SIMPSON MILLAR
The open lawyers

Independent Review of Administrative Law

Simpson Millar's Response to Call for Evidence

1. In order to fulfil the Terms of Reference (ToR), the IRAL Panel issued a Call for Evidence on 7 September 2020, with an end date of midday on 19 October 2020, i.e. a period of six weeks (subsequently extended until 26 October 2020). The intention is that the IRAL Panel will report back to the Government by the end of the year 2020. The ToR are exceptionally extensive in scope. We have significant concerns about the Review and the Call for Evidence, both as to the principle of conducting such a review in this way, and as to the practicalities of doing so in the manner proposed.

Introduction

2. Simpson Millar is a national claimant law firm with over 500 staff and offices in Bristol, Cardiff, Lancaster, Leeds, Liverpool, London, Manchester and Southport.

3. Our 80- strong Public Law Team is represented across most of these offices (Bristol, Lancaster, Leeds, London and Manchester) and specialises in public law, community care, education law, Court of Protection work, claims against public authorities, inquests, care proceedings and abuse work. The vast majority of the team's work is publicly-funded and judicial review proceedings (and the pre-action stages of such proceedings) forms a significant proportion of our work.

4. It is important to state at the outset that the vast majority of the cases where we represent clients in respect of potential challenges to decisions, acts or omissions taken by public authorities do not result in judicial review proceedings. In most cases, either preliminary correspondence or correspondence following the pre-action protocol for judicial review is sufficient to resolve the matter in our client's favour, with the public authority agreeing to take the action we requested.

5. Our public law team casework survey in 2019 revealed that we served 81 pre action protocol letters which resulted in a claim settling successfully prior to issue. Proceedings were issued in 17 cases. In 2020 to date, 72 pre action protocol letters resulted in a claim settling successfully prior to issue. Proceedings have been issued in 17 cases. Often the threat of judicial review prompts the decision maker to reach a lawful decision.

6. It is also important to highlight that the vast majority of our cases do not concern policy or strategic challenges (though this is also an important aspect of our work). The majority of our cases relate to individual acts, omissions or failures towards vulnerable individuals, many of whom are children and many of those are children with disabilities. They are straightforward challenges where the particular public authority concerned has failed to comply with the law. They are resolved reasonably quickly at pre-action stage by our firm sending pre-action correspondence. Authorities take our letters seriously because they know that if they fail to do so, the consequence will be judicial review claim which will probably be successful and also result in a costs order against them.

7. As indicated above, in the vast majority of cases where we threaten judicial review proceedings, there is no need to issue as the claim is resolved at pre-action stage. However, in those cases where litigation is necessary and judicial review proceedings are issued, we are generally successful because the case settles successfully.

8. In most cases, we obtain an order for our costs and in most of the cases where we issue, litigation would not have been necessary had the public authority responded appropriately to our pre-action correspondence in the first place.

9. We thought it would be helpful at the outset to give an overview of the types of cases we cover that are relevant to this review of administrative law which include the following:

Education Law

10. We have a strong reputation for education law. For a number of years we have held the CLA Legal Aid Education Contract (the national telephone advice contract, through which all education legal aid cases must be referred), acting on a nationwide basis for hundreds of individual clients, predominantly in cases relating to special educational needs. The team undertakes significant work dealing with the myriad ways in which pupils are failed by the education system. As well as appeals to the First Tier Tribunal relating to special educational needs provision, the team works for children and young people who have been or are being unlawfully excluded and otherwise pushed out of school; we also carry out a significant amount of work for Travellers around the country, dealing with issues they face, including relating to bullying and unlawful exclusions.

11. Many of the education cases where we send pre action protocol letters are relatively straightforward, and relate to missed statutory deadlines by local authorities. Local authorities regularly miss these deadlines. If, for example, a local authority does not make a decision whether or not to conduct an Education and Health Care Needs Assessment within 6 weeks it has broken the law. If we send a letter before action, a decision (one way or the other) will be made straight away (giving a right of appeal if

negative). The local authority will not delay further, as otherwise we will issue proceedings and obtain costs. We are not aware of ever having had to do that. The same principle applies to many other stages of the (Education, Health and Care Plan (EHCP) process – failing to amend following an annual review/ not issuing a final ECHP in time/ failure to amend EHCP by deadline for secondary transfer and so forth. By the time parents come to us for cases of this nature, they have often been trying fruitlessly for weeks or (more normally) months to get something to happen. For us, resolving the blockage is normally a 'one letter' exercise. The law is clear, but unfortunately it is very often honoured in its breach. Parents normally get there in the end even if they do not have our assistance by way of an letter before action. It just takes a lot longer, and the detriment to their child from the unlawful act of the local authority is greater. Indeed, very often a letter from us is required to remove a 'blockage' (e.g. EHCP not finalised) before they are even able to use the statutory appeals process.

