Response to Call for Evidence:

Independent Review of Administrative Law

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1 BASIS OF SUBMISSION

I have been invited by the Panel by letter of 7 September 2020 to submit a response to the call for evidence. The view set out below are based upon my experience in practice and discussions with colleagues and clients over the last 25 years. They represent however my own professional views; they are not the views or position of Burges Salmon LLP or any specific client or other person.

My own experience, and that of the colleagues with whom I have worked in cases involving judicial review, has focused on commercial judicial review actions. That is to say cases in which the actions of government or regulators have been argued to have had a direct impact on businesses. I have therefore focused comments on issues and experiences from that specific segment of cases primarily. I have sought to put that into the context of the wider range of judicial review cases but I have less extensive/detailed experience of those other cases.

This response focuses primarily on an overview with brief responses to the specific questions of detail, linking back into those themes.

2 OVERVIEW

Section One reproduces the questionnaire sent to government departments and other public bodies and then raises the following questions of consultees:

- ***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?***

- ***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 Response (Comments):

2.2 Judicial Review is a critical component of the overall constitutional system, providing independent oversight of the exercise of powers which have fundamental effects on those subject to them, whether individuals or organisations. It is therefore a distinct, and third limb of the court system whose characteristics are fundamentally different in purpose and design from:

(a) Criminal law, the structure of which is 'vertical' (state versus individual or organisation) and designed to incentivise, dis-incentivise and sanction certain behaviours;

(b) Civil law, the structure of which is 'horizontal' (individuals or organisations dealing with disputes between themselves).

2.3 Criminal and civil law are of course adversarial structurally and procedurally. Judicial review adopts many of the adversarial procedures and processes but is - or logically

should be in essence – more inquisitorial; in practice an inquisitorial/adversarial hybrid. The court is in the position of independent arbiter assessing whether decision-making and the exercise of powers are being carried out legally, fairly and sensibly. To carry out that role and to create in practice the resulting balance in the constitutional settlement, the court needs visibility on what was actually done and why that is said to be poor administration, unlawful, or a combination.

2.4 Due to the strength of divergent opinions and comment on the issue, there is a risk in not first identifying, then analysing, the different segments of judicial review. Whilst there are overlaps in the Venn diagram (for example Human Rights arguments and the underlying arguments on permissible grounds of challenge may be raised in all categories), there appear to be the following main subcategories of judicial review:

(a) Cases involving immigration, prisons, housing and access to benefits. These are generally founded on, or heavily involve, arguments around Human Rights and statistically form by far the greatest number of cases - both issued and those that proceed to trial.

(b) Planning cases in which particular development or other related decision is challenged.

(c) Cases involving campaign groups - for example on environmental grounds or against legislation which particularly impacts a specific group or demographic, for example the challenge to the third runway at Heathrow[1] and the challenge to the changes to the state pension age for women by the *'Backto60'* campaign.

(d) Commercial cases, where decisions by government or by regulators are said to adversely impact a particular organisation or market segment.

(e) Cases of major constitutional significance – for example '*Miller 1'* and '*Miller 2',* dealing with the role of Parliament in approving a decision to trigger Article 50 and the 2019 prorogation of Parliament respectively. These are relatively few but very far reaching in profile, perception and impact.

2.5 The principles and the court procedures are shared between the different categories. However the characteristics of each vary significantly. In the very recent (October 2020) Court of Appeal judgment held unlawful the Home Office 'Judicial Review and Injunctions' Policy whilst criticising in strong terms common practices found in immigration cases in the following terms[2]:

"Any system of removing irregular migrants must operate in the sure knowledge that some are reluctant to leave the United Kingdom, even when there is no basis for remaining here, and will take whatever steps are permitted by the legal and administrative arrangements in place to resist, delay or frustrate removal. Late claims raised shortly before the known date of removal have been endemic, many fanciful or entirely false. Whilst there is no suggestion of any such conduct in these proceedings, it is a matter of regret that a minority of lawyers have lent their professional weight and support to vexatious representations and abusive late legal challenges. The courts have developed controls which provide some protection for its own processes and for the proper functioning of immigration control (e.g. Madan, Hamid and SB, cited at paragraph 104 above); but the practical and

