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INDEPENDENT REVIEW OF ADMINISTRATIVE LAW

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

ELA RESPONSE TO CALL FOR EVIDENCE

26 October 2020

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Introduction

1. The Employment Lawyers Association ("ELA") is a non-political group of specialists in the field of employment law and includes those who represent Claimants and Respondents/Defendants in the Courts and Employment Tribunals. It is therefore not ELA's role to comment on the political merits or otherwise of proposed legislation, rather to make observations from a legal standpoint. The ELA's Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes, including to consider and respond to proposed new legislation and regulation.

2. A sub-committee, chaired by David Widdowson, was set up by the Legislative and Policy Committee of ELA to respond to the call for evidence by the Independent Review of Administrative Law entitled "Does judicial review strike the right balance between enabling citizens to challenge the lawfulness of government action and allowing the executive and local authorities to carry on the business of government?"

3. Judicial review is used extensively in the employment field

   3.1. to challenge the decisions of public bodies not otherwise reviewable;
   3.2. to challenge the scope of primary and delegated legislation;
   3.3. to clarify the interpretation of statutes; and
   3.4. to challenge the dismissal of public servants including discharge of members of the armed services.

   We have set out the scope and width of employment judicial review illustrated with cases in Appendix 1.

ELA's Response

SECTION 1 - Questions 1 and 2 are not applicable to ELA

SECTION 2 – Codification and Clarity

QUESTION 3 – PART 1

IS THERE A CASE FOR STATUTORY INTERVENTION IN THE JUDICIAL REVIEW PROCESS?

4. The four classic justifications for codification are well known: certainty, clarity, democratic legitimacy and rationality.[1] While these aims are admirable, they do not tackle the practical difficulties of codification itself. This is a complex and risky process if the law is to be properly reflected in any codified document produced.

5. There are two points we wish to make in respect of codification: first, that there are process issues associated with codification itself; and second we argue that (in any event) codification does not effect the changes desired.

6. In this review, we do not set out the well-rehearsed arguments that our administrative law focused colleagues will do. Instead, we focus on the issues to which we can speak as employment lawyers.

QUESTION 3 – PART 2

IF SO, WOULD STATUTE ADD CERTAINTY AND CLARITY TO JUDICIAL REVIEWS?

Issues with the process of codification

7. The broad aims of codification are desirable, as set out in point 4 above. Codification can make the law more accessible to those subject to it.[2] This is all the more important in the case of judicial review because of the nature of the body of law itself: it bestows upon its citizens the ability to challenge acts of the government.

[1] Timothy H. Jones, Judicial review and codification, Legal Studies (Vol 20, Issue 4, p. 571), November 2000

[2] Eva Steiner, Challenging (again) the undemocratic form of common law: codification as making the law accessible to citizens, Kings Law Journal, 31:1, p. 27

8. However, the core problem with codification is that it necessarily provides a snapshot of what the position was (or was chosen to be) at the particular moment when codification occurred. It does not leave room for adaptation, refinement or development, unless it is reviewed by the legislature at a future date. This is more difficult, and riskier, when the laws that are sought to be codified are not clearly delineated or there are multiple sources of law which make up the scheme. There is every chance that the codification itself will fail to capture or adequately specify the bases for challenge that currently exist. For instance in *R (Shoesmith) v Ofsted [2011] EWCA Civ 642* the applicant claimed that: (1) an OFSTED report commissioned by the Secretary of State was produced in contravention of statutory procedures and common law requirements of fairness; (2) directions given by the Secretary of State to the London Borough of Haringey removing her from her position as Director of Children's Services ("DCS") were unlawful; and (3) her dismissal by Haringey following her removal was unlawful because it was founded on the Secretary of State's directions and was the result of an unfair procedure. In dealing with the dismissal, the Court of Appeal drew a distinction between two threshold issues, namely: (1) whether the dismissal was amenable to judicial review; and (2) if so, whether the application ought to be entertained in view of the alternative remedy available in the Employment Tribunal [76].

9. Regarding the first question, it was significant that the DCS was '*a position created, required and defined by and under statute'* and had *'a "statutory underpinning" in accordance with Walsh'.* On this basis, the dismissal was considered amenable to judicial review [91]. However, it is the decision regarding alternative remedies that exemplifies the type of development that codification would not have captured. The Court of Appeal began from the starting point that judicial review is a remedy of last resort and in the great majority of cases, the Employment Tribunal will be the better, if not the only, remedy [92]. However, it stated that:

   '[T]here will still remain cases which are amenable to judicial review and in relation to which the alternative remedy in the Employment Tribunal will be inappropriate or less appropriate. This may be because the remedy available in the Employment Tribunal is inadequate because of the statutory cap on compensation… or because the case raises significant issues falling out with the inquiry which could take place in the Employment Tribunal.' [87]

   Accordingly, the dismissal was subject to review. This is an example of the fine, case specific decisions, that we suggest Courts are best delegated to make rather than hard edged codification that would ossify legal developments.

10. Regard may be had in this connection to the example of Australia, which has been given as a blueprint for potential codification in the UK. However, the circumstances surrounding the codification of administrative law are different to the situation that exists currently in the UK because the Australian jurisprudence did not allow a merits review as opposed to a legality review. Australia codified its administrative law position in the 1970s after the Kerr Committee, the Bland Committee and Ellicott Committee[3] published reports reviewing the function of administrative law. As part of those reviews, an emphasis was placed on the simplification of the grounds for challenge. Australia had a relatively blank canvas as to judicial review. Australia now maintains a hard distinction between a legality review (which is permissibly carried out by judicial bodies) and a review of the merits of a decision (which is not permissible for judicial bodies to carry out). A review of the merits is, however, available through the Administrative Appeals Tribunal created as a result of the Kerr Committee. The concept of this distinction came from the Kerr Committee's report. In fact, prior to the various committees setting out their reports, the Australian courts had not been carrying out a review of the merits of decisions.

11. In the UK, by contrast, there is no such hard and fast distinction between merits and legality review and judicial review has been available for both. Indeed, even when challenges had to meet the highly restrictive bar of *Wednesbury*[4] unreasonableness, there was no absolute bar to the judiciary considering the merits of a decision. Matters are further complicated in that the European Convention of Human Rights and EU law, which through proportionality, has facilitated a greater examination of the merits of cases. If codification were to take place in the UK (to reflect the current position) then it would require extremely careful analysis of the permissible scope of a potential challenge with consequent challenges to drafting. Some scholars have recently argued, persuasively, that far from keeping to distinct and established rules, the Courts at the apex of various jurisdictions are adopting a more "contextual" approach to review.[5] Would this be reflected in any codification? Or would it be confined to more "traditional" grounds of review?

12. If the objective of codification is to reduce the scope of the bases of the challenge, then as set out below we doubt that such codification would achieve that effect.

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[3] Report of the Commonwealth Administrative Review Committee, Parliamentary Paper No. 144 of 1971; Interim Report of the Committee on Administrative Discretions, Parliamentary Paper No. 316 of 1973; Report of the Committee of Review of Prerogative Writ Procedures, Parliamentary Paper No. 56 of 1973

[4] Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223

[5] Paul Daly, "Facticity: Judicial Review of Factual Error in Comparative Perspective", *Forthcoming in Cane, Ip, Hoffmann and Lindseth eds. Oxford Handbook of Comparative Administrative Law*

Effect of codification

13. Having highlighted the risks associated with codification, it is necessary to consider whether it makes any difference to the decisions made by the Courts themselves. In the Employment jurisdiction, the potential effect of codification can be tested by reference to *R (on the application of UNISON) v Lord Chancellor [2017] UKSC 51* which reviewed the legality of an order requiring a certain level of fees[6] to be paid by many claimants when making claims in the Employment Tribunal. The Supreme Court held that the legislation breached both the common law principle that citizens should have proper access to justice and the EU law obligation to provide an effective remedy for breaches of rights granted by EU law, and that it was indirectly discriminatory against women in its application. Lord Reed analysed the legal basis for the challenge. He first considered the challenge from a common law perspective of statutory interpretation of the Order.[7] In doing so he set out two constitutional principles that inform any type of statutory interpretation

    13.1. the right of access to justice as part of the rule of law; and

    13.2. that statutory rights should not be cut down by subordinate legislation.

