Immigration and Public Law Team
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26th October 2020

IRAL Secretariat
Ministry of Justice

Sent via email to IRAL@justice.gov.uk

Dear Sir/Madam,

Response to the Call for Evidence – Judicial Review

We write in response to the 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".*

This document represents the collaborated views of members of our specialist team of immigration and public law barristers. We are a 40-strong team with extensive experience in immigration judicial reviews and other public law challenges relating to immigration, asylum, nationality and human rights, with several senior members of our team having been practicing in these fields for in excess of 20 years. We are ranked as a leading Band 3 set by the Legal 500 and several of our members are singled out for their expertise.

Review remit and approach:

It is understood that the remit of the review being conducted is that set out below, as taken from the published IRAL Call for Evidence which has been sent out to government bodies:

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

- *Whether the legal principle of non-justiciability requires clarification and, if so, the identity of subjects/areas where the issue of the justiciability/non-justiciability of the exercise of a public law power and/or function could be considered by the Government;*

- *Whether, where the exercise of a public law power should be justiciable: (i) on which grounds the courts should be able to find a decision to be unlawful; (ii) whether those grounds should depend on the nature and subject matter of the power and (iii) the remedies available in respect of the various grounds on which a decision may be declared unlawful;*

- *Whether procedural reforms to judicial review are necessary, in general to "streamline the process", and, in particular: (a) on the burden and effect of disclosure in particular in relation to "policy decisions" in Government; (b) in relation to the duty of candour, particularly as it affects Government; (c) on possible amendments to the law of standing; (d) on time limits for bringing claims, (e) on the principles on which relief is granted in claims for judicial review, (f) on rights of appeal, including on the issue of permission to bring JR proceedings and; (g) on costs and interveners.*

We note that, through the Questionnaire directed at government departments only, the Call for Evidence has not, thus far, sought the input from users of Judicial Review or Claimant representatives. This is of concern as without an open call for input from the outset there is a risk that the direction of the Review to be undertaken may be unduly influenced by just one of the many relevant perspectives which should be taken into account. We are concerned that the resulting Review may not result in a balanced assessment without inclusive input from all relevant parties.

We are concerned that the approach taken by the IRAL review appears to seek the criticism by government bodies of a system which is intended to protect individual rights and ensure that government/public bodies and others charged with discharging public duties act lawfully. The methodology behind the Call for Evidence is consequently questionable and may give rise to an imbalanced and unfair assessment.

Immigration decisions form a substantial proportion of the public law challenges brought against government bodies and the consequences of this Review for the immigration law sector will therefore be significant. As a specialist immigration law team with extensive expertise and experience of those particular challenges, we seek to share our input and views on the matter at this juncture.

<u>Reasons for the increase in use of Judicial Review in recent years and why it is not in the interests of justice to limit its use</u>

In our experience, the increase in the use of Judicial Review practice in recent years can be attributed to a number of factors, none of which arise as a result of any wholesale abuse of process or attempted impediment to good governance. Those reasons include:

1) The culling of appeal rights

The number of immigration decisions which attract a right of appeal in the event of refusal has been substantially reduced, such as for example with the introduction of the Immigration Act 2014 which replaced appeal rights in all non-human rights/protection cases with administrative review as a remedy.

Similarly, the limitation on appeal rights in family visitor cases (which has happened in cycles over many years now) has resulted in significant categories of claims in which there is no direct recourse to any independent oversight of decision making.

It is our estimation that one reason for this was a perception by the government that there were too many (successful) appeals. Instead of reviewing the root of the difficulties, i.e. the poor quality of initial decision-making, the available course of redress was altered. The result is that the focus of challenges has shifted, with far more Judicial Review challenges being brought in lieu of appeals.

2) The introduction of Administrative Review as a remedy

Similarly, the introduction of Administrative Review (AR) with all of its restrictions, as specified in the Immigration Rules, has resulted in an increase in the use of Judicial Review. AR has now been repeatedly noted as ineffective, see for example the Court of Appeal judgments in *Balajigari v SSHD* [2019] EWCA Clv 763 and *R (on the application of Karagul & Others) v SSHD* [2019] EWHC 3208 (Admin) in which it was said to be neither effective nor fair.

It is therefore unsurprising that prospective Claimants seek to address the failures of that system by resorting to Judicial Review as an effective remedy.

3) Fast-paced and 'political' area of law

Too often, complex areas of law are regulated/legislated through secondary legislation/quasi-executive policy only (e.g Rules and regulations) and too often at short notice, with little oversight and debate. This often results in poor drafting and the production of short-sighted bodies of law, which very often are only then corrected by way of Judicial Review. One example is the EEA Regulations which have been amended several times to fit with developments in case-law and governmental interpretation of the same, the majority of which has only come about through the use of Judicial Review. Another glaring example are the Immigration Rules themselves. These have been repeatedly criticized by the Higher (and lower) Courts for being difficult to understand - for lawyers let alone lay members of the public - and were recently the subject of Law Commission recommendations for simplification.

It is our view that precisely because of the above reductions in the availability of independent oversight of government decision making, and the haste with which legislation is generated in the field of immigration law, that Judicial Review has provided and continues to provide an essential minimum level of oversight and protection for individuals.

We hope that this feedback is of assistance and are available to discuss matters further if any further input is desired.

Yours faithfully,

Goldsmith Chambers Immigration and Public Law Team