SWALA

South West Administrative Lawyers Association

Response Of The South West Administrative Lawyers Association to the Ministry of Justice Judicial Review Reform Consultation

Introduction

By way of preliminary comment, we do wonder what is to be gained from the Government making statements as to what "it considers" to be the law. Further, some of our members have expressed some disquiet with the idea that it is appropriate for Her Majesty's Government to express its understanding of the law and constitution, even for the purpose of stimulating debate. The Crown receives advice as to what the law is from its legal advisers, which advice is ultimately the responsibility of Her Majesty's Attorney-General. Only the courts can decide what the law is and it is a matter for HM Attorney-General as to what legal arguments may properly be advanced on behalf of the Crown in court. If Parliament legislates, it is on the basis of what the law is, as determined by Her Majesty's Courts, not on the basis of what Ministers of the Crown consider the law to be.

We note that the consultation is based upon a number of controversial statements as to what the law "is" which are at odds with the current state of the case law and indeed inconsistent with the express wording of statute.

For example it is stated at that the *"Acts of Judicature in the 1870s placed the courts on a statutory footing and combined the common law courts and courts of equity, thereby showing how Parliament could both define the jurisdiction of the courts and clarify the bounds of the Rule of Law"*. At the time of the Judicature Acts it was well established, as expressly stated by Blackstone (Bk. 3 Ch. 3 pg 23-4), that all courts, whether established by statute or otherwise, exercise a prerogative jurisdiction of the Crown - i.e. the judicial power of the State. The language of the Judicature Acts[1] therefore only purports to transfer the jurisdiction of the courts to new courts and the Act does not establish the proposition for which the Government argues.

[1] Section 16 *"there shall be transferred to and vested in the said High Court of Justice the jurisdiction which, at the commencement of this Act, was vested in, or capable of being exercised by, all or any of the Courts following. . . "*; Section 18 *"The Court of Appeal established by this Act shall be a Superior Court of Record, and there shall be transferred to and vested in such Court all jurisdiction and powers of the Courts following . . ."*

It is stated that *Roberts v Hopwood* is no longer part of the law, but this is plainly wrong. A decision that is set aside for breach of a fiduciary duty owed by the decision maker establishes that the decision is and always was unlawful. It may be that, if the decision is within the legal capacity of the decision maker then it follows that there is an initial presumption of legality, with the consequence that, if not set aside, the decision will be treated as lawful for all purposes. That, however, is a different point.

It is asserted that Parliament can "reverse" the decision in *Cart* or legislate to effectively oust the court's jurisdiction. We question whether such action would be either lawful or consistent with the rule of law. If Parliament establishes a court with limited jurisdiction, it is only a court with unlimited jurisdiction that can determine the limits of the jurisdiction of that court, which it logically cannot determine for itself. Parliament can therefore no more limit the prerogative jurisdiction of the Crown to determine the law in order to administer justice according to law (the judicial power of the State) than it can limit the prerogative jurisdiction of the Crown in Parliament to legislate (the legislative power of the State).

Finally, we make the following broad observations regarding the consultation itself:

a) We note that the consultation raises a number of proposals that either were not referred to the panel for the Independent Review of Administrative Law or which were considered and expressly recommended by the panel to be taken no further. We are concerned that the Government appears both to not have listened to the expert panel which it set up to advise and to not have referred all matters which required consideration to the panel. It raises the question as to the point of the panel in the first place.

b) We are concerned that inadequate time has been afforded to consultees to properly engage and respond to this consultation. Given the scope and breadth of the consultation, and the serious implications that these proposals have for the rule of law and access to justice, six weeks is simply not sufficient time, particularly for vulnerable groups for whom judicial review is so vitally important. We support the requests made

by a number of organisations, including Liberty, Law Society, JUSTICE and others[2], that additional time should be afforded for consultation responses.

c) We note that the consultation seeks to rely upon statistics as providing an evidence base for many proposals[3]. This is most notable in relation to the proposals regarding Cart judicial reviews (as discussed below) but applies more generally. The statistics which are being relied upon are not accurate and importantly do not reflect the outcomes in the vast majority of judicial reviews which are concluded prior to proceedings being issued. As an example, we note the Department of Health and Social care reported that "For the past three years, DHSC has not lost a substantive Judicial Review"[4]. This is incorrect[5] and also does not include the many cases that the DHSC has conceded following a pre-action letter[6].

