



RESPONSE BY UKELA (UK ENVIRONMENTAL LAW ASSOCIATION) TO THE CONSULTATION ON JUDICIAL REVIEW REFORM

UKELA (UK Environmental Law Association) comprises over 1,500 academics, barristers, solicitors and consultants, in both the public and private sectors, involved in the practice, study and formulation of environmental law. Its primary purpose is to make better law for the environment.

The government has invited comments on its proposals to reform judicial review in the light of the recommendations of the Independent Review of Administrative Law (**IRAL**) as set out in its Report of March 2021 (the **Report**). UKELA prepares advice to government with the help of its specialist working parties, covering a range of environmental law topics. This response has been prepared primarily by the Environmental Litigation Working Party but with input from UKELA's Governance and Devolution Group (GDG) which includes representatives from all its working parties. Given the broad nature of UKELA's membership, these submissions do not necessarily and are not intended to represent the views and opinions of all UKELA members but have been drawn together from a range of its members working in a variety of sectors.

Preliminary comments

UKELA is grateful for the opportunity to submit a response to the government's consultation. At the outset, UKELA wishes to express its concern that what the government has characterised as '*targeted, incremental*' changes to judicial review will, if they are adopted, amount in practice to a significant reform of the system of judicial review which will act to the detriment of environmental justice.

UKELA observes that in many respects the government's proposals go far beyond the Report's recommendations and appear to be driven by a misplaced concern as to a perceived "judicial overreach", which the government has characterised as '*a growing tendency for the courts in Judicial Review cases to edge away from a strictly supervisory jurisdiction, becoming more willing to review the merits of the decisions themselves, instead of the way in which those decisions were made.*' In UKELA's view, such a view does not reflect the conclusions of the Report and appears to be influenced more by high-profile constitutional judicial review cases decided in recent years, most prominently those which related to EU exit and which are exceptional in terms of their factual and political background, rather than the vast majority of judicial review cases.

In UKELA's view, the proposals for reform appear to have the wrong priorities. One of the central concerns regarding the operation of judicial review and its results should be a desire to improve the quality of decision-making by public bodies. Any potential problems that may exist 'at source' should be addressed at source rather than attempt to 'solve' misplaced concerns about the role of the courts by amending judicial review in an effort to secure more favourable outcomes to the executive at the expense of communities and individuals. As the Institute for Government's recent paper on judicial review and policy making¹ concludes:

'Policy makers should recognise that lawful decisions are likely to be better ones. They should also recognise that the best way to protect a decision from judicial review is to get a proper democratic mandate for it in parliament or, failing that, to follow a fair and robust policy process.'

UKELA has provided responses to the specific questions asked in the consultation document.

Q1. 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?

UKELA considers that implementing s. 102 of the Scotland Act would be likely to significantly extend the time for JR hearings, requiring additional evidence to be

¹ <https://www.instituteforgovernment.org.uk/sites/default/files/publications/judicial-review.pdf>

presented. The Panel explains at 3.49-50 of the Report that a suspended quashing order would bring 'benefits' to the existing remedies provided for by s. 31 of the Senior Courts Act 1981 (**SCA 1981**). UKELA is concerned that the evidential basis for introducing such a power is thin and the reform is unlikely to have the intended beneficial effect.

As a broad principle, environmental judicial review claims often concern matters that require immediate action, for example the construction of a site halted, or the pollution of a river prevented in the wider public interest. UKELA is concerned that, by allowing courts the option of suspending the operation of a quashing order, then the environmental urgency of judicial reviews could face damaging delay.

Moreover, given the complicated nature of many environmental judicial review claims (e.g. whether a proposed development should have been subject to environmental impact assessment or whether the public body should have consulted before reaching a decision), it would not be appropriate for courts to set 'conditions' for the quashing of decisions to be suspended. To do so may lead to satellite litigation in relation to whether a 'condition' of a suspended quashing order had been complied with.

Q.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?

UKELA does not support moving to a position where suspended quashing orders become the default remedy in judicial review cases (see above). Nor does it support the Report's recommended reforms to Cart Judicial Reviews. The evidential basis for this reform is improperly calculated. It relies upon a figure of only 12 successful Cart JRs since 2012 which out of 5,502 applications, represents an apparent success rate of 0.22% (paragraph 3.46 of the Report). As highlighted by the UK Constitutional Law Association ('Putting the Cart before the Horse: the Confused Empirical Basis for Reform of Cart JRs'²), this is misleading. The Report authors were only able to establish the outcomes for 45 Cart JRs out of the 5,502 applications, and 12 of those 45 were successful. The known success rate is therefore 26.7%. The 0.22% figure is simply wrong. It may therefore be seen that Cart JRs are actually more effective than the Report

²<https://ukconstitutionallaw.org/2021/03/29/joe-tomlinson-and-alison-pickup-putting-the-cart-before-the-horse-the-confused-empirical-basis-for-reform-of-cart-judicial-reviews/>

suggests.

