October 2020

Friends of the Earth England, Wales and Northern Ireland Submission to the Call for Evidence from the Independent Review of Administrative Law

Introduction

Friends of the Earth (FOE) is a leading not-for-profit environmental organisation concerned with the protection of the environment. It is the largest grassroots environmental campaigning community in the country, and one of the oldest and largest worldwide. It includes around 300 local and affiliated groups across England, Wales and Northern Ireland, with over 300,000 registered supporters. It has extensive experience in working alongside local communities in resisting environmentally damaging developments, including major infrastructure developments and fossil fuel developments with climate impacts, as well in overturning a variety of unlawful decisions made by government at all tiers: local, regional, central.

Examples of our recent successful judicial reviews (JRs) include:

- ***R. (on the application of FoE Ltd) v Secretary of State for Transport*** **[2020] EWCA Civ 214; [2019] EWHC 1070 (Admin)** - in which the designation of the Airport National Policy Statement approving expansion at Heathrow Airport was ruled unlawful for failure to consider the Paris Agreement and the full climate impacts of airport expansion. This was found to breach sustainable development duties under s10 of the Planning Act 2008 (including on the basis of being irrational), and also breached the Strategic Environmental Assessment Directive.

- ***R. (on the application of FoE Ltd) v Department of the Environment*** **[2017] NICA 41; [2016] NIQB 91** – a successful challenge to the decision not to issue a 'stop notice' for unlicensed sand dredging of the bed of Lough Neagh, a protected nature site. The case clarified the correct interpretation and application of the precautionary principle under the Habitat's Directive and Environmental Impact Directive regimes in the UK.

- ***R. (on the application of RSPB, Friends of the Earth and ClientEarth) v SoS for Justice*** **[2017] EWHC 2309 (Admin)** - in which the amendments made by the Civil Procedure (Amendment) Rules 2017 that undermined costs protection arrangements for environmental claimants were helpfully clarified and their operation in practice delineated by the Judge. The judge ruled that reasonable predictability was required and that the costs rules needed to give early certainty to claimants as to their financial exposure. The case also led to further amendments of the CPR.

Examples going slightly further back include:

- ***R. (on the application of FoE Ltd) v SoS for Energy and Climate Change*** **[2012] EWCA Civ 28; [2011] EWHC 3575 (Admin)** – preventing the Secretary of State from retrospectively removing feed-in tariffs for solar energy and undermining the

growing small-scale solar industry. It was correctly argued that the Secretary of State did not have the necessary power to modify the tariff rate proposed under the 2008 Energy Act, with retrospective effect.

- ***Kay v Commissioner of Police of the Metropolis* [2008] UKHL 69** – successfully protecting the right of 'Critical Mass' cyclists to protest and raise awareness of safe cycling; overturning attempts by the Metropolitan Police to restrict their right of assembly. It was found that the police had misunderstood the scope and operation of s. 11 of the Public Order Act 1985. [FoE Solicitor representing Kay, via what was then our 'Rights and Justice Centre']

- ***Friends of the Earth, re Application for JR* [2006] NIQB 48 –** successful challenge to a failure to comply with the Urban Waste Water Directive and the Urban Waste Water Treatment Regulations (Northern Ireland) 1995. If unchallenged it would have allowed sub-standard sewerage treatment connections that endangered the environment and public health without any consideration for the attainment of the necessary standards set out in law.

As will be clear, we have direct and long-standing experience in taking public interest JR claims, and that is the experience which we draw on in responding to this call for evidence. Our response is focused on public law and JR in the environmental field.