With those observations recorded, we turn to the specific consultation questions.

Question 1: Do you consider it appropriate to use precedent from section 102 of the Scotland Act, or to use the suggestion of the Review in providing for discretion to issue a suspended quashing order?

It is unclear whether this is a general question, relating to the principle of suspended quashing orders or whether s.102 could be considered a template for such orders. If the former, then see our response to question 5 below on suspended quashing orders. If the latter, we would observe that s.102 is different in scope from what appears to be proposed in both the IRAL Report and the Government's Response in at least two significant ways. Firstly, it relates to the legislative competence of the devolved body. Secondly, it is also available more widely than in proceedings for judicial review, being exercisable by "any court or tribunal" which has decided

[2] https://www.libertyhumanrights.org.uk/wp-content/uploads/2021/04/Joint-letter-to-Lord-Chancellor.pdf
[3] See for example Summary of Government Submissions to the Independent Review of Administrative Law
[4] Summary of Government Submissions to the Independent Review of Administrative Law

[5] For example: Good Law Project Ltd & Ors, R. (On Application of) v Secretary of State for Health And Social Care [2021] EWHC 346 (Admin) (18 February 2021), R (Worcestershire County Council) v Secretary of State for Health and Social Care and Swindon Borough Council [2021] EWHC 682 (Admin), R. (on the application of British Medical Association) v Secretary of State for Health and Social Care [2020] EWHC 64 (Admin) (17 January 2020)
[6] For example: https://www.39essex.com/family-rights-group-secures-significant-amendment-to-covid-regulations/

that the legislation or executive action in question was outside competence. Due to the significant differences between the scope of s.102 and the Government's current intentions we do not believe that those intentions can be achieved by simply using s.102 as a precedent.

Some members agree that the court should have a discretion to make suspended quashing orders or some such equivalent procedure for the reasons given by IRAL at 3.50 to 3.55 in exceptional circumstances and within the full discretion of the court. Others consider that there is a conceptual difficulty with this for the reasons stated in *Ahmed v HM Treasury (No 2)* and because it would primarily be a political decision whether to legislate to retrospectively ratify past actions, which the courts should not be drawn into. A middle course would be for the court to stay proceedings where Parliament had already expressed an intention to correct a defect in order to allow an appropriate legislative process to take place. If Parliament adopted a procedure for expressing such an intention, the Courts could have regard to such statement of intent when deciding whether to stay proceedings under its inherent jurisdiction. If necessary, the court could be granted an express procedural power to grant such a stay, but the court should not be granted what would in effect be a substantive legislative power.

Question 2: Do you have any views as to how best to achieve the aims of the proposals in relation to Cart Judicial Reviews and suspended quashing orders?

We are troubled by the IRAL report on the issue of Cart Judicial Reviews and, specifically the statistical basis which informed the panel's recommendation on this point.

The panel recommended legislation to reverse the Supreme Court's decision in *R (Cart) v Upper Tribunal* [2011] UKSC 28, which allowed for a judicial review in the Administrative Court of a decision of the Upper Tribunal to refuse permission to appeal from a decision of the First-Tier Tribunal. The recommendation relies upon questionable statistics that suggest that of the 5502 *Cart* cases issued since 2012, only 12 have been successful. That statistical analysis is troubling. The panel bases the 12 successful cases on a very specific definition of 'a positive outcome', which we would suggest is too narrow. It also appears those 12 cases are based upon the cases the panel have been able to identify from legal search engines, rather than actual data.

Cart cases are subject to a very specific and streamlined procedure, as can be found in Civil Procedure Rule 54.7A. There is a much higher test for the grant of permission, which considers

not just arguably of the case, but also whether the case involves "*an important point of principle*" or "*there is some other compelling reason*" to hear the case. Even if the case meets that high test and permission is granted, the procedure in CPR 54.7A then acts to automatically quash the Upper Tribunal's decision and remit the case back to the Upper Tribunal to consider the law (unless the Upper Tribunal or Secretary of State for the Home Department asks for a hearing in the Administrative Court). We would suggest that a quashing order which requires the Upper Tribunal to reconsider its decision is a positive outcome, contrary to the view of the panel. From our experience, the number of cases where this happens far exceeds 12.

