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23 October 2020

By email

The Independent Review of Administrative Law
Ministry of Justice
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Our ref GLOBALREG/CRNB/9950441

For the attention of the Panel (iral@justice.gov.uk)

Dear Sir / Madam

THE INDEPENDENT REVIEW OF ADMINISTRATIVE LAW – OUR RESPONSE TO THE CALL FOR EVIDENCE

We write in response to the Independent Review of Administrative Law's call for evidence on how well or effectively judicial review balances the legitimate interest in citizens being able to challenge the lawfulness of executive action with the role of the executive in carrying on the business of government, both locally and centrally.

Hogan Lovells is a global law firm that provides a full range of legal services to businesses operating and investing in countries around the world, including the UK, as well as to sovereign states, government departments and regulators. We are recognised as a leading law firm in dispute resolution and administrative and public law. We have substantial experience over many years of acting for claimants, defendants and interested parties involved in high-profile and complex commercial judicial review cases, and of advising on administrative public law issues on both sides. We are therefore well-placed to provide insight into the importance of judicial review in a business and regulatory context and, in particular, how it enhances the UK's reputation as an attractive place to do business.

We have sought to limit our answers to the areas on which we feel we can most meaningfully contribute. For ease of reference, we address the questions in the order that they appear in the call for evidence.

1. **Question 1: Are there any comments you would like to make, in response to the questions asked in the questionnaire for government departments and other public bodies?**

1.1 Any future reform to judicial review must bear in mind the importance of maintaining the rule of law and, in particular, the important role that judicial review plays in giving businesses confidence that the rule of law is respected, upheld and enforced in the UK.

1.2 For our private sector clients, particularly businesses in highly-regulated industries, the impact of government intervention on the viability and attractiveness of operating in the UK, and their business model, is a legal risk that they must assess and manage.

1.3 The potential scope for government intervention in business activities in the UK is broad. For example, it includes when:

(a) a new government policy or new primary or secondary legislation changes the legal, tax, regulatory or policy environment in which a business must operate;

(b) a public body, such as a statutory regulator, makes a decision that directly impacts a business, for example the grant or refusal of a licence or the imposition of a fine for a breach of applicable regulatory obligations; and/or

(c) a business submits a tender in a public procurement exercise and/or contracts with government for the provision of a public service.

1.4 When faced with government intervention of any kind, businesses value predictability. In particular, they value the security of knowing that, in the UK, government action is subject to the law and that, as a result, businesses are not generally subject to the arbitrary and unlawful exercise of government power.

1.5 Judicial review – the primary means by which the English courts are able to ensure that the actions and decisions of the UK Government, and other bodies exercising public functions, comply with the law – is a vitally important mechanism by which businesses obtain the security they need that the rule of law is respected, upheld and enforceable in the UK. In particular, judicial review provides businesses with the confidence that all government action must have a proper legal basis, must be based on rational and relevant considerations and must be taken in a procedurally fair way, or, if it does not fulfil these requirements, that such action is liable to be challenged in the independent English courts.

1.6 In our experience as a global law firm, this security has a real and measurable impact on the investment decisions that businesses routinely make. For example, in 2014, we conducted a survey of 301 senior executives of multinational corporations[1] on the relationship between foreign direct investment, decision-making and the rule of law in collaboration with the Bingham Centre for the Rule of Law, the Economist Intelligence Unit and the British Institute of International and Comparative Law.[2] The focus of the study was on the degree to which multinational corporations weigh rule of law considerations when they decide where to invest.[3] Key findings from the study included that:

(a) the rule of law is among the top three considerations (together with "ease of doing business" and "stable political environment") when multinationals make foreign direct investment decisions, with 88% of respondents saying it is "essential" or "very important";

(b) for multinational investors, the three most important elements of the rule of law were integrity (i.e. the lack of corruption), political and social stability and transparency in rule-making in the host country; and

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1 Each a Forbes 2000 company with global annual revenues of at least USD1bn.

2 Available here: https://www.biicl.org/documents/625_d4_fdi_main_report.pdf?showdocument=1

3 Reports by recipients of significant incidents were not limited to a small number of States. The UK was ranked 21st out of 43 States in terms of the countries where most significant incident(s) were reported to have occurred by respondents; see page 30 of the report.

(c) 95% of respondents deemed national laws either "essential" or "very important" to protecting their rights, property and security. Of these, 66% said "essential" and 29 % said "very important".

