Submission on the Independent Review of Administrative Law

Public Interest Law Centre

PILC's submission on the Independent Review of Administrative Law

1. The Public Interest Law Centre (PILC) specialises in public law, actions against public authorities and public inquiries. We act for individuals and campaign groups that have been treated unlawfully by public bodies. We are affiliated to the Law Centres Network, which comprises 40 plus local law centres nationwide.

2. We also run a number of frontline advice projects that particularly tackle issues relating to domestic violence and housing; EEA nationals and homelessness.

3. Coupled with our public interest litigation we conduct research and publish reports. That work seeks to highlight social, legal and social justice issues that we believe require significant attention and radical change. We also support communities, activists and social movements to use the law as a tool for social action. We are based in London, with clients citywide as well as in the South East and nationally.

4. PILC's response to this consultation is informed by the experience of front-line practitioners - solicitors and caseworkers who have been supporting those whose most basic and fundamental rights have been infringed at every turn. Twelve years of austerity-driven Britain, the Government's racist 'hostile environment' policy, and the demise of an already strict legal aid system has meant that our clients have found it increasingly difficult, and at times impossible, to access justice. It is in this broader context that any discussion around judicial review must be considered.

Nature and Scope of Judicial Review

Whether certain executive decisions should be decided on by judges – including whether there are areas where the issue of the justiciability could be considered by the Government.

5. Judicial review underpins the rule of law and allows judges to establish whether public bodies, including Central and Local Government have acted in accordance with the law when carrying out functions, exercising powers and making decisions. Preventing the Government from acting unlawfully and/or holding it to account when it does, is of course in the public interest. Not only does judicial review protect the public from abuses of state power, and allows them to assert their fundamental rights, but also should (though we accept in many cases does not) lead to better decision and policy making in the future.

6. The Government should not be above the law or be able to use their powers arbitrarily. It is therefore worrying that the Terms of Reference as proposed place emphasis on the role of the 'executive' and 'executive action' but fail to include a consideration of the inevitable impact of any changes in judicial review on fundamental constitutional principles. This is particularly the case given that judicial review acts as a check and balance on executive power and plays a crucial role in upholding the rule of law and parliamentary sovereignty.

7. The test of justiciability is used by the court to decide whether it has jurisdiction to adjudicate upon an issue raised in a legal challenge. The question posed in the Call for Evidence as to whether the Government should try to prescribe what areas would be non-justiciable, implies that it could ever be appropriate for the Government to specify broad areas or categories as being effectively immune from legal challenge.

8. Allowing the Government to proclaim areas of immunity for itself would clearly place its actions above the rule of law. It would in effect have the power to exclude legal cases that raise issues that would ordinarily be justiciable according to the test that the courts have always used – issues that do not go

beyond the institutional capacity or legitimacy for the courts to decide. The proposal to legislate for justiciability is therefore a proposal to create, through law, areas of legal immunity of executive action. In PILC's view, that is an affront to the Rule of Law.

9. PILC takes on a vast range of public law challenges, including those relating to housing and homelessness, environmental law, policing, access to education, domestic abuse, community care and immigration. We also take on a range of anti-austerity challenges relating to issues such as the closures of libraries, care homes, and community services. Our clients'[1] experiences are all very different, but they have one thing in common; they demonstrate the struggle to have their basic rights upheld, the massive power imbalance between individuals and state bodies, and the role and importance of judicial review in helping them access justice.

10. We are and have been instructed in individual cases that have public interest elements (those affecting a number of other people in the same cohort), as well as those which relate to local level gatekeeping. Over 95% of our cases are resolved/settled at the pre-action stage, with local authorities or central Government accepting that they had acted unlawfully. The threat of judicial review alone is often what makes public bodies respect their legal duties. On the rare occasion that judicial review proceedings are issued (in less than 5% of cases), a further 3% are resolved either prior to or shortly after the permission stage. Less than 2% of our cases end up going court. We have so far won all but one of our cases where judicial review proceedings have been issued - the one case that we have lost we are in the process of appealing to the Court of Appeal.

11. It has become clear that local government has a tendency to act unlawfully not only due to a lack of training or guidance from Central government on what their legal duties are but also as a result of a decade of austerity measures which has pushed councils and public services to their breaking point. The 'hostile

[1] Individuals, community groups and campaigning organisations.

environment' has fostered racist practices across society, led to people losing their jobs, forced people into destitution and resulted in mass deportation.[2]

12. The Panel must therefore acknowledge that Judicial Review is becoming even more important for Claimants in seeking justice, accountability and holding Government to account. The last forty years of neo-liberal capitalism has hampered the ability of individuals to challenge unjust laws or treatment through alternative means. In the workplace for example, collective bargaining has disappeared, the ability of trade unions to organise and represent workers has been neutered, and the capacity for local councils to respond to local needs has been severely curtailed. Successive Governments have not only limited what councils can spend but have made significant cuts. Councils and national Government no longer respond to the lobby of the electorate. There is a democratic deficit, and an accountability deficit. Judicial Review allows the potential for the massive power imbalance between individuals, public and state bodies to be righted.

