RESPONSE ON BEHALF OF HLPA TO THE CALL FOR EVIDENCE BY THE INDEPENDENT REVIEW OF ADMINISTRATIVE LAW

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1. The Housing Law Practitioners' Association ('HLPA')[1] was set up to provide a forum for practitioners working in the housing field to share knowledge and information. Membership is open to all those who work in the field of housing law, for the benefit of the homeless, tenants and other occupiers of housing. Its current members include solicitors, barristers, advice workers, independent environmental health officers and other housing specialists.

2. On 31 July 2020 the government launched an independent panel to examine "if there is a need to reform the judicial review process". The review is chaired by Lord Edward Faulks QC and is considering:

    - *Whether the terms of Judicial Review should be written into law.*
    - *Whether certain executive decisions should be decided on by judges.*
    - *Which grounds and remedies should be available in claims brought against the government.*
    - *Any further procedural reforms to Judicial Review, such as timings and the appeal process.*

3. The terms of reference are extensive in scope and the review will examine a range of data and evidence, including relevant caselaw, on the development of judicial review and will consider whether reform is justified. This response is intended to feed into that exercise and, in particular, will address the importance of judicial view and other administrative law in the housing context. In our response, we have had regard to the responses received to HLPA's survey (partly about judicial review) conducted in October 2020. We have had the benefit of reading ALBA's response of 19 October 2020 and we endorse their response in its entirety.

PART I: Judicial review and the political framework

4. The Lord Chancellor, Robert Buckland QC MP, said: *"Judicial review will always be an essential part of our democratic constitution – protecting citizens from an overbearing state. This review will ensure this precious check on government power is*

[1] http://www.hlpa.org.uk

maintained, while making sure the process is not abused or used to conduct politics by another means".[2] In its press release launching the review, the government said that "*the work forms part of the Lord Chancellor's duty to defend our world-class and independent courts and judiciary that lie at the heart of British justice and the rule of law*".[3]

5. As Lord Steyn famously said "in law context is everything"[4]. Thus, to properly understand why the government has identified judicial review as being potentially "politics by another means", the appropriate context must necessarily be the broad political backdrop from the summer of 2016 to date. In particular, there have been a number of legal and political events that have led many to query the driving force behind this review:

    - *R (on the application of Miller and another v Secretary of State for Exiting the European Union*[5] ("*Miller I*"): Parliament, not the government, had to decide when to trigger Article 50. The use of the Royal Prerogative without asking MPs to approve Article 50 was unconstitutional.
    - *R (on the application of Miller) v The Prime Minister*[6] ("*Miller II*"): PM Boris Johnson's decision to prorogue Parliament for five weeks was unlawful. Lord Pannick QC argued the "exceptional length of the prorogation was "strong evidence" that the prime minister's motive was to "silence Parliament", which he saw as an obstacle to his political aims. Ms Miller publicly accused the government of side stepping their "duty of candour".[7]
    - Human Rights Act 1998: The government is to commission a review of the HRA.[8]
    - United Kingdom Internal Market Bill[9]: Clause 47 gives powers to the Secretary of State which are said to *"have effect notwithstanding any relevant*

[2] https://www.gov.uk/government/news/government-launches-independent-panel-to-look-at-judicial-review
[3] https://questions-statements.parliament.uk/written-statements/detail/2020-09-01/HCWS427
[4] *R v Secretary of State for the Home Department, ex parte Daly* [2001] UKHL 26, [2001] 2 AC 532, per Lord Steyn at [28].
[5] [2017] UKSC 5, [2018] AC 61
[6] [2019] UKSC 41, [2020] AC 373
[7] https://www.standard.co.uk/news/the1000/gina-miller-after-her-latest-legal-victory-over-the-government-in-the-supreme-court-i-pay-a-huge-a4246251.html
[8] https://www.lawgazette.co.uk/news/government-to-review-human-rights-act/5105899.article
[9] https://publications.parliament.uk/pa/bills/lbill/58-01/135/5801135.pdf

international or domestic law with which they may be incompatible or inconsistent". The Lord Chancellor stated that the fundamental right to judicial review is not ousted by the Bill, but the House of Lords Select Committee on the Constitution (of which Lord Faulks is a member) concluded that it was not persuaded by the Lord Chancellor's construction of clause 47.[10]

- The government's apparent mistrust of lawyers, echoed by its rhetoric: the government has accused lawyers who act for clients in claims against public bodies of being "do gooders" and "activist lawyers", sending shock waves through the entire legal profession.[11]
- The confidence (or lack of) in senior the government legal advisors: The Attorney General, Suella Braverman QC, was asked during the annual general meeting of the Bar Council in October 2020, with reference to the Internal Market Bill, how Britain could retain "a shred of credibility" in imploring other countries to follow international law after its own willingness to breach it.[12]