1.7 In short, the importance of the rule of law to ensuring continued business confidence in the UK, and thus for the UK's future economic prosperity and international trade platform, cannot be understated. In business terms, in countries where the rule of law is not properly upheld and enforced, the legal risk of operating in the country increases, resulting in a higher cost of capital and a lower likelihood of investment. Ensuring the UK maintains its robust and world-leading judicial system and legal sector, including the continued availability of an effective means of judicial review of government and public sector decision-making, is central to this.

1.8 We do not address here each aspect of judicial review listed in question 1 of the questionnaire to government departments. However, we note that the Panel asks whether these specific aspects of judicial review "*seriously impede the proper or effective discharge*" of government functions. In our experience, the opposite can be true. The potential for a judicial review challenge can provide public bodies with a focused analytical framework through which to test the rationale for their decisions, the potential impact those decisions might have (intended or otherwise) and the procedure by which they are adopted (including when it is appropriate to seek representations from those who will be affected). As a result, many of our public sector clients value the insights and frameworks that the principles of judicial review provide because they help our clients make better and more robust decisions.

2. **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 In our view, judicial review procedure could be improved by strengthening the obligations of the putative parties to an action to engage more openly and constructively in pre-action correspondence, so as more often to avoid the need to proceed to formal judicial review proceedings, where possible. These new obligations could provide that claims should only be pursued once the parties can demonstrate that they have engaged sufficiently at the pre-action stage to identify and narrow the issues in dispute (e.g. by seeking to agree a list of agreed issues for the court to determine) and to determine whether the parties agree there is an arguable case. The time limits for bringing judicial review claims could be adjusted so time 'stops' once the parties engage in pre-action correspondence, thus reversing the incentive not to engage meaningfully in such correspondence under the current system, due to the shortness of time available to issue formal judicial review proceedings in most circumstances.

2.2 If both sides were to engage constructively in such a process, this would mean public bodies would not need to engage as much at the permission stage if formal proceedings were brought, as the Court's permission decision could be based on the pre-action correspondence alone. Public bodies could also be encouraged not to contest permission where there is clearly an arguable case.

2.3 Such changes to judicial review procedure would need to be coupled with (a) robust transparency and duty of candour obligations on the part of public bodies to ensure that the parties are able to engage each other openly at the pre-action stage in shared knowledge of the full facts of the dispute; and (b) clear rules as to the applicable time limits in terms of when a claimant must file formal proceedings in the event that such pre-action discussions do not result in a resolution to the dispute.

3. **Question 3: Is there a case for statutory intervention in the judicial review process? If so, would statute add certainty and clarity to judicial reviews? To what other ends could statute be used?**

3.1 See answer to question 2.

4. **Question 4: Is it clear what decisions/powers are subject to Judicial Review and which are not? Should certain decisions not be subject to judicial review? If so, which?**

4.1 The boundary of amenability to judicial review is an area of considerable complexity. However, this is necessarily the case, given the nature of the exercise being undertaken and the broad range of circumstances in which public and administrative law is potentially applicable.

4.2 Put simply, all bodies exercising functions of a public nature are potentially susceptible to a challenge by way of judicial review. To determine whether a particular act or decision is judicially reviewable, the courts will consider the nature of the act or decision being challenged, not merely the identity of the body in question. This is necessarily a fact-dependent exercise, requiring the courts to weigh a number of factors, such as the source of the power, the public importance and/or public character of the function being performed, and the existence of private law remedies.

4.3 In the face of this complexity and nuance, the case law has developed a set of legal principles and precedents to be applied to determine the question of amenability to judicial review, which in our view provide an effective framework by which these factors can be applied to the specific facts of the case at hand. The courts frequently apply these principles in a manner that disappoints claimants seeking an overly expansive interpretation of what amounts to a public function, for example see *R (on the application of the Liberal Democrats and the Scottish National Party) v ITV Broadcasting Limited* [2019] EWHC 3282 (Admin). In the words of Lord Justice Hoffman, as he then was, in *R v Disciplinary Committee of the Jockey Club, ex p. Aga Khan* [1993] 1 WLR 909: "*I do not think that one should try to patch up the remedies available against domestic bodies by pretending that they are organs of government*".

4.4 The Call for Evidence suggests a desire on the part of the Panel to explore the possibility of codification in this area. In our view, it is difficult to see how codification by statute could improve upon the current position. In fact, we believe codification in this area risks either (a) enacting a new statutory test for amenability that effectively amounts to the same weighing of factors currently conducted by the courts and therefore adds little in practice, or (b) oversimplifying and thus undermining the flexible and fact-sensitive approach currently adopted.