13. Council departments are therefore not in every case simply unwilling to act lawfully, but given their financial pressures feel that they are unable to do so. It is this which has increased the amount of individual and public interest cases that we have taken on. If the Government is keen to cut down on the number of judicial review cases, rather than restricting access to justice and interfering with the rule of law, it should instead:

    - Issue comprehensive guidance to local authorities where unlawful practices are rife - working with rather than against frontline and grassroots organisations, across areas of housing, homelessness, community care etc. and provide training on that guidance.

    - Provide local authorities with the funding they so desperately need to enable them to comply with their legal obligations.

[2] Access Denied: The human impact of the hostile environment, Institute for Public Policy Research, 3 September 2020

14. In almost all of our public law cases, arguments relating to human rights and/or discrimination law are raised. It is impossible for the panel to consider the importance of judicial review, the grounds for it, or issues of justiciability, without reflecting also on these areas. Judicial review, human rights and discrimination law are inextricably linked, and we are deeply concerned that without including explicit reference to these areas in the terms of reference, the panel will be forced to take an artificial and narrow approach to the review.

Whether the amenability of public law decisions to judicial review by the courts and the grounds of public law should be codified in statute

15. We are aware that grounds of judicial review (or the equivalent) have been codified in other countries. However, where this has been done, the codification has taken place in order to establish the grounds that exist, and/or to clarify pre-existing grounds.

16. However, as is implicit here (or rather explicit, given the Home Office's recent attack on so called 'activist lawyers'), codification appears to be for the purpose of constraining the development of other grounds, to confine existing grounds to a set number of rigid principles, or worst still, to eliminate those that have already been developed as part of the common law.

17. A major concern that we have is therefore the failure to recognise that to codify the grounds of judicial review would seriously hamper the court's ability to develop the common law as it has done throughout history (an integral part of courts function). It is a serious infringement on the rule of law for the Government to tell judges that they are no longer able to develop the law in this way – the sole purpose being, it seems, in order to shield itself from common law accountability.

Procedural Reforms

The burden and effect of disclosure regarding "policy decisions"

18. Where individuals or organisations are challenging the actions of the state, disclosure must be considered a responsibility, and not a burden. Government lawyers have large-scale resources at their disposal and so are in a position to properly fulfil their disclosure obligations. This is especially important in public interest litigation, for example where the legality of a policy is called into question. In these cases, it is our view that the current rules around disclosure do not go far enough.

19. In one of our cases[3], it was only after a successful judicial review, that we discovered the existence of material suggesting that the Home Office had been aware (or at the very least strongly suspected) that the policy in question, the detention and deportation of EEA rough sleepers, was unlawful prior to the judgment of the High Court. We had requested the disclosure of this material on behalf of each of the Claimants but were denied it. Had the Government been forced to disclose this evidence, it is likely that much of the courts valuable time and resources would have been saved.

The law of standing

20. Anyone who is impacted by unlawful decisions by public bodies must be able to access justice. Alongside individual claimants, specialist organisations, charities, trade unions, campaign and grassroots groups must also be able to bring claims in the interests of those they represent/support. This is especially important where individuals are not able to bring the case themselves (either for personal, or more commonly financial reasons due to legal aid restrictions).

21. Creating a stricter test for standing in judicial review cases would significantly limit the amount of meritorious claims being brought to the court's attention. Indeed, any limitation on the current test would allow the Government to act

[3] R (Gureckis) v Secretary of State for the Home Department [2017] EWHC 3298 (Admin), 14 December 2017

with impunity. Such a prospect is particularly concerning when considering the pre-existing limitations on legal aid eligibility, which already prevents many individuals from being able to access justice (see para 27 onwards below).

Relief and Remedies

22. We are concerned that the Government is attempting to constrain the role of judges and the rule of law further by controlling or limiting the remedies that are currently at the courts' disposal. Our work shows that the types of judicial review cases are diverse and contain distinct issues for the courts to address. There must be a wide range of remedies available to Judges so that where a public body has acted unlawfully, the remedy is effective.