6. Despite the government's expression of concern about judicial review, the number of judicial claims brought is, in fact, falling. 2019 saw the lowest number of claims issued since 2000 and, of all the claims that had reached the permission stage, only 20% of them were granted permission to proceed to a full hearing.[13]

7. Against this backdrop and the reducing number of claims, it is apparent that the government, in calling for this review, is looking at mechanisms that will increasingly shield public authorities from the sort of legal scrutiny that the current judicial review process provides. Leaving aside whether the government's intentions do, in fact,

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[10] https://committees.parliament.uk/publications/3025/documents/28707/default/. Further, Lord Pannick, in response to answers by the Lord Chancellor, stated "I cannot see that you can claim credit for not excluding judicial review, while, at the same time, clause 47 immunises any regulations from any review by reference to any principle of domestic law. That's my difficulty."

[11] https://www.conservatives.com/news/home-secretary-priti-patel-fixing-our-broken-asylum-system. Priti Patel's speech included a reference to "…those who are well-rehearsed in how to play and profit from the broken system will lecture us on their grand theories about human rights".

[12] https://www.theguardian.com/politics/2020/sep/12/top-lawyers-slam-suella-braverman-for-wrecking-uks-reputation. The Attorney General was asked what had changed since former justice minister Lord Faulks QC stated in 2015 that ministers would not breach international law. She said his statement reflected "government policy at the time".

[13] A guide to reading the Official Statistics on judicial review in the Administrative Court', October 2020, Lewis Marsons, Professor Sunkin and Dr Joe Tomlinson.

represent a real threat to our constitutional order or an attack on the checks and balances necessary to preserve the rule of law, what is equally important is the perception that this review, taken together with the steps identified above, is an attack on the rule of law, engineered by a government that is seeking to curtail the breath of potential challenges to its exercise of power. Looking at the entire context, it is not unreasonable to conclude that we are witnessing the first signs of political interference with our independent judicial system; this will act as a warning sign to those countries and individuals that would otherwise regard our legal system as consisting of "world class independent courts".

8. We raise the foregoing not because we seek to politicise our response but in order to illustrate the depth of feeling about the potential dangers posed by (i) the government's actual intentions and (ii) the widespread perception of those intentions. We urge the Panel to not lose sight of these when considering what recommendations (if any) it may make - whether it be codifying judicial review, restricting the grounds upon which a claim can be brought, or limiting the standing of those who can bring it.

PART II: Public law in housing

9. At the core of judicial review is the consideration of whether or not an error of law or unfairness has been committed by a public authority, in a wide range of statutory contexts. In the field of housing, this includes statutory homelessness appeals (s204 of the Housing Act 1996), decisions relating to interim accommodation in homelessness cases and in some instances public law defences to possession proceedings in the County Court. The circumstances in which housing based judicial review claims are brought in the High Court are limited and, in practice, are largely confined to urgent applications for relief (Part 7 s188 of the Housing Act 1996) , housing allocation decisions (Part 6 of the Housing Act 1996) and decisions taken in respect of the provisions of accommodation for those that fall outside of the Housing Acts.

10. In respect of the statistical information that exists for housing judicial review, it does not appear that it is divided into different types of housing cases.

PART III: Underlying assumptions of this review

11. There appear to be two key assumptions built into the questions posed by this review: (i) that there is, all other things being equal, "good governance" and (ii) judicial review impedes that good governance.

12. The first of these, the assumption of good governance, fails to take account of the quality and perhaps relatedly the quantity of decision making and the legislation passed in recent years. The second is plainly wrong. The positive impact of judicial review and its importance in securing good governance, in the context of housing law, will be explored further in this response.

PART IV: Good governance

13. It is thought that one of the government's concern about judicial review is the growth in its use over the last forty years. The reasons for the expansion since that time are difficult to identify with any precision, but it is generally accepted that the bulk of the increase since the 1980s can be largely attributed to immigration related claims.

14. What is clear, however, is that a review that considers the 'balancing of the rights of citizens to challenge executive decisions and the need for effective and efficient government' is incomplete if it fails simultaneously to review the quantity of legislation being passed by Parliament and the quality of government decision making over the same period. The review fails to ask *"Are there problems with how executive policy, rules and decisions are being made?"* or *"What is the quality of debate which underpins the ever constant flow of laws and regulations being enacted"?* The making of laws and regulations at speed (most recently illustrated by both the pandemic and Brexit) is displacing debate from Parliament and into the Courts. Legislation is being pushed through at breakneck speed with inadequate debate or discussion. With this in mind, the judicial review process plays a critical role in ensuring that governmental decision making is scrutinised appropriately. Of course, good law making, properly scrutinised by Parliament, is itself a natural inhibiter of the need for judicial review.