4.5 It may be instructive to illustrate why by reference to two examples where statute has sought to define the public authorities to be subject to comparable areas of law, namely s. 6 of the Human Rights Act 1998 (the "**HRA**") and s. 3 of the Freedom of Information Act 2000 ("**FOIA**").

(a) Section 6 HRA provides that "*it is unlawful for a public authority to act in a way which is incompatible with a Convention right*". In this context, public authority is defined as including "*… any person certain of whose functions are functions of a public nature*". "Functions of a public nature" is not defined. As such, the test set out in the HRA – although codified in statute – in practice requires the courts to conduct a similar fact-based analysis as is required in respect of the question of amenability to judicial review, in this case to determine whether the function being exercised is "*of a public nature*".

(b) Section 3 FOIA provides that a public authority for the purposes of FOIA means any person or holder of an office (a) listed in Schedule 1 to FOIA, (b) designated in an Order made under FOIA by the Secretary of State, or (c) a publicly-owned company, as defined by s. 6 FOIA. While defining the scope of FOIA by reference to the body concerned (and limiting its scope to those bodies that are publicly-owned) is arguably desirable in the context of FOIA (e.g. so as clearly to delineate the scope of the obligations imposed by that Act), it is in our view less desirable in the context of amenability to judicial review, for the reasons set out above.

4.6 As such, while we understand the desire to simplify the law in this area, we have concerns that an attempt to do so by way of codification in statute would either in practice add little to the analysis or could risk oversimplifying what is necessarily a nuanced and fact-sensitive exercise, which we consider currently strikes an appropriate balance in a developing area of law. A move to codify by statute thus risks leading to cruder outcomes in terms of the types of decisions that could be found to fall either 'side of the line' when judges come to apply the new statutory test.

5. **Question 5: Is the process of i) making a Judicial Review claim, ii) responding to a Judicial Review claim and/or iii) appealing a Judicial Review decision to the Court of Appeal/ Supreme Court clear?**

5.1 The process of making and responding to a judicial review claim is primarily set out in Part 54 of the Civil Procedure Rules ("**CPR**"). As such, it is not dissimilar to other causes of action that may be brought before the English courts. We consider the procedure to be well established and widely understood.

5.2 That is not to say that the process is beyond improvement, for example to streamline the efficient flow of cases through the Administrative Court, to update its technological systems and processes and/or to ensure that the Court is properly equipped to deal with particularly complex and technical cases. However, any legislative reform of the procedure should only be adopted after an appropriate period of consultation on the proposals and only to the extent that the reform will demonstrably enhance the ability of the courts to review the legality of the exercise of public power, if called upon to do so.

5.3 We of course note that, in certain circumstances, other forms of statutory appeals and/or statutory judicial review before a tribunal exist, which are conducted under different rules to judicial reviews brought solely under CPR Part 54.

6. **Question 6: Do you think the current Judicial Review procedure strikes the right balance between enabling time for a claimant to lodge a claim, and ensuring effective government and good administration without too many delays?**

6.1 There are presently two substantial hurdles within judicial review procedure designed to prevent and/or discourage unmeritorious and tardy claims for judicial review. These are the short period for bringing such claims and the permission stage.

6.2 The question suggests that these hurdles aim solely to strike a balance between the respective interests of claimants, to ready access to justice in the event of an abuse of government power, and defendants, to protection from unmeritorious claims that frustrate the lawful exercise of public functions. However, in our view, these interests are not opposing: there is a clear public interest in ensuring that the judicial review process is both efficient and an effective means of testing the lawfulness of public sector decisions.

6.3 For example, claimants with meritorious claims have a clear interest in their claims not being delayed unnecessarily by those with unmeritorious claims clogging up the courts. Similarly, good governance is not antithetical to effective legal scrutiny of decision-

making; public bodies in a modern democratic State should be concerned that they are exercising their powers in a manner that is lawful and should welcome the important constitutional role of the judiciary to supervise that the law is being upheld.

6.4 What is required is a procedure that reconciles these legitimate interests to the greatest possible extent. As such, any reform to the procedure must seek to strike this balance, rather than seeking to 'tip the balance' in favour of one party to judicial review or the other.

The short time period in which claims must be brought

6.5 The short time period in which claims must be brought – which is currently that claims for judicial review must be brought promptly and in any event not later than three months after the grounds to make the claim first arose (CPR 54.5(1)) – aims to balance:

(a) the need on the part of a prospective claimant in a judicial review to have sufficient time to prepare their claim so as to have effective access to justice; and

(b) the legitimate public interest that the lawfulness of public sector decision-making not be left open to challenge for an inordinate amount of time following the publication of a decision.