    It was by reference to these two principles that the Fees Order was held to effectively prevent access to justice.[8]

14. The Supreme Court then went on to consider the position under EU law. It highlighted that the Court of Appeal had identified 24 rights which were enforceable in Employment Tribunals and that the EU had long recognised effective judicial protection of rights.[9] Accordingly, the EU bases for the review amounted, analogously, to a codified basis for review. And yet, the Supreme Court found that both led to the same conclusion – and chose to analyse the case first in terms of common law constitutional principles.

15. This approach is not a singular UK based view – but is also reflected in other common law jurisdictions. A similar approach was taken by the Supreme Court of Canada in *Trial Lawyers' Association of British Columbia v British Columbia [2014] 3 SCR 31*, where a challenge was brought against fees payable for hearings, the fee

[6] SI 2013/1893
[7] Ibid. [65]
[8] Ibid. [98] and [104]
[9] Ibid. [105] to [106]

being dependent on the length of the hearing. The Supreme Court found that the fees to be charged were unlawful. Cromwell J, giving his reasons, stated that he wished to analyse the appeal as a pure administrative law question derived from the common law. He refrained from referring to the constitutional basis and the associated codified charter when giving his reasons.

16. If the objective of codification is to restrict judicial review, the obvious problem is that ultimately it will be the Courts that decide what the words used in the codified document mean subject to the principle of the rule of law. As can be traced back before the time of *Jackson v Attorney General [2005] UKHL56,* but forcefully alluded to in that case, there may be a time when even Parliamentary Sovereignty is found to be limited. This would be most clearly the case if fundamental rights are restricted or the rule of law is undermined. Accordingly, any attempt to limit the scope of judicial review in a way which further qualifies or overlooks pre-existing rights is likely to be ineffective.

17. Please see also our comments arising out of our analysis of justiciability below and in particular at paragraphs 76-78. We would also make the point that, if codification has the effect of significantly restricting the scope of permissible judicial review, it is likely to lead to excessive Government influence over the rules by which it is itself judged. As noted above, this is likely to damage the barriers which presently exist to maintain the separation of powers and thereby the rule of law. From an employment law perspective it may also have a limiting effect on human rights law and its effect on employment rights if, for example, proportionality were to be removed as a ground for judicial review.

QUESTION 3 – PART 3

TO WHAT OTHER ENDS COULD STATUTE BE USED?

18. We do not see that statutory intervention into judicial review is warranted save as noted below at paras 76-78.

QUESTION 4 – PART 1

IS IT CLEAR WHAT DECISIONS/POWERS ARE SUBJECT TO JUDICIAL REVIEW AND WHICH ARE NOT?

19. It is generally clear what is and what is not within the scope of a claim for judicial review. The limiting factor, namely whether a challenge to a particular decision has an

alternative remedy other than judicial review, is rarely a live issue at trial. There are, as there always will be, cases which occupy the margins in an area of decision making.

20. In general, however, these marginal determinations appear to arise from drafting ambiguities - see for example section 120(7) Equality Act 2010 which ousts Employment Tribunal proceedings against "qualifications bodies" such as the GMC in proceedings where "*the act complained of may, by virtue of an enactment, be subject to an appeal or proceedings in the nature of an appeal*". It required an appeal to the Supreme Court in *Michalak v General Medical Council [2017] UKSC 71; [2017] 1 WLR 4193* to resolve whether that included the availability of judicial review.

21. Similar consideration apply in respect of the judicial review jurisdiction of the Upper Tribunal (Administrative Appeals Chamber). The limits on that jurisdiction are applied by section 18 Tribunals, Courts and Enforcement Act 2007, and the requisite directions given by one of the Lord Chief Justice (either of England and Wales or Northern Ireland as the case may be), the Lord President of the Court of Session or the Senior President of Tribunals.

22. Beyond those marginal cases though, there is not general difficulty in understanding that:

    22.1. generally speaking any decision taken by a public authority can be challenged by way of judicial review; unless,

    22.2. there is an alternative remedy (such as statutory appeal or a private law claim) is available; or

    22.3. a specific statutory exception applies.

23. While we would support any attempts to define more clearly the marginal cases we do not believe the scope of judicial review claims is uncertain.

24. As the panel will know, justiciability concerns the amenability of a matter to adjudication by a court per *R v Derbyshire County Council, ex parte Noble* [1990] ICR 808, 814

> "*[...] there is no universal test which will be applicable to all circumstances which will indicate clearly and beyond peradventure as to when judicial review is or is not available. It is a situation where the courts have, over the years, by decision*

in individual cases, indicated the approximate divide between those cases which are appropriate to be dealt with judicial review and those cases which are suitable dealt with in ordinary civil proceedings."

25. In many claims for judicial review in the field of employment and work, justiciability will not be an issue between the parties. For example, it is well-settled that Decision Bodies and Appeal Bodies, established under the Armed Forces Act 2006 are amenable to judicial review. So are decisions of the Central Arbitration Committee, and secondary legislation relating to EU law rights.

26. Where a dispute about justiciability arises, case law has identified factors relevant to justiciability which the Courts have little difficulty in applying, including in particular:

    26.1. the type of power involved in a challenge;

    26.2. the subject matter of the case; and

    26.3. the extent of permissible review.

The Type of Powers Amenable to Judicial Review

Statutory Powers

27. In the absence of express exclusion of judicial review, decisions taken pursuant to statutory powers are amenable to judicial review, to the extent that they raise justiciable issues.

Prerogative

28. In *Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374* ("***the GCGQ Case"***), itself a workplace case concerning the lawfulness of prohibiting membership of a national trade union, Lord Scarman said at 407:

    "The law relating to judicial review has now reached the stage where it can be said with confidence that, if the subject matter in respect of which prerogative power is exercised is justiciable, that is to say if it is a matter upon which the court can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power."

So, on settled principles, the fact that a decision is taken pursuant to a prerogative power does not render it non-justiciable.

De-Facto Powers

29. Decisions based on powers derived neither from statute or the prerogative may be justiciable: *R v Panel on Take-overs and Mergers, ex p Datafin [1987] QB 815*.

30. From the analysis above, it can be seen that decisions may be justiciable, whatever the source of the power being exercised.

Subject Matter Amenable to Judicial Review

31. While the source of a power is rarely determinative of justiciability, the subject matter of a decision may be. The question is whether "*the subject matter in respect of which the prerogative [or statutory power] is exercised is justiciable": (the GCHQ case*, above). High policy issues, such as entering treaties or granting honours, are unsuitable for judicial review; they raise political, not legal questions.

32. In *R (Beer trading as Hammer Trout Farm) v Hampshire Farmers' Market Limited [2004] 1 WLR 233*, the Court of Appeal explained the shift from a focus on the source of power, to a focus on subject matter, since 'public' rights (in *Beer*, rights to trade at a market) might be exercised by a private body but be strongly public in nature, while rights to trade at a market might not be inherently public in nature (comparing a car boot sale to a statutory or charter market).

