NATIONAL RESIDENTIAL LANDLORDS ASSOCIATION

212 Washway Road, Sale
Manchester M33 6RN

0300 131 6400
info@nrla.org.uk
www.nrla.org.uk

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?

NRLA Response

Who are we?

Representing over 80,000 landlords and letting agents, the National Residential Landlords Association (NRLA) is the leading landlord association in England and Wales. The organisations that merged to form the NRLA have been involved in a number of judicial review cases around areas of the law that affect landlords.

These cases typically involve challenging local authorities over licensing schemes, but it has also included intervening in challenges to national legislation such as the 'right to rent' scheme[1]. Typically, informing a local authority we are considering judicial review has led them to reconsider their procedures, improving them before court action is required.

General concerns regarding the Terms of Reference

The NRLA has a number of concerns regarding the scope and clarity of the Terms of the Reference accompanying this call for evidence. Judicial review is fundamental to ensuring the rule of law is maintained. Its most important function is to ensure that the executive does not overstep the limits set on it by Parliament[2]. Any moves to restrict or amend the scope of judicial review needs to be considered carefully, and conservatively, as reducing the ability of the courts to perform this crucial role is likely to cause serious constitutional issues.

Unfortunately, the Terms of Reference do not provide clarity on what changes may be considered. Nor do they set limits on the scope of potential reforms meaning that the potential scope for review appears wide and unfocused with the aims and goals uncertain.

Judicial review has been developed over centuries through careful and considered developments that retain the flexibility necessary to meet the demands of changing times[3]. It is the NRLA's view that a similarly methodical and conservative approach needs to be taken to changes that would restrict judicial review to ensure that this flexibility is retained. To do this, it is essential that the review is led by an evidence-based approach perceived impediments, balanced against the promotion of good administration that judicial review brings. This would need to include an investigation into whether or not the decisions that were subject to judicial review were based on 'politics by another means' or

[1] R (on the application of Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department [2019] EWHC 452 (Admin).
[2] R (G) v Immigration Appeal Tribunal [2004] EWCA Civ 1731,
[3] R v IRC, ex parte National Federation of the Self-Employed [1982] AC 617

NATIONAL RESIDENTIAL LANDLORDS ASSOCIATION

212 Washway Road, Sale
Manchester M33 6RN

0300 131 6400
info@nrla.org.uk
www.nrla.org.uk

whether they were due to poor decision making by public authorities. It would also need to address the potential constitutional risks of any specific changes that are recommended.

As the principles of judicial review are applied in a number of other public law contexts, this methodical approach will also need to comprehensively address the potential consequences in areas such as planning applications[4] and homelessness decisions. This is briefly mentioned in the Terms of Reference but it is not clear whether a full investigation of the impact will be considered as part of this review. It is the NRLA's view that this needs to be an essential part of any review prior to recommending changes.

The NRLA is also concerned about the amount of time given to consider the responses and report back to the Government. The Law Commission's periodic assessments of judicial review have typically featured long consultations followed by extensive periods of research. Usually this takes 18-24 months[5] before providing recommendations. By contrast this consultation has had a much shorter time frame. The NRLA is concerned that not enough time is being given to properly address the potential issues that arise from amending such a constitutionally important area of the law.

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?**

In the NRLA's experience, the prospect of judicial review, or having a 'judge over your shoulder' incentivises public authorities to think about whether their decisions are within the scope of their powers before they take the decision.

However, where public authorities do overstep their boundaries, the very nature of judicial review means that their experience will be restrictive in some way. As a result, public authorities are likely to consider it a burden on their ability to make decisions. With this in mind, the NRLA is concerned that the questionnaire does not have a counterpart for claimants who use judicial review to hold public authorities to account.

The danger with the current questionnaire is that the respondents are too narrow and focused exclusively on the experiences of defendants, rather than including all the affected stakeholders that a change in the judicial review process would impact.

It also does not ascertain the true benefit judicial review because it does not ask whether the public authority has had to change their policies as a result of a successful challenge or settlement prior to court. As a successful judicial review or a change in policy is evidence of an ultra vires decision, the value of JR can be shown by the number of times that a public body has had to alter their original decision.

[4] Planning Act 1990
[5] Administrative Law: Judicial Review and Statutory Appeals, Consultation Paper No 126.

NATIONAL RESIDENTIAL LANDLORDS ASSOCIATION

212 Washway Road, Sale
Manchester M33 6RN

0300 131 6400
info@nrla.org.uk
www.nrla.org.uk

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)?

One of the ways that judicial review could be improved is by widening access through lowering costs rather than attempting reform of the judicial review process. Courts are already obligated to reject cases without a significant public interest component. As a result, only cases with some significant merit should be heard by the courts. Given this public interest test exists, the NRLA believes there is value in financially supporting the claimants who do make it to the courts in making their case.

The NRLA would like to see the Government revisit Lord Justice Jackson's recommendations around qualified one way costs shifting and extending the Aarhus Convention to all forms of judicial review[6].

The costs of the present system act as a financial barrier to individual claimants, restricting access to justice for those who cannot afford the significant costs. While legal aid is available for some cases the 'financial limits, however, are strict and many deserving claimants of modest means do not qualify for assistance'[7]. By implementing the measures Jackson LJ proposed in his report, the NRLA believes that those who most need access to civil justice will be supported, ensuring that public wrongs are righted.