12. The department also does a significant amount of work of wider public interest. In the past year it has worked on issues relating to the use of isolation booths in schools,[1] changing the procedures and practices of a number of academy chains, as well as contributing to the promise of new Central Government guidance on internal exclusion. It has also been involved in a successful judicial review challenge to the lack of any monitoring of the equality implications of police officers in schools,[2] which has led to significant improvements to the police's oversight of its school based officer programme as well as a high profile case relating to discrimination arising from the way a mixed race schoolgirl's natural hair was dealt with by her school.[3]

Community Care

13. We are well known for our children's rights work, regularly acting in community care challenges for homeless teenagers, young people leaving custody, unaccompanied asylum seeking minors and care leavers, as well as in age assessment challenges. We also act for destitute migrant families and families with disabled children in securing suitable support. Recent cases of note include *AB v Ealing* [2019] EWHC 3351 (Admin) concerning a vulnerable 18-year-old's retrospective care leaver status, as well as successfully settling a difficult challenge (*XY v Newham* CO/2887/2019) involving two authorities concerning a care leaver "housing swap" for a vulnerable care leaver.

14. We act for vulnerable adults including vulnerable migrants in Care Act 2014 challenges. A recent case of note, which settled successfully after permission had been granted, involved a challenge to a local authority's refusal to provide accommodation

[1] https://www.independent.co.uk/news/education/education-news/school-suicide-autism-child-department-education-high-court-a8852451.html
[2] https://www.dailymail.co.uk/news/article-8163459/Metropolitan-Police-faces-legal-challenge-deployment-officers-schools.html
[3] https://www.independent.co.uk/news/education/education-news/afro-hair-discrimation-student-legal-action-payout-ruby-williams-urswick-school-a9323466.html

and support under the Care Act to a vulnerable EU national who was eligible for, but had not applied for EU Settled Status. The client suffered brain injuries when he was hit by a car when crossing the road and had spent many months in hospital beyond the point when he became suitable for discharge and needed rehabilitation which the hospital could not offer because the local authority had refused to accept his eligibility for Care Act services.

Public Law and Human Rights

15. We are well known for our specialism acting for victims of trafficking (VOTs) including in judicial review challenges relating to their status as VOTs and access to support, false imprisonment challenges, challenges to removal and civil damages claims, including in county lines cases. Important trafficking cases include *R (TDT) v SSHD* [2018] EWCA Civ 1395, *R (K & AM) v SSHD* [2018] EWHC 2951 (Admin) as well as *MN v SSHD* [2018] EWHC 3268 (QB) on which judgment is currently awaited from the Court of Appeal.

16. We regularly act in challenges concerning the reunification of unaccompanied asylum seeking children stranded in Europe, who are seeking to reunite with a family member in the UK under Council Regulation EU No 604/2013 ("Dublin III"). Notable cases include the Upper Tribunal judgments in *KF v SSHD* JR/1642/2019 and *HN & MN v SSHD* JR/4719/2019.

17. These are examples only. We also act in a range of public law and human rights cases across different areas. One highly publicised case from December 2019 is *A&B v UK* (ECtHR; 80046/17) which concerned a successful challenge to government policy prohibiting women from Northern Ireland accessing NHS-funded abortions in England.[4]

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

18. Public authorities generally do not like being judicially reviewed. It is precisely for this reason that judicial review fulfils such an important constitutional role. Judicial review is about public law wrongs that, if left unchecked, would undermine the checks and balances inherent in our constitutional settlement. All members of our society have an interest in the proper administration of executive power and it is for this reason that access to judicial review is so important. The existence of an active judicial review jurisdiction in this country is evidence of a functioning democracy and attempts to

[4] https://www.theguardian.com/world/2019/dec/19/northern-ireland-women-win-abortion-costs-compensation-case

restrict it further (given the significant restrictions which have already been made in recent years, primarily in the context of restrictions to public funding, but not only) merit cause for serious concern.

