

Response to the Independent Review of Administrative Law Call for Evidence

“Does judicial review strike the right balance between enabling citizens to challenge the lawfulness of government action and allowing the executive and local authorities to carry on the business of government?”

The Helen Bamber Foundation is a human rights charity providing specialist support to survivors of torture, human trafficking and other forms of severe abuse. We provide a bespoke Model of Integrated Care for survivors which includes medico-legal documentation of physical and psychological injuries, specialist programmes of therapeutic care, a medical advisory service, a counter-trafficking programme, housing and welfare advice, legal protection advice and community integration activities and services. Our training, research and medico-legal evidence is recognised globally and by the UK Government and courts.

We work with some of the most vulnerable people in British society and from our experience judicial review is a vital safeguard, without which the people we work with would face very serious harm.

We believe that the High Court’s supervisory role in the British constitution is extremely important in avoiding abuses of power, illegality and maladministration. The permission stage to judicial review acts as a rigorous sifting process and there is a mechanism for either party to request expedition. We believe that the independence of this process and the way that the High Court defines its own jurisdiction is critical for checks and balances of executive power. We are alarmed that there is a suggestion to curtail this fundamental oversight mechanism and check on abuse.

The issues of illegality which are explored in this call for evidence are divided into different ‘grounds for judicial review’. At the heart of judicial review challenges, are an alleged abuse of power or maladministration. Whilst of course the principles of the grounds for judicial review that you raise underpin the process of judicial review, in practice cases often involve overlapping aspects of illegality. Trying to delineate and compact the whole plethora of complex real life situations that arise into a narrow range of separate statutory grounds could, in our view, result in a loss of legal rights and entitlements, as well-developed sophisticated legal concepts would be lost (such as where ‘minded to’ decisions need to be communicated to provide a party with a chance to correct a misunderstanding or provide information). Compacting all of judicial oversight by way of judicial review into a few statutory grounds would deprive the High Court of its inherent role of determining its jurisdiction, allowing it to remain credible and provide coherent judgments of the specific issues before it.

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Issues specific to our work with human trafficking survivors

There is no alternative remedy to judicial review in human trafficking cases: there is no statutory appeal to a negative identification decision in the National Referral Mechanism, a challenge to a failure to make a referral into the national referral mechanism, a delay in referring or providing support and/or no care planning court or tribunal which could be accessed to challenge the nature of the support plan for a person who is a human trafficking survivor. The only means by which maladministration, abuses of power and illegality can be checked in these areas is by means of judicial review. It is therefore vital that this oversight is not reduced or made less accessible.

The quality of initial decision-making is often extremely poor, with results that would directly leave survivors at risk of exploitation, destitution or unlawfully deprived of their liberty in detention. The only remedy is judicial review. There could be many improvements made to the human trafficking system, however at the absolute minimum judicial review provides independent oversight and a crucial safeguard in a system aimed at protecting survivors of modern slavery.

The creation of an internal administrative review mechanism (which does not currently exist for identification decisions, delay challenges or care planning decisions and there is no plan we are aware of to create one) would not resolve the need for judicial review as there is no guarantee review decisions would be of any higher quality or independent (since it would be colleagues checking each other's decisions, once they have already been made¹).

Issues specific to our work with survivors seeking international legal protection

Similarly, there are many situations where there is no alternative remedy to judicial review in international protection claims (for example where a fresh claim is wrongly rejected under paragraph 353 of the immigration rules or where a person who is medically unfit for interview is told they must attend an interview anyway). If fair and proper access were not available for judicial review then we have no doubt that miscarriages of justice would be the result. The three-month time limit for judicial review provides an exacting timetable for vulnerable people who may struggle to obtain legal representation, whose legal representative may then need to make a subject access request for freedom of information request and then engage in pre-action correspondence in advance of issuing proceedings.

Similarly with human trafficking cases, there is often extremely poor quality decision-making in international protection and immigration decision-making, which gives rise to a plain error of law and makes access to judicial oversight critical.²

¹ The Chief Inspector of Borders and Immigration has recommended that the Secretary of State consider whether it would be better to scrap the immigration administrative review system, as not delivering on its objectives, altogether: <https://www.gov.uk/government/news/inspection-report-published-an-inspection-of-administrative-reviews-may-december-2019>.

²² See for example 'Lessons not Learned' (2019) Freedom from Torture, <https://www.freedomfromtorture.org/news/lessons-not-learned-report-september-2019>.

There has been a dramatic reduction in appeal rights over recent years which has channelled an increasing number of cases into judicial review (allowing review rather than substantive appeal as a remedy only). This was a deliberate decision and it would now be quite wrong to also restrict access to judicial review, leaving those facing abuses of state power without a remedy and encouraging a culture of impunity within the executive.

There have been severe cuts to legal aid, including to legal help for most immigration proceedings, which has further increased dependency on judicial review, because without legal help at an earlier stage and with wide-reaching legal advice deserts, circumstances in individual cases are at greater risk of going wrong, before eventually judicial review is sought to put matters onto the right track.

There is no access to legal advice in many initial accommodation sites, because they are in legal advice deserts. The result is that crucial information is not being identified by a legal representative and so survivors of torture, human trafficking and critically unwell people are being detained (contrary to public policy and the legal requirements around detaining vulnerable people) and faced with removal directions with potentially severe and life-threatening consequences. From detention, public law lawyers and medical charities are able to identify some of these cases and so it is then only at the last minute that arguments are being made by way of urgent judicial review proceedings and other methods. It is not by choice that these 'last minute' challenges are being made, it is because they are the only opening to access justice for vulnerable individuals in these circumstances. What is needed is early interventions and advice, so cases can be progressed safely and properly. Curtailment of judicial review on the other hand is not an appropriate response. Judicial review is currently operating in many cases as the sole safeguard to serious breaches of domestic and international law.

Conclusion

The entire systems and processes for working with survivors of torture, human trafficking and severe abuse, particularly in relation to the National Referral Mechanism and immigration and asylum systems, depend on accessibility of judicial review to ensure a basic and acceptable degree of fairness. If access to judicial oversight were curtailed then the current system would lack fundamental checks and balances and would require root and stem restructure (and substantial upskilling) to operate fairly.

15 October 2020