We are also the co-author of a report assessing the impact of previous changes to the system providing access to justice in environmental matters: '**A Pillar of Justice**' (1 November 2019). The report was based on data from the Ministry of Justice (who notably was not itself tracking and reporting on such matters) and looks at successive governments 'reforms' to JR in the environmental field against the UK's commitments and obligations under **the Aarhus Convention.** The report concludes (among other matters) that:

> *'1. The number of Aarhus Convention claims peaked in 2015-16 but have now fallen back to 2013-14 levels. The continuing decrease in cases is a concerning trend given their clear public interest basis in the context of the continuing parlous state of the environment generally, and by extension, environmental governance.*
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> *[…]*
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> *JR is generally the legal mechanism of last resort available to claimants to address decisions by public bodies on environmental issues, many of which are of wide public interest. As above, the data suggests that legislative reforms have made this mechanism less accessible.*
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> *The combined impact of an increase in challenges by defendant public bodies to the status of Aarhus Convention claims (thus potentially removing costs protection), a fall in cases being granted permission, and an overall fall in success rate creates a concerning picture of an uninviting and challenging system that can (and does) deter claimants from pursuing JRs. Indeed, we would suggest the findings in (1) could already be indicative of a loss of public faith in JR as an effective (or even fair) means of redress due to declining numbers of claims.*

In light of accelerating environmental degradation, and the continuing rise in public concern for environmental issues, especially climate change, it is imperative that the UK maintains a clear, transparent and accessible system of review that provides citizens with an effective and affordable means of holding decision-takers to account when the need arises. In order to facilitate the broad access to justice required by the Convention, the administration of justice in environmental matters must be better adjusted towards claimants' needs so it can operate fairly and implement the system they are entitled to under the Convention, and be less about managing the numbers of claims down and/or evading the provision of effective remedies. Ultimately, that will depend on credible and more confident governance, that is not afraid of public challenge on controversial environmental decisions within a democratic system." (pages 6 and 7)

This is important context to the current call for evidence and review and we respectfully urge the panel to consider it carefully. The system does not currently operate well for claimants, especially in the environmental field where specific international legal obligations regarding access to justice in environmental matters are not adhered to; but difficulties for claimants are by no means exclusively found in the environmental field.

Any credible system for the administration of justice must ensure that claimants see and experience a fair process, and the process does in practice deliver justice. JR and judicial management of cases should not create, or create the clear perception of, an unbalanced or one-sided process. Narrowing the scope of JR, removing or restricting remedies, or otherwise undermining the role of judicial review and the independence of Judges such that the government becomes less accountable (in whatever way that may be achieved). This will undermine public trust and confidence in the institutions of this country, the administration of justice, and in government.

Any significant reduction of accountability risks being viewed as an 'establishment' attempt to place public authorities above and out of reach of the law and will leave claimants without fair access to justice. Political accountability via elections (where they may apply as a small and blunt measure of accountability) are infrequent and generalist, and not all potential defendants abusing state power are subject to democratic accountability in any event.

We would ask the panel to keep well in mind the following essential principles to this review:

1. **Access to Justice** – broad access to justice is required so that people and organisations can easily bring claims to engage the review function of the court and seek redress where they see their rights and interests unlawfully damaged. (There are various current barriers to access to justice that are picked up in our response).
2. **Rule of Law –** all public bodies and government must remain subject to the rule of law and not avoid accountability when acting unlawfully, whether due to reduced access to justice, limited scope of JR, or lack of remedy. Transparent and accountable decision-taking is a pre-requisite to the rule of law in practice.
3. **Parliamentary Sovereignty** – government/the executive is not Parliament. The courts are needed to supervise action by public bodies to ensure the will of Parliament is adhered to. This is part of the rule of law, and broad access to justice is required to achieve it.

Section 1 – Questionnaire to Government Departments

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

As will be apparent from the introduction, it is fundamentally important that the public and wider civil society are not restricted from challenging perceived unlawful action by those in power. This is of constitutional significance, reflecting a central element of democratic society. This must encompass due separation and balance of powers between the courts and the executive, with the former ensuring the will of Parliament can and does reign over the will of Government. Otherwise there is a risk that we fall into authoritarianism.

Not only is there a very clear and obvious public benefit in the ability to freely hold to account elected and unelected authorities, departments, regulators, and others who wield state power – to ensure they do not abuse their position and act illegally; but also because the regulatory function of the court entirely depends on claimants (whoever they may be) being able to come forwards and to issue claims because they are not precluded (e.g. due to standing/justiciability/expense). This also depends on claimants being willing to do so (because the process is accessible, fair and provides effective remedy).