An examination of their underlying purpose indicates that they are an important measure of fairness and accountability in our legal system. The effect of s. 13(8)(c) of the Tribunals, Courts and Enforcement Act 2007 means that without a Cart JR, there could be no appeal mechanism for wronged litigants. The Government's own response to the Report (at paragraph [52]) acknowledged that removing Cart JRs '*may cause some injustice*'. UKELA cannot therefore endorse the proposals relating to Cart JRs, and if the Government's aim is to increase fairness in the judicial review system, recommends that the Government properly invest in and financially resource the independence of the courts, rather than pursuing reforms to judicial review.

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

Yes. It should be recalled that, even before devolution took effect, matters such as judicial review were dealt with separately for the separate jurisdictions within the UK. It would, therefore, not be appropriate for the government's proposals in relation to judicial review to have effect in Scotland and Northern Ireland.

Q.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?

UKELA considers that an amendment to s. 31 of the SCA 1981 to introduce a permissive power for the courts to award a prospective-only remedy may be appropriate in limited circumstances. It is noted that the focus of the government's attention is on Statutory Instruments rather than decisions made by public bodies more generally which may be amenable to challenge by way of judicial review and which commonly form the basis of environmental cases with which UKELA members are involved. However, UKELA considers that the introduction of a discretionary power for the court to award prospective-only remedies should be approached with great caution. As noted in the government's consultation document (para 61), the Panel did not recommend the introduction of a discretionary power for the court to order a remedy be prospective-only

in nature. The government appears to justify the introduction of such a power on the basis of what may be convenient to the government (para 6), even though it is acknowledged that this '*could lead to an immediate unjust outcome for many of those who have already been affected by an already made policy*'. In UKELA's opinion the introduction of such proposals has not been sufficiently justified. Further, it should be noted that the precedent relied upon in the consultation document is not what may be regarded as a 'typical' judicial review case. *Hurley and Moore* concerned a challenge to the legality of regulations introducing increased student tuition fees, a significant and politically controversial issue, the quashing of which would have led to administrative chaos. Although the court accepted that there had been a breach of the public sector equality duty (PSED) in the making of the impugned regulations, the court declined to quash them, partly on the basis that there had been 'very substantial' compliance with the duty and partly because of the administrative difficulties that would have arisen had the court done so. It should also be borne in mind that all judicial review remedies are at the discretion of the court, which will carefully consider the implications of a particular remedy (e.g. a quashing order) in a given case. In that regard the decision in *Hurley & Moore* highlights the flexibility of the current system and is not evidence of a need for reform. Recent reform of the SCA 1981, including the introduction of s. 31(2A), give further powers to the courts to decline to grant a remedy where the outcome for the claimant would not have been substantially different had the legal error identified not occurred, thereby offering further protection for public body defendants.

In UKELA's view, legislating to prescribe factors which the court must consider when deciding whether to award a prospective-only remedy would go against the grain of established practice. Moreover, it may risk adding more uncertainty which would not be in the wider interests of justice and UKELA does not therefore support this proposal.

Q.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?

As noted in the previous response, whilst UKELA acknowledges that an amendment to the SCA 1981 to introduce the potential for prospective-only remedies would provide the courts with an additional tool in appropriate cases, the scope for making remedies

prospective-only should be tightly drawn. Although the recent experience of EU exit may be exceptional in terms of the sheer number of Statutory Instruments which were required to be made to give effect to EU withdrawal, it has clearly demonstrated that parliamentary procedures are not always capable of providing thorough and meaningful scrutiny of the volume of Statutory Instruments which can be presented for consideration under the negative procedure. It would, in UKELA's view, be wholly inappropriate to adopt a mandatory approach of prospective remedies only (option (b)). In relation to a presumptive approach such as option (a), this seems to be based on a view of the effectiveness of parliamentary scrutiny which is not wholly justified in all circumstances³. If the SCA 1981 is to be amended to introduce the possibility of prospective-only remedies, this should be on a purely discretionary basis in line with the existing position in relation to judicial review remedies.

Q.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?

In UKELA's view the same considerations identified in the response to question 5 above in relation to prospective-only remedies would apply equally to suspended quashing orders, namely that a discretionary power to suspend the operation of a quashing order would be appropriate, rather than a presumptive or mandatory approach.

Q.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?