15. Judicial review also plays an essential role in providing protection to individual rights in areas where Parliament has failed to make any provisions. In recent times this is largely as a consequence of the Human Rights Act 1998, which is now a fully embedded tool of judicial review.[14]

16. Further, the rate at which Parliament has been producing primary and secondary legislation has been increasing year on year. This growth in legislation is in many respects a reflection of a developing and increasing complex society, and the attendant need for the state to protect and provide for its citizens. Governments have legislated to redefine and restructure the relationship between citizen and state corresponding to their own political stance.

17. It is therefore inevitable that with this growth of law, will come a corresponding increase in areas of dispute between the state and its citizens which require adjudication by the Courts. That is not a criticism of Parliament or the government – it is merely a reality.

18. We have seen this growth across all aspects of housing law: The Housing (Homeless Persons) Act 1977 for instance was the first true piece of homelessness legislation and was later incorporated into the Housing Act 1985 - it gave legal definitions of homelessness and priority need and, with it, the avenue to challenge local authority decisions by way of judicial review.

19. Similarly, societal and governmental attitudes towards equality that existed in the 60s, 70s and 80s were challenged following the death of Stephen Lawrence and the McPherson report. The report recognised that the state had an important role to play in shifting the onus from individuals to organisations, placing for the first time an obligation on public authorities to positively promote equality not merely to avoid discrimination. Years later, in the housing context, the public sector equality duty (s.149 Equality Act 2010) gave tenants the right to challenge local authority decisions

[14] See *Al Ameri v Royal Borough of Kensington and Chelsea* [2004] UKHL 4, [2004] 2 AC 159, and the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 amendment to s.199 Housing Act 1996.

that failed to keep to their statutory obligations; often by way of a public law challenge raised in a defence to possession proceedings in the County Court.

Effective alternative remedies

20. Claimants must exhaust all effective alternative remedies before bringing a claim for judicial review. However, if the relief being sought is only available in judicial review, then a claim can be brought. This is a fundamental principle, which acts as a powerful restraint on unnecessary use of judicial review.[15]

21. In many instances where claims are brought without first having pursued alternative remedies, it is not the wilful refusal of claimants to use these routes, but the failure of such alternative options to properly hold public bodies to account and to provide effective remedies. In our survey of our members, of those that used a complaints procedure before commencing judicial review proceedings, 82.6% said that those routes were not an effective or timely option, and 0% found ADR to be an effective or timely option. This is not particularly surprising as complaint systems are designed primarily to investigate disputes of fact linked to finding of maladministration and not legal errors.

22. Furthermore, it does not assist claimants or defendants if disputes are pushed towards other forms of resolution without the ultimate option of judicial review. Judicial review is litigation setting with all the advantages of 'binding precedent'. Decisions by individual High Court judges are binding on courts inferior in the hierarchy. A single judicial review can settle a point for thousands of other potential disputes because it sets a precedent.

23. Lastly, to remove judicial review 'in exchange' for 'something else', without the same remedies and judicial scrutiny, would be to remove any proper opportunity to give effect to the will of Parliament – only judges are equipped to do this under our

[15] See *Anufrijeva v Southwark LBC* [2003] EWCA Civ 1406, [2004] QB 1124.

constitutional order. As the results of our survey clearly show, no consumer type dispute resolution can be utilised, or is as effective, in the same way.

PART V: Judicial review does not impede good governance, it promotes it.

24. HLPA's response to the terms of reference are addressed below. In summary, while it appears to be universally considered that the basis of this review is opaque and difficult to understand, what we believe to be (and what is at any rate widely perceived to be) the review's objectives are to limit access to judicial review. This will undoubtedly impact adversely on our members' clients.

25. While judicial review in housing is used modestly compared to other areas of law, when it is used, it provides an absolute life-line for vulnerable claimants who have no other satisfactory alternative remedy.

The amenability of public law decisions to judicial review by the courts and the grounds of public law illegality should be not codified by statute.

26. There is nothing necessarily exceptional about codifying the common law. However, the prospect of codifying amenability of judicial review and the grounds upon which it a claim is brought is, constitutionally, an enormous task that requires a much more in depth, long term, process than this review. It is, however, worth noting that the Law Commission have long held the view that it should not consider the substantive law of judicial review, but rather that it should be left to judicial development.[16]

27. As set out in ALBA's response, *"in order to achieve the aim and to ensure that Parliament is fully approaches of both the significance and the consequences of any reforms the Government may propose, the Review would require (a) adequate time; (b) clarity in its scope and aims and (c) independence from government"*.[17] HLPA is of the view that this review lacks these features.