[1] Which is also of course a planning case – albeit at the very largest scale. https://www.judiciary.uk/judgments/r-friends-of-the-earth-v-secretary-of-state-for-transport-and-others/

[2] Judgment of the Lord Chief Justice at para 178. [2020] EWCA Civ 1338

R (on the application of (1) FB (AFGHANISTAN) (2) MEDICAL JUSTICE) (Appellants) v SECRETARY OF STATE FOR THE HOME DEPARTMENT (Respondent) & EQUALITY & HUMAN RIGHTS COMMISSION (Intervener) (2020)

administrative problems for the Home Office in dealing at speed with substantial new representations in the days and hours leading up to a removal are legion."

2.6 It is respectfully suggested that analysis is required on the breakdown of cases between those different categories (to establish their respective scale/volume), the nature of the arguments raised in each and the pattern of outcomes. This could be done by reference to available statistics but also by use of artificial intelligence solutions[3] which analyse underlying factors and outcomes. If this is not done there is a material risk, probably the likelihood, that solutions to perceived or actual issues in one segment of cases will cause unintended adverse effects in others.

2.7 In terms of commercial cases specifically there is a concern which is the opposite of that most usually publicly expressed. Business organisations generally only turn to judicial review as a reluctant last resort. However, the experience of the process is rarely a positive one. Institutionally, judicial review appears to focus on the other four categories of cases identified at paragraph 2.4 above. Whilst businesses can have standing to bring judicial review cases, their experience in practice is often (although not always) that it is not a regime where commercial concerns will be seen as important.

2.8 Recent experiences have, for example, included:

(a) A case in which the claimant businesses had suffered significant loss as a result of actions found to have been in breach by the relevant authority, but where at each level of the court system remedy/recourse was denied as a matter of discretion.

(b) A case involving an economic regulator where the actions of that regulator had very serious potential consequences for both consumers and businesses and raised structural issues in areas involving several hundred millions of pounds. A detailed and measured application was submitted to the administrative court, with a request that a permission hearing be listed along with an application for expedition. Detailed witness evidence, and a skeleton argument grounds were submitted carefully setting out both the issues of principle and the arguments, together with the request that the matter be considered at the permission stage orally. The bundle was succinct but given the scale of the issues involved material detail. Permission was refused by email, contrary to that request, within 25 minutes of the papers having been handed in to the court front office.

(c) Cases involving refusal to give a succinct details of, and the key few documents relating to, the decision-making process. These can involve detailed exchanges on the basis that judicial review is not a disclosure based regime. The outcomes potentially affect the viability of the relevant businesses and the livelihoods of those whom they employ. A common experience in such cases can be that the Court will be reluctant to engage fully. It can sometimes see the exchanges between business and the state through a contested adversarial disclosure application lens, rather than as an issue of what key evidence of decision making is required to enable the Court to exercise its independent supervisory function. There is an asymmetry of information around the decision-making sequence and process in judicial review cases.

(d) A case involving a government ordered inquiry into a significant contract where an urgent claim seeking expedition, supported by all parties, on a relatively narrow point was issued in November of year 1, listed for an expedited rolled up hearing

[3] For example https://www.solomonic.co.uk/overview or https://www.artificiallawyer.com/2016/10/24/academics-build-ai-to-predict-human-rights-case-outcomes/

in June of the following year with the, relatively short, judgment handed down in December of that same year.

2.9 There are positive exceptions. The recent 2019 rail franchising litigation involved both procurement law and judicial review challenges to the outcome of three 2019 rail franchise competitions. The High Court, with a TCC Judge sitting also as an Administrative Court Judge, and the Court of Appeal dealt effectively with the legal and practical interface between the judicial review and procurement law aspects. The case involved three reported judgments, the first two of which all dealt with the legal interface between the overlapping regimes (High Court[4] and Court of Appeal[5] level) and the last was the liability judgment[6] which dealt with the application of those principles.