19. We trust that the Panel will be considering responses to past consultations (including, for example, the responses to the 2013 consultation) in detail as part of this review as well as gathering data on the effects that other recent changes have had.

20. The questions themselves in the questionnaire are impossible to comment on in the abstract without seeing the responses.

21. We have already outlined the importance of the threat of judicial review proceedings in the form of a letter sent pursuant to the pre-action protocol for judicial review in resolving the vast majority of our cases. This is only possible because defendants know that a failure to respond adequately will result in a claim being brought. This is hugely important for our vulnerable clients. Without it, the public law wrong affecting them, which is usually hugely significant for them personally, would go unchecked.

Question 2: In light of the IRAL's terms of reference, are there any improvements to the law on judicial review that you can suggest making that are not covered in your response to question (1)?

22. No. As can be seen from the answers to the other questions set out below, we are of the view that the law on judicial review strikes the right balance between the rights and needs of individuals and those of public authorities, that it is sufficiently clear and fair and that it operates appropriately and successfully as a check on executive power.

23. We have addressed below under question 6 our position in respect of the time limit within which proceedings must be brought and the element of discretion that judges have both in determining that a claim has not been brought promptly even though issued with 3 months and conversely in extending time beyond the 3 month limitation period in appropriate cases.

24. As the Panel will be well aware, unlike in civil proceedings, judicial review is a two-stage process. Permission from the court is required before the claim can proceed. The intention behind this process was to ensure that public bodies did not have to spend too much in time and resources in defending unmeritorious claims.

25. However, in relation to costs, we do consider that there are improvements which could be made. Unlike in other civil claims contexts, judicial review does not include any mechanism for claimants to recover their costs from defendants at pre-action stage. This means that if a pre-action letter is sent and the claim settles successfully at pre-action stage, then there is no way of recovering costs. For publicly funded claimants, their lawyers will still get paid, but this is at significantly lower rates and as it is often at a very early stage in the case before a legal aid certificate has been granted, this will be at legal help rates ranging, for solicitors, between £48 and £52 per hour (non-London and London rates) with no prospect of claiming an enhancement. These rates were not, when they were set, as unsustainable as they are now, but they have not been increased for years and were, in fact, reduced by 10% in 2010.

26. This creates a perverse incentive to focus on cases where litigation is more likely to be necessary and a cost order is more likely to be obtained.

27. It further causes problems with commercial sustainability of the firms doing this work and contributes to the increase in advice deserts.

Question 3: Is there a case for statutory intervention in the judicial review process? If so, would statute add certainty and clarity to judicial reviews? To what other ends could statute be used?

28. This is a very vague question, and not one which we can answer in the abstract without specific proposals.

29. Furthermore, judicial review has developed into what it is over a prolonged period of time, and a massive overhaul of the system by statutory intervention would require a very detailed evidential analysis underpinning it. So far as we are aware, that is not being proposed, and no evidential analysis has been conducted.

30. Procedurally of course, the Civil Procedure Rules (CPR) are very clear, and they set out procedure in an easy to understand way.

31. Further, the CPR also contains the format for the judicial review pre-action protocol process, which again is very clear and extremely effective at ensuring that very few judicial reviews are actually issued.

32. Finally of course, there is the Administrative Court Judicial Review Guide (the current version at the time of writing dates from July 2020) which effectively contains in a nutshell everything that one needs to know about practice and procedure insofar as judicial review is concerned.

33. The advent of the guide in particular (it did not use to exist) is a positive step. Our view is that there is currently sufficient clarity and predictability in respect of judicial review practice and procedure, and we do not think that it would be wise to introduce a greater degree of uncertainty.

34. At present, the only uncertainty in the system is that inherent in any litigation (what the other side may do or say, what information may come to light to either support or weaken an argument, and what the judge may decide). We do not see the benefit any statutory intervention would bring.

Question 4: Is it clear what decisions/powers are subject to Judicial Review and which are not? Should certain decisions not be subject to judicial review? If so, which?

35. To us as lawyers what decisions/powers are subject to judicial review is very clear. It will be clear to anyone who practices in the field. It should be clear to anyone working in a public authority, or any elected official, who reads the Treasury Solicitor's excellent "Judge Over Your Shoulder" guide. This is a very good guide that is produced for non-lawyer decision makers in public bodies. Indeed, it is one that a number of our solicitors who used to work for public authorities very strongly encouraged their clients to read. Encouraging its wider dissemination is probably the most effective (and cheapest) action that could be taken to improve the quality and lawfulness of decision making by public bodies, as well as the awareness of what decisions/ powers are subject to judicial review, and which are not.

