Independent Review of Administrative Law

Call For Evidence

Response to Questionnaire

Introduction

I am providing this response in a personal capacity based on my 20 years' experience of judicial review as a planning solicitor. During this time I have worked in both local government and private practice, as well as undertaking a secondment to the Planning Litigation team of the Treasury Solicitor's Department as a trainee solicitor. I have acted for claimants, defendants and interested parties in a range of planning-related cases.

Q1.

The first question to the Government Departments is framed around the notion of judicial review impeding the efficiency of government. However, one should not lose sight as to what judicial review is and its vital constitutional function: It is a supervisory process to ensure that public powers are exercised lawfully. It is not an appeal process against the substantive decision.

In that context it is difficult to see why judicial review should impede, reduce the quality of or otherwise adversely impact on public decision-making. Or to put it another way, if public decision-making is being undertaken lawfully (as it should always be), why there is anything for public decision-makers to fear by the existence of such power and why this should reduce the efficiency of government.

Indeed, the example grounds for judicial review provided at a to f illustrate exactly why judicial review is needed; it is impossible to see why a public decision that is based on, say, a mistake of fact or Wednesbury unreasonableness would be better removed from the risk of judicial review and why that would improve efficiency. On the contrary this would reduce the quality of public decision making and surely that must be the ultimate measure of the efficiency of government?

Furthermore I believe it remains the case that in practice very few public decisions are judicially reviewed and that, statistically, most judicial reviews fail. Certainly that is my experience over the past 20 years. Accordingly I would question the notion that judicial review is actually impeding the efficiency of government in practice. I do not believe the evidence is there to suggest that it is having this effect.

Q2

I think that the main relationship between the efficiency of government and judicial review relates to the time that it takes for any judicial review to be finally disposed of in the Courts, and in particular how unmeritorious claims are dealt with, rather than the principle of judicial review itself. In this regard the 2014 reforms have benefitted planning judicial reviews, which are now dealt with in a much more timely manner in the High Court, thereby reducing the incentive for third parties to bring claims simply to cause delay.

One aspect that remains imperfect, however, is the amount of time it takes for matters to be dealt with by the Court of Appeal, although this is perhaps more of a resourcing issue.

Q3

No I do not believe there is or what improvement would actually be achieved by doing this.

I also question whether, from a constitutional perspective, it is really possible for the Government to do this?

Q4

Please see my answer to Q1 – for this reason I do not believe that there is any case to reduce the scope of judicial review and, in particular, for certain decisions to be taken outside of its ambit.

Q5

In broad terms, I think that it is. In terms of the interaction between Part 54 and the remainder of the CPR, this is not always perfect but these are points of detail.

Q6

One of the 2014 reforms to JR was to reduce the time limit for bringing a claim in planning cases from 3 months to 6 weeks. Whilst I think that any further reduction in this time-scale would be unfair to claimants, my view is that the current 6 week period strikes the right balance between claimants and government in planning cases.

Whether a 6 week time limit would be appropriate for bringing claims in other types of public decisions is questionable; I suspect that different timescales may be appropriate for different types of public decision according to the nature, complexity and degree of prior public involvement in the same. Having said that, I do not think that there should be too much variance in time limits across the spectrum of public decision-making because this would be potentially confusing for members of the public.

Q7 & Q8

Re costs, most planning judicial reviews constitute environmental cases and so are caught by the Aarhus cost capping rules in the CPR. This means that potential costs liability is a less significant factor in the proceedings than it perhaps is in other types of proceedings.

Re unmeritorious claims, there are a number of filters already built into the JR process that are generally effective in screening out unmeritorious claims. In my experience, though, the Courts have been reticent to record claims as totally without merit, so this particular tool is under-used.

Q9

No, I believe that the Courts have appropriate discretion/flexibility when it comes to remedies.

Q10-Q12

I think the nature of planning decisions means that planning judicial reviews tend to be "all or nothing" cases for the parties and there is often little or no scope for compromise. Accordingly, if a decision-maker believes that it is acting lawfully by granting a planning consent – but a claimant believes that it is not – I do not think that there is much either party can do to minimise the prospect of judicial review other than follow the judicial review pre-action protocol.

The consequence of this is that, whilst I do have experience of planning JR cases settling, this happens rarely and I do not think there is any real scope for ADR in planning JRs either.

Q13

In planning JR, I think that the concept of standing has become so broad as to have become meaningless. I therefore think that there is scope for this to be tightened/given more meaning.

Michael Dempsey

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