We would also recommend amending Section 87 of the Criminal Justice and Courts Act 2015 so that intervening groups can recover their costs from public authorities in the event of a successful intervention. Many of the judiciary have cited the practical benefits of interventions from interested parties and this should be encouraged. Baroness Hale for example has referred to the critical role that interventions can play in providing context that may otherwise be lacking in our adversarial system.

In her speech 'Who Guards the Guardians?' in 2013, Baroness Hale cited numerous cases where the expertise of intervening parties had allowed the judiciary to gain greater understanding of a particular issue. This is especially true where the intervening party may be able to provide valuable specialist knowledge or raise points that individual claimants may not be able. The judicial review of the 'right to rent' scheme saw RLA research cited substantially throughout the judgement, with the quality of our intervention being particularly persuasive[8].

These high quality interventions come at a cost to the intervening parties however, and restrictions on recovering costs naturally make it more difficult to assign resources to provide this valuable insight. If organisations such as ourselves are to share the products of our labour with the courts then it stands to reason that we should be able to recover the costs of these interventions where the product has been useful in highlighting ultra vires decisions.

[6] 'Review of Civil Litigation Costs: Supplemental Report' - Lord Justice Jackson
[7] 'Review of Civil Litigation Costs: Supplemental Report' - Lord Justice Jackson
[8] Joint Council for the Welfare of Immigrants, R (On the Application Of) v Secretary of State for the Home Department [2019] EWHC 452

NATIONAL RESIDENTIAL LANDLORDS ASSOCIATION

212 Washway Road, Sale
Manchester M33 6RN

0300 131 6400
info@nrla.org.uk
www.nrla.org.uk

Section 2 – Codification and Clarity

The NRLA does not believe that codifying or clarifying the grounds for judicial review would be beneficial to the rule of law. The three heads of illegality, irrationality and procedural impropriety[9] are already well established and broad enough to allow for both a proper assessment of parliament's intention with legislation and further developments of the law. Codification of these higher level heads would be largely symbolic and ultimately pointless.

If the intent is further codification beyond these three heads then this would likely serve only to restrict access to justice and run contrary to the goals of improving clarity or improving accessibility. Given the scope of decisions that can potentially be subject to judicial review, replacing the common law with statute would be a huge undertaking, requiring significant, technically detailed legislation to adequately replace the existing, more flexible arrangements in a like for like fashion. The likely end result of this would be either a reduction in the available grounds for review or a narrowing of the scope of what is justiciable.

Restricting the grounds for review would also have a wider impact than judicial review cases alone. In housing cases for example, restricting the grounds of judicial review will lead to restrictions on the ability of social housing tenants to raise public law defences in a wide range of cases relating to possession and homelessness. For example, an individual may currently appeal a homelessness decision in the county court using a public law defence[10]. This qausi-judicial review procedure would be adversely affected by a restriction on public law defences.

The availability of these public law defences has also often been used as the rationale behind introducing mandatory grounds for possession in social housing[11]; the existence of the public law defence acts as a restraint on the actions of the local authority. By removing these restraints on mandatory grounds, social housing tenants would have less security of tenure but it would also unintentionally remove the basis on which parliament made their decision in the first place.

Section 3 – Procedures

The NRLA disagrees strongly with the underlying assumptions of the Paragraph 4 of the terms of reference. Further streamlining of the procedures and time frames for judicial review are not necessary, particularly in light of restrictions imposed in 2015 as part of the Criminal Justice and Courts Act.

The existing time frame, is already difficult to meet in many cases and it is hard to see how it could be shortened further, particularly in areas such planning decisions. The NRLA would recommend increasing the time frames for responses to allow an adequate amount of time for individual claimants to consider their options before contacting a solicitor for further advice.

[9] Council of Civil Service Unions v Minister for the Civil Service [1984] UKHL 9
[10] Section 202-204 Housing Act 1996
[11] https://www.legislation.gov.uk/ukpga/1985/68/section/107D for example includes reference to review processes being wrong in law.

NATIONAL RESIDENTIAL LANDLORDS ASSOCIATION

212 Washway Road, Sale
Manchester M33 6RN

0300 131 6400
info@nrla.org.uk
www.nrla.org.uk

This would also allow for more time to raise the funds needed for judicial review and increase the chances that a public authority will reconsider their decisions before proceeding to court or look towards the existing the ADR mechanisms that are in place. In particular, the NRLA has found that as a result of our work, local authorities take action to address the deficiencies in their licence schemes after being served a letter before action. Increasing the available time for local authorities to consider their options would likely lead to better outcomes for public bodies and landlords alike.

For organisations such as ourselves, this additional time would also allow us more opportunity to raise cases in the public interest. In the last few years, crowd-funded judicial review cases have become far more common and we have used it on a number of occasions to support cases where we felt that landlord's interests needed to be represented. This is particularly useful in public interest based judicial review cases where a cost-cappings order may apply[12] as we can effectively raise the funds to bring a public interest case and have certainty as to our required level of funding.

We would also strongly oppose anything that would restrict the law of standing to exclude interested parties from initiating judicial review proceedings in the public interest. As the Worboys case has shown, it is already possible to deny standing where the potential claimant is not suitable. Further restrictions are unnecessary as the courts have shown they are perfectly capable of ascertaining suitability.

For further information

Please contact James Wood at [redacted]

[12] Section 88 Criminal Justice and Courts Act 2015