36. For those who are not lawyers, the starting point is that, in our experience, none of the general public will have ever heard of the concept of judicial review.

37. Between us, we cannot recall any parent whose child was unlawfully excluded / off-rolled from school who has come to us requesting that we write a judicial review pre-action letter. Similarly, no homeless 17 year old has ever asked us directly to judicially review the council's failure to accommodate and support them under section 20 Children Act 1989. Both of these scenarios are ones that will normally be resolved by one LBA, yet the unlawfully excluded pupil will typically be out of school for many months before finding their way to us, and the homeless 17 year old will have tried all manner of sofa surfing/ night buses/ dodgy men offering assistance before eventually finding their way to our door. Short of a large public education programme, educating the public about judicial review, and embedding that in the curriculum, that is not going to change.

38. Furthermore, a lot of the time it is only going to be apparent to specialist lawyers that a decision subject to judicial review has been made. To take an example in which we

acted, which received widespread coverage at the time, grammar schools had been routinely refusing 'progression' to Year 13 to pupils who had not met whatever the school's internal standards were at the end of Year 12. While this had affected large numbers of pupils, and would have no doubt been known about by all their peers and the teachers in the schools concerned, it was only once it came to specialist education solicitors that the practice was successfully challenged.

Should certain decisions not be subject to judicial review?

39. The courts are very good at policing what should and should not be subject to judicial review. There have been numerous judgments over the years in the fields in which we operate, particularly community care, where the Courts have had to issue a reminder that judicial review is not for merits based challenges.

40. Similarly, on the wider stage, the more optimistically pitched cases have failed at the permission stage (e.g. R (Fawcett Society) v Chancellor of the Exchequer [2010] EWHC 3522 (Admin)/ R (Campaign for Nuclear Disarmament v Prime Minister and others) [2002] All ER (D) 245 (Dec). There is strong and established case law which provides a very nuanced position, and any attempt to codify this in a blanket way is likely to create significant difficulties. It is also likely to damage the UK's standing as a jurisdiction in which the rule of law applies, which is the cornerstone of the UK's attractiveness as a place to do business.

Question 5: Is the process of i) making a Judicial Review claim, ii) responding to a Judicial Review claim and/or iii) appealing a Judicial Review decision to the Court of Appeal/ Supreme Court clear?

41. Yes. This is all very clear and is set out in the CPR. Further, as set out above, the Administrative Court has produced a very helpful guide.

Question 6: Do you think the current Judicial Review procedure strikes the right balance between enabling time for a claimant to lodge a claim, and ensuring effective government and good administration without too many delays?

42. The current framework for limitation and delay is set out in part 54.5 of the Civil Procedure Rules which requires that "The claim form must be filed promptly and in any event, not later than 3 months after the grounds to make the claim first arose."

43. Arguably current provisions regarding limitation and delay are strict as there is no facility for parties to a claim to agree an extension to the time limit.

44. Additionally, it is well known that the courts take a very strict view on delay as there have been cases where applications have been held to be out of time even though they were brought within three months. This is following the court's interpretation of "promptly" and its consideration of the potential adverse impacts on public bodies if certain claims are not brought expeditiously. A prime example is the area of school admissions where the slightest delay is hazardous to the claimant as the court has to bear in mind the impact on local authorities and schools in planning schooling arrangements at the outset of the school academic year. Hence, if a claimant issues shortly before the three month deadline of the decision under challenge, the impact upon the public body's calendar is an overriding consideration of the court.

45. Arguably, the current procedural requirements and interpretation of part 54.5 of the Civil Procedure Rules already place the onus on claimants to act without delay. It is therefore concerning if the Government seeks to further shorten the timescale within which claims can be brought.

46. There are already statutory exceptions to the three month time limit, specifically in relation to planning and procurement decisions where time is particularly of the essence for public bodies due to the financial and statutory implications of the decisions in question.

47. When considering time limits in judicial review, the key concerns are balancing the need for public bodies to make efficient, timely and cost- effective decisions, balanced against the need to ensure that claimants have reasonable and fair opportunity to seek legal redress. Arguably, the judiciary already acts as an effective gatekeeper to ensuring this balance occurs by having at its disposal the ability to treat a claim as being out of time even whilst issued within three months.