2.10 The June 2020 liability judgment respected the clear boundaries between policy and the review function of the Courts, setting out at paragraph 20 the established principle that:

"Policy and allocation of resources

20. It is well established in EU and English jurisprudence that Member States are afforded a wide margin of appreciation in relation to decisions involving the discretionary allocation of public resources. The principle was stated by the Supreme Court in R (Lumsdon and others) v Legal Services Board [2015] UKSC 41 at [40]:

"Where EU legislative or administrative institutions exercise a discretion involving political, economic or social choices, especially where a complex assessment is required, the court will usually intervene only if it considers that the measure is manifestly inappropriate."

2.11 Whilst the rail franchising litigation was decided against the claimants both in the procurement action and (in practice) the linked judicial review action, the process was thorough.

2.12 Experience in other cases however and also discussions over the years with those involved at senior level judicial review cases, reinforce a view that the option of judicial review for business (outside planning) is often difficult. The JR jurisdiction can perceived as focused on individual and human rights cases, occasional significant constitutional cases and planning. This is partly a matter of process but also of mindset. It may possibly result from the clear blue water which exists between the Commercial & Business Courts and the Administrative Court - structurally and in terms of background/perceptions. This is bridged in practice in procurement cases where judges sit with a 'dual ticket'. In other categories of case however a similar bridge does not exist structurally. It is not ideal for business or for oversight of (and the encouragement of robust) decision-making. The decisions involved can have profound effects on business and those who depend upon it for their livelihoods.

2.13 Suggestions

2.14 In response to the Panel's request the following suggestions are made for consideration:

(a) A separate review and analysis against the different segments of judicial review case categories identified at paragraph 2.4 above to identify different trends in terms of both procedure and outcome. Some of the segments are relatively low volume but others are high-volume and so would involve a representative sample. That task could also potentially use existing artificial intelligence (AI) capabilities designed to carry out jurisprudential analysis.

[4] Stagecoach East Midlands Trains Ltd & Others v Secretary of State for Transport & Others [2019] EWHC 2922 (TCC)

[5] Secretary of State for Transport v Arriva Rail East Midlands Ltd (2019 EWCA Civ 2259

[6] Stagecoach East Midlands Trains Ltd & Others v Secretary of State for Transport & Others [2020] EWHC 1568 (TCC)

(b) Part of such review would however involving manual analysis of sample cases given and refused permission and the ultimate outcomes, and process timings of.

Without review of the different categories of cases there is a risk that issues – both perceived and actual – relating to one category will produce unintended adverse effects in relation to others.

(c) The pre-action protocol for judicial review cases is focused on procedural sequences and approaches; It does not include wider issues of underlying purpose or application, as is done in the protocols or guidance for other kinds of action – for example in the Commercial Court and the Technical and Construction Court.

The practical result is that some kinds of procedural exchange tend to repeat in different cases. One particular area in which the guidance/protocol could potentially be expanded for efficiency and cost-efficiency (and increased effectiveness) would be around the area of the duty of candour and related disclosure. The TCC Guidance for Procurement Cases notes that there is an asymmetry of information between authority and claimant. This mirrors that which exists in judicial review cases. It summarises the balance to be achieved and the limited categories of documents which should be provided by an authority at an early stage once a prima facie case has been articulated.

The Guidance specifically discourages fishing expeditions and over extensive disclosure, but identifies the categories which should logically be available and which should be provided in order to allow the court to exercise its supervisory jurisdiction. A similar provision in the JR protocol would enhance decision-making by setting out effective parameters as to the core material that should be available. That would eliminate many of the unproductive exchanges and resulting avoidable time and cost which tend to feature in cases.

It would also emphasise the court's role as independent arbiter (effectively in judicial review cases having a quasi-inquisitorial role distinct from that in purely adversarial cases).

(d) Time limits are not currently consistent or predictable in effect.

The "*promptly and in any event within…"* element within the main three month time limit creates avoidable uncertainty. That type of formulation has been recognised within other contexts as insufficiently certain in practice, for example the Court of Appeal in Sita[7] citing Uniplex:

"11. In Uniplex UK Limited v NHS Business Services Authority (C-406/08) [2010] 2 CMLR 47 the ECJ had to consider whether regulation 32(4)(b) complied with EU law. The Court held that it did not, for two reasons. First, the rule infringed the EU doctrine of legal certainty which requires the rule to be sufficiently clear, precise and foreseeable. The regulation infringed this principle because by stipulating that proceedings had to be taken "promptly", the limitation period was placed at the discretion of the national court, and its effect was not predictable.

