

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 – Daniel Scharf MA MRTPI

1. I have worked as a Chartered Planner for over 40 years in public, private and voluntary sectors. For most of that time I worked for a law firm and would estimate that I have been involved in about 20 court cases; advising with the assistance of counsel whether or not to take a matter to court, and to supervise cases that proceeded to review.
2. I include below the IRAL's list of questions to Government departments to emphasise the point that I would be disappointed were there to be any representations that these grounds for review should be changed or weakened in any way. I would be very concerned were any such representations to be accepted by the IRAL.
3. It could be very likely that councils and government departments are stretched to find the resources necessary to administer their functions without contravening one or more of the criteria/grounds on which a decision could be reviewed. That cannot be accepted as a reason to change these well founded rules.
4. Not only is the potential for judicial review necessary to maintain standards in the procedures followed by councils and government departments, but they most definitely provided a well respected frame for the giving of planning/legal advice to clients. It has been a cause of some frustration that planning authorities have been protected from having decisions (ie refusal of permission) judicially reviewed because there is a statutory 'remedy' (a principle based on a Sullivan J LJ decision). There are many cases where a LPA would be more careful in how it dealt with a case if the applicant could go to court and have a decision quashed on well established legal grounds, and not just to a planning appeal, where the merits of the case are considered and the matter decided in the name of the Secretary of State. The costs regime introduced into planning appeals has introduced some but not enough discipline on LPAs decision-taking.
5. There are two aspects to the operation of the Planning Acts that deserve examination by the IRAL, especially as a special court was established due to the volume of planning litigation.
6. In much civil litigation there is advice if not coercion that parties should rely on a sole expert witness? The Royal Town Planning Institute has a professional code of conduct that would suggest that professional opinions relating to the determination of planning applications would be based on professional judgments that should not vary significantly between those engaged by and paid for the applicant, and of those planners working on behalf of the planning authority.

7. The same councillors who receive the advice from officers at a planning committees also act as their employers and have control over their careers. This relationship is not conducive to the giving of independent advice rather than what the councillor would like to hear. It has been a cause of frustration and disappointment to witness fellow professionals bending their views to suit client or council employer.
8. The planning appeal system would benefit from the appointment of sole experts to help the inspector examine the evidence and reach a decision. The same could also be true when an expert witness is required to support a ground for judicial review. The development industry has its trusted experts and will resist the prospect of having to rely on the expert opinion of an expert that is not in their pay. That is not a reason to allow experts on either side of a development proposal to prejudice their professionalism.
9. Mediation has been tried and failed in resolving planning applications/disputes. My career as a professional adviser was/is stained by the fact that clients served custodial sentences in HMP Pentonville. It is my opinion that this was due to the adversarial nature of the proceedings that became a barrier to the fair examination of some important facts. The fact that the council in question has not now been able to enforce requirements that were based on false premises that obtained and were asserted during the litigation requires explanation – mine being that the process suppressed examination of the facts. I believe that an expert mediator could have better understood the case than did a succession of judges (who seemed hard to persuade that their predecessors could have got it wrong) basing their opinions on affidavits and limited cross examination.
10. **In summary**, the grounds for review are essential to protecting the rights of private interests when dealing with public authorities. However, the procedures could be improved with the reliance on sole experts and mediation.

Annex

1. In your experience, and making full allowance for the importance of maintaining the rule of law, do any of the following aspects of judicial review seriously impede the proper or effective discharge of central or local governmental functions? If so, could you explain why, providing as much evidence as you can in support?
- a. judicial review for mistake of law
 - b. judicial review for mistake of fact
 - c. judicial review for some kind of procedural impropriety (such as bias, a failure to consult, or failure to give someone a hearing)
 - d. judicial review for disappointing someone's legitimate expectations
 - e. judicial review for Wednesbury unreasonableness
 - f. judicial review on the ground that irrelevant considerations have been taken into account or that relevant considerations have not been taken into account

- g.any other ground of judicial review
- h.the remedies that are available when an application for judicial review is successful
- i.rules on who may make an application for judicial review
- j.rules on the time limits within which an application for judicial review must be made
- k.the time it takes to mount defences to applications for judicial review

2.In relation to your decision making, does the prospect of being judicially reviewed improve your ability to make decisions? If it does not, does it result in compromises which reduce the effectiveness of decisions? How do the costs (actual or potential) of judicial review impact decisions?

3.Are there any other concerns about the impact of the law on judicial review on the functioning of government(both local and central)that are not covered in your answer to the previous question, and that you would like to bring to the Panel's attention? From this, we would appreciate your response to the following questions:

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?

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)?