We would endorse the more in-depth analysis of the statistical issues arising on this issue in the UK Constitutional Law Blog by Joe Tomlinson and Alison Pickup, "*Putting the Cart before the Horse?*".[7]

Even if we were to accept the panel's statistical analysis, we would note that the streamlined *Cart* procedure takes up minimal judicial time, it being a paper-based process. We would balance that against the persons who would have experienced a miscarriage of justice were it not for the *Cart* procedure and we consider the *Cart* procedure to be a necessary and proportionate procedure.

In summary, it is our view that the *Cart* procedure is sufficiently streamlined and serves as a quite proper check on the lawfulness of the decisions of the Upper Tribunal.

We do not support a change to the *Cart* procedure.

If there is evidence that the *Cart* procedure is being abused, which we do not necessarily accept, then any appropriate remedy would be procedural not substantive. One possibility would, for instance, be a requirement for any application to be accompanied by the certificate of a Higher Courts Advocate that there is a point with substantial prospects of success that meets the *Cart* threshold. Whether such a practice or procedure is necessary is however a matter for the courts and/or the Civil Procedure Rule Committee.

On the issue of suspended quashing orders, see our answer to Question 1.

[7] Joe Tomlinson and Alison Pickup: Putting the Cart before the horse? The Confused Empirical Basis for Reform of Cart Judicial Reviews – UK Constitutional Law Association

Question 3: Do you think the proposals in this document, where they impact the devolved jurisdictions, should be limited to England and Wales only?

As an organisation which represents lawyers in the South West of England, we do not intend to comment on this question.

Question 4: (a) Do you agree that a further amendment should be made to section 31 of the Senior Courts Act to provide a discretionary power for prospective-only remedies? If so, (b) which factors do you consider would be relevant in determining whether this remedy would be appropriate?

No, it is not for courts to be given the power to ratify unlawful administrative actions. The decisions of public bodies are either unlawful or they are not and that is for the court to determine. Once that has been done it would, in our view, be inappropriate for the court to effectively approve as lawful, even for a short period, what is unlawful.

We are also concerned that the introduction of prospective remedies could leave the individual claimant without a benefit. This may have significant implications for the availability of legal aid.

Question 5: Do you agree that the proposed approaches in (a) and (b) will provide greater certainty over the use of Statutory Instruments, which have already been scrutinised by Parliament? Do you think a presumptive approach (a) or a mandatory approach (b) would be more appropriate?

No, this seems to us to be contrary to the constitutional principle of the rule of law and to undermine the separation between the role of government in deciding and executing policy and that of the courts in identifying illegality and ensuring that the public are protected from its consequences.

Further, we do not agree with the underlying rationale behind the proposal that Statutory Instruments have already been scrutiny by Parliament. Our experience is that where Statutory Instruments have been found by the courts to be unlawful, they have often not benefitted from robust legislative scrutiny.

Question 6: Do you agree that there is merit in requiring suspended quashing orders to be used in relation to powers more generally? Do you think the presumptive approach in (a) or the mandatory approach in (b) would be more appropriate?

See above. There is no merit in introducing any such "requirement". It is for Parliament to consider whether there is any merit in a ratification procedure.

Question 7: Do you agree that legislating for the above proposals will provide clarity in relation to when the courts can and should make a determination that a decision or use of a power was null and void?

No.

Question 8: **Would the methods outlined above, or a different method, achieve the aim of giving effect to ouster clauses?**

No. As mentioned above, Parliament can no more oust the court's ultimate supervisory jurisdiction, than it can oust its own jurisdiction to legislate. In our view any attempt to oust the jurisdiction of the courts is contrary to the fundamental constitutional principle of the rule of law and should not be undertaken.

Question 9: **Do you agree that the CPRC should be invited to remove the promptitude requirement from Judicial Review claims? The result will be that claims must be brought within three months.**

We support the removal of the promptitude requirement. We would agree with the observation that rarely is permission to apply for judicial review refused for this reason and removal of the requirement would bring clarity and certainty to the time limit for bringing a judicial review as of right (leaving it to the discretion of the Court whether to extend the time limit under CPR 3.1(2)(a)).

