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Lord Faulks QC
Independent Review of Administrative Law Panel

By email to: iral@justice.gov.uk

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Dear Lord Faulks QC,

The 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?

Call for Evidence – Which?’s Response

Introduction

We write with regards to the Independent Review of Administrative Law (IRAL) and to raise Which?’s concerns in relation to the potential reform of the process for judicial review proceedings.

By way of background, the Which? group is an independent, not-for-profit consumer organisation with over 1.3 million members and supporters in the UK. Since we were founded in 1957, Which? has been championing the cause for consumers by empowering them to make informed decisions and by campaigning to make people’s lives fairer, simpler and safer.

Whilst Which? supports the Government’s decision to review administrative law in principle, we are keen to ensure that there are no unintended, adverse consequences which may arise as a result of the IRAL’s consideration of responses submitted in relation to its call for evidence.

Which? therefore welcomes the opportunity presented by the IRAL to set out its views on the importance of allowing judicial review proceedings to continue, unimpeded by procedural or legislative obstacles. The mechanism exists as a critical tool that maintains the checks and balances of the power of the executive branch of Government. This is a core function of the UK’s democracy, ensuring that decisions made by the Government or a public body are properly scrutinised and held to account by the public.

To that end, we wish to stress that the ability to bring judicial review proceedings must exist as a matter of practice as well as principle. For example, a consumer may be adversely affected by an unlawful decision of a regulator such as the Financial Conduct Authority. While the consumer may be entitled to bring judicial review proceedings, in practice they may not know about the decision until it’s too late and risk being out of time to issue proceedings. Even if the individual consumer was aware, it may often be the case that they lack the necessary resources to commence legal proceedings from the outset.



Which?'s response to the IRAL's questionnaire

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

- 1.1 Firstly, we note the importance of judicial review proceedings and the value that they can bring to the administration of justice. We are concerned, therefore, that the questions posed to the Government departments seeking their views on their experiences of working on judicial review proceedings automatically assumes a negative experience and does not seek to understand the benefits it brings. This is evidenced by the formulation of the first question, which asks whether “any of the following aspects of judicial review **seriously impede** the proper or effective discharge of central or local governmental functions?” (our emphasis).
- 1.2 Secondly, we also consider it important not to underestimate the disciplining effect that is borne out by judicial review. It seems more likely than not that public authorities will want to avoid the possibility of their decisions being subject to judicial review. This has a direct and beneficial effect on the legitimacy of the decision making process of Government and public bodies, and the public's subsequent trust in those decisions.
- 1.3 Finally, if the Government is concerned about its ability to properly discharge its responsibilities and duties when faced with unmeritorious claims, then we note that there are already a number of safeguards built into the process which help deter such claims. The pre-action protocol for judicial review under the Civil Procedure Rules (**CPR**) exists to facilitate resolution between parties and to avoid the need to initiate legal proceedings. Further, unlike other civil litigation, the permission stage gives the courts an opportunity to identify unfounded claims at the early stages of the proceedings and to manage such cases appropriately. This is in addition to the usual ‘loser pays’ costs risks associated with unsuccessful legal proceedings under English law.

2 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)?

- 2.1 We would support improvements to the law on judicial review that would be for the ultimate benefit of consumers – for example, extending the three month time limit (set out in CPR 54.5(1)) within which claimants can issue judicial review proceedings. In addition, we believe that there should be a proper consultation on previous suggestions that the Aarhus Convention rules for the protection of individuals against prohibitively expensive costs penalties should be extended to more categories of cases, including those involving individual consumer rights and protections. As Which? has shown repeatedly, consumers can face serious harms and financial loss if public authorities make the wrong decisions, whether on data protection, financial services or product safety. They should not be deterred from challenging these decisions.

3 ***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?***

3.1 Which? does not consider that there is a need for statutory intervention in the judicial review process if any such intervention were to be detrimental to, or be overly restrictive of, the current process for commencing proceedings.

4 ***Questions 4-5***

4.1 Which? does not have any specific comments to make in relation to these questions.

5 ***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?***

5.1 Which? considers that if any amendments are to be made they should relate to extending the current strict three month window within which proceedings must be issued. One such possible proposal would be to extend the time limit to issue a claim form to six months, with the possibility that the parties are able to agree extensions as appropriate and contrary to the current rule in CPR 54.5(2). The three month time limit is unnecessarily short in comparison with other civil law limitation periods. There is no evidence that an extension to six months would prejudice good public administration, and we believe that consumers may face difficulties obtaining advice on unfair decisions of public bodies that adversely affect them and drawing serious problems to our attention.