33. The amenability of a decision to judicial review, therefore, depends on whether the exercise of the power in issue has a public element. This is a case-sensitive inquiry contingent upon a number of factors, including, but not limited to, the nature of the power and function to be exercised.

34. Although this case-by-case approach to the bounds of justiciability can lead to some legal uncertainty in borderline cases, it does provide a flexibility of approach available to the Courts to respond to societal and legislative change. The working party would value flexibility and inability to predict the future over the risk of codification which fails to anticipate future events.

Further Limitations on the Scope and Extent of Judicial Review

35. Even where a decision is justiciable, there are circumstances where the High Court:

35.1. limits the extent of judicial review (for example where a decision is judicial or quasi-judicial): *R (Cart) v Upper Tribunal [2011] UKSC 28);* and/or

35.2. exercises its discretion to decline relief, where, for example, alternative remedies are available: "*[w]here there was a right of appeal, an aggrieved party would be expected to use that rather than judicial review. Judicial review was always a remedy of last resort." Cart,*

Amenability of Employment Tribunals to Judicial Review

36. In the fields of employment and work, judicial review may be relevant to challenges to Employment Tribunals and other decision-making bodies, and to challenges to decisions affecting work and employment.

37. The High Court's supervisory jurisdiction extends to the decisions of statutory tribunals, such as Employment Tribunals. Since the Employment Tribunal is a public body created by statute and exercising a judicial function, its decisions have the requisite public law element to be justiciable. However, since an alternative means of challenge exists - by appeal to the Employment Appeal Tribunal - the High Court would be unlikely to grant judicial review. However, there have been judicial review challenges to general practices of the Employment Tribunals: in *R (Matthews) v The Employment Tribunal [2004] EWHC 3385 (Admin)*, M challenged the Employment Tribunals' failure to provide contemporaneous recordings of proceedings, alleging that this breached his article 6 right to a fair trial. His claim was refused permission on the merits, not because it was not justiciable.

38. While available in theory, it seems unlikely in practice that there could be a ground of challenge on the grounds of procedural unfairness that would succeed in the Administrative Court on a claim for judicial review, but would fail on an appeal to the Employment Appeal Tribunal.

39. So, while it is arguable that decisions of the Employment Tribunal are justiciable, the statutory route of appeal to the Employment Appeal Tribunal means that judicial review will rarely be an appropriate alternative means of challenge (except possibly in the case of general practices such as in *Matthews* above).

Is it clear what decisions/powers are subject to Judicial Review in the field of employment and 'work'?

40. The great majority of employment matters relating to public bodies will not be justiciable in judicial review proceedings. The two thresholds of a sufficient public law element in the case and an absence of alternative remedies mean that it is only in exceptional cases that such decisions are justiciable. We set out below a comprehensive review of judicial review cases in the employment and work field. The cases show clearly that the test of judicial review is understood, is enforced but is flexible depending on the circumstances of the individual case which is that which justice and fairness requires.

41. As is clear from the general framework concerning justiciability, the Court of Appeal in *R (Tucker) v Director General of the National Crime Squad [2003] EWCA Civ 57* held (at [13] to [14]) that:

> "*The boundary between public law and private law is not capable of precise definition, and whether a decision has a sufficient public law element to justify the intervention of the Administrative Court by judicial review is often as much a matter of feel, as deciding whether any particular criteria are met*… [and] *there is no single test or criterion by which the question* [of whether there is sufficient public law element and thus a decision amenable to judicial review] *can be determined'.*

42. As with justiciability in judicial review generally, a multi-factorial analysis is used on a case-by-case basis to determine whether a given decision is amenable to judicial review. How this factorial analysis has been applied in cases is outlined below. It confirms our evidence that the Courts police the boundary of judicial review in employment law strictly. Unlike Parliament, Courts are able to tailor their decisions to the merits of the individual factual circumstance. We bring these strands together at the end of the review in three sections: Context of the decision, Key factors and Inconsistencies.

R v East Berkshire Health Authority, ex p Walsh [1985] QB 152

43. W, a senior nursing officer, challenged his dismissal by a district nursing officer on the grounds of misconduct following a disciplinary hearing. W pursued a complaint of unfair dismissal in the ET and applied separately for judicial review on the grounds that (1) the district nursing officer did not have the power to dismiss him and (2) the procedures that led to the dismissal were unfair.

44. The Court of Appeal held that the decision was not amenable to judicial review as the decision lacked the requisite element of public law. Neither the fact the employment was by a public authority nor that W was a senior employee injected the necessary element of public law. There was no '*statutory provision bearing directly upon the right of the health authority to dismiss"* W and so nothing that provided W with public law rights additional to those in his employment contract and in general employment legislation (164-165, 178).

45. The Court's conclusion about amenability for judicial review was supported with reference to the existence of appropriate alternative remedies. May LJ said that earlier decisions:

> *'must now be read in the light of the employment protection legislation… The concept of natural justice involved in many of the cases is clearly now subsumed in that of an 'unfair dismissal'. Further, I think that at the present time in at least the great majority of cases involving disputes about the dismissal of an employee by his employer, the most appropriate forum for their resolution is an industrial tribunal. In my opinion the courts should not be astute to hold that any particular dispute is appropriate for consideration under the judicial review procedure.'* (169-170)

46. The case highlights the relevance of a statutory underpinning to employment relationships within public authorities as a factor in meeting the public element threshold. It also highlights the existence of alternative remedies as a factor dissuading judges from considering a decision to be justiciable in a claim for judicial review.

Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374

47. The applicants challenged a ministerial decision, taken without prior consultation, that altered the conditions of service in the applicants' employment contracts, prohibiting them from trade union membership. The applicants sought judicial review on the grounds of procedural unfairness due to the alleged breach of their legitimate expectation that prior consultation would be undertaken. The ministerial decision was made pursuant to a prerogative order.

48. The challenge was held to be justiciable (though it failed on distinct national security grounds). Upon establishing that decisions under prerogative powers were justiciable, the House of Lords concluded that there was a sufficient public element in the case.

Significant in this regard was the fact that the civil servants had no private law rights regarding notice and consultation, but did have a legitimate expectation under public law because they had been permitted to join trade unions since 1947 (Lord Diplock, 411-412). The absence of private law rights and the result that the applicants were required to rely on the public law protection of legitimate expectation injected the necessary public law element into the case (Lord Fraser, 401). While not explicit, the absence of alternative remedies also appears to have influenced the judgment.

R v Hampshire County Council, ex p Ellerton [1985] 1 WLR 749

49. The applicant, a fire officer, was found guilty of corrupt practice under the ***Fire Services (Discipline) Regulations 1948*** in disciplinary proceedings and stopped £40 in pay (notably, he was not dismissed, which may have given rise to dismissal-related remedies). He challenged the decision by way of judicial review on the grounds that a civil as opposed to criminal standard of proof was used in the proceedings.

50. Justiciability was not explicitly discussed in the judgment, but it appears to have been assumed, with the challenge being dismissed on its merits. A significant factor leading to justiciability not to be disputed appears to be the statutory underpinning of the disciplinary process and the corresponding lack of alternative remedies available to the applicant.

R v Civil Service Appeal Board, ex p Bruce [1988] ICR 649

51. The applicant was dismissed from the civil service due to unsatisfactory performance. He exercised his right of appeal to the Civil Service Appeal Board which upheld the termination in a written decision. The applicant then applied to the Industrial Tribunal alleging unfair dismissal, issued a civil claim in the High Court seeking wrongful dismissal, and sought judicial review of the Board's decision on the ground it was procedurally unfair due to a failure to give reasons.