Further, the uncertainty created by promptitude requirement causes real problems for claimants in many cases:

a) It does not reflect the realities of access to justice, for example, the difficulties faced by Claimants in areas where there are 'advice deserts' in trying to find a legal aid solicitor, or the delays in obtaining legal aid which the courts have indicated is not good reason for delay.

b) The requirement runs contrary to principle that judicial review should be a remedy of last resort as it deters Claimants from engaging in ADR.

c) Our experience is that Judges can take inconsistent approaches to the requirement which creates difficulties when advising clients

d) Whilst the courts may rarely refuse permission for this reason, it is regularly argued by Defendants as a reason by permission should not be granted, resulting in additional costs for the Claimant to respond to these arguments in Reply, or, because the point is so routinely pleaded, having to prepare additional evidence when issuing to head off arguments.

Question 10: Do you think that the CPRC should be invited to consider extending the time limit to encourage pre-action resolution?

Whilst we recognise there are arguments both ways, on balance, we do not support an extension of the three month time limit to encourage for pre-action resolution. We have in mind that judicial review proceedings are intended, for good reason, to be expeditious. We consider that the current pre-action time limits (with the requirement for promptitude removed) would strike the right balance between encouraging resolution between the parties without recourse to the Court and ensuring expeditious filing and determination of claims. In forming this view we note that extending the time limit is likely to have an adverse impact both on Claimants, who want unlawful decisions affecting their lives to be remedied quickly, and Defendants, who wish to proceed with giving effect to their decisions without delay.

We note that there is already a mechanism within judicial review procedure to issue claims protectively, for example pending resolution via alternative complaint schemes[8].

[8] St George's, University of London v Rafique-Aldawery; University of Leicester v Sivasubramaniyam [2018] EWCA Civ 2520

We also note that an extension of time for pre-action correspondence in the absence of an extension of the time limit for filing of 3 months would reduce the time for Claimant's to prepare their case. The current time limit is, in our view, an appropriate but tight time limit and a reduction in case preparation time is likely to be detrimental to the Claimant's case.

Question 11: Do you think that the CPRC should be invited to consider allowing parties to agree to extend the time limits to bring a Judicial Review claim, bearing in mind the potential impacts on third parties?

Again, whilst we recognise there are arguments both ways, on balance, we do not support a change in the Civil Procedure Rules to allow the parties agree to extend the time limits before filing the claim. We would rely on the reasoning in our response to question 10 above and the benefit to the parties (and the public) of expeditious resolution of judicial review claims.

We agree with the observations made in the consultation that decisions made by public bodies will often have an impact on third parties (both directly and indirectly) and those third parties are entitled to certainty and clarity in the judicial review process. Judicial oversight of any procedure outside of the clear time limits and procedures within the Civil Procedure Rules is, in our view, in the public interest.

On the other hand not all decisions have a significant effect on wider public interests which would be adversely affected by further delay. In such circumstances the parties might be encouraged to agree what would effectively be a standstill agreement, which, while not ousting the court's jurisdiction as to whether to extend time, would undoubtedly carry very considerable weight. Such a point is made at footnote one of the Judicial Review Pre-action Protocol. It may be wise to move this observation to a more prominent place in the pre-action protocol as it is our experience that many practitioners and public bodies are simply not aware of the point.

Question 12: Do you think it would be useful to invite the CPRC to consider whether a 'track' system is viable for Judicial Review claims? What would allocation depend on?

We do not support a 'track system' of judicial review. Whilst we do consider that certainty and clarity in judicial review procedures is in the public interest, it is our view that it would be

difficult if not impossible to definitively or appropriately set out allocation factors in judicial review proceedings.

Further, extended time limits for more complex cases (which may warrant a different 'track') may not be necessary in a particular case and may result in unwarranted extended times for consideration and resolution, which would not be in the public interest.

Furthermore, we would observe that a 'track' procedure would result in an allocation decision having to be made by the Court. If the allocation decision was made before permission is decided it would involve additional work for the Court and would inevitably result in delays in the Court system, and thus (in fact) deceased efficiency of the Administrative Court. If the allocation decision is made when permission is granted then it will have an impact on a far fewer number of claims and, in any event, a variation in the procedure or time limits can already be ordered (on a case-by-case basis) at this stage by the Court giving directions alongside granting permission (CPR 54.10(1)).

It is our view that where a claim may warrant a different procedure or time limit to those provided within the CPR Part 54, then such arrangements may be appropriately addressed by the Court on a case-by-case basis utilising the Court's case management powers under CPR Part 3.

Question 13: Do you consider it would be useful to introduce a requirement to identify organisations or wider groups that might assist in litigation?

