

Response

I write to respond to the consultation, most obviously to question 5, though my point is relevant elsewhere too and so I would be grateful if you would also consider it more widely.

The consultation questions, and those asking about the potential for statutory codification in particular, largely focus on the mechanics and process of judicial review, saying little about its purpose or how it is to be approached by public bodies, claimants, and the court.

On that, I draw attention to the following from the Court of Appeal, which – though set out in the context of the candour duty falling on public bodies - also makes a point of wider importance about the nature of judicial review:

Citizens UK v SSHD [2019] 1 All ER 416 [106]:

“This is because the underlying principle is that public authorities are not engaged in ordinary litigation, trying to defend their own private interests. Rather, they are engaged in a common enterprise with the court to fulfil the public interest in upholding the rule of law.” [underlining added]

In a similar vein, here in the context of considering the standing of a claimant, but again of general application to the nature of the judicial review process:

R v Somerset ex p Dixon [1998] Env LR 111 [28]:

“Public law is not at base about rights, even though abuses of power may and often do invade private rights; it is about wrongs - that is to say misuses of public power; and the courts have always been alive to the fact that a person or organisation with no particular stake in the issue or the outcome may, without in any sense being a mere meddler, wish and be well placed to call the attention of the court to an apparent misuse of public power.”

Those are (or should be) both important reminders that, even where a claimant is pursuing a private interest through judicial review (but particularly so where they are not, which is very often the case), the judicial review process should be a neutral one in which the court seeks to establish the legality of public authority action.

Particularly once a claimant has secured permission (but even in the process of securing it) the private law notions which place burdens on a claimant (such as in proving facts) fall away, or should fall away. The judicial review process is then not concerned (as it would be in private law litigation) with (say) whether a claimant has

proved their case in some adversarial sense. Rather it is concerned with maintaining the rule of law in the common interest.

That is all relevant here, particularly if the review is contemplating recommending a statutory codification of judicial review: Specifically, any such codification needs to make clear to all the purpose of judicial review (as above) and not just the process of judicial review, as the consultation questions presently concentrate upon.

Please take those points into account,

David Wolfe QC

MATRIX

19 October 2020