23. Any proposal which tilts the courts more towards using less effective forms of remedy will:

- Weaken the role of the court significantly at a time when public bodies are not only unwilling but also in many cases unable to fulfil their legal duties (see paragraph 13 above);

- Weaken the role of the courts by limiting remedies to more declaratory forms of relief (as opposed to mandatory or quashing orders);

- Have serious knock on effects for Claimants – who will be unsure as to whether there is any point in bringing a case; and therefore

- Fail to properly hold public bodies to account.

Rights of appeal, including on the issue of permission to bring JR proceedings

24. Oral renewal hearings are a vital part of the judicial process. As noted above, most of our cases end up being resolved early on due to the Defendant public body conceding pre-action. Where we have had to apply for permission, in many cases we have been refused permission on the papers. The reasoning behind those decisions have tended to be lacking in detail, failed to get to grasp

the true essence of the case, and/or were presided over by judges specialising in different areas of law. By way of example, a judge with expertise in banking law had to preside over one of our cases involving discrimination and the public-sector equality duty.[4] This is not to say that judges with varying specialisms are unable to grasp the issues raised in other areas. However, in this particular case (as in many other cases) it was clear that the judge's lacked a real understanding of the issues. He was unable to consider the Claimants case with sufficient time and in any real detail, and this had meant that a number of important factors were not properly taken into account when refusing permission.

25. Nearly all of our applications that were refused at the paper permission stage (including the case example raised immediately above) were then granted permission at an oral renewal hearing, once the court had an opportunity to hear oral arguments on complex issues, from both sides. These applications were then either successful at full hearing or settled prior to.[5]

26. It is clear that the renewal process is essential in ensuring access to justice. Without this process, many of our clients would have been left without their rights realised, and public bodies would have been able to continue to act with impunity.

Costs

27. The cost of litigation should not be so excessive so as to frustrate an individual's ability to bring a claim and have their rights realised.

28. There is a massive disparity in resources between an individual, NGO, grassroots or frontline organisation as compared with a local authority or central government department. Other than those who are eligible for legal aid, we have never come across anyone who can afford to pay for the litigation privately (sometimes hundreds of thousands of pounds). Legal aid eligibility rules are

[4] See - Mohinder Pal v London Borough of Ealing [2018] EWHC 2154 (Admin)
[5] Ibid, examples also include: Gunars Gureckis and others v Secretary of State for the Home Department [2017] EWHC 3298 (Admin), and OA v Secretary of State for Education [2020] EWHC 276 (Admin).

both strict and restrictive. Many Claimants find themselves just above the threshold for legal aid – despite being on very low incomes.[6] Where clients have clearly been treated unlawfully by the state, they find themselves unable to assert their rights due to the chilling effect of costs liability.

29. As this clearly creates massive hindrance to access to justice, the courts can use Cost Capping Orders (CCO's), placing a cap on the Claimant's liability for costs. CCO's are primarily available for public interest cases, and they must remain accessible for this purpose. CCO's help to prevent central and local government from acting with impunity – as if they are engaging in unlawful practices which are impacting a community or other cohort (sometimes hundreds or thousands of people), organisations have the potential to bring Judicial Review claims on behalf of the people they support (particularly, where those individuals do not meet the rigid legal aid eligibility requirements).

30. CCO's are no doubt important in helping to facilitate access to justice, but in our view do not go far enough and therefore do not mitigate against access to justice concerns. Notwithstanding the grant of a CCO, Claimants will still normally be exposed to some financial risks of litigation:

    - A CCO is only available in public interest cases and only if certain criteria, which are strict and narrowly defined[7], are met;

    - A CCO can only be awarded if permission is granted, but by this stage the Claimant is already at risk of exposure to costs. Costs are going to be incurred *before* a decision is given on permission, because even if the Claimant's lawyers are acting pro bono (which we always do in these cases), the Defendant won't be and will no doubt seek the costs associated with compiling their evidence in response to the claim, and drafting their summary grounds of defence; and

[6] https://www.lawsociety.org.uk/topics/research/legal-aid-means-test-report/
[7] R (We Love Hackney Limited) v London Borough of Hackney [2019] EWHC 1007 (Admin)

- Even if a CCO is granted, the Claimant organisation will not be protected from any adverse costs up to and including the permission stage and must also be willing to take financial risks moving forward; how much will depend entirely on what the court considers a reasonable cost cap. For many organisations that we have represented, even £5,000 (what the court considers to be a relatively low-cost cap), may deter them from continuing with the Claim (given that it requires all of its resources in order to provide vital services to the most vulnerable).