[16] Law Commission, Remedies in Administrative Law (Working Paper 40 1971).
[17] Para 25 of ALBA's Response to the IRAL, October 2020.

28. Furthermore, in raising the desirability of codification, the notes to the terms of reference cite the need to increase public confidence and trust in the judicial review process. Public confidence is a complex issue that cannot be determined simply within the confines of a review - separated from the political setting identified above and the rhetoric of our politicians. Broadly, restricting access to judicial review (in whatever way) is also likely to undermine rather than further public confidence. The Worboys case[18] is a helpful illustration of this, whereby two of Mr Worboy's victims were able successfully to judicially review a Parole Board decision.[19]

29. In the housing context, our clients see the option of judicial review and public law defences as their last resort – where the law has left them with no other remedy. Removing or restricting their ability to bring such claims (that are already limited) will, itself, undermine their confidence and trust in the judicial process. It will also, as a direct consequence, further erode confidence in political and democratic processes.

The legal principle of non-justiciability do not require clarification.

30. There are no areas of housing policy or administration that are regarded as categorically 'non-justiciable'. However, in the housing context, the courts exercise significant restraint when dealing with matters of public policy and/or allocation of finite public resources, with due deference being given to the democratically elected decision-maker.

31. In modern law, it is recognised that an executive act may be impugned either because the decision-maker acted in excess of their statutory powers or because their act, although authorised by statute, was made in breach of a rule of public law. Both species of error render an executive act *ultra vires*. This principle was established in *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147 and the theoretical and practical

[18] [2018] EWHC 694 (Admin), [2019] QB 285

[19] The High Court overturned the Parole Board's decision to release Mr Worboys and ordered it to carry out a fresh determination with a freshly constituted board. The judgment also supported a challenge against rule 25 of Parole Board proceedings, which prevents any reasons being given for decisions made by the board. Sir Brian Leveson said: *"There are no obvious reasons why the open justice principle should not apply to the Parole Board in the context of providing information on matters of public concern".*

implications of this continue to be explored, in recent cases such as *DN (Rwanda)*[20], *Miller II*, *Guled*[21], and *Privacy International*.[22]

32. Accordingly, it is a striking feature of these terms of reference that they are not only asking the panel to address the complex questions of public and constitutional law, but also questions that have been and are continuing to be, decided and developed by the House of Lords and, more recently, the Supreme Court.

33. What this review effectively does, therefore, is to ask a group of panel members, appointed by the government, to consider whether the judgments of the Supreme Court, some where the government was itself a defendant, were the 'right' decision. The danger of curtailing the independence of the judiciary is clear. It is HLPA's view that if the government consider that the recent decisions have not 'struck the right balance', it must go to Parliament to have that debate, rather than seek to curtail the scope of judicial review as a means of seeking to reverse Court decisions that it does not like.

The exercise of public law power should be justiciable.

34. The Courts are not routinely impeding the decision making functions of local and central government and HLPA does not consider that there is a case to review or narrow the grounds upon which judicial reviews can be brought, regardless of the area of law, but in particularly in housing.

35. The judicial review process (the time strict time limits, pre-action protocol and permissions stage) and grounds operate in such a way that unmeritorious cases are filtered out before reaching a final hearing. Those that do succeed at the permission stage and reach a final hearing are subject to thorough scrutiny by the courts. Cases that

[20] *R (on the application of DN (Rwanda) v Secretary of State for the Home Department* [2020] UKSC 7, [2020] AC 698.
[21] *R (On the Application of Guled) v The Secretary of State for the Home Department* [2019] EWCA Civ 92, [2019] Imm AR 917
[22] *R (on the application of Privacy International) v Investigatory Powers Tribunal & Ors* [2019] UKSC 22, [2019] 2 WLR 1219

are funded by Legal Aid are subject to further obstacles by reference to the continuing merits 'test'. By contrast defendants do not have such a formal additional restriction.

36. There are on average 2,000 non-immigration civil judicial reviews issued per year - of these, only a fraction are housing cases. In 2019, 18 cases were issued against the Department for Communities and Local Government and 586 against Local Authorities.[23]

37. HLPA also notes that at every stage of the judicial review process, cases are settled or discontinued for various reasons before reaching a final hearing. Accordingly, only a very small majority of cases issued actually make it to a final hearing (around 3%).

38. In respect of settlement, the majority of claims brought are settled at an early stage, with the vast majority of those being settled in favour of the Claimant.[24] Although the rate of settlement differs between different areas of law, it is estimated that more than half of all homelessness cases issued before the Administrative Court are settled at some stage of the litigation.[25]

39. Further, although not easy to quantify, it is thought that a significant number of cases (possibly 60%) are settled prior to formal commencement of proceedings and in the housing context, this may be higher.[26] A significant number of these settlements appear to favour the claimant[27] and our own survey of our members supports this - revealing that a significant number of cases settle after sending a Letter Before Claim but before issuing a claim.