Impact on potential settlements

48. Cogent and comprehensive research was undertaken on the issue of time limits in "The Dynamics of Judicial Review Litigation: The Resolution of Public Law Challenges Before Final Hearing" (Public Law Project, 2009 – Varda Bondy and Maurice Sunkin):[5]

49. They identified anecdotal evidence that parties are likely to focus their minds and efforts on key issues and identify and dispose of weak cases at an earlier stage in the event of a reduced time limit. The report also concludes that this would be counterbalanced by the key disadvantage arising from reducing the likelihood of early settlement. In the research, the authors were informed that many solicitors who acted

[5] https://publiclawproject.org.uk/wpcontent/uploads/data/resources/9/TheDynamicsofJudicialReviewLitigation.pdf

for claimants and defendants reported that there would have been an increased likelihood of settlement of cases had they had more time available for negotiation, and instead were pressurised into issuing proceedings in order to meet the time limit. This situation would be exacerbated in the event of a shorter time limit as claimants would be even more pressurised to issue proceedings which in turn could result in an increase in premature and weak claims.

50. A shortened time limit could also place additional pressure on public authorities which would have to use their limited resources responding to premature claims.

51. As the focus of the judicial review pre-action protocol is to focus the parties' minds on the issue in dispute and to secure early resolution where possible, arguably the timescale for issuing a claim should reflect and support the underlying principles of the pre-action protocol.

52. In conclusion, we would be very concerned if the Government sought to shorten the current limitation period. The courts already have power to treat a claim as out of time by taking a strict approach when appropriate. If the limitation period were reduced even further, this could have the impact of requiring the judiciary to even further abridge the period of time for lodging claims, holding them to be out of time within the shortened limitation period. This would not be in fitting with the pre-action protocol principle of seeking to encourage parties to reach settlement. It would also have a very likely consequence of increasing the number of applications issued in order to comply with the shortened time limit and avoid accusations of delay. Not only would this increase costs, but it would also place greater burden on the court's limited time and resources.

53. Additionally, there are real issues regarding claimants' access to justice if the time limits were reduced. In these the increasingly challenging economic climate, the pool of experienced solicitors in this legal field is limited. It can often be very difficult for claimants to find solicitors with the capacity and expertise within a very short period of time for urgent matters and bearing in mind the need to avoid delay.

54. From the perspective of public bodies, clearly they face increasing challenges in terms of budgetary constraints and the multitudinous statutory obligations to which they are subject. It is not therefore suggested that the time limit should be increased, in recognition of the pressures faced by public bodies.

55. We are therefore of the view that there should be no change to the current time limit and the approach to delay in issuing judicial review claims.

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

Question 8: Are the costs of Judicial Review claims proportionate? If not, how would proportionality best be achieved? Should standing be a consideration for the panel? How are unmeritorious claims currently treated? Should they be treated differently?

56. We deal with questions 7 and 8 together as they relate to costs. The overwhelming majority of our clients are publicly funded and in the unusual event that the defendant succeeds a costs order against a publicly funded claimant would remain enforceable only with the permission of the court. We do not see any alternative approach that can be taken in respect of those claimants for whom judicial review is the only remedy, where there is merit in bringing judicial review proceedings which can be justified under the strict Legal Aid Agency criteria for public funding and who but for financial resources are unable to bring a claim.

57. We have not brought cases engaging Section VII of CPR 45 ('the Aarhus Rules') which were introduced on 1 April 2013 to meet the UK's obligations under the UNECE Convention of 25 June 1998 on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ('the Aarhus Convention'). These provisions introduced a system of costs capping in environmental claims. We do not have particular views on these provisions save that it is understood that the rules appear to work well in practice in the experience of claimants, defendants and interested parties in environmental and planning cases.

58. Although we do not routinely undertake privately funded judicial review claims, it is clear that the costs rules inevitably influence litigants' decisions as to whether to bring or defend judicial review claims. The risk of having to meet adverse costs orders and the incurring of costs which cannot be recovered from the other side act as significant deterrents. The costs rules affect the ability and willingness of litigants to pursue claims, even if they are meritorious. Any reform should not undermine the ability of both claimants and defendants to assert their rights. The consequences would otherwise restrict access to justice and the ability of the executive to be checked at a local or national level

59. We note that Sir Rupert Jackson considered the question of costs in judicial review claims in detail in his reviews of civil litigation costs in 2010 and 2017. It is understood costs budgeting is as a result subject of an ongoing consultation process by the Ministry of Justice. It is not understood what further reform is necessary.