12. Second, the regulation also contravened the principle of effectiveness because if time runs from the date when the cause of action arises, the three months may have run their course before the claimant even knows of the facts which would enable him to pursue a claim. So he could be deprived of a right which he never knew existed. The question posed to the court asked in terms whether time should run from the date of the infringement or when the Claimant knew or ought to have known of it. The court held that it was the latter (para 35):

[7] SITA UK Limited v Greater Manchester Waste Disposal Authority 2011 EWCA Civ 156

"The answer to the first question accordingly is that Article 1(1) of Directive 89/665 requires that the period for bringing proceedings seeking to have an infringement of the public procurement rules established or to obtain damages for the infringement of those rules should start to run from the date on which the claimant knew, or ought to have known, of that infringement."

This produces a split regime: in cases involving EU law[8] the 'promptly' provision is not applicable but in domestic law cases it does. Mixed cases with some EU and some domestic causes of action pleaded involve a further layer of complexity.

Planning cases have a six week time limit.

Some procurement JR cases have a 30 day time limit: those deriving from/linked to the Public Contracts Regulations 2015 but not others[9] (those deriving from general principles, the Utilities Contracts Regulations 2016, the Concessions Contracts Regulations 2016 and other Procurement provisions such as Regulation 1370/2007/EC). It is not clear why only a subsection of ostensibly similar categories of challenge has a different limitation period.

Potential trigger points for JR – in particular what is and is not a 'decision' capable of review as opposed to a precursor step - produces a "*too early to issue/too late to issue"* dilemma for authorities and potential challengers. That can inhibit effective decision-making and also lead to challenges being issued early on a precautionary basis.

(e) Some form of codification (or published guidance by the courts) around what is and is not trigger point, linked to good practice in decision-making would increase efficiency and reduce uncertainty for all parties.

(f) Removal of the "*promptly*" sub- condition within the 3 month main limitation period for all categories of cases and rationalisation of limitation periods as between ostensibly similar categories of challenge would also increase efficiency and reduce uncertainty.

(g) A review of the application of judicial review to business related cases would be helpful. Court guidance (or additional provisions within the protocol) setting out understandings and expectations as the applicability of judicial review in the commercial context would be helpful to start to unlock the current difficult interface between judicial review and legitimate commercial areas of concern involving authorities or regulators.

(h) Clarification on remedies would also be helpful. It is not always clear when remedies will and will not be available, in particular where it involves an exercise of discretion. The absence of a freestanding right of damages (the rationale for which is understandable in policy terms) means that judicial review can produce uncertainty of consequence in practice.

[8] The position post 31 December 2020 in relation to continuing EU derived law may give rise to further complexities.

[9] CPR 54.5(6)

3 CODIFICATION AND CLARITY

3.1 **Question three: *is there a case for statutory intervention in the judicial review process?***

3.2 **Response**: rationalisation of limitation periods may require primary or secondary legislation. However full codification of judicial review would be highly complex and the unintended effects would be unpredictable. Adding statutory codification to a common law jurisdiction would not be straightforward and would risk significant changes to the UK constitutional settlement. If it were to be attempted, it would logically only be sensible after clear identification of specific objectives for the changes and full analysis of both process and outcomes against the very different categories of judicial review cases.

3.3 **Question four: *is it clear what decisions/powers are subject to judicial review and which are not? Should certain decisions not be subject to judicial review and if so which?***

3.4 **Response**: it is broadly clear from the authorities the decisions and powers which are capable of oversight by the courts. It is less clear as to the precise trigger points that initiate the point of intervention. Guidance and clarification within court guidance on the latter would be helpful.

3.5 Insofar as the question is directed at the very small category of constitutionally significant Supreme Court cases which deal with the interface between the prerogative powers of the Executive, the role of Parliament and the constitutional role of the higher courts, that ultimately is a much more significant but narrower question.

3.6 Question five: is the process of making, responding to or appealing a judicial review claim clear?

3.7 **Response**: please see suggestions under overview (response to question two) above.