6.6 In our experience, preparing a judicial review claim within the three month period is often challenging, particularly where the claim is based on complex and technical factual evidence and/or legal argument. This is in part also due to the need in judicial review for the claimant to prepare and file the entirety of their claim (including their detailed grounds of challenge and any evidence on which they seek to rely) at the outset of proceedings, which is another aspect of judicial review procedure that keeps the length of proceedings to a minimum. In our view, any shortening of the time period in the sorts of cases that we have brought on behalf of our clients would present a disproportionate risk to access to justice for our clients, and could adversely affect the efficiency and effectiveness of subsequent stages of the judicial review process.

6.7 That said, we note that different (and shorter) time periods exist for other types of judicial review, such as in relation to planning or public procurement. Therefore, in our view, if time periods were to be shortened in certain circumstances, we would advocate for this to be done only where it can be shown that the shorter time period will not present a disproportionate risk to access to justice in respect of the specific type of case being pursued.

The permission stage

6.8 The permission of the court is currently required to proceed in a claim for judicial review. Permission is only granted to those cases that have an arguable case that justifies full investigation of the substantive merits. Permission is routinely decided on the papers, usually within one to two months of the claim being filed, with unsuccessful claimants having the opportunity to apply for a reconsideration of their application for permission at a hearing, unless the court decides on the papers that the claim is "totally without merit". Prior to the permission stage, the defendant is only required to file summary grounds of defence and the claimant has no means of recovering their costs unless they are ultimately successful at a full hearing.

6.9 In our experience, the permission stage can be a real and substantial bar to unmeritorious claims. The existence of the permission stage also means that defendants have the opportunity to strike out such claims without substantial engagement on the merits and at low cost. As such, we consider the permission stage to be an effective means of balancing the interests of both claimants and defendants in judicial review claims.

6.10 In terms of possible changes to the process, we would caution against raising the bar for claimants to meet at the permission stage. This is because this could in practice lead to the courts needing to engage more with the substantive merits of the case at this earlier stage, meaning that both claimants and defendants could be incentivised to expend greater expense and effort when contesting permission, leading to more cost and delay overall. In our experience, there may be scope in certain cases for defendants to engage more selectively at the permission stage so as to contest permission only where there is a genuine argument that the claimant has no arguable case.

7. **Question 7: Are the rules regarding costs in judicial reviews too lenient on unsuccessful parties or applied too leniently in the Courts?**

7.1 Not answered.

8. **Question 8: Are the costs of Judicial Review claims proportionate? If not, how would proportionality best be achieved? Should standing be a consideration for the panel? How are unmeritorious claims currently treated? Should they be treated differently?**

8.1 As a preliminary point in response to this question, it is not clear what is meant by "proportionality" in this context. Judicial review is an expensive undertaking that is beyond the means of many citizens, often with no prospect of obtaining compensation even in the event of a successful claim. Further, in our experience, the overall costs of judicial review are both higher and also more front-loaded for claimants than defendants, which itself acts as a disincentive for bringing unmeritorious (and sometimes even well-founded) claims.

8.2 In relation to the rules on standing in judicial review, these require that a party must have a "sufficient interest" in the matter to which the application relates. However, given that the subject matter of judicial review is the lawfulness (or otherwise) of the exercise of public power, it is understandable, in our view, that the courts have over time adopted an expansive interpretation of what amounts to a "sufficient interest", albeit one that is not entirely open-ended.

8.3 In our view, it would be a cause of concern if the courts' jurisdiction to review the lawfulness of government and public sector decisions were precluded on the narrow basis that no specific individual or group has a sufficiently delineated interest in the matter. It is in the interest of every citizen of the UK, including those who have been elected to public office, that the government and all other bodies exercising public functions do so according to the law. Unmeritorious claims for judicial review should fail on their merits.

9. **Question 9: 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?**

9.1 In our experience, the courts have adopted a flexible approach to remedies in judicial review. In the context where any remedy in a judicial review necessarily flows as a consequence of a judicial determination that a public body has acted unlawfully, the courts can order a notably wide range of potential outcomes. These range from an order quashing the original decision under challenge and requiring the decision-maker to retake the decision, to an order simply declaring that a government decision or action was unlawful, with no further legal consequences for the parties.

9.2 Remedies are at the discretion of the court, according to what fairness requires and what is appropriate in all the circumstances. Damages are not available, except where another established cause of action is available for which damages may be sought. The court

must also refuse to grant remedies where the unlawfulness identified would have made "no substantial difference" to the decision under challenge.