40. Of those cases that are settled or that have 'dropped out', the claimant's prospects are good. There are some differences in the empirical and statistical data with some placing

[23] 'A guide to reading the Official Statistics on judicial review in the Administrative Court', October 2020, Lewis Marsons, Professor Sunkin and Dr Joe Tomlinson, p.7
[24] *Ibid*, p.5.
[25] PLP note of the empirical evidence relating to the operation of judicial review, p.4.
[26] Varda Bondy and Maurice Sunkin, The Dynamics of Judicial Review Litigation: the resolution of public law Challenges before final hearing (Public Law Project 2009).
[27] *Ibid*.

the defendant's success rate at 44% whilst others place the success rate slightly higher.[28] This is largely because outcomes differ depending on the identity of the defendant.

41. This represents clear evidence that judicial review in its current form acts as an essential check on public bodies' decision making and exercise of power. If the decision making were lawful one would expect to see many more cases litigated to a final hearing, rather than being settled in the Claimant's favour when it becomes clear (usually upon receipt of legal advice) that defending the claim is untenable.

42. As all housing lawyers know, all too often the mere threat of judicial review is all it takes for a local authority to comply with settled law, for example in relation to the statutory duty to provide interim accommodation pending a decision on a homeless application, or suitable accommodation once a full housing duty is accepted. In practice, housing practitioners are called upon, often outside of working hours, to assist families and vulnerable people to secure urgent accommodation for that evening. The 'success' in obtaining accommodation at this early stage is high – often resulting in interim orders being made or in the underlying issue being resolved. This high success rate is largely the result of cogent legal reasons presented either in the Pre-Action Protocol Letter or at the interim hearing stage, allowing local authorities to reflect on the lawfulness and/or rationality of their decisions.

43. The judicial review case load of our members are, therefore, in many respects a million miles away from *Miller II* and the prorogation of parliament. Nevertheless, the application of public law principles are just as vital in the housing context. HLPA is concerned that the everyday utility of judicial review for vulnerable claimants, who do not have high profile cases, may be overlooked in this review, which appears to have been prompted by highly publicised defeats for the Government in cases of significant constitutional importance.

[28] The figures for judicial review claims issued at the Administrative Court in 2018 and 2019 show that of the cases that make it to a final hearing, the Defendant is more likely to win. See 'A guide to reading the Official Statistics on judicial review in the Administrative Court', October 2020, Lewis Marsons, Professor Sunkin and Dr Joe Tomlinson, p.5.

In the housing context the Courts have been slow to intervene but, when they have, judicial review has assisted all parties: 'the utility of judicial review' .

44. In housing law Courts have generally been slow to interfere with decisions taken by local authorities. However, when they have, it has been of considerable use to both Defendants and Claimants and has helped to clarify the will of Parliament rather than subverting it.

45. The courts are acutely aware of the demands and pressures on local authorities, where housing stock and finances are limited: In *R (Ahmad) v Newham LBC*[29] the House of Lords said that it is "*……inapt ….. for the courts to interfere with housing allocation schemes, save in clear and exceptional circumstances. ... Knowledge of the circumstances of applicants generally, long term strategy considerations, expertise, political and social awareness, and local knowledge all have a part to play when it comes to formulating and implementing a housing allocation scheme. With information essentially consisting of the Scheme itself, the circumstances of the particular applicant and a few statistics (of questionable mutual consistency), the court should be very slow indeed to second guess Newham*" [62].[30]

46. The HRA has been an important development in public law. In context of a local authority's power to provide accommodation outside of the confines of their statutory duties (housing acts), there is little primary legislation. The HRA has been used to determine how and/when their powers should be exercised. They include circumstances where our members clients are cold, tired, and hungry, display varying degrees of desperation and humiliation as well as mental and physical illnesses, and accommodation is necessary because they are otherwise destitute.[31]

[29] *R (on the application of Ahmad) v London Borough of Newham* [2009] UKHL 14, [2009] 3 All ER 755
[30] See *R (on the application of Idolo) v London Borough of Bromley* (2020) EWHC 860 (Admin) in which the High Court refused damages on the human rights act claim stating that "*… The council says that what went wrong was that it does not have enough housing resources to meet the needs of even its top priority tenants any faster*" [69] and that overall, while it was *"utterly regrettable"* [65] that the claimant should have been stuck in the situation he was for such a length of time, the delays were not unlawful.
[31] *R (Adam, Limbuela and Tesema) v Secretary of State for the Home Department* [2005] UKHL 66, [2005] 3 WLR 1014