52. The Divisional Court reached the conclusion that the employment of the applicant was under the prerogative and not under a contract of employment. In these circumstances, the Court held that '*one is bound to hold that there was a sufficient public law element behind the applicant's dismissal… to entitle him to apply for judicial review'* (May LJ 660). However, citing *Walsh*, the Court exercised its discretion to refuse the grant of relief due to the availability of appropriate alternative remedies in the Industrial Tribunal. The Court of Appeal upheld the decision.

McLaren v The Home Office [1990] ICR 824

53. A dispute arose between the claimant, a prison officer, and Wandsworth Prison regarding the implementation of a new shift system alleged to be in breach of a collective agreement concerning working hours and overtime. The claimant refused to work, was subsequently suspended, and was not paid for the suspension period. He brought an action against the Home Office in the Industrial Tribunal seeking a declaration that he was still employed under the previous shift system and claiming the payment of salary for the suspension period. The claim was originally struck out on the basis that the claimant was only entitled to seek the relief claimed by way of judicial review on the basis that there was no contractual relationship and arguable claim in private law.

54. The Court of Appeal held that the question as to whether a contract of employment existed and its terms was a matter of private law rather than public law, hence the claimant had rightly brought his claim in the Industrial Tribunal.

55. Woolf LJ began from the starting point that '*[i]n relation to personal claims against an employer, an employee against a public body is normally in exactly the same situation as other employees'* and it will normally be inappropriate to seek relief by way of judicial review (836). He continued to highlight two situations where judicial review of employment decisions is appropriate: (1) where decisions are made by a public body that have wide-reaching consequences for its employees in general (citing *GCHQ*); and (2) where there is a disciplinary or other body established by statute or prerogative to which employment disputes must be referred (citing *Bruce*) (836-837).

56. The above dicta were considered in *R v London Borough of Hammersmith and Fulham, ex p NALGO and others [1991] IRLR 249*, where Nolan LJ stated that Woolf LJ's words could not be taken to mean that every policy decision taken by a public authority affecting its employees as a whole is automatically a matter for judicial review. Instead, Nolan LJ considered it was a factor.

R v British Coal Corporation ex parte Vardy [1993] ICR 721

57. V challenged British Coal's decision to close 31 deep mine collieries. Glidewell LJ and Hidden J held that the available remedies pursuant to the statutory right to be consulted about collective redundancies did not displace British Coal's statutory obligations to carry out a separate statutory review procedure, and the failure to do so was amenable to judicial review.

R (Tucker) v Director General of the National Crime Squad [2003] ICR 599

58. The applicant was a police officer, seconded to the National Crime Squad, whose secondment was prematurely terminated without reasons. The claimant challenged the termination decision by way of judicial review on the grounds of procedural unfairness.

59. The Court of Appeal held that the claim was not amenable to judicial review because there was no sufficient public law element. The fact the NCS was created by statute, was a public body and performed an important public function, and there was no private law remedy, was not enough to attract public law remedies. Scott Baker LJ said:

> "*It is, of course, beyond dispute that the NCS is a public body and it is also accepted that the Appellant has no private law remedy. Both of these are factors which as a starting point might suggest that the court does have jurisdiction to intervene. But it is necessary to look further and focus on what the Deputy Director General was doing when he made the impugned decision."* (606)

60. Regarding the decision in question, Scott Baker LJ, citing *The Queen on the application of Hopley v Liverpool Health Authority & Others (unreported) 30 July 2002*, held that it was critical that the defendant was not '*performing a public duty owed to the claimant*', but was making a decision, specific to the claimant, that it was expressly permitted to make in the context of the relationship and under the National Conditions of Service (607-608). Further, the Court considered that there was a critical distinction between disciplinary issues entitling an officer to public law safeguards, and '*operational or management decisions'* affecting individual officers where the police had to be able to run their own affairs without judicial interference (609). In view of these factors, it was held that the decision did not have the necessary public law element to render it amenable to judicial review.

61. Without elaborating, the Privy Council in *Ramjohn v Permanent Secretary, Ministry of Foreign Affairs; Kissoon v Manning [2011] UKPC 20* stated that it '*has some doubt as to the correctness of the Court of Appeal's conclusion in Tucker that the DDG's decision was altogether beyond the Court's supervisory jurisdiction'* [34].

R (Shoesmith) v Ofsted [2011] EWCA Civ 642

62. We have set this case out above at paragraph 8. The applicant claimed that: (1) an OFSTED report commissioned by the Secretary of State was produced in contravention of statutory procedures and common law requirements of fairness; (2) directions given by the Secretary of State to the London Borough of Haringey removing her from her position as Director of Children's Services ("DCS") were unlawful; and (3) her dismissal by Haringey following her removal was unlawful because it was founded on the Secretary of State's directions and was the result of an unfair procedure.

63. In dealing with the dismissal, the Court of Appeal drew a distinction between two threshold issues, namely: (1) whether the dismissal was amenable to judicial review; and (2) if so, whether the application ought to be entertained in view of the alternative remedy available in the Employment Tribunal [76].

64. Regarding the first question, it was significant that the DCS was '*a position created, required and defined by and under statute'* and had *'a "statutory underpinning" in accordance with Walsh'.* On this basis, the dismissal was considered amenable to judicial review [91].

65. Regarding alternative remedies, the Court of Appeal began from the starting point that judicial review is a remedy of last resort and in the great majority of cases, the Employment Tribunal will be the better, if not the only, remedy [92]. However, it stated that:

> *'[T]here will still remain cases which are amenable to judicial review and in relation to which the alternative remedy in the Employment Tribunal will be inappropriate or less appropriate. This may be because the remedy available in the Employment Tribunal is inadequate because of the statutory cap on compensation… or because the case raises significant issues falling outwith the inquiry which could take place in the Employment Tribunal*.' [87]

66. In *R (Lock) v Leicester City Council [2012] EWHC 2058 (Admin),* the High Court considered *Shoesmith*, noting that the Administrative Court was concerned with challenges relating to a party's public office, but not to private law matters of contract.

R (Simpson) v Chief Constable of Greater Manchester Police [2013] EWHC 1858

67. Pursuant to **Police (Promotion) Regulations 1996**, the applicants were police officers who had passed promotion selection assessment and were informed they would be promoted, subject to vacancies and checks. Following a promotion freeze,

the applicants were told their previous results no longer qualified them and they would have to re-apply, in effect dissolving the pool of candidates. The applicants challenged this decision by way of judicial review on the grounds they had a legitimate expectation they would be promoted under the selection policy.

68. The High Court held that the decision was amenable to judicial review. Distinguishing the case from ***Tucker***, the Court considered that the fact that (1) the decision had been made on the basis of policy considerations and pursuant to the Regulations and (2) it affected all the officers who had been selected for promotion, irrespective of their individual circumstances, sufficient to render it amenable to judicial review [27].

The Context in which the Disputes Arose

69. The contexts in which the case law arose can be categorised as follows:

    69.1. cases involving dismissals (*Walsh; Bruce; Shoesmith*);

    69.2. cases involving disciplinary matters (*Tucker; McClaren; Ellerton*); and

    69.3. cases involving policy decisions (*Simpson; GCHQ, Vardy*).

70. In terms of final decisions, those involving policy matters were more likely to be considered justiciable than dismissal cases. Cases concerning disciplinary matters may be more likely to be justiciable than challenges to dismissal.

71. It is submitted that the discrepancy between these different categories of cases relates to the following factors:

    71.1. in disciplinary and policy contexts it is more likely that there are no (or no effective) private law remedies available, and thus no appropriate alternative remedies; and

    71.2. policy decisions often affect a large number of employees.