We do not support any duties or obligations on a party to identify organisations or wider groups who might wish to intervene in proceedings. This is primarily because we do not consider any purpose would be served by such an obligation and, indeed, it may be counterproductive, diverting case preparation time into fruitless endeavours.

We would also observe that there is an inherent difficulty in parties positively identifying persons or bodies that might wish to intervene, where the considerations are wider than those who may be directly affected by the claim (and thus should be an interested party to the claim).

Question 14: Do you agree that the CPRC should be invited to include a formal provision for an extra step for a Reply, as outlined above?

We support a formal provision for a reply from the Claimant. Whilst we would observe that paragraph 7.2.5 of the Administrative Court Judicial Review Guide 2020 notes that the Court may allow a reply at the discretion of the Judge considering the claim, and thus there is nothing to prevent a reply being filed under the current procedure, we agree that bringing clarity and certainty to the procedure would be beneficial to the parties and would be in the public interest.

It is not uncommon for Claimants to be unaware of factual points which are be raised by the Defendant in an acknowledgement of service and which require comment by the Claimant in order for the Court to properly understand the facts or context of the claim. A reply stage would minimise the danger of decisions being made by the Court without the full facts or context and thus reduce the need for a renewed permission hearing (or appeal to the Court of Appeal if the claim is certified as 'totally without merit').

We note that the proposed additional 7 days in the judicial review procedure is not an excessive period and the benefits of certainty and clarity of procedure as well as clarity on newly raised facts / factors will outweigh detriment of the additional time.

Question 15: **As set out in para 105(a) above, do you agree it is worth inviting the CPRC to consider whether to change the obligations surrounding Detailed Grounds of Resistance?**

Firstly, we would observe that the wording of paragraphs 105 and 106 of the consultation is somewhat confused, appearing to conflate summary grounds of defence and detailed grounds of defence, which apply at different stages in the judicial review procedure. We have answered the question we think is being asked but we would invite the government to issue a note of clarification on this question and allow consultees further time to respond..

We observe that the current judicial review procedure does not oblige a Defendant to file an acknowledgment of service and summary grounds of defence. Civil Procedure Rule 54.8(1) only requires a Defendant to file an AOS where they wish to take part in the judicial review. The Defendant may, if it so wishes, take no part in the claim at all and/or only take part if permission is granted (by filing detailed grounds of defence (see CPR 54.9(1)(b)). In effect, under the current rules, the Defendant may choose their level of involvement in the claim, albeit limited or no involvement risks the Defendant's decision being quashed and liability for costs.

This said, we would suggest that the Court will always likely be assisted by some form of response from the Defendant, even if simply to clarify the Defendant's position and rely on the points made in the pre-action response. Indeed, it is open to the Defendant to file an AOS simply cross-referring to the pre-action response should that be appropriate in the circumstances of the case. It may be that clarity of the availability of such a position may be achieved by simply adding a tick box to form N462 (acknowledgement of service) which reads "The Defendant opposes the claim and relies on the position set out in the pre-action response (attached)".

We would also, in any event, observe that any pre-action response should be before the Court, irrespective of filing an AOS, because the Claimant is under a duty to ensure the Court is aware of the pre-action correspondence as part of the Claimant's duty of candour (see paragraph 6.4 and chapter 14 of the Administrative Court Guide 2020).

Question 16: Is it appropriate to invite the CPRC to consider increasing the time limit required by CPR54.14 to 56 days?

We do not support an increased time limit under CPR 54.14. As observed in our answers to the questions above, judicial review is intended to be expeditious. In more straightforward judicial review claims we find public bodies more than capable of meeting this time limit. If, in any particular case, an extension of this time limit is required and warranted the Defendant may apply to the Court for an extension of time and/or the Court may, upon observing the complexity of the case when considering permission, order a longer time limit (CPR 54.10(1)). Ultimately, we consider the Court is well equipped to deal with cases where longer time periods are required utilising its case management powers under CPR Part 3.

Question 17: Do you have any information that you believe would be useful for the Government to consider in developing a full impact assessment on the proposals in this consultation document?

We have nothing to add.

Question 18: Do you have any information that you consider could be helpful in assisting the Government in further developing its assessment of the equalities impacts of these proposals?

We have nothing to add.

Question 19: Are there any mitigations the Government should consider in developing its proposals further? Please provide data and reasons.

We have nothing to add.

For and on behalf of the SWALA Committee

29 April 2021