In UKELA's view, legislation would not be an appropriate way of dealing with jurisprudential concepts such as nullity. As noted in the consultation paper, the logic of nullity has not been rigorously followed through by the courts and it is the consequences rather than the underlying conceptual basis which justify legislative attention. With the

³ c.f Recent Hansard Society article highlighting the shortcomings of the scrutiny of SIs
<https://www.hansardsociety.org.uk/blog/end-of-session-si-debate-spree-highlights-shortcomings-of-scrutiny-process>

potential noted earlier for prospective only remedies (when accompanied by suitable powers in relation to consequential matters) the significance of nullity largely disappears (flawed decisions become voidable in the hands of the court, not automatically void). The dangers of unintended consequences seem too great to attempt to legislate on this matter.

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

As a general principle, UKELA does not support the introduction of legislative amendments which are intended to exclude the role of the courts in reviewing acts of public bodies which may have made errors of law. UKELA shares the Panel's concern at the political and constitutional implications were the government to legislate to give greater effect to statutory ouster clauses and undermine the role of the common law, through judicial review, in checking the exercise of executive and administrative power. It should be emphasised that enabling the review of a particular type of public law power only on certain grounds through the use of an ouster clause was not recommended by the Panel. At paragraph 3.16, the Panel noted that:

'It is unlikely that such an ouster clause would be any more effective at protecting a public body from review on a particular ground than predecessor ouster clauses have proved. And even if an ouster clause could be drawn up in terms that were tight enough to be effective at limiting the grounds on which a particular exercise of public power could be reviewed, the practical advantages resulting from the existence of the clause would probably not be sufficient to justify the potential constitutional fallout that enactment of that clause might trigger.'

Q.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.

The issue of promptitude is closely bound up with the issue of the time limit for judicial review, and the two issues should be considered in tandem. In many instances, judicial review in the fields of environmental law of relevance to UKELA is now subject to a six

week time limit for bringing a claim (see, for example, challenges to the grant of planning permission under the Town and Country Planning Act 1990 pursuant to CPR 54.5(5)). In other circumstances involving an environmental dimension, such as statutory challenges to decisions which are run on judicial review grounds, e.g. to the making of a development consent order under the Planning Act 2008 or to the confirmation of a compulsory purchase order under the Acquisition of Land Act 1981, claims are also subject to a 6 week time limit without a promptitude requirement. As to the proposed reform of non-planning judicial review claims, the removal of the requirement for promptitude would simplify and add clarity to the rules on timing. Such a step would, however, place greater emphasis on the question of how far a lack of promptitude on the part of the applicant should affect the discretion to award a remedy, or the nature of that remedy (a discretion that may be considerably widened if the earlier proposals are introduced). In the absence of supporting detail, the removal of a promptitude requirement may leave claimants without clarity as to whether a quashing order will be made where a claim is successful but where the claim was filed towards the end of the challenge period.

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

The scope for pre-action resolution of claims may be increased with longer time limits. As noted above, in many environmental cases, the time limit for bringing a claim by way of judicial review is 6 weeks. Such an abbreviated period does not usually allow for meaningful engagement between a claimant and a public authority, or for the use of any formal method of alternative dispute resolution. In theory, therefore, a longer time limit would assist. However, there may be other means by which the settlement of claims may be encouraged, for example enabling a stay of proceedings shortly after they are formally instituted to allow for discussions between the parties, such as the exchange of correspondence/evidence regarding the impugned decision which may result in the claim being withdrawn (e.g. if the public authority accepts at that stage that the decision in question was unlawful). Steps such as these may reduce the overall costs of bringing and responding to judicial review claims which would be in all parties' interests, including the taxpayer's.

Q. 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?

UKELA considers that such a proposal may be more complicated in cases where there may be multi-stage decision-making procedures. For example, where a reviewable error occurs at an early or preliminary stage of the decision-making process, it would be undesirable to require an immediate challenge to be brought in circumstances where the error in question may be remedied or become irrelevant as the matter proceeds through the further stages towards a formal decision. Equally undesirable would be to delay an inevitable challenge until the formal end of the procedure where the grounds for review arose at an earlier stage. Any further rules as to timing should have clear provisions to allow the right to challenge to be preserved by some form of notification at an earlier stage. This should both increase the chances of the matter being resolved in the later stage of the process and protect aggrieved parties from the risks of either being forced into raising a challenge that may be unnecessary or losing their chance to raise a challenge if they wait to see the eventual outcome of a lengthy process.

Q.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?

UKELA welcomes further detail regarding the factors and circumstances upon which allocation to different ‘tracks’ would depend upon. UKELA notes that planning judicial review claims have for a number of years been allocated to the Planning Court, a specialist list within the Administrative Court, part of the Queen’s Bench Division of the High Court, and is itself an evolution of the ‘Planning fast track’ procedure in the Administrative Court which was established so that important planning cases could be allocated to specialist judges and be heard quickly. In theory, a ‘track’ procedure in other areas of judicial review could improve the administration of environmental justice where the procedure was used to manage cases proactively, leading to quicker case management decisions and the hearing of substantive cases before specialist judges. It should also be borne in mind that judicial review claims tend not to be financial in nature, and cannot be compared with each other in terms of their financial value as with other types of litigation. If judicial review claims are to be prioritised or allocated to different

'tracks', care will be needed to ensure that the system does not simply prioritise cases concerning politically controversial issues (such as EU exit).