Key Factors

72. Surveying the developments in the case law, the key factors that bear on the question of whether there is a sufficient public element in the decisions under review are as follows:

72.1. whether there is a statutory underpinning to the decision (*Walsh; Ellerton; Shoesmith; Simpson*);

72.2. the nature of the function - for example, whether the decision involved the exercise of a judicial or disciplinary function (*Bruce; McClaren*), or was an operational or managerial decision (*Tucker*); and

72.3. whether the whether the decision was individuated (*Tucker*) or affected a large group of persons in a similar fashion (*GCHQ; Simpson; McClaren, Vardy*).

73. Regarding justiciability in the broad sense, the availability of alternative remedies was often the key factor in judges' decision-making (*Walsh; GCHQ; Ellerton; Bruce; Shoesmith*). In some cases, the availability of alternative remedies was considered as directly pertinent to the question of amenability to judicial review (*GCHQ; Tucker*) and in others it was considered a distinct threshold relating to the exercise of the court's discretion not to grant relief (*Shoesmith; Bruce*). In either case, the availability of alternative private law remedies and, relatedly, the existence of an employment contact, were of utmost significance to the assessment of justiciability.

74. Other pertinent principles that appeared in a smaller number of cases were the imperative of ensuring consistency between private and public sector employees (*McClaren*) and the advantage of hearing complaints based on the same facts in the same forum (*Shoesmith*). These factors are unlikely to be decisive but may be influential in finely balanced cases. The circumstances in *Shoesmith* are likely to be rare, and *Lock* shows that dismissal from a statutory office that goes hand-in-hand with employment will not enable disputes about both to proceed in the Administrative Court.

Inconsistencies and Distinctions in the Case Law

75. As illustrated, it is possible to identify a number of common factors and principles in the case law concerning justiciability in employment and work judicial reviews. However, as with justiciability generally, it remains the case that the weight attached to different factors is case sensitive and there is an element of unpredictability in how the Courts approach concrete cases on an individual basis. In particular, the absence of a unified approach was demonstrated by the judicial consideration of previous cases in *NALGO* and *Ramjohn*. Inevitably, a court's appreciation of where justice lies is likely to weigh in the scales where fact-sensitive cases are decided.

Conclusion

76. In response to the IRAL's question, it is submitted that it is clear what powers are subject to judicial review, and this conclusion extends to the employment context. However, it is less settled which decisions are subject to judicial review and which are not. There are clear examples above of justiciable cases, namely, decisions in the employment context with a sufficiently clear public law element, such as disciplinary or policy decisions taken pursuant to statute that affect a wide range of persons, and/or for which the claimant has no alternative remedy. The factorial analysis of the Courts in approaching justiciability and the variability of the weight given to different factors means that there may be cases, at the margins, where it is less certain whether a decision will be amenable to judicial review or not. However, the factors used by Courts are clear and it is possible for advisers to predict with some success a court's approach to justiciability.

77. Placing relevant factors and tests on a statutory footing might increase clarity and certainty, but that would be at the expense of a court's ability to react flexibly to the circumstances of a particular case. The ability of the concept of justiciability and its application to evolve and be responsive to the individual circumstances of each case has been seen by many as a strength rather than a weakness in the area of judicial review.

78. Further, the procedural requirements which must be satisfied before a matter is permitted to proceed to judicial review are designed to (and in our experience do) exclude unmeritorious cases. It is in the nature of judicial review that a public body will consider that challenges to decisions that it makes under the powers that it has been granted, undermine its ability to operate effectively. That is not, in our view however, a reason for exempting that public body from the application of the law. An articulation of the test, and a non-exhaustive elaboration of relevant factors could increase judicial consistency and clarity in this area of law and may merit consideration.

QUESTION 4 – Part 2

SHOULD CERTAIN DECISIONS NOT BE SUBJECT TO JUDICIAL REVIEW? IF SO WHICH?

79. Our view is that exempting a decision from judicial review, other than on accepted common law principles, risks placing some public bodies outside legal controls. Our concern as to the application of statutory exemptions is that it may undermine the rule of law. We would suggest that the Courts respect the width of discretion that a public body has and contextualise that discretion appropriately. However, an arbitrary line

drawn between those decisions of public bodies which are to be justiciable would in our view be likely to cause more problems than it might solve because it risks undermining the doctrine of the rule of law.

PROCESS AND PROCEDURE

80. In relation to the Terms of Reference at point 4 [https://assets.publishing.service.gov.uk/media/5f27d3128fa8f57ac14f693e/independent-review-of-administrative-law-tor.pdf] we address 3 discrete matters that are raised that are not directly covered in the Questions posed by the Call for Evidence. Where matters in the Terms of Reference are covered by the Questions we have set out our views in response to those at paragraphs 96 and following below.

TERMS OF REFERENCE POINT 4 QUESTION 1

WHETHER PROCEDURAL REFORMS TO JUDICIAL REVIEW ARE NECESSARY, IN GENERAL TO "STREAMLINE THE PROCESS"

81. The judicial review process is governed by the Civil Procedure Rules (at Part 54 and Part 52 (appeals)), and ELA's view is that procedural reforms to judicial review are not necessary. Specific responses to the questions have been set out below.

82. Should procedural reforms be proposed, ELA wishes to point out that any attempts to alter the judicial review process through statutory powers must not restrict fundamental rights, including the common law right of access to justice, and that any such alteration must be read as being subject to a requirement of proportionality: see *R v Pham v Secretary of State for the Home Department [2015] UKSC 19, [2015] 1 WLR 1591* at §§118-119 *per* Lord Reed.

83. In addition, Convention rights under the European Convention on Human Rights and EU law require that judicial protection be *"real and effective" (Marshall v Southampton and South West Area Health Authority II (Case C271/91)* [1993] ECR 1-4367, §022-24). In determining whether any procedural rule restricting access to a court is consistent with the requirements of EU law, and is proportionate, regard will be had *"to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances",* in which context *"it is necessary to take into consideration, where relevant, the principles which lie at the basis of the national legal system, such as the protection of the rights of the defence, the*

principle of legal certainty and the proper conduct of the proceedings" (Tele2 Telecommunication GmbH(Case C-426/05) [2008] ECR 1-685, §5573.[10].

TERMS OF REFERENCE POINT 4 QUESTION 2

ON THE BURDEN AND EFFECT OF DISCLOSURE IN PARTICULAR IN RELATION TO "POLICY DECISIONS" IN GOVERNMENT

84. This question considers the unqualified effect on Government of the obligation of disclosure of evidence. However, it should also take into account whether such disclosure is consistent with the overriding objective contained in Part 1 of the Civil Procedure Rules. That rule requires that Courts deal "with cases justly and at proportionate costs so far as is practicable – ensuring that parities are on equal footing; saving expense…".

85. In judicial review, there is no duty of standard disclosure under Civil Procedure Rule 31. A defendant whose decision or action is challenged by way of judicial review owes a duty of candour to give a true and comprehensive account of the decision-making process (*Secretary of State for Foreign & Commonwealth Affairs v Quark Fishing Ltd [2002] EWCA Civ 1409*) and, as a matter of good practice, a public authority will ordinarily exhibit documents that are significant to its decision as the primary evidence.

86. Orders for disclosure in judicial review cases are not automatic but will depend on whether it is necessary to resolve the matter fairly and justly. Disclosure may be refused to protect individuals from harm or to avoid a miscarriage of justice in a future trial.

87. In many judicial review cases there will very often be nothing to disclose beyond the documents the claimant already has e.g. any relevant guidance or policy, materials provided by the claimant and the decision. The standard letter before claim contained in the *Pre-action Protocol for Judicial Review* includes details of any documents that are considered relevant and necessary.