<u>Proportionality</u>

60. We are unclear what is meant by whether the costs of judicial review claims "are proportionate". The rules only award standard costs on the basis of what is reasonable

and proportionate per CPR 44.3(2) and in the case of costs on an indemnity basis, reasonableness will be a consideration: CPR 44.3(3).

61. In the case of judicial review "proportionality" is more difficult to determine as compared to other types of civil claims where the "remedy" is generally a sum of money or a non-monetary relief where a financial value can relatively easily be given. Judicial review claims rarely involve financial compensation. They involve a challenge to a decision or policy and if the claimant is successful then the decision will be quashed. Judicial review claims may be complex and urgent. To that extent "proportionality" in judicial review cases need to take account of factors which are more abstract than just the amount of damages in issue. This is well understood by practitioners and the Courts and further reform is unnecessary.

Unsuccessful parties and unmeritorious claims

62. We do not believe that the costs rules are too lenient on unsuccessful parties or applied too leniently by the courts. Unsuccessful parties in judicial review claims can expect to pay their opponent's reasonable and proportionate costs. It is our experience that the court will apply this rule carefully and consistently, including the use of "split orders" where a claimant succeeds in part. In short the cost rules are the same rules as unsuccessful parties in other types of civil litigation. There are some differences (for instance, the general rule that defendants will not obtain costs for attendance at permission hearings) which are limited in scope and work well.

63. We note that a claimant can in very specific circumstances apply for Judicial Review Costs-Capping Orders per ss.88–90 of the Criminal Justice and Courts Act 2015 and thereby operate outside of the normal costs rules. As far as SM are aware they are infrequently used and only in the case of "public interest proceedings". SM do not believe these orders have any significant impact on judicial review and serve a useful purpose in exceptional circumstances.

Question 9: Are remedies granted as a result of a successful judicial review too inflexible? If so, does this inflexibility have additional undesirable consequences? Would alternative remedies be beneficial?

64. There are a wide range of remedies available in judicial review, including quashing orders, mandatory orders, prohibition orders, declarations, injunctions and declarations of incompatibility. In some cases damages claims can be brought in parallel with the claim. The vast majority of our claims seek injunctions (to protect our clients from homelessness or destitution) and declarations as to the unlawfulness of the actions or omissions of the public body.

65. We note that the rules for granting relief were reformed pursuant to section 31(2A) of the Senior Courts Act 1981, inserted by s 84 of the CJCA 2015 with effect from 13 April 2015. This amendment requires the Court to refuse to grant relief (save for reasons of "*exceptional public interest"*) on an application for judicial review where,

> "*it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred"*.

66. There has been a limited period of time to assess the effects of this statutory reform although undoubtedly the Court will have regard to the statutory test. In our experience a case which is "academic" in outcome for the claimant will not be successful and we would not pursue such a claim save where there may be a wider public interest.

67. We believe that remedies granted as a result of a successful judicial review are sufficiently flexible. Generally our client's seek urgent relief or changes in policy for a wider class of persons and the Court where appropriate can provide the necessary relief.

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

68. As far as claimants are concerned, we can only speak from the experience of our firm and our colleagues. Our practice is that we always send a letter pursuant to the pre-action protocol which identifies clearly what the issues are and what is sought. Where possible, we provide the recommended 14 days' notice. If we are faced with something which cannot wait that long (e.g. a homeless teenager or an urgent removal case), then we abridge the time frame accordingly. Where possible and appropriate, we always invite the defendant to agree to preserve the status quo or to protect the claimant's position on a without prejudice basis if they require more time to respond. (By way of example, in a situation where a client has been informed that their social services accommodation is about to be terminated within a few days (unlawfully), our pre-action protocol letter would have a very short deadline, but we would generally offer that provided the defendant confirms immediately that the accommodation will be extended and that the client will be provided with, say, 14 days' written notice of any further decision to terminate, then the defendant will be afforded the full 14 days to respond to the pre-action letter.)

69. We often send more than one pre-action letter. For example, if we sent a pre-action protocol letter with a 14-day deadline and we heard nothing from the defendant, we would usually write again following the expiry of the deadline to point out that we are now taking steps to issue proceedings in light of the failure to respond.

70. We do everything we can to avoid litigation at every stage and we issue proceedings only when it has not been possible to resolve the matter through the exchange of correspondence.