47. In respect of possession proceedings in the County Court, however, the Human Rights Act 1998 does not feature in the same way that it has done in other areas of law. The Supreme Court made it clear that only in "very highly exceptional cases" will it be appropriate for the court to engage with a proportionality argument in an Article 8 case. The Supreme Court held in *Powell* held that "where … the local authority is entitled to possession as a matter of domestic law, there will be a very strong case for saying that making an order for possession would be proportionate."[32]

48. However, on the rare occasions that the courts do conduct proportionality assessments in housing law, they will do so cautiously, according significant weight to the views of the primary decision-maker. In *R(C) v London Borough of Islington*[33], which concerned a challenge under Article 8 read with Article 14 ECHR, to a local authority's housing allocation scheme, the Court held: "*.... it is a matter for the court to determine the question of proportionality… albeit, as the policy also concerns the allocation of finite resources, namely social housing, by a body that not only has considerable expertise and experience in these matters, but has been entrusted with this task by Parliament, significant weight should be accorded to the defendant's decision*" [81].

49. Furthermore, judicial review is also an essential process that enables local authorities to resolve issues with other local authorities (such as local connection in homelessness cases, social care provisions etc.[34] This illustrates, very effectively, that judicial review is a process which helps clarify the intentions of parliament for public authorities and not just solely for the benefit of individuals, important as that is.

The reality of existing restrictions on judicial review for our members' clients.

50. The procedure and grounds for judicial review are well known and will not be repeated here. Save for urgent applications, the procedure is relatively lengthy, with numerous obstacles, and the grounds are limited.

[32] *London Borough of Hounslow v Powell* [2011] UKSC 8, [2011] 2 AC 186.
[33] *R(C) v London Borough of Islington* [2017] EWHC 1288 (Admin)
[34] *Buckinghamshire County Council v Royal Borough of Kingston upon Thames* [2011] EWCA Civ 457, [2011] Fam Law 814

51. Beyond that there are further obstacles for many of our members' vulnerable clients that restrict access to judicial review though they do not receive the attention that they should. Restricting judicial review further (whether by way of restricting the grounds or reducing the time limits etc) for this group of people will have a disproportionate impact on them than on many other sorts of potential judicial review claimants.

(i) Over 75% of judicial review cases are brought by individuals rather than organisations.[35] Most of those individuals who bring claims in the housing context are vulnerable, often homeless, victims of domestic violence or suffering from mental health problems. Some may need the involvement of the Official Solicitor or a litigation friend, which delays the process of obtaining instructions and bringing the claim to court.

(ii) There are huge parts of the country without housing law providers, resulting in no legal advice at all.[36] Decisions in those local authorities will inevitably go unchallenged, however bad they are. In *Al Ahmed v London Borough of Tower Hamlets*[37], Sir Stephen Richards giving the judgment of the Court said, referring to evidence from Shelter, that "*many housing cases were taken out of the scope of legal aid, and the resulting shrinkage in the number of providers means that there are now areas of the country where it is almost impossible to get face to face legal advice in housing law—there are housing advice deserts throughout the country. Even those who are still entitled to legal aid will often not be able to find someone to provide the service they need. Those housing advice providers that are still left are facing increased demand and often do not have the capacity to assist everyone who approaches them for help*" [21]. He concluded that the evidence presented a "*bleak picture*" [34].

(iii) In housing law, judicial review claims are almost always brought by claimants who are publicly funded and, accordingly, such cases are contingent upon a

[35] 'A guide to reading the Official Statistics on judicial review in the Administrative Court', October 2020, Lewis Marsons, Professor Sunkin and Dr Joe Tomlinson, p.6.
[36] https://www.lawsociety.org.uk/en/campaigns/legal-aid-deserts
[37] *Al Ahmed v London Borough of Tower Hamlets* [2020] EWCA Civ 51, [2020] WLR 1546

crossing a series of thresholds imposed by the Legal Aid Agency – constraints which do not exist for example in the planning context.

(iv) Further, legally aided housing lawyers will only be guaranteed payment if they are granted permission to bring a claim: payment for cases that settle before this is at the discretion of the Legal Aid Agency. In the light of the statistics regarding the success rate at the permission stage set out above, the financial risk and thus disincentives to lodge a claim are large.[38]

(v) Accordingly, costs protection must not be removed – to do so would effectively remove the judicial review remedy from people simply because they are poor.

52. In the light of the aforementioned, HLPA urges the Panel to consider the harsh limitations that already exist, limiting access to the Courts for those that should be otherwise be able to access them. In this regard, there is a sound and strong case that such funding restrictions should be removed, providing proper funding for our clients through the legal aid regime. We urge the Panel to make that recommendation in order to promote a 'proper balance' between individual rights and effective government.