5.2 Please also see our response to question two above.

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

6.1 Insofar as this question relates to ‘unsuccessful claimants’, Which? does not believe that the issue of costs are too lenient on unsuccessful claimants. There should certainly be no further restrictions on the rules regarding interveners in s.87 Criminal Justice and Courts Act 2015, as these are already strict, and interveners such as Which? can sometimes be hindered by the parties not being supportive despite the matter clearly being in the public interest. In practice, ‘crowdfunding’ may not be an option for consumer and other public interest cases, where there is a need to keep the proposed challenge confidential at the initial stages of proceedings.

6.2 As a matter of policy, claimants should not be deterred by the risk of public bodies or Government pursuing them for their costs. Judicial review proceedings are usually brought against defendants as a matter of public interest, and significant issues regarding access to justice are likely to arise as a consequence of any reform on the rules relating to costs.

- 6.3 To that end, we stress the importance of the court's power to make costs capping orders where it is satisfied that the claimant is able to meet the required conditions under ss88-89 of the Criminal Justice and Courts Act 2015. This safeguard in theory enables consumer claimants, for example, to pursue meritorious claims freely in the security that its liabilities will be capped to a certain limit, thereby avoiding any access to justice barriers. However, it is arguable that the criteria for costs capping orders are already too onerous when a case is clearly in the public interest. In particular, the test for a judge to apply in those circumstances (that a case would otherwise be withdrawn for good reasons) is difficult and subjective to assess in practice.

7 **Questions 8-12**

- 7.1 Which? does not have any specific comments to make in relation to these questions.

8 ***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?***

- 8.1 While Which? has not experienced any issues in relation to standing in judicial review proceedings, we are particularly concerned by the prospect of possible restrictive amendments to this important procedural rule. Potential reform of the rules on standing could result in representative organisations such as Which? being prevented from challenging important decisions of public bodies on key consumer issues. Such reform will have a major prohibitive effect on representative organisations' abilities to properly hold the executive to account.
- 8.2 We agree that the courts should not be clogged up with cases with unmeritorious claims and which are brought solely with the purpose of generating publicity or delaying the implementation of a properly made decision. However, we are concerned that limiting the ability of those who can bring a judicial review claim solely to those who are directly affected by the decision may increase the risk of decisions being made unlawfully and not being properly scrutinised. Judicial review is crucial to ensuring that Government and public body decisions are properly checked, and are therefore instrumental in upholding the rule of law.
- 8.3 This is particularly true in the consumer sphere where individuals will be routinely affected by Government and regulator decisions, but may find it hard to bring a claim themselves. Not all decisions will impact consumers directly straight away and, while in some cases it may be clear that some consumers may be adversely affected in due course, it may not be clear who, precisely, the affected consumers will be. Consequently, it is possible that no one who is directly affected would be aware of the fact and be able to bring a judicial review application within the required three month time limit. Even when an affected consumer is aware, they may not be best placed to initiate judicial review proceedings.
- 8.4 Indeed, in many cases, while the adverse impact on consumers as a whole may be significant, the impact on any one individual may be relatively small, and as such it would not make rational or economic sense for an individual to challenge a decision.



- 8.5 It is therefore critical that consumer representatives remain able to bring judicial review actions on behalf of consumers.
- 8.6 Which? has made effective use of judicial review proceedings in recent years to achieve positive outcomes for consumers in the UK. In 2016, Which? pursued judicial review against Peterborough City Council's Trading Standards department to challenge its decisions relating to Whirlpool's handling of a tumble dryer safety issue. After our application for judicial review was filed, Peterborough Trading Standards was quick to take action against Whirlpool, issuing a Notice of Requirement to Warn under Regulation 13 of the General Product Safety Regulations 2005. Whirlpool consequently changed the safety advice relating to its fire-risk dryers and Which? was able to give more tangible advice to consumers on how to effect a repair and how to tell if a machine was faulty.
- 8.7 More broadly, Which?'s actions opened up a public conversation about the way that product safety laws are enforced across the country. In 2018, the Business, Energy and Industrial Strategy Select Committee published a report warning of flaws in the system and heavily referenced Which?'s evidence, including learnings from our judicial review action.
- 8.8 Which? also brought judicial review proceedings in relation to the Government's implementation of the Unfair Terms in Consumer Contracts Regulations 1999 (superseded by the Consumer Rights Act 2015). The Government intended to reserve enforcement of the Regulations to public enforcers only, but Which? challenged this decision and was successful in having the regime extended to private enforcers. This was a significant positive outcome for consumers because it allowed representative organisations such as Which? to continue to hold businesses to account for potential unfair trading practices against consumers.

In conclusion, judicial review is a crucial legal tool that provides the proper checks and balances on Government that are vital to the UK's democracy, and is instrumental to upholding justice by holding the executive to account. Given the importance of the IRAL's review of the current judicial review regime, and its potential implications for organisations such as Which?, we would appreciate the IRAL's balanced and thorough consideration of our views and concerns as set out in this response.

Which? welcomes the opportunity to engage further with the IRAL and would be more than happy to assist the IRAL's consultation by way of providing further views and evidence as necessary.

Yours sincerely,

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