71. In so far as other claimants who are not represented by our firm do not follow the pre-action protocol for judicial review prior to issuing proceedings, then this has cost consequences.

72. Accordingly, we are not able to identify any steps which claimants could take beyond compliance with the protocol which would minimise the need for judicial review.

73. It should be remembered that there is an enormous inequality of arms in most judicial review litigation. It generally involves an individual (often very vulnerable) taking on a local authority or central government department. These decisions are not taken lightly by our vulnerable clients. Legal aid has to be obtained first, itself subject to stringent merits tests and the subject of heavy gatekeeping by the Legal Aid Agency. Taking on a public authority in litigation is a big step and is intimidating and stressful. It is an absolute last resort in every sense.

74. There is, however, much that defendants can do to minimise the need to proceed to judicial review.

75. Making timely decisions where statutory time frames are clear and not delaying decisions unreasonably where this is clearly highly detrimental to the individual affected as well as unlawful would remove the need for many of our pre-action letters in the first place.

76. Complying with clear statutory obligations and their own published policies would have a similar effect.

77. Responding to pre-action protocol letters by the deadline given would further reduce the number of judicial review claims brought.

78. In general, our experience is that local authority legal departments are much better at doing this than the Home Office is. The vast majority of pre-action protocol letters we send in relation to our education cases, for example, are resolved without the need to resort to proceedings (though if statutory obligations had been complied with including in respect of time frames, there would have be no need for the pre-action letter in the first place).

79. Conversely, the majority of pre-action letters we sent to the Home Office are not resolved without the need to bring judicial review proceedings. In those cases, the Home Office has either not responded at all to the pre-action correspondence or the response simply upholds whatever act or omission is being challenged without properly

engaging with the arguments we have made. However, of those where proceedings are issued, the majority are then settled prior to final hearing, often shortly after proceedings have been issued, some after the permission decision with our client achieving what had been sought in pre-action correspondence from the outset.

80. In the vast majority of cases, we are simply seeking compliance with that particular authority's statutory obligations or compliance with published policy. That is why so many of our cases are resolved at pre-action stage or shortly after issuing proceedings.

Question 11: Do you have any experience of settlement prior to trial? Do you have experience of settlement 'at the door of court'? If so, how often does this occur? If this happens often, why do you think this is so?

81. As indicated above, we do have experience of this. The overwhelming majority of the claims where we issue judicial review proceedings do not proceed to trial. Most settle either fairly immediately post-issue or shortly after grant of permission. Some occasionally later and, rarely, at the door of the court.

82. In most cases where proceedings are issued, if the defendant had engaged properly with the pre-action correspondence, the claim should have been capable of resolution without the need for proceedings at all.

83. It is hard to know exactly why defendants behave in this way, but anecdotally we are told by barristers who act mainly for defendants, that defendants often ignore the clear legal advice that they are being given both by their own in house legal teams and also by counsel.

84. That includes cases where the same litigation is being brought repeatedly. To give two examples:

    a. As long ago as 2009, the House of Lords provided very clear guidance on the obligations of local authorities to homeless children and teenagers under section 20 of the Children Act 1989 in *G v Southwark* [2009] 1 WLR and the circumstances in which it would be unlawful for local authorities to seek to accommodate such children pursuant to section 17 Children Act 1989, thereby avoiding the statutory obligations which come with being a "looked after child" as well as the further obligations to care leavers which follow from age 18 to 25. It took years for many local authorities to start to comply with the judgment and even now, 11 years since the judgment, we regularly still have cases

where local authorities are failing to comply with their obligations under section 20 Children Act 1989 in a way which is clearly unlawful as set out in *G v Southwark*.

b. In the judgment of *JP & BS v SSHD [2019] EWHC 3346 (Admin)*, the Secretary of State for the Home Department's policy of deferring decisions on grants of trafficking discretionary leave following a positive conclusive grounds decision that someone is a victim of trafficking pending determination of the individual's asylum matter was found to be unlawful in December 2019. The relevant published policy on discretionary leave has only just been updated to reflect this judgment on 8 October 2020, almost a year later and in the meantime, decisions continued to be made routinely in breach of the judgment.

Question 12: Do you think that there should be more of a role for Alternative Dispute Resolution (ADR) in Judicial Review proceedings? If so, what type of ADR would be best to be used?