88. Orders for specific disclosure can be made where information before the court suggests that a statement is inaccurate, inconsistent or incomplete in a material respect (see *Tweed v Parades Commission for Northern Ireland [2006] UKHL 53*).

[10] see also e.g. *Cofidis* (Case C-473/00) [2002] ECR 1-10875, §37 and *Duarte Hueros v Autociba SA* (Case C-32/12) [2014] 1 CMLR 53, §34).

The test will always be whether, in a given case, disclosure appears to be 'necessary in order to resolve the matter fairly and justly'. The Court has been clear that, where a request involves a disproportionate amount of work, it is unlikely to be granted (see Dingemans J in *Bredenkamp v Secretary of State for Foreign and Commonwealth Affairs [2013] EWHC 2480 (Admin)*)

89. The principle of open justice means that the discretion should be exercised presumptively in favour of disclosure, and this is especially the case where the issue is of public importance. The guiding principle of the Courts is the need for justice to be done in the open and that Courts at all levels have an inherent jurisdiction to allow access in accordance with that principle.

TERMS OF REFERENCE POINT 4 QUESTION 3

IN RELATION TO THE DUTY OF CANDOUR, PARTICULARLY AS IT AFFECTS GOVERNMENT

90. In judicial review cases, both parties have an obligation to disclose certain information, make full and frank disclosure and conduct judicial review proceedings with "all their cards face up on the table", having regard to the fact that "the vast majority of the cards will start in the [public] authority's hands" (*R v Lancashire County Council, ex p Huddleston [1986] 2 All ER 941*). Unlike other litigation proceedings, the facts in a judicial review are generally not in issue and the decision that is challenged is being reviewed for its legality and not for its merits.

91. The duty of candour is designed to ensure 'equality of arms' as set out in the Overriding Objective (Rule 1 CPR) on the basis that persons affected by state decisions should be able to know which factors played a part in that decision. This allows them to make an effective challenge to that decision.

92. In ELA's experience, compliance with the 'duty of candour' has resulted in the disclosure of crucial evidence, such as early details of numbers of claims to the Employment Tribunals or the remission of fees for those with financial difficulties (see *R(on the application of UNISON) v the Lord Chancellor* [2017]). In *UNISON* an abrogation of the duty of candour would have meant that the challenge would not have been possible.

93. It should be made clear that whilst this Call for Evidence places a lot of emphasis on the effects of Judicial Review on government, it should also focus on the individuals and organisations seeking to challenge what they have deemed to be an unlawful

decision. The impact on the Government should be balanced against the impact and effect of Government decisions on livelihoods and other central rights.

94. We would refer the panel to Lord Reed in *UNISON* para 68 where the Supreme Court gave the classical definition of the separation of powers:

> *"At the heart of the concept of the rule of law is the idea that society is governed by law. Parliament exists primarily in order to make laws for society in this country. Democratic procedures exist primarily in order to ensure that the Parliament which makes those laws includes Members of Parliament who are chosen by the people of this country and are accountable to them. Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced. That role includes ensuring that the executive branch of government carries out its functions in accordance with the law. In order for the courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade. That is why the courts do not merely provide a public service like any other."*

95. If Courts are to continue, as the Supreme Court found that they must, to ensure that the laws made by Parliament and the common law are applied and enforced then a necessary part of that function was found to be to ensure that the 'executive branch of government carries out its functions in accordance with the law.' If that uncontroversial principle is applied then it can be seen that the duty of candour could not be modified or replaced without fundamentally weakening the Courts' role in ensuring the executive behaved lawfully: and it should be remembered that a challenge is only successful where the government is found to have acted unlawfully.

SECTION 3 – PROCESS AND PROCEDURE

QUESTION 6

DO YOU THINK THE CURRENT JUDICIAL REVIEW PROCEDURE STRIKES THE RIGHT BALANCE BETWEEN ENABLING TIME FOR A CLAIMANT TO LODGE A CLAIM, AND ENSURING EFFECTIVE GOVERNMENT AND GOOD ADMINISTRATION WITHOUT TOO MANY DELAYS?

96. Generally, judicial review applications should be brought within three months of the act of which complaint is made. The time limits for making judicial review applications are already short as they must be brought "promptly", and in any case no more than 3 months after the initial decision is made. This time limit is much shorter than, for example, claims in tort or contract, where actions can be brought up to six years from the relevant act.

97. Time limits were reviewed in 2013 and changes were made then to reduce time limits for certain cases, such as planning. The three month time limit is one of the shortest limitation periods for claims in the judicial system. It is certainly not, in our view, an unduly long period and provides time both for compliance with pre-action protocols and correspondence to dispose of much of the claims which otherwise might find their way to Court and for cases which cannot be settled to be properly prepared.

98. The time limit facilitates the effective disposal of many cases before issue of claims and means at the time of issue such cases are better prepared by applicants. A reduction would be likely to impact adversely on those with a disability or who are dependent on legal aid. Shortening time-limits would also be likely to result in more cases being issued and such cases being less well focused. The current time limit strikes a balance between quick action and time for resolution and reflection.

99. The Court can refuse permission to proceed with a judicial review claim on the papers or at a hearing if it decides it was not brought "promptly". Any further reduction in time limits risks excluding meritorious claims from the ambit of the Courts, impeding access to justice. As noted above, the current time limit of three months is a relatively short time limit and ensures that intrusion into "good government" is clearly time limited and minimal so that problems can be resolved quickly and effectively.

100. The procedure for an applicant to follow is front-loaded and requires the applicant to comply with the pre-action protocol, whereby a letter before claim must be sent, and

then a suitable period (normally 14 days) provided for a response. This also assumes that applicants have time to instruct lawyers and seek legal aid, prepare their claims, including filing witness evidence and all relevant materials. For certain types of cases, an even shorter time limit already exists i.e. Planning (6 weeks); Procurement (30 days); judicial review of decisions of the Upper Tribunal ('Cart JRs') – (16 days). These time limits can only be extended by the court.

101. In our view these limits do not disproportionately hinder good government and we are not aware of any evidence suggesting to the contrary. The issue of time taken for a judicial review application to be heard and then disposed of is normally of far greater significance and is one for resourcing by the Ministry of Justice.

QUESTION 7 – Parts 1-3

ARE THE RULES REGARDING COSTS IN JUDICIAL REVIEWS TOO LENIENT ON UNSUCCESSFUL PARTIES OR APPLIED TOO LENIENTLY IN THE COURTS? ARE THE COSTS OF JUDICIAL REVIEW CLAIMS PROPORTIONATE? IF NOT, HOW WOULD PROPORTIONALITY BEST BE ACHIEVED?

102. The rules relating to costs and interveners in judicial review cases were changed by section 87 of the Criminal Justice and Courts Act 2015 by extending the circumstances where interveners may be required to pay costs and imposing an obligation to make such an order in certain circumstances. As noted in our comments on standing under Question 13 below (see paras 119-124), we think the principle of relevant bodies being able to appear before the Courts to provide assistance on matters in which they are expert or represent the interests of a wider body of individuals is desirable and generally in the interests of justice. Unless the policy intention were to remove the right of intervention altogether we do not consider that any further change should be made to the costs regime as it applies to interveners.

103. The general rule in judicial review proceedings is that costs normally follow the event although are ultimately subject to the court's discretion. We can see no reason why a more onerous approach should be taken to applicants in judicial review. If it is being suggested that the court exercises its discretion differently in judicial review cases, that is not our experience. The principles to be followed are set out in *M v London Borough of Croydon [2012] EWCA Civ 595* and those seem to us still to be sound guidance. The potential for an unsuccessful party to have to pay their opponent's costs along with their own (which can easily amount to six

figures) is already a formidable hurdle to many potential applicants and any more onerous a provision would be hard to justify if access to justice is to be preserved.

