Independent Review of Administrative Law

I wish to make the following comments in response to the recent call for evidence; not all questions are addressed. These comments are made on a wholly personal basis and do not represent the views of any institution or organisation.

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[redacted]

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?

It must be recognised that the different grounds of review do not exist as separate compartments but overlap and flow into each other. The same flaw underlying an ultra vires decision may be described by different people as acting for the wrong purpose, applying the wrong legal test, having regard to irrelevant considerations, ignoring other relevant considerations or acting unreasonably/irrationally. This is inevitable given that this is not an area where hard and fast rules can apply to the endless variety of circumstances and where it is important that loopholes do not emerge as a result of adopting a legalistic approach based on trying to establish a series of watertight compartments.

In considering the impact of judicial review, the vast number of cases that do not get to the courts must also be considered. The presence of potential scrutiny in the courts adds rigour to decision making processes at all levels. Indeed, the threat of review may lead to closer internal scrutiny of decisions in specific instances – when a case passes from the housing/planning etc team to the legal one, the fresh pair of eyes may identify weaknesses in the decision which are put right (whether or not these would amount to a basis for the decision being quashed). [This comment is supported by research several years ago on the resolution of cases where judicial review was threatened against local authorities; sadly I cannot find the relevant reference, but I think it related to housing decisions and was possibly part of Maurice Sunkin's studies of judicial review in practice early this century.]

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)?

Over the years judicial review cases seem to have become more complicated – unnecessarily so. As is still the case in some Scottish judicial opinions (this was more marked a couple of decades ago), in showing the reasoning for most decisions it should be enough to recognise the universally accepted grounds for review as noted above, supported by a leading authority, and then apply them. Too often there is detailed quotation of the slightly different formulations used in a series of cases, referring to differences in wording which make no real difference to the exercise of judgement that has to be made and serve only to obscure the position. This is an area governed by broad principles, not the application of detailed rules, and counsel and judges should have confidence in their arguments and opinions based on these rather than having recourse to multitudes of authorities which cannot provide definitive guidance.

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?

The procedure is already largely governed by statute and as noted above, many of the key issues do not lend themselves to sharp black-and-white answers. This applies not just to the grounds of review but also to some procedural aspects (when is an alternative remedy appropriate, so as to preclude recourse to judicial review?). A statutory formulation would not solve the difficulties and uncertainties and indeed risk merely creating more uncertainty and disputes over the proper interpretation of the particular phrasing chosen for the grounds listed.

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

Although the idea of identifying some decisions as beyond the scope of review seems attractive, the reality is that the ways in which government works, and the ways in which it can end up acting in unacceptable ways, are ever-changing, so that other than a few extreme cases it will not be possible to create an appropriate list of matters legitimately immune from all judicial supervision. The days of a sharp divide between the government business and the private sector are long gone, with many bodies and partnerships occupying the ground in-between and private law tools being used to achieve public purposes. Equally the extent to which parliamentary and other processes genuinely provide scrutiny over governmental action also varies. Moreover, any excluded decision or action will often have associated decisions or actions which would fall outwith the area of immunity and thus be open to challenge, exposing the same underlying issue to review but in an indirect and less efficient way.

In many sensitive areas, the courts' practice is not to say that judicial review is impossible in some areas, but to recognise that it would take exceptional circumstances before the courts would intervene. That seems an appropriate position, leaving government to operate freely most of the time but with some constraint in the event of truly egregious conduct.

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

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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?

One difficulty over timing is that many decision-making procedures involve multiple stages. Where a flaw occurs at one of the earlier stages, it is undesirable to require an immediate challenge when the flaw may be remedied or become irrelevant as the case proceeds through the further stages, but equally undesirable to delay an inevitable challenge until the formal end of the procedure. Any strict rules on timing should have clear provisions to allow the right to challenge to be preserved by some form of notification at an earlier stage. This might increase the chances of the matter being resolved in the later stage of the process and protect aggrieved parties from the risk of losing their chance to raise a challenge if they wait to see the eventual outcome of a lengthy process.

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

In this context the specific obligations under the Aarhus Convention must be borne in mind, affecting expenses in cases involving an environmental aspect.

8. Are the costs of Judicial Review claims proportionate? If not, how would proportionality best be achieved? Should standing be a consideration for the panel? How are unmeritorious claims currently treated? Should they be treated differently?
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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?
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10. What more can be done by the decision maker or the claimant to minimise the need to proceed with judicial review?
This is really the crucial issue. Judicial reviews are a symptom that something is thought to have gone wrong in the decision-making process and that root cause must be tackled. There are perhaps three strands.
One is "getting it right first time", where the quality of administrative decisions and the creation of internal procedures and checks must be given attention, not just the speed and cost of administration. Administrators need time, expertise and the willingness to explain themselves to, and take seriously the views of, those affected if they are to make good decisions which will be accepted, even by those who lose out. Attention to a simplification of rules and procedures and rationalising the many statutory duties on authorities (which often pull in different directions) would also help.
A second strand is ensuring that there are suitable means of redress for those unhappy with decisions: internal reviews, appeals, appropriate tribunal or related routes, supported by readily available advice, should avoid the need to go to court. Progress is being made here with tribunal reform, but more could be achieved to provide avenues for advice and redress that are genuinely accessible and inspire confidence.
The third and most difficult strand is to rebuild confidence in the competence, impartiality and basic fairness of government processes. Too often today those who lose out through political and administrative processes are not willing to accept that outcome and look for other routes to challenge or block the process. Similarly authorities are too often seen as determined to pursue their own pre-determined policies, without listening properly to other views and willing to operate on the edges of legality. This is a deep malaise in the political and governmental system, and increased recourse to judicial review is one symptom. When people have no trust in government looking after their interests fairly, they will turn to other means to try to do so.

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?
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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?
In some cases ADR is appropriate, but in many cases it must be remembered that the decisions subject to judicial review do not involve just two or three parties, but that many other people are affected as well as the wider public interest. ADR to resolve a planning case may provide a satisfactory outcome to the direct parties (e.g. the planning authority and the developer or specific objector) but risks cutting out completely others who are also affected, not least those who have been satisfied with the initial outcome on the basis that the planning authority has acted

appropriately to protect their interests and therefore have not done anything to draw attention to their interest in the matter. Any form of negotiated settlement privileges those participating in the negotiations, to the exclusion of all others, despite the impact on their interests.

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?

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