Currently the process is not that fair to claimants – it can present a massive uphill and unequal struggle, it is highly adversarial, and it can often be prohibitively expensive. As quoted above, our report has identified that JR claims in the environmental field are now falling back despite an environmental context that is consistently worsening. We suggest this could indicate reducing public confidence in the administration of JR, including the practical and financial barriers that must be overcome.

Effective access to justice has another aspect here because the understanding by decision-takers that they can in fact be held to account effectively will also mean they regulate their own behaviours better in the first place. Strong standards of review across the full range of public law grounds is what will help achieve better government.

Therefore, it is concerning that the premise of question 1 is a negative one – seeking problems with the people on the receiving end of claims in the main. The questions are obviously loaded – and as the saying may go: "a turkey does not vote for Christmas". We would invite the committee to take a more balanced approach, avoiding framing questions in a negative light (or to elicit a particular answer), and to scrupulously hear the views of those that depend on JR as their only real means of correcting unlawful governance.

Furthermore, we would add:

- JR challenges can only succeed if the government has acted unlawfully, so the idea that they can impede government function seems unlikely unless you have a pre-disposition towards seeing JR as unnecessary and that government, unelected regulators/actors, and other public law decision-takers should not be held accountable.

- JR is essential to ensure fairness in society and allow people redress. The court process is aimed at analysing and determining if there is illegality where it appears there may be. That entails a forensic and involved process to get to the truth. This may at times be burdensome for government[1], but this is necessarily so – the court needs a full picture of the decision taken and relevant context. In addition, most forms of oversight are burdensome, and that doesn't mean it is inherently wrong. The point being that at the outset of a claim, the illegality of a decision is not yet known for sure, but it is necessary to find out.
- We would like to challenge the narrative set out in question 3 which seems to set up the idea that JR is always antagonistic between claimants and public authorities, rather than a situation where it can help clarify the law, improve services from public bodies and ensure good governance. Our case: ***R. (on the application of RSPB, Friends of the Earth and ClientEarth) v SoS for Justice*** **[2017] EWHC 2309 (Admin)**, is a direct example of this in action. Understanding of and the operation of the new civil procedure rules was clarified and improved as a result of the case.
- A more fundamental question the panel should ask itself, is whether it is constitutionally appropriate for the executive to seek to restrict or manipulate the courts' current function as a vital check on the exercise of state power, in circumstances where there is no written constitution to safeguard against excessive and damaging change. A degradation of the court's ability to review executive action threatens the rule of law.

3. 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)?

The duty of candour plays an important role in allowing transparency where illegality is alleged. At a pre-action or pre-permission stage it is essential to understanding a case or reaching early settlement. However, it is in our experience poorly adhered to by defendants and interested parties and as a result can create an unequal and unfair balance between defendants and claimants, who are unlikely to have full information about the decisions they challenge as being arguably unlawful. The government or public bodies who have full information may seek to (or do so erroneously because it is not very clear) withhold as much as possible, and some seek to leverage this information advantage as the courts will (rightly) filter out claims that are not strong enough. We refer to a recent example of ours below.

There appears to be a practice developing which is not consistent with the duty properly understood; that there is a sliding scale of candour for defendants, with more disclosure and information being provided later on after permission stage, rather than more fully at the outset. This undermines the court process and the position of claimants. It means:

- Less public scrutiny and potential accountability in the first place (claims are less likely to come forwards or come forwards on a strong basis - because people do not know enough).

[1] However, perhaps worth noting here that the Government's duty of candour in JR is often less involved and burdensome than disclosure in other claims that engage CPR 31.

- Claims are not fully informed and so evolve more than they would otherwise – this increases time and cost as grounds get amended and issues fluctuate to a greater extent.
- The pre-action stage of proceedings where issues should be narrowed and possibly disposed of is not fully achieved, because claimant's cannot simply accept the unevidenced descriptions Defendant's like to give, and where experience show they are often very partial, can be inaccurate, and are almost entirely driven by the narrow interest in getting rid of proceedings.