104. There is no evidence that the rules on costs in judicial review are in any way too lenient on an unsuccessful party. On the contrary, a democratic society should allow effective access to justice to challenge decisions affecting its members where such claims are meritorious.

QUESTION 8 – Part 4

SHOULD STANDING BE A CONSIDERATION FOR THE PANEL?

105. We deal with this at Question 13 below at paragraphs 119-124.

QUESTION 8 – Part 5

HOW ARE UNMERITORIOUS CLAIMS CURRENTLY TREATED? SHOULD THEY BE TREATED DIFFERENTLY?

106. Judicial review claims are subject to a paper sift. The merits of claims are, therefore, considered at an early stage. Where claims do not make the sift, there is a possibility of an oral application for permission. If, after these processes, a claim gets through, it is highly unlikely to be identified as "unmeritorious". Currently, around only around 20% of cases which reach the permission stage are allowed to proceed to a full hearing. Lawyers will also advise against pursuing unmeritorious claims, and wider access to good legal advice (through legal aid) at the outset would be likely to result in fewer unmeritorious claims being issued.

107. In our experience the lack of disclosure may mean that certain information has not been disclosed to a Claimant. If that information had been disclosed earlier it may well have avoided the need for litigation. This reinforces our view that early disclosure can avoid the parties proceeding to litigation.

108. We can therefore see little justification for amending the procedure as it currently stands because it already contains safeguards against unmeritorious applications. A party failing to obtain permission to proceed to a full hearing has to bear his/her own costs in any event.

QUESTION 8 – Part 6

SHOULD [UNMERITORIOUS CLAIMS] BE TREATED DIFFERENTLY?

109. Please see our comments at paragraphs 102-104 above.

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?

110. The court's powers in terms of remedies and outcomes of judicial review cases are set out in legislation, in the Senior Courts Act 1981. The court may act in a number of ways, including:

110.1 setting aside the challenged decision;

110.2 making a formal declaration that the body acted unlawfully, sometimes with an explanation of how the law should have been applied;

110.3 ordering the public body to take a particular action; and

110.4 ordering the public body to refrain from taking, or discontinue, a particular action.

111 The specific relief ordered in each case will depend on the circumstances in each instance and what is sought by the parties. Most remedies imposed by the Courts ensure that the decision-maker complies with the rules set out by Parliament. If the decision must be made again, the public authority remains the decision-maker and not the court. Remedies remain flexible to ensure that the correct solution is found. We do not therefore agree with the premise implied by the question that the range of remedies is too inflexible – to the contrary, we consider that remedies should remain flexible (as currently) in order to ensure that the correct solution is found. We do not consider that alternative remedies would be beneficial, and are not necessary.

QUESTION 10

WHAT MORE CAN BE DONE BY THE DECISION MAKER OR THE CLAIMANT TO MINIMISE THE NEED TO PROCEED WITH JUDICIAL REVIEW?

112 If this question is directed at the quality and communication of decision making then we consider that decisions generally could as a minimum clearly identify the nature and provenance of the power being exercised and record clear reasons for the decision reached. Further, consideration of the individuals or groups likely to be affected by the decision and some consultation with them, prior to making the decision, would in our view be likely to reduce the number of challenges to the exercise of powers.

113 If what is being sought are views on what mechanisms might be deployed to avoid the need for judicial challenge then clearly effective internal dispute resolutions systems would help. We would encourage them.

114 In our experience, settlement in judicial review is common (and occurs in about one third of all claims). In the Employment Tribunal system there is a compulsory period of conciliation prior to proceedings being issued – this system can suffer from inadequate resourcing of conciliation officers but is nonetheless well intentioned and can lead to some issues being resolved without the need for formal tribunal hearings. We would welcome a well-resourced formal conciliation or mediation process, pausing the judicial process and or extending time to issue claims. In our view this would reduce the need for judicial review, avoid unnecessary expenditure and promote settlement between the parties.

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?

115 As we have set out in the immediately preceding paragraph, settlement in judicial review is common. It is often in the claimant's favour. It can occur at any stage in proceedings and, whilst settlement at a late stage before hearing does happen, it is not in our experience common. As in all litigation settlement occurs when the parties - see settlement as a preferable option to the expense, disruption and cost

of the judicial process - for example, because of a belief that a case is very strong which diminishes when the full extent of the opposing party's case is known or where there is a perception that the principle involved outweighs the cost. As noted above in paragraph 114, we suggest that a conciliation and mediation process, pausing the judicial process or extending the time to issue a claim, would help to avoid unnecessary expenditure and promote settlement at an earlier stage and avoid the undesirable "doors of the court" settlement.

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?

116 The current *Pre-Action Protocol for Judicial Review* requires both parties to consider ADR and to include ADR proposals in pre-action correspondence. It warns parties that they may be required to explain any failure to engage in ADR and may be penalised in costs for an unreasonable failure.

117 However, the time limits within which to bring judicial review claims are such that conventional settlement negotiations are under pressure and a specialist conciliation/mediation service would be a positive step, perhaps managed by an existing body, such as the relevant Ombudsman or the Centre for Dispute Resolution.

118 In addition, in our experience public authorities do not always have the authority to settle matters where the exercise of power is delegated from central government.

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?

119 Permission to bring an application for judicial review will only be granted if the applicant has a "sufficient interest" in the matter under review – section 31(3) Senior Courts Act 1981.

120 Although there is some elasticity in this definition, the Courts have identified a number of factors relevant to deciding sufficiency of interest including

120.1 the importance of maintaining the rule of law;

120.2 the importance of the issue involved;

120.3 the nature of breach of duty;

120.4 the identity and role of the applicant and the extent of interest;

120.5 whether there is any more appropriate potential applicant; and

120.6 the extent and nature of remedy sought.

121 This has enabled the Courts to permit claims from applicants other than private individuals directly affected by the decision under review. For example see *R v Inspectorate of Pollution ex parte Greenpeace (No 2) [1984] 4AllER 329* for well-established campaigning organisations and *R v Secretary of State for Foreign and Commonwealth Office ex parte Rees-Mogg [1993] EWHC Admin 4* for individuals with no private interest but where the issue was of public importance.

122 The majority of judicial review cases involve individual applicants, and the Courts are in our experience careful to limit the standing so as to exclude inappropriate parties pursuing a judicial review. To ensure access to justice, it is important that someone is able to challenge a decision and the actions of public bodies. “Public interest standing” may be granted in those circumstances to organisations, companies and charities, but this is usually only done where no individual victim or more appropriate claimant can be identified.

123 Public interest claims can also be a more efficient use of the Courts’ resources allowing a single claim challenging an unlawful policy or practice which will reduce the need for multiple individual claims, or several experts bringing claims.

124 Codification might be warranted in specifically limiting standing to affected private individuals or by codifying the factors as set out above. In doing so however, consideration would need to be given to the principle of maintaining access to justice which may be compromised for private individuals without the means to commence such applications. Such a change could have unintended consequences: a single (campaigning) body could be replaced by a multiplicity of

individuals thereby increasing costs and complexity. In an employment context it is hard to see any legal justification for excluding trades unions from having standing: our experience is that their involvement brings focus, legal expertise and consequentially lower costs to challenges as opposed to unrepresented parties or parties unable to access the expertise which trades unions contain.

ELA'S CONCLUDING COMMENTS

125 Our concluded view is that, overall, the present rules strike an appropriate balance between ensuring that the rule of law is upheld and restricting the ability of those with no proper interest in the matter under review to improperly interfere with the process of government.