9.3 In light of the considerable flexibility presently available, we do not consider there to be inflexibility in the manner that remedies are awarded in judicial review.

10. **Question 10: What more can be done by the decision maker or the claimant to minimise the need to proceed with judicial review?**

10.1 Judicial review is a remedy of last resort and is treated as such by the courts, which require claimants to demonstrate that they have had recourse to all other adequate alternative remedies before resorting to judicial review.

10.2 Our private sector clients seek to avoid litigation wherever possible, including judicial review, but sometimes there is no acceptable alternative. Therefore, the matters on which we advise generally only result in a judicial review being brought where there are irreconcilable differences between the business and the public body, such as a regulator, whose decision is being challenged or where informal engagement has not achieved the desired outcome for our client.

10.3 As such, in our experience, the most effective means of avoiding judicial review in a commercial context is open and constructive engagement between the parties at an early stage, so that issues can be identified, isolated and discussed without the need for recourse to the courts. On the other hand, where a public body seeks to withhold information relevant to a dispute, such that meaningful discussion of the matter at issue between the parties cannot easily take place, this increases the risk that litigation becomes unavoidable.

10.4 In our experience, the duty of candour, which obliges public bodies voluntarily to assist the court with full and accurate explanations of all the facts relevant to the dispute, is an important means by which expensive and time consuming disclosure exercises are avoided in judicial review. Furthermore, public bodies that are transparent about their decision-making processes should not find the duty of candour in judicial review particularly onerous, as much of the relevant material relevant to the decision should already be publicly available.

10.5 If the duty of candour were to be removed or diluted, this would risk adding further complexity and expense to judicial reviews in circumstances where a public body were to withhold information relevant to a dispute, as the claimant would be forced to make applications to court to oblige the public body to provide such information. This is often the case in other forms of civil proceedings where the duty of candour does not apply to the parties.

11. **Question 11: Do you have any experience of settlement prior to trial? Do you have experience of settlement 'at the door of court'? If so, how often does this occur? If this happens often, why do you think this is so?**

11.1 In a commercial context, as explained above, the vast majority of potential judicial review claims do not reach court, because they are resolved informally by correspondence as a result of open and constructive engagement between the parties.

11.2 However, in circumstances where formal proceedings are initiated, settlement in judicial review proceedings often depends on the openness of the public body whose decision is under challenge to engage with the complaint against it and be willing to change course. This is because:

(a) judicial review, by its nature, is a means of determining the lawfulness of the decision of a public body, rather than a vehicle for the claimant to obtain compensation for any wrong suffered and, as such, settlement cannot be reached by way of a monetary payment;

(b) by the time a claimant has decided formally to commence a judicial review, they have usually made the calculation that the potential risk and cost of going through with the claim are worth incurring for the chance of obtaining a positive determination and, as such, claimants are generally unlikely to discontinue their claim unless or until the public body releases new information that changes the parties' respective positions and/or makes concessions; and

(c) in certain circumstances, the public body under challenge no longer has the legal capacity to reverse or re-take their decision (due to their having become *functus officio*), meaning that a judicial intervention or fresh process is required to unlock the dispute.

11.3 For this reason, in our experience, settlement occurs most often at the pre-action correspondence stage, at which point the outline of the respective legal positions of the parties becomes known. As explained above, the duty of candour also assists with settlement, as it ensures that the public body discloses its full position upfront, without the need for the court to intervene.

12. **Question 12: Do you think that there should be more of a role for Alternative Dispute Resolution (ADR) in Judicial Review proceedings? If so, what type of ADR would be best to be used?**

12.1 The CPRs already require the parties to consider whether ADR is appropriate as part of the Pre-Action Correspondence phase, and the Court takes this into account when considering costs. In our experience, however, the courts rarely ask parties to justify the fact that there was no ADR. This is most likely due to many judicial review proceedings not being capable of being easily resolved by common means of ADR, such as arbitration or mediation, usually because the decision under question impacts parties other than the claimant or because the issue is one of vires/lawfulness of the decision. It is also usually difficult for the parties meaningfully to pursue ADR in the context of a prospective judicial review, given the tight limitation periods for judicial review.

12.2 However, it is possible to envisage that ADR could be useful in the limited circumstances where the challenge is to the exercise of a discretionary power in an individual case, with limited broader application, although we note that many of these types of decisions have pre-existing statutory appeal procedures and so rarely result in judicial review claims.

13. **Question 13: Do you have experience of litigation where issues of standing have arisen? If so, do you think the rules of public interest standing are treated too leniently by the courts?**

13.1 See our response to question 8.

Yours faithfully

Hogan Lovells International LLP