4 PROCESS AND PROCEDURE

4.1 **Question six: *do you think that the current JR procedure strikes the right balance between enabling a claimant to lodge a claim and ensuring good government and good administration without too many delays?***

4.2 **Response**: it is right that challenges should be brought quickly from a defined trigger point to avoid prolonged uncertainty and resulting difficulties with formulating and implementing both policy and decisions. However the trigger points and limitation periods currently have uncertainties and apparent inconsistencies between similar types of situation. Please see comments above and suggestions under overview (response to question two) above.

4.3 Question seven: *are the rules regarding costs in judicial reviews too lenient on unsuccessful parties or applied to leniently in the courts?*

4.4 Question eight: are the costs of judicial review claim is proportionate?

4.5 **Response**: In commercial cases, the costs submissions and orders are dealt with in a similar way to that which will be expected in conventional civil litigation in relation to the main parties. The position of interested parties is also clear under the court rules, with the default rule being that they do not pay or recover adverse costs, other than exceptionally. I do not have the full visibility across the range of cases to be able to comment meaningfully on other categories.

4.6 **Question nine:** ***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?***

4.7 **Response**: remedies have evolved through common law development and are understandably focused primarily upon the procedure of decisions rather than the substantive policy merits of the decisions.

4.8 Whilst this is logical because there is no freestanding right of damages (for understandable policy reasons) and also because the courts do not have jurisdiction to adopt the substantive decision making role of the authority, the limitations can create uncertainty for both challenges and authorities as to what will follow. Where decisions are declared unlawful or quashed, there is not always certainty as to what must then follow, nor of the procedures which must be followed to avoid repetition or confirmation bias in the resulting follow-on procedures.

4.9 Whilst the court will be understandably wary to cross the line into decision-making, there is potentially an analogy with another area of the court system which is inquisitorial (judicial review being in practice quasi-inquisitorial). That is the ability of the coronial courts to make recommendations and for those to be registered by the Chief Coroner. It would require careful thought but a process for making appropriately constructive recommendations and a central body of learning for the benefit of authorities and those affected by decisions might possibly be something to be explored.

4.10 In addition the rules around when damages parasitic upon a parallel cause of action in judicial review will benefit from review, to give meaningful recourse in cases where legitimate business interests in particular have been provably and directly harmed unlawfully. The relationship between that area of law and Francovich/state liaiblity damages post Brexit might also need to be reviewed as the jurisprudential basis of Francovich damages is scheduled to be abolished[10].

4.11 Question ten: what more can be done by the decision-maker or by the claimant to minimise the need to proceed with judicial review?

4.12 Response: please see suggestions under overview (question two) above relating to guidance on trigger points for judicial review but also court guidance on what should and should not be provided by way of early disclosure on the decision-making process once a prima facie case (not fishing) has been made out, drawing the analogy with the protocols in place in procurement cases.

4.13 Question eleven: do you have any experience of settlement prior to trial? Do you have experience of settlement at the door of the court? If so how often does this happen and why?

4.14 Question twelve: do you think there should be more of a role for ADR in judicial review proceedings? If so what type of ADR should be used?

4.15 **Response:** in commercial cases, settlement is a part of the underlying dispute in the usual way. ADR is clearly signalled/encouraged within the JR pre-action protocol and will generally be considered by the firms and government advisers involved. I am unable to comment on its use other categories of cases.

4.16 Others have observed that the permission stage should act as a form of Early Neutral Evaluation. However, the permission stage can be highly unpredictable in practice. The facility for a form of ENE operated by the court may be highly beneficial. Some courts have trialled this in different types of cases in the past, where a judge not connected with the case offers a papers only non-binding and confidential view to the parties at an early stage. This may be something which will be useful to explore either prior to issue or during

[10] European Union (Withdrawal) Act 2018 Schedule 1 Para 4

the early stages as it would both flush out the key issues and documents and also give both, or all, parties and early reality check to inform actions and options. The confidentiality status of such a ruling would however need to be looked at for public authorities in terms of freedom of information obligations in particular. Some form of protection from disclosure would be needed for such a scheme to be workable and effective.

4.17 Question thirteen: do you have experience of litigation where issues of standing have arisen? Do you think that the rules of public interest standing are treated to leniently by the courts?

4.18 **Response**: I do not have enough breadth of direct experience of such cases to comment.