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

Whilst UKELA agrees in principle that giving the court and other parties early notice of potential interveners would be beneficial, further clarity would be welcome in relation to the circumstances in which a judicial review claimant would be required to identify a potential intervener when filing a claim. A limited duty where the claimant actively represents or is affiliated with a potential intervener (e.g. an environmental campaigning organisation) would seem appropriate, whereas a general duty to identify potential interveners in every case, even where the individual claimant may not necessarily be aware of the wider potential implications of or interest in their claim, would not be proportionate.

Q.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?

Yes. It is very often the case that a Reply to the Acknowledgement of Service and summary grounds of resistance helps define the scope of the judicial review and can narrow the points at issue. Currently, many claimants submit a Reply in any event and those Replies are read and are found helpful by the court. Amending the CPR explicitly to permit claimants to file Replies will simply formalise the current position.

Q.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?

This question refers to amending the obligations surrounding Detailed Grounds of Resistance but this is unclear as it refers to paragraph 105(a) of the government's response but 105(a) refers solely to Summary Grounds of Resistance and not to Detailed Grounds of Resistance. As Q16 (below) addresses Detailed Grounds of Resistance we

have proceeded on the basis that Q15 is, in fact, addressed to changing the obligations surrounding Summary Grounds of Resistance.

The experience of UKELA practitioners is that, given that the grounds of challenge often crystallise and narrow between the pre-action stage and filing of grounds, particularly when there are multiple decisions being made or where there is a multiple stage decision making process, the provision of Summary Grounds of Resistance is an important element in judicial review litigation which should not be lost. It assists the claimant by providing them with a further opportunity to understand the Defendant's case and, if appropriate, discontinue and it assists the court by providing it with a fully particularised response to the challenge which allows the judge to determine whether permission should be granted.

The provision of Summary Grounds of Resistance entails some additional expense for the Defendant but this is a minimal and proportionate expense as a) the Summary Grounds of Resistance may well persuade the court not to grant permission in cases where the Pre-Action Protocol response is not as robustly argued, b) the costs of drafting Summary Grounds of Resistance are usually minimal as they build on the Pre-Action Protocol response and c) it typically obviates or limits the requirement for the Defendant's counsel to prepare a skeleton argument or speaking note at an oral permission hearing.

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

The proposed increase from 35 days to 56 days for filing the Defendant's Detailed Grounds of Resistance should be unnecessary if the rules relating to Summary Grounds of Resistance are unchanged.

UKELA shares the conclusions of the Report that the pre-action protocol procedure for judicial review claims is generally working as planned. In UKELA's experience judicial review Claimants do take the time to draft pre-action letters carefully and they receive an appropriate response. The system is perhaps limited though in some planning/environmental cases which UKELA members are involved in (which have a reduced time limit to bring a challenge). The reason for this is that prospective claimants often have to start organising, fundraising and then instruct specialist solicitors and

counsel in a short period of time and can often only draft a pre-action protocol letter shortly before the time limit expires. This means that a Defendant often has a very short period to respond to the correspondence before the claim is served which in turn means that any pre-action protocol response is not comprehensive as little time is available. This is another reason why the provision of Summary Grounds of Defence is a helpful stage in the proceedings as both parties may not have had the opportunity to set out their cases fully at the pre-action stage.

Q.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?

UKELA urges the government to revisit the basis on which some of the recommendations are proposed, including in relation to the statistical weaknesses highlighted by other respondents in relation to the number of *Cart* judicial review claims, and to carry out further consultation on its proposals supported by a robust impact assessment.

Q.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?

UKELA defers to other respondents who are better placed to deal with issues relating to whether the proposals in the consultation document respect the obligations under the Equality Act 2010.

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

The government should play close attention to the relationship between any potential reform of judicial review and the role of the Office for Environmental Protection (**OEP**), to be established under the Environment Bill, including the provisions of the Bill in respect

of environmental review and the proposed power for the OEP to apply for judicial review of the decision of a public body in certain circumstances. In particular, the policy objectives which underpin the Environment Bill and the proposed introduction of 'environmental review' as a complementary remedy to judicial review in the case of breaches of environmental law risk being diluted by the government's proposals to weaken access to environmental justice in the manner indicated in the consultation document. As noted at the outset, focus should be applied in improving the quality of administrative decisions, which would (a) lead to better government and (b) reduce the scope for such decisions to be successfully challenged in the courts. Any amendment to the current system of judicial review should enhance access to environmental justice, not weaken it.

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29 April 2021

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