***Wandsworth London Borough Council v Winder* [1985] AC 461**

53. In the last ten years, there have been significant statutory changes to the relationship between tenants and their social landlords, such as the introduction of non-secure and flexible tenancies[39] and to the succession rules.[40] Tenants are now more likely to have less security of tenure and fewer statutory defences to possession proceedings than previously. It is, therefore, no surprise that *Winder*, decided 35 years ago, has regained its significance in the last ten years, giving occupants a basis and avenue to challenge a decision that renders them, quite literally, defenceless. Tenants of social housing have been stripped of statutory protection of s.85 Housing Act 1985 and s.9 Housing Act

[38] The panel should be aware that the courts do not automatically extend time limits where delays in the grant of legal aid are responsible for the delay (see, in another context, *R (on the application of Kigen) v Secretary of State for the Home Department* [2015] EWCA Civ 1286, [2016] 1 WLR 723).
[39] Changes made to the Housing Act 1985 by the Localism Act 2011.
[40] Housing Act 1985, amended by the Localism Act 2011

1988 and decisions to bring possession claims against tenants in these circumstances, depriving someone of their home, should be an option of last resort for any local authority. Public law defences have provided a 'safety net' where the decisions of public authorities to utilise this often draconian option are potentially unlawful. It is very clear to us that Parliament passed such primary legislation (removing security of tenure) because public law defences remained available as a remedy - affording claimants protection against unlawful decisions. Accordingly, in advising on such public law defences, lawyers are not being 'activists'. Rather, they are 'reacting' to the changing legal framework, just as a functioning democracy requires them to do.

54. In the light of this, removing the right to raise a public law defence in the County Court will not remove the need to challenge local authority decisions. If our clients are unable to raise a defence in the County Court on public law principles, they would instead be required to adjourn possession proceedings whilst a challenge is brought in the High Court. There would be financial and practical implications to this and would serve only to increase the numbers of judicial reviews, not reduce them.

55. Lastly, the panel should be aware that, in pursuing public law defences in the County Court, claimants are not only subject to the same constraints set out above but are further constrained by the restrictions imposed by CPR 55. Any defence to possession proceedings can only be brought if they are 'genuinely disputed on grounds that appear to be substantial'. Such public law defences are not, therefore, brought by defendants or considered by the courts lightly.

The duty of candour is an essential part of judicial review.

56. The rationale of judicial review is to ensure lawful, fair and just public administration. The public authority's objective should not be to win the case at all costs but to assist the court in ensuring that the decision taken, and the reasons for that decision, are lawful and fair. The process should be collaborative.

57. It is unclear, therefore, why the government is concerned about the current scope of the duty of candour, and why it appears to be suggesting that the scope of this critically important duty be narrowed. Open and transparent decision making is a facet of a democratic society.

58. In fact, the duty of candour and the attendant disclosure obligations (which are rarely onerous) serve to improve the quality of decision making which surely the government and claimants have a shared interest in.

59. It is worth outlining what may be lost. In a recent homelessness statutory review and appeal conducted and settled by HLPA's Co-chair, the local authority was forced, by their duty of candour, to disclose information relating to the claimant's housing application. It was only in the course of this exercise did it transpire that his housing application data had been lost. That was information that was, itself important for the claimant to know, but was also essential in determining the lawfulness of the decision made by the defendant. This is a case that was settled before a final hearing.

60. HLPA endorses the submissions at paragraph 93- 95 of the ALBA response.

Remedies

61. In the housing context, any perception that there are excessively favourable remedies for claimants is misplaced. The available statistics do not cover those cases where the decision is found to be unlawful but where the court declines to exercise its discretion to grant a remedy[41]. However, the resource constraints under which public authorities in housing operate means that this sort of outcome occurs regularly. The tight resources afforded to public authorities in housing means that this is often the case.

[41] The court must refuse to grant relief if it appears highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had no occurred, Senior Courts Act 1981 s.31 (6). The Administrative Court is entitled to confirm a decision where it is satisfied that a properly directed authority, which did not make the same error of law, would have inevitably reached the same decision – *Ali and Nessa v Newham L.B.C.* (2002) HLR 20.

62. Furthermore, judicial review confers significantly less far reaching powers on the courts than in the case in most Commonwealth jurisdictions. The Human Rights Act itself, only confers powers on the courts to grant declarations of incompatibility, leaving Parliament to consider how, if at all, to respond.

63. There is no evidence that declarations of incompatibility are being routinely made or that the remedies available to the court are so inflexible that they do not meet the needs of the parties.

64. It is unclear, therefore, what can be achieved by restricting the remedies available to the court.

Interveners

65. Interveners can be of great assistance to the court and can bring evidence and perspectives that the parties may not be able to bring. It is not clear what evidence is being relied on to give rise to a review of interveners, but it is difficult to think of examples that would give rise to any cogent reason for restricting their use.