A clear example of this problem is found in our recently issued JR challenge to the Department for International Trade, UK Export Finance, and the Chancellor's decision to provide financial support to a vast new liquified natural gas project in Mozambique (e.g. as reported in **the Guardian** and **Energy Voice**). You will see mentioned there that one of the live issues in the claim is the lack of transparency and a failure to disclose information about the decision for public scrutiny, and we can confirm that this has been continued by – in our clear view - a failure to comply with the duty of candour and disclose clearly relevant information necessary to inform any update of our grounds (per court order) once information that formed the basis of the decision is made available . The case is issued, but this information should have already been provided in pre-action exchanges, as was repeatedly requested.

Every person affected by an apparently unlawful action or omission of the state should be able to see the relevant facts and factors that played a part in those decisions, as this will help understand the truth and allow informed decisions on whether a claim should be issued and/or progressed, and on what grounds (and in effect avoiding unnecessary claims and so not causing a barrier to the implementation of a valid decision). This does not always work well in practice as some defendants are tempted to withhold more information than permitted under the duty, but also because the time-periods for bringing a claim are so tight as to often make fully informed engagement not possible.

It is important for the rule of law, and a feature of good governance, that there is transparent and accountable decision-making. A clearer and stronger statement of the duty of candour in the Civil Procedure Rules could help reduce consistent poor practice by public bodies seeking to evade scrutiny and accountability. Good government should have nothing to hide and must accept the possibility of *meaningful* public scrutiny where decisions appear to fall short of legal standards.

Section 2 – Codification and Clarity

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?

There is a definite danger that any codification of JR can limit and reduce its flexible application and effectiveness, and its ability to progressively evolve as essentially a part of the common law and on a case by case basis.

This means that it could become outdated to the needs of society, and any updating of it would need to initiated by politicians in government who are informed enough to consider it expedient and important to revisit the issues even though it may adversely

impact them. This could of course further politicise JR in exactly the way that the current government professes a desire to avoid.

Codification/legislation also does not inherently provide more certainty than currently is the case. Many cases are around the lack of clarity in legislative drafting and what is meant by a particular provision, what it seeks to achieve, and in what way.

It is our strongly held view that attempts to codify JR (i.e. map out and define it in totality in a single Act or SI) would be dangerous and likely to create a limited and worse outcome than currently is the case; or else be an essentially meaningless process that adds an unhelpful repetitive gloss (and which could have unintended consequences in practice).

Furthermore, there will always be a level of uncertainty in JR, because the process necessarily entails a flexible but principled approach to vastly changeable circumstances from case to case, and the need for judges to exercise discretion and judgment.

There are however, some suggestions for areas where additional legislative changes could make a positive difference if done in a balanced and careful way (and not at the price of additional barriers to access to justice, or to materially limit JR):

- Full and clear, direct incorporation of the Aarhus Convention for environmental matters would be helpful. Articles 3 and 9 seeks to establish clear and consistent minimum standards for access to justice (ones the UK has not yet attained), and these could helpfully be applied to other areas of public law too. Indeed, Lord Jackson's review of fixed costs has considered this in relation to improving the costs position of claimants in JR generally and in compliance with Aarhus.
- Greater certainty would be achieved by removing judicial discretion to *not* order an effective remedy, and repealing s84 of Criminal Justice and Courts Act 2015, which directs Judges to refuse permission or relief if it predicts the outcome would not be substantially different if the unlawful conduct had not occurred. Access to a remedy should be as of right in successful cases and this would remove uncertainty for claimants.
- A clearer and stronger approach to the duty of candour on defendants and interested parties – so that claims are properly informed at the outset. Or replacement of that duty with equivalent or better specific disclosure obligations in the Civil Procedure Rules would ensure relevant information is not withheld as it routinely is. Defendants could easily be made subject to a similar process as part 31 of the Civil Procedure Rules, but earlier on in the process. Better disclosure early on would ensure a fairer 'cards up on the table' approach more in accordance with the existing CPR overriding objective.

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

No area of the exercise of power by the executive or other public body should be immune from the regulatory function and oversight of the court. That is to ensure that all action has legal basis, and all acts and omissions are within the law as set by Parliament or the common law.