31. As a result, whilst organisations may be in possession of evidence demonstrating that a public body has treated a number of the individuals it supports unlawfully, and have 'standing', they are in many cases nevertheless deterred from / face barriers in bringing a claim, especially where their resources are scarce.

32. Crowdfunding in conjunction with a CCO can provide a way out of the morass. However, whilst this approach has been effective in a number of our cases, it will not be suitable or viable in many others:

    - Cases may not attract interest from the public and even where it does, the court may require / the Defendant may argue that the organisation should put forward a sum of money *in addition* to that raised through crowdfunding;

    - Organisations may therefore have to consider how much they are able to contribute to the litigation based on their reserves. Many organisations will be concerned about the prospect of paying a significant sum from its reserves, given their limited resources and the need to spend these on delivering their services / supporting those who need it most;

    - There is compassion fatigue. Increasingly it is difficult to raise the necessary finance from sectors of society that have also been badly affected by Government cuts; and

- In any event, the burden should not be placed on the ability of an individual or organisation to launch a fundraising campaign.

33. Organisations and individuals need certainty. Bringing a judicial review claim against a public body is a legally daunting prospect, notwithstanding the risk of adverse costs. We propose a cost capping / costs protection regime that starts at the point of filing the claim. Costs pre-permission should be capped to rates that are reasonable. If the case is granted permission, and the matter is heard at a full hearing then again, the Claimant needs to know what they can be expected to pay if their claim is unsuccessful. This should be codified and there should be clear rules that the court must follow. The Aarhus rules can provide a guide.[8]

34. Improvements should be made to the working of judicial review so that it functions more effectively, more fairly, and crucially to allow greater access. It is imperfect, but recommendations need to be geared towards ensuring that individuals and organisations are not deterred from bringing claims. Allowing greater access to legal aid, and, (where legal aid is not available) providing a level of certainty to the CCO regime with a clearer and more transparent system, will help to mitigate against any access to justice concerns.

Recommendations

Recommendation 1: Broaden the Scope of the Terms of Reference

- When carrying out the review, the panel ought to consider how judicial review links with alternative remedies as well as the law on human rights, discrimination and EU rights;

[8] The panel will be aware The UK is a signatory to the Aarhus Convention. As such the Court has a duty to set out a specific costs regime for such claims which involves environmental issues and law. The 'Aarhus rules' determine how much individuals and charities have to pay if they lose an environmental judicial review claim against a public body or developer. The costs regime (which was established up to 2017) set an automatic cap on costs liability. This limited the costs liability of an unsuccessful claimant to £5,000 (for individuals) or £10,000 (in all other cases – such as if a community or campaigning group brings the claim) and that of an unsuccessful defendant (the council or other public body) to £35,000 or £70,000.

- The panel must consider the impact that any reforms would have on the Rule of Law, the Separation of Powers and Parliamentary Sovereignty; and

- The panel must also take into account / recognise the constitutional consequences of codifying the grounds of judicial review, particularly in relation to the accountability of the executive to the common law.

Recommendation 2: Government Guidance and Local Authority Funding

If the Government is keen to cut down on the number of judicial review cases, rather than restricting access to justice and interfering with the rule of law, it should instead:

- Issue comprehensive guidance to local authorities where unlawful practices are rife - working with rather than against frontline and grassroots organisations, across areas of housing, homelessness, community care etc. and provide training on that guidance.

- Provide local authorities with the funding they so desperately need to enable them to comply with their legal obligations.

Recommendation 3: Access to Justice (CCO's and Legal Aid)

In order to ensure that organisations and individuals feel confident in bringing claims against state bodies and hold them to account, we are of the view that the Government should:

- Extend cost protection up to and including the permission stage for organisations and individuals who are seeking CCO's;

- Allow greater access to legal aid, and, (where legal aid is not available) providing a level of certainty to the CCO regime underpinned by a clearer, fairer and more transparent system; and

- Amend and expand the current legal aid eligibility rules, so that only individuals who can reasonably be expected to afford to pay for the litigation are excluded.

Recommendation 4: Composition of Judges

It is no secret that the judiciary needs to be more diverse. High Court judges are predominantly white, male, and upper class. The judiciary is seriously lacking in their experiences and perspectives which ought to mirror, at least to some extent, those whose claims they are considering.

In order for judicial review to function more effectively, and to instil public confidence in the justice system, we recommend:

- That Judges commit themselves to annual diversity training – such training to include time spent (a minimum of four days a year/one day per quarter) in a prison, detention centre, refuge, homeless hostel, law centre, or other frontline agency, so as to obtain an understanding of the issues that they rule on day in and day out.