respondent) should not be able to recover the legal costs reasonably incurred in drafting the skeleton argument and defending the application at the oral hearing.

56. As with any other application or appeal, costs should usually follow the event, subject of course to the discretion of the court. There is no reason why an oral renewal application should be treated differently.

Protective Costs Orders (CCOs)

57. We take no issue with the rationale behind CCOs: it is right that individuals issuing genuine public interest proceedings of general public importance, and who have no economic interest in the outcome of the proceedings, should not run the risk of losing their homes or life savings as a result of an unsuccessful JR application.

58. For the following reasons, however, we take the view that the present CCO regime could be improved:

59. A large proportion of public interest litigation is now being funded through online crowdfunding campaigns / other private third party funding. This new reality is inadequately addressed by the present CCO regime.

60. By way of example, we were recently involved in a JR matter in which the court granted what is considered to be a standard £10,000 CCO in favour of the claimant (with a £35,000 cross cap in favour of the defendant). The CCO was granted at permission stage. By the time of the trial hearing the claimant had raised over £120,000 through an online crowdfunding platform. The effect of the CCO is that the public purse is needlessly exposed to irrecoverable costs that the claimant could in fact easily have paid.

61. If the primary purpose of a CCO is to protect the claimant from significant adverse costs orders (rather than ensuring that the claimant is in a position to pay their own costs), the above CCO undoubtedly failed to reflect the claimant's position at the time of the trial hearing.

62. There may be multiple reasons for this, including:

    (i) the timing of CCO Orders;
    (ii) an absence of procedural mechanisms to allow regular reviews of CCO; and
    (iii) an absence of special provisions in respect of JR proceedings which are either crowdfunded / otherwise funded by third parties (e.g. a requirement to update the court regularly on the claimant's crowdfunding efforts; or elements of CCOs being set in the form of a % of available third party funding).

63. CCOs are often granted in the light of limited and incomplete information as to the claimant's income, assets and third party funding.

64. In the light of the above, we wonder whether a more satisfactory system for both claimants and defendants would be one with a broader legal aid regime for public interest litigation coupled with a narrower CCO regime to cover exceptional circumstances falling outside the scope of legal aid.

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?

65. Subject to the considerations set out in the section above, we do not consider that there are

particular proportionality issues in connection with JR costs that would need to be addressed by way of legislative intervention. In particular the costs in most judicial review cases are below a level where cost budgeting would be a proportionate exercise, although a mechanism where either party could call for light touch cost budgeting in defined circumstances (for example where it is thought either party's costs could exceed a certain threshold) could have merit.

66. That said, we could see the merits in a broader review (and robust costs and benefits analysis) of the costs regime associated with legal aid funded JR claims. In particular, we question whether the disapplication of the indemnity principle in respect of Claimant lawyers' hourly rates in successful JR claims is really the most effective (and fair) approach to safeguarding claimant firms' viability (which for the avoidance of doubt is a legitimate policy goal if access to justice is to be maintained). If such disapplication is retained then attention should be given to the rates claimed, which typically substantially exceed and can be more than double the defendant's own solicitor's rates. These are not realistic solicitor-client rates and in effect require a subsidy from defendants to a no doubt underfunded legal aid budget.

67. In our experience, the present state of affairs can give rise to unnecessary and protracted costs litigation one a judicial review is concluded or settled, resulting in further unnecessary costs to the public sector (i.e. defendants and the courts).

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?

68. Current judicial review remedies are not at all inflexible, if anything the opposite. We remarked above that defendants take judicial review seriously as a collaborative exercise to establish the legality of their actions, and where they have acted unlawfully they consider not only the remedy ordered but also the judges reasons for ordering it. This two cases may both end in the same formal remedy of a quashing order, but one may lead to a wide ranging review of processes at the defendant and the other may lead to only relatively minor changes and a swift repeat of the decision in question,

69. We do not believe any additional remedies such as damages should be available (save, as now, where there is a private law cause of action that is adjudicated on at the same time). Financial remedy for a public law error is in our view conceptually ill-conceived and could potentially expose public bodies to significant liability and speculative claims. We appreciate that such a remedy exists for breach of human rights but this exception (which does in any event relate to an individual right enjoyed by the Claimant) should not be extended.

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

70. In our experience the pre-action protocol works well. Defendants do review their decisions on receipt of a pre-action letter, and where arguable weaknesses are identified decisions are retaken. For a case to proceed past this stage typically a defendant will have concluded its decision is robust and/or it contains a point of principle or a point impacting on the rights of others that the defendant is not willing to concede.