Where there is abuse of power, or breach of legal requirement, those at fault must be accountable, and the decision capable of review with remedy provided for in law.

If there are areas where public law decision takers can act with impunity from the courts then there will be from time to time abuses of that position in order to suit political convenience or other imperatives, or due to mistakes, and there will be occasions where the consequence of that is large and highly controversial, but maybe without redress if the scope and application of JR is reduced. Political accountability does not deliver meaningful redress for those impacted.

It is plainly obvious from a general standpoint that this can impact all or any of us in grossly unfair and prejudicial ways and would be unacceptable in a democratic society that respects and upholds the rule of law.

If all decisions are potentially subject to JR in the established categories, then there is no need to delineate or describe further which ones are and which ones are not, in various circumstances. To seek to exhaustively categorise these upfront would be prone to error and create more complexity.

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?

There are published rules of court which are tolerably clear, but they are not easy to understand, well written, very coherent, or accessible to the person on the street as a potential litigant in person.

Some complexity and quantity of rules is unavoidable, because courts operate in different contexts, and legal cases are by their nature complex as they apply to facts and changing circumstances in the real world, but the rules could be much better drafted, and processes much more user friendly.

Major practical barriers for people and community groups include:

- the cost of proceedings for most claimants and uncertainty around potential cost orders,
- lack of/much reduced legal aid or state support for claimants to bring cases,
- the complexity of legal process, and of legal issues, and the prohibitive expense of expert legal support,
- a system that is unnecessarily overly adversarial,
- large inequality of arms with public body defendants greatly better resourced and with all the information about any decision under challenge,
- lack of modernity in the court system and how information is managed,
- the applicable timeframes for JR and on appeal are excessively demanding and often unfair given the practical steps needed to start and progress a claim.

Section 3 - Process and Procedure

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?

The time limit for commencing a general environmental JR is 'promptly' and within 3 months (CPR 54.5(1)). The requirement for promptitude means that you have less than 3 months unless there is good reason to use the whole period (and which opens you up to attack on this point from defendants). This contrasts starkly with the time-limits applicable to private law environmental claims such as in nuisance, negligence, or trespass, which can be 6 years (e.g. see s2 of Limitation Act 1980).

From a practical point of view this can be a major (sometimes insurmountable) challenge for claimants who are unfamiliar with the process, need to fundraise to make the claim, prepare documentation, and need to engage with defendants in order to obtain specific information to understand and delineate the perceived illegality. The position is worse still in planning and infrastructure cases, for example under s13 of the Planning Act 2008, or generally for planning matters, which apply a 6-week time limit (CPR 54.5(5)).

Furthermore, applicable time limits for appeal can be very tight indeed. If a rolled-up hearing is ordered in the High Court, and a decision is taken to refuse permission to JR, then any appeal to renew the application before the Court of Appeal must be taken in 7 days (CPR 52.8(3)). The problem here is that following a rolled-up substantive hearing, the facts and issues may well have shifted and it is not always a simple renewal of the same case, and some organisations (e.g. an informal unincorporated association, or voluntary community group) may not be able to take decisions that quickly.

Anyone who has had to deal with an obstructive and unconstructive defendant refusing access to information within a highly adversarial process whilst trying to resource and make a claim would not agree the correct balance is struck with a timeframe of less than 3 months.

Furthermore, it should not be considered 'interfering' with effective governance if JR is helping to ensure government is acting in a proper and lawful manner – which is essential. Even where cases are unsuccessful, they can improve decision making going forwards, and it is essential that the public concerned can be fairly heard at court on legitimate issues that impact them.

Shorter time periods would reduce access to justice and preclude claimants, this would make the administration of justice inconsistent and less effective, with valid claims that have wider public interest not coming to light.

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

A more enlightening (and balanced) question would be to ask more generally whether costs are problematic for access to justice and effective JR, and how things could be improved.