66. While not a judicial review case *per se*, HLPA intervened to provide critical evidence in support of the stay in possession proceedings in *Arkin v Marshall*[42] on the application of PD51Z and the stay on possession proceedings. The Court of Appeal upheld the Secretary of State's decision to approve the mechanism of the stay, a position supported by HLPA. The evidence that HLPA provided was made available in subsequent appeals on issues similar to those raised in *Arkin*. We see this as a helpful intervention on an issue that affected a significant number of people.

67. We also see no evidence that would suggest that the funding of interveners should be reviewed or changed. Importantly, HLPA, a very modestly funded organisation, could

[42] *Arkin v Marshall* [2020] EWCA Civ 620

not have intervened without the assurance of all parties that costs would not be sought against them.

68. HLPA endorses the ALBA's response at paras 154 – 160.

PART VI: The current administrative arrangements strike the right balance

69. There are no clear reasons, or evidence, as to why or how the government may consider that the grounds of judicial review have affected balance between the citizen's right to challenge the lawfulness of executive action and the role of the executive to govern effectively under the law.

70. The administrative law arrangements in the UK are already perfectly well able to flex to ensure that the correct balance between individual rights, the public interest and effective government at all levels is achieved. In debate concerning the 1996 Housing Bill (later enacted as Housing Act 1996) Parliament recognised the need for administrative law oversight of decisions in homelessness cases but was concerned about the extent of judicial review in this area. That led to the statutory appeal jurisdiction, conducted in the county court and "in substance the same as that of the High Court in judicial review".[43] The point is that Parliament developed a 'better method of appeal' without any need to undermine or indeed alter at all the fundamental principles of administrative law. [44]

[43] *Begum (Runa) v Tower Hamlets LBC* [2003] UKHL 5

[44] In urging the government to introduce the right to a statutory appeal, Lord Dubs said: "There is a requirement for a better method of appeal than simply an internal review. That is why this amendment is important. Apart from the internal review, the only choice open to an individual is to go for judicial review". In response Lord Mackay of Ardbrecknish for the government said: "… Lord Dubs, mentioned the possibility of judicial review, although I fully appreciate that is very much a back-stop. We have to bear in mind the scope for vexatious or speculative appeals which could be caused by too wide a right of appeal, and I do not think that that would be in anyone's interest. However, I have some sympathy with the case put forward by the noble Lord. …I would like to reflect further on what he said, bearing in mind the burden on the courts and the potential for unnecessary appeals…. We are very much alive to the issues which the noble Lord has raised this evening". https://api.parliament.uk/historic-hansard/lords/1996/jun/25/housing-bill-2

PART VII: Recommendations

71. We have found responding to the call for evidence difficult. We are not aware of the evidence that the government relies on in calling for this review or the reasons for its 'concern' relating to the specific elements of the judicial review process.

72. In the limited time available we have been unable to properly gather detailed evidence on such wide issues and have not had access to all the empirical or statistical data relating to housing that we would have hoped. We ask that the review discloses the basis and evidence relied on by the government in calling for this review and that there is a longer and more detailed assessment of the evidence available and to be gathered (specifically addressing each area of law). We further ask that there is an opportunity to respond to the panel's findings. We endorse the letter dated 20 October 2020 sent to Lord Faulks QC by the Rt. Hon. Harriet Harman MP, Chair of the Joint Committee of Human Rights.

73. HLPA further recommends that the inequitable restrictions placed on access to justice posed by legal aid should be removed. The ability to bring judicial review proceedings in housing, homelessness and allocation cases were significantly restricted by the changes to legal aid introduced by LASPO; in terms of eligibility, scope and the general funding costs.[45] In particular, extensive reform to the civil legal aid 'means test' is needed to ensure that access to judicial reviews is available, equally, to all. As Lord Justice Jackson noted in his supplementary report of civil costs, the "*financial limits are strict and many deserving claimants of modest means do not qualify for assistance*."[46]

74. Lastly, we urge the panel to be conscious of "throwing the baby out with the bath water". In an attempt to restrict judicial review to avoid 'outcomes' that the government may consider to be 'problematic', there is a real risk that all types of challenges are

[45] Illustrated in the House of Commons research paper on LASPO, at https://commonslibrary.parliament.uk/research-briefings/cbp-8910/
[46] Public Law Project submission to the Independent Review of Administrative Law, October 2020, p.12, para 2.

inadvertently affected. We are concerned that our members' clients, who are some of the most vulnerable in society, should not be collateral damage.

Co-chairs of HLPA

Simon Mullings

Marina Sergides

with

Timothy Baldwin

William Ford