71. Because the pre-action protocol works well to avoid unnecessary litigation we suggest the (rare) case where it is not followed or where it is only followed perfunctorily should be more firmly penalised in costs: we suggest that in such cases there should be a presumption that a successful claimant (or it may be defendant) will not recover its costs unless it can satisfy the court, at the permission stage, that there was good reason not to have followed the protocol.

72. We also consider a similar sanction should apply where a claimant substantially amends its grounds of claim during a case, unless the amendment can be shown only to have arisen from the disclosure of new material by the defendant to the claimant. We are aware of cases where very substantial changes have been made to claims very close to trial, and feel that such conduct should attract a significant cost penalty unless the defendant itself has been the cause of the change.

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?

73. We have experience of parties using the judicial review process to maximise commercial advantages, particularly in the planning context. This has resulted in negotiations where actions are agreed and/or monies have been paid. It does not happen very often in our experience. It sometimes happens where a developer wishes to implement a planning consent which is the subject of a challenge and the developer will seek to achieve a negotiated solution so that the challenge is withdrawn.

74. We noted above our experience that many cases 'settle' in that the public authority will, with the benefit of legal advice, often conclude that it is prudent to retake the decision under challenge, taking account of the claimant's concerns. This avoids the expense and uncertainty of legal proceedings, addresses the issues raised by the claimant, and leads to more robust decision-making. In our view that indicates a system working well.

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?

75. Judicial review is not an exception to the general rule that parties are expected to try to settle their disputes without recourse to the courts. However the nature of judicial review makes ADR less appropriate than in most other litigation. From a defendant's perspective, engaging in private discussion with a claimant about a legal position that may affect the rights of many others who are not party to the claim or to the discussions is often not acceptable. This treats one member of the public more favourably than another and lacks transparency (and in some cases the defendant may be functus, or even if not strictly functus it may be contrary to good administration to reopen a decision too readily). There is also a concern with ADR that claimants with deep pockets (or conversely very shallow pockets who can access legal aid) may achieve outcomes that most would be claimants cannot. Of course that may be true of litigation itself, but at least litigation is a public process.

76. We have advised on a number of judicial reviews where the Claimant has sought information on how a decision was made and they have suggested forms of ADR to understand this. We consider that an advised claimant should not need this, but there may be an issue with litigants in person who may genuinely not understand, say, the grounds of judicial review or the significance of the material released. We are not familiar with the details of the availability of legal aid or other legal support for claimants, save, obviously, that it is not generous, but from a defendant's perspective there is a case to be made that more (and better) support for claimants would save court time and the parties money (and thus overall be better value for the taxpayer).

77. There could usefully be clear guidance in the CPR/Administrative Court Judicial Review Guide on the duty of candour and how public bodies should comply with it. This guidance should be developed in conjunction with the Law Commission and consulted upon. The TSol guidance is widely followed but strictly it has no force, and we consider it could be simplified.

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?

78. In our experience, if a claim raises an issue with any public interest, the courts are very unlikely to hold that the proposed claimant does not have standing. This includes where the claimant is a company incorporated specifically for the purpose of bringing proceedings, and where the claimant has little or no direct interest in the matter under challenge.

79. We do not consider this approach to be too lenient. The rule of law the state to act in accordance with law. This obligation is not contingent upon there being a person directly harmed by a breach who is willing to bring a legal challenge. The essence of public law challenges is that they are brought in the public interest.

80. We do find that the questions of ‘does the claimant have sufficient interest’ and ‘is there an arguable claim raising issues in the public interest’ are often conflated by the court. It is not clear what the ‘sufficient interest’ test adds to the second question, in many cases. We would welcome guidance on the scope of the ‘sufficient interest’ test, particularly clarification that in fact, any claimant will be considered to have sufficient interest where the claim raises issues in the public interest.

81. We do feel the question of multiple claimants could usefully be looked at. In our experience, multiple claimants can add considerably to the costs of defending proceedings, without adding much if anything to the substance of the claim. This can be particularly onerous for defendants where a CCO has been made, as is increasingly common. We would advocate either for a stricter application of the sufficient interest test for second or third claimants, based on their particular interest or experience adding something of substance to that of the established first claimant or possibly an approach where a defendant pays only one set of claimant’s costs unless the second, third etc. claimants have demonstrable added something to the case that the first claimant could not.

82. There should be clear guidance on standing in the CPR/Administrative Court Judicial Review Guide where there are multiple parties. This guidance should be developed in conjunction with the Law Commission and consulted upon.

DAC Beachcroft LLP
26 October 2020