Speaking from an environmental claimant point of view, the UK has been in breach of its international legal obligations on access to justice, and specifically costs, for many years now - as can be seen from the Aarhus Convention Compliance Committee's **findings against the UK**, and with the Committee's **March 2020 review** of the UK's continued lack of progress. These have been confirmed and agreed by the signatories to the Convention at successive Meetings of the Parties, which includes UK accedence.

Cost and adverse costs risks are major barriers to claimants taking cases, and it is a hurdle that should not exist. People should be able to bring cases on merit and regardless of expense due to the public interest in doing so, and the court system should not allow claims of a public interest nature to be shut out because of financial pressure and prohibitive expense, but they routinely are. For example, the uncertainty around what a claimant may be liable for when deciding to take a case has a chilling effect, and it is not possible except in the most extreme of cases to predict with certainty how courts may deal with complex issues (including cost protection), and where the defendant has not disclosed to you all relevant information.

Further issues around Aarhus cost caps for environmental JR are discussed in our successful case '*R. (on the application of RSPB, Friends of the Earth and ClientEarth) v SoS for Justice* [2017] EWHC 2309 (Admin)' - in particular the need for early certainty and reasonable predictability for claimants. However, Aarhus cost caps have been weakened over successive changes as detailed in our report 'A Pillar of Justice', and there are examples of government departments not adhering to the rules and seeking maximum leverage by, for example, seeking to vary cost protection after hand-down of judgment. This happened to Friends of the Earth relatively recently. We restate the recommendations in our report for positive reform.

To answer the question directly, the rules need improving to avoid the risk of prohibitive expense for claimants in public interest cases, and this means protecting claimants when they lose, and ensuring they can recover full costs if they win. A reciprocal cap limiting defendants liability is not justified where it is acknowledged that the case is in the public interest - in large or complex cases this makes litigation 'too expensive to win' for some claimants.

Qualified one-way cost shifting should be implemented to this effect (as is successfully operating in personal injury cases), and reciprocal caps to protect defendants removed. As above, reciprocal caps, or as is the standard case in most Tribunals where each party bears their own costs, can make cases too expensive to win.

Consideration of payment of costs from central funds in public law cases should be seriously considered to protect defendant public bodies and claimants alike. This could also allow legal costs to be better regulated.

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?

Please see our answer above at 7.

We would also add that the process of JR deals with unmeritorious claims by way of the permission stage and there is no suggestion that this level of judicial oversight does not work. Indeed, we have found in our report that the permission stage is operating to increasingly limit cases. There should not be additional treatment for cases found to be unarguable at permission than is currently the case.

For example, inexperienced and naïve litigants in persons or community groups who feel very strongly about a controversial decision may not know they have an un-arguable case because they are not familiar with how JR operates. It would be unfair to

penalise them further, and it is important that they feel they are able to bring a case in the first place where they have legitimate grievances and no other route of redress. Given that for many people they will not know and could not easily predict what the permission decision may be, and this is the case often when taking advice from leading Counsel too, it would be hugely detrimental to further penalise people acting in good faith but feeling strongly a sense of injustice having being caused to them.

Standing should remain open and broad, in order that legitimate grievances are not closed off. The public policy benefits of this are obvious. Closing it off could remove the oversight of courts in genuinely important instances because a claim may otherwise not be brought. This is particularly true in the environmental field as many cases are brought without private legal interest in the outcome (especially by NGOs), to protect the environment in the public interest where nature has no legal standing itself (and where no private law interest exists in it either). Furthermore, the Aarhus Convention sets out minimum standards for standing in environmental matters.

A final comment on use of the term 'unmeritorious'. It is a hugely subjective and loaded term which has no place in the characterisation of JR claims that pass permission test or are otherwise brought in the public interest. It is simply another way for someone with a different political point of view to taint the JR process and what it seeks to achieve, by characterising only some JR cases as meritorious, and as if successful cases – or even arguable ones - are routinely identifiable with certainty at the outset where they depend entirely on someone else's (the Judge's) view (and please see comments on the duty of candour at the outset).

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?