85. In our experience, many judicial review claims are settled prior to a hearing. Settlement typically takes place at the pre-action stage or at the stage at which a claim is issued. It is rare, in our experience, for claims to be settled at the door of the court. This is often because judicial review claims will turn on a question of legal interpretation or a dispute about whether a public body has the power to take a certain step, where there is less scope for ADR in the same way as commercial or other disputes.

86. In general, ADR is not presently excluded or discouraged. It is available for use in any appropriate case. It is plain from the jurisprudence that the Court expects individuals to use judicial review as a remedy of last resort per *R (ex p. Cowl) v Plymouth City Council* [2001] EWCA Civ 1955, [2002] 1 WLR 803, in which the court held that alternative means should have been pursued prior to commencement of judicial review proceedings and penalising the claimant in costs accordingly. This appears to suggest that the senior Courts are fully focussed on the issue.

87. The Pre-Action Protocol for Judicial Review emphasises the point, providing at §9 that:

> *"The courts take the view that litigation should be a last resort. The parties should consider whether some form of alternative dispute resolution ('ADR') or complaints procedure would be more suitable than litigation, and if so, endeavour to agree which to adopt. Both the claimant and defendant may be required by the court to provide evidence that alternative means of resolving their dispute were considered."*

88. This may be enforced either in costs or by refusal of judicial review on the basis that alternative remedies could and should have been pursued. The claimant must address

the issue of whether ADR is appropriate in the Letter before Claim and any respondent will reply to this and may propose ADR.

89. A number of matters arise in our experience from the use of ADR in judicial review including;

    89.1. the lack of funding or organisation of ADR services

    89.2. access to ADR proceedings where there are many parties or the general public interest may be engaged where a claim for judicial review concerns issues beyond the parties to the claim. It would be inappropriate for a claimant to have a privileged position above others affected by a decision or policy under challenge simply by virtue of having initiated a claim which was resolved by ADR.

    89.3. ADR process is usually conducted behind closed doors which would undermine public confidence in good administration and the rule of law.

90. Generally, we take the view that the present system is sufficiently flexible to support recourse to ADR in any judicial review case in which it is suitable. Any proposal that ADR should play more of a role in judicial review should be approached with caution.

Question 13: Do you have experience of litigation where issues of standing have arisen? If so, do you think the rules of public interest standing are treated too leniently by the courts?

91. We have relatively limited experience of this, as in most of the cases that we deal with standing is not a problem (a disabled child whose social care support has been withdrawn/a child not receiving education contrary to section 19 Education Act 1996 etc.).

92. However, we do some cases where there are wider issues in play, which affect numerous people, often in a local authority's area. In these sort of cases it is common for the local authority or other defendant to seek to take a point on standing in the pre-action correspondence or at the permission stage.

93. Recent cases where this has happened include:

    a) An ultimately successful judicial review of reductions to a local authority's SEN budget.

b) A case which related to the changes the way in which a local authority produced its EHCPs. Permission was refused, but the local authority conceded the case before the renewal hearing.

c) A case which resulted in the Metropolitan Police setting up a board to oversee the deployment of police officers in schools, as well as commit to undertaking an equality analysis of the impacts thereof. Permission was refused on the papers in this case, and granted on oral renewal (whereupon it was immediately conceded by the police).

94. All of these cases saw attempts by the defendants at an early stage to run standing points. In each of the cases our clients were representative of those affected by the policy issue, and in all cases a result was achieved which had significant benefit for a wider number of people.

95. Our view is that the rules of public interest standing are not treated too leniently by the courts. They are treated appropriately. It is just as well that that is so, given the efforts that, to varying degrees, defendants will seek to make to get rid of an inconvenient case that challenges an unlawful policy that has wider implications for significant numbers of people in their area. It is fairly normal for a standing argument to be tried by a Defendant, as they have little to lose by so doing and sometimes they 'get lucky' with the judge on a paper permission decision.

96. Our experience is that defendant public authorities (and those advising them) are often very wise to issues of standing (as well as legal aid funding), and will often seek to "buy off" claimants raising wider issues to stop policies being looked at by the courts/ to argue that cases brought by individuals raising wider issues are academic. The rules work well at present, and are well policed by the Courts, and the Government should be very wary of doing anything that will upset this, as anything that narrows standing runs the risk that unlawful and unfair policies and practices will go unchallenged, with significant detrimental effects for all those impacted by them.

97. Finally, we note that this issue was addressed in the 2013 judicial review consultation. In the consultation response the Government reported that 241 of 325 responses were against changes to the rules of standing, and the judiciary in particular was concerned about it.

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