126. We do consider that the availability of a specialist, dedicated alternative dispute resolution process would be a positive development and one likely to reduce the number of challenges which ultimately come before the Administrative Court. We also consider that improved communication of decisions and their reasoning would also be desirable. Whilst we see no advantages, and considerable potential risks, in codification, a non-exhaustive list of factors to be taken into account could be helpful.

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APPENDIX 1

Challenging Public Bodies not otherwise amenable to review

126 The main example is the Central Arbitration Committee ("**CAC**") which was established by section 259 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("**TULRCA**") and whose main function for present purposes is the role it plays in determining applications for recognition by trade unions under Schedule 1 to TULRCA. Applications for judicial review have been made against decisions

126.1 as to whether the relevant persons in respect of whom recognition is sought are "workers" within the meaning of the Act based on Article 11 of the European Convention on Human Rights – see R (on the application of *The Independent Workers' Union of Great Britain) v Central Arbitration Committee & Ors [2019] EWHC 728 (Admin)* (a case involving drivers working in the "gig economy" for Deliveroo)

126.2 as to whether a bargaining unit approved by the CAC was compatible with effective management – see *R (on the application of Cable & Wireless Services UK Limited v Central Arbitration Committee & Anor [2008] ICR 693*.

127 In respect of the duties carried out by the Advisory, Conciliation and Arbitration Service ("**ACAS**"), one of the members of our working party was involved in a recent challenge to a decision it had made in nominating independent job evaluation experts in existing equal pay proceedings where that challenge had to be on judicial review grounds.

Challenging Delegated Legislation

128 The recent challenge in *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51 to the legality of an order requiring fees to be paid by many claimants when making claims in the Employment Tribunal where the Supreme Court held that the legislation breached both the common law principle that citizens should have proper access to justice and the EU law obligation to provide an effective remedy for breaches of rights granted by EU law, and that it was indirectly discriminatory against women in its application.

129 The application in *R v Secretary of State for Employment ex parte Nicole Seymour-Smith & anor ([2000] UKHL 12)* seeking the annulment of an Order increasing the qualifying period of service required by an employee in order to be able to bring a claim for unfair dismissal on the basis that this increase unlawfully discriminated against the female workforce.

130 The application in *R (Amicus) v Secretary of State for Trade and Industry [2007] ICR 1176* for an annulment of certain regulations in the Employment Equality (Sexual Orientation) Regulations 2003 introduced by the then Labour government on the basis that they failed properly to implement its obligations under EU law to introduce laws to protect gay people at work because they included exemptions in favour of organised religions that operated unfairly against gay people.

Interpretation of Statutes

131 As employment lawyers we are concerned not only with employees employed under a contract of service but with a much wider group of workers. As Helen Mountfield QC (sitting as a deputy High Court judge) said in the very recent decision of the Administrative Court in *Simple Learning Tutor Agency & Ors v Secretary of State for Business, Energy and Industrial Strategy [2020] EWHC 2461 (Admin)* (a decision made on a challenge by judicial review to establish the ambit of the relevant legislation regulating employment agencies):

> *"Unlike much employment legislation, the [relevant legislation] does not rely on a common law understanding of who is 'an employee'. The meaning of "employment …. is a wide and compendious one, intended to include both those workers who would fall within the normal common law definition of employment under a contract of service, but also the many workers who would fall outside the definition of "employee" in employment law, who offer their services in some other way*." (paragraph 47)

Challenging Dismissal / Discharge Decisions of persons in the Armed Forces

132 The lawfulness of the discharge of a member of the Armed Forces is amenable to judicial review as is the level of any award of any compensation awarded as part of the Service Complaint process (see *R (on the application of Wildbur) v Ministry of Defence [2016] EWHC 821 (Admin)*). Moreover, the seminal judicial review case of *R v Army Board of the Defence Council, ex parte Anderson [1991] Q.B. 169* related to a successful challenge by a soldier in respect of the procedure adopted by the Army regarding his complaint of race discrimination. Ministers of the Church of England, some of whom have protection under ecclesiastical law akin to employment rights whereas others do not, may be able to use judicial review in certain circumstances (see *Sharpe v The Bishop of Worcester [2015] EWCA Civ 399* and *R v Bishop of Stafford, ex parte Owen (2000) 6 Ecc LJ 83*). Finally, certain posts in local authorities are underpinned by statutory protections designed to protect the holder from political retribution for carrying out their duties, for example a local authority monitoring officer *R (on the application of Lock) v Leicester CC [2012] EWHC 2058 (Admin)*). See also the case of *The Lord Chancellor and anor v McCloud and ors [2018] EWCA 2844* where a successful challenge was made to transitional provisions in two public sector pension schemes (for judges and firefighters) on the basis that it unlawfully discriminated against younger workers.

133 On occasions judicial review will be required to challenge decisions made by public bodies where there are legitimate concerns as to whether the body has acted lawfully. In 2011 the Court of Appeal held that the process to remove Sharon Shoesmith by Haringey Borough Council following certain directions given by the Secretary of State for Education under the then Labour government was tainted by procedural unfairness (*R (on the application of Shoesmith) v Ofsted & ors [2011] EWCA Civ 642*) and some 25 years ago the same court held that the decision by British Coal and the then President of the Board of Trade (Michael Heseltine) to close a number of collieries without consultation was unlawful because it breached a number of statutory obligations to consult (*R v British Coal Corporation ex parte Vardy [1993] ICR 720*). Challenges have also been made to the operation of the civil service compensation scheme see *R (PCS) Minister for Civil Service (No 1) [2010] ICR 1198* and *Public and Commercial Services Union & Ors v Minister for Cabinet Office [2018] ICR 269*.

134 Although an ordinary employment dispute is not governed by public law merely because the employer is a public body (see *R v East Berkshire Health*

Authority ex parte Walsh [1985] QB 152 addressed in more detail in our response to Question 4 in the Call for Evidence*)* a number of decisions have, however, demonstrated there is real scope for judicial review. In *R (on the application of Shoesmith) v Ofsted* (above) the Court of Appeal considered the availability of judicial review for the former Director of Social Services in the London Borough of Haringey. There was no doubt that the Claimant was entitled to pursue a judicial review claim against the Secretary of State for Children's Services, who had directed the local authority to remove Ms. Shoesmith from her statutory position. However, there was doubt over whether she was entitled to claim judicial review against the local authority who had dismissed her following her removal from her statutory post or whether she could only pursue her remedy of unfair dismissal in the employment tribunals. Maurice Kay LJ explained that a distinction had to be drawn between the issues of amenability to judicial review and alternative remedy.

135 In the great majority of cases, proceedings in the employment tribunal would be the better, if not the only, remedy. However there were cases which were amenable to judicial review and where the remedy in the employment tribunal would be inappropriate or less appropriate due, for example, to the inadequacy of compensation (note the cap on compensation for ordinary unfair dismissal claims that can be paid or the superimposition of wider issues than those which are the subject of inquiry at the employment tribunal. See further on the aspect of justiciability at paragraphs 50-78 above. See also *R (on the application of Bakhsh) v Northumberland Tyne & Wear NHS Trust [2012] EWHC 1445 (Admin)* where a local authority failed to comply with an order made by an employment tribunal for reengagement , ostensibly because of the claimant's militancy, thereby raising issues pursuant to Article 11 of the European Convention on Human Rights, and *R (A) v B Council [2007] ELGR 813,* where a self-employed driver was debarred from being used in educational transport contracts with the Council because of serious criminal convictions in her youth despite having led a blameless life for 30 years. Permission was given for the claimant to raise arguments that the action was both disproportionate and contravened her Article 8 rights, although those arguments failed on the facts. See also on the issue of justiciability generally our response to Question 4 in the Call for Evidence.

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