As a prior point of principle: there should be no circumstances where unlawful action or omission by a public body stands uncorrected. The idea that there should be scope (such as directed by s84 of CCJA 2015) to allow for situations where such bodies are allowed 'off the hook' despite acting unlawfully offends the rule of law and legal certainty. It also undermines the value and fairness in the court process and will reduce further the public confidence in the administration of justice.

An unlawful decision must not stand, and it is unclear how an 'alternative remedy' would be reasonable unless it included a court order removing the illegality. Where courts decide to order remedies, they would appear to have sufficient potential range to be broadly effective. The main issue is whether and what they will order if you win.

As with much of JR, a principled and fair approach is needed. The main focus must be on providing access to effective remedies for successful claimants. That means access to effective interim remedies too, so cases do not get overtaken by events as the court process takes time. In the environmental field, access to effective remedies are also protected under the Aarhus Convention, Article 9.

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

Please see our comments on duty of candour. We cannot emphasise enough how intransigent and unhelpful defendant public bodies simply encourage litigation by failing to supply adequate disclosure up front. This is because:

- in an absence of proper information, a claimant must simply assume its concerns are correct (as otherwise why would the public body be hiding information),
- A claimant knows they can only get the information if they issue and force a proper response within the court process.

Longer time limits to take cases would enable greater disclosure and opportunity for alternative dispute resolution (ADR), however, in our experience ADR rarely occurs in environmental JR. Defendants are invariably convinced of their own rectitude (and the need to 'save face'), and will only seek ADR or concede if left with no other choice. This is perhaps also partly because the court process is much easier and with great deference to the original decision taker and so an intransigent and more confident approach by defendants can be more readily taken.

If courts were prepared to be more interventionist at an early stage, and to do so in a genuinely balanced and fair way, then a more intensive facilitated pre-action process with some form of ADR could theoretically be beneficial. This could increase cost and delay initially (but save on both overall if the claim is compromised), but where there is an established public interest in the case then this could be picked up by the State.

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?

Lawyers at Friends of the Earth have experienced both, although mainly in previous roles. It is considered rare, and sometimes only because of a judge's particular approach to a claim. Where settlements occur, in our experience, it is either because of the clear strength of the claim grounds, bad faith or improper conduct has been exposed, or for political reasons a claim needs to be disposed of.

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?

Please see our answer to question 10. The appropriateness of ADR will vary between areas of public law.

In practice it would require more time initially (although could save time overall if successful), and provision for the cost unless mediation/ADR were provided by the court system, and, meaningful engagement by both parties. Many defendants could not countenance such because it would be politically difficult.

The public authority is usually in the driving seat in these claims and the onus is likely to be on them. Claimants are not in a similar position but similarly may benefit from a nudge to be less entrenched. However, they lack full information at the outset and often throughout, and will feel they have legitimate grievance and that the defendant has

acted unlawfully. Combined with the position of the defendant and its political context this may make effective ADR very hard.

However, genuine engagement and at an early stage could be highly beneficial and limit claims continuing. The problem is that in many instances this simply is not possible.

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?

It is important to maintain broad standing rules that allow wide access to the courts rather than shutting out claimants prematurely. Whether or not a case is meritorious should then be a matter of court process and judicial oversight and not one dealt with by politically motivated public policy, changing long-standing rules and principles of JR that generally work.

For all potential claimants (and there read every legally recognised person in society), trust and confidence in a fair and balanced system starts with one that recognises your right to bring a claim when your rights and interests are damaged by what appears to be unlawful and abusive action by those in power.

In public law and public interest cases, it is often the case that the infringements and violations that you experience will exemplify a much larger systemic problem that impacts others detrimentally too.

Conclusion

Our main concern remains that a potential review process is taken forwards on a dubious and politically driven premise, without **any** compelling evidence published and debated that it is needed, and could result in a damaging restriction on access to justice and an undermining of JR as it currently exists.

However, this does also present an opportunity to make genuinely important and positive reforms - where there is an established objective need - that strengthen the ability for claimants to access justice and hold government to account, such as:

- in the implementation of Aarhus requirements,
- removing clear and present practical and financial barriers for claimants
- reducing inequalities of arms between claimants and defendants
- strengthening